

ONTARIO MUNICIPAL BOARD

IN THE MATTER OF THE *EXPROPRIATIONS ACT*, R.S.O. 1990, c.E. 26
AND IN THE MATTER OF A MEDIATION

BETWEEN:

JSN PROPERTIES INC. AND COSMEDX INCORPORATED

Claimants

- and -

QUEEN'S UNIVERSITY AT KINGSTON

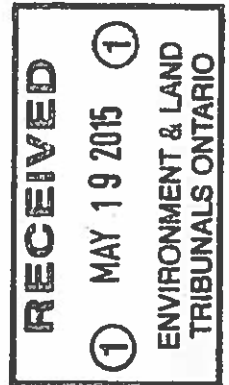
Respondent

NOTICE OF ARBITRATION

1. Take notice that the Claimants, JSN Properties Inc. and Cosmedx Incorporated (collectively the "Claimants"), require compensation claimed herein from the Respondent, Queen's University at Kingston ("Queen's University"), with respect to the lands described below, be determined by the Ontario Municipal Board.

2. The Claimants claim compensation for the full expropriation in fee simple by the Respondent of the lands in Kingston, Ontario bearing the following legal descriptions:

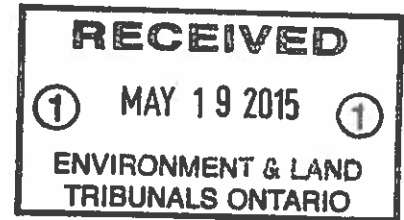
Lot 1, 43-45, Plan A4, Kingston City; Part Lot 2, Plan A4 Kingston City designated as Part 1 on Reference Plan 13R13456, except Lots 43 & 44, Plan A4, being all of PIN 36038-0066, Kingston, the County of Frontenac (80 Barrie Street or "Parcel A");



and

Lots 43 & 44, Plan A4, being all of PIN 36038-0065, Kingston (9 Arch Street or "Parcel B") (collectively, the "Subject Properties")

3. The Claimants claim compensation for the market value of the Subject Properties, as well as compensation for damages which are the natural and reasonable consequence of the expropriation.
4. An illustration the Subject Properties expropriated by the Respondent is attached hereto as Schedule "A".



STATEMENT OF CLAIM

The Subject Properties

5. Parcel A and B were owned respectively by Cosmedx Incorporated (“Cosmedx”) and JSN Properties Inc. (“JSN”). Cosmedx and JSN are related companies owned and controlled by Dr. Dijana Oliver.

6. The Subject Properties benefited from being situated in a vibrant, historic, and developed area, with an abundance of commercial/retail, social and recreational amenities. The Subject Properties were situated on Queen’s University’s Main Campus and one block north of Kingston General Hospital.

7. Before the taking, the location and size of each property were as follows:

a) **Parcel A - 80 Barrie Street:** comprised a total area of 10,460 square feet, and was improved with a 2 ½-storey, historic dwelling converted into commercial and residential space. The improvement was divided into five residential units and 11 office and commercial units zoned for medical and related uses. At the time of the taking, all five residential units were leased and eight of the commercial units were leased. The commercial tenants included doctor offices, orthotics and a pharmacy.

b) **Parcel B - 9 Arch Street:** comprised a total area of 6,600 square feet, and was improved with a parking lot and a building containing one residential unit and a garage. At the time of the taking, both the residential unit and garage space were leased.

8. Parcel A and B are contiguous, and collectively comprised a total area of 17,060 square feet, six apartment dwellings, 11 commercial units, and 17 parking spaces. Cosmedx managed and rented out the units and parking for both properties.

Agreement of Purchase and Sale

9. On November 7, 2008 the Claimants and 114152 Ontario Limited entered into an Agreement of Purchase and Sale for the Subject Properties. 114152 Ontario Limited was an arm's-length party. The agreement was executed by Dr. Duncan Scott, 114152 Ontario Limited's Chief Executive Officer.

10. Pursuant to the Agreement of Purchase and Sale, the Subject Properties were sold to 114152 Ontario Limited for a total of \$8,950,000.

11. The transaction was to be completed in or about December 2008, but was frustrated by the expropriation processes initiated by Queen's University which has given rise to this matter.

The Expropriation Process and the Section 30 Agreement

12. Prior to November 2008, no formal steps were taken by the Respondent to expropriate the Subject Properties.

13. On November 7, 2008 the Claimants and 114152 Ontario Limited entered into an Agreement of Purchase and Sale as described above. Dr. Oliver subsequently informed Anne Brown, a representative of the Respondent, of the pending sale of the Subject Properties to 114152 Ontario Limited. Ms. Brown stated to Dr. Oliver that she would need to speak with the Principal of Queen's University. The very next day the Respondent's lawyers informed Dr. Oliver's lawyer Richard McNevin that it would be expropriating the Subject Properties.

14. 114152 Ontario Limited did not take any further steps to close the Agreement of Purchase and Sale after learning in November 2008 that the Respondent was expropriating the Subject Properties. Therefore, as a direct consequence of the taking, the sale to 114152 Ontario Limited did not close.

15. Unable to sell the Subject Properties in light of the Respondent's stated intent to expropriate, the Claimants consented to the expropriation in an agreement pursuant to Section 30 of the *Expropriations Act* (the "Agreement"). The Respondent paid to the Claimants \$1,745,000, without prejudice to their right to make further claims under the *Expropriations Act*. The Agreement was executed on February 26, 2009.

16. The expropriated lands were acquired by the Respondent to accommodate part of Queen's University's new School of Medicine Education Building.

17. The Subject Properties were transferred to Queen's University on February 27, 2009.

18. On February 27, 2009, the parties entered an extended occupancy agreement whereby the commercial tenants were allowed to remain at 80 Barrie Street until June 30, 2009. The Respondent collected the rent from the tenants and paid to Dr. Oliver \$2,000 per month as compensation for her services in management of the Subject Properties. The occupancy agreement was later extended until September 11, 2009.

19. Pursuant to the Agreement and Section 30 of the *Expropriations Act*, R.S.O. 1990 c.E.26, the effective date for the purpose of this claim is October 20, 2008.

Market Value

a) Sale of Subject Properties to 114152 Ontario Limited

20. The Subject Properties were agreed to be sold for \$8,950,000. This arm's length transaction is the best evidence of fair market value for the lands taken by the Respondent. Any lower amount does not reflect the requirements under the *Expropriations Act*, which stipulates that the "market value of land expropriated is the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer".

b) Highest and Best Use

21. Parcel A and B were situated in a vibrant, historic and developed area of the City of Kingston, which enjoyed an abundance of commercial, retail, social and recreational amenities. The Subject Properties were situated on Queen's University Main Campus and one block north of the Kingston General Hospital.

22. Parcel A was improved by a 2 ½ storey building with commercial units on the ground floor and residential apartments on the other floors. Parcel A's physical, geographical and economic factors, which, before the expropriation, favoured its highest and best use being its continued use as a commercial and residential rental space, with future redevelopment potential in accordance with the applicable land use regulations, and the possible redevelopment into an addiction residential treatment center in accordance with the Agreement of Purchase and Sale with 114152 Ontario Limited.

23. Parcel B was improved by a one-storey building containing one residential unit and a four-car garage. The highest and best use of Parcel B was its continued use as existing residential and parking uses pending redevelopment into a mixture of uses or a residential use with associated parking, and the possible redevelopment into an addiction residential treatment center in accordance with the Agreement of Purchase and Sale with 114152 Ontario Limited.

24. Given the highest and best use of Parcel A and B on the effective date, the Claimants claim compensation of \$8,950,000 for the market value of the Subject Properties.

Disturbance Damage – Frustration of the Agreement of Purchase and Sale

25. The Agreement of Purchase and Sale between 114152 Ontario Limited and the Claimants did not close because of the expropriation of the Subject Properties. Therefore, but for the expropriations, the sale would have closed and the Claimants would have received \$8,950,000 in accordance with the Agreement of Purchase and Sale.

26. In the event that market value of the lands taken by the Region is determined to be less

than the \$8,950,000 that 114152 Ontario Limited agreed to pay for the Subject Properties on the open market, then the Claimants have suffered damages as a natural and reasonable consequence of the expropriations frustrating the sale to 114152 Ontario Limited. The Claimants seek damages to account for any difference in value between the funds that would have been paid by 114152 Ontario Limited and the market value of the Subject Properties.

The Replacement Property

27. On August 7, 2009 the Claimants purchased a replacement property located at 128 Ontario Street ("Replacement Property") for \$1,851,000. The Claimants' offices were relocated to the Replacement Property on September 11, 2009.

28. The Replacement Property is a considerable distance from the Subject Properties and Queen's University Main Campus. The Claimants had intended to relocate to a property within close proximity to the Subject Properties and conducted an extensive and lengthy search. However, no such property was available because – due to their location, improvements and zoning – the Subject Properties were unique and irreplaceable.

29. At the time of the purchase, the Replacement Property was vacant for approximately 10 years. The building was effectively an empty shell and required extensive modifications. The Claimants were unable to lease any of the Replacement Property's units during the renovations and, consequently, incurred significant carrying costs in the form of property taxes and mortgage interest.

30. The Claimants have incurred significant costs modifying the Replacement Property in order to mitigate their losses. The Claimants do not have the funds available to complete the required renovations to the Replacement Property because the Respondents failed to provide fair compensation for the taking.

31. The Claimants lost more than fifty percent of their commercial tenants and all of their residential tenants as a result of the taking. Many units remain unfilled despite the Claimants

best efforts to improve this relocation property to attract tenants. The Claimants require fair compensation so that they can complete the necessary renovations for the Replacement Property.

Additional Disturbance Damage & Business Loss

32. The Claimants incurred the following additional disturbance damages and business losses:

- a) *Improvements made to the Subject Properties prior the expropriations:* Prior to taking, the Claimants intended to construct a six unit, three-storey dwelling on 9 Arch Street. The Claimants commissioned redevelopment plans, which now, in light of the taking, are costs thrown away. 80 Barrie Street was also repaired prior to the taking. The Claimants therefore lost the benefit of those repairs.
- b) *Rent paid to the Respondent:* After the taking, the Claimants were required to make a one-time payment of \$5,000 to the Respondent for the continued rental of the Subject Properties.
- c) *Lost Executive time:* Dr. Oliver, as the owner and directing mind of the Claimants, has and continues to expend a considerable amount of time due to the expropriation, particularly in her efforts to mitigate the Claimants' damages and pursue fair compensation. This time could otherwise have been spent by Dr. Oliver on profitable enterprise. The Claimants seek \$36,000 (\$180 per hour, for 200 hours). This figure continues to accumulate as Dr. Oliver, on behalf of the Claimants, continues dedicate time to the expropriation proceedings and the renovation of the Replacement Property.

Summary of Claim

33. The Claimants claim compensation for the following items which are a natural consequence of the expropriation:

- a) \$8,950,000 for the market value of the fee simple interest expropriated by the Respondent, pursuant to Sections 13(2)(a) and 14(1) of the *Expropriations Act*, less the \$1,745,000 paid by the Respondent in accordance with the Section 30 Agreement;
- b) In the alternative, the market value of the fee simple interest expropriated by the Respondent pursuant to Sections 13(2)(a) and 14(1) of the *Expropriations Act*, and the business loss the Claimants suffered by the frustration of the Agreement of Purchase and Sale executed with 114152 Ontario Limited as plead in paragraphs 9 to 15 above;
- c) \$1,330,000 for disturbance damages for lost rental income, pursuant to Sections 13(2)(c) or 13(2)(b) of the *Expropriations Act*;
- d) \$ 2,500,000 for the cost of renovating the Replacement Property, pursuant to Sections 13(2)(d) or 13(2)(b) of the *Expropriations Act*;
- e) \$400,000 for disturbance damages for the costs associated with the Replacement Property, including but not limited to carrying costs, moving and relocation costs, and associated professional fees, pursuant to Sections 13(2)(d) or 13(2)(b) of the *Expropriations Act*;
- f) \$55,000 for improvements made to the Subject Properties before the expropriations, and which were costs thrown away;
- g) \$5,000 in rent paid to the Respondent;
- h) \$36,000 (as of April 30, 2015) for executive and management time for

Dijana Oliver, pursuant to Section 13(2)(b) of the *Expropriations Act*;

- i) All legal, appraisal and other costs for the claim for compensation in accordance with Section 32 (1) of the *Expropriations Act*;
- j) Interest in accordance with Section 33 of the *Expropriations Act*; and
- k) Such other and further relief as counsel may advise and this Board may deem just.

34. This notice is given by Rueter Scargall Bennett LLP, solicitors for the Claimants. The address at which documents may be served on the Claimants is:

Rueter Scargall Bennett LLP 250
Yonge Street, Suite 2200 Toronto,
Ontario
M5B 2L7
Attention: Shane Rayman / David Barbaree

Dated at Toronto this May 19, 2015

RUETER SCARGALL BENNETT LLP
250 Yonge Street, Suite 2200 Toronto,
Ontario M5B 2L7
Shane Rayman / David Barbaree
L.S.U.C. # 44649V / 59725J
Tel: (416) 597-5406/(416) 597-5403
Fax: (416) 869 3411

Lawyers for the Claimants

Schedule "A"

**SUBJECT PROPERTY
PARTIAL COPY OF REFERENCE PLAN 13R-13456**

