Submission to Executive Policy Committee

in Relation to the

Southwest Rapid Transitway (Stage 2) on behalf of McDonald Grain Company Limited

And in Relation to the

Cockburn-Calrossie Combined Sewer Area Drainage Upgrade Project on behalf of

6165347 Manitoba Inc. and First National Financial GP Corporation

January 20, 2016

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Introduction

1. The City of Winnipeg (the "City") for purposes of Stage 2 of Southwest Rapid Transitway (the "Transitway Project") commenced expropriation proceedings. As a consequence a number of parties objected and participated in an inquiry in August and September 2015. The Inquiry Officer issued a report on November 16, 2015 and made certain findings. McDonald Grain Company Limited (the "Owner") makes submissions with respect to the findings of the Inquiry and the appropriate response of the City thereto.

2. A further inquiry was commenced by virtue of a separate expropriation concerning the Cockburn-Calrossie Combined Sewer Area-Drainage Upgrade Project (the "Sewer Upgrade Project"). 6165347 Manitoba Inc. and First National Financial GP Corporation objected to the expropriation. A second inquiry report was issued on November 23, 2015, and this property owner makes submissions in relation thereto.

Purpose of the Expropriations

3. The purpose of the Transitway Project is to extend Rapid Transit into the Southern part of the city. The purpose of the expropriation insofar as McDonald Grain is concerned relates to the need to construct a pumping station.

4. The purpose of the Sewer Upgrade Project is to diminish flooding of residential homes in certain areas of the city and to separate storm and waste sewers.

Purposes of an Inquiry

5. Section 6(2) of the Act, notes that at the inquiry 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 . . . ".

6. Essentially the purpose of the inquiry is a search for whether all reasonable alternatives have been considered so as to minimize the draconian impact on a private landowner, reduce, if possible, the extent of the land expropriated, and minimize the exposure to the City while at the same time allowing the achievement of the objectives.

7. To be noted is the decision 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):

> 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.
> ...

8. To similar effect, is the decision in Walters et al. v. Essex County Board of Education (1971), [1971] 3 O.R. 346, 20 D.L.R. (3d) 386, affirmed: [1974] S.C.R. 481, 38 D.L.R. (3d) 693

> 14 ... The chief purpose of the inquiry of course seems to be to ensure that nothing has been overlooked and that the approving authority before it makes its final decision has placed before it all relevant information which may be of assistance to them. It is not for this Court to say whether the board has made a wise or an unwise decision; they

have been elected to office for the very purpose of making such decisions.

...

19 Finally, I emphasize that the decision to build a secondary school in this township is a matter that has been placed solely in the hands of the Essex Board of Education. Similarly the decision to place the school on these particular 25 acres owned by the plaintiffs is also the sole decision of the board's. **All that the Legislature has done is to require that the board, when objection is made, obtain and then consider a report from an inquiry officer which has the advantage of ensuring that considerations which may have been overlooked by the board are brought to their attention.** This has all been done. It is still completely within the board's jurisdiction to either desist or proceed. They have chosen the latter and having complied with all the requirements of the *Expropriations Act, 1968-69* they are entitled to do so... **[emphasis added]**

9. The obligation of this inquiry is to ensure that Council of the City of Winnipeg, the confirming authority, has all necessary information to make an informed decision.

10. In order to make an informed decision, it is necessary that the confirming authority consider:

- The cost of the expropriation of the Owner and all consequential damages that may flow as a result;
- The cost of the various alternatives to expropriation of land from the Owner and their cost;
- The extent to which the various alternatives will achieve a result that is as good, better, or the best alternative necessary to achieve the objective.

11. Counsel for the Owner has participated in 4 inquiries over the last 18 months. In my experience, the City of Winnipeg decisions with respect to the land to be expropriated, are driven solely by engineers, and do not in any way take into account the potential exposure of the City of Winnipeg to the obligation to compensate an owner for the land expropriated.

12. Common sense and good business practice dictates that the City should consider conducting a cost benefit analysis to determine the alternative which adequately achieves the necessary objective, and minimizes the cost or exposure to the City.

13. For this reason, evidence relating to the potential claim of an owner is relevant to the cost benefit analysis which should be part of every decision to expropriate.

Conclusions of the Inquiry Officer

14. In his separate inquiry reports the Inquiry Officer reached conclusions and made findings with respect to the proposed expropriations and how they should be addressed.

15. The Winnipeg Public Service has filed reports which recommend that Council of the City ignore these recommendations and proceed with the expropriations.

16. The conclusions of the Inquiry Officer were as follows:

Transitway Project

> 331. The Objector had offered three possible sites for the placement of the pumping station; the Capri Motel, land to the south of the property, and within the Transit corridor itself.
>
> 332. The Objector examined the three objectives, the first being the Capri Motel. The evidence of Mr. Krahn was that this was not viable as there were three or four structures that would have to be taken down. It was submitted that, what was not considered, was the fact that the property at 1833 Pembina Highway is assessed for tax assessment at just below $20,000,000.00 and the Capri Motel has been appraised at just under $2,000,000.00. Mr. Newman suggested that the land to the south could have the same analysis.
>
> 335. It would appear that the Objector is in fact correct in submitting that there was inadequate consultation or investigation of the placement of the proposed pumping station. At the time, there was no adequate discussion with the Objector, or it appears, any site visits. This Inquiry Officer did attend at 1833 Pembina Highway and the Capri Motel, and examined the properties. Whilst mindful that this Inquiry Officer is not a property evaluator, one can easily observe the buildings on the Capri Motel site which could be used for the placement of the pumping station, are old, run down, and do not appear to be maintained. A visit to the site may well have affected the placement of the pumping station.
>
> 337. It is this Inquiry Officer's opinion that the City has failed to examine and pursue options, failed to do due diligence concerning the taking and has not satisfied the onus that it is fair or reasonably necessary in the circumstances for the taking, and has failed to establish the taking would balance the private versus public interests. The proposed taking is denied.
>
> 338. This Inquiry Officer would urge the City to explore alternate sites and/or arrange a meeting with the City, the Objector, and Manitoba Hydro.

17. This property owner has plans to expand its apartment building by 42 units. The plans require construction of the building in the location proposed to be expropriated. If the expropriation proceeds the apartment expansion cannot.

18. Immediately adjacent to the site is the Capri Motel. Its value from an assessment perspective is significantly less than that of McDonald Grain. Evidence was heard that if the expansion plan cannot proceed the loss will be in the millions of dollars.

Sewer Upgrade Project

> 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 no contact 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.
>
> 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.

Public Service Recommendation – Transitway Project

19. The recommendations of the Public Service are essentially to ignore the inquiry's recommendations. The recommendations focus on the Capri Motel site and ignore the recommendation by the inquiry that there be discussions with Manitoba Hydro to determine if construction of the pumping station could occur in the transit corridor.

20. A request was made to the City of Winnipeg for permission to discuss with the proponents who are bidding for the construction and design of the project this possibility. Permission has been refused.

21. The recommendation of the Public Service focuses on certain factors. These conclusions may be described as follows

- it is better to take a number of parking spots than three – four hotel buildings. This ignores the fact that these "hotel buildings" are essentially the size of construction trailers and as noted by the Inquiry Officer are run down and not well maintained. Photos are attached

- arrangements have already been made with Manitoba Hydro for parking within the Hydro lands to offset the parking to be lost by virtue of the expropriation. This is accurate but it ignores the **fundamental concern** which is that the opportunity to expand the apartment building will be lost because the expropriated land is where the apartment building is to be built.
- The access road from Plaza Drive, and the length of pipe will be 75 m longer. Has anyone taken the trouble to price out the cost of this additional construction relative to the multimillion dollar exposure which the city will have if the opportunity to construct the expanded apartment building is lost?
- Noise and disturbance will be caused to hotel units but no noise and disturbance will be caused to apartment dwellers because the pumping station will be located in the parking lot. Look at the photos! There is no reason why the pumping station cannot go on the Capri Motel lands.

The city administration in the report states

- In summary, it is the position of the Public Service that the expropriation of the 1833 Pembina Highway location (Holding #38) is less costly to the City and has less impact on the expropriated parties than the expropriation of the Capri Hotel is likely to have on its interested parties.
- Has the appropriate analysis been done? It is difficult to comprehend that the value of a number of "construction trailers" on the Capri Motel site can be of greater value, then the cost of a multimillion dollar lost opportunity.

22. Has the Public Service given you the necessary analysis of the cost?

23. Has the Public Service recommended that Manitoba Hydro be approached to determine if the pumping station can go in the transit corridor?

24. Are you satisfied that you have the whole story? Who wrote the recommendation, the Public Service or the consulting engineers?

Public Service Recommendation-Sewer Upgrade Project

25. The Public Service in its report provides a variety of recommendations and reasons why the recommendation of the Inquiry Officer should be rejected, and the expropriation proceed.

26. The issue is not whether the project should proceed, but the issue is whether the project should proceed with one pond. The comments of the Inquiry Officer with respect to the initial recommendations of the consulting engineers are detailed above. Essentially the consulting engineers recommended the two pond option.

27. For some unexplained reason this option was discarded.

28. A variety of reasons are now provided in support of the discarding of this option. Some comments in response are appropriate as follows

- 1200 MM piping is the most efficient and creates the least amount of construction risk- the evidence was clear that for pipe sizes up to 1800 MM there is no construction risk

- Reference is also made to tunnel boring machines and the risks associated with this type of construction. You are left with the impression that tunnel boring machines will not be necessary by use of a smaller pipe size. This is false and the intention is to use tunnel boring machines.

29. The Inquiry dealt fully with the construction risks and advantages. There is no reason why a pond option could not be used.

30. More importantly the very matter which the Inquiry expressed concerns about, the failure to consult with the property owner, continues.

31. Consultation with the property owner did not occur through the planning process. The absence of consultation continues to this day. When the Inquiry Officer's report was issued the response of the Public Service was that there would be no repetition of failure to consult.

32. The failure to consult continues.

33. Ultimately the owner is left with a claim for compensation. In the present case that claim will be in the tens of millions of dollars.

34. There seems to be no interest in participating in a consultative process which would only serve to potentially mitigate and reduce this claim.

35. Why?

Conclusion

36. Expropriations create difficult issues. No one wants to have their property expropriated. The City is faced with making difficult choices the cost of which can be significantly higher than other choices.

37. The expropriation is not final until it is confirmed by Council of the City. The obligation of this committee is to make a recommendation to Council. The obligation of this committee is to ensure that it has all necessary and requisite information.

38. The obligation of this committee is to ensure that as the steward of the assets of the City it acts in a fiscally responsible fashion, makes informed choices, and does so in a fashion to ensure that the citizens of the City receive the greatest possible benefit, with the least possible expenditure, and with minimal exposure to claims from expropriated owners.

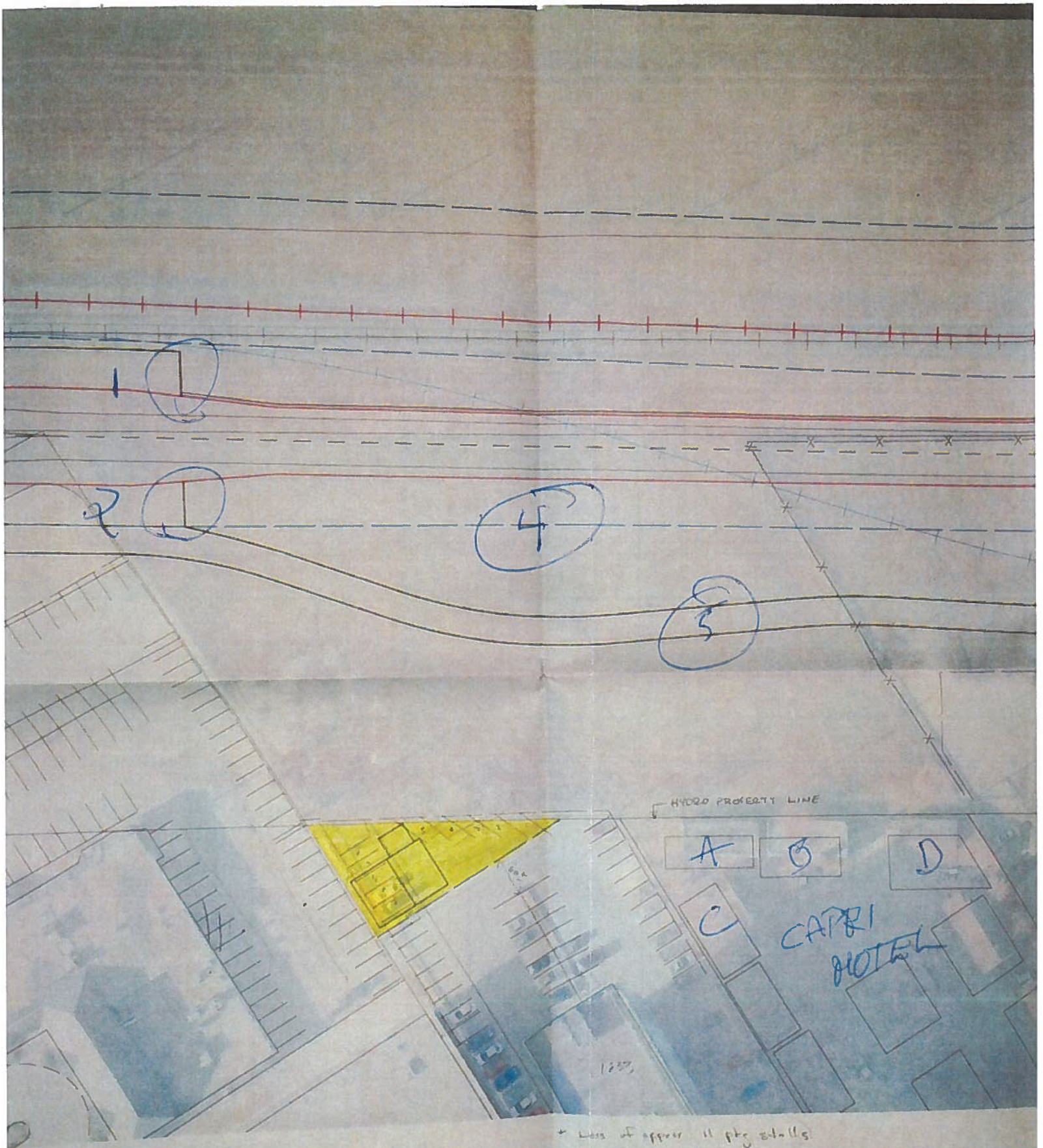
39. This administration has made transparency a fundamental plank of its platform.

40. We do not see transparency at work.


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Please say that again
49°49'24.15" N 97°09'15.90" W elev 811 ft eye al

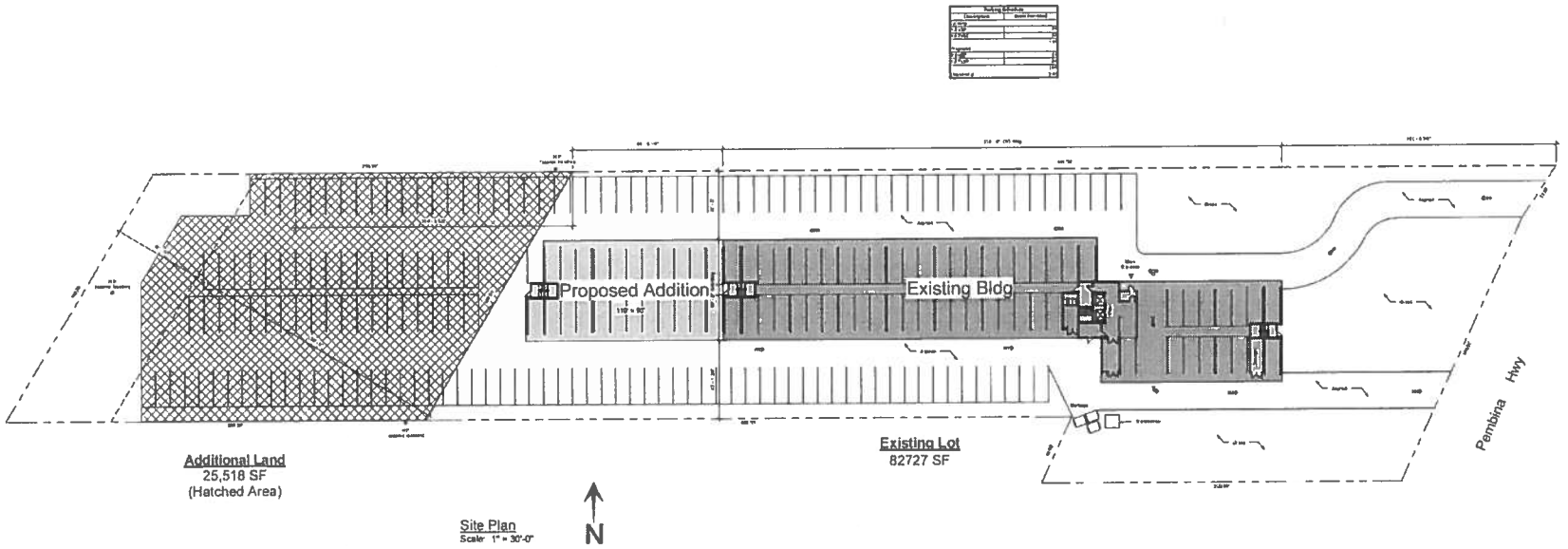

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Google eart
2002
49°49'24.33" N 97°09'17.35" W elev 779 ft eye alt 921 ft


1
2
4
3
HYDRO PROPERTY LINE
A
B
D
C
CAPRI
MOTEL

FX 50

Current Zoning	RMF-M	Proposed Zoning	RMF-L
Min Lot Area/Suite	800 SF	Min Lot Area/Suite	400 SF
Lot Area	82 727 SF	Lot Area	82,727 SF
Max Suite Count	103 Suites	Max Suite Count	206 Suites
Max Bldg Height	60'-0"	Max Bldg Height	150'-0"
Current Suite Count	140 Suites	Proposed Suite Count	182 Suites
Current Bldg Height	72'-4"	Proposed Bldg Height	72'-4"
Current Parking Count	153 Stalls	Proposed Parking Count	240 Stalls
Stalls/Suite	1.09	Stalls/Suite	1.32



Additional Land
25,518 SF
(Hatched Area)

Existing Lot
82727 SF

Site Plan
Scale: 1" = 30'-0"

N

Pre-Con Builders
1540 Taylor Ave. Winnipeg, Manitoba, R3N 1Y1
Tel.(204)633-2515
Fax:(204)804-5576
www.preconbuilders.com

Consultant

Consultant

Rev. No.	Description	Date

Revision Schedule

Seal/Permit

Copyright

Project Title:
Drury Apartments
1833 Pembina Hwy

Drawing Title:
Site Plan

Project No: 10-017
Drawn By: CF
Scale: 1" = 30'-0"
Date: Sept 21, 2010

Sheet No.
A-100

148 Suite Apartment Building