

IN THE MATTER OF the *Expropriation Act*, being Chapter E-13 of the *Revised Statutes of Alberta*, 2000, and amendments thereto (“Act”);

AND IN THE MATTER OF the intended expropriation by the City of Edmonton of a fee simple interest in those lands described as:

THOSE PORTIONS OF:

FIRST: PLAN 1738KS
 BLOCK (A)
 LOT FIVE (5)
 CONTAINING 1.84 HECTARES MORE OR LESS
 EXCEPTING THEREOUT:
 (A) 0.053 HECTARES MORE OR LESS FOR ROAD, AS SHOWN
 ON ROAD PLAN 4981TR
 (B) 0.117 HECTARES MORE OR LESS AS SHOWN ON RIGHT-
 OF-WAY PLAN 7822381
 EXCEPTING THEREOUT ALL MINES AND MINERALS

SECOND: PLAN 1738KS
 BLOCK (A)
 LOT SIX (6)
 CONTAINING 1.65 HECTARES MORE OR LESS
 EXCEPTING THEREOUT:
 (A) 0.291 HECTARES MORE OR LESS FOR ROAD, AS SHOWN
 ON ROAD PLAN 4981TR
 (B) 0.012 HECTARES MORE OR LESS AS SHOWN ON RIGHT-
 OF-WAY PLAN 7822381
 EXCEPTING THEREOUT ALL MINES AND MINERALS

MORE FULLY DESCRIBED AS AREA H WITHIN LOTS 5 AND 6 COMPRISING 0.261 HA. MORE OR LESS.

(“Lands”)

AND IN THE MATTER OF the Notice of Objection to the said intended expropriation filed by Yellowhead Motor Inn Ltd. by its solicitor, Donald P. Mallon, Q.C.;

AND IN THE MATTER OF an Inquiry in respect thereof pursuant to the provisions of the *Act* by Graham McLennan as Inquiry Officer appointed by the Executive Director, Civil Law, to conduct the Inquiry;

REPORT OF THE INQUIRY OFFICER
November 5, 2004

COUNSEL

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PART 1 INTRODUCTION

By agreement between counsel for the City of Edmonton (“City”) and counsel for the Objector, Yellowhead Motor Inn Ltd. (“Yellowhead Inn”), the Inquiry Officer conducted the hearing at a boardroom at McLennan Ross, 600, 12220 Stony Plain Road, Edmonton, Alberta.

The City was represented by Douglas Debrinski and the Objector, Yellowhead Inn, was represented by Donald Mallon.

This Inquiry concerns the intended expropriation by the City of portions of the Yellowhead Inn property for the purposes of improving Yellowhead Trail and constructing a service road, associated intersections, and associated access points, all for the purpose of establishing a new interchange at Yellowhead Trail and 156 Street (the “Project”), as noted on the Option 10 drawing found at Exhibit 1, Tab 44.

Counsel for the parties agree that all appointments, notices, filings, and registrations required under the Act with respect to the intended expropriation, the objection thereto, and this Inquiry have been performed in accordance with the Act.

Counsel for the parties advised that there were no preliminary objections and that they were ready to proceed with the hearing at the appointed time and place on October 29, 2004. At the request of counsel for the parties, evidence was given under oath and a court reporter transcribed the proceedings.

There was no request for the Inquiry Officer to inspect the Lands affected by the Project and the intended expropriation.

PART 2 SUMMARY OF THE EVIDENCE

1. Exhibits

All exhibits were entered without objection, save for Tab 49 of Exhibit 1. A list of the exhibits entered at the hearing are found in Appendix 1 to this Report.

With the consent of the parties, exhibits are only attached to the copy of the Inquiry Officer's Report provided to the expropriating authority.

2. Evidence of the City of Edmonton

Most of the documents entered by the City were entered by consent in Exhibit 1. Exhibit 1 constituted a binder of documents Tab 1 to Tab 52. Exhibit 1 was entered by consent, except for Tab 49 which was removed pending further evidence/argument from counsel for the parties.

a. *Mr. Kabarchuk*

Mr. Kabarchuk, a City Transportation Engineer, reviewed the *City Transportation Act* (found at Tab 6 of the City's Book of Authorities). He then referred to the *City Transportation Regulation*, found at Tab 7 of the Book of Authorities of the City.

Mr. Kabarchuk explained that the City applies Transportation Association of Canada ("TAC") standards in design and construction of City transportation infrastructure.

Mr. Kabarchuk then reviewed the hierarchy of legal and planning documents that relate to a project such as the within Project. Mr. Kabarchuk reviewed the *City Transportation Act*, the City Transportation Plan, the Facility Planning Study (also known as the functional or concept planning study), the preliminary design, and the more detailed design plan. He explained that these are the various steps, in hierarchical order, that are typically complied with by the City when planning for transportation projects such as the within Project.

Mr. Kabarchuk referred to the City's transportation master plan found at Tab 10 of Exhibit 1. He noted the recommended major roadway improvements include making the inner city ring road a free flowing major transportation corridor. Further, that part of the inner city ring road is the Yellowhead Trail.

Mr. Kabarchuk also explained that very high, if not highest, on the City's priority for improvements to the inner city ring road is the improvements to the intersection of Yellowhead Trail and 156 Street, and associated service road and access changes, of which the within Project is a part.

Mr. Kabarchuk explained that the City's objective is to reduce the number of at-grade, single controlled intersections and to reduce direct access to Yellowhead Trail, to bring it up to a high standard of roadway from an efficiency and safety perspective, specifically at the intersection of Yellowhead Trail and 156 Street. This was the objective of the Project that is the subject of this hearing.

Mr. Kabarchuk reviewed the functional planning studies for the Yellowhead Trail. The study noted the traffic congestion and delays given the growth in traffic from 1994 to 1998. He further noted that the number of collisions on the west portion of Yellowhead Trail is relatively high and alleviating congestion on Yellowhead Trail, including the 156 Street intersection, would improve safety.

Mr. Kabarchuk explained that a functional plan with Yellowhead Trail was the subject of public consultation with affected property owners, as well as the public at large. He noted that some of the public consultation meetings were held at the Yellowhead Inn.

Mr. Kabarchuk explained how the standard business area concept for the Yellowhead Trail functional plan was developed. Further, he explained the objective of removing direct access to Yellowhead Trail and replacing these with a minimum of two entry points and two exit points for each business area to service roads which, in turn, connect with Yellowhead Trail. This is part of the overall objective of developing Yellowhead Trail as a free flowing ring road without direct access from business areas.

Mr. Kabarchuk then reviewed the various diagrams of options for the design of business area access of Yellowhead Trail in the area of 149 to 156 Street. These are found at Tab 44 of Exhibit 1. Mr. Kabarchuk noted that the plan was to close the 153 Street direct access to the Yellowhead Trail. Mr. Kabarchuk reviewed design Options 1 to 10 which are found at Tab 44 of Exhibit 1. All of these options contemplate a service road being constructed along the front or back of the Yellowhead Inn property. Mr. Kabarchuk advised that Option 10 was the final desired option for this Project, from the City's perspective.

Mr. Kabarchuk then returned to the facility planning study for the entire Yellowhead Trail, found at Tab 13 of Exhibit 1. The conclusion of this report, and other documents referred to by Mr. Kabarchuk, was that there are major safety concerns regarding the intersection at 156 Street and Yellowhead Trail, and it is a high priority for the City to improve this intersection.

Mr. Kabarchuk reviewed the various factors that went into the City's design of the 156 Street and Yellowhead Trail intersection and the associated Project. He advised that businesses in the areas were consulted, their views on various options gathered, affected landholders were consulted, public open houses were held, drainage issues were considered, utility issues were considered, environmental considerations were made, safety considerations were made and, finally, risk analysis and value engineering were considered.

Mr. Kabarchuk went through the various motions passed by City Council relating to approval of the conceptual designs for the Project and various approvals of changes made once value engineering was completed (Tab 18 of Exhibit 1).

Mr. Kabarchuk noted that changes to the intersection design at 156 Street and Yellowhead Trail were reconsidered. Estimated cost savings of approximately \$10 million drove certain design changes to the intersection.

Mr. Kabarchuk noted that the City has accelerated the steps required to construct this Project in recent years. Further, he advised that changes to the 156 Street and Yellowhead Trail intersection, and associated changes, have been under construction since earlier in 2004.

He further explained that the ultimate intersection design approved by Council was a half simple diamond and half parclo intersection at 156 Street and Yellowhead Trail. This was primarily as a result of safety audits performed by Hamilton-Finn, as well as an additional projected cost savings of approximately \$2 million.

Mr. Kabarchuk then reviewed discussions that were held specifically between City representatives and representatives from the Yellowhead Inn. These consultations took place periodically from at least September of 2002 to September of 2004. Mr. Kabarchuk reviewed several letters between representatives of the City and representatives of Yellowhead Inn, which are found at Tabs 18 to 48 of Exhibit 1. Mr. Kabarchuk explained how the City reviewed various design options with representatives of the Yellowhead Inn. The City attempted to take the concerns of Yellowhead Inn into account in making changes to the design options for the Project. This included moving the service road from the front to the back of the Yellowhead Inn property, as well as moving the service road design on the west side of the Yellowhead Inn property further to the west so that the Yellowhead Inn property would not have to be expropriated for this portion of the service road. Further, Mr. Kabarchuk advised that City representatives met with representatives of the Yellowhead Inn, together with legal and transportation expert advisors. As a result of this meeting in September of 2004, the City considered a number concerns raised by Yellowhead Inn.

At this point in Mr. Kabarchuk's evidence, a dispute arose as to whether a letter dated October 13, 2004, which purported to summarize the September 2004 meeting between representatives of the Yellowhead Inn and representatives of the City, was admissible. Mr. Debrinski led evidence from Mr. Kabarchuk concerning the admissibility of this letter. Mr. Mallon cross-examined Mr. Kabarchuk in respect to the admissibility of this letter. Counsel for both parties then presented argument as to whether this October 2004 letter is admissible.

The position of Yellowhead Inn was that the letter in question dealt with without prejudice discussions between City representatives and representatives of the Yellowhead Inn. These discussions were without prejudice because they were directed at attempting to resolve the issues between the Yellowhead Inn and the City in connection with the proposed expropriation

Mr. Mallon, on behalf of the Yellowhead Inn, also submitted that the letter in question had little, if any, probative value.

On behalf of the City, Mr. Debrinski argued that the letter in question was not privileged and did not address without prejudice communications between the parties. He advised that much of the letter had to do with ongoing discussions between the Yellowhead Inn and the City and did not address discussions between the parties with respect to an attempt to resolve this intended expropriation dispute. Mr. Debrinski made reference to three requirements or conditions for this privilege to be recognized:

- (i) a litigious dispute must be in existence or within contemplation;
- (ii) the communication must be made with the express or implied intention that it would not be disclosed to the Court in the event negotiations failed; and
- (iii) the purpose of the communication must be to attempt to effect settlement.

Further, he submitted that these requirements are not met in these circumstances because there was no attempt to effect settlement and there was not an express or implied intention that the communication referenced in the October 13, 2004, letter would not be disclosed to the Court or the Inquiry Officer.

The Inquiry Officer ruled that the October 13, 2004, letter would not be admissible and directed Mr. Kabarchuk and Mr. Debrinski to not address any subject matter that may have been covered in the letter that could reasonably be considered to be offers to resolve issues as between the Yellowhead Inn and the City. The Inquiry Officer was satisfied that the three conditions for recognition of the privilege associated with communications to try and effect a settlement were met. Further, the Inquiry Officer was satisfied that there was likely little probative value in the evidence that may be construed as offers of settlement between the Yellowhead Inn and the City. Finally, the Inquiry Officer wanted to encourage parties in like circumstances to engage in settlement discussions to try and resolve an expropriation matter short of an inquiry officer hearing and to not admit the letter would foster this type of environment. After this ruling, Mr. Debrinski continued with his examination-in-chief of Mr. Kabarchuk.

Mr. Kabarchuk discussed Yellowhead Inn's concerns with respect to Design Option 10. There was a discussion with respect to the length of rolled curbing along the northern portion of the service road, dangerous goods parking concerns, and concerns with respect to maneuverability and access of large tractor trailers with the service road design for the northern portion of the Yellowhead Inn property. There was much discussion between the Yellowhead Inn representative and the City with respect to the access along the service road eastbound and access to the liquor store situated in the southwest corner of the Yellowhead Inn property.

After the meeting of September 2004, Mr. Kabarchuk stated that the City obtained an independent safety audit dealing with the issue of eastbound traffic making a left-turn access into the liquor store. The safety audit was obtained by the City and was reviewed by Mr. Kabarchuk (Tab 51 of Exhibit 1). The safety audit concluded that the City's Design Option 10 would be a safer design than the design sought by Yellowhead Inn with respect to the access to the liquor store by eastbound traffic at the southwest corner of the Yellowhead Inn property. This was primarily because the City design would eliminate left-hand turns to oncoming traffic to access the liquor store.

Mr. Kabarchuk also described traffic counts and licence plate surveys that were undertaken by the City with respect to existing ingress and egress of Yellowhead Inn property access points, as a result of the meeting between Yellowhead Inn representatives and City representatives. These traffic counts and licence plate surveys were performed and the results of that are found in Tab 52 of Exhibit 1. Mr. Kabarchuk explained how these traffic counts and licence plate surveys appear to indicate that a significant percentage of local traffic appeared to be using the Yellowhead Inn property as a short cut between 149 Street and the existing service road. Mr. Kabarchuk offered that making the proposed changes, in accordance with Design Option 10, may enhance the safety of traffic flow on the Yellowhead Inn property, as it would likely reduce or eliminate the number of vehicles going through the Yellowhead Inn property as a short cut.

Mr. Kabarchuk also offered his opinion on the qualifications of Mr. Gray, the individual who prepared the Bunt & Associates Report dated October 26, 2004 (Exhibit 2). Mr. Kabarchuk advised that his information was that Mr. Gray was an engineering technician, not a professional

engineer, and that he could not therefore provide a professional engineering seal signature on plans intended for construction. Mr. Kabarchuk also provided his opinion on the Bunt & Associates Report (Exhibit 2), which included the following points:

- a. Mr. Gray's alignment of the service road intersection makes it difficult for larger transport vehicles to maneuver.
- b. There is an additional stop sign for vehicles turning northward travelling from the east.
- c. It includes a left turn to the service road across traffic into the liquor store, which is a potential safety problem.
- d. With the large truck traffic, there could be potential for congestion of vehicles stopped at the stop sign traveling eastbound and vehicles attempting to ingress or egress the liquor store intersection.

Mr. Kabarchuk advised that he considered the Bunt & Associates design not preferable, from a safety and traffic flow perspective, to the design proposed by the City.

Mr. Kabarchuk referred to aerial photographs with measurements on them (Exhibit 4). These depicted the Yellowhead Inn property and the distances between buildings at the Yellowhead Inn. Mr. Kabarchuk indicated that the distance between the liquor store and the hotel building, 11.5 meters, compared favourably to local road widths in the City of 7 to 8.5 meters.

Mr. Kabarchuk referred to a map prepared by the City identifying various properties that the City needed to acquire to facilitate construction of the Yellowhead Trail/156 Street interchange and related construction, including this Project. Mr. Kabarchuk advised that the vast majority of these properties had been acquired or were in the process of being acquired.

Finally, Mr. Kabarchuk advised that, as a result of the September 2004 meeting with representatives of the Yellowhead Inn, it was his understanding that the only issue in dispute was the design of the access point of the southwest portion of the Yellowhead Inn property.

b. Cross-Examination of Mr. Kabarchuk by Mr. Mallon

Mr. Kabarchuk advised he was 36 years of age and had been a professional engineer for approximately eight years. Further, he had been with the City for four and a half years.

Mr. Kabarchuk conceded that one of the considerations of the City in design of roadways is economics. Another consideration is safety, which is why the City had a report done by Hamilton-Finn.

Mr. Kabarchuk agreed that the issues of safety and economics are probably also important to landowners adjacent to the Project. Mr. Mallon had Mr. Kabarchuk confirm that the Hamilton-Finn study evaluated the relative safety of the access options preferred by the Yellowhead Inn versus the access options preferred by the City, in connection with the liquor store in the southwest corner of the Yellowhead Inn property.

Mr. Kabarchuk conceded that, inherently, left-hand turns into oncoming traffic are inherently less safe than right-hands turns in the same direction as the traffic flow.

Mr. Kabarchuk acknowledged that the existing access into the liquor store on the Yellowhead Inn property is a left-hand turn into oncoming traffic. He did not know how long this access had been in place, but had no information to dispute that it was used for approximately 27 years. When asked by Mr. Mallon how many collisions had occurred in those 27 years, Mr. Kabarchuk referred to collision statistics dating back from the year 2000. These indicated that two accidents were recorded somewhere between 149 Street and 156 Street on the existing service road. This is all the information Mr. Kabarchuk had with respect to any collisions which may have occurred at the existing access to the liquor store.

Mr. Kabarchuk agreed that, if information was not important, Hamilton-Finn would not have put it in their report.

Mr. Kabarchuk advised that he was not in a position to opine on the impact on the operations of the Yellowhead Inn by any of the design options, simply that he understood that the Yellowhead Inn preferred Option 10 of all the options reviewed with the Yellowhead Inn.

Mr. Mallon asked Mr. Kabarchuk about the licence plate counts and traffic surveys that were done. He noted that the five-minute intervals between surveys may not account for the fact that individuals may have stopped at the gas bar to acquire small items and carried on. Therefore, they may not be simply short cutting through the Yellowhead Inn parking lot.

Mr. Kabarchuk acknowledged that the study was not designed to capture this possible phenomenon.

c. Re-examination of Mr. Kabarchuk by Mr. Debrinski

Mr. Debrinski had Mr. Kabarchuk explain why the traffic survey and licence plate count was done with five-minute intervals. City representatives assumed that five minutes would not provide sufficient time for vehicles to stop at the gas bar, acquire items at the convenience store, and continue their journey.

Mr. Kabarchuk also confirmed that, with the closure of 153 Street, the City is anticipating the increase in volume of traffic using the proposed service road around the Yellowhead Inn, and the general increase in traffic expected on the Yellowhead Trail, to be significant.

Counsel for the parties agreed that, in lieu of the City calling Mr. Parry as a witness, it could be agreed that there were several communications between the City and the Yellowhead Inn from late 2002 until September 2004, with respect to the Project and the acquisition of the Lands by the City. Those facts are generally described on page 17 to 20 of the City's written submissions and the documents relating thereto are Tabs 29 to 46 of Exhibit 1.

This concluded the evidence on behalf of the City.

3. Evidence of the Objector, Yellowhead Inn

a. Mr. Panasiuk

Mr. Panasiuk advised he is 77 years old and that he assists in operating the Yellowhead Motor Inn as a manager and that he is one of the owners.

Mr. Panasiuk advised that the Yellowhead Inn property includes the liquor store, hotel accommodation, a restaurant, a lounge, a tavern, and a gas bar. In addition, the parking lot to the north has power supply for large trucks to plug in while they are parked on the Yellowhead Inn property.

Finally, Mr. Panasiuk advised that there is a Lady Luck Casino included on the Yellowhead Inn property.

Mr. Panasiuk advised that in the north and northeastern portions of the Yellowhead Inn property there are often 14 to 15 tandem tractor trailer trucks parked during the winter time. There is a double row of power outlets affixed to the ground that these trucks use while they are at the Yellowhead Inn property. Further, trucks that are hauling dangerous goods have a separate parking area in the very northeast corner of the Yellowhead Inn property. Mr. Panasiuk advises that the City has provided regulations to the Yellowhead Inn indicating that they must be located approximately 50 meters from any buildings.

Mr. Panasiuk explained that trucking customers are important to the Yellowhead Inn and they include well known companies such as Canadian Freightways, North American Van Lines and Atlas Van Lines. Further, the restaurant is open 24 hours a day so that truckers can obtain service at all times.

Mr. Panasiuk advised that, in the northwest corner of the property, moving vans often park and from time to time exchange cargo, which he described as "swamping".

Mr. Panasiuk explained that deliveries go to the hotel and the liquor store at loading docks which are found on the north side of the liquor store and the west side of the hotel. Further, there is traffic (both passenger vehicle and on foot) that regularly passes between the northeast corner of the liquor store and the southwest corner of the Yellowhead Inn. For example, Mr. Panasiuk's wife works at the liquor store and she walks between the liquor store and the hotel on a regular basis, as do other employees and customers.

Mr. Panasiuk advised that he was concerned that, if the City proceeded with their intended development of proposed Access 'B' (as noted in Option 2 of the Hamilton-Finn report at Exhibit 1, Tab 51), then the pedestrian traffic, vehicle parking, and loading operations Mr. Panasiuk described would be interfered with and would create congestion and safety concerns.

Mr. Panasiuk testified that the liquor store was important to the Yellowhead Inn property and has been there since 1989.

Mr. Panasiuk explained that he was concerned that, if Option 10 proposed by the City for the Project proceeded, it would interfere with the ability of long trucks to get in and out of the parking spaces currently used by the trucks, as there would be insufficient space between the parking area and the proposed service road for the trucks to back out and leave the Yellowhead Inn parking lot.

Mr. Panasiuk further explained his concern that, if the existing access to the liquor store in the southwest corner of the Yellowhead Inn property is eliminated, as proposed by the City, then traffic flowing and the patrons stopping at the liquor store may diminish.

Mr. Panasiuk indicated that he has no information that there has ever been a traffic safety concern or has ever been a traffic accident at the access points in the southwest portion of the Yellowhead Inn property near the liquor store, this notwithstanding that a left turn has been permitted in that location for many years. Eliminating access to the Yellowhead Inn property from vehicles traveling from the west to the east is a concern to Mr. Panasiuk. Many of the liquor store and gas bar customers do not spend a lot of money, and he is concerned that they will not bother to go around to proposed Access point 'B' and then double back to the liquor store or gas bar.

b. Cross-Examination of Mr. Panasiuk by Mr. Debrinski

Mr. Debrinski had Mr. Panasiuk look at Option 10 (found in Exhibit 1 at Tab 44). Mr. Panasiuk agreed that most of the big trucks accessing the Yellowhead Inn property presently access the property through the entrance on 149 Street. Mr. Panasiuk agreed that the large trucks, if Option 10 proceeded, could enter the Yellowhead Inn parking lot from the north side of the Yellowhead Inn property at multiple locations along the rolled curb.

Mr. Panasiuk agreed with Mr. Debrinski that one option for the solution to the problem that large trucks may have exiting the Yellowhead Inn property was to move the power plug ins so that they are overhead rather than on the ground. Mr. Panasiuk acknowledged that this was

discussed but there would have to be some sort of engineering to determine how overhead power might work and that no such engineering has been done.

Mr. Panasiuk agreed that, instead of one access point on 149 Street, there will be at least three access points for trucks.

Mr. Panasiuk reiterated his concern that patrons will not use proposed Access 'B' to come around back to the liquor store/gas bar, or for a cup of coffee. He indicated that his business is a "five- and ten-cent store". He does not think people will take that route, with the associated traffic congestion, safety concerns, and pedestrian traffic between the liquor store and the hotel, to spend a small amount of money for a cup of coffee or for other similar purchase.

Mr. Panasiuk agreed that, especially with the closure of 153 Street, his business may increase. He acknowledged that that would be great. However, his assessment is that he thinks there will be a loss of traffic and a loss of business if the Project proceeds.

Mr. Panasiuk agreed with Mr. Debrinski that building a new service road to the south of the Yellowhead Inn property is the worst of the options that were presented by the City.

Mr. Panasiuk advised that he asked the City to expropriate land from the CNR to make a service road, not from his property. Further, he stated, under cross-examination, that he would be happy if the City just left his property alone and made no changes.

To expedite the proceedings, Mr. Mallon acknowledged that a number of options were reviewed with the Yellowhead Inn by the City. Mr. Panasiuk concurred with this acknowledgement, and Mr. Debrinski did not have to cross-examine Mr. Panasiuk further on this area.

Under continued cross-examination by Mr. Debrinski, Mr. Panasiuk acknowledged that Option 10 may be the best option, if there has to be change and if there has to be expropriation of Yellowhead Inn's property. Further, he has grave concerns that the development of the Project, even using Option 10, will do serious damage to his business on the Yellowhead Inn property (although he hopes that he is wrong in this regard).

c. Mr. Gray

The Bunt & Associates report prepared by Mr. Gray, Mr. Gray's curriculum vitae, and the drawing prepared by Mr. Gray were collectively included as Exhibit 2.

Mr. Mallon proposed to qualify Mr. Gray as an expert in geometric road design and planning. Mr. Mallon examined Mr. Gray on his qualifications.

d. Cross-Examination of Mr. Gray on his Qualifications by Mr. Debrinski

Mr. Gray acknowledged that he was a planning technician, not a professional engineer. However, he noted that he directed professional engineers to sign drawings that he is responsible for as a Manager at Bunt & Associates.

Mr. Debrinski did not argue that Mr. Gray was not qualified to provide an expert opinion in geometric road design and planning.

e. Mr. Mallon Continues Examination of Mr. Gray

Mr. Gray explained the illustration diagram that is attached to Exhibit 2. He indicated that this diagram demonstrates that the large tandem trucks do not have sufficient space to maneuver in the northeast portion of Yellowhead Inn's property, if the service road is constructed in accordance with Option 10.

Mr. Gray then reviewed the Bunt & Associates report that he prepared (included in Exhibit 2). He advised that Bunt & Associates was asked to look at the proposed access to the liquor store as proposed by the City and determine whether it was possible to prepare a plan in a professional manner that would permit a left-turn access into the liquor store from eastbound traffic, as is presently the case on the Yellowhead Inn property.

Mr. Gray explained he did not see anything wrong, in principle, with the City's proposed plan (as outlined in Option 10, Exhibit 1, Tab 44). However, he advised that there is an alternate design reconfiguring the service road intersection at the southwest corner of the Yellowhead Inn property. Mr. Gray indicated that the proposed stop condition at this intersection was something

that was not mentioned or addressed in the City's material or in the Hamilton-Finn report (Exhibit 1, Tab 51).

In commenting on the Hamilton-Finn report, Mr. Gray noted that collision statistics were not mentioned. This is because safety is not really an issue at this liquor store access service road point. He noted that traffic volumes are extremely low, as are any available collision statistics. Accordingly, in Mr. Gray's opinion, safety simply is not an issue for a left-turn access into the liquor store at the southwest corner of the Yellowhead Inn property. This is especially the case where there is a stop condition at the proposed service road intersection, which will further reduce any safety concern.

Mr. Gray described his proposed option, Figure 3 in the Bunt & Associates report (Exhibit 2). Further, because of the stop feature at the new service road intersection, Mr. Gray indicated that his proposed intersection and access would be safer than the existing situation at that location.

f. Cross-Examination of Mr. Gray by Mr. Debrinski

Mr. Gray noted that his design for the service road intersection differed considerably from that proposed by the City. He opined that his intersection is better designed to reinforce the idea of a stop condition, whereas the City's proposal allows for a straight-through access movement which, in his opinion, runs the risk of vehicle traffic intentionally or unintentionally disobeying the stop sign for traffic continuing westward at the proposed intersection. His intersection design reinforces the idea of a stop condition.

Mr. Gray agreed with Mr. Debrinski that his proposed access and intersection design is the minimum distance required under TAC between an access point and an intersection. Mr. Gray noted that TAC standards are guidelines and do not replace professional judgment. Mr. Debrinski asked Mr. Gray whether moving access points on the south of the Yellowhead Inn property by the liquor store would create a more safe condition. Mr. Gray responded that the City has not established that there is a safety issue at that intersection, and the information available indicates the opposite.

Mr. Gray did agree with Mr. Debrinski that, if you isolate roadway use from land use and simply ask the abstract question—Is allowing a left-turn access across traffic safer than not?—then one would conclude that to eliminate left-hand turns across traffic would be safer. However, Mr. Gray noted that as professional transportation planners, as a matter of fact, no one isolates road use from adjacent land use. Otherwise, all left-hand turns would be eliminated because they are more dangerous.

Mr. Gray acknowledged that, of the various options he reviewed, Option 10 is probably the best of those proposed by the City.

The Inquiry Officer then asked of Mr. Gray whether the proposed Access point 'B' contemplated both left and right turns on exit. All parties agreed that that was contemplated by the City plan for this Project.

PART 3 SUMMARY OF ARGUMENT

1. City of Edmonton

Mr. Debrinski, quite accurately, noted that the City had provided detailed written argument and case law authority to the Inquiry Officer prior to the commencement of the hearing. Accordingly, he was not going to repeat the arguments set forth in the written submissions.

The City argues that, pursuant to section 6 and section 15 of the *Expropriation Act*, it is not an acceptable position of the landowner to dispute the right of an expropriating authority to have recourse to expropriation. Further, the landowner objecting to an expropriation is not entitled to challenge the objectives of the expropriating authority.

The City makes reference to the report of an Inquiry Officer in the *Town of Westlock v. Marks* and the report of an Inquiry Officer in the *City of Edmonton v. Guaranty Properties*, in support of these propositions. Further, the City notes comments by the Inquiry Officer McLennan that it is not generally appropriate for an Inquiry Officer to “micromanage the design of any given project” and that “issues of compensation are generally not relevant to the task of an Inquiry Officer”.

The City cites the well known case of *Re Parkins v. The Queen* for the proposition that “fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority” is essentially equivalent to whether the intended expropriation was “reasonably defensible” in the context of the objectives of the expropriating authority.

The City cites *Nanaimo v. Rascal Trucking Ltd.*, a decision concerning judicial review of a City Council decision, in support of a proposition that the decision of the elected officials of the City of Edmonton with respect to a transportation decision need only be “reasonably defensible” or not “patently unreasonable” in the achievement of the City’s stated objectives.

The City argues that the objectives of the City from the policy level to the specific design level are clearly set forth in the evidence: namely, in accordance with the *City Transportation*

Act, the transportation system bylaws, the Yellowhead Trail functional planning study, the Yellowhead Trail/156 Street interchange concept planning study, and Council approvals, the objective for this Project is improvement of the interchange at Yellowhead Trail and 156 Street, which necessitates the construction of this service road Project.

The City also notes in argument that considerable consultations and negotiations have taken place between City representatives and Yellowhead Inn representatives. This has occurred from at least September of 2002 through to September of 2004. The documents evidencing this consultation and negotiations are found, *inter alia*, in Exhibit 1, Tabs 24 to 46.

The City further argues that the position of the objector, Yellowhead Inn, is unreasonable and that this hearing is unnecessary. The City argues that the Yellowhead Inn does not object to the taking of land for expropriation. Rather, the Yellowhead Inn simply has a disagreement with the City over the configuration of access at the southwest corner. Disagreement with respect to access does not even take place on the land which is intended to be expropriated. Furthermore, no landowner had an enforceable right to access city streets and any said dispute is not the subject matter for an Inquiry Officer under the *Expropriation Act*. Further, the City argues that because Yellowhead Inn is only taking issue with the design of this access point, which is not on the land intended to be expropriated, these are special circumstances and, under section 15(10)(b) of the *Expropriation Act*, the Inquiry Officer ought to reduce or deny any costs claimed by the Yellowhead Inn. In support of this argument, the City cites *Nissen v. The City of Calgary* and Rule 635 of the *Alberta Rules of Court*, cited therein (*The City Transportation Act*, section 24, indicates that no person has a right of direct access between a controlled street and land adjacent to it. Further, section 26 expressly authorizes the City to close any such access, and section 27 sets out a procedure for claiming compensation for any alleged damages arising from such a closure.).

In conclusion, Mr. Debrinski submitted on behalf of the City that the intended expropriation should be found to be fair, sound and reasonably necessary for the achievement of the City's objective to improve Yellowhead Trail to a free-flowing facility by eliminating at-grade intersections and restricting direct access to the Trail, of which this Project is a part.

Further, the City requests special circumstances be found to exist, so that the Yellowhead Inn is denied costs of this Inquiry.

2. Argument of Yellowhead Inn

Mr. Mallon acknowledged that these proceedings are governed by section 6(2) of the *Expropriation Act*, at least in part.

Mr. Mallon disagreed that the Ontario decision of *Parkins*, which equates “fair, sound and reasonably necessary” to the phrase “reasonably defensible”, is accepted in the Province of Alberta. Furthermore, Mr. Mallon argued that the “reasonably defensible” test does not add anything to the analysis.

Mr. Mallon made reference to the decision of Inquiry Officer Carr in the matter of *The City of Edmonton v. Michael Wild*.

Mr. Mallon argued that, if the part of the taking involves a road design and the road design impacts the Yellowhead Inn and the road design itself is faulty, then the expropriation cannot be fair, sound, nor reasonably necessary. Mr. Mallon indicated that he disagreed with the City’s position that the Inquiry Officer has no jurisdiction to deal with the matter. He noted that section 2(1) of the *Expropriation Act* takes precedence over all other Acts, including the *City Transportation Act*.

Further, Mr. Mallon referred to section 56 of the *Expropriation Act* and noted that land that is proposed to be expropriated, and the works which are proposed to be constructed thereon, are part and parcel of this Inquiry and properly before the Inquiry Officer pursuant to the *Expropriation Act*.

Mr. Mallon also noted that this is the only forum that the Yellowhead Inn has to take issue with the expropriation by the City and the specific works on the lands to be expropriated. Mr. Mallon noted that there have been examples in the past where an Inquiry Officer’s findings with respect to the associated “works” have been effective in having the expropriating authority re-examine their design and find ways to accommodate points raised by the objecting landowner.

Mr. Mallon made reference to the *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.* case. At page 8, paragraph 20, the Supreme Court of Canada stated:

The expropriation of property is one of the ultimate exercises of government authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the powers of an expropriating authority should be strictly construed in favour of those whose rights have been affected. This principle has been stressed by eminent writers.

Mr. Mallon argued that the Hamilton-Finn report is seriously lacking in that it did not take into account traffic volume and collision experience in addressing safety of the various access options from the service road and related intersection in the southwest corner of the Yellowhead Inn property. Hamilton-Finn also did not take into account that there was a stop intersection proposed by Bunt & Associates, which further reduced any concern with respect to the safety of a left-turn access into the liquor store (which safety concern Yellowhead Inn argues does not exist in the first place).

In response to the City's argument that the Yellowhead Inn should be deprived of costs, Mr. Mallon made the following points. Firstly, the owner has a statutory right to his day before the Inquiry Officer where the intended expropriation is opposed by the landowner. Secondly, Yellowhead Inn has concerns with respect to the expropriation and the intended use of the expropriated property by the City, in addition to simply the left-turn access to the liquor store area in the southwest corner. Thirdly, the owner is concerned that the expropriation and overall design Option 10 will reduce the business of the liquor store, gas bar and Yellowhead Inn hotel facilities. Fourthly, the proposed Access point 'B' will cause disruption at the loading docks, problems with parking, and safety concerns regarding pedestrian and traffic flow between the liquor store and the hotel. Finally, the expropriation and proposed service road design by the City will cause problems for large trucks, found in the north central and northeast portion of the Yellowhead Inn property, in entering and exiting that parking area.

3. City of Edmonton – In Reply

In reply, Mr. Debrinski argued that the only issue between the City and the Yellowhead Inn is with respect to the configuration of the access point and the service road to the liquor store

in the southwest corner of the Yellowhead Inn property. This does not involve the expropriated lands and is therefore not a matter properly raised by the Yellowhead Inn before the Inquiry Officer appointed under the *Expropriation Act*.

Mr. Debrinski argued that there is no parallel, factually speaking, between this case and the *The City of Edmonton v. Michael Wild*, as there have been considerable negotiation and flexibility demonstrated by the City in attempting to deal with the concerns raised by Yellowhead Inn.

PART 4 FINDINGS OF FACT

As agreed between the parties, and confirmed in the first several Tabs of Exhibit 1, the Inquiry Officer finds as a matter of fact that all steps required under the *Expropriation Act* relating to the intended expropriation and this Inquiry have been taken by the City.

The Inquiry Officer finds that the lands the City intends to expropriate are those portions of:

FIRST: PLAN 1738KS
 BLOCK (A)
 LOT FIVE (5)
 CONTAINING 1.84 HECTARES MORE OR LESS
 EXCEPTING THEREOUT:
 (A) 0.053 HECTARES MORE OR LESS FOR ROAD, AS SHOWN
 ON ROAD PLAN 4981TR
 (B) 0.117 HECTARES MORE OR LESS AS SHOWN ON RIGHT-
 OF-WAY PLAN 7822381
 EXCEPTING THEREOUT ALL MINES AND MINERALS

SECOND: PLAN 1738KS
 BLOCK (A)
 LOT SIX (6)
 CONTAINING 1.65 HECTARES MORE OR LESS
 EXCEPTING THEREOUT:
 (A) 0.291 HECTARES MORE OR LESS FOR ROAD, AS SHOWN
 ON ROAD PLAN 4981TR
 (B) 0.012 HECTARES MORE OR LESS AS SHOWN ON RIGHT-
 OF-WAY PLAN 7822381
 EXCEPTING THEREOUT ALL MINES AND MINERALS

as outlined in Option 10 at Tab 44 of Exhibit 1.

The Inquiry Officer finds that the objective of the City is to improve Yellowhead Trail to a free-flowing roadway by eliminating at-grade intersections and restricting direct access to the Trail, specifically with an intersection at 156 Street and the construction of the associated service road defined herein as the Project.

Further, the objective of the City is clearly set forth in the various planning studies, concept plans, and more detail plans prepared by the City and considered by City Council.

A service road must be constructed in and around the Yellowhead Inn property to achieve the City's objectives. The Option 10 design, of those developed by the City, is the one the City is prepared to proceed with, and the one Yellowhead Inn finds least objectionable.

Yellowhead Inn would prefer no changes be made which affect its property. The Yellowhead Inn is, quite sincerely, concerned about loss of business, congestion at proposed Access point 'B', problems with the maneuverability of large trucks in the north parking lot, and safety concerns with respect to traffic at the proposed Access 'B'.

The Yellowhead Inn has taken the very laudable step of hiring a professional transportation planner to present both the City, and the Inquiry Officer, with a professional plan that lays out an alternative for the service road intersection and access point at the southwest corner of the Yellowhead Inn property. Mr. Gray's insights were of value to the Inquiry Officer.

The Inquiry Officer accepts the evidence of Mr. Gray that there is not really a safety concern with respect to the existing left-turn access into the liquor store at the southwest corner of the Yellowhead Inn property. Further, the Inquiry Officer accepts Mr. Gray's evidence, as set forth in the Bunt & Associates report, that this service road intersection could be designed in a manner which would allow left-turn access to the liquor store without creating any undue traffic safety concerns.

The Inquiry Officer finds that considerable efforts have been made by City representatives to locate and design a service road in a manner which meets some of Yellowhead Inn's concerns. Negotiations and discussions in this regard have been lengthy covering at least the period of September 2002 to September 2004.

The Inquiry Officer also accepts the evidence of Mr. Kabarchuk that the City transportation engineers, to some degree supported by the Hamilton-Finn report, prefer the service road intersection design in Option 10; further, that the City has concerns with respect to the maneuverability of long trucks proceeding in a westerly direction along the service road, in the design proposed by Mr. Gray of Bunt & Associates.

The Inquiry Officer finds there are pros and cons to both the City's preferred design for this service road intersection and access to the liquor store, as well as Mr. Gray's proposed service road intersection design and access to the liquor store.

PART 5 OPINION ON THE MERITS OF THE EXPROPRIATION AND REASONS THEREFOR

In the Inquiry Officer's opinion, the intended expropriation of the Yellowhead Inn lands is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority, the City of Edmonton. The Inquiry Officer is persuaded that the intended expropriation meets the statutory test in section 6(2) of the *Expropriation Act*.

The objectives of the City to develop Yellowhead Trail as a free-flow inner city ring road, the improvement of the intersection at 156 Street and Yellowhead Trail, and the associated reconfiguration of the service road as outlined in Option 10 (Exhibit 1, Tab 44) are very clearly set forth in the evidence led by the City.

It is further clearly demonstrated that there must be a service road constructed and that the general location of the service road, which causes least inconvenience to the Yellowhead Inn, is that set forth in Option 10.

The Inquiry Officer is not persuaded that the City's proposed design of the service road intersection and liquor store access in the southwest corner is preferable, objectively speaking, to the design preferred by the Yellowhead Inn, as presented by Mr. Gray of Bunt & Associates. Nonetheless, this is not a basis upon which to conclude that the intended expropriation of the Yellowhead Inn property, which does not physically include the liquor store access, is not fair, sound and reasonably necessary. As noted in previous Inquiry Officer decisions, it is inappropriate for an Inquiry Officer to micromanage what are, in effect, details of transportation road planning as part of the statutory duties of an Inquiry Officer under the *Expropriation Act*.


Other than the liquor store access option presented by Mr. Gray, the Yellowhead Inn did not present any evidence on how the City's objectives could be met without the expropriation of Yellowhead Inn property and construction of the service road in accordance with the City's design for the Project (Option 10, at Tab 44 of Exhibit 1).

With respect to the question of costs, the Inquiry Officer does not accept the submissions of the City that special circumstances exist to deprive the Yellowhead Inn of costs associated

with these proceedings. The City's submissions in this regard would have much more force if Yellowhead Inn's **only** position before the Inquiry Officer was the configuration of the service road intersection and related access to the liquor store in the southwest corner of the Yellowhead Inn property. This was not the case. Mr. Panasiuk, on behalf of the Yellowhead Inn, preferred no change at all to his property and raised very legitimate concerns with respect to proposed Access point 'B', the general diminution of his business with the road design proposed by the City for the intended expropriated lands, and difficulties for his large truck clients in the north central and northeast portion of the property. These are all legitimate concerns that landowners such as the Yellowhead Inn are entitled to raise before the Inquiry Officer in these proceedings.

Accordingly, Yellowhead Inn is entitled to its reasonable costs in connection with these proceedings.

DATED at the City of Edmonton, in the Province of Alberta, this 5th day of November, 2004.



GRAHAM McLENNAN
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THIS NOTICE OF INQUIRY IS FOR SERVICE ON:

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PART 6 APPENDIX 1 - EXHIBITS

Exhibit

- 1** Binder of documents prepared by City of Edmonton
- 2** Bunt & Associates report dated October 26, 2004
- 3** Two aerial photographs with schematics
- 4** Aerial photograph with measurements
- 5** Map prepared by City of Edmonton