



Shovel ready

Expediting property acquisitions for infrastructure projects post-COVID-19



Abbey Sinclair is a lawyer at Scargall Owen-King LLP in Toronto. She represents municipalities and other public entities in the acquisition/expropriation of privately owned lands for a wide variety of projects throughout Ontario. Abbey previously worked as a Senior Policy Advisor in the Realty Division of the Ontario Ministry of Infrastructure. Abbey can be reached at abbey.sinclair@sokllp.com or 416-869-2202.

Municipalities across Canada are gradually reopening through their own phased lifting of COVID-19 restrictions and are shifting focus to the uncertain road of economic recovery. Central to any recovery, be it v-shaped, u-shaped, or otherwise, are the wide range of infrastructure building projects that are expected to play a crucial role in Canada's post-pandemic rebound.

Post-Pandemic Recovery Planning

Significant government infrastructure spending following an economic downturn is a familiar strategy. Following the 2008-2009 global financial crisis, the Canadian government injected more than \$63 billion in fiscal stimulus into the economy, with an estimated \$45 billion provided to provincial and territory governments for priority and shovel-ready infrastructure projects aimed at encouraging economic growth and jobs. In many instances, provinces, territories, and municipalities matched the stimulus funds, allowing for more ambitious infrastructure projects.

It is anticipated that many more such projects could soon be on the way. In April 2020, the federal government announced plans to budget billions of dollars in infrastructure funds as a way to stimulate the economy as soon as pandemic restrictions are lifted. Several provinces and municipal governments have also released plans for substantial spending on local construction projects.

Getting people back to work is a top priority, for obvious reasons, which makes so-called shovel-ready projects a particularly important part of governments' post-pandemic recovery plans. However, a project is only as shovel ready as the land on which it is to occur. Unexpected changes in the scope and timing of planned projects, as well as the rush to start new projects, can create a number of practical and logistic challenges, particularly where private property is required for the undertaking.

As long as COVID-19 lingers as a public health threat, most aspects of the property acquisition process – from negotiations with property owners to dispute resolution mechanisms, possession timelines, and pre-construction due diligence activities – are likely to be complicated by safety concerns.

Three Ways to Fast Track Property Acquisition during COVID-19

Timing is one of the biggest challenges. Access to, or possession of, the required lands must be secured before many aspects of due-diligence and inspection activities can take place, construction contracts can be finalized, and shovels can hit the ground. In a pre-pandemic world, such negotiations could take several months. Social-distancing protocols and stretched municipal resources have done little to speed up the process. Even in the best of times, the legislative frameworks setting out the formal expropriation process in the various provinces require

a series of procedural steps and notice requirements. Consequently, it can take up to a year or more before possession can be obtained by expropriation.

So what happens when it is simply not possible to spend up to a year negotiating or expropriating land through the normal process? Here are three possible ways municipalities can look to fast track property acquisition programs for their post-pandemic recovery projects.

1. Financial and other incentives

As a first step, municipal realty departments might consider offering owners financial and other incentives in order to acquire the necessary property rights or permissions on an expedited basis.

Incentives can take a number of forms depending on the specific situation and project needs. For example, a payment may be offered in exchange for access, early possession, or as compensation for an extended occupation or easement period. An early signing bonus or a premium for entering into an agreement by a set date can also help speed up negotiations to meet desired project timelines.

In other instances, the incentives offered could include landscaping or improvements to affected properties. Such non-financial enticements may involve items such as a new driveway or parking, fencing, business signage, or trees and sod, which can be undertaken by the project contractor or municipal personnel. It may even be possible to include these improvements as part of the construction contract for the project.

Offering financial and other incentives to owners impacted by a project is not a novel concept, but it can be controversial if inducements are not offered on an equitable and transparent basis. But in circumstances where speed is at a premium, undertakings to provide defined payments and/or improvements can be an effective and economical approach to acquiring property under tight timelines and avoiding the need for expropriation. For this reason, incentives are a common point of negotiation between public authorities and property owners.

2. Contractual expropriations

In cases where it is not possible to reach a resolution with the landowner, and there is insufficient time to go through the lengthy expropriation process, a contractual expropriation or partial settlement can provide a convenient path forward.

The expropriations legislation in several provinces allows expropriating authorities and owners to contract into the statutory regime. This means that the landowner is provided with all of the rights set out in the legislation without the municipality having to serve notices and go through the cumbersome procedural steps of the process.

For example, section 30 of the Ontario *Expropriations Act*, R.S.O. 1990, c. E.26 enables a property owner to consent to the acquisition of land by a statutory authority without giving up their right to later apply to the Local Planning and Appeal Tribunal for the determination of compensation in the same way as if the owner had been formally expropriated. In Alberta, the *Expropriation Act*, R.S.A. 2000, c E-13 enables an owner to consent to the acquisition of land in an express written agreement in which compensation is agreed to be determined by the Land Compensation Board at a future date.

The British Columbia *Expropriation Act*, R.S.B.C. 1996, c.125 also provides a mechanism allowing a municipality to avoid the formal expropriation process if an owner agrees to transfer or dedicate land to the expropriating authority. The parties can later have a court determine the compensation to be paid to the owner, as if the land had been expropriated. Like the Alberta statute, the British Columbia expropriation legislation specifies some of the terms that must be included in the agreement between the municipality and the owner.

3. Partial settlements

In jurisdictions without statutory provisions that enable parties to avoid the time-consuming expropriation process and contract into the expropriation legislation, a solution that might be attractive

to both landowners and municipalities is a partial settlement or resolution of compensation for the required lands. An agreement that contemplates certain advance payments in exchange for timely possession, and specifies mechanisms for determining final compensation after the value of the lands or impacts of the project can be fully and fairly assessed, may provide an efficient option for a municipality seeking to meet funding deadlines and move forward with construction.

Contractual arrangements offer a number of advantages for municipalities. In addition to avoiding the costly and time-intensive procedural requirements of the expropriation process, a contractual expropriation or partial settlement can provide a greater degree of certainty and control over the date of transfer and the timeline for possession of the property. Terms allowing for early access or pre-construction investigations can also be negotiated as part of the arrangement, which can assist in advancing pre-construction investigations on a shortened timeframe. Finally, the agreement can serve as a framework that enables the parties to work cooperatively to mitigate construction damages or impacts. The flexibility and potential for an ongoing dialogue offered by contractual arrangements can be especially important where aspects of the project have not been finalized or may need to be adjusted to accommodate funding requirements.

Local Government: Central to Post-COVID-19 Efforts

In order for a project to be shovel ready, all necessary access permissions and property rights must be secured in advance. Financial and other incentives, as well as contractual expropriations or partial settlements, can assist in abbreviating property acquisition timelines. These negotiation and contractual tools may enable municipalities to participate in provincial and federal stimulus funding programs and position local governments to be central players in Canada's post-COVID-19 infrastructure building efforts. **MW**

as published in

MUNICIPAL WORLD

CANADA'S MUNICIPAL MAGAZINE | WE SHARE YOUR STORIES

MUNICIPALWORLD.COM