

LC150008

**ONTARIO MUNICIPAL BOARD**  
**Commission des affaires municipales de l'Ontario**

IN THE MATTER OF the *Expropriations Act*, R.S.O. 1990, c. E. 26, as  
amended

BETWEEN:

JSN PROPERTIES INC. AND  
COSMEDX INCORPORATED

Claimants

- and -

QUEEN'S UNIVERSITY AT KINGSTON

Respondent

**STATEMENT OF DEFENCE**

1. The Respondent, Queen's University at Kingston ("Queen's") agrees with the following paragraphs of the Claimants' Statement of Claim:  
  
5, 12, 13, 15 (second sentence only), 16 – 19, 21 (second sentence only), 27 and 28 (first sentence only).
2. Queen's disagrees with the following paragraphs of the Claimants' Statement of Claim:  
  
6, 8 – 11, 20, 21 (first sentence only), 22 – 25, 26 (the respondent is not the "Region" and the damages alleged and the calculation thereof are disputed), 27, 28 (first sentence only), 29 – 33.
3. Queen's has no knowledge of the following paragraphs of the Claimants' Statement of Claim:

7, 14, 28 (second and third sentences only).

**Subject Properties:**

4. The Subject Properties are located in a primarily institutional area of the City of Kingston. Commercial and retail amenities are limited on the campus of Queen's University and residents must travel to downtown Kingston to take advantage of the vibrant amenities offered there.
5. 80 Barrie Street and 9 Arch Street are separate properties that abut one another.
6. 80 Barrie Street is designated under the *Ontario Heritage Act* and any alterations to the structure require permission of Council pursuant to that Act.
7. 9 Arch Street was not rented out for either residential or commercial uses, but rather was being used as storage and parking at all material times.
8. The residential uses at 80 Barrie Street were limited to 4 non-conforming dwelling units only.
9. The pharmacy use at 80 Barrie Street was not permitted under the zoning by-law.

**Agreement to Purchase:**

10. The "offer to purchase" entered into by 114152 Ontario Limited dated November 7, 2008 was not a bona fide offer from an arm's length purchaser and does not represent fair market value of the Subject Properties.
11. Queen's and the Claimants had been in negotiations to acquire the Subject Properties for a considerable period of time prior to November of 2008. The Claimants were aware that if a purchase price could not be negotiated that Queen's was prepared to expropriate. It is in the context of these negotiations that the "offer to purchase" was executed.

12. The principal of 114152 Ontario Limited was a tenant of the Claimants and continues to be a tenant of the Claimants.
13. 114152 Ontario Limited had never developed or operated a facility similar to what was proposed for the Subject Properties prior to making the "offer of purchase" and have not proceeded to develop or operate any similar facility since that time.
14. The fact is that the proposed facility was not a bona fide development. The "offer to purchase" contained no conditions, especially related to financing, and there was no business case or other evidence to suggest the proposed business venture was viable.
15. The purported "sale" was not on the open market, was not to an arm's length purchaser and is not an appropriate reflection of the fair market value of the Subject Lands.

**Fair Market Value:**

16. Contrary to the Statement of Claim, the highest and best use of the Subject Properties is not a residential treatment center.
17. The Subject Properties contain fewer legal residential dwelling units than purported. In 1996 the property obtained permission to remove an existing residential dwelling unit, resulting in four legal non-conforming residential units at 80 Barrie Street; none of which was located in the basement. Any number of residential units above four is illegal under the zoning by-law. The basement apartments may also be illegal as no evidence has been presented that those apartments were built in conformity to the applicable regulations.
18. In addition, the pharmacy is not a permitted use in the zoning by-law.

19. The rents claimed for the commercial uses are not reflective of market rates.
20. The alternative fair market value of the Subject Properties proposed by the Claimants is vastly overstated.
21. The fair market value provided by Queen's in its statutory offer of compensation is reasonable, and is based on an accepted methodology and an appropriate consideration of the highest and best use of the Subject Properties.

**Disturbance Damage:**

22. The difference between the actual fair market value of the Subject Properties and the "offer to purchase" is not a business loss and is not compensable as such. The offer as stated above is not a bona fide offer, and even if it were, disturbance damages are not properly measured in the manner proposed by the Claimants.
23. The Subject Properties were neither unique nor irreplaceable and a number of comparable properties and properties that would have permitted comparable uses and comparable income streams were available to the Claimants at the time of the expropriation and subsequent purchase of replacement property by the Claimants.
24. The fact that the Claimants purchased a vacant shell building that required extensive repairs and renovations is neither a function of nor a reasonable or natural consequence of the expropriation.
25. The Claimants were not obligated to purchase the replacement property and the condition of said property was such that the Claimants knew at the time of purchase that the replacement property would not be capable of being

renovated and repaired in a reasonable time such that it could replace lost income in a commercially reasonable time frame.

26. The fact is that the Claimants purchased a completely different form of property, in a superior location and with significantly more floor area as an investment, not as a replacement for what was expropriated.
27. The replacement property reflects significant betterment as compared to the Subject Properties. In addition, the cost to repair, renovate and restore the replacement property far exceeds what would be expected of a reasonable replacement for the Subject Properties. The claims for disturbance damages amount to unjust enrichment and betterment which are not compensable.
28. All other costs claimed as disturbance damages are excessive and do not reflect a reasonable and natural consequence of the expropriation.

**Relief Requested:**

29. Queen's respectfully requests that the Board award the Claimants the following compensation for the expropriation:
  - a. For the fee simple interest in 80 Barrie Street, \$1,445,000.00;
  - b. For the fee simple interest in 9 Arch Street, \$300,000.00; and
  - c. A modest amount for disturbance damages supported by evidence presented at the hearing in this matter.

30. This Statement of Defence is submitted by Cunningham, Swan, Carty, Little & Bonham, solicitors for the Respondent. The address at which documents may be served on the Respondent is:

Cunningham, Swan, Carty, Little & Bonham LLP  
27 Princess Street, Suite 300  
Kingston, ON K7L 1A3  
Attention: Tony Fleming

Dated at Kingston this 19<sup>th</sup> day of June, 2015

**JSN PROPERTIES INC. AND  
COSMEDX INCORPORATED**

**CLAIMANT**

- and -

**QUEEN'S UNIVERSITY AT KINGSTON**

**RESPONDENT**

Board File No. PL150008

**ONTARIO  
MUNICIPAL BOARD**

In the matter of the *Expropriations Act*, R.S.O. 1990,  
c. E. 26

And in the matter of an Arbitration

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**STATEMENT OF DEFENCE**

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