

Report of the Inquiry Officer, Sharon Roberts, March 2, 2020

IN THE MATTER OF the *Expropriation Act*, being Chapter E-13 of the Revised Statutes of Alberta, 2000, as amended (the "*Expropriation Act*");

AND IN THE MATTER OF the intended expropriation by THE CITY OF EDMONTON of the lands legally described under Certificate of Title Number 172 123 112:

PLAN 679HW  
BLOCK A  
CONTAINING 1.32 HECTARES (3.27 ACRES) MORE OR LESS  
EXCEPTING THEREOUT:     HECTARES (ACRES) MORE OR LESS  
A) PLAN 1721619 – ROAD   0.692    1.71  
EXCEPTING THEREOUT ALL MINES AND MINERALS  
Municipally located at 12560 Fort Road, Edmonton, Alberta

AND IN THE MATTER OF the Notice of Objection to the said intended expropriation filed on behalf of the landowner 539878 Alberta Ltd., 864163 Alberta Ltd. operating as Carma Auto Sales (also known as Carma Auto) and Michael Kraychy and Giselle Miller, as represented by their solicitor, Mr. Kim Wakefield, Q.C. of Dentons Canada LLP;

AND IN THE MATTER OF an Inquiry in respect thereof pursuant to the provisions of the *Expropriation Act* by Sharon Roberts as Inquiry Officer appointed to conduct the said Inquiry by the Minister of Justice and Attorney General for the Province of Alberta, as represented by Kate Bridgett, Acting Executive Director, on January 3, 2020;

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REPORT OF THE INQUIRY OFFICER

SHARON ROBERTS

MARCH 2, 2020

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Kraychy and Giselle Miller

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TABLE OF CONTENTS

	Page
I. .... PURPOSE AND INITIATING PROCEDURE .....	1
II. .... SUMMARY OF EVIDENCE .....	2
A. .... EVIDENCE OF THE EXPROPRIATING AUTHORITY .....	2
1. .... Direct Examination of Kris Lima .....	2
2. .... Cross Examination of Kris Lima .....	6
3. .... Qualification of Randy Block .....	7
4. .... Direct Examination of Randy Block .....	7
5. .... Cross Examination of Randy Block .....	12
B. .... EVIDENCE OF THE OBJECTORS .....	13
1. .... Qualification of Ken Zhao .....	13
2. .... Direct Examinaton of Ken Zhao .....	14
3. .... Cross Examination of Ken Zhao .....	18
4. .... Direct Examination of Michael Kraychy .....	19
5. .... Cross Examination of Michael Kraychy .....	21
6. .... Redirect Examination of Michael Kraychy .....	21
III. .... SUMMARY OF ARGUMENT .....	22
A. .... Expropriating Authority’s Argument Regarding the Intended Taking .....	22
B. .... Objectors’ Argument Regarding the Intended Taking .....	24
IV. .... NOVEL QUESTION .....	27
V. .... FINDINGS OF FACT .....	29
VI. .... OPINION ON THE MERITS .....	31
VII. .... COSTS .....	33

I. PURPOSE AND INITIATING PROCEDURE

1. This Inquiry was held at the offices of Field LLP in Edmonton, Alberta located at 2500, 10175 101 Street NW on January 29, 30, 31 and February 3 and 12, 2020. The expropriating authority, The City of Edmonton (the "City"), was represented at the Inquiry by Laura Dunham, Gordon Buck and Andrew Chai. 539878 Alberta Ltd., 864163 Alberta Ltd., Michael Kraychy and Giselle Miller (collectively, the "Objectors") were represented by Mr. Kim Wakefield, Q.C. of Dentons Canada LLP.
2. I was appointed as Inquiry Officer in this matter by the Minister of Justice and Attorney General for the Province of Alberta, as represented by Kate Bridgett, Q.C., Acting Director of Litigation, on January 3, 2020 pursuant to three Notices of Objection to the said intended expropriation filed on behalf of the Objectors, by way of their solicitor, Mr. Wakefield, Q.C. (the "Notices of Objection").
3. The three Notices of Objection before me in this Inquiry were dated December 24, 2019 and addressed a Notice of Intention to Expropriate that the City registered against title to the subject lands, located in the City of Edmonton at 12560 Fort Road (the "Fort Road Lands") on or about December 3, 2019 (the "NOITE").
4. The NOITE states that the interest in the Fort Road Lands intended to be expropriated is the fee simple interest, together with all registered and non-registered rights, titles and interests in and to all or part of the Fort Road Lands of all owners, and any other interests of any other owner who has an interest in or possession of or occupation of the Fort Road Lands, excepting thereout all mines and minerals.
5. The NOITE further states that the work or purpose for which the said interest in the Fort Road Lands is required is:

Without limitation, to facilitate the construction of the Yellowhead Freeway Conversion Program, which may include the widening and upgrading of Yellowhead Trail and nearby roads, intersections, over/underpasses, public utilities, sidewalks, as well as access modifications, road network improvements, interchange construction, construction of public utilities and sidewalks, and any other infrastructure incidental to the construction of the Yellowhead Freeway Conversion Program.
6. The Notices of Objection was made pursuant to section 10 of the Expropriation Act and each one states that the Objector under each such Notice objects to the intended taking on basis that the proposed expropriation is unfair, unsound and not reasonably necessary in the achievement of the objectives of the expropriating authority, the City of Edmonton and, in so doing, relies upon the following grounds:
  - a. The lands are not required or not required in their entirety to expand Fort Road;
  - b. There are less obtrusive ways for the City of Edmonton to expand Fort Road; and

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c. Such other grounds as may be disclosed in the record.

7. It was not disputed in the evidence or argument of either the City of the Objectors and I find that all procedural requirements under the *Expropriation Act*, including all appointments, notices, filings and Land Titles Office registrations relating to the intended expropriation and this Inquiry were fulfilled in accordance with the *Expropriation Act*.

## II. SUMMARY OF EVIDENCE

8. The City of Edmonton called two witnesses, the first being a lay or ordinary witness, namely, Kris Lima, and the second being an expert witness, Randy Block. Kris Lima was a City of Edmonton employee at the time of the Inquiry and is the director of the Yellowhead Trail portfolio section at the City of Edmonton. At the time of the Inquiry, Randy Block was a Senior Transportation Engineer and Corporate Support and Technical Advisor with WSP, the consultants retained by the City of Edmonton as part of the Fort Road expansion portion of the Yellowhead Freeway Conversion Program (the “Yellowhead Program”). The ordinary and expert witnesses’ evidence, both in direct and on cross examination, is summarized below.

### A. EVIDENCE OF THE EXPROPRIATING AUTHORITY

#### 1. Direct Examination of Kris Lima

9. Mr. Lima has both bachelor of engineering and master of structural engineering degrees, together with a civil engineering technology diploma. He has over 18 years’ experience in design and project management, primarily in civil, bridge, transportation and infrastructure. His team at the City is responsible for the planning, design and construction of the Yellowhead Program. His experience includes very small to large transportation infrastructure projects.
10. The Yellowhead Program, according to Mr. Lima, involved converting the existing Yellowhead Trail and converting it into a freeway, meaning a free-flowing thoroughfare east to west from the North Saskatchewan River in the east to the western portion of the City. It requires removal of 10 to 12 signalized intersection, including by grade separation and channeling of traffic. Mr. Lima testified that the Yellowhead Program is fully funded by the City and two funding partners, being the Alberta (provincial) and Canadian (federal) governments. The project is anticipated to take eight to nine years to complete.
11. Mr. Lima’s evidence on behalf of the City is that the Yellowhead Program involves consideration of network improvements so as to support not only the movement of traffic onto and off of Yellowhead Trail but *support for businesses adjoining or directly adjacent to Yellowhead Trail and beyond*. The Yellowhead Program had its origins in the City’s September 2009 transportation master plan, The Way We Move.
12. The transportation master plan was adopted shortly after the introduction of Bylaw 15100, The Way We Grow, the City’s municipal development plan. Mr. Lima testified that The Way We Grow is focused on the City’s growth and development as a sustainable urban centre

that integrates land, transportation systems and people. Page 6 of The Way We Grow (section 1.4) describes the alignment of City strategic planning processes with a “holistic approach toward city building over the next three decades”. According to The Way We Grow, the transportation master plan (The Way We Move) establishes City Council’s policy direction for transportation decisions.

13. Among the strategic goals set out in The Way We Move are access and mobility. Mr. Lima noted that these are objectives of the Yellowhead Program, which includes the movement of not only individual motorized vehicles but public transit, pedestrians and cyclists. Another strategic goal identified in the Transportation Master Plan is “a well maintained infrastructure”, which Mr. Lima described as “the buzz word of the day” or, in other words, *sustainability*. According to Mr. Lima, not only the current generation but future generations are considered through the design process and construction process, at least to lay groundwork to have sustainable or well-maintained infrastructure, which is a social, environmental and fiscal responsibility.
14. The Yellowhead Program, in Mr. Lima’s evidence, is not merely about moving people through the City. Rather, it’s about moving people in and out of the corridor, bringing business to and good and services into and out of the corridor and supporting the adjoining Capital Region by having an effective, responsible network to support the movement of goods and services. Mr. Lima noted that this planning document, The Way We Move, “talks about complete, healthy, and livable communities”.
15. One example of this is shared use paths (“SUPs”), which are pathways the use of which is shared between pedestrians, cyclists, and others. Mr. Lima conceded that SUPs may not be desirable or relevant along the course of the freeway into which Yellowhead Trail is being converted. Rather, his team is looking at the adjoining communities to see if there are links the City can establish, for example, with a new sidewalk where there has never been one.
16. The Way We Move includes a road classification system, which includes local roads, collector roads and arterial roads. Local roads are those within neighbourhoods, they are narrower, sometimes lower speed. Collector roads are somewhat wider and enable travel between local roads in one area and another area, i.e., they collect traffic from one local road and channel it to arterial roads. Mr. Lima pointed out that in more recently constructed neighbourhoods, there will be one collector road coming out of a neighbourhood that attaches to an arterial road. Arterial roads carrying higher volumes of traffic, are generally wider, have more lanes and permit travel at higher speeds.
17. Mr. Lima testified that Fort Road is currently an arterial road. He expects it will remain so following the proposed changes to it contemplated by the Yellowhead Program.
18. Mr. Lima reviewed a City Council agenda for February 21, 2017 from the City’s evidence and considered a community report presented to Council per that agenda. The report was intended, according to Mr. Lima, to update City Council with respect to the state of funding at that time and to seek approval of the proposed budget for the freeway conversion project. Mr. Lima then explained that the term “Program” is used for this project because, in reality, his team has about eight to ten active projects at any given time pertaining to the Program, of

which the Fort Road widening is but one. The Way We Move includes a schedule of events; Mr. Lima acknowledged that some timelines in it have been pushed back by one or two years.

19. The February 21, 2017 report on the Yellowhead Program was approved by City Council as presented. Mr. Lima indicated the budget for the Yellowhead Program is approximately 1.03 billion dollars. The provincial, federal and City governments have each provided one third of a 760 million dollar budget; the balance to bring the Program costs to 1.03 billion the City alone must fund.
20. With respect to the intended taking that is the subject of this Inquiry Report, MR. Lima noted that the Fort Road widening project is closely linked to another project, being the construction of 125 Avenue to connect the new freeway (currently Yellowhead Trail) with 66 Street to the east, running in a north/south direction. The widening of Fort Road will accommodate traffic between the inner ring road, being Yellowhead Trail, and the City's outer ring road, being Anthony Henday Drive.
21. Mr. Lima testified that the intersection of Fort Road at Manning Drive is an important link between those two ring roads for the movement of goods, services and people. The collector road, 125 Avenue, is intended to be built in 2021, before the Fort Road widening construction, which is to begin the following year, to address construction impacts of the Fort Road work. The City intends to build 125 Avenue in priority, in short, to mitigate the impact of the Fort Road widening while still supporting the transportation network between the two ring roads.
22. Another important part of the Fort Road widening project within the Yellowhead Program is the lengthening of the CN rail bridge over Fort Road, and lowering of the road surface beneath that overpass to address an existing shortfall in the clearance available for tall vehicles travelling on Fort Road north of Yellowhead Trail. Mr. Lima anticipates Fort Road remaining open to some degree during the widening, with support for traffic distribution coming from the then-constructed 125 Avenue collector road. In short, construction of 125 Avenue – which by necessity requires a taking of a portion of the Fort Road Lands – is a critical constraint on scheduling in the sequence of interrelated projects in this portion of the Yellowhead Program.
23. In 2015 the City completed a Fort Road widening Concept Plan and report. Mr. Lima testified that the report looked at what was required and the project impacts from various perspectives, including traffic analysis, area context, utilities, and environmental impacts. His evidence was that, this process yields “a good understanding of what’s going to be required from an infrastructure perspective, possibly from a utility perspective, and sort of what sort of impacts it may have socially, environmentally, and on existing and possibly future infrastructure” [emphasis added].
24. I understood Mr. Lima’s evidence to be that concept plans are intended to enable an understanding of the limits of area required for the road, which is not merely about vehicles and travel but also multiple other variables, including multi-modal transportation and utilities. That being said, Mr. Lima testified that he did not expect any fundamental changes from the 2015 Concept Plan for the Fort Road widening project. He further stated that Appendix B to

that Concept Plan Report shows the Fort Road Lands as being required in their entirety for the road widening.

25. When asked why the Fort Road Lands are required, Mr. Lima said that part of the widening project is to support the adjoining network. This includes “understanding that we need to adequately and in an efficient way support our businesses and our local businesses.” He went on to explain that in the concept plan, 125 Avenue curves around and becomes 71 Street, and a means to connect an adjacent business community. It is another means of access for businesses and residents of the area to access the community to the north or the west. According to Mr. Lima, the 125 Avenue collector road requires the taking of a portion of the Fort Road Lands and is “a vital connector to the business community to the west.”
26. Mr. Lima identified the subject of this Inquiry as falling under two projects within the larger Yellowhead Program, namely, the section of Yellowhead Trail from 82nd to 50th Street (Fort Road Widening project) and the 125th Avenue, Yellowhead Trail to Fort Road project. Although these are displayed in a more current scheduling document as two projects, this is done for the public and, in fact, contractually these two initiatives are a single project.
27. The first phase – 125 Avenue – is into preliminary design with an intended construction start as early as next year. Mr. Lima testified that the City currently anticipates this initiative going to tender in January 2021, and construction commencing May 2021. The City has retained WSP as the successful proponent under its RFP for this work and entered into a contract with WSP in or around late December 2019.
28. Mr. Lima explained the role of concept planning relative to preliminary engineering or design. One of the initial steps is to validate the concept planning work done in 2015, not by validating the approach to that plan but by fine tuning the elevations and other particulars. After the validation and preliminary design phase is detailed design or detailed engineering. By the end of detailed engineering (or in some cases at the end of preliminary design), the City and other stakeholders are sufficiently confident that the work can go to tender and be publicly bid upon – i.e., the work can be accurately priced and built.
29. Mr. Lima testified that, ordinarily, there isn’t a big difference between the concept plan and for-construction design in terms of the land required to complete the work. He would not normally anticipate much change in terms of the footprint of land required from the concept stage to the end of detailed design.
30. The City’s general practice, according to Mr. Lima, is to go directly to market with a request for proposal after detailed engineering is completed, provided budget is in place (as it is here). This is done for a number of reasons, including the fact that when projects sit on the shelf, guidelines and other matters can change and impact cost, among other things. For this reason, WSP was already into validation since it was retained for the two related projects within the Yellowhead Program. This includes bringing the project up to today’s guidelines and standards. The scope of work from the Inquiry stage forward would, said Mr. Lima, include preliminary engineering of 125 Avenue, the Fort Road widening, the CN Rail overpass lengthening (bridge lengthening) and utilities – identified by Mr. Lima as including



water, drainage, telecommunications, street lighting, as well as multimodal transportation objectives (SUPs, sidewalks, connectivity between business communities, etc.).

## 2. Cross Examination of Kris Lima

31. On cross examination, Mr. Lima was asked whether his training and practice experience is in civil and structural engineering, not water resources or hydraulic engineering. He admitted he is not a specialized hydrologist, but his civil engineering training did include some course work in hydrology.
32. Mr. Lima was asked whether the two projects he described – the Fort Road widening project and the 66th Street project – are interrelated. He confirmed they are. After reviewing the limited references to drainage in the 2015 Concept Planning Report on the Fort Road project, Mr. Lima was asked to confirm that there was precious little about drainage in that Report. He so confirmed.
33. Mr. Lima was then referred to a Yellowhead Trail/66th Street Concept Planning Study Report dated October 2019 prepared by Al-Terra Engineering, a City consultant retained in relation to portions of the Yellowhead Program. Mr. Lima acknowledged this report had been produced in or around October 2019. He further confirmed that this report had not been finalized yet, at least as at the date on which Mr. Lima gave evidence in this Inquiry. The 2019 Al-Terra report indicates that “[a] modelling study to review the drainage for the area, including Fort Road and 125 Avenue, is currently underway and may influence the drainage work of this study.”
34. Mr. Lima confirmed that the “modelling study” referenced in the Al-Terra report formed part of the deliverables in the Description of Work for the Fort Road project. In it, section 4.7, entitled drainage design, requires the consultant (which Mr. Lima confirmed to be WSP) to identify the impact of the Fort Road widening and addition of 125 Avenue on the existing drainage system. Mr. Lima went on to confirm that, based on a RFP procurement process, the City retained WSP to complete that modelling study and identifying the impact of the Fort Road project on the existing drainage system. Mr. Lima confirmed that WSP has drainage expertise, hydraulic or water resource engineers to complete this work.
35. According to the Description of Work with respect to which WSP was the successful contractor, at minimum, WSP is required to review various items, including the identification of catchment areas and review of record drawings. Further, WSP is required to prepare and submit preliminary drainage design report and detailed design drainage report, design drawings and cost estimates for identified system deficiencies and recommended upgrades. Mr. Lima acknowledged that this deliverable had not been completed yet; he assumed work on it was underway given the schedule of deliverables in the Description of Work, which targeted July 31, 2020.
36. Mr. Lima was asked about the repeated references in the Al-Terra report to use of “a holistic approach”, including for the review of drainage of the “entire area up to Fort Road” in addressing capacity issues “would likely be beneficial to all of the City projects in the vicinity”, he declined to answer whether adopting a holistic approach is desirable. He

admitted, however, that Al-Terra recommended completion of a drainage study and modelling for the general area, including Fort Road, 125 Avenue and Yellowhead/66 Street projects so as "to develop a holistic approach to address drainage for that area."

37. Finally, Mr. Lima acknowledged that Michael Kraychy is a local business owner, having carried on business on the Fort Road Lands for many years.

### 3. Qualification of Randy Block

38. After hearing from Randy Block with respect to his education and 35-year transportation engineering history, his professional qualifications and expertise, I heard from counsel for the City and the Objectors with respect to the same. Mr. Block had some prior experience providing expert evidence in litigation and subdivision development appeal board (tribunal) contexts in his practice discipline, civil engineering.
39. It was Mr. Block's evidence that approximately 10% of the engineering work involved in complex transportation infrastructure projects typically pertains to drainage. Mr. Block is not an expert in hydraulic engineering, drainage or hydrology and was not so qualified, nor did the City seek to have him qualified as an expert in drainage, notwithstanding drainage issues being a major focus of the letters and memoranda of opinion authored by Mr. Block and tendered in evidence by the City. Mr. Wakefield, Q.C. urged me to give no weight to any opinion evidence of Mr. Block relating to drainage and, rather, to prefer the evidence of Ken Zhao, the expert witness for the Objectors. I address this issue in my findings and opinion, below.
40. Ultimately, I qualified Randy Block to give expert opinion evidence in his capacity as a transportation and civil engineer, senior project manager with expertise in municipal transportation related infrastructure with respect to the need for the Fort Road Lands, in their entirety, for completion of the Fort Road widening project and the 125 Avenue construction project.
41. So as to ensure all of the evidence available on point was before me, with weight to be considered in forming my opinions and preparing this report for consideration by City Council, I permitted examination, in direct and on cross, of Mr. Block with respect to drainage issues pertaining to the Fort Road Lands. In doing so I was mindful that the City produced Mr. Block to testify as to why the Fort Road Lands are required for completion of the Fort Road widening and 125 Avenue construction projects within the Yellowhead Program.

### 4. Direct Examination of Randy Block

42. Mr. Block's initial written technical memorandum, dated January 20, 2020, states that WSP is a multi-discipline Consultant Firm providing a broad range of services in the area of municipal and transportation infrastructure. WSP is currently retained to provide consulting services for the Fort Road widening project within the Yellowhead Program. Mr. Block is the WSP Project Manager for this Fort Road widening project and is responsible for the delivery of all WSP engineering services on that project. Among those are transportation, structural, electrical, municipal infrastructure (storm water management and drainage, utility

coordination), geomatics, environmental, geotechnical investigation, LRT crossing design coordination and review, and construction phase engineering services.

43. Mr. Block testified that the reasoning behind the work on Fort Road in terms of widening it to six lanes, and to the industrial collector road (125 Avenue), is to help manage some of the increased traffic volumes anticipated once the City starts to close intersections on Yellowhead Trail as part of its conversion into a freeway. Some of those intersections are at-grade; their closure will improve traffic flow so as to achieve a freeway flow condition. The corresponding displaced traffic, once those intersections are closed, will need a place to go so drivers can still access the freeway and their neighbourhood residences and neighbourhood businesses. Accordingly, the vision is to have Fort Road replace some of that displaced traffic. The current at-grade intersection will become a grade-separated intersection with interchange and limited movements. Some of the traffic will end up having to travel north on 66 Street and connect with 125 Avenue, giving those vehicles a correction heading west to connect onto Fort Road when drivers can make left turns and access the all-directional interchange at Fort Road and Yellowhead Trail.
44. Fort Road is currently a four lane roadway. Widening it to six lanes will help carry demands of increased traffic volumes that will be seen and future traffic volumes from growth in the area. 125 Avenue will also be constructed in that area, connecting west of Fort Road to existing 71 Street, which requires the new roadway to run through the Fort Road Lands. 125 Avenue will also extend to the east of Fort Road, past the new transit centre adjacent to Yellowhead Trail and Fort Road. There will be a new LRT crossing before 125 Avenue intersects at a signalized intersection with 66 Street, enabling displaced traffic to access Fort Road from 66 Street.
45. Mr. Block's role as lead of the multi-discipline team at WSP responsible for this project is to ensure an integrated design and to work with all individual disciplines to achieve that integration and a holistic approach to the project. At the time of this Inquiry, WSP was still at the concept stage, validating the 2015 concept plan and working on the deliverables under the Description of Work. WSP is not yet at detailed design in any of the project components (geometry, grade lines, storm water management, for example). The process is, according to Mr. Block still at "a very high level". That said, this process allows WSP to define the scope and needs of the project.
46. Mr. Block explained that part of the Fort Road widening project includes changes relating to the desire of CN Rail to get clearances up to legal limits on its rail structures passing over Fort Road. Fort Road is part of the City's 24-hour truck route. Currently, clearances are only 4.1 metres northbound and 4.0 metres southbound, both of which are significantly deficient. Maximum legal clearance for Alberta roadways is 5.4 metres. To achieve the requisite clearance, the road surface on Fort Road must be lowered beneath the CN Rail structures, and the CN structures must be extended to the west and, as planned out long ago, they are also to be widened to the west of Fort Road. Prior work was done in anticipation of the eventual widening of Fort Road to the west.
47. Mr. Block discussed the City's past acquisition of a portion of lands that formerly were part of the Fort Road Lands at 12560 Fort Road, which were defined as the "Right of Way Lands"

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during the Inquiry. He testified, as did Mr. Lima, that there had been an agreement between the registered landowner and the City executed in 2005 that resulted in the City acquiring the Right of Way Lands in May 2017; in consideration for the acquisition the City paid cash and exchanged lands, as discussed in more detail below in the summary of Michael Kraychy's evidence. The road widening portion of the Fort Road project will utilize those Right of Way Lands. There are also plans to incorporate a three-metre shared use path (SUP) and 1.8 metre sidewalk on the other side to remedy the very limited sidewalk area currently located along Fort Road.

48. Mr. Block testified that the new transit centre to the east of the Fort Road Lands and Fort Road, was built out with parking and storm water facilities and was preparing to open for operations at the time of the Inquiry. He also explained that to the north and east of Fort Road is a vacant parcel of land which has some identified soil contamination; Mr. Block was not aware whether remediation work was being undertaken, but noted some grading activity on site.
49. In Mr. Block's opinion, the Fort Road Lands are required for the construction of 125 Avenue, a surface storage pond and a subsurface storage vessel (two thirds of which would be located under the Right of Way Lands, one third under the Fort Road Lands) for drainage from the additional asphalt surface created when 125 Avenue is built over the Fort Road Lands and the CN underpass road surface is lowered. In addition, the Fort Road Lands will be needed for back sloping on a permanent basis and as a temporary laydown and staging area, according to Randy Block, who testified that only a small, unusable remnant would remain after these various uses are made of the parcel.
50. Further, there would be almost no means of accessing the remnant portion even if a lesser amount of it were needed for a surface storage pond given the necessary alignment of 125 Avenue as it arcs at grade over the Fort Road Property and adjoins with 71 Street, which limits sign lines significantly. Other modifications would have to be made for an access to be established off of 125 Avenue, including the restriction of boulevard landscaping that could limit already constrained sight lines for motorists using that corridor. Accordingly, Mr. Block is of the opinion that the Fort Road Lands are required in their entirety for the Fort Road Widening Project. In reaching this conclusion, he rebutted each of the arguments advanced by Objectors' hydrologist expert, Mr. Ken Zhao as follows.
51. First, Mr. Block critiqued Mr. Zhao's opinion evidence as having been directed toward finding solutions to regional drainage issues, well beyond the scope of WSP's engagement, though his evidence was that the Zhao opinion was beyond the scope of the Fort Road widening project and that the project is not there to solve all regional drainage needs.
52. Second, Mr. Block opined that Mr. Zhao misapprehended the hard surface area differential between the 66 Street project and the Fort Road project, suggesting that there is 30 times the net hard surface area in the Fort Road widening/125 Avenue construction project in the area of the Fort Road Lands relative to the change in surface area resulting from the 66 Street project.

53. Third, Mr. Block rejected Mr. Zhao's critique of the evaluation criteria and opportunistic sewer separation ("OSS") accommodation that was requested by EPCOR. Mr. Block maintained that this is only related to the 600 millimetre combined sewer, and not any provisions for separation of the 1500 millimetre trunk main. According to Mr. Block, it is "quite feasible and functional" for WSP to accommodate the requested sewer separation within the Fort Road widening project given that the consultant is already lowering the grade line under the CN underpass and extending that underpass. Further, he opined that the project results in considerably more road surface infrastructures to drain, necessitating improvements in the area in any event.
54. Fourth, Mr. Block agreed with Mr. Zhao's opinion that true sewer separation will not be achieved with the methods proposed by WSP. That is not, in Mr. Block's opinion, the object. Rather, the plan is to "facilitate the future sewer separation of the 6000 millimetre combined sewer line, then reintroducing that at the project limits. The intended purpose of this plan is for EPCOR or its contractor to then connect at the project limits at a future date, with less disruption. According to Mr. Block, the goal is not to improve downstream beyond the project limits; WSP's responsibility is not a regional one.
55. Fifth, Mr. Block conceded that Mr. Zhao was correct in noting that WSP overestimated a portion of the drainage area indicated in concept drawings insofar as some of the area indicated is serviced by a separate drainage system at present. Further, Mr. Block rejected the suggestion that the higher volumes and increased flow would be directed to a treatment plant as a function of reducing/eliminating flooding at the CN underpass and increasing service levels to a 1 in 100 year events level, arguing instead that the underground or subsurface storage facility will, in fact, reduce the rate of inflow into the combined sewer line and will actually lessen the dilution of sewage during a storm event.
56. According to Mr. Block, this will result in a more constant organic load in the sewage, making the process more operationally effective. In short, the higher volume into the underground storage and slower volume leaving it would effect a buffering of the process, making the downstream sewage plant operate more efficiently.
57. Next, Mr. Block responded to Mr. Zhao's reference to combined sewer overflows. Mr. Block asserted that this is a regional matter and the drainage plan being considered for the Fort Road widening project is not intended to handle storm drainage requirements across the region, only those within the local project area. Similarly, Mr. Block opined that the separation of the 1500 millimetre combined sewer trunk is part of the regional network, not the Fort Road drainage objectives.
58. With respect to flood risk, Mr. Block noted that Mr. Zhao critiqued WSP's use of Google Earth profiles for defining catchment areas as "a crude method" and recommended the use of high resolution imagery. This was rejected by Mr. Block, who noted that WSP did not only use Google Earth and that the work to date was still concept level planning work, not even at preliminary design stage. Further, WSP had been given and relied upon GIS shape files by EPCOR and, together with survey data, used them to identify horizontal and vertical positions of storm lines in the project area. Finally, Mr. Block testified that high resolution

imagery will be used to define catchment areas during the preliminary design phase of the project.

59. Mr. Block responded to Mr. Zhao's observation that the 127 Avenue storm trunk to the north of the Fort Road project (a 2,400 mm trunk) should have been considered as an option for a downstream sewer connection as it could have provided true sewer separation and is lower than the proposed underpass elevation. Mr. Block testified that the 127 Avenue trunk was, in fact, considered when examining options for downstream connections, but was rejected as it was known to have frequent surcharging or overflow. This could place the underpass at risk of backup from the storm drainage trunk, he said and, further, this option lacked the depth of clearance required at the CN underpass.
60. Mr. Block responded to Mr. Zhao's concerns over the limited benefit of the surface storage pond in terms of reducing drainage contribution for the underpass area. Mr. Block conceded that the total catchment area contributing to the underpass is greater than 12 hectares. He agreed with Mr. Zhao that in the event that the 127 Avenue storm trunk surcharges, causing it to back up and overflow, an overland flow of that back up would possibly travel to the CN underpass area. In other words, in a large storm event, the pipe may not be able to handle the influx of drainage, and starts to back up. Once that happens, everything at surface will drain past the collection point, to the lowest point – namely, the underpass. Mr. Block agreed with this possibility but opined that this is a problem with the 127 Avenue trunk main, and outside the scope of the Fort Road project.
61. Next, Mr. Block acknowledged that, as set out in Mr. Zhao's opinion, the surface storage pond proposed by WSP at the concept planning stage, offered very little benefit by providing a 15% reduction in drainage in the underpass area. However, Mr. Block testified, from EPCOR's direction to do whatever was possible to effect an incremental reduction in drainage flows into the system, it was possible to achieve a large net benefit from various incremental developments within the overall drainage network.
62. Mr. Block referenced Mr. Zhao's further argument that underground storage could be constructed under the Kathleen Andrews transit centre or under Fort Road, and that such storage may be able to meet the incremental runoff associated with the Fort Road project. However, Mr. Block reiterated that the transit centre was "fully built out" and, further, that a review of the lands did not reveal any opportunity for underground storage or a combining of the sites' drainage needs. Further, with respect to the suggestion to locate underground storage under Fort Road, Mr. Block testified that while it is feasible, that area is currently needed to establish some alignment for a water line that will require some relocation, together with the new separated storm sewer line, will all be placed under Fort Road. In light of that, Mr. Block's opinion was that the best option in terms of flexibility is to move the subsurface storage into the Right of Way Lands, at minimum. Further, in the event of future work, it is more convenient to dig up a green space outside the roadway than to dig up Fort Road anew, Mr. Block indicated.
63. Mr. Block testified that the decisions respecting what lands to utilize in the project followed a multi-disciplinary approach and that a number of considerations were taken into account, not merely the best place for the facilities. When an objection was made that this was new

evidence, not previously disclosed, Mr. Block was asked about whether there were minutes of any meetings in which these considerations were entertained and a decision of what lands for what purpose was made. However, Mr. Block said it was “just an internal design discussion” and was not recorded in minutes or otherwise documented in writing..

64. With respect to Mr. Zhao’s suggestion that the vacant lands east of Fort Road and north of 125 Avenue would be more suitable for locating the storm water management facility and could be developed into a regional facility, Mr. Block testified that the storm water management concept plan for Fort Road is intended to manage drainage for the local area, not the regional area. It is not intended to solve regional drainage issues. Further, those vacant lands belong to another landowner and not the City; they too are private lands. In addition, those lands are known to be contaminated and, in Mr. Block’s opinion, would involve “considerable more costs” to remediate and involve a “large depth of excavation” to service the underpass area.

#### 5. Cross Examination of Randy Block

65. On cross examination, Mr. Block confirmed that WSP first became involved in the Fort Road project in November 2019. He clarified that the signed contract was not received until sometime in January 2020, however. By that time, the NOITE respecting the Fort Road Lands had already been issued (in October 2019), although Mr. Block was not aware of the timing.
66. Mr. Block admitted, in fact, that his team had been frustrated because the team had inquired of the City what lands were available and which lands were not and the fact that the intended taking of the Fort Road Lands was objected to or subject to expropriation was not disclosed. Mr. Block speculated this may have been done so as not to prejudice WSP’s decision process and design, but no evidence was led by the City about this.
67. Mr. Block confirmed on cross examination that his team had looked at the Kathleen Andrews Transit Facility on the east side of Fort Road, opposite the Fort Road Lands, and assessed that this property had no capacity for additional contributions of storm water drainage. He was asked if there was any document that records this assessment, which Mr. Block assumed would have been the case, but could not confirm. He agreed to find out. I was advised by counsel for the City, after the close of evidence and during the course of oral argument, that Mr. Block had confirmed that no such record exists.
68. When asked about the risk of an overland flow in the event of a surcharge affecting the 127 Avenue trunk main, Mr. Block reluctantly admitted that a very large portion of the water moving towards the CN underpass on Fort Road would come from outside the project area, i.e., it is a regional matter, but that the impact would be experienced as a local event within the project area, and more specifically, at the lowest point, being the underpass area.
69. Mr. Block also conceded that the City owned neither the lands north of the Kathleen Andrews Transit Facility nor the Fort Road Lands, that he was unaware whether there was any contamination on the Fort Road Lands, that he was not aware that Michael Kraychy had signed right of entry agreements allowing the City to test for contamination on the Fort

Road Lands, or that the City had not done so to date. Mr. Block was aware, however, that the City had registered a Notice of Intention to Expropriate for a portion of those lands north of 125 Avenue and east of Fort Road, opposite the transit centre lands.

70. Mr. Block further declined to answer questions about whether a car lot could continue to operate on the remnant portion of the Fort Road Lands if the surface storm water pond was not located on it and if the underground storage facility did not require a portion of the Fort Road Lands, saying he could not comment as he did not know what the operation was or how viable it might be. In addition, Mr. Block testified that he was not aware of any contractual agreement between the City and the owner of the Fort Road Lands ensuring access to the back of that parcel (i.e., the portion opposite Fort Road).
71. Mr. Block confirmed the timeline of WSP deliverables to the City as set out in the Description of the Work. He also confirmed that, but for the storm drainage issue, there would be no need to expropriate the entirety of the Fort Road Lands. Finally, he confirmed that there are two sources of storm water requiring drainage in the Fort Road project area, one of which is any storm water coming off the paved surfaces and the other is the rest of what's shown in the catchment area identified in the WSP conceptual drawing of the surface and subsurface storage areas on the Fort Road Lands.
72. At the time of the Inquiry, Mr. Block had not checked the capacity of the 1500 millimetre trunk line along Fort Road. Mr. Block conceded that, as Mr. Zhao had stated in his report, the City (now EPCOR) operates and maintains many underground facilities below the roadway, including underground storage facilities at Yellowhead Trail for the 1500 millimetre combined trunk sewer just downstream of the project. Mr. Block agreed that, in fact, there are existing projects in the City where there is access to underground storage under roadways.
73. Mr. Block further conceded that the need for staging and laydown areas are not permanent and could be achieved with something less than a full taking of the Fort Road Lands for those purposes. However, Mr. Block argued that the portion of the Fort Road Lands that originally would be used for a laydown area for the CN expansion work would later be required for backsloping. Asked to refocus solely on the laydown area purpose, he admitted that could be achieved by means other than a permanent taking through expropriation. He further admitted that he had not been aware that Michael Kraychy had agreed to allow the City to use a portion of the Fort Road Lands as a lay down area.

#### **B. EVIDENCE OF THE OBJECTORS**

74. The Objectors called one expert witness, being Ken Zhao, who holds a PhD in engineering and a permit to practice in Alberta.

##### **1. Qualification of Ken Zhao**

75. Mr. Zhao was presented for qualification as an expert in water resources engineering, specializing in water management, drainage assessment and design, hydrology, hydraulic modelling for the purposes of giving evidence with respect to drainage aspects relating to



the project in issue in the proposed expropriation of the Fort Road Lands. The City made no objection and I so qualified Mr. Zhao.

## 2. Direct Examination of Ken Zhao

76. Mr. Zhao began by noting his impression that the justification to take the entire parcel of land referred to in this inquiry as the Fort Road Lands is partially or primarily due to the storm water storage proposed by WSP. As such, Mr. Zhao focused his attention on the drainage aspects of the intended taking and acknowledged that whether or not this is a critical component of the purpose for which the entirety of the Fort Road Lands is proposed to be taken is outside of Mr. Zhao's scope given his specialization in drainage, hydrology and water management.
77. Mr. Zhao described the Fort Road project as a "typical road expanding, widening project", which would typically be required to accommodate incremental runoff due to the change of the footprint of the road involved. Mr. Block's January 20, 2020 memo identified a distinct component that often goes with road project, being drainage improvement. In Mr. Zhao's opinion, EPCOR is separate from road construction, road transportation. He acknowledged, however, that Mr. Block correctly emphasized that the objective of drainage here is twofold, namely, to separate combined sewer in the project area and to provide flood protection for the underpass beneath the CN Rail crossing. Finally, Mr. Zhao noted that Mr. Block had mentioned another objective, being the accommodation of incremental runoff.
78. Based on the evidence given by Mr. Block during the Inquiry, as summarized above, Mr. Zhao ran calculations on the incremental runoff pertaining to the Fort Road project. The new pavement, inclusive of sidewalks and road surface, on the Fort Road project, is roughly three hectares. However, the underground storage proposed would accommodate, according to Mr. Block, 9.87 plus 0.68 hectares, or three times what is required.
79. Mr. Zhao testified that it is quite common to want to control for flood risk mitigation in low lying areas, such as the underpass beneath the CN Rail structure, and for sewer expression. In Mr. Zhao's experience, the City would usually undertake a study to identify needs because, although improvement relative to drainage could be done separately from road work, it would cost more to do so. In his opinion, Mr. Block's technical memo is more a statement of conclusion or decision absent a cost benefit analysis or means of quantifying how one compares cost versus benefit in terms of financial, environmental and social impacts.
80. Mr. Zhao acknowledged that it is outside his scope to comment on whether the cost of taking the entire parcel of land is a small portion of the overall project costs. He limited his opinion to drainage and an interpretation of Mr. Block's technical memorandum through the lens of a water resources specialist, focusing on the stated drainage objectives of sewer separation and flood risk mitigation. Mr. Zhao's key question was "what benefit can it provide, the drainage plan?"
81. In Mr. Zhao's opinion, as acknowledged by Mr. Block, true sewer separation is not achieved. The work being proposed simply leaves to EPCOR the possibility of a future sewer

separation, should it want to separate the entire region. As such, there is a potential long term benefit, but this hasn't been evaluated. Accordingly, it remains an open question whether the new storm sewer will be required in future – Mr. Zhao posits a 50/50 prospect of a long term benefit resulting from the separation contemplated in WSP's current concept planning proposal. However, in Mr. Zhao's opinion, there are some potential short term negative impact, while long term benefits are not clear at this stage. Based on information currently available, Mr. Zhao testified he is unable to complete sufficient analysis to compare cost to benefit and adequately analyze the decisions being proposed and justified by Mr. Block at this stage.

82. In a typical project where Mr. Zhao is working only on the water resource component of a given project, 90% of his analysis and work is involved in delineating the catchment area. This is a significant component, in his opinion, because if that is off by 50% or 10%, the results will be off by at least the same magnitude. Mr. Zhao took issue with the catchment areas indicated in Mr. Block's memorandum and the concept drawings prepared by WSP, noting they do not accord with the flow direction of existing piping and drainage, or appear to be drawn without corresponding to the directional flow of water/sewer. In his estimation, the concept design is off by approximately 15% at minimum. At maximum, Mr. Zhao opined it may be out of order entirely, but at this stage based on information presently provided by the City and Mr. Block, Mr. Zhao cannot make a decision about whether the design proposed will be achievable.
83. In summary, Mr. Zhao pointed out considerable gaps in analysis in the proposed drainage concept planning produced on behalf of the City of Edmonton for this project. Generally, it is Mr. Zhao's opinion that insufficient analysis has been done to even compare different options. For example, Mr. Zhao indicated that without matching the capacity of the existing large trunk to the output requirements of a new area, there can be no determination of whether capacity exists to accept the output that may be generated, or required to be discharged. Changes in these amounts can materially impact the required size of the surface pond proposed by WSP.
84. There is, in Mr. Zhao's opinion, an unacceptable level of uncertainty in what is being proposed to know that it can, in practical application, ever be realized. While Mr. Zhao conceded the possibility that, because this is a road project, the high level concept may not change much at the preliminary design phase, but there exists the potential of a significant change in preliminary design if drainage is planned more carefully.
85. Mr. Zhao also considered the secondary objective Mr. Block identified with the proposed drainage plan for the Fort Road Lands, namely, to mitigate flood risk. First, it is Mr. Zhao's opinion that there is no meaningful discussion of flood mitigation – i.e., what caused the flooding? How severe is it? There is no definition of parameters, merely a desire to provide a service level of 100 years. In Mr. Zhao's opinion, the City needs to understand where the water would be coming from when flooding occurs.
86. Again, he considers the requisite cost benefit analysis to be missing. While Mr. Zhao agrees with Mr. Block's comment in his rebuttal that any incremental benefit will help in the sense that putting in a storage basin will reduce some flow travelling through the area, he asks

whether that impact is detectable? Is it sufficiently significant to warrant the corresponding financial investment? In place of analysis, there are statements and conclusions. If, for example, the 1500 millimetre pipe is the root of the problem, there will still be a surcharge and back up, with overland flooding into the underpass area below the CN structure. Again, there are analytical gaps at this stage that prevented Mr. Zhao from determining the likely success of the proposed approach to drainage incorporated in the concept planning proposals generated at the time of this Inquiry.

87. With respect to the surface pond referenced in Mr. Block's evidence, Mr. Zhao noted considerable uncertainty at this stage with respect to the functionality and performance of the proposed drainage plan in terms of flood protection. Further, the proposed plan is based on preliminary assessment or high level assessment of local conditions absent a determination of the roots of the flood risk problem. He opined that if the objective is to resolve the risk of flood in the underpass area, the City might undertake a regional study and determine if they actually need the storage being proposed currently; perhaps the risk is all controlled upstream, in which case the storage facilities would be constructed without a corresponding need to be met. Mr. Zhao again emphasized the considerable uncertainty in the drainage design for the project.
88. Further, in his opinion report Mr. Zhao noted that options should have been considered and evaluated, and documentation created to reflect those processes and methods of evaluation. In the absence of that information, Mr. Zhao proposed some alternatives or factors he would consider or evaluate. His focus was not whether or not any remaining portion of the Fort Road Lands was usable by its owner but whether there is any way to save a portion of those lands from being taken. In short, Mr. Zhao sought to exhaust the available options and noted that the matter remains subject to further assessment.
89. As one alternative to achieve opportunistic sewer separation, Mr. Zhao proposed connecting the existing area to an already existing storm sewer, i.e., the 127 Avenue trunk. Responding to Mr. Block's rebuttal of this suggestion, Mr. Zhao noted that no detail has been provided as to whether this connection is absolutely out of consideration. There was no information provided about the risk of surcharge referenced by Mr. Block, what causes the surcharge and does it affect what the City is attempting to achieve in this project area?
90. With respect to the comments of Mr. Block regarding the space limitations in the area of the CN rail structure and Fort Road underpass, Mr. Zhao agreed that space is limited, but also noted that the minimum cover is 0.5 metre and, without a complete analysis it is not possible to say that a connection to the 127 Avenue main is unworkable.
91. Mr. Zhao also opined that to the extent an underground storage facility is required, it is not necessary to locate it on the Fort Road Lands. Such a facility could also be located to the west of Fort Road. Indeed, he noted, this was done (as Mr. Block acknowledged) on the Transit Centre lands, but without the opportunity for the City to accommodate the road widening project at the same time. Mr. Zhao testified that he had not been aware originally of the soil contamination on the unused land just north of the Transit Centre until Mr. Block commented upon it, just as Mr. Block was unaware whether the Fort Road Lands had any contamination.

92. In addressing Mr. Blocks' rebuttal opinion, Mr. Zhao reiterated that the road surface area of the new 125 Avenue, widened Fort Road and addition of sidewalk and shared use path, or in other words the impact of the area footprint, and corresponding incremental increase in water storage required is significant. The hard surface area is only approximately 25% of the total catchment area that the storage is designed for, according to Mr. Zhao. He would expect to see an assessment, such as that done by Al-Terra, including different options for evaluation. This was not done or not provided by WSP.
93. Simply putting in the pipe separation as EPCOR requested be done, to separate the combined sewer results, according to Mr. Zhao, in an OSS (opportunistic sewer separation) project and necessitates a cost benefit analysis being undertaken to evaluate whether it makes sense. In his words, "[y]ou've got to consider if it's worth it", even with a local OSS (as this would be). In Mr. Zhao's expert opinion and experience, the consultant would still need to look at the regional situation, given that "water doesn't recognize boundaries". Water simply flows the way it should, making the distinction Mr. Block drew between local and regional artificial, in effect.
94. In Mr. Zhao's opinion, where, as here, no true sewer separation is achieved by the proposed plan for a potential future benefit (sewer separation at some later date, should EPCOR or the City pursue it), serious consideration should be given to avoiding short term negative impacts. Without a future separation study having been done, it is impossible to know the future separation or what it will require.
95. Further, Mr. Zhao challenged the untested assumption underlying Mr. Block's comments that a more constant rate of flow (in Mr. Block's evidence, 5.1 litres per second per hectare) will be beneficial. There is no evidence that this will be a benefit to the treatment plant, nor is there evidence of what the maximum output discharge is. Depending on other design alternatives, including whether gravity drains are used, the flow rate may actually change; to avoid this, the City would need to install a pump to ensure constant flow at 5.1 litres/s/hectare.
96. It is also disingenuous, according to Mr. Zhao, for Mr. Block to baldly assert that the project drainage plan is not intended to resolve regional drainage issues when, by its very nature, sewer separation is a regional issue. He asked what is the benefit of not resolving that issue, impliedly while incurring corresponding expense and taking privately held lands in the process?
97. Mr. Zhao expressed professional discomfort with Mr. Block's assertion that WSP did not expect any resulting inaccuracy based on the high level concept planning at this stage, indicating he would not make such a statement without having undertaken the assessment necessary to have certainty with respect to catchment delineation and flood risk, including overland drainage. From Mr. Zhao's professional experience with flood risk mitigation, he cannot simply ignore the upstream basin potentially impacting the project area, while acknowledging the constraints of the specific project. He would weigh in on whether or not it's worth doing the local improvement based on that analysis. That has not been done here, at least not at the time of the inquiry.

98. As part of the cost benefit analysis he advocated for, Mr. Zhao opined that it may be that placing subsurface storage under Fort Road or at the Transit Centre may be adequate to meet the incremental runoff associated with the Fort Road widening project. Without running the numbers, this cannot be known and it not known by Mr. Block or his team, and, as such, is not known by the City. Mr. Zhao admitted he did not visit the Transit Centre site personally and, as such, could not speak to whether opportunity may exist to utilize storage options there for runoff from the Fort Road expansion or construction of 125 Avenue.
99. Mr. Zhao maintained that exploring the land north of the new Transit Centre and east of Fort Road remains worthwhile because the land is empty, unlike the Fort Road Lands, on which operates a local business. Those lands may be utilizable to resolve the flood risk at the underpass completely. If that's not desirable due to cost, another option would be to expropriate only that portion required for the road widening project. In Mr. Zhao's opinion, these lands offered greater or potentially greater flexibility, reliability and functionality than the Fort Road Lands. That said, Mr. Zhao acknowledged the complication that soil contamination may add. Mr. Zhao was unaware of the contamination until hearing the testimony of Mr. Block immediately prior to his own.

### 3. Cross Examination of Ken Zhao

100. The City had Mr. Zhao confirm he is not a transportation engineer and does not have expertise in that practice discipline. Nor is he a road designer, an expert in road safety, pavement and road surface design, pedestrian or cyclist connectivity. His qualifications are strictly with respect to water resource engineering. Mr. Zhao agreed that like any of those disciplines, water resource engineering is but one of many disciplines engaged in the design and construction of roadways. He also admitted to having never been a project manager for urban road construction. His project management expertise is with respect to drainage specifically.
101. When asked to admit that the Fort Road widening project is not a drainage project but a road construction project with one component being drainage, Mr. Zhao testified that drainage is a major component of this project, as demonstrated by the fact that there are two stakeholders engaged – the City and EPCOR drainage.
102. When asked if it would be more expensive to separate drainage improvement from road construction, Mr. Zhao denied it would necessarily be so. Rather, he indicated that the very reason for the existence of the opportunistic sewer separation program is the cost benefit analysis, using triple bottom line policy or criteria – i.e, social, economic and environmental. When asked if it would be more disruptive to do drainage and road construction work separately, again Mr. Zhao rejected the automatic assumption this would be true. Without an opportunistic analysis – which was not done here, in his opinion – it is impossible to know whether there will be a need to resolve the problem later by disrupting traffic a second time with respect to drainage.
103. In Mr. Zhao's opinion, as an expert in flood mitigation, it is preferable to adopt a regional approach, which has not been done in relation to the Fort Road project based on

the City's evidence and Mr. Block's opinion. According to Mr. Zhao, Mr. Block's language is that of sewer separation and flood risk mitigation; as such, it warrants the kind of analysis Mr. Zhao advocated. Without doing the regional analysis, there is risk and uncertainty about the relative cost and benefit of what's being proposed. The City does this for many projects, albeit not all of them, in Mr. Zhao's opinion and experience.

104. Asked whether the Fort Road Lands are one option for the drainage improvement proposed for the Fort Road widening project, Mr. Zhao acknowledged it was one option. On redirect, he clarified that based on the information presently available, he cannot say that the Fort Road Lands are a *viable* option.

#### 4. Direct Examination of Michael Kraychy

105. Mr. Kraychy testified that he and his wife, Giselle Miller, are personal objectors. He is also the principal of the objector 539878 Alberta Ltd., which is the registered owner of the Fort Road Lands and the 66 Street Lands that were also the subject of expropriation proceedings that resolved by consent immediately before the Inquiry hearing began. Another objector, 864163 Alberta Ltd., is a commercial leasing company that leases properties to auto sales lots, auto dealers, warehouses. Mr. Kraychy also operates Carma Auto, an auto business, through 864163. Mr. Kraychy has been operating a business at the Fort Road Lands location for 30 years; he also operated for 12 years on the 66 Street lands.
106. By letter dated February 23, 2005 from the City of Edmonton, the City proposed to enter into an agreement to acquire a portion of the Fort Road Lands, the Right of Way Lands, for widening Fort Road at the front portion of 12560 Fort Road so as to avert proceeding to expropriation. The proposal involved both a land exchange and cash payment to be made. Mr. Kraychy agreed to accept a warehouse that the City had as surplus in partial exchange, as a form of deposit, for the Right of Way Lands.
107. The warehouse was transferred in 2005 and credited towards the purchase price for the Right of Way Lands. The City acquired the Right of Way Lands on or about May 31, 2017, in anticipation of the Fort Road widening project moving forward. A number of extensions agreements were signed, largely at the City's request.
108. Over time, the road plan with respect to the configuration of 125 Avenue on the Fort Road Lands changed somewhat, but the agreement contained a representation throughout that access will be located along the future roadway, access point to be determined, likely along the northeast portion of the subject site, being the Fort Road side of the property. There were negotiations for land exchanges over the years, but nothing was mutually agreed upon and ultimately the City paid cash for the Right of Way Lands. No other portion of the Fort Road Lands was sold to the City.
109. Mr. Kraychy's businesses and/or tenants had use of the Right of Way Lands and the Warehouse from 2005 forward until, in the case of the Right of Way Lands, even after the City became the registered owner of them on or about May 31, 2017 until late 2019, when the City insisted on vacant possession as it was entitled to under the February 2005 letter agreement.

110. A courtesy notice dated July 5, 2019 was sent by email on July 8, 2019 to Mr. Kraychy, advising of a July 12, 2019 City of Edmonton executive committee meeting. Mr. Kraychy was out of town and did not attend that meeting.
111. Roughly two years prior, in or around June 2017 Mr. Kraychy met Shawn Caithness from the City of Edmonton and indicated his willingness to lease part of the Fort Road Property as a lay down area during road widening work on Fort Road. Nothing further came of that discussion. Mr. Kraychy also signed two rights of entry agreements, one of which was for the Fort Road Lands; Mr. Kraychy's signature is dated November 8, 2019. Presently, all tenants but Carma have moved off the Fort Road Lands and relocated to other premises and all vehicles that had occupied the Right of Way Lands have similarly been removed.
112. In September 2019 counsel for the Objectors requested a meeting with the City to deal with the related issues of the City's land acquisition and demand that 535878 Alberta Ltd. relocate its improvements, being three office buildings, off of the Right of Way Lands. The City wanted 535878 to move those office buildings approximately 30 feet back, onto the Fort Road Lands and off of the Right of Way Lands, notwithstanding the intended expropriation of the Fort Road Lands. Mr. Kraychy confirmed he had no other property onto which he could relocate those three office buildings. The cost to relocate these buildings Mr. Kraychy indicated is between \$40,000 and \$50,000 based on estimates he's obtained for that purpose.
113. Mr. Kraychy first learned of a storage pond being constructed on the Fort Road Lands at a meeting with the City in December 2019. Mr. Kraychy indicated that he attends at the Fort Road Lands two to three times per week and has attended at the property for the past 30 years. In that time he's never observed flooding in the underpass under the CN Rail structure on Fort Road.
114. Mr. Kraychy described observing the construction work that occurred on the new Kathleen Andrews Transit Centre and speculated that there was remediation work done. He reported rumour of the clean up costing some \$10 million. No documentary evidence was cited among the records produced by the parties.
115. Mr. Kraychy testified that the impact on his business of consenting to the taking of the 66 Street lands and the intended taking of the Fort Road Lands is significant in that he used the 66 Street property as his business' repair clean up shop, while the Fort Road Lands houses the used car sales operation. He further testified that he does not have alternate properties suitable for relocating these operations and that, despite having looked for other properties for that purpose, has not found suitable ones. The City recently offered alternate lands for consideration, but it was located in an industrial area, is neither serviced nor zoned properly; as such, it is not suitable as an alternative location from which to carry on operations of the car lot and repair/clean up shop. In short, Mr. Kraychy's evidence is that he's out of business. He's already lost six tenants

### 5. Cross Examination of Michael Kraychy

116. On cross examination Mr. Kraychy acknowledged that of the various extensions to the acquisition agreement for the Right of Way Lands, the final two, in 2015 and 2016, were made following his request, with the final one being requested so as to allow him to discuss relocation with his tenant and to permit time to complete a land exchange in concluding the agreement (although a further land exchange ultimately did not occur, as noted in the summary of Mr. Kraychy's evidence in direct).
117. In partial payment for the Right of Way Lands, the City transferred and sold, respectively, a warehouse valued at \$400,000 and an old residential apartment building valued at \$266,000. Mr. Kraychy caused his business to pay a cash deposit for the apartment building, with the balance of the purchase price being credited toward the City's acquisition of the Right of Way Lands. He continued to have use of the Right of Way Lands, and paid taxes on the entirety of the property at 12560 Fort Road, including the Right of Way Lands, as well as on the warehouse and apartment lands throughout the period in which he had possession of them and, on the Right of Way Lands, until May 31, 2017.
118. It was a term of the agreement with the City to acquire the Right of Way Lands that the owner surrender vacation possession at closing (May 31, 2017). This did not occur, as noted in my summary of Mr. Kraychy's direct evidence. Moreover, Mr. Kraychy acknowledged he continued to lease the Right of Way Lands up to and including during 2019, and that he had been notified and was aware that the City considered such occupancy to be an illegal action.
119. When asked if the City made numerous attempts to find other lands for exchange, Mr. Kraychy denied this and said he initiated most of the discussions of possible land exchanges. Mr. Kraychy admitted to having other land holdings, namely the warehouse he received as a partial land exchange in 2005 and the apartment building he also acquired in consideration for the Right of Way Lands. He also has some office buildings and a few residential properties. He leases out those properties. None of those properties is suitable for auto sales, however. He denied having the ability to purchase lands like the Fort Road and 66 Street Lands from which to carry on operating his car lot business.
120. Mr. Kraychy testified on cross examination that at the time of the Inquiry, no environmental testing had been undertaken by the City on the Fort Road Lands, but that he had received a phone call the same week as the hearing about scheduling an attendance.

### 6. Redirect Examination of Michael Kraychy

121. On redirect, Mr. Kraychy confirmed that all vehicles had been removed from the Right of Way Lands by November 1, 2019 and that the City had taken no enforcement steps in the result.
122. Mr. Kraychy further confirmed when questioned briefly by me that 864163 Alberta Ltd. operates a car lot business as Carma Auto and that this is the only remaining tenant on the Fort Road lands at the time of the Inquiry.



### III. SUMMARY OF ARGUMENT

#### A. Expropriating Authority's Argument Regarding the Intended Taking

123. The City in its closing argument referenced the statutory test for expropriations in Alberta, being that set out in section 15(8) of the Expropriation Act, namely, whether the intended expropriation is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority. The test is conjunctive, meaning an intended taking must be not only fair, but it must also be sound and reasonably necessary in the achievement of, in this case, the City's objectives. The objectives are not open to review.
124. The City argued that I should adopt a standard of proof other than the civil balance of probabilities standard. Specifically, the City advocated I apply a "reasonably defensible" standard, being something less than a balance of probabilities. In support of its argument, the City cited the 1978 Ontario Court of Appeal decision in *Parkins*.<sup>1</sup> The City urged me to accept that this lower standard ought to apply in particular where an objecting party asks an Inquiry Officer to consider alternative sites to the interest that is the subject of the intended taking.
125. In such instances, the City encouraged me to follow the reasoning of Inquiry Officer McLennan in the *Guaranty Properties* inquiry, where he held that it was inappropriate for an Inquiry Officer to "micromanage the design of any given project" and, further, that the expropriating authority "does not need to demonstrate that it has selected the best design for a project to satisfy that the proposed taking is fair, sound, and reasonably necessary."<sup>2</sup> The City submitted it need not even show that its design is "objectively preferable"; the City need only demonstrate that the intended taking is fair, sound and reasonably necessary in the achievement of its objectives.<sup>3</sup>
126. The City expressed regret over the unfortunate ill effects of expropriation on private landowners, but argued that this is not a basis for finding an intended taking is not fair, sound and reasonably necessary to achieve the City's objectives. Indeed, this is beyond the Inquiry Officer's jurisdiction as compensation for the Alberta Legislature has directed that harm resulting from expropriation be remedied before the Land Compensation Board.
127. With respect to the City objectives, I was reminded by counsel for the City of the evidence from Mr. Lima about the "vision" documents passed by City Council, namely, *The Way We Grow* and *The Way We Move*, the latter of which identified the Yellowhead Program as a strategic goal. I was reminded that the project is fully funded and that the December 2015 concept planning report for the Fort Road Widening Project considered the various requirements for that project's success, including a traffic analysis, area context, existing and future utilities and environmental impacts.
128. The City reminded me that the Fort Road Lands were flagged as needed for the project as early as December 2015 and that Mr. Lima did not expect material changes to the land

<sup>1</sup> *Parkins v Her Majesty the Queen in Right of Ontario*, 1978 CarswellOnt 1755

<sup>2</sup> Report of Inquiry Officer Graham McLennan dated April 3, 2000, page 25.

<sup>3</sup> Report of Inquiry Officer Graham McLennan dated November 5, 2004, page 25.

requirement based on the concept plan. Further, the City argued, there is peril in waiting to the next stage in the process, being preliminary design, or the subsequent stage, detailed design, to acquire all land needed for the project to proceed. The City schedule contemplates work being tendered in early 2021.

129. In attempting to distinguish this case from the Wood Buffalo decision of Inquiry Officer Larry Carr, Q.C., dated March 15, 2013, the City urged me to find that, unlike in that case, the City looked at alternative sites to the Fort Road Lands for drainage solutions, that planning is not at a very preliminary stage currently, and so forth.<sup>4</sup>
130. The City urged me to recognize that “[t]he drainage infrastructure is not the only reason the City needed to acquire those lands.” This is not a drainage project; it is a road widening project tacked onto which are the construction of improvements to storm water management and storage to protect downstream capacity, provide flood protection, and accommodate future sewer separation (should it come to pass). The project involves access management along the roadway alignment and sustainable urban integration features. For these reasons, I was urged to accept, make the intended taking fair, sound and reasonably necessary in achieving the City’s objectives as set out in the NOITE.
131. With respect to fairness, the City argued it engaged substantively with Mr. Kraychy in relation to the project, provided him notice of the City’s intentions with respect to the lands and made attempts to acquire the lands voluntarily. The City urged me to find that it intended to utilize the entire parcel of the Fort Road Lands since the December 2015 Concept Planning Report, but acknowledged that drainage was a very small part of that report. Further, I was discouraged from finding any unfairness in light of the Objectors’ own conduct in using the land and benefitting from leasing it after having an obligation to surrender vacant possession. I was urged to find Mr. Kraychy did not come to this Inquiry with clean hands, that he is not “a complete victim” in this process.
132. With respect to soundness, the City argued that there is clear evidence demonstrating the necessity of the Fort Road Lands for the 125 Avenue construction portion of the Yellowhead Program. Mr. Lima’s evidence and that of Mr. Block illustrate that there is unlikely to be significant change from concept planning to preliminary and detail design stages in terms of this requirement. The need for that portion of the lands on which the roadway and sidewalks are to be constructed was not contested by the Objectors; their focus was on the intended taking of the remainder of the Fort Road Lands for drainage and storm management.
133. Counsel for the City argued that drainage is an ancillary part of the Fort Road Widening Project and urged me to find that the drainage solutions proposed by WSP at the concept level were adequate and appropriate in grounding the fairness, soundness and reasonableness of the intended taking.
134. I was urged to accept Mr. Block’s evidence, uncorroborated by meeting minutes, written analysis or study that alternative sites to the Fort Road Lands were given meaningful

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<sup>4</sup> Report of Inquiry Officer Larry P. Carr, Q.C. dated March 15, 2013. See in particular pages 45-46.

consideration for locating the drainage solutions WSP is engaged to provide as part of the Fort Road widening project.

135. The City reminded me that damages are not before me for consideration, but conceded it is within my jurisdiction to consider the balancing of private landowner interests and the greater public interest engaged by this intended taking.
136. The City recommended I accept the evidence of Mr. Block over that of Mr. Zhao insofar as Mr. Zhao has no expertise in transportation engineering, transportation project management, road design, geometrics but rather only has expertise with respect to drainage and storm water management. Further, the City argued that even Mr. Zhao accepted that the Fort Road Lands is one option for the construction of a pond and underground facility, even if it is premature to evaluate if the proposed option is a functionally viable one. The City urged me not to give too much weight to Mr. Zhao's evidence insofar as drainage and storm water management are merely "one small component of the project."
137. With respect to the matter of reasonable necessity, the City argued that the lands are required not only for the road and related improvements, but for ancillary improvements. This harkens back to the transportation master plan, The Way We Move. The project is a major transportation infrastructure upgrade and will be a benefit to all Edmontonians. The expropriation and construction will allow the City to meet both its technical design and overall strategic objectives. There are multiple reasons why the subject lands are required, as Mr. Block noted in his evidence. I was again urged not to view the drainage and storm water management in isolation but, rather, to consider it as but one component of many in a larger road project.
138. The City argued it was taking an incremental approach to this transportation project, balancing regional and local concerns. I should find that the intended taking is proactive, attempting to minimize future disruption by addressing EPCOR requests now. Further, were I to look to another site and recommend City Council consider other lands for the ancillary objectives of drainage and storm water management, another private landowner would be impacted just as Mr. Kraychy stands to be impacted.
139. The City urged me to consider as an ancillary objective any infrastructure that's incidental to building the road, which in this case is more specifically 125 Avenue given that the Right of Way Lands are adequate to take care of the widening of Fort Road, construction of a SUP and sidewalk related to that road construction. The City suggested that underground storage and surface pond facilities are incidental to the road widening, lowering the grade at the CN underpass and the larger project as a whole.

#### **B. Objectors' Argument Regarding the Intended Taking**

140. The Objectors urged me to consider not only section 15(8) of the Expropriation Act, but 15(9), which requires the expropriating authority "to attend and provide any maps, plans, studies, documents" that, as the Inquiry Officer, I may consider necessary in determining whether the intended taking is fair, sound and reasonably necessary.

141. The Objectors resisted the City's urging that I adopt a "reasonably defensible" standard of proof and referenced the Dell decision of the Supreme Court of Canada, reminding me that expropriation law is an extraordinary exercise of state power and urging me to interpret the law liberally in favour of the landowner faced with the state's exercise of such power.<sup>5</sup>
142. The Objectors urged me to exercise my jurisdiction in this context and noted that an Inquiry under the Expropriation Act necessitates a balancing of public and private interests. In doing so, it was suggested I consider two time periods in particular when considering if the intended taking of the entire parcel of the Fort Road Lands is fair, sound and reasonably necessary.
143. First, I was urged to consider the period up to and including July 16, 2019 when City Council approved the commencement of expropriation. Second, I was asked to consider the period of December 3, 2019, when the NOITE was registered on title to the Fort Road Lands, notwithstanding the NOITE itself is dated October 15, 2019 such that the City held onto it for six or seven weeks before registering it.
144. The Objectors encouraged me to begin with the agreement dated August 2005 by which Mr. Kraychy and the City arranged for the latter's acquisition of the Right of Way Lands. Following that, I am to consider the period in 2016, 2017 when discussions take place regarding a swap of land and the closing under the 2005 agreement. I was urged to find that, as at May 31, 2017, the City wanted the right of way, which it got. If it had its way, it would have taken more land and given up some other land or, in other words, the "hole in the donut" that represents the Fort Road Lands.
145. The December 2015 concept planning report for the Fort Road Widening Project then refers to the storm water drainage system being completed during the design phase. After that, the Objectors argue, there is nothing said about drainage until the Al-Terra concept plan in October 2019, which includes a rather significant discussion of drainage. I am urged to accept that there are concept plans, and then there are concept plans, the December 2015 one being inconsequential and the October 2019 one being more consequential but arriving almost four years later.
146. The Objectors then urge me to consider what City Council had before it on July 16, 2019 when it approved the commencement of the expropriation process. Council had before it, according to the Objectors, only the report to executive committee, which then went from that committee to City Council. While it does show the acquisition of various properties, including Mr. Kraychy's lands, it also shows the U-shaped property that is being expropriated from the contaminated lands to the north of 125 Avenue and east of Fort Road.
147. What did City Council have before it when it approved the commencement of the process by which the City now intends to take the entirety of the Fort Road Lands? Precious little, say the Objectors. Even if the December 2015 concept planning report for the Fort Road widening project was before Council, there was nothing in it to suggest that the Fort

<sup>5</sup> *Dell Holdings Ltd v Toronto Area Transit Operating Authority*, [1997] 1 SCR 32 ("Dell Holdings"). See paras 20-23.

Road Lands were required for drainage and storm management. The Objectors argue it was a “leap in the dark” on the part of City Council to receive and act upon a recommendation from administration based on the limited information then available, particularly when other representatives of City administration are having very different discussions with Mr. Kraychy.

148. I was reminded that there is no evidence before me that he received the proposal to City Council when he got a few days’ notice by email of the meeting. City Council did not, in the Objectors’ submissions, have enough information to make an informed decision about what was required, most certainly not for drainage. Rather, the City administration has provided an ex post factor justification for the intended taking since Council approved the commencement of the expropriation process.
149. The Objectors suggested that the justification for the intended taking was created, or came together, some six months after the decision to expropriate the entirety of the Fort Road Lands but the decision to proceed down that path was made without any reasonable justification for the intended taking. Referencing the Wood Buffalo decision, the Objectors urged me to draw a similar conclusion as did Inquiry Officer Carr, namely that the concept plan at issue here – the December 2015 concept plan – was as lacking in completeness as was that in issue in the Wood Buffalo decision of Officer Carr. The December 2015 report had nothing that could be described as a utility study that included storm drainage, not on July 16, 2019 nor when Mr. Block’s expert opinion was first provided on January 20, 2020.
150. Inquiry Officer Carr in the Wood Buffalo case found the intended taking was not fair because it failed to consider the interests of tenants, failed to notify the owners of the intended project and involved no public hearings. I was urged to find that the same could be true here. The only notice Mr. Kraychy received up to July 16, 2019 was that the hole in the donut on the Fort Road Lands would remain available to the Objectors. The City wasn’t communicating with Mr. Kraychy about acquiring other lands.
151. Then, the City failed to clearly identify the purpose behind the intended taking. The purpose, in the broadest sense, has got something to do with the Fort Road project, but what? No idea, say the Objectors. That much was not clear in the materials before City Council on July 16, 2019. Inquiry Officer Carr found the intended taking in Wood Buffalo was not sound because details were not sufficiently advanced to make a reasonable decision and the taking wasn’t reasonably necessary because it wasn’t necessary at that time and they were not certain they were going to proceed (which turned out to be prescient). Further, the expropriation process may still be available at another stage, found Mr. Carr. The same is true here, argue the Objectors – the taking is premature.
152. It is the role of an Inquiry Officer to recommend alternatives where warranted. This was done in the 1987 Yellowhead Trail and 82 Street Inquiry to which the Objectors made reference.<sup>6</sup> Similarly, I was urged by the Objectors to consider the decision of Inquiry Officer Meagher in April 8 Developments where acquisition of a portion of the land was not disputed, but an intended taking of its entirety was resisted successfully on the basis of a

<sup>6</sup> Report of Inquiry Officer James L. Lewis, Q.C. dated June 2, 1987.

balancing of interests and the Inquiry Officer's suggestion that the entire parcel of land was not, in fact, needed for the project in issue.<sup>7</sup>

153. Finally, the Objectors referred me to the Ontario Court of Appeal decision in *Karn* to argue that eliminating consideration of alternatives from an expropriation inquiry would be to "almost negate the inquiry".<sup>8</sup>
154. With respect to the evidence, the Objectors noted an array of concerns that Mr. Zhao raised with the proposed construction of the underground storage facility and urged me to find that there was no compelling reason this facility could not be accommodated within areas already owned or controlled by the City rather than taking more of the Objectors' land.
155. The Objectors urged me not to be persuaded by the confidence with which Mr. Lima and Mr. Block declared the necessity for taking the entirety of the Fort Road Lands. This is not, argued the Objectors, a valid basis for expropriating land.

#### IV. NOVEL QUESTION

156. Counsel for the Objectors asked that I make a finding as to the effective date on which to evaluate whether an intended taking is fair, sound and reasonably necessary. Based on the facts of this case, the question was whether that date is July 16, 2019 when City Council approved the recommendation to commence expropriation proceedings; or October 15, 2019 when the NOITE was dated; or December 3, 2019 when the NOITE was registered on title to the Fort Road Lands in issue in this Inquiry; or January 20, 2020 when WSP Senior Project Manager Randy Block, P.Eng., issued his technical memorandum for reliance in this Inquiry process, which, *de facto*, became the first deliverable under the contract between WSP and the City in relation to the Fort Road/125 Avenue project. Another date was offered by the Objectors during submissions before me, namely, December 9, 2019 being the date on which Mr. Kraychy was served with the NOITE.
157. The City argued this question was a red herring and irrelevant to my role and the scope of the Inquiry, which is defined in section 15(8) of the *Expropriation Act*. It is not my role to review the decisions of City Council as expropriating authority respecting the commencement of the expropriation process. The City relies upon section 14(5) of the *Municipal Government Act* ("*MGA*") as providing express authority for a municipality to expropriate more land than it requires for a project where the municipality considers it advantageous to do so. Further, the City argues that I ought to consider the whole of the evidence before me and not artificially constrain the scope of my review on a temporal or other basis.
158. The Objectors argued that section 14 of the *MGA* authorizes a "council" to acquire an estate or interest in land via expropriation and section 7 of the *Expropriation Act* empowers municipal council, as the approving authority, to engage the expropriation process. In the Objectors' submission, "council" is not the same as "municipality"; the municipality is, by

<sup>7</sup> Report of Inquiry Officer Timothy S. Meagher dated June 8, 2015.

<sup>8</sup> *Karn v Ontario Hydro*, 1977 16 O.R. (2d) 737, 1977 CarswellOnt 1090, para 7.

definition within section 4 of the *MGA*, a corporation. The corporation can execute on the approving authority's direction to expropriate (meaning it is the expropriating authority), but the corporation (municipality – or City administration) is not an approving authority empowered to commence the expropriation process. Further, City Council is politically accountable for its decisions; this is a core democratic principle. The Objectors urge me to treat as “authoritative” comments made by the Supreme Court of Canada and, specifically, those made in *Dell v Toronto*, where our highest court stated that expropriation statutes are, by their nature, an extraordinary exercise of state power and to be interpreted liberally in favour of the rights of the landowner.<sup>9</sup>

159. The Objectors urged me to find that the relevant date on which I ought to assess whether the intended taking is fair, sound and reasonably necessary is the date on which the democratically elected body exercising powers delegated it by the Legislature of Alberta approved the decision to commence expropriation. In a half-hearted alternative argument, the Objectors argued that the decision to expropriate ought to be evaluated as of the date on which service of the NOITE on the affected landowner is effected (December 9, 2019 in this case).
160. I am not entirely persuaded by either argument, though I see merit in each position. In my view, the concern raised is less about timing, more about democratic accountability.
161. I agree that, as elected officials, City Council in its role as the approving authority under section 7 of the *Expropriation Act* are, and must be, politically accountable to voters. City Council ought to exercise that power judiciously.
162. Specifically, I encourage City Council to require that the “corporation” under section 4 of the *MGA* – i.e., City administration – ensure municipal council is provided sufficient, reliable data and analysis for it to make a reasonably informed and considered decision about commencing an expropriation process against one or more private owners or interest holders. Perfection is not required. Nor should a decision to invoke the expropriation process be founded on postulation.
163. I also agree with the City that an Inquiry Officer must consider all of the available evidence in determining whether an intended taking is fair, sound and reasonably necessary. Indeed, municipal council arguably depend – or ought to depend – on the impartiality and relative objectivity of an Inquiry Officer in reporting on the evidence, argument and findings of fact and in providing recommendations for Councillors’ careful consideration.
164. While not quite a “red herring”, I do not see the Inquiry process or the role of Inquiry Officer lending itself well to the analogy of judicial review.
165. While the facts of Court of Queen’s Bench of Alberta decision in *Koebisch* are not on point, the principle that municipal government powers ought to be exercised reasonably,

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<sup>9</sup> *Dell Holdings*, paras 20-23, 37-38.

based on sufficient relevant information, is of the motherhood and apple pie variety and warrants mention on that basis.<sup>10</sup>

166. The process has a safety valve – for better or for worse. The elected officials – City Council, in this case – can accept or reject the findings and recommendations of an Inquiry Officer. One hopes, as a member of the electorate, that this is not done on a “torpedoes be damned” basis but, rather, with the scrutiny and consideration required of an elected representative.
167. As the Objectors aptly noted, “municipal council has the last say since the Inquiry Officer’s report is not binding” and “the principle of democratic accountability must be top of mind.” With that, I tender for Council’s consideration my findings of fact and opinions on the merits.

#### V. FINDINGS OF FACT

168. As noted above, I find, and it was not disputed before me, that all preliminary statutory requirements related to the intended expropriation have been met.
169. For the purposes of the requirement set out in sections 6(2) and 15(8) of the Expropriation Act, I find that the City of Edmonton’s objective in support of which the NOITE affecting the lands located at 12560 Fort Road was issued is the construction of Yellowhead Trail Freeway Conversion Program, which in this particular intended taking includes the widening and upgrading of Fort Road and nearby intersections, over/underpasses, sidewalks, access modifications, road network improvements, interchange construction, sidewalk construction and all road-related infrastructure incidental to the same (the “City Objective”).
170. I find on the evidence before me that opportunistic sewer separation as requested by EPCOR and the construction of surface and subsurface storm water storage and drainage facilities on the Fort Road Lands as proposed in Mr. Randy Block’s January 20, 2020 technical memorandum is not incidental to the road-related infrastructure that falls within the City Objective and is not a *bona fide* ancillary objective.
171. If I am mistaken in so finding and drainage infrastructure of this nature is, in fact, incidental to the City Objective, I find that there is insufficient preliminary studies of an empirical and reliable nature and the details of such drainage infrastructure is not sufficiently advanced to enable me to make, or to recommend that City Council make, a reasoned decision as to the appropriateness of this portion of the proposed work on the Fort Road Lands.
172. I accept that there will be some incremental increase in runoff resulting from the construction of 125 Avenue and adjacent multimodal pathways on the Fort Road Lands.
173. The lowering of Fort Road to provide necessary clearance under the CN Rail structure crossing Fort Road creates a risk of flooding and corresponding need for flood mitigation.
174. No detailed analysis has been completed with respect to the efficacy or cost-benefit of the concept-level drainage solutions proposed by Mr. Block’s team at WSP. The concept level design is not, to my understanding, “holistic” in the sense contemplated in the Al-Terra 2019 report referenced during Mr. Lima’s evidence.

<sup>10</sup> *Koebisch v Rocky View (County)*, 2019 ABWB 508 at paras 101-102, 118, 120.



175. But for the construction of a surface storage pond and a subsurface storage facility, there would be no need to take the entire parcel referred to in this Report as the Fort Road Lands.
176. Portions of the Fort Road Lands are required on a permanent basis for the construction of 125 Avenue and ancillary pedestrian/cyclist modes of transportation. Some land may be needed for back-sloping on the approach as well, although there was limited evidence apart from Mr. Block's assertion this was so before me and I am mindful that this aspect may be better delineated at the preliminary design phase.
177. The need for a staging and laydown area is not permanent and was not objected to, at least in principle, by Mr. Kraychy, provided the parties could enter into a lease agreement with respect to the same. I find it does not require a permanent taking, in any event.
178. I accept Mr. Kraychy's evidence, which is not contested or contradicted by the records before me, that the first time he was advised of the City's intention to construct a surface and subsurface storm water storage facility on the Fort Road Lands was in December 2019. This does not mute entirely the fact that the December 2015 Concept Planning Report for the Fort Road Widening Project identified the entirety of the Fort Road Lands for potential taking, but it was not in evidence before me as to whether Mr. Kraychy had any awareness of this potentiality before summer 2019.
179. The City did have considerable engagement with Mr. Kraychy, on behalf of the Objectors, with respect to the Right of Way Lands. I am unable to conclude the same with respect to the Fort Road Lands. Indeed, the evidence favours Mr. Kraychy's testimony that he was the more active participant in identifying alternate properties for a potential land exchange.
180. Further, the interaction between the City and Mr. Kraychy in recent months, since expropriation was approved by City Council, appears less than enthusiastically friendly. Mr. Kraychy is, understandably, unhappy with how events have transpired and are effectively depriving him of his car lot and related repair/clean up business. While he behaved opportunistically, perhaps, I do not see a need to find he came to this process with unclean hands, but if I was obliged to make such a finding, I would decline to do so and might suggest the very argument is unbecoming the City as an expropriating authority.
181. I find that the City has, in large part, behaved fairly toward Mr. Kraychy, with the exception of the very late notice of the intended taking of the entirety of the Fort Road Lands. The City's decision not to engage enforcement steps in late 2019 was appropriate, but set off to some extent by the requirement that Mr. Kraychy relocate offices that, if the intended taking is successful, will only have to be relocated yet again in short order, or demolished, presumably.
182. The Way We Move illustrates the commitment of City Council to sustainable, integrated transportation and, incidentally, environmental stewardship. From my read of it, this document includes numerous references to infrastructure, which relate primarily to *transportation* infrastructure, with a notable emphasis on green technology use and decreased long term reliance on single vehicle traffic, where appropriate. As one might expect, the plan does not substantively address services or infrastructure other than transportation (including drainage).
183. The City's strategic plan as set out in both The Way We Grow and The Way We Move includes greater connectivity and engagement with the environment, including through multi-modal transportation and increased walkability; the three-metre SUP and 1.8 metre

sidewalk to be constructed as part of widening Fort Road is consistent with this policy objective.

184. The City's transportation master plan is focused on multi-modal transportation, efficiencies and diversification and movement over time away from overabundant single use vehicle transportation.
185. The December 2015 Fort Road Widening Concept Planning Report includes a section (3.5) on Utilities, noting that various utility providers were contacted and comments from each summarized in headings within that section of the Report. One such heading, Drainage (3.5.4), details the existence of a 1500 mm combined sanitary and storm water truck and a 600 mm combined sanitary pipe under Fort Road.
186. There is no specific reference in the 2015 Fort Road Widening Concept Planning Report to the Fort Road Lands being required for drainage purposes. The Report indicates that "[t]he location and design of the storm water drainage system will be completed during the design phase." However, the Report also proposes that a local catchment storm line be constructed "below Fort Road over the length of the project corridor", noting that new catch basins and manholes would be required.
187. WSP had not completed the modelling study and concept planning validation with respect to the drainage system in the entire area impacted by the new 125 Avenue and Fort Road widening projects at the time of this Inquiry.
188. WSP inquired about, but was not informed by the City during the tendering process or before contracting with the City to complete the work within the Description of Work (including the drainage modelling and design portions of the Fort Road Widening and 125 Avenue construction projects) that the Fort Road Lands in issue in this Inquiry were the subject of objections and an Inquiry under the Expropriation Act.
189. No evidence was put before me by the City as to whether the decision not to disclose is based on an existing policy or mandate from City administration or approved by City Council. No explanation was provided for the non-disclosure of the contested expropriation proceedings at WSP's request.
190. I am satisfied that Mr. Kraychy does not presently have other options available to him for carrying on the operation of the Carma Auto car lot business should he lose the entirety of the Fort Road Lands, meaning if he loses the hole as well as the donut, to paraphrase Mr. Wakefield, Q.C..

#### VI. OPINION ON THE MERITS

191. By reason of the foregoing, I find that the construction of a surface pond and subsurface storm water retention facility is neither incidental, nor ancillary, to the City Objective.
192. Accordingly, I am of the opinion that the intended taking of the entire parcel located at 12560 Fort Road is not fair, sound or reasonably necessary in the anticipated achievement of the City Objective, which I find to be confined to the road construction and related transportation infrastructure and not to a drainage, storm water retention, or flood risk

mitigation objective that, at this stage, is premature and impossible for me to meaningfully evaluate as fair, sound and reasonably necessary.

193. The balancing I am to undertake is public interest relative to private and confidence or certainty when a project is still in its relative infancy or, perhaps more accurately, an embryonic state is not a valid consideration. Respectfully, I simply do not have before me adequate evidence to accept that the taking of the lands for construction of a surface pond and underground storm water storage facility is reasonably necessary or sound. Absent that evidence, I am similarly unable to find that such a taking would be fair. Indeed, without evidence of whether the drainage proposals will be effective and meet existing or future needs, I find that a taking for this purpose neither benefits the public nor the private interests in play.
194. Mr. Kraychy has been agreeable historically, to my understanding, in relation to the taking of that portion of the Fort Road Lands required for the road construction. As such I see no basis for City Council not to direct development and acquisition proceed in that fashion and proceed with a limited acquisition, as has not been contested by Mr. Kraychy.
195. Further, I recommend City Council consider tasking City administration with expediting a modelling study and holistic approach to drainage recommended in the October 2019 Al-Terra report with respect to the management of incremental runoff resulting from the widening of Fort Road and construction of 125 Avenue and their corresponding shared use path and sidewalk construction.
196. The evidence before me as the Inquiry Officer should not be the first time or place where reasons for an intended taking or an alleged objective are particularized. This is, in essence, what appears to have happened here in that Mr. Block's January 20, 2020 technical memorandum, which became the "first deliverable" under WSP's contract with the City.
197. The drainage question is at such a preliminary stage, it is not possible for me, Mr. Zhao or City Council to make a well-reasoned decision as to the appropriateness of the proposed drainage and storm retention facilities and flood risk mitigation measure. On these facts, I cannot find that the intended taking for these purposes is within the City Objective. If it is, I find the intended taking of the entirety of the Fort Road Lands is not sound but, rather, is premature and I urge City Council to require adequate analysis of the drainage and storm water management options be made available for consideration before any taking of the Fort Road Lands for that purpose is effected.
198. It may well be that the taking of the entire parcel at 12560 Fort Road proves necessary in time. Of what I am certain today is that I am unable to micromanage the intended taking or find it to be reasonably necessary for the same reason – there simply isn't adequate information before me to do so.

**VII. COSTS**

199. In accordance with section 15(1)(b) of the *Expropriation Act*, the City of Edmonton shall pay the reasonable costs of this inquiry incurred by the Objectors, including the expert fees associated with the evidence of Mr. Zhao.
200. I am grateful to all counsel for their thoughtful and capable representation and submissions, as well as for indulging my questions and requests for additional information, particularly during oral argument.

Dated at the City of Edmonton, in the Province of Alberta, this 2<sup>nd</sup> day of March, 2020.



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**Sharon Roberts**  
Inquiry Officer  
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