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Report of the Independent Fairness Commissioner

City of Winnipeg

Report on Compliance – Encroachment Agreement between 109 James Avenue Ltd. and the City of Winnipeg

August 23, 2018

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Auditors' Report on Compliance with Framework
City of Winnipeg
Encroachment Agreement between 109 James Avenue Ltd. and the City of Winnipeg

To: City Council

We performed an audit of the proposed real estate transaction described in Section 1 of this report (the "Transaction") to determine whether the Transaction was undertaken by the City of Winnipeg's Planning, Property and Development Department ("PP&D") in compliance with version 1.01 of the framework referenced in Section 1 of this report (hereinafter referred to as the "Compliance Framework"). The Compliance Framework as well as compliance of the Transaction with the Compliance Framework are the responsibility of PP&D. Our responsibility is to express an opinion on the City of Winnipeg's compliance with the Compliance Framework based on our audit.

We conducted our audit in accordance with Canadian generally accepted auditing standards. Those standards require that we plan and perform an audit to obtain reasonable assurance whether PP&D complied with the applicable criteria of the Compliance Framework described in Section 1. An audit includes examining, on a test basis, evidence supporting compliance with the applicable criteria of the Compliance Framework and included: 1) performing corroborative interviews with City of Winnipeg employees and representatives who were responsible for conducting the Transaction; 2) examining documentation provided by City of Winnipeg employees; and 3) reperforming transaction specific calculations, where applicable. We performed our audit procedures based on discussions with PP&D Management and information available as at August 22, 2018.

In our opinion, except for the compliance exceptions noted in Section 2, PP&D is in compliance, in all material respects, with the individual criteria of the Compliance Framework (version 1.01) for the Transaction noted above.

This report was prepared for City Council for the purpose of City Council's ultimate determinations related to the above noted transaction, and although it may be made publically available, readers are cautioned that this report is not suitable for any other purpose.

Deloitte LLP

Chartered Professional Accountants
Winnipeg, Manitoba
August 23, 2018

Section 1 – Compliance Framework, the Transaction, and Management's responsibility

Compliance Framework
City Council ("Council") created the role of the Independent Fairness Commissioner ("IFC") for the purpose of ensuring that real estate transactions and management services ("Transactions") are performed in a fair, transparent and open manner. Under the direction of Council, the City Auditor has engaged Deloitte LLP ("Deloitte") to provide certain services as part of the IFC role through the performance of compliance audits in accordance with the assurance standards of the Chartered Professional Accountants of Canada ("CPA Canada"). To ensure Council's objectives for the IFC are addressed, a Compliance Framework was developed under the oversight of PP&D (also referred to as "Management") through consideration of applicable City of Winnipeg by-laws, policies and procedures including PP&D's internal Real Estate Transaction Management Framework ("RETMF"). The Compliance Framework is to be used as the basis for the performance of compliance audits of selected Transactions, and can be subject to revision by PP&D based on evolving requirements. Further background information regarding the Compliance Framework is in Appendix 1.

The Transaction
The proposed transaction is the execution of an encroachment agreement to allow for the use of the City Right-of-Way adjacent to 109 James Avenue, as defined in Misc. Plan No. 15358 in favour of the property owner of 109 James Avenue (the "Transaction"). The scope of the Compliance Audit includes only the compliance aspects of the Transaction outlined in the associated Administrative Report, and excludes any prior or ongoing Transaction related activities, where applicable. Management represents that the complexity of this transaction has been deemed "low" for the purposes of this compliance audit.

Management responsibility and assertion
Transaction documentation has been prepared by PP&D based on information available at August 22, 2018. The Compliance Framework and applicable criteria is the responsibility of PP&D and has formed the basis of the compliance audit conducted by Deloitte on the Transaction. PP&D is responsible for ensuring the fairness, transparency, and openness of any proposed or completed transactions and the compliance of transactions with the Compliance Framework. Further, as discussed in Appendix 2 of this report, PP&D has made certain representations regarding the information provided to Deloitte to support the performance of the independent compliance audit. Deloitte's responsibility is to express an opinion on PP&D's compliance with the Compliance Framework based on the results of their independent audit procedures performed as outlined in Appendix 1 to the report.

Yours truly,



Planning, Property and Development Department
City of Winnipeg

Section 2 – Exceptions noted and Management's unaudited response

Exceptions noted

The criteria within the Compliance Framework was subject to audit procedures performed by Deloitte for the purposes of determining compliance to support our independent auditors' report, as discussed in Appendix 2. Included in the table below is a summary of the exceptions noted in testing the compliance of the Transaction with the Compliance Framework, the associated criteria, and the unaudited responses to these exceptions prepared by Management. The City Auditor has requested responses from PP&D for each exception noted and provided the responses to Deloitte for inclusion in the report. Management's responses are unaudited, and have been included to provide commentary by the City of Winnipeg, to the SPCPDHDD and/or Council.

A complete listing has been included in Appendix 2 of those criteria for which exceptions were noted, criteria that were deemed to not be subject to audit, and criteria deemed by Management to not be applicable to the Transaction.

Summary of exceptions noted		Related criteria
Reporting documentation incomplete	Aspects of the Administrative Report were not completed as required by Appendix B of the RETMF, such as (but not limited to) appraisal considerations and evidence of review. Further details regarding the exceptions noted are included in Appendix 2 of this report.	1.01
File documentation incomplete	The file documentation was not in compliance with several aspects of the Compliance Framework, including (but not limited to): • The Complete Reporting Checklist relating to the Transaction has not been fully completed and evidence of review of the Complete Reporting Checklist by the author of the Administrative Report, as required by Appendix C of the RETMF, was not present in the file; • There was no evidence in the transaction file that PP&D issued a circulation to the applicable City departments, utility and service provider entities, or the Ward Councillor; • The proposed Terms and Conditions of the encroachment agreement did not include environmental provisions to clarify environmental liability during the agreement period or thereafter; and • There was no documentation provided to indicate that the Transaction has been included in the Tracking Database.	1.03, 1.04, 3.01, 7.05, 8.01 20.01
Appraisal not completed	Neither an appraisal nor rationale as to why an appraisal was not performed with respect to the subject property was included in the Transaction file as prescribed by Appendix D of the RETMF.	2.01, 2.02, 2.04

Unaudited Management response to exceptions noted

Management does not consider any of the IFC's findings of non-compliance to have materially impacted the transaction. After the IFC review is available, Management takes the necessary steps to correct non-compliant items (where possible), such as adding proper file documentation or completing sections of the checklist.

The staff member administering the file had an unexpected leave of absence and was not able to have the file fully compliant prior to the IFC review (documentation was provided to the IFC after the review). It is also noted that encroachments do not require appraisals where the Fees and Schedules By-law is applicable, and circulation of the encroachment is not handled by Real Estate staff.

While procedures of the RETMF were not achieved in certain circumstances, Management remains mindful of the framework's intent. In general, Management's compliance to the RETMF has been improving.

Management accepts the findings of the IFC but takes the position that if full compliance were achieved, the final outcome of the transaction would remain unchanged.

Appendix 1 – Scope of services requested

Introduction

As outlined in Section 1 of the report, and to address Council's objectives for the IFC, a Compliance Framework was developed under the oversight of PP&D. The Compliance Framework development process also included assistance from Deloitte and the City Auditor in the form of consultation as to the sufficiency and appropriateness of the Compliance Framework for PP&D's ultimate determinations. The version of the Compliance Framework utilized for the purposes of this compliance audit is Version 1.01 dated March 27, 2018 as made available by Management. The Transaction is to be presented to the Standing Policy Committee on Property and Development, Heritage and Downtown Development ("SPCPDHDD") and/or Council for approval. Council has adopted the Executive Policy Committee's recommendation that the compliance audit of Transactions will occur prior to presentation to SPCPDHHD and/or Council. Accordingly, Deloitte has been engaged to perform the compliance audit of Transactions while in progress, the results of which will be reported directly to SPCPDHHD through the City Auditor and Deloitte.

Scope of services requested of Deloitte by the City of Winnipeg

Deloitte has been engaged to perform an independent audit of the Transaction's compliance with the Compliance Framework noted above as follows:

a. Produce an independent auditor's report on whether the Transaction is in compliance with the relevant criteria outlined within the Compliance Framework;
b. Submit the results of the compliance audit and specific Auditor's Report to the City Auditor.
c. Report specific findings and compliance exceptions within the Auditor's Report based on the Compliance Framework where applicable.
d. Prior to performance of a specific compliance audit of a Transaction,
    i. declare any conflict of interest in connection with the specific Transaction; and
    ii. obtain management's representation of the complexity rating of the Transaction, based on specific guidance retained by the City and in consultation with the Contract Administrator.
e. Attend the SPCPDHDD's regular meeting and/or any agreed upon special meetings in person where the independently prepared auditor's report will be tabled so as to answer questions regarding the report.

Deloitte's audit procedures to determine compliance with the stated criteria within the Compliance Framework included testing on a sample basis of the evidence supporting compliance with the applicable criteria of the Compliance Framework and included: 1) examining documentation provided by City of Winnipeg employees; 2) reperforming transaction specific calculations, where applicable; and 3) performing corroborative interviews with City of Winnipeg employees and representatives who were responsible for carrying out the Transaction.

For criteria identified to not be in compliance and related exceptions noted, the report provides these findings and, where applicable, management comments related to the compliance exceptions. Any identified instances of non-compliance in relation to the Transaction are detailed in Appendix 2 of this report. Management's unaudited responses to the compliance exceptions, if any, are included in Section 2 of the report. Responses regarding the cause of non-compliance, where provided, are prepared by PP&D. Observations regarding the impact on the fairness, transparency, and openness of the Transaction, where provided, would be prepared by PP&D and/or the City Auditor.

Appendix 2 – Findings and compliance exceptions noted

Background information provided by the Independent Auditor

The Compliance Framework referenced in Appendix 1 above forms the basis of the criteria for Deloitte's independent audit of the Transaction. The Compliance Framework is presented in two components as follows:

Objectives	Summarized objectives of the IFC and RETMF as considered and defined in the applicable by-laws, policies, procedures, and the RETMF.
Criteria	Specific requirements that a real estate transaction is expected to comply with in order to be considered fair, transparent and open. Criteria were developed in consideration of specific statements or requirements within by-laws, policies, procedures, and the RETMF. Management's ultimate determination of applicable criteria is based on the nature of the transaction, property type, and transacting party.

Our audit procedures to determine compliance with the stated Criteria within the Compliance Framework included testing on a sample basis of the evidence supporting compliance with the applicable Criteria of the Compliance Framework and included: 1) examining documentation provided by City of Winnipeg employees; 2) reperforming transaction specific calculations, where applicable; and 3) performing corroborative interviews with City of Winnipeg employees and representatives who were responsible for carrying out the Transaction. We performed our procedures based on discussions with Management and information available as at August 22, 2018. Any compliance exceptions pertaining to individual Criteria noted by Deloitte during the performance of our audit procedures are identified below.

Management's representations provided to the Independent Auditor

As discussed in Section 1 of this report, Management has represented that to the best of their knowledge and belief, the following:

- All information presented to Deloitte has been presented fairly and accurately, and in a manner that would not create judgements requiring interpretation that could result in a change in conclusion as to the compliance of the Transaction with the Compliance Framework;
- All documents prepared and provided to Deloitte for review were prepared in the course of conducting the Transaction;
- Deloitte has been provided access to all relevant documents, information, and City employees or representatives who possess information related to the Transaction, and within the stated period to meet the City's requirements to determine compliance;
- Criteria deemed as not applicable to the Transaction are identified in sub-section C of this appendix; and
- The complexity rating of the transaction based on the review completed by PP&D is low.

Findings and compliance exceptions noted

The findings and compliance exceptions noted through the performance of Deloitte's audit procedures have been presented in the following categories:

A. Exceptions noted	The table outlines only those Criteria defined in the Compliance Framework that are applicable to the Transaction and for which we have noted exceptions in compliance. The exceptions have been organized in the table by the Objective reference number, and included in the second column those Criteria where instances of non-compliance have been identified. The third column contains a description of the exception noted.
A. Criteria not subjected to audit	The table outlines those Criteria that could not be subjected to audit on the basis of Management's representation that the related activities have not been performed based on the rationale provided.
B. Criteria not applicable to the Transaction	During the course of our test procedures performed, Management has represented and confirmed that the Criteria referenced in this table are not applicable to the Transaction, and have therefore not been included in the scope of our audit.

It should be noted that Criteria for which no compliance exceptions were noted are not included in the tables below. The Compliance Framework should be referenced for a complete listing and description of all applicable Criteria included within the Compliance Framework as at the date specified above.

A. Exceptions noted

1. Information reported to Council or delegate with respect to the transaction was complete

	Criteria	Exceptions noted
1.01	Reporting to Council has been prepared in the form of an Administrative Report that includes a recommendation(s); reason for the Administrative Report; implications of the recommendations; history of the Administrative Report; financial impact of the transaction; summary of consultations; and identification of the preparer, reviewer, and review date, in accordance with Appendix B of the RETMF.	An appraisal was not prepared as noted in finding 2.01, and there was no discussion of appraisal considerations included as outlined in Appendix B of the RETMF:
1.03	The complete reporting checklist (as outlined in Appendix C of the RETMF) which corresponds to the transaction type has been fully completed, including all attachments noted to be evidenced in file. Rationale for the notation of any particular item within the checklist as "N/A" has been included.	The following sections of the Property Management checklist per Appendix C of the RETMF were not completed at the date of file review: • Tenant (partially completed); • Circular Document (partially completed); • Market data, appraisals and assessments undertaken (partially completed); • Risk & complexity tool; • Marketing process; • Term; • Terms & Condition Reviews; • Term Sheet; • Delegation of Authority; • Reporting; and • Final negotiated position
1.04	The complete reporting checklist relating to the transaction has been reviewed by the author of the associated Administrative Report or Briefing Note, as evidenced by date and sign-off on the checklist.	Evidence of review of the Complete Reporting Checklist by the author of the Administrative Report, as required by Appendix C of the RETMF, was not present in the file.

2. An appraisal of the property has been performed by a qualified individual, in an acceptable format, as needed

	Criteria	Exceptions noted
2.01	An appraisal of the subject property has been prepared, and the associated Appraisal Requisition Form has been filled out and included in the file.	Neither an appraisal nor a completed Appraisal Requisition Form was included in the file documentation, as required by Appendix D of the RETMF.
2.02	In cases where the Manager of Real Estate has conferred with the Appraisal Branch and it has been determined that an appraisal was not required, the rationale has been documented and retained in the file.	Rationale for not completing an appraisal on the subject property was not included within the transaction documentation, as required by Appendix D of the RETMF.
2.04	The decision as to the form of appraisal and the use of an internal or external appraiser was made by the Senior Appraiser, Superintendent of Property Management, Supervisor of Sales & Acquisition or Manager of Real Estate in accordance with the guidance and matrix in Appendix D of the RETMF, and documented by the Appraisal Branch. Documentation outlines the preparer's consideration of the "Reasonable Appraiser" test as defined by Canadian Uniform Standards of Professional Appraisal Practice.	Transaction file did not include documentation of the decision as to the form of appraisal, or consideration with respect to the use of an internal or external appraiser, as required by Appendix D of the RETMF.

3. Consultation and communication with internal City stakeholders such as City departments, the Ward Councillor, and utility agencies has been solicited prior to the execution of the transaction

	Criteria	Exceptions noted
3.01	PP&D issued a circulation to applicable City departments, the Ward Councillor, and utility agencies to identify any requirement(s) for the real property with a 14 working day deadline for response in accordance with the requirements stipulated in Appendix H of the RETMF. All correspondence has been retained within the transaction file. Departments that are required to be contacted include: Assessment and Taxation, Community Services, Fire Paramedic Service, Local Improvements, Planning, Property and Development Department, Public Works Department, Transit Department, Water and Waste department, Winnipeg Parking Authority, and Winnipeg Police Service. Utility and service provider entities that are required to be contacted include: BellMTS, Manitoba Hydro, and Shaw.	There was no evidence in the transaction file that PP&D issued a circulation to the applicable City departments, utility and service provider entities, or the Ward Councillor.

7. An Environmental Site Assessment ("ESA") was completed as required

	Criteria	Exceptions noted
7.05	For any lease transaction, the lease documentation includes environmental provisions to clarify environmental liability.	The proposed Terms and Conditions of the encroachment agreement did not include environmental provisions to clarify environmental liability during the agreement period or thereafter.

8. A competitive procurement process was conducted when prescribed by the RETMF

	Criteria	Exceptions noted
8.01	A Risk & Complexity Tool in the format outlined in Appendix F of the RETMF was completed as prescribed by the criteria outlined in Appendix E of the RETMF. If required, the Risk & Complexity Tool was completed by the Real Estate Division / Property Management Branch staff responsible for the transaction and reviewed by their respective Supervisor/Superintendent/Manager. If not completed, the rationale for not utilizing the tool has been documented by the Real Estate Division / Property Management Branch staff member and approved by their respective Supervisor/Superintendent/Manager.	A completed Risk and Complexity tool was not included in file documentation, as required by Appendix E of the RETMF. The rationale for not utilizing the tool was not documented within the file.

20. The transaction has been included in the Tracking Database

	Criteria	Exception noted
20.01	The transaction has been included in the Tracking Database in accordance with Appendix L of the RETMF.	There was no documentation provided to indicate that the Transaction has been included in the Tracking Database, as required by Appendix L of the RETMF.

B. Criteria not subjected to audit

2. An appraisal of the property has been performed by a qualified individual, in an acceptable format, as needed

	Criteria	Representations or rationale provided
2.05	Where an external appraiser was deemed to be required, a competitive bid process was undertaken or an appraiser was selected at the discretion of the Appraisal Branch from the pre-approved list of appraisers. If the external appraiser was selected from the pre-approved list of appraisers, the appraiser has been pre-approved for the type of appraisal function required (i.e. expropriation, disposition, acquisition, internal use, etc.).	As noted under Criteria 2.01 and 2.04 in Section A above, neither an appraisal of the subject property nor consideration with respect to the use of an internal or external appraiser was included in the Transaction documentation. As a result of these exceptions, we could not subject Criteria 2.05, 2.06, and 2.07 to audit.
2.06	Consideration with respect to the engagement of Materials Management in the procurement process for an external appraiser was made and documented.	See rationale noted in criterion 2.05 above.
2.07	If an external appraiser was used, the engagement to prepare an external appraisal report with respect to the property was documented through a signed written engagement letter using the most current template maintained by City Legal Services (as at the date of engagement).	See rationale noted in criterion 2.05 above.
2.08	Prior to finalizing the appraisal report and within six weeks of the delivery of the appraisal report, the draft appraisal (both internally and externally prepared) has been reviewed by a designated member of the Appraisal Institute of Canada. This review has been documented by either a narrative review or review memo signed off by the Senior Appraiser.	As noted under Criteria 2.01 in Section A above, an appraisal of the subject property was not included in the Transaction documentation. As a result of this exception, we could not subject Criteria 2.08, 2.09, 2.10, 2.11, 2.12, 2.13 and 2.14 to audit.
2.09	The appraisal has been reviewed by staff of the Real Estate Division or Property Management Branch, as applicable based on the type of transaction.	See rationale noted in criterion 2.08 above.
2.10	The appraisal was completed by an accredited member in good standing with the Appraisal Institute of Canada (as at the date of Transaction review).	See rationale noted in criterion 2.08 above.
2.11	The appraisal was prepared in conformity with Canadian Uniform Standards of Professional Appraisal Practice, as evidenced by a signed certification contained within the appraisal.	See rationale noted in criterion 2.08 above.
2.12	In cases where the most recent appraisal with respect to the property was completed more than 24 months from the expected date of the transaction, an Update Appraisal was completed.	See rationale noted in criterion 2.08 above.
2.13	A copy of the appraisal has been retained within the office file, or the location of the appraisal has been referenced within the file.	See rationale noted in criterion 2.08 above.
2.14	Management of PP&D have represented that appraisal documents have not been shared or released to the Community Committees or any other third parties, in accordance with confidentiality requirements.	See rationale noted in criterion 2.08 above.

3. Consultation and communication with internal City stakeholders such as City departments, the Ward Councillor, and utility agencies has been solicited prior to the execution of the transaction

	Criteria	Representations or rationale provided
3.02	No requirements were identified by a City department to retain the subject property in response to the circulation to City departments outlined in criteria 3.01.	As noted under Criteria 3.01 in Section A above, there was no evidence in the transaction documentation that PP&D issued a circulation to the applicable City departments, utility and service provider entities, or the Ward Councillor.

4. Transaction approval has been granted by an appropriate individual based on the delegations of authority outlined in the Delegation of Authority - January 28, 2009 Council minutes

	Criteria	Representations or rationale provided
4.01	Transaction approval has been granted by an appropriate individual based on the delegations of authority outlined in Delegation of Authority - January 28, 2009 Council minutes.	The Transaction has not yet been provided to Council for approval.

C. Criteria not applicable to the Transaction

Objective	Criteria not applicable
1. Information reported to Council or delegate with respect to the Transaction was complete.	1.02
2. An appraisal of the property has been performed by a qualified individual, in an acceptable format, as needed.	2.03
5. All land has either been declared surplus or is planned to be declared surplus concurrently with the approval of sale by the Chief Administrative Officer and/or Council, based on the applicable Delegation of Authority.	5.01
6. PP&D has been authorized to commence negotiations for the acquisition or disposal of land, and completed site inspections as appropriate.	6.01 6.02 6.03
7. An Environmental Site Assessment ("ESA") was completed as required.	7.01 7.02 7.03 7.04 7.06
8. A competitive procurement process was conducted when prescribed by the RETMF.	8.02 8.03 8.04 8.05
10. Alternative properties and procurement methods were considered in selecting the property.	10.01
11. Where land is to be expropriated, compliance with the Expropriation Act has been considered and verified by City Legal Services.	11.01 11.02 11.03 11.04 11.05 11.06 11.07 11.08
12. Unsolicited offers for the purchase of City owned property have been pursued only when the conditions established by Council have been met.	12.01
13. Any offer for the purchase of City-owned property was only acted on by PP&D if it was provided in the form of a formal written offer.	13.01
14. Acquisitions of privately owned property containing dilapidated structures are accompanied by a program of rehabilitation, redevelopment, or improvement.	14.01 14.02
15. Specific policies relating to transactions involving property under the purview of the Parks & Recreation division have been observed.	15.01 15.02
16. Where land declared surplus had previously been transferred by a Developer to the City, that land has first been offered back to that Developer.	16.01
17. Other policies related to the general process for the sale of land have been adhered to.	17.01 17.02
18. The policies pertaining to acquisitions and dispositions of specific types of property have been adhered to.	18.01 18.02 18.03 18.04 18.05 18.06 18.07 18.08 18.09 18.10
19. The policies pertaining to specific types of transaction have been adhered to.	19.01 19.02 19.03 19.04