INQUIRY OFFICER'S REPORT

INTO: AN EXPROPRIATION BY THE CITY OF WINNIPEG
OF LANDS AND PREMISES COMMONLY REFERRED TO AS
1780 TAYLOR AVENUE AND LEGALLY DESCRIBED AS:

LOT 1 Plan 38325 WLTO

In RL 59 and 60 Parish of St. Boniface

REPORT SUBMITTED BY:

MICHAEL T. GREEN

INQUIRY OFFICER

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REPORT OF THE INQUIRY OFFICER

I. INTRODUCTION

On October 28, 2014 I was appointed pursuant to subsection 4(2) of Schedule "A" of *The Expropriation Act* as Inquiry Officer respecting a Notice of Expropriation initiated by the City of Winnipeg on April 30, 2014.

The intended expropriation affects the following lands:

Lot 1 Plan 38325 WLTO
In RL 59 and 60 Parish of St. Boniface

The street address of the fire/paramedic station located on the property is 1780 Taylor Avenue. The property is located on the south side of Taylor Avenue directly across from Centennial and Beaverbrook Streets.

The objector to the intended expropriation is 3177751 Manitoba Ltd., the registered owner of the land. The formal Notice of Objection was filed on May 27, 2014. The notice states in part that objection is taken to the intended expropriation of Parcel A on Plan Deposit 397/2014 WLTO, prepared by Kelly Wayne Mantik, Manitoba Land Surveyor on the grounds that:

(a) The decision to expropriate only Parcel A and to exclude Parcel B from the expropriation is not fair or reasonable;

(b) Parcel B is a small triangular parcel of land which will be severed from the remaining lands of the owner which are identified as Parcels C, D and E. Parcel B will have no remaining utility to the owner and the owner will have to pay property taxes and carrying costs and will be exposed to third party liability with respect to this parcel;

(c) Such further objections and grounds as may be provided prior to or at the Public Hearing into the matter.

A public hearing into the intended expropriation was held on December 15th and 16th, 2014 at The RBC Convention Centre in Winnipeg, Manitoba.

Notice of the public hearing was published in the Saturday, November 8, 2014 edition of The Winnipeg Free Press, a newspaper having a general circulation in the area in which the lands intended to be expropriated are situated.

Notice of the public hearing was also served on the City of Winnipeg and the objector 3177751 Manitoba Ltd. as well as persons who had been served with the Notice of Intended Expropriation.

Schedule A to The Expropriation Act deals with the responsibilities of inquiry officers such as myself.

Section 8 of that schedule provides that inquiry officers must make and deliver to the confirming authority a report setting out:

(a) a summary of the evidence and the arguments of the parties;
(b) a determination of the facts;
(c) an opinion on the question in issue; and
(d) such other matters as are considered expedient and in the public interest.

It is my intention in this report to follow those general requirements in the order set out in Section 8.

2. PARTIES TO THE INQUIRY PROCEEDING

The parties to the inquiry process are The City of Winnipeg and 3177751 Manitoba Ltd.

Legal counsel for the City of Winnipeg at the public hearing was Ms Denise Pambrun and Mr. Antoine F. Hacault appeared for the objector.

A letter dated November 14, 2014 from lawyers for 6674984 Manitoba Ltd., the adjoining landowner, was provided to me. This letter stated that 6674984 Manitoba Ltd. "does not object to the expropriation".

For convenience sake the adjoining land is usually referred to as "the Scoop n' Weigh property". The property houses a retail establishment with that name.

3. SUMMARY OF THE EVIDENCE AND POSITIONS OF THE PARTIES RESPECTING THE INTENDED EXPROPRIATION

(A) EVIDENCE

Although Section 8 refers to a summary of the evidence, I interpret that directive as meaning a summary of the evidence which I consider to be relevant to my general responsibility to inquire into whether the intended expropriation is fair and reasonably necessary for the achievement of the expropriating authority, being in this instance the City of Winnipeg.

I make the reference to relevant evidence because, in my view, much of the evidence adduced at the public hearing, although helpful as background information, is not directly relevant to my task as inquiry officer.

There was a great deal of evidence as to the history of how we came to be where we are today, including references to a facility audit conducted in 2005, briefing notes generated in 2008 dealing with the facility audit and so on. Although the historical background is interesting and does add some context which is of assistance, it need not, in my opinion be repeated or examined in any depth.

Similarly a fair amount of evidence concerning the history of the dealings between Shindico Realty Inc., the controlling corporate entity of the registered owner of the property (hereinafter usually referred to as "the objector"), and various City departments over the years in relationship to the four fire hall/paramedic sites was led at the hearing. Again the relevance of that evidence to the present issue is, in my view, of little direct relevance. It is interesting background information but does little to inform the main issues of fairness and reasonable necessity.

The City of Winnipeg called two witnesses at the public hearing being Mr. John Zabudney and Mr. Rob Robinson.

Mr. Zabudney is the Manager of real estate for the City's Planning, Property and Development. He has held that position since September, 2011, but has been with the real estate arm in various capacities since 1991.

Mr. Zabudney testified that Winnipeg Fire Paramedic Service had commissioned an audit in 2005 which concluded that four fire/paramedic stations needed replacement. One of the four stations was located at 1710 Grosvenor Street in north River Heights. The replacement plan, which was developed after the audit, contemplated relocating the Grosvenor station to the vicinity of Grant Avenue between Waverley Street and Kenaston Boulevard. Ultimately that station was built by Shindico Realty Inc. in 2012 on the property of the present objector 3177751 Manitoba Limited, the registered owner. As alluded to earlier it is common knowledge that 3177751 Manitoba Limited is controlled by Shindico, which has operated a commercial and investment real estate business in Winnipeg for many years.

A Request for Qualification was issued by the City in 2009 and was titled "Request for Qualification for Innovative Options in Designing, Building, Financial and Maintenance of Four Paramedic Stations". Four areas were targeted for the development of new fire paramedic stations being St. James, Charleswood, River Heights and South St. Boniface. Six or seven proponents were selected as being potentially capable of meeting the requirements of the project, Shindico Realty Inc. being one of them.

A Request for Proposal (RFB No. 200-2009B) was then issued to the proponents. The Request repeated the earlier advice that bids were being invited for the design, construction financing and maintenance of four paramedic stations. Three of the stations were to be suburban stations and one was to be a core facility.

In my opinion it is not necessary to review in any detail the various business proposals which Mr. Zabudney alluded to in his evidence

concerning the location and ultimate construction of the River Heights station. Suffice to say that early on the concept of a public/private relationship was put forward (commonly known as a "P3"), later on a land swap was negotiated subject to the approval of the Council of the City of Winnipeg (which approval was ultimately not forthcoming) and still later an outright purchase of the lands at 1780 was attempted. The parties were unable to agree upon a real estate purchase and the City finally decided that it would expropriate the land upon which the fire paramedic station was built.

The City also called Mr. Ron Robinson as a witness but for the sake of a better understanding of my ultimate opinion I propose to review the objector's relevant evidence before dealing with Mr. Robinson's evidence.

The objector called Mr. Robert Downs as its sole witness at the public hearing. Mr. Downs is a development manager with Shindico Realty Inc.

Mr. Downs gave evidence pertaining to some of the relevant history connected to 1780 Taylor Avenue.

He advised that the numbered company had originally owned a larger piece of property which included 1780 Taylor Avenue but sold part of the eastern portion of the property in the year 2000 to a numbered company controlled by a business named Gemini Kitchens. As previously stated the portion which was sold has usually been referred to in these proceedings as the Scoop n' Weigh property.

At the time of the sale the two numbered companies, being 3177751 Manitoba Ltd., the objector herein, and 3946593 Manitoba Ltd., the purchaser of the Scoop n' Weigh lands, entered into an easement agreement dated March 23, 2000. In simple terms an easement may be defined as a non-possessory right to use or enter the real property of another. Mr. Downs explained in his evidence that one of the reasons for entering into the easement agreement was to define rights of access and obligations of

maintenance over a shared approach to what would be two separately owned pieces of property. He stated that "by having the approach line up with the roadway that straddles the property line, it allows that approach to be shared by both parcels. It is more efficient for street traffic and more economical for the owners of the two parcels, and it also allows for shared access without the potential of disagreements on insurance, snow clearing, things like that." The responsibilities of each of the parties was set out in the easement agreement. The entitlements under the easement agreement were to be in perpetuity, meaning that the benefits and obligations would run with the land.

The easement agreement essentially bestowed mutual benefits and obligations upon the parties in relation to the construction, operation and maintenance of common drive aisles and shared approaches to Taylor Avenue (which as we know fronted the northern boundary of the property) to be constructed partially on each of the parcels. In particular the parties wished to "grant to the other (party) reciprocal easements for the purposes of pedestrian and vehicular ingress and egress in, over, upon and across the drive aisles and approaches situated upon each of the parcels".

Specifically Paragraph 1.2(a) of the easement agreement provided as follows:

> "317 (the present objector) hereby grants and conveys to 394 (the purchasing numbered company) for the benefit of the 394 Parcel, a non-exclusive easement and right to the use during the term of this Agreement over, upon and across the drive aisles and approach to Taylor Avenue situated upon the 317 Parcel (the "317 Easement Area) for purposes of ingress, egress, passage and delivery by vehicles (but not parking) and pedestrians from Taylor Avenue to the 394 Parcel;"

And Paragraph 1.2(b):

> "394 hereby grants and conveys to 317 for the benefit of the 317 Parcel, a non-exclusive easement and right to the use during the term of this Agreement over, upon and across the drive aisles and approaches to and from the public lane situated to the east of the 394 Parcel, to the extent that access from such lane is available, and to and from Taylor Avenue, which Taylor Avenue approach is situated within the area coloured blue on the Site Plan (the 394 Easement Area) for purposes of ingress, egress, passage and delivery by vehicles (but not parking) and pedestrians to the 317 Parcel;".

A party gaining the benefit of an easement is known legally as the owner of the dominant estate while the party granting the easement is the servient estate. Since this was a mutual easement agreement, each of the numbered companies obtained a dominant estate as respects the other party's land and had a servient estate as respects the land it was allowing the other party to have rights upon.

The easement agreement entered into between the numbered companies had certain schedules attached. One of these, Schedule C, consisted of a site plan which showed the building which 3946593 Manitoba Ltd. intended to construct on its portion of the subdivided land, as well as an area coloured in blue, which showed the outline of the area over which 317 (ie. the objector) was granted an easement.

Both of the numbered companies' easement interests were registered in the Winnipeg Land Titles Office on April 13, 2004.

Mr. Downs testified that the owner is objecting to the proposed expropriation on basically two grounds. First, Parcel B, a small triangular piece of property (which the City does not propose to expropriate and upon which the drive aisle is partly located) is of no use to the objector and in fact had certain financial costs and liability risks which would attach to it. Secondly,

that access to the objector's other properties to the south and east (Parcels C,D and E) would be lost because of the proposed expropriation of the easement.

Mr. Ron Robinson, a senior geomatics officer with the Geomatics and Land Information Systems Branch was the second witness called to testify on behalf of the City.

Mr. Robinson explained that one of the functions of his department is to assist in the preparation and finalization of documentation required under The Expropriation Act including notice(s) of expropriation, bylaws, declarations of expropriation, notices required by the Winnipeg Land Titles Office, and so on. The Geomatics department works in conjunction with the real estate and legal services divisions. In his testimony Mr. Robinson referred to potential negotiations with the landowner whose property is to be expropriated. In this instance, however, very little if any negotiation took place in respect to the expropriation.

Mr. Robinson's recollection is that he first became involved in this matter in or around October of 2013.

The first step undertaken by him and his department was to commission a building location certificate. Coincidentally Fire and Paramedic Services had made a request for building location certificates for all of the four new fire stations. Mr. Robinson explained that the purpose of a building location certificate is to prove the structures on the land and their relationship to the limits of the certificate of title.

Mr. Robinson gave evidence that when the miscellaneous plan of the property was first received a question arose as to why a small triangular piece in the northeast corner of the property was being excluded as "it didn't seem to make sense". Older aerial photos were consulted and it became clear that traffic off of Taylor Avenue was travelling over the triangular area in order

to access the adjoining Scoop n' Weigh property. This gave some context to the configuration.

Mr. Robinson attended the site of the property with a member of the surveying company which was retained to prepare the building location certificate and instructed the surveyor to "tie in the curb, make sure you get the gutter, tie in the seam, get the other approach further to the east". This latter reference is to a public lane which runs along the eastern boundary of the Scoop n' Weigh property.

The building location certificate was prepared and it was the information contained in the document which was used by Mr. Robinson's department to form the basis for the expropriated lands.

The easements which had been prepared and registered by the numbered companies in the year 2000 were reviewed and decisions were made among the three departments (geomatics, real estate and legal) that the expropriated lands would be taken free of encumbrances except for Instrument No. 2478832/1. That instrument originally gave the objector easement rights over the Scoop n' Weigh property but under the expropriation some of those rights would enure to the benefit of the City. Mr. Robinson stated in evidence that "there is no harm in keeping it". He also noted that the rights granted to the objector over its neighbour's property were greater than its neighbour's dominant easement rights.

The small triangular piece, which Mr. Zabudney testified was of no use or benefit to the City, was not included in the property to be expropriated. The eastern property line immediately below the triangular piece was to extend right up to the western edge of the Scoop n' Weigh property.

During the course of the public hearing various documents were filed as exhibits by the parties. These included various site plans, a plan of

subdivision and aerial photographs. This documentation had been generated prior to the time the decision to expropriate had been made. That is, the plans and photographs filed as exhibits were generated during the very limited period within which a P3 was a possibility, during the time that land swaps were being negotiated (but never finalized by receiving city council approval) and at the time the contract for the construction of the station was being finalized. The purpose of this evidence, as I understand it, was to demonstrate what the parties understood from time to time would be the boundaries of the property on which the station was situated and which would ultimately be owned by the City either through an exchange of land or through a purchase of real estate.

Again, I do not think it necessary to review this evidence in detail, but insofar as the parties actually turned their minds to precise and exact boundaries (and I am not convinced that they ever really did so before the decision to expropriate was made) I am of the opinion that this evidence suggests that the eastern boundary line of the property would be a few feet to the west of the existing property line.

I am satisfied that the boundaries were not looked at with any precision until it became evident that a sale and purchase of the property would not be possible and that expropriation would have to take place in order for the City to become the owner of the land upon which Shindico had constructed the fire paramedic station.

(B) POSITIONS

The City takes the position that it has demonstrated through the evidence that the intended expropriation is fair and reasonably necessary for the achievement of the objectives of the expropriating authority. In other words, it is the City's position that the intended expropriation should proceed in accordance with the Notice of Expropriation issued on April 30, 2014.

The objector, on the other hand, although it concedes that the expropriation of the land upon which the station is situate is reasonably necessary, takes the position that the City's refusal to include Parcel B (being the small triangular piece at the northeast corner of the property) is not fair. It says that Parcel B provides absolutely no benefit to it, and in fact leaves it in the position of having to pay realty taxes and bear carrying charges on what essentially is a worthless piece of land. Under the servient easement, which will remain in force because the City is not taking the property, the objector will be legally obliged to maintain the area in question. The usual potential third party liabilities which attach to land would also remain extant.

The objector goes on to say that if the intended expropriation proceeds as planned it will effectively be deprived of all legal rights to access from Taylor Avenue to its lands which it continues to own to the south and west of the expropriated property. Specifically, it says, that Parcels C, D and E will be difficult to access from Taylor Avenue.

To cure what it says is inequitable, the objector submits that I ought to make the following findings and recommendations:

(1) that Parcel B, Deposit No. 0397-2014, should be included as part of the expropriated lands;

(2) that the City of Winnipeg should not expropriate the portion of easement interest in Parcel A, Deposit No. 0397-2014, notice of which is given by Caveat No. 2478832/1. The result of this would be that the objector would have the continued legal use, maintenance and repair over a portion of the expropriated land;

(3) that the City of Winnipeg should grant dominant easement rights to the objector over Parcels A & B (assuming that

item (1) above is implemented) in form and content similar to that included in 2478832/1;

(4) that the City be required to remove a caveat which is registered alleging a right to purchase concerning parcel B be removed.

It should be noted that items number (4) is not an issue as the City has undertaken to remove that caveat.

4. OPINION ON THE QUESTION IN ISSUE AND MY RECOMMENDATIONS

As indicated above, it is the position of the objector that the City's decision not to expropriate Parcel B is unfair as the tiny triangle of land has no utility to it and in fact simply leaves it with the obligation to pay realty taxes, bear carrying charges, and be exposed to potential third party liability. At the same time the City proposes to expropriate the lands south of the triangle right up to the existing property line, meaning that from a legal standpoint the objector has lost its access (at least access from the east end of the property) to its other properties located to the south and west.

In my opinion there is merit to this position.

Mr. Zabudney admitted in his testimony that he, on behalf of the City, did not really consider whether the expropriation was fair to the objector but rather concentrated upon whether it was fair to the City and the taxpayer who owns the Scoop n' Weigh property to the east. I must say that I was rather surprised by this statement. It seems to me that it is implicit in the governing law that the concept of fairness applies in a general sense, and must include a consideration of whether the overall taking is fair to the party whose property is being expropriated.

When I was reviewing the evidence and the submissions of the parties it occurred to me that a potentially equitable solution to the problem would be to recommend that Parcel B be left with the objector, but also to recommend that the proposed eastern property line (as it extends southward from the triangular piece) be moved approximately five feet to the west, with ownership of the five foot strip thereby created also remaining with the objector. To me this possibility would seem to meet the expressed concerns of both the City and the objector.

The City has said that it has no need for the triangular piece and if it were to take ownership of that land it would be saddled with repair and maintenance obligations and receive nothing in return. If the triangular piece is left with the objector that expressed concern will be eliminated.

The objector's concern that it will be left with a virtually worthless smidgen of land would be met, in my opinion, by the fact that in retaining ownership of the five foot strip coupled with the existing dominant easement over the Scoop n' Weigh land would mean that it will have access to its remaining lands to the south and west. The five feet is an approximation based on the evidence I have heard but basically the property line should coincide with the western edge of the area coloured blue in Schedule C of the easement agreement (Exhibit 5, Tab 3).

This possible solution had not been raised by either of the parties in arguments presented at the end of the public hearing and I therefore contacted counsel for the parties, outlined what I was thinking and invited them to make additional written submissions.

Brief correspondence between and among the parties and me ensued. The upshot was that the objector would be prepared to accept my potential recommendations while the City of Winnipeg would not.

The City maintains its original position that the expropriation of the land is fair and reasonable as is the elimination of the easement as respects the land it is taking. It also states in correspondence from counsel that ownership by it of the most easterly five feet is reasonably necessary to permit the City sufficient room to access the fire hall for maintenance purposes. If it does not own the strip it might have to negotiate access from the objector for this purpose.

Counsel for the City also pointed out that the Building Location Certificate indicates that a coping of 0.25 feet exists along the east wall of the

station itself. If the property line were moved five feet the station would encroach onto the objector's property and the City does not support a result that creates an encroachment no matter how small.

Additionally counsel for the City suggests that the owner of Scoop n' Weigh ought to be contacted as the potential recommendation may have an "impact" on it.

In my opinion the concerns expressed on behalf of the City respecting the possible solution are not particularly persuasive.

The suggestion that the City needs title to the five foot strip is, in my view, inconsistent with the evidence given by Mr. Zabudney and Mr. Robinson at the public hearing.

Mr. Zabudney's evidence at the hearing was as follows:

"Q. Were there any discussions and the other witness will speak to this in some detail, were you aware of any discussions of whether the City should acquire the interest?

A. Internally, yes, there was discussion as to whether the City should acquire that interest and what benefit it would have.

Q. Tell us about that discussion.

A. That discussion was, again, if we were to acquire that interest, I believe the City would be responsible to maintain that approach, or portion thereof, in which the City has no benefit whatsoever. ***Our property is serviced most adequately in the approaches. Our fence is located along the lines somewhere there. And again, there would be no benefit for the City to undertake or ascertain that interest."***

(Italics added)

The evidence of the City's witnesses, in my opinion, seemed to be more along the lines that it made sense to expropriate to the existing property line and that is why that line was selected. No evidence was called to suggest that the passageway between the buildings was needed to provide the City with access to the station for maintenance purposes.

If in fact the City finds that access through the passageway is a necessity it can always expropriate an easement giving it that right.

The coping/encumbrance point raised by counsel can easily be accommodated. Coping of three inches can, in my opinion, be eliminated as a problem by lopping three inches off the west boundary of the narrow strip. If that is not feasible the City can always expropriate an easement to accommodate the three inch encroachment.

The suggestion that counsel for Scoop n' Weigh needs to be notified is appreciated but I do not feel that it is necessary to do so. If my recommendation is followed Scoop n' Weigh's rights and obligations will remain exactly the same as they were prior to the Notice of Expropriation.

In summary, therefore, I find that the intended expropriation is not fair or reasonably necessary.

As discussed earlier it is my recommendation that the eastern boundary of the land to be expropriated should be established approximately five feet to the west of the existing property line. The five foot strip should extend southerly from the triangular piece (ie. from Parcel B). The existing easement rights should remain in place and should not be expropriated.

I realize that it may be a source of some confusion as to what exactly I am recommending as far as the property lines are concerned.

Fortunately two of the exhibits filed at the public hearing may be of assistance.

Exhibits 3 and 2 are aerial photographs of the subject property which I have attached to this report as Schedules "A" and "B" respectively.

The area outlined in yellow on Schedule "B" shows the parameters of what the City proposes to expropriate. The area outlined in yellow on Schedule "A" is what I am proposing.

I would like to thank counsel for their courteous and helpful input throughout.

All of which is respectfully submitted this 29th day of January, 2015.

MICHAEL T. GREEN
INQUIRY OFFICER

LIST OF EXHIBITS

1.	City of Winnipeg book of documents.
1A.	Document 14096, Tab 11.
2.	Board of miscellaneous plans 14096.
3.	Board of miscellaneous plans 14096/1.
4.	Board of plan deposit 0397-2014.
4A.	Board of plan deposit 0397-2014 with dotted lines.
5.	Book of documents of 31277751 Manitoba Ltd.
6.	Expropriation plan 0397-2014.
7.	Cropped site plan.
8.	Minutes of November 6, 2012.
9.	Sketch of surveyor's building location certificate revised June 2, 2014.
9A.	11 inch by 17 inch version of exhibit.