IN THE MATTER of the *Expropriation Act*, R.S.N.W.T. 1988, c. E-11;

AND IN THE MATTER OF the intended expropriation by the City of Yellowknife of an easement interest in those lands described as:

Lot 39
Block 308
Plan 3953;

AND IN THE MATTER OF the Notice of Objection to the said intended expropriation filed by 994552 N.W.T. Ltd. by its solicitor, Sheldon Toner;

AND IN THE MATTER OF a Hearing in respect thereof pursuant to the provisions of the Expropriation Act by Donald P. Mallon, Q.C. as Hearing Officer;

REPORT OF HEARING OFFICER
DONALD P. MALLON, Q.C.

OCTOBER 27, 2011

Kerry Penney
The Municipal Corporation of the
City of Yellowknife
4807 – 52 Street
Yellowknife, NT X1A 2N4

Sheldon Toner
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5016 – 50 Avenue
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I. INTRODUCTION

1. The expropriation inquiry hearing was held on Thursday, October 20, 2011 in Council chambers at City Hall in the City of Yellowknife Northwest Territories (the "Hearing"). The City of Yellowknife (the "City") was represented by Ms. Kerry Penney, a City solicitor and 994552 N.W.T. Ltd. ("Nova"), the Owner, was represented by Mr. Sheldon Toner of Dragon Toner Law Offices.

2. This hearing concerns the intended expropriation by the City of an easement over, through and under a portion of Nova's property legally described as Lot 39, Block 308, Plan 3953 (the "Lands") for the purposes of construction, installation and maintenance of municipal infrastructure namely: water and sewer lines. The specific easement sought is attached as Schedule "A" to the Notice of Intention to Expropriate.

3. The Hearing Officer independently inspected the Lands October 19, 2011.

4. A Notice of Intention to Expropriate was registered with the Land Titles Office for the Northwest Territories registration district on May 31, 2011. It was served on Nova on or about June 9, 2011. A Notice of Objection was served by Nova on the City on or about June 29, 2011. The City appointed the Hearing Officer September 28, 2011. The Hearing Officer caused a notice of this hearing to be published in the Yellowknife newspaper on October 5, 2011. Notices of the Hearing were also communicated by fax on October 4, 2011 to the City and Nova through their respective legal counsel and to an encumbrance holder registered on title to the Lands.

5. Written briefs and documents were exchanged between the City and Nova and provided to the Hearing Officer prior to the hearing.

6. There were no preliminary objections.

II. SUMMARY OF EVIDENCE

A. Documents

7. All documents entered by the City or Nova as evidence in this hearing are listed in Appendix A to this Report. Those documents are not attached to this Report as both parties participating have received copies of the same prior to or during the Hearing.

8. Counsel for the City and for Nova provided copies of the relevant Statutes and a number of cases to the Hearing Officer. Those references and others contained within the text of this report were considered and are listed in Appendix B to this Report.

B. Evidence of the City

1. Jeffrey Humble

9. Mr. Humble is the Director of Planning and Development for the City. He has been in that position for six years. He oversees 12 employees and deals with long-term planning as well as land development. Mr. Humble has been involved with Phases V and VII of the Niven Lake development.

10. Mr. Humble noted that By-Law 3898, the General Plan By-Law (1996), identified the Niven Lake area as a Development Scheme Area. He reviewed in summary By-Law 4339, the Niven Lake Development Scheme 2004 and advised it provided a future vision of the Niven Lake Development. Mr. Humble referred to By-Law 4315, General Plan By-Law (2004) as a renewal of the General Municipal Plan which contained a continuation of the Niven Lake development. He discussed By-Law 4438, the Niven Lake Development Scheme 2007 as containing changes from the original development scheme but confirmed that the water and sewer infrastructure were still there. Mr. Humble specifically pointed to Schedule 1 of By-Law 4438 as showing that "services from Phase V" were designated to be located on the Lands.

11. Mr. Humble then went back to By-Law 3794, the Niven Lake Development Scheme enacted in 1994 and discussed that the basic foundations of the development, the major road structure and infrastructure had not changed. He advised that the connection from Phase V to Phase VII was integral to the plan.

12. Mr. Humble then referred to the City General Plan 2011 draft which indicated a growth projection from 20,270 in 2011 to 23,500 in 2121. He also discussed a concept within the draft General Plan of "Smart Growth" and advised it meant that the City needed to be strategic in its growth. Niven Lake was closer to the core of the community and needed to be developed earlier than communities further from the core. He advised that Niven Lake Phase V contained 90 units, Phase VII contained 195 units and Phase VIII contained 190 units.

13. Mr. Humble then moved on to the purchase agreement dated August 29, 2003 between the City and the previous owners of the Lands, Bond Street Properties Inc. ("Bond Street"). Paragraph 14 of that agreement provided that Bond Street would at its cost be responsible for regulatory approval of a Descriptive Plan of Easements and would enter into an easement agreement with the City for the purposes of connecting servicing to Phase VII through the Lands. Mr. Humble advised that Schedule C of the agreement showed the same servicing on site as By-Law 4438 and stated that the previous owner had not requested any changes to the proposed easement during the term of its ownership of the Lands.

14. According to Mr. Humble an easement agreement was at one point forwarded to Nova for their review. He stated that no compensation offers were extended to Nova at that time as such easements are typically part of development agreements.

15. He stated he had spoken to the current owner on multiple occasions. He had a brief call setting up further discussions and then a February telephone discussion together with Mr. Kefalas and Mr. Mrdjenovich of Nova. At that time Mr. Mrdjenovich advised he had possible plans for an apartment complex and suggested a better location for the easement might be adjacent the property line. Mr. Humble advised Mr. Mrdjenovich the City may be open to viable alternatives. Parts of the discussion were encapsulated in a letter from the City to Nova dated March 23, 2011 (the "March Letter"). The following are important passages from that letter:

> *We are writing at this time with respect to the easement agreement required by the City of Yellowknife (the "City") across the Property. On January 11, 2011, the City's Solicitor sent a copy of an Easement Agreement (attached hereto) via email to your assistant Debbie Hannah for your review and execution. On February 18, 2011, Dennis Kefalas, Director of Public Works, and I spoke with you regarding the City's requirement of an easement across the Property. To date we have not received an executed agreement for the required easement. Nor have we received any applications regarding proposed development of the Property.*
>
> *As discussed in our conversation on February 18, the City's design and development of future phases of Niven Lake is dependent upon the installation of water and sewer as per the previously approved development plans for the Property. The failure to proceed with this installation has delayed the City's completion of the eastern most cul-de-sac of Niven Lake Phase VII. As these are the only single family lots to be developed and offered to the public in the foreseeable future it is imperative that the City be able to proceed with the development as planned.*
>
> *During our discussions you stated that you would not oppose granting an easement if the proposed infrastructure could be located along the rock face of the Property instead of the currently proposed location because you plan to make application to the City to develop the Property differently than the previous owners…Based on what is accepted practice in the Northwest Territories, the City could not blast a trench any closer to the rock face than 5m and as such the City would require an easement located between 5m and 11m from the rock face. Therefore the City could offset the currently proposed alignment of water and sewer infrastructure by approximately 20m if such an amendment is proven necessary and cost effective. However, the City can advise that the area from the rock face and the outside edge of the easement/ROW would have restrictions on its end land use.*
>
> *…the City could consider amending the proposed location of the necessary infrastructure if such an amendment is justified. Due to the fact that such an amendment is likely to result in increased installation costs to the City, there would need to be convincing evidence to support such a change. Throughout our discussions you have indicated that you plan to amend the current plans including the layout, building type and design and this is the reason you have*

refused to execute the easement agreement as presented. However, to date the City has not received any applications from you regarding development of the Property.

…Therefore, we request that you submit a completed development permit application, including, but not limited to location and dimensions of proposed structures on site, location of curbs and sidewalks, location of existing and proposed service connections, dimension layout of proposed parking areas, entrances and exits abutting streets and lanes, and floor plans and elevations of all proposed structures(section 3.3 of Zoning By-law 4404) for review and assessment to determine whether amending placement of the infrastructure is justified. In recognition of the fact that the short building season is almost upon us and the urgency of the City to proceed with development of Phase VII, we require submission of the application and supporting document by no later than April 8, 2011.

If the City does not receive the required documents from you regarding development of the Property then it will not be able to justify the increased expense to alter the current placement of the infrastructure and will be forced to proceed in accordance with the installation of the water and sewer infrastructure as planned. Although it is the City's desire and intention to work with you to reach an amicable solution regarding placement of the easement, if we are unable to reach such an agreement then the City will be forced to take other action to facilitate installation of the water and sewer infrastructure so that we may proceed with development of Niven Lake Phase VII in the 2011 building season.

Pursuant to section of the Cities, Towns and Villages Act, S.N.W.T. 203, c.29 and the Expropriation Act, R.S.N.W.T., 1988, c.E-11, the City has the authority to expropriate " any interest in land" that is in the opinion of the City, required for the lawful purposes of the City. As such, due to the importance of the City's need to have an easement on the Property and the time sensitive nature of the project, the City asks that you submit the documents as requested above so that we can continue to negotiate placement of the easement. However, if we are unable to successfully negotiate an easement agreement as required for development of Phase VII to continue, the City will be forced to file a Notice of Intention to Expropriate pursuant to Section 5 of the Expropriation Act with the Registrar of Land Titles so that installation of the infrastructure can proceed.

The City looks forward to receipt of your development permit application and anticipates that we will be able to reach an easement agreement that satisfies the needs of both parties in a timely fashion…

16. Mr. Humble testified that there were development pressures on the City. It had made an investment in Phase VII. There were no indications of problems from the previous owner between 2006 and 2008. It was only in 2009 the City discovered Brook Street's

problems. The City had sold Phase VII properties, some of those were being developed and would need water and sewer in the coming spring. There were no other single family lots on the market right now. Phase VIII was eighteen months away.

17. In cross-examination by Mr. Toner, the witness advised he was involved in the planning processes currently being undertaken by the City. He stated that By-law 4438 did not fully set out the infrastructure needs for the Niven Lake Development Scheme as it was a high level plan. However, he alleged that by looking at Schedule 1 to the By-Law one could discern, particularly on the website, a linear designation of the proposed easement.[1]

18. Mr. Humble, responding to further questions from Mr. Toner also stated:

a) the proposed easement did not service Phase VIII;

b) there was no alternative to service Phase VII from the highway;

c) most engagement with developers occurred during the development process;

d) developers purchasing properties would rely on the title but also ordinarily have meetings with his department prior to permitting phases;

e) the agreement for an easement was with Bond Street, not Nova;

f) he was unsure what discussions were had between his department and Nova prior to Nova's purchase of the Lands;

g) there was no discussion of the easement prior to its being sent to Nova;

h) no easement agreement was signed by Bond Street;

i) no encumbrance was registered on title;

j) the City provided easement information to the realtor involved with the property sale;

k) the January 2011 communication of the easement was the first formal indication to Nova of the easement requirement;

l) he had one discussion with Mr. Mrdjenovich two weeks prior to the February conversation;

m) he agreed that the March Letter did not contain an agreement to change the location of the easement;

[1] While technically that may be true, the blue line designating the easement on the color copy provided at the hearing was barely discernible and certainly not apparent until pointed out.

n) he denied telling Mr. Mrdjenovich that an apartment application would be refused;

o) he had at the time of the March 23 Letter advice as to the additional cost of relocating the easement close to the property line;

p) he sensed unwillingness on the part of Mr. Mrdjenovich to proceed with a development application or to grant an easement;

q) he stated the relocation cost was approximately $150,000.00 which cost the City was prepared to incur;

r) the City was ready to go ahead with the relocation;

s) the City did not follow up with Mr. Mrdjenovich after the March Letter;

t) he made no phone calls to Mr. Mrdjenovich after the March Letter;

u) there are other options to the proposed water and sewer lines but none are cost effective;

v) trucking water and sewage is not a viable option;

w) the General Plan mandates piped services;

x) he did not cost trucked services;

y) no examination of the lift station option was performed before these proceedings; and

z) he was involved in the preparation of By-Law 4637 but did not review with City Council the variety of alternatives discussed in cross-examination.

19. Mr. Toner then reviewed various provisions of a memorandum to City Council dated May 9, 2011 (the “Memorandum”) to consider prior to passage of By-Law 4637 authorizing expropriation proceedings:

a) after considerable hesitation Mr. Humble admitted there was no effective easement agreement with Bond Street that could be registered at Land Titles;

b) he agreed that there was not an outright refusal to the easement proposal or the terms proposed by the March Letter but stated there was also no response from Nova; and

c) he agreed the dimensions of the proposed easement in Schedule A to the Memorandum were not put to Nova.

20. On redirect questions from Ms. Penney, Mr Humble advised the City was not involved with the property on re-sale save for the information provided to the realtor; that the City only

found out about the new purchaser in late 2009; Phase VII, Stage 1 construction started in 2008; a primary purpose of the March Letter was to request Nova to submit a plan; it was the City who initiated all communications with Nova and no responses were received to any of the letters nor to the February phone call.

2. Dennis Kefalas

21. Mr. Kefalas is the Director of Public Works and Engineering for the City. His department provides central services, i.e. roads, sewers and landfill, for the City. He has been the Director of the department for the last three years and had been a manager in that department since 2002. He was involved in most phases of the Niven Lake development and confirmed AECOM was the engineering consultant for those phases.

22. In answer to a question as to whether trucked services are contemplated for new developments, Mr. Kefalas advised that Consolidation of Water and Sewer Services By-Law 3529 requires the City to provide to its citizens efficient municipal services.[2]

23. The witness confirmed Mr. Humble's testimony that during the phone conversation with Mr. Mrdjenovich he advised that townhouses will not sell, that he wanted to build an apartment or apartments on the Land and wanted the easement closer to the boundary rock face.

24. Mr. Kefalas then talked about technical aspects of the water and sewer operations. He advised that the water needs to move so that it does not freeze and for continuous chlorination purposes. The alternatives are a circular system or a bleeder valve. However, a bleeder valve is wasteful. The easement requested is for both water and sewer services. With respect to water, the alternatives to the easement were a single line system which was wasteful or an alternate circuit could be built but would involve ripping up a newly built road and sidewalk and would take to May 2012 to plan and the summer following to build. On the other hand, the construction of the services through the proposed easement would take three weeks to complete. With respect to the sewage line, constructing through the easement would utilize gravity whereas to build an alternative would entail a lift station.

25. Under cross-examination he advised that stage 2 of Phase VII had 62 lots. Half of those lots were sold. Of the sold lots, seven were affected by the incomplete sewer and water lines. Of the seven, two were issued permits and would require water and sewer at the latest by spring 2012. There were potentially temporary solutions to this problem but those solutions were not cost effective. He also denied Nova's assertion that an apartment would not be considered due to view issues.

26. In re-direct Mr. Kefalas clarified that the temporary solutions he spoke of were really for emergencies only. Ordinarily trucked services in other areas of the City are utilized two

[2] s. 205(3): The City shall make every effort to provide safe, continuous and efficient municipal services.

times per week. In this instance as there were no holding tanks the trucking required would be constant. Further there was a real concern about sewer backup.

3. Robert Boon

27. Mr. Boon is an engineer with AECOM Canada Ltd., formerly Earthtech Canada, "AESCOM." He was engaged by his company in Yellowknife between 1977 and 2004 when he move to Edmonton. He still provided services to the City these days from his Edmonton base. Mr. Boon was involved in the majority of the Niven Lake Development design. He referred to his technical paper and in particular to a number of design drawings explaining the history of the Niven Lake development. He discussed the alternates to connecting Phase VII services through the Lands as costing an additional $720,000.00. He advised that the City years ago looked at trucked water and sewer services for future development and determined while the costs overall were similar to piped services, the latter provided better service including better firefighting capacity. He was requested to look at the cost to relocate the easement from the area agreed to by Bond Street to the west property line and calculated the additional cost to be between $100,000.00 to $130,000.00. He explained that the lines could not be placed against the rock wall on the property line for safety reasons and that a step of approximately 5 meters was preferred. He stated a 6 meter easement was sufficient for all construction and maintenance requirements as shown in his design drawing 100754-107 revision 1 attached to his technical report.

28. Mr. Boon explained during cross-examination that the original design of the easement was done in concert with Bond Street. He also admitted that a contract had been entered into with RTL for the easement construction in March or April of 2011 and that the construction cost of $468,000.00 included the change order changing the location of the easement and services. Mr. Boon advised that the reason a portion of the Lands was expropriated between the property border and the prebuilt fire vault was simply that since the prior owners had expended much money to put it there they might as well use it to install a hydrant that would service Phase V. According to Mr. Boon it is a reasonably simple matter to install a hydrant right at or near the 90 degree corner at the property border.

C. NOVA'S EVIDENCE

1. Mike Mrdjenovich

29. Mr. Mrdjenovich is the owner and director of Nova. He first was in Yellowknife in 1975 and started construction there in 1976. He has since constructed between 6,000 and 7,000 residential units, 20 hotels and a number of commercial buildings in Yellowknife and elsewhere. He was looking at the Lands for possible purchase before they were sold to Bond Street. He kept an eye on the property and when it was in foreclosure he purchased it from the bank. Prior to doing so he and his lawyers pulled a title and reviewed the Bond Street plans for the Lands which were approved by the City's Director of Planning on July 7, 2005. Neither the title nor the approved plan indicated an easement was required. After purchasing the property he advises that he had trouble getting documents from the City.

30. Mr. Mrdjenovich explained that in recent times his relationship with the City administration had deteriorated. The City has taken him to court on two occasions for what he considers minor issues. On both occasions he successfully defended himself.

31. He is upset that the City waited 13 or 14 months to advise him an easement might be required on the Lands. The first communication was the easement that was sent to him. He advises that he was told in the February telephone conversation that an apartment on the Lands would not be approved. He believes also that the City was levering any approval to his plans on his agreement to the easement. He is upset that while he paid $3.5 million for the Lands, his plans will be thwarted because the views of seven lots totalling $1.2 Million in value would be impacted.

32. Mr. Mrdjenovich advises that when he purchased the Lands, he had in mind to locate an apartment building on the western edge. The previous owners had blasted and removed as much as fifteen feet of rock on that edge and created a flat superior building site. This is why, if there was to be an easement, he wanted it moved towards the property line within the setback areas. Mr. Mredjenovich does not accept that there is a safety issue associated with blasting a vertical face in excess of 6 meters and suggests there is no reason for Mr. Boon's stepped approach to the location of the lines as the precambrian rock on the Lands is the "hardest there is."

33. Mr. Mrdjenovich volunteered that he was not opposed to an easement to service Phase V through the Lands but he feels the expropriation puts it in the wrong location and that the City should negotiate with him. He considers the single phone call and the single letter he received not to be negotiations. He characterizes the March Letter as threatening. The demand for a development application within a two week time period was an unrealistic demand and he feels the City administration would have used any such application to their advantage to acquire the easement from him. He was therefore willing to dig in his heels and outwait the City. He advises they communicated through the media.

34. Under cross-examination Mr. Mrdjenovich admitted his research of the property consisted of no file searches at City Hall but rather pulling title, talking to the bank/mortgage holder, meeting with the Mayor and a person named Max Hall. He believes that it was necessary to keep his interest in acquiring the Lands as quiet as possible to avoid interference by some within City administration. He confirmed that he currently owns two land parcels in Yellowknife and has held one without developing it for six to seven years and the other, the Lands, for two years. In answer to whether he had specific plans for an apartment on the Lands he advised that he had any number of plans as he has built many buildings and could use previous plans as a "cookie cutter." He confirmed he was aware of the setback requirements.

III. REBUTTAL

35. In rebuttal, Ms. Penney asked some clarification questions of Mr. Boon. The Hearing Officer asked Mr. Boon to address Mr. Mrdjenovich's characterization of precambrian rock

being the hardest in the world that therefore it was safe to place the trench directly below a vertical wall greater than six meters. Boon agreed it was hard rock. He disagreed with Mr. Mrdjenovich's safety assessment.

IV. SUMMARY OF ARGUMENTS

A. Nova

36. In his written Brief Mr. Toner asks that the expropriation be abandoned until the City has undertaken a public and transparent process taking into account the Owner's preference and giving consideration to the alternative of a sewage pumping lift station. If the expropriation is allowed, he seeks terms and conditions to ensure substantive and procedural fairness to the Owner.

37. In oral argument he asked that the Hearing Officer recommend the expropriation be abandoned and the Hearing Officer recommend the following conditions:

    a) Nova and Mr. Mrdjenovich be directed to produce a concept drawing on Phase V within two weeks;

    b) The City be directed to have meaningful consultations with Nova and Mr. Mrdjenovich on how to tie-in the easement with the concept drawing;

    c) The City be direct to have meaningful consultations with Nova and Mr. Mrdjenovich regarding the possible tie-in or removal of the hydrant vault on the Lands; and

    d) The City be directed to utilize the services of Mr. Boon in its consultations with Mr. Mrdjenovich and Nova to determine how the easement can be reconciled with the rock face.

38. Mr. Toner says the City "dropped the ball" and that Nova is entitled to a better process.

39. He points out that the City did not communicate with Nova between December 2009 and January 2011 regarding the need for an easement and that following that period the communications consisted of a single substantive discussion and a threatening letter. He notes with apparent cynicism that the City had already obtained a costing for the relocation of the easement before the letter was written. While he did not use these words his point appears to be that the City was not acting in good faith towards Nova and was using the expropriation threat as a lever against his client.

40. In support of the abandonment argument Mr. Toner says there is no urgency here. Currently the line is to service only two houses in Phase VII and eventually five other lots in the cul-de-sac. Mr. Toner says there is time for the parties to properly consider the alternatives, for the City to consult with his client utilizing the services of Mr. Boon, to jointly decide on the easement location and to determine the usefulness of the hydrant vault on the Lands.

41. Mr. Toner is of the view that the expropriation is not reasonably defensible. City Council did not have the information before them to make an informed decision. Contrary to the Memorandum from City administration that was before them, Nova did not refuse an easement agreement and there was no easement agreement with the previous owner.

42. In his written materials Mr. Toner provided extracts from Eric Todd, *The Law of Expropriation and Compensation in Canada* (Toronto: Carswell, 1976) pertaining to the role of the Hearing Officer and the difference between the role as defined by *Expropriation Act*, R.S.C. 1985, c E-21 (the "Federal Expropriation Act") and the *Expropriation Act*, R.S.N.W.T. 1988, c. E-11 (the "Expropriation Act") as opposed to several provincial expropriation statutes. He noted that the Federal Court of Appeal rejected the notion that a Hearing Officer was merely a scribe or "human tape recorder" (*Society Promoting Environmental Conservation v. Canada (Attorney General)*, [2003] 4. F.C. 959, at para. 90) ("Society Decision"). Mr. Toner's view is that therefore the Hearing Officer may recommend the Expropriating Authority affirm, modify or abandon the proposed expropriation.

43. While acknowledging the test for a Hearing Officer in the Expropriation Act is not the provincial "fair, sound and reasonably necessary" test, if the taking is anything less, then Mr. Toner says the Hearing Officer should report the same to the Expropriating Authority.

44. Mr. Toner quoted several Ontario cases to illustrate the expropriation should fail on substantive grounds. In his view the lack of procedural fairness shown by the City in this expropriation process indicates that the expropriation should also fail on procedural grounds.

45. In answer to a question from the Hearing Officer Mr. Toner stated that if the test to be met by the City was the "lawful purpose" test advocated by Ms. Penney then a purposive interpretation of the Act would require an expansion of that definition.

B. City

46. Ms. Penney requests that the Hearing Officer find that the intended expropriation is necessary in order for the City to achieve its lawful purposes. She states that under the Expropriation Act, this is all the City must demonstrate in order for expropriation to be warranted. Ms. Penney takes a literal interpretation of Section 3 of the Expropriation Act:

> *"Any interest in land, including any interest referred to in subsection 5(3), that…(b) in the opinion of the expropriating authority...is required for the lawful purposes of the authority... may be expropriated by the Commissioner or other expropriating authority, as the case may be, in accordance with this Act"*

47. She argues there is no requirement under any Northwest Territories legislation for negotiations with an owner prior to expropriation proceedings.

48. The role of the Hearing Officer, in the view of the City, is constrained by the Expropriation Act to only "report on the nature and grounds of the objection made" – in other words simply to hear and report. In support of this position she relies on a statement by Todd in The Law of Expropriation and Compensation at page 47 to that effect. She also included in her materials page 49 of the same text wherein Todd states: "The officer functions as a scribe or human tape-recorder." Ms. Penney moved from that view in her oral argument stating the Hearing Officer could make recommendations.

49. In both written and oral argument Ms. Penney deftly wove various provisions of the Expropriation Act and the Cities, Towns and Villages Act, S.N.W.T. 2003, c.22 into a cohesive argument illustrating that acquisition of land through expropriation for the purposes of water and sewer infrastructure was a proper exercise of Municipal authority.

50. She also provided a historical look at the planning and development by-laws between 1995 and the present which showed that Niven Lake development planning and servicing was a long term effort involving a great deal of planning and design.

51. Ms. Penney argued the landowner's concerns were balanced against the public interest by the City expending significant funds to relocate the easement near the property line as he had requested in the telephone discussion with Messrs. Humble and Kefalas. She notes that a fair balance of the public and private interest is required generally in expropriations and in that regard the actions of the City are reasonably defensible and not patently unreasonable.

52. Further in her written materials she discussed the legal, social and economic imperatives which must be satisfied by the City. The expropriation allows the City to satisfy those imperatives. She requested the Hearing Officer find the expropriation is required for the lawful purposes of the City.

53. In answer to the question of whether Todd's views of the role of the Hearing Officer stated in the 1970's still held true today in light of more recent Supreme Court of Canada rulings on interpretation of expropriation statutes, she stated the words of the Expropriation Act were unchanged.

V. FINDINGS OF FACT

54. I find the following facts based on the evidence that was before me:

55. The Niven Lake subdivision has been through a number of planning and development stages since 1995. The City initially considered other alternatives but settled on piped underground water and sewer infrastructure as the best way to service the developed neighbourhoods.

56. In 2005 land comprising Phase V of the Niven Lake development scheme (the Lands) was sold to Bond Street. A condition of the sale was that Bond Street enter into an easement agreement for municipal services to Phase VII across a portion of the Lands. The cost of

the easement and the services was to be borne by Bond Street. The City did not register a caveat indicating its ongoing interest in the Lands nor did it register any easement agreement with Bond Street at Land Titles.

57. It was Bond Street's intention to construct townhouses on the Lands and to that end received approval for a development plan from the City on July 7, 2005. Bond Street improved the Lands for construction by blasting significant rock and levelling a portion of the site and by the construction of a hydrant vault approximately 20 meters east of the western boundary of the Lands. The blasting created a boundary wall of precambrian shield which at its highest point is approximately 6 meters. In 2008 Bond Street lost title to the Lands through foreclosure. The City provided the easement information to the real estate company listing the lands on behalf of the foreclosing bank.

58. In December 2009, Nova purchased the Lands from the foreclosing bank. It did not receive information about the easement from the bank's realtor. While a thorough search of the various planning documents for the Niven Lake development scheme might have revealed the City's intentions for the easement, Nova was under no obligation to make such searches. Nova was not bound by Bond Street's promises to the City as it had no notice of those promises.

59. I accept the technical evidence of Mr. Robert Boon in its entirety including:

a) the natural outlet for a gravity sewer system to connect to the developed sewer on Niven Drive is through Phase V;

b) the shortest connection for a watermain from Phase VII to Niven Drive is through Phase V, paralleling the proposed gravity sewermain;

c) the watermain is required to complete the Niven Lake watermain loop, a loop that allows recirculation of water for freeze protection and allows full design fire lows to fire hydrants throughout Niven Lake;

d) an alternate sewermain solution exists however this can only be implemented at considerable additional cost ($722,000.00) and would result in future maintenance costs for a sewage pumping station;

e) the time to design the alternate sewermain, tender the contracts and procure the materials will force completion into 2012;

f) siting the lift station is an issue;

g) the gravity situation is desirable, not only from a cost perspective, but from a reliability perspective;

h) an alternate method of looping the watermain is possible, but not desirable, as it is a much higher capital cost and will slightly reduce available fire flow rates; and

i) a six meter easement is required to install and maintain the proposed mains (design drawing 100,754 Revision 1).

60. I accept Mr. Boon's assertion that it is prudent to locate the easement 5 meters from the rock wall.

61. I further find that development permits have been granted for construction of two houses in Phase VII which would rely on the water and sewer services provided by the mains proposed to be located in the expropriated easement. Provision of alternate temporary water and sewer services to those homes in the spring of 2012 is possible but not preferable to the City for reliability and cost reasons. An unlooped single line watermain with a bleeder valve at its terminus is not preferable due to the wastage of treated water.

62. The provision of the proposed water and sewer services to Phase VII through the suggested alternate route would entail ripping up and replacing significant amounts of newly constructed roads and sidewalks.

63. The only substantive communications regarding the proposed easement between the City and Nova are:

a) provision of the proposed easement to Nova on Jan 11, 2011;

b) a February 18, 2011 telephone conversation between Mrdjenovich, Humble and Kefalas; and

c) the March Letter quoted herein.

64. In the March Letter the City requested Nova to submit within a period of two weeks: "*a completed development permit application, including, but not limited to location and dimensions of proposed structures on site, location of curbs and sidewalks, location of existing and proposed service connections, dimension layout of proposed parking areas, entrances and exits abutting streets and lanes, and floor plans and elevations of all proposed structures (section 3.3 of Zoning By-Law 4404) for review and assessment to determine whether amending placement of the infrastructure is justified*."

65. When writing the letter Mr. Humble would have been aware, as the Director of Planning and Development that completion of such plans with the requested level of detail in fourteen days would have been a tall, if not impossible, order. In the final three paragraphs of the letter he warns Nova no less than three times that if such plans are not received and an easement agreement is not negotiated, consequences such as "*placement of the easement in its original location*," "*other action*" and expropriation will occur. While they might not have been intended as such, Mr. Mrdjenovich correctly interpreted these warnings as threats.

66. In my view, Mr. Humble was playing poker. Outside of a costly and time consuming expropriation process the City had no leverage over the new landowner. If Nova had provided the development plan as requested, the City would have been in a position to negotiate dedication of the easement lands as part of the development approval process. However Mr. Mrdjenovich has played a few hands of this game before and wasn't about to show his cards.

67. The most unfortunate fact is not that the City sent the letter but that upon realizing no development plan would be forthcoming, no further effort was made to enter into negotiations for the easement with Nova. Mr. Mrdjenovich is not blameless in this situation. He had a rare opportunity to bridge the gap between his ideas for the Lands and the City's need for orderly and planned development of Niven Lake and he did not seize upon that opportunity. However, it was the City who had legal, social and economic imperatives to service properties in Niven Lake. In my view they also owe a duty of good faith to those landowners upon whom they intend to impose their statutory might. They dropped the ball earlier by not encumbering the Lands with the Bond Street agreement and they further dropped the ball in relation to their failure to make significant attempts to negotiate with Nova.

VI. OPINION ON THE MERITS

68. The authorities and duties of a hearing officer are found in Section 9 of the Expropriation Act.

69. In addition to setting and publishing a suitable time and place for the public hearing (s. 9(4)(a)) the hearing officer **shall** make an inspection of the land **that the hearing officer considers necessary** (s. 9(4)(b)), **receive and consider** written representations filed with the hearing officer before or at the hearing by any person who served an objection, provide an opportunity to be heard to each person who served an objection or to as many of (such persons) as the hearing officer considers necessary in order to report to the expropriating authority on the **nature** and grounds of the objections (s. 9(4)(d)) and shall prepare and submit to the expropriating authority a written report on the **nature** and grounds of the objections made (9(4)(e)) (emphasis mine).

70. In interpreting statutes generally one must look first to the ordinary meanings of the words contained therein but in the setting in which they appear. (*Drieger on the Construction of Statutes 3rd Edition*, Butterworths (1994) at pages 160 and 193)

> "Consider" (verb) think carefully about (something), typically before making a decision (Oxford English Dictionary)
>
> "Nature" (noun) the basic or inherent features, character, or qualities of something (Oxford English Dictionary)

71. In the interpretation of expropriation statutes a broad purposive approach is mandated (*Toronto Area Transit Operating Authority v. Dell Holdings Ltd*., [1997] 1 S.C.R. 32, at

page 16). Further, such statutes must be broadly interpreted in favor of landowners. This is because the exercise of the power of expropriation constitutes the ultimate power of the state over the property rights of individuals.

72. With all due respect to Professor Todd, hearing officers are not merely scribes or human tape recorders. *"This is a simplistic and misleading description of the hearing officer's role. It ignores the significant intellectual challenge of conveying to the Minister in a succinct and otherwise helpful manner the information that he needs to know before deciding whether to affirm, modify or abandon the expropriation"* (Society Decision, para 9).

73. I agree with Mr. Toner that the modern interpretation of Section 9 provides that a "suitable" (s. 9(2)) hearing officer may recommend that the expropriating authority affirm, modify or abandon the proposed expropriation.

74. On what basis must that recommendation be made? Ms. Penney urges that the Expropriation Act be literally interpreted and that the sole test for the Expropriating Authority is whether its actions are for a "lawful purpose". If these were not her words it seems this is her intent. I disagree. It seems to this hearing officer that in considering the nature and grounds of an objection one must by necessity consider the interests and rights of the individual landowner against the interests of the larger community upon whose behalf the proposed expropriation is undertaken. Perhaps this is a matter of semantics and as Mr. Toner says, that larger question is subsumed in the broad and purposive interpretation of the word "lawful." Whether or not that is the case, I am mindful of the balance of individual rights verses public good in making my recommendations to the City.

75. Nova has both procedural and substantive grounds for objecting to the proposed expropriation. The procedural grounds are based on fairness. He says it is unfair that the communications and negotiations with Nova consisted of forwarding the proposed easement, one phone call and one letter. Ms. Penney on behalf of the expropriating authority says there is no requirement on the part of the City to negotiate with the owner at all and that the City's commitment to relocate the easement to the boundary of the property is an indication that the City listened to Mr. Mrdjenovich's concerns as expressed in that single phone conversation.

76. I agree with Ms. Penney. There is no legal requirement that negotiations take place prior to an expropriation. While it is lamentable that the parties and particularly the City did not make more effort to resolve any issues regarding the easement acquisition I cannot recommend the expropriation be abandoned on this count.

77. Mr. Toner further says that the Memorandum which informed City Council prior to the passage of By-Law 4637 authorizing the expropriation of the easement is inaccurate, misleading and missing necessary information - therefore the expropriation is procedurally flawed. The alleged inaccuracies lie in the statements: "*The City had made numerous attempts to reach an agreement,*" "*the owner has refused to consider all reasonable offers*

made by the City" and "*there is no other viable option for relocation of the municipal infrastructure.*"

78. The following are my responses to those concerns: "*The City had made numerous attempts to reach an agreement.*" - - - - Two written communications and one phone call barely qualify as "numerous" attempts. "*the owner has refused to consider all reasonable offers made by the City*" - - - - Nova disputes that there were any offers made however, the March Letter does suggest the City would consider moving the easement if the move was justified. This was really the only "offer" made by the City to Nova."*there is no other viable option for relocation of the municipal infrastructure*" - - - - Nova is of the view that failure on the part of City administration to cost and compare trucked services, and alternate routes and failure to provide that information in the Memorandum to City Council is misleading. However, as Mr. Humble pointed out, not every detail goes into such memorandums. City administration certainly made the case that the proposed easement through the Lands is by a large measure the most viable option.

79. I could not recommend abandonment of the expropriation on these grounds of objection. The failings of City Administration in briefing City Council, if any, are minor. City Council was not mislead in any material way.

80. On the substantive side, Nova asserts in its written brief the City has not established the proposed easement is reasonably necessary, has not provided sufficient evidence that the alternative was given due consideration, or established that the cost differential should take precedence over the rights and interests of the Owner in developing the Lands.

81. On the first two points, I simply disagree and refer the reader to my findings of fact.

82. I also disagree with the third point but will elaborate. During the hearing Mr. Mrdjenovich compared his rights as a developer having paid $3.5 Million dollars to the collective rights of seven adjacent residential landowners whose lands collectively cost $1.2 Million dollars. The suggestion was almost that since he paid more money for his land, his rights should prevail. The issue for consideration by the expropriating authority is not only financial but the impact of either not constructing the mains or constructing the alternate solutions on the municipality and its citizens. Many more than just two homeowners will be impacted by the alternate solutions that were discussed. It was clear the time factors, inconvenience to other residents, the time to construct the mains on as opposed to off the easement and the reliability and ongoing costs of lift stations were all factors that were considered by City administration. In fact, Mr. Mrdjenovich himself stated that he was not opposed to the concept of the easement.

83. Also in the written brief Nova asserts the City has not provided a clear commitment to relocate the proposed easement as close as possible to the rock face. As stated in my findings of fact, I accept Mr. Boon's testimony that five meters is as close as the mains can be safely trenched to the boundary rock face. Mr. Boon was the only witness with expert qualifications to comment on this issue with authority. While he may not be entirely independent of the City his was the best evidence.

84. During the hearing two other points were initiated by counsel for Nova and followed up by me with the City's and Nova's witnesses. In the March Letter the City states: *" the City would require an easement located between 5m and 11m from the rock face."* The easement shown in the AECOM (Boon) technical report in design drawing 107,754 Revision 1 is six meters across. Mr. Boon categorically stated that a six meter wide easement was sufficient for all purposes. Yet the width of the easement described in the Notice of Intention to Expropriate and attached to the Memorandum is approximately eleven meters throughout. There was no evidence produced during the hearing which demonstrated in any way that the five meters closest to the west boundary of the Lands is required for any "lawful purpose" whatsoever.

85. Further, it became clear that the portion of the proposed easement which would contain a water line from the property boundary to the existing concrete hydrant vault was being expropriated for convenience alone. According to Mr. Boon this portion of the expropriation is not for the benefit of Phase VII but was included simply to benefit Phase V as the vault had obviously been constructed at some considerable expense. Mr. Mrdjenovich is uncertain if the vault can be utilized in his plans for development of Phase V. Since Nova is the only owner to bear both the benefit and burden of the expropriation and since Nova currently does not know if there is a benefit to the expropriation, in my opinion there is no "lawful purpose" to this portion of the proposed expropriation.

86. I therefore recommend that the proposed expropriation be modified and the proposed easement be reduced to six meters in width and by the length of the portion sought to service the existing hydrant vault.

87. In conclusion I find that:

a) There was a lamentably small amount of communication between the City and Nova and I recommend the City make every effort in the small time left to attempt to clarify with Nova how best to minimize the impact of the easement on the Lands. It is in the City's interests to do so as they are responsible to compensate the owner for disturbance damages. Mr. Toner's proposed conditions have merit but I cannot recommend abandonment of the expropriation in order that they be fulfilled.

b) The process was somewhat procedurally flawed. However, when balancing the individual landowner's rights against the public benefit of the proposed easement I recommend that the proposed expropriation proceed in some form.

c) The City has proven the need for the easement in principle and I accept that Nova's right to keep its lands intact is outweighed by the utility of the easement for others. However, the taking as proposed would not pass any of the enunciated federal, provincial or territorial tests. The taking in its current configuration is not for "Lawful Purpose," is not "Reasonably Defensible," is not "Fair, Sound and Reasonably Necessary" and is "Patently Unreasonable." I recommend the proposed easement be

narrowed to a maximum of six meters in width and that portion of the easement dedicated to servicing the Phase V hydrant vault be eliminated.

VII. COSTS

88. Section 12 of the Expropriation Act states: "*An expropriating authority, on the recommendation of the hearing officer, may pay the amount that it considers reasonable in respect of the costs incurred by any person in asserting an objection*."

89. Nova claims solicitor and client costs for this Inquiry. Ms. Penney on behalf of the City agrees the claim is appropriate. A basic tenet of expropriation law is that owners not be out of pocket. This was recently reinforced in the Supreme Court of Canada case of *Smith v. Alliance Pipeline Ltd.,* (2011 SCC 7, [2011] 1 S.C.R. 160) in which Mr. Smith was awarded full solicitor and client costs of the expropriation proceedings and related Trial Court, Court of Appeal and Supreme Court of Canada Costs all of which dwarfed the initial claim by several magnitudes.

90. In accordance with Section 12, I recommend that the City pay Nova's reasonable solicitor and client costs to this point of the expropriation process.

91. I thank both counsel for their able, professional and courteous conduct of this case.

DATED at the City of Edmonton, in the Province of Alberta, this 27th day of October, 2011.

DONALD P. MALLON, Q.C.
Hearing Officer
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APPENDIX 1 – DOCUMENTS

1. Notice of Intention to Expropriate dated May 27, 2011
2. Sales Agreement between City of Yellowknife and Bond Street dated August 29, 2003
3. By-Law No. 4479 – Authorizing Easement Agreement
4. By-Law No. 3794 – Niven Lake Development Scheme
5. By-Law No. 3898 – 1996 General Plan By-Law
6. By-Law No. 4339- Niven Lake Development Scheme 2004
7. By-Law No. 4315 – General Plan By-Law (2004)
8. By-Law No. 4438 – Niven Lake Development Scheme 2007
9. Council Motion 198-10 dated July 26, 2010
10. City of Yellowknife 2011 Draft General Plan (June 2011)
11. E-mail from Edward Gullberg to Kerry Penney dated March 8, 2011
12. Copy of Draft Easement Agreement between the City of Yellowknife and 994552 N.W.T. Ltd.
13. Letter from the City of Yellowknife to 994552 N.W.T. Ltd. dated March 23, 2011
14. Report prepared by Robert Boon of AECOM dated October 7, 2011
15. By-Law No. 4637 – Motion to expropriate Lands
16. Certificate of Title Lot 39, Block 308, Plan 3953, Yellowknife
17. Notice of Objection dated July 29, 2011
18. Appointment of Hearing Officer dated September 28, 2011
19. By-Law No. 4596 – The Land Administration By-Law
20. Letter from the City of Yellowknife with attached Notice of Intention to Expropriate dated June 9, 2011
21. Letter from the City of Yellowknife to 994552 N.W.T. Ltd. dated June 13, 2011
22. Letter to the City of Yellowknife with attached Notice of Objection dated July 29, 2011
23. Photographs provided by 994552 N.W.T. Ltd., August 29, 2011
24. Sketch and Aerial Photograph provided by the City of Yellowknife
25. Development Plan Approved July 7, 2005
26. Memorandum to Council dated May 9, 2011
27. By-Law No. 3529 – Water and Sewer Services By-Law

APPENDIX B – STATUTES AND CASES CONSIDERED

1. *Expropriation Act*, R.S.N.W.T. 1988, c. E-11
2. *Cities, Towns and Villages Act, S.N.W.T. 203, c. 29*
3. Todd, E., *The Law of Expropriation and Compensation*, Second Edition (Scarborough, Ontario: Carswell) 1992
4. *Expropriation Act*, R.S.C. 1985, c. E-21
5. *Society Promoting Environmental Conservation v. Canada (Attorney General)*, [2003] 4. F.C. 959
6. *Toronto Area Transit Operating Authority v. Dell Holdings Ltd*., [1997] 1 S.C.R. 32
7. *Smith v. Alliance Pipeline Ltd.,* (2011 SCC 7, [2011] 1 S.C.R. 160
8. *Nanaimo (City) v. Rascal Trucking* [2000] 1 S.C.R. 342
9. *Grauer Estate v. Canada* [1986] F.C.J. No. 946
10. *Human Rights Institute of Canada v. Canada (Minister of Public Works), [1999] F.C.J. No. 1404 (Fed. Ct. T.D.)*
11. *Ball et al. and Ontario Hydro et al., [1974] O.J. No. 2007 (Ont. H.C.J.)*
12. *Karn et al. and Ontario Hydro et al., [1977] O.J. No. 2344 (O.N.C.A.)*