INQUIRY INTO THE EXPROPRIATION OF LAND BY THE CITY OF WINNIPEG FOR THE PURPOSES OF THE COCKBURN-CALROSSIE COMBINED SEWER AREA – DRAINAGE UPGRADES PROJECT

Prepared by:

GEORGE ERNEST ULYATT

Inquiry Officer

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INQUIRY OFFICER'S REPORT

1. The City of Winnipeg, the Expropriating Authority, passed Bylaw No. 11/2015 expropriating lands (see attached Schedule A) and subsequently filed a Declaration of Expropriation in the Winnipeg Land Titles Office and caused to be issued a Notice of Intended Expropriation which was served on all affected parties of the expropriation.

2. As a result of the Notice of Intended Expropriation, a notice of objection was filed.

3. On the 22nd day of September, 2015, George Ulyatt was appointed as an Inquiry Officer pursuant to Schedule "A" of The Expropriation Act, R.S.M. 1987, c. E190, with respect to the Notice of Expropriation filed by the City of Winnipeg.

4. Pursuant to the terms of the legislation, Section 8 of Schedule "A" of *The Act*, the Inquiry Officer has 30 days to submit his report. Pursuant to a Consent Order of the Honourable Justice McCawley, dated July 17th, 2015, the date for the Inquiry Officer to submit his report was extended to November 16th, 2015, and the Confirming Authority's extension to confirm the report was extended to November 26th, 2015. A further Consent Order was pronounced by the Honourable Justice Dewar, dated November 12th, 2015, which extended the submission date for the Inquiry Officer's Report to November 23rd, 2015 and the confirmation date for the Confirm Authority to February 29th, 2016.

A. LANDS AFFECTED BY THE UNDERTAKING

Lands to be expropriated:

5. The intended expropriation affects the lands as listed in Schedule A attached hereto.

Notice of Expropriation:

6. The notice of such public hearing was affected by serving the Notice of Public Hearing on counsel for the party who had filed a Notice of Objection and by serving by Registered Mail a Notice of Public Hearing on all persons who have an interest in lands which are subject to the matter of the intended expropriation.

7. This Inquiry Officer caused to be published in the Saturday, September 12th, 2015 edition of the Winnipeg Free Press, a local newspaper, a Notice of Public Hearing for this Inquiry.

B. PARTIES TO THE INQUIRY PROCESS:

8. In accordance with Section 5 of Schedule "A" of *The Act* this Inquiry Officer fixed the 24th day of September, 2015, at 10:00 a.m. at Assiniboia Room B, Best Western Plus Charter House Hotel, 330 York Avenue, Winnipeg, Manitoba, as the commencement time for a Public Hearing to determine whether or not the intended expropriation was reasonably fair and reasonably necessary for the achievement of the objectives of the Province, the Expropriating Authority in this matter. The hearings continued on September 25th and October 2nd, 2015.

9. Pursuant to Section 6(2)c of Schedule "A" to *The* Act, the Objector and the Expropriating Authority are parties to the hearing.

10. Members of the public who attended the Public Hearing were not added as parties to the proceedings.

11. The parties who attended the inquiry hearing were the following:

A) For the City of Winnipeg: **Denise Pambrun**,
Counsel for the City.

B) Objector: **6165347 MANITOBA INC. and FIRST NATIONALS FINANCIAL GP CORPORATION**

Counsel for Objector: **Mark Newman**
Fillmore Riley LLP

PRELIMINARY MATTERS

12. On June 10, 2015, at the request of the Objector, and informal hearing was conducted with respect to a request by the Objector of documents from the City. The City had objected to producing the documents based upon relevancy. At the conclusion of the hearing, a decision was reserved and by letter dated June 18, 2015, there was a ruling that all but one of the documents requested by the Objector should be provided.

C. SUMMARY OF EVIDENCE

DIRECT EXAMINATION OF MR. OFFMAN BY MS. PAMBRUN

12. At the outset of the hearing, Exhibit 3, a large binder of documents was tendered by the City and this Exhibit is 20 documents, 17 of which relate directly to the expropriation.

13. Ray Offman, an Engineer with the Consulting Company KGS Group, was called as the first witness for the City of Winnipeg ("the City"). Mr. Offman stated that he had a Bachelor's Degree and Master's Degree in Civil Engineering. Mr. Offman has been with KGS Group since graduating and works primarily on sewer and water projects.

14. KGS Group, in 2006, was awarded the work to look into modelling concepts for the Cockburn-Calrossie Retention Pond, and worked on the concept plans from 2006 to 2010. In 2010 KGS Group was the lead firm in a combination of engineering firms, including CH2M Hill, Dillon Consulting.

15. The project is the development of a modern sewer system to replace the existing antiquated system which will provide benefits for both flood relief and sewer overflows.

16. The witness described three distinct sewer districts, Cockburn West, Cockburn East, and the Calrossie Sewer District. The witness testified that there were three main sewer districts that were referred to:

    1a. Cockburn West: This system goes along Grant Avenue in the north, following Cambridge Street along the west of Parker Avenue into the south Fort Rouge Yards where it follows on the east side and continues north on Stafford Street to Grant Avenue.

    1b. Cockburn East: This system is bound again by the Fort Rouge Yards, Bailey Street and the Red River.

    2. Second Sewer District: The Jessie Combined Sewer District southeast portion of Jessie Combined Sewer District bound on the north by Grant Avenue, Stafford Street on the west, and the Taylor extension along the south and the Fort Rouge Yards on the east.

    3. Calrossie Sewer District: This system is bound by Jubilee Avenue along the north, by Pembina Highway on the west, Calrossie Street along the south and the Red river along the east.

17. Mr. Offman stated that in a modern sewer system, sewage from homes/businesses enters a sanitary sewer system, then goes to a

treatment plant; and water from rain fall would enter a second system and water flowing from the treatment centre would flow into lakes, rivers and ponds. In a combined district, there is a single set of pipes that takes water to the sewage treatment plant and the rain water to the sewage treatment plant.

18. The purpose of the Calrossie Project is to provide total separation of storm sewers and sanitary sewers. Mr. Offman advised that in order to achieve the goals of:

    a. Eliminating basement flooding;
    b. Sewer run off; and
    c. Design required a pond to be built.

19. Originally, the mandate of the consultant was to deal just with basement flooding, but as the project developed, a combined sewer overflow program became an equally important goal.

20. There were two variations for a total separation, one is an expandable plan which separation was in a staged methodology or a total separation. The total separation requires all of the infrastructure to be done at one time.

21. In reviewing design options, there were 3 constructability issues that were addressed:

    1. The first issue was using pipes and the pipes that would be required would be very large pipes on Pembina Highway these would impede traffic flow as there would be construction on

Pembina Highway for approximately one year.

2. The second issue found on constructability was managing to put the trunk sewer under the Jubilee Avenue Underpass and during the construction, losing one lane of traffic.

3. Finally, the most important issue according to Mr. Offman, to get total separation, the size of piping required did not fit within the right of way with other existing infrastructure.

22. As a result of these issues, three alignments were examined:

a. the Cockburn south alignment;
b. the Harrow alignment, down Harrow; and
c. the Rockman alignment.

23. Mr. Offman went on to describe alternate alignments, the pros and cons, and chose the Rockman alignment.

24. Mr. Offman described the benefits or cons of a pond. According to Mr. Offman, the benefits would include, the piping between the ponds would be smaller and much cheaper as the larger the piping, the more expensive. Also, the pond offers greater capacity and also, there is a decreased risk from constructability not incurring exposure with errant risks of using large equipment in varying conditions. Mr. Offman also stated that the storm retention basin allows finer materials to settle down and allows natural plants to clean pollutants out of the water.

25. Mr. Offman stated that in reviewing the options in the present circumstances, that on a cost analysis basis, the two pond option was the cheapest and met the requirements. The single pond option, according to Mr. Offman, required less overall land than two ponds and this is for the reason for the side slopes that are allowed for a pond are 7 to 1 for every meter down you go. Thus, when you build two smaller ponds those side slopes are closer together and the volume that you have gained in the larger one is lost so the two pond option, there would be need for more land overall than the single pond option. Ultimately, Mr. Offman testified that the single pond option, in the present case, would require 6.7 hectares. Mr. Offman stated that the single pond option would have the advantages of:

a. Construction costs;
b. Less area required;
c. Less excavation required;
d. Only one set of roads;
e. Less fencing required; and
f. Operation costs and maintenance costs would be decreased.

26. Mr. Offman went into detail to describe construction and design constraints because of Manitoba Hydro utilities, power lines, and transmission lines and that whilst you can build under the land you cannot build over. Mr. Offman offered that at the present time the single pond option will be as “cheap” as or “cheaper” than the two pond option.

27. Mr. Offman went into detail on how to optimize the pond and that the pond was designed to gain as much width as possible with

taking as little land as possible. Mr. Offman went into detail describing difficulties in designing a retention pond with the constraint of Manitoba Hydro.

CROSS EXAMINATION OF MR. OFFMAN BY MARK NEWMAN

28. Mr. Offman was cross examined by Mr. Newman extensively and it was determined that the initially 6.7 hectares was going to be increased to 8.3 hectares. The deviation from 6.7 hectares to 8.3 hectares is being lands required from the historic Manitoba Hydro Corridor which is presently owned by the Objector.

29. Mr. Offman was examined as to the taking being due to Hydro wanting to expand their system, and Mr. Offman confirmed that was his understanding.

30. Mr. Newman examined the witness on the organization of the project team and construction issues which included piping issues with respect to large diameter pipes. Mr. Newman canvassed, at length, Mr. Offman concerning Exhibit 3, tab 5, which is a series of slides with bullet point issues within them. Mr. Offman was shown Exhibit 8, a Request for Proposal, with a submission deadline of November 2, 2010, and the said document further describes Mr. Charles Boulet as the Project Manager. Mr. Newman referred Mr. Offman to Exhibit 3, Tab 8, page 3, which states:

> "To facilitate the public consultation process we are proposing the engagement of a public consultation consultant experienced with City of Winnipeg projects."

31. Mr. Offman was questioned as to why a number of the documents Exhibit 3, tabs 4, 6 and 7, were all stamped “draft”. Mr. Offman indicated that these were in fact all of the final versions and accurate.

32. Mr. Offman, in being referred to Exhibit 3, tab 4, explained that one is an optimized scenario and the other is not optimized. The difference, it was determined, between the optimized and the non-optimized scenarios is that in the optimized scenario there is a pipe connecting the two ponds. Mr. Offman acknowledged that at the end of the day, the construction under one pond on the Taylor Lands were no difference in the terms of functionality. Mr. Offman, on cross examination, acknowledged that the decision based upon costs, constructability and development, was the best option.

33. Mr. Offman confirmed Exhibit 3, tab 9, a memo from Diane Sacher, Director of Water and Waste, to Deepak Joshi, Chief Operating Officer, outlining the key issues were 3C, which states that the two pond option in Parker and Taylor was recommended. It was suggested that Exhibit 10 was in keeping with previous findings. However, Mr. Offman, in reference to a memo (Exhibit 3, tab 8) from Charles Boulet, which stated:

> “There is an outstanding issue with the City and GEM involving Hydro, namely that the City sold Gem the Parker land without registering the large Hydro easement that runs north/south through the middle of the lands. GEM suggests that any storage ponds required for Cockburn/Calrossie could be accommodated on Hydro or City-owned Parker land, perhaps using the “easement issue” as leverage to sort out a fair resolution.”

34. Mr. Offman testified that he had no dealings with the owner of the Parker Lands. Mr. Offman agreed that he had no knowledge of the owner of the Parker Land.

35. Mr. Offman again confirmed upon questioning that the cost estimate, without the actual taking of lands, and that the valuation of the lands would be the responsibility of the City, not the consultant. Mr. Offman indicated that pond sizes impact trunk sizes and with respect to the pond on the Parker Lands, they can make it bigger but cannot make it any smaller. If the pond was made any smaller the levels would rise beyond the capacity that it is designed to hold. Mr. Offman indicated that he was aware that there is a pond on the Taylor Lands but that handles developing flows as opposed to regional flows and that the flows from Taylor empty into the combined sewer system and then flows from the Taylor to the Parker pond. Mr. Offman was asked about Exhibit 3, tab 11, which stated:

> "The Parker pond shape and location are based on the concept that Gem Equities would prefer an elongated pond design, which could potentially act as an aesthetic feature to a high-density residential development. This concept should be presented to Gem Equities to ensure that this is consistent with their development plans."

and was asked whether this was ever presented to the owner of Parker to which he had no knowledge. Also, examining costs, the Hydro costs initially were $3,175,000.00 and have been increased by $704,600.00. The witness was questioned on whether or not the City needed to own the lands and whether Hydro could deal

with it by way of an easement to which Mr. Offman was only able to admit that it might be possible. Mr. Offman also indicated that the access from the south and from the west of the Parker Lands and that the Hydro right of way does not prevent access to the lands.

RE-EXAMINATION OF MR. OFFMAN BY MS. PAMBRUN

36. Mr. Offman acknowledged that when you consider ponds in equal volume to each other the cost of the single option was the same as the two pond option and if you were to compare a different model using a larger comparison and all equal in volume, it would demonstrate that the single pond option was as cheap. Mr. Offman was shown two maps (Exhibit 14) and advised Ms. Pambrun that they received this from the City of Winnipeg and was asked to review. Mr. Offman understood they represented the proposed land for the use of the lands from the Objector and that he examined these on February 20 and provided a response marked as Exhibit 15. Mr. Offman gave evidence speaking to the issues in the memo, but has no knowledge as to if it was ever shown to or shared with the Objector.

DIRECT EXAMINATION OF MR. JEFFREY PATTEN BY MR. PAMBRUN

37. The second witness for the City was Jeffrey Patten, who testified that he received his Bachelor's of Science and Engineering in 1981, worked in private practice for approximately 8 years and joined the City of Winnipeg Water and Waste Department in 2001

and has handled many different roles. At present he is the Manager of Engineering Services for the Water and Waste Department. Mr. Patten indicated that in terms of the present project, this capital project is supervised by different branch heads and he in turn supervises the branch heads. Succinctly, Mr. Patten had overall accountability for capital projects for Water and Waste.

38. Mr. Patten testified that the Cockburn-Calrossie Combined Sewer District has a deficient level of flood relief and the City has attempted to work through the different water districts and at present, the project has progressed to include both basement flooding and combined sewer overflow mitigation. Mr. Patten was referred to tab 1 of Exhibit 3, “The Basement Flooding Relief Program Review – 1986.” Mr. Patten indicates that the City prioritizes districts that require relief for basement flooding and they have looked at costs associated with damages with each of the districts based upon a cost benefits analysis and then that sets the priorities for the work. The present project, the subject of this Inquiry, is one of the high priorities for the City of Winnipeg but, coincidentally, there is work being done on Ferry Road, Riverbend, and in the area of Polo Park, Alexander Avenue, Bannatyne Avenue and in the Mission part of St. Boniface.

39. Ms. Pambrun asked the witness to reflect upon the previous witness’ (Mr. Offman) testimony and to put into context who “the stakeholders are.” Mr. Patten said there are both internal and external stakeholders. The internal stakeholders are of the

departments of the City of Winnipeg in terms of what they have interests in such as public works, transportation, property, and then there would be external stakeholders such as property holders, and developers.

40. Mr. Patten in making reference to a memorandum dated May 15, 2012, Exhibit 3, tab 4, provides that during the clarification stage and prior to the first project meeting, August 31, 2011, the Water and Waste Department requested additional consideration be given to relocating the proposed outfall from the Cockburn funnel station to the existing Calrossie station. The primary reason was that the project was going to have to cross Pembina Highway and it would be very difficult, with very large drain pipes in a congested right of way. Mr. Pambrun referred Mr. Patten to the Memorandum of May 23, 2013, (Exhibit 3, tab 11) requesting that Option 3D (Parker Pond only) be reviewed in more detail in preparation for discussions with various stakeholders, including the developers of the Taylor Lands and Parker Lands.

41. Mr. Patten testified that in August of 2012, he met with Mr. Marquess to discuss the development of the Parker Lands. This meeting was at the office of Water and Waste at 1190 Pacific Avenue and a general discussion was about the proposed development plans. Mr. Patten indicated that at the meeting he advised that the project was under review for drainage options and everyone was well aware that drainage was a concern with this combined sewer district.

42. Furthermore, there was consultation with Shindico, the Taylor Land owners, in December of 2012 in terms of meeting with them to discuss lands for Taylor development, discuss drainage options and this would have occurred in the letter part of 2012.

43. Mr. Patten indicated that Water and Waste had considered various options and made reference to Exhibit 3, tab 9, a memo to Chief Operating Officer wherein Option 3C, the Parker/Taylor option, was the preferred option. Mr. Patten said this was based on technical considerations but there were other issues the City wished to consider and therefore requested a Committee of internal stakeholders be developed to review the options in greater detail. Mr. Patten confirmed that the memorandum to the City dated June 6, 2012, (Exhibit 3, tab 9) recommended 3C, Parker/Taylor ponds, and the Rockman Street alignment. As a result of this briefing out, a Capital Integration Committee (the "Committee") was struck in terms of involvement from the Directors of Transit, PP&D, Water and Waste, and Public Works would meet to discuss various projects in an integrated fashion to ensure every department is informed. At that time, the City not only had a very large project with respect to the Cockburn-Calrossie separation, but the Rapid Transit terms of Transit's responsibilities and Jubilee Underpass conceptual designs would be analyzed. Thus, the role of the Committee was to facilitate and to coordinate the actions of all the different departments in terms of these projects.

44. At the Capital Integration Committee meeting, discussions whether there should be a single pond, or two ponds, and that neither the Taylor nor Parker Land Owners wanted a pond.

45. Mr. Patton had direct communications in the fall or winter 2012 with Shindico/Taylor and Sobey's in terms of the Shindico/Taylor Lands, and identified multiple pond options in that area. Mr. Patten stated that both Shindico/Taylor Lands owners knew there needed to be a pond constructed to reduce the post-development run off. Mr. Patten confirmed that the Taylor Lands were basically everything bounded by Taylor to the north, the existing Sobey's to the west, the rail line into the lands inside south of Sparling. Shindico was quite explicit that they did not want a pond on their facility. They're lands were easily developed with drainage requirements that were required.

46. Mr. Patten referred back to his meeting on August 3, 2012, with Mr. Marquess, to discuss the Parker Land development options in terms of what plans were being developed and members of the Project team PP&D were at the meeting as well. There was a quick discussion about the plans that the developer had and Mr. Marquess' advice was to "ensure the development was modular and it could be moved around to accommodate his own needs and the needs of any drainage works". Mr. Patten testified that he did not recall if Mr. Marquess had indicated he did not want a pond on his property and there were no specific development plans. Mr. Patten did acknowledge, like Mr. Offman, that the

Parker development was a high-density development of the Parker Lands, but in their view, the potential for high-density to the west part of the lands due to challenges to develop these parts in terms of where there is multiple access issues, but the City's thought process at the time was that the development would be west. Mr. Patten indicated the decision was made where the pond would be placed, keeping mind constraints of Hydro and Rapid Transit.

47. Mr. Patten acknowledged that he does not believe the specifics of these concerns had been discussed with Mr. Marquess.

48. Ms. Pambrun referred the witness to Exhibit 3, tab 11, wherein the fall of 2012, WWD requested Option 3D, Parker pond, be reviewed in more detail for city discussions with various stakeholders. Mr. Patten said it was definitely a recommendation from the Capital Integration Committee that a decision needed to be made in terms of the options, different factors had to be considered and how they would communicated that to the different stakeholders. Ms. Pambrun referred to the following:

> "Conceptual alignments, Parker Ponds only to WWD. WWD asked that the memorandum remain confidential until recently due to the sensitivities to the politics involved, especially as it pertained to developers".

49. Mr. Patten indicated that there were a number of activities going on in that area and it was sensitive for the politics involved around proper communication and making sure there was conclusive

communication being given once decisions were made. Mr. Patten was of the option that there were a number of options being presented, a number of issues to be considered, and it was felt that concise commination was necessary and these discussions should not be made known while the evaluation process was occurring because no decisions has been made, at that time and they did not wish to have issues become a media issue. Mr. Patten stated:

"it needed to be a City decision based on the factors".

50. Mr. Patten indicated that developers needed clear information from the City until such time as that is made, it would be premature having these conversations with the developers. Mr. Patten testified that Option 1, total separation 6.7 hectare pond, 1200mm trunk, 25 rise, was 2.17 meters and according to Mr. Offman's evidence, was outside the standards. Mr. Patten said the standards are set in collaboration with the development committee, but in other jurisdictions there is tendency, and in a number of growing bodies, that makes these types of recommendations. The City, in the past, has always had a history of collaboration with development groups in terms of changes to those standards. At one point, it was very standard in pond designs and those changes started to be made in 2006 to look at a more naturalized system, those were always made in consultation. Also, each pond is designed individually to where the environment is placed in. Thus, the City looks to optimize the land

for the pond itself by taking in the standards necessary. Mr. Patten went on to give discussions of the risks associated with ponds, potential uses around them, whether or not they can put visual cues or barriers to prevent people from entering, slopes, and these factors in conjunction with the developer worked upon. In December 2013, different concepts were received and circulated. These were a couple plans or concept drawings where the pond would be placed.

51. Mr. Patten testified that there was public consultation at the development of this project as it moved forward. Mr. Patten stated:

> "We engaged in public open houses and had online commentary at the city of Winnipeg's Water and Waste engagement site."

52. Mr. Patten indicated public consultation can take many forms, it can involve public information linked to the City's decision. Ms. Pambrun referred Mr. Patten to Exhibit 3, tab 14, a memo dated December 17, 2013, which contained *inter alia* a request to "negotiate with the Parker Land Owner for the acquisition of 6.7 H.A. of land within the Parker Lands required for the Cockburn-Calrossie basement flood relief and combined sewer operation program". Mr. Patten indicated that this was the "kick off point from a decision making point of view".

CROSS EXAMINATION OF MR. PATTEN BY MR. NEWMAN

53. Mr. Patten confirmed that his meeting of August 2012 with Mr. Marquess was a high level meeting of general discussions, notes,

site plans, and no configurations. Mr. Patten confirmed that Exhibit 14, the two site drawings were not at the meeting as the City only received them in 2014, Mr. Patten advised that Mr. Marquess had wanted from the City, a general understanding of what was going on with the City project wise and at the meeting the City was not sharing any specific options, only mentioned that different options were being considered.

54. With respect to design options, Mr. Newman questioned Mr. Patten on the design standards of 2.17 meters and designs standards of 2.18 meters would not be significant. The options, Mr. Patten said, that Mr. Offman was considering were options to save money whether they were viable or not. Mr. Patten confirmed that other than the meeting in December of 2014, the only other meeting that took place with Mr. Marquess was August of 2012.

D. EVIDENCE ON BEHALF OF THE OBJECTORS

EXAMINIATION IN CHIEF OF ANDREW MARQUESS

55. Mr. Marquess testified that he is President of 6165347 Manitoba Ltd., the owner of the Parker Lands and has been the Owner since 2010. Mr. Marquess indicated that he has a Master's in Business Administration from the Richard Ivey School of Business at the University of Western Ontario and was involved in Real Estate in Calgary, acquiring and redeveloping multi-family residential properties from 1997 to 2002 and thereafter, became involved with the Management Group called Assante Asset

Management. In 2002, the witness indicated, he started acquiring properties, renovating them, and holding onto them as rental properties. This changed in 2009 to 2010, when he moved his focus to a land development business and got involved in new construction as opposed to buying a building and renovating it, his company built new buildings. This business venture was called Gem Equities. Mr. Marquess testified that he is involved in a development project known at the Fort Rouge Yards which is an in-filled brown field site which had contaminates in the soil so remediation work has to be completed in order for the company to build multi-family residential units.

56. In the summer of 2012, Mr. Marquess had a meeting with Mr. Patten as a part of the process of trying to understand what the City services are around the Parker Lands, what would have to be connected into, tie into, and use. Mr. Marquess indicated that when he says services, he means roads, infrastructure, underground services, water mains, sewers, pipes, etc. There had been a preliminary meeting to see what was on the Parker site that would be needed to work with as the site was developed and site plans were developed.

57. Mr. Marquess referred to Exhibit 9, the memo to Mr. Joshi, Chief Operating Officer and the Director of Water and Waste, dated August 2, 2012. When the preference of Option 3C (Exhibit 3, tab 4 Taylor/Parker pond optimization) was the preferred option with a pipe connecting them. At the meeting in the summer of 2012, Mr.

Marquess indicated that Mr. Patten; did not make him aware that the report was in existence from KGS Group, did not advise that KGS Group had been engaged, and did not advise that there had been a preferred option identified by Water and Waste.

58. Mr. Marquess testified that after the conversation in the summer of 2012, the next discussions were in October 2013 when he contacted Braden Smith of the planning department wherein he indicated he would like to start the rezoning process and speak to the planning group. As a result of that initial contact, there was an exchange of emails and he was advised that Glenn Doney would be the primary contact for him. He was further advised that they were forming a planning group and that a report was being prepared and that report was only given to him on December 5. Mr. Marquess testified he received from Mr. Doney Exhibit 18 “Parker Lands Major Route Development of Site Characteristics and context”. The document and table of contents indicated information about a variety of matters that a developer would be interested in and on page 9 of the document deals with water, waste water, land and drainage works but there was no mention of a retention pond or any reference in the attached diagrams.

59. Mr. Marquess indicated that prior to Exhibit 18, he had had a meeting with Donovan Toews (Landmark Planning) and Dave Krahn (Dillon Consulting) with respect to Bus Rapid Transit Stage 2. During the course of the discussions, it was mentioned that a large retention pond was being planned for the Parker Lands but

they were unable to speak about it officially.

60. Mr. Marquess examined Exhibit 10, Memorandum from KGS Group, dated October 10, 2012, where it makes reference to the preferred option, being the Parker/Taylor Pond Optimization. Mr. Marquess was then referred to Exhibit 3, tab 7, and specifically page 4 which stated:

> "At this early juncture, prior to stakeholder input, Option 3C, Calrossie outfall with Rockman Street alignment with Parker and Taylor pond optimization has been identified as the preferred alternative by WWD."

61. At this juncture, Mr. Marquess indicated that when he was speaking to Mr. Braden Smith in the fall of 2013, he was not aware that 3C was the preferred option, nor was he aware that any of the documentation prepared by KGS Group was in existence. Mr. Marquess was referred to Exhibit 10, memo to Charles Boulet from KGS Group which stated:

> "At the end of September 2012, however, WWD requested that KGS Group assess variation of Option 3D (Parker Pond only) based on the preliminary feedback obtained from the potential developers of the Parker and Taylor Lands (Gen Equities and Shindico). The request stemmed from a desire from the developers to only have one pond."

62. In reviewing the previous Exhibit and the above-noted quote, Mr. Marquess testified that as of October 2012, he had no discussions with KGS or any other City representatives with respect to his preferences with respect to the existence of a pond on the Parker Lands, the size, or configuration. He was referred to page 2,

Exhibit 10, which stated:

> "Based on preliminary discussions with WWD, it is assumed that the Parker pond should be as narrow as possible, since the current vision is to construct a pond that would be an aesthetic feature to the potential adjacent high density residential development for which a more elongated pond is more favourable."

63. Mr. Marquess indicated that in October 2012, there had been no discussion expressing any preference whatsoever and as a point of fact, a site plan had not been developed so it would have been premature to be talking about preferences for a pond and how it would fit into the development.

64. Mr. Marquess was referred to Exhibit 3, tab 11, page, 6, which was the memo from KGS Group to the City of Winnipeg, page 6 had a bullet point which stated as follows:

> "The Parker pond shape and location are based on the concept that GEM Equities would prefer an elongated pond design which could potentially act as an aesthetic feature to a high density residential development. This concept should be presented to GEM Equities to be sure it is consistent with their development plans."

65. Mr. Marquess, in response to direct questions from Mr. Newman confirmed that neither the City of Winnipeg, nor the Consultants, presented a concept of an elongated plan. Mr. Marquess gave evidence as to he was aware of what the Taylor Lands were, their description, that the Taylor Master Plan has been approved, but there has been no master plan approved for the Parker Lands.

66. Mr. Marquess gave testimony that in mid-January of 2014, he had a meeting with a number of individuals from the City of Winnipeg, Braydon Smith, Michael Robinson, Charles Boulet, Frank Mazur, Gary Holmes, Stuart Anderson and some other individuals he did not know. At this meeting, he was given a drawing of the proposed pond on his property (Exhibit 20). Mr. Marquess testified this was the first time he had seen the document and went through a number of reactions that there was a significant part of the land was being used for the pond and how it would impact development as land is the most important asset.

67. Subsequent to this meeting, there was a meeting arranged which included Councilor John Orlikow, the acting COO Deepak Joshi, Barry Thorgrimson, head of Property and Planning, Braydon Smith, and Jeff Zywira, a representative of Gem. The purpose of the meeting was, according to Mr. Marquess, obviously namely to point out that a significant part of land is being taken for a pond. Mr. Marquess wanted clarity and he wanted to know what was going to be proceeding. As a result of his concerns being voiced at this meeting, he stated Mr. Joshi advised as follows:

> "The response from Mr. Joshi, was he described the pond as a place holder and felt that it was time to get us, "us" being my organization, involved in the discussions about the pond. And there would be future discussions that would happen about this. And, the indication was that this wasn't set in stone, this was, you know, the word "place holder" was used."

68. As a result of these comments, Mr. Marquess indicated he and Mr. Zwain from his office, took this comment to say that we should

think about potential incorporating some of it in the planning design.

69. Mr. Marquess was referred to Exhibit 14, a memo to Diane Sacher, Director of Water and Waste, to Barry Thorgrimson, head of Property and Planning and it in part states:

> "Barry, as per discussion at PEAC yesterday, the following is our formal request to negotiate with partner landowner for the acquisition of 6.7 hectares of land within the Parker area required for the Cockburn and Calrossie basement flooding relief and combined sewer overflow program."

70. Mr. Marquess indicated that at the meeting in late January 2014, he was not aware of the Decision of December 17, 2013, that the City was to proceed to negotiate 6.7 hectares and in fact it was his understanding from the meeting that it was exactly the opposite. As a result of the meetings in January, designs had been sent to the City attempting to minimize the taking.

71. It was not until January of 2015, that Mr. Marquess became aware of the configuration of the pond. Mr. Marquess went on to indicate that the proposed development was a planned community to have different types of buildings to accommodate people's various preferences. The project would have everything from single family housing to duplexes to 4-plexes, town houses and multi-family buildings of 4 to 10 storeys. A schematic of these drawing was provided at Exhibit 21. Mr. Marquess testified that there were approximately 2901 units contemplated and did an analysis of the location of buildings at different sites where there would be a rapid

transit station which is valuable land. Mr. Marquess was referred to tab 7, Exhibit 3, which talks about a no-pond option increasing from 2100mm to 2400mm and comments from Jacqueline East to the effect that the developer may wish to contribute to the costs of additional piping or pumping. Mr. Marquess indicated that no one had approached with respect to that. Mr. Marquess indicated that as a result of the drawn design, he will lose the ability to develop 1159 units.

CROSS EXAMINATION OF MR. MARQUESS BY MS. PAMBRUN

72. Ms. Pambrun confirmed that when we are talking about Gem Equities, it would relate to both the Objector and the numbered company. Ms. Pambrun further confirmed that at the time of the expropriation, there were some lands owner by CN, but since that time the status has changed where Mr. Marquess controls the property. Ms. Pambrun elicited from Mr. Marquess that the City would become aware of his interest in the CN property in 2014. Mr. Marquess did disagree with her characterization that the whole 59 acres is wet lands or swampy. Mr. Marques indicated that a portion of the lands, in fact the majority of the site, is not. Ms. Pambrun dealt with the Fort Rouge development, suggested that the Fort Rouge development was a mere extension of an existing community. Mr. Marquess disagreed with that and said that it is a different development where the existing one is single family and their proposed development is not.

73. Mr. Marquess confirmed on cross examination that the meeting on

August 3, 2012 was at his request, but contrary to Ms. Pambrun's suggestion, he characterized the meeting was to determine a general understanding of what was in the area for services as we go to design the project, where the water pipes and sewers are etc. Mr. Marquess, with respect to discussions with the City, indicated there was never a discussion of option of ponds on the property but he did understand that the City was considering various options. Ms. Pambrun put to the witness:

"you never told him: "I don't want a pond on my land""

The witnesses' response was:

"I would have -- no, I would have never told him I don't want a pond on my land, but I would have never thought of telling him that because I wasn't far enough along in the planning process to understand what is required and not what's required, so I am not sure that would have been a relevant discussion at that particular time."

74. Ms. Pambrun confirmed that as a result of his knowledge of the pond from Mr. Toews and Mr. Krahn, a meeting was requested which took place on January 13, 2014, where Exhibit 20, which shows the pond development, was produced. Mr. Marquess confirmed that he had never seen the map up to this point, but shortly thereafter produced the proposed pond designs, Exhibits 14a and 14b in response to Exhibit 20. Ms. Pambrun refers to the meeting Mr. Joshi attended and he confirmed his understanding that the decision was not cast in stone.

75. Mr. Pambrun and Mr. Marquess acknowledged that at no time had he prepared a hydraulic study, and did not determine whether his

plans would address or resolve the flood relief in the area or has addressed Manitoba Hydro or infrastructure on the Parker Lands.

76. At the end of the cross examination Mr. Marquess agreed that Exhibit 21 is not equivalent to an approved development plan for which he acknowledged in simply the location of buildings roads and from this basis, there would be further development.

E. REVIEW OF EVIDENCE

77. The expropriation by the City is to construct a new sewer relief works in the Cockburn-Calrossie district. The existing system is antiquated and the City wishes to develop a combined system for water runoff and sewage to be diverted to a treatment facility and then into the river. The design will prevent flooding to both residents and businesses and also prevent sewage overwhelming the system and directly discharging into the river. The City, as far back as 2006 was using a consultant to review modelling concepts and in 2010, retained KGS Group as the lead consultant along with other engineering firms including CH2M Hill and Dillon Consulting for the development and design of the project. The consultants, in their evidence, addressed route and design options, choosing, for many reasons, not to run the sewer system suing large piping down Pembina Highway and under the Jubilee Underpass. The goal was to minimize the piping size and maximize the efficiency of the system.

78. There were a number of alignment options with respect to both pond and no pond options. A detailed analysis was done and the Rockman Street alignment was chosen and the recommendation to use same came forward by the consultant that the Rockman Street (Cockburn option) is a two pond option with one pond on the Taylor Lands and one pond on the Parker Lands be used. This option, 3C, was the preferred option by both the consultant and Water and Waste, see tabs 4, 5, 6 and 7.

79. In the minutes of a meeting prepared by KGS Group on May 16, 2012, paragraph 3.1 stated:

> "There was general agreement at the meeting that Option 3C (Calrossie outfall – Rockman St. Alignment with Parker and Taylor Pond Optimization) was the best technical recommendation. Option 3C is recommended since it has the lowest cost, satisfies the immediate needs for the Parker and Taylor Lands development and has fewer constructability issues. However, this needs to be presented to senior management at the City."

80. Some three weeks later, in memorandum to Charles Boulet from Andree Kirouac, the conclusions previously stated were supported at page 4, which stated:

> "At this early juncture, prior to stakeholder inputs, Option 3C (Calrossie outfall with Rockman St. Alignment with Parker and Taylor Pond Optimization) has been identified as the preferred alternative by WWD. This tentative conclusion was discussed at a progress meeting on May 16, 2012, and this option was selected because of its several advantages, including cost, constructability, accommodation of development opportunities, and scheduling as summarized in Table 3."

81. In a memorandum to Deepak Joshi, Chief Operating Officer from Diane Sacher, Director of Water and Waste Department, dated August 2, 2012, at page 1 of the agreement, two of the bullet points are as follows:

- "Prior to stakeholder input, the Water and Waste Department has reviewed the KGS Group draft memorandum considering cost, constructability, accommodation of development opportunities, scheduling and relief level of protection and for all affected stakeholders and has a preferred alternative.
- Option 3C is the preferred option by the Water and Waste Department"

82. Furthermore, in the same memorandum, in discussing "next steps", page 2 of the memorandum stated:

- "The stakeholder input process should start with meetings with the KGS Group, W & W, PP&D, PW and Transit to gather all relevant information and review the preferred alternative – Option 3C
- **Only the most viable options should be developed with more detailed information and presented to the major land owner stakeholders"** (Emphasis added)

83. It is interesting to note that in the present circumstances, none of the options had been shared with the Objector. Thus, at this juncture, two ponds were to be built, one on the Taylor Lands, owned by Shindico, and one on the Parker Lands owned by Gem Equities. There would be a pipe connecting the two ponds.

84. Between the two memos, Exhibit 3, tab 7 and time indicates concerns by Shindico that they only wanted a temporary pond on

their property and it was their desire to have the water from that pond flow to the parker pond which would be a permanent pond. We see in the emo of May 23, 2013, (tab 11, Exhibit 3) the Water and Waste Department asked the consultant to examine option 3D, the single pond option, only for the Parker Lands. The memo, at the bottom of page 1 stated:

> "In the fall of 2012, WWD requested that Option 3D (Parker Pond Only) be reviewed in more detail in preparation for the City's discussions with various stakeholders including developers of the Taylor Lands (owned by Shindico) and the Parker Lands (primarily owned by Gem Equities) shown in Figure 1. On October 10, 2012, KGS Group submitted the Draft Memorandum, "Cockburn and Calrossie Combined Sewer Relief Works – Review of Alternative Conceptual Alignments, Parker Pond Only" to WWD. WWD asked that the memorandum remain confidential until recently due to the sensitivity of the politics involved, especially as it pertained to the developers."

85. The above memo contemplates discussions with various stakeholders, including "the developers of the Taylor Lands (owned by Shindico) and the Parker Lands (owned by Gem Equities)." At paragraph 5.0 contains excerpts from the same memo:

> "Discussions between WWD and the developers of the Parker and Taylor Lands took place in the fall of 2012, which focused on the Parker Pond Only option. This option was considered more desirable for developers because of the need for only one pond. The land acquisition requirements were also smaller for this option."

86. Again, in the fall of 2012, the owner of the Parker Lands was not aware of the options. Ultimately, in January of 2014, there was a meeting between Mr. Marquess and representatives of the City in

which a plan of the pond (Exhibit 20) was presented. This was the first occasion Mr. Marquess was aware of the design and as a result, he arranged a meeting with senior executives of the City who advised that the plan was not finalized and that the drawing was only for holding purposes. This statement, we know, was not true, and ran counter to the memo (Exhibit 3, tab 14) from Diane Sacher to Barry Thorgrimson, and other senior executives including Deepak Joshi, where there was a formal request "to negotiate with the Parker Lands owner for the acquisition of 6.7 H.A. of land within the Parker area". The question that arises, is the proposed taking fair and reasonably necessary?

F. POSITION OF THE PARTIES

POSITION OF THE CITY OF WINNIPEG

87. Ms. Pambrun suggested that the present expropriation especially one of this magnitude, is by necessity and engineer driven. At hand, there is a unique set of land in terms of development and servicing challenges that a developer would face and certainly, the City has some new challenges to deal with the concerns. The overreaching goals of the City is to resolve basement flooding and sewage overflows. The City has a license from the Province of Manitoba, pursuant to the *Environmental Act* and there are heightened expectations now, and in the future, from the Province of Manitoba, in terms of relieving basement flooding and issues arising out of combined sewers in the City of Winnipeg. Mr. Offman outlined construction issues with respect to construction of

the combined sewer system and the alignments relative to same. They were:

a. There would be the need for massive pipes that would have to run down Pembina Highway, along Pembina Highway, which would cause disruption impact to the citizens in terms of construction, disrupt traffic and difficult to manage;

b. Crossing that pipe underneath Pembina Highway at the Pembina Highway underpass and the CN Line creates constructability issues, especially with the infrastructure.

c. There was an issue of whether or not there would be room for the large piping that would be required. Thus adding a second pipe to an existing right of way creates difficulties.

88. As a result of these difficulties, KGS Group looked at different design alternatives. One alignment running down Harrow, one ran down Rockman Street to Calrossie Street. Upon doing an analysis of the alignments, KGS chose the Rockman Street alignment. Using the alignment, they examined the concept of using retention basins, more commonly referred to as ponds. The evidence shows that they considered different options with the initial preferred option being 3C, namely, one pond in the Parker Lands and one pond in the Taylor Lands, which would have a pipe running in between them to equalize the levels. The other option would be a single pond option on the Parker Lands. KGS Group examined options initially on a general basis and then specifically, and whilst the two pond option would be the cheapest option, there were other design issues that had to be considered. The issue of using the piping creates many risks dealing with machinery construction which was all detailed by Mr. Offman, and

there are many benefits of using a pond including filtering the settlement and biological advantages of naturalizing the pond.

89. Ms. Pambrun indicated that the documents referred to stakeholder consultations, and her position is there are many stakeholders, two of which stand out. The first is the internal stakeholders of the City departments in dealing with the Capital Integration Committee, that had many departments represented, Streets, Water and Waste, Property, Transit, who analyzed general construction matters and the cost of same in terms of Bus Rapid Transit and the Pembina Highway Underpass. The Capital Integration Committee chose to look at a single pond option. The evidence of Mr. Patten was that in the fall of 2012, they believe the Parker Lands were going to be a high-density focused in the west part of the land.

90. Mr. Offman indicated there were difficulties in developing the Parker Lands, that there is a CN line to the north, the Hydro to the south, and some CN to the south and Rapid Transit to the south and the Underpass on Pembina Highway to the east.

91. KGS Group recommended the single pond option and then did a technical analysis and modeling to configure and achieve the goals of the City at the lowest cost and with the least impact on the land Owners. The design was a 6.7 hectare pond. In the modelling, KGS Group did look at small ponds and again analyzed it with respect to pipe sizes and the City standards for construction and sloping. Ms. Pambrun submitted that documents by the City

that requested confidentiality or discreetness, were not inappropriate. It is important that the decision makers have an opportunity to make a decision, consider facts, and the parties being expropriated hear it in an appropriate manner. Ms. Pambrun discussed the Taylor pond is a temporary retention pond to deal with the run off in that area, but once the Parker pond is built, the pond on Taylor would not be required.

POSITION OF THE OBJECTOR

92. The Objector is not objecting to the project *per se*, namely the addressing of basement flooding and a combined sewer overflow. The question is how the City achieves their goals. The Objector submitted a written argument which stated in part:

> "The issue becomes whether the objectives of the City, namely, the Cockburn-Calrossie Basement Flooding Relief ("BFR") and Combined Sewer Overflow ("CSO") are valid municipal purposes. No objection is taken to the purposes, but rather, the means by which they are to be accomplished. Can the necessary result be accomplished by taking less land, or no land."

93. The issue is the proposed taking of 6.7 hectares of land and an additional 1.6 hectares of land for the purposes of Manitoba Hydro which is unrelated to the needs of the City. The Objector went into great detail that the documentation, Tab 3, makes ongoing references for ongoing consultation and identifies a budget for it. Furthermore, it submitted various KGS Group Memoranda at tabs 4, 5, 6 and 7 which make reference to the need for a consultative process. Ultimately, the City took, in-house, the public consultation

process that was initially with KGS Group and the Owner of the Parker Lands was never consulted with respect to the issues or the Owner's concerns relative to the pond.

94. The Objector pointed out that a retention pond is not something a land owner wants. Land, it was submitted, is the very asset that creates opportunities and tax revenue for the City.

95. The evidence of the City in the KGS Group documentation showed that the Parker Lands want an aesthetic feature in the form of an elongated pond. Unfortunately, Mr. Newman submits that neither the consultant nor the City, discussed this with the Developer. The Objector submitted that there was no communication from the City, that there was disclosure with respect to the pond being on Parker Lands.

96. The Consultants in their reports, Exhibit 3, tabs 4, 5, 6, 7 and 9, are unanimous in their conclusion that Option 3C, the two pond option, is the best recommendation and that the 3C Option is to put a 2 hectare pond on each of the Taylor and Parker Lands and connect these ponds with a 1500mm pipe from the ponds to the Calrossie outfall. In fact, Exhibit 3, tab 9, notes that option 3C is the "preferred option for water and waste". The Objector argued that there are no constructability issues with respect to an 1800mm pipe and that the outfall is sized to receive a 2550mm pipe without any disruption to existing infrastructure and as late as August 2, 2012, in fact, it was submitted that the Director of Water and Waste wrote the COO of the City of Winnipeg indicating that

Option 3C was the preferred option. Mr. Newman points out that a changed approach appears in the June 26, 2012, letter (tab 8) and states that Shindico, the Owner of the Taylor Lands, do not wish to have a permanent pond and it can be drained by a pipe to the Gem properties in the Parker Lands.

97. Exhibit 10, it is submitted that the Owner of the Parker Lands wanted an elongated pond which would provide an aesthetic feature, which Mr. Newman pointed out is wrong. At no time was the Parker Lands Owner consulted. The evidence of Mr. Marquess, even in the meeting of August 2012, was there was no advice given to him as to pond configurations, even though Option 3C had been chosen.

98. It is clear, Mr. Newman submitted, that at no time did anyone from the Planning Department advise Mr. Marquess of the existence of a pond, that the Planning document from Mr. Doney dated December 5, 2013, (Exhibit 3, tab 8) does not mention a pond despite an email dated December 17, 2013, by Diane Sacher, Director of Water and Waste, requesting the City move forward to acquire 6.7 hectares of the Parker Lands for the pond. Mr. Newman suggested that the evidence discloses that Mr. Marquess only became aware of the pond when he met with Mr. Toews and Mr. Krahn about Rapid Transit and they advised there was to be a large pond on his property. The concerns were then addressed by Mr. Marquess by requesting a meeting with Mr. Deepak Joshi and senior City Officials and during the course of

the meeting, he was advised that the ponds shown on Exhibit 20, was a “placeholder only”.

99. Mr. Newman has submitted that the KGS Group documents which were not signed and were marked draft, were addressed by Mr. Offman, who confirmed they were accurate and complete in all respects and that this Inquiry Officer should accept the reliability and accuracy. Mr. Newman refers to tab 15 which has a spreadsheet dated September 25, 2014, which identifies various options, with Option 3C (total separation 4.2 hectare pond, 1800mm trunk) is the same cost as the 6.7 hectare pond with the only issue appearing to be the variation for the once in 25 years storm being 2.6 meters rather than 2.7 meters. Mr. Newman suggests that the City was prepared to accept 2.17 meter rise and this 2.62 meter rise results in the taking of 4 hectares less of land and only results in a very temporary increase in rise only. Throughout the Consultants testimony they stated they were not providing land costs in their documentation. Mr. Newman addresses the Taylor Lands which had been previously discussed, the fact that they have a pond, though temporary, could in fact be made permanent and that the Taylor Lands had been given the privilege of dumping its run off water into existing combined sewer systems which he submits is prohibited under Environmental Licenses. Also, Mr. Newman indicates the taking of 4.2 hectares rather than 8.3 hectares would also eliminate the need for taking additional lands for Manitoba Hydro, at a cost of approximately

$4,000,000.00.

100. Mr. Newman submitted that:

a. The purpose of an inquiry is to ensure that the City of Winnipeg, and its Council, as the confirming authority, make a fully informed decision before proceeding with an expropriation.

b. Part of making an informed decision is understanding the cost exposure which may arise.

c. That costs exposure has not been adequately, or at all, considered and there is no evidence that the City has properly considered this.

101. Mr. Newman makes the following recommendations:

a. The two pond optimized Option, 3C, be utilized.

b. Alternatively, Option 3C as set forth in the September 25, 2014, spreadsheet, a 4.2 hectare pond with an 1,800 mm pipe which has the same cost as the proposed expropriation, should be more fully investigated and should be utilized.

c. The consultative process must be improved. The Owner of the Parker Lands was not treated fairly in this process and no consultation occurred with him at the appropriate time.

G. JURISDICTION OF THE INQUIRY OFFICER

102. The Jurisdiction of the Inquiry Officer is set forth in Subsection 6(2) of Schedule A of *The Act* which requires that the Inquiry Officer determine if the intended expropriation is fair and reasonably necessary for the achievement of the objectives of the expropriating authority. By Statute the Inquiry Officer is obligated to do the following:

1. Require the expropriating authority to attend at the hearing and to produce such maps, plans, studies and documents as are deemed necessary for the purpose of the inquiry.

2. Add any owner whose land would be injuriously affected by the intended expropriation and by the work for which the intended expropriation is required, as a party to the inquiry.

3. Give each party to the inquiry a reasonable opportunity to present evidence and argument and to examine and cross-examine witnesses, either personally or by his or her counsel or agent.

4. May inspect the land intended to be expropriated or the land of an owner referred to, either with or without the presence of the parties.

103. Furthermore, Section 6(2) also states that for the purpose of an inquiry, the Inquiry Officer is not legally bound by any technical or legal rules of evidence. The Inquiry Officer however, by Section 6(3) of Schedule A of the Act, is not to consider any matter or question relating to the following matters:

1. The due compensation that would be payable if the expropriation is continued; or

2. The advisability, expediency, legality or necessity of the objectives of the expropriating authority for the achievement of which the land to be expropriated is being acquired.

104. As a result of the Notice of Expropriation, there was one Objector, 6165347 Manitoba Inc. and First Nationals Financial GP Corporation.

105. The hearings were commenced on September 24, 2015, and continued on September 25, 2015, and October 2, 2015.

106. The purpose of the Expropriation is to create a new Combined Sewer System that would serve water flow and waste, replacing

an old antiquated system.

107. The Objector does not take issue with respect to the goals of the project, or the routing design.

108. The issue is the design using a single pond (Parker Lands) or two pond (Parker Lands and Taylor Lands), and if the single pond option is chosen, to examine design alternatives using a smaller pond and larger piping.

109. There is also the issue of the conduct of the City throughout the process.

110. It is trite law that the Inquiry Officer in order to make an informed decision, consider the alternatives to the proposed expropriation. Authority for this proposition was stated in *Parkins v R.,* (1977), 1977 CarswellOnt 1245, 13 L.C.R 306 (Ont. HCJ), affirmed: 14 L.C.R. 327, 19 O.R. (2d) 473 (ONCA), which states**:**

> "37 It must be borne in mind that the hearing before the inquiry officer provides the property owner with an opportunity for putting forward alternatives. The report to the expropriating authority may refer to those alternatives and give an opinion with regard to them. The inquiry officer's report is in no way binding on the expropriating authority and that authority need not follow the advice or opinion set out in the report. Nor does the hearing before the inquiry officer in any way fetter a claim for full compensation for the land expropriated by the property owner.
>
> …
>
> 47 I repeat once again that it is important to consider the purpose or purposes of the hearing. It is to permit a person whose property it is proposed to expropriate to investigate the position of the expropriating authority and to put forward alternate proposals."

111. Also, *Ball v Ontario Hydro* (1974), 53 D.L.R 519 (Ontario

Divisional court) and *Karn v Ontario Hydro* (1977) 79 D.L.R (3d) 256 (ONCA) provided direction that an Inquiry Officer must consider alternate routes or alternatives.

112. The Inquiry Officer, in dealing with the tests at Subsection 6(2) of Schedule A of *The Act*, which states in part:

> "The Inquiry Officer shall inquire into whether the intended expropriation is fair and reasonably necessary for the achievement of objectives of the expropriating authority."

113. In the case of Bourbounniere et al. v. The Queen in right of Manitoba et al., 39 L.C.R. 225; The Court acknowledged that the Inquiry Officer has wide discretion and at Page 227 stated:

> "Pursuant to s. 6(2) of Schedule A to The Act, at the public hearing the Inquiry Officer "shall inquire into whether the intended expropriation is fair and reasonably necessary for the achievement of the objectives of the expropriating authority". The Inquiry Officer is given a wide discretion as to the conduct of the hearing and the evidence that he deems necessary for the inquiry. Pursuant to s. of Schedule A of The Act, the Inquiry Officer, in making his report, is required to provide a summary of the evidence, a determination for the facts, his conclusions, and "such other matters as he deems expedient and in the public interest".

114. The word "fair" in the above section has been canvassed in previous Inquiry Reports by this Officer and the powers of the Inquiry Officer have been reviewed by the Courts.

115. The test of fairness is examined in *Walters et al. v. Essex County Board of Education* 3 (1971) O.R. 346. There was a discussion by

the High Court of Justice in dealing with farmers land being expropriated, stated at 347:

"The plaintiffs, like many persons whose properties are expropriated, feel that a great hardship is being done them."

116. The Ontario legislation uses the words "fair", "sound" and "reasonably necessary". The only difference between Manitoba and Ontario legislation is the word "sound", it is not found in the Manitoba Act. The Court, in the Walters Case (at page 347 – 348) states that:

"The desirability or undesirability of this particular site is a matter to be determined solely by the Essex Board of Education. They are entrusted with wide powers of expropriation and the Legislature is entitled to assume that they will exercise these powers in the widest public interest."

117. The Court also at page 349, made the following comments:

"In applying the words used in the Act, namely, "fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority" and lacking any judicial pronouncement as to the meaning of these words, the Inquiry Officer adopted the suggestion made my Mr. John W. Morden in the Special Lectures of the Law Society of Upper Canada, 1970, "Recent Developments in Real Estate Law", 9. 226, where that writer had suggested, "that it would be more realistic to regard to the formula as conveying the broad standard – having regard to the objectives of the authority is this expropriation reasonably defensible." Similarly, as to the meaning of "fair" the Inquiry Officer adopted Mr. Morden's suggestion, "that it involves a balancing of the public interest allegedly being advanced by the expropriation with that of the private interest of the owner."

118. Parkins (supra) in dealing with the balancing act between public versus private interests set the appropriate tests. These tests need to be restated and in the case of *Re Parkins and the Queen*

(1978), 14 L.C.R. at 327 discusses the 1998 O.J. 4069 the Court in dealing with the concept of fair sound and reasonably necessary made the following comments:

> "Again, giving full allowance to the applicant's argument that expropriation matters require a strict construction approach to favour, the property owner, the legislation lays down a test of whether the expropriation is fair, sound and reasonably necessary. It is my view that this implies that some latitude has to be accorded to the expropriating authority and that the court is not entitled to substitute its opinion for that of the expropriating authority. In a case such as the present, some consideration has to be given to the practicality of the situation that confronts the expropriating authority."

119. The test in Parkins has been followed by this Inquiry Officer in the past and by other Courts. *Kowal v. Ontario* (Ministry of Transportation) 200 CarswellOnt 6023, 70 L.C.R. 70 (Ont. Bd. of Inquiry) which states:

> "He (speaking of the inquiry officer) may want to consider aspects of comparable costs, aesthetics, environmental impact or safety to mention just a few. What constitutes fairness, justness, and reasonable necessity will vary with the circumstances of each proposed expropriation…"

H. DETERMINATION OF FACTS AND ISSUES

120. The City of Winnipeg has since, at least 2006, been reviewing the Cockburn and Calrossie Combined Sewer Relief Works, with a Conceptual Design Report provided in May 2010. The evidence was that at present, the Cockburn-Calrossie District has a deficient level of flood relief and the City was attempting to work through different water districts and at the present time, to include

a program that would alleviate basement flooding and combined sewer overflow.

121. The Consultants, KGS Group, in conjunction with other consultants, considered different alignments and designs. The project disclosed constructability issues around Pembina Highway and the Jubilee Underpass that would require large piping which would impact upon traffic flows on Pembina Highway for a considerable period of time. Therefore, different alignments were sought and ultimately, the Rockman Street Alignment was developed and then various options were considered, including having a single pond or two ponds, with one pond being located on the Parker Lands or two ponds, one on the Parker Lands and one on the Taylor Lands, and connected by a pipe.

122. Initially, the recommendation was the two pond option, but at the request of Water and Waste in the fall of 2012, the consultant was asked to reconsider the single pond option on the Parker Lands. The advantages of the single pond options, according to the Consultants was:

a. Construction costs;
b. Less area required;
c. Less excavation required;
d. Only one set of roads;
e. Less fencing required; and
f. Operation costs and maintenance costs would be decreased.

123. The evidence disclosed that from 2012 to the end of 2013, there was minimal contact by the City with the Objector and that the

Objector only became aware of the one pond on his property by accident in December 2013, which led to a meeting with City Officials in January 13th, 2014.

124. There were no consultations with the Objector to discuss the pond potions until January 2014.

125. The evidence disclosed that internal memos of the City and correspondence between the Consultants and the City indicated that a decision had been made to proceed with the single pond option on the Parker Lands and a temporary pond on the Taylor Lands were to be built. The temporary pond on the Taylor Lands was to collect water overflow and ultimately transfer it to the Parker pond.

126. The Objector subsequent to the meeting of January 13, 2014, met with Senior City Officials in late January 2014, and was advised that no decision had been made when in fact in December 2013, the Director of Water and Waste had requested that the Property Department acquire 6.7 Hectares of land from the Owner of the Parker Lands.

127. The City has moved to expropriate lands from the Objector and the Objector has filed his Notice of Objection to this taking.

128. The proposed taking will require the taking of 6.7 hectares of land for the pond, and additional lands to meet the requirements of Manitoba Hydro. The Objectors asks for:

a. The two pond optimized Option, 3C, be utilized.

b. Alternatively, Option 3C as set forth in the September 25, 2014, spreadsheet, a 4.2 hectare pond with a 1,800 mm pipe which has the same cost as the proposed expropriation, should be more fully investigated and should be utilized.

c. The consultative process must be improved. The Owner of the Parker Lands was not treated fairly in this process and no consultation occurred with him at the appropriate time.

129. It is evident that the Consultant did an extensive analysis of the project and that their initial choice was to develop a two pond concept. The two pond concept was initially endorsed by Water and Waste and Senior Management was advised of the choice. However, the City directed the Consultants to examine the single pond option and the Consultants proceeded to do so with the final design for the single pond option on the Parker Lands.

130. Not suggesting any error or bad faith on the part of the Consultants, the design brought forward was a single pond option that the City directed the Consultants to examine.

131. The Consultant acknowledged that there were design issues using a large pond on the Parker Lands and that there were issues of land use both from the characteristics of the land and issues with Manitoba Hydro and the railway lines.

132. Design decisions were made by the Consultant having <u>no contact</u> with the Parker Land Owner and only receiving information concerning the land owner's thoughts from the City. (Emphasis added)

133. Therein lies a problem. The City failed to consult with the Parker Land Owner, and it could be fairly argued that there appeared to be a conscious effort on the part of the City to keep the Objector unaware of the plans of placing a single pond on the property. It was only by accident that the Objector became aware of the proposed pond on his property which led to a meeting with City Officials on January 13, 2014. As a result of the meeting, wherein the Objector received Exhibit 20, the Pond Design, a subsequent meeting was set with Senior Officials of the City, including the Acting COO Deepak Joshi, who advised that there was no final decision on the pond design and it was placed on Exhibit 20 for placement purposes. This was not true. The evidence of Mr. Marquess respecting the foregoing was not challenged in cross examination or in rebuttal evidence.

134. As previously stated, in the case of Walters (supra) the Court, when examining persons who were having their property expropriated, stated:

> "The plaintiffs, like many persons whose properties are expropriated, feel that a great hardship is being done them."

135. In the present circumstances, the Objector, it appears, feels a great hardship is being imposed on him and to that extent, this Inquiry Officer agrees.

136. *Kowal v. Ontario (Ministry of Transportation)* 200 CarswellOnt 6023, 70 L.C.R. 70 (Ont. Bd. of Inquiry) states:

> "He (speaking of the inquiry officer) may want to consider aspects of comparable costs, aesthetics, environmental impact or safety to mention just a few. What constitutes fairness, justness, and reasonable necessity will vary with the circumstances of each proposed expropriation…" (Emphasis added)

137. In the present circumstances, the evidence demonstrated a course of conduct contrary to the City objectives of fairness, openness and consultation. In fact, the evidence demonstrated that the City was, at least to this Inquiry Officer, secretive, uncommunicative, and non-consultative, to the extent that the Objector only found out about the placement of the pond on his property by accident. Furthermore, when the Objector, upon learning of the City's plans, pursued discussions at the highest level of the City's administration, he did not receive a truthful answer.

138. The Objector is attempting to develop lands that have challenges and the amount of usable land, as in all developments, is the ultimate consideration. There were ongoing discussion by the City with other developers in the area, and this Objector ought to have been granted an opportunity to have input/consultation with the City in its decision making process.

139. In light of the foregoing, the City has not met their obligation to show that the proposed taking is "fair and reasonably necessary"; nor has the city met the tests of balancing public versus private interests, and therefore, the proposed taking is denied.

CLOSING COMMENTS

140. There is no doubt that the proposed project must proceed in some form as it is well needed for the residents of that area of the City. However, the City, being the Expropriating Authority, ought to consider all other options and alternatives in light of the circumstances concerning this proposed taking.

Date: November 23, 2015

Submitted by G.E. Ulyatt

Inquiry Officer.

SCHEDULE A

THE LANDS TAKEN FOR WORKS AND SHOWN AS PARCEL A ON PLAN DEPOSIT 0053-2015 WLTO, PREPARED BY DONALD NEIL BOURGEOIS, OF THE CITY OF WINNIPEG, MANITOBA LAND SURVEYOR;