Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: October 15, 2021 **CASE NO(S).:** LC120027

PROCEEDING COMMENCED UNDER subsection 26(b) of the *Expropriations Act*, R.S.O. 1990, c. E.26, as amended

Claimant:	1353837 Ontario Inc.
Respondent:	City of Stratford
Subject:	Land Compensation
Property Address/ Description:	Parts 13, 16 and 17 on Registered Plan 44R-3154
Municipality:	City of Stratford
OLT Case No.:	LC120027
OLT File No.:	LC120027
OLT Case Name:	1353837 Ontario Incorporated v. Stratford (City)

Heard: April 26-30; May 3-7, 10-14, 17-21, 25-28; and June 10-11, 2021 by video hearing

APPEARANCES:

Parties	**Counsel**
1353837 Ontario Inc.	J. S. Doherty R. D. Aburto J. Minnes T. Neill K. Duquette
City of Stratford	C. J. Williams T. J. Hill A. J. Skinner H. Wong

DECISION DELIVERED BY S. JACOBS AND ORDER OF THE TRIBUNAL

[1] Before it became home to its well-known Shakespearean festival, Stratford was an important rail hub in Canada. The Grand Trunk Railway chose Stratford as the

location for its machine and repair shops in 1870. It established these at its property located in downtown Stratford and continued to develop the property to keep pace with the evolving rail industry, most notably culminating in the 1909 opening of its locomotive repair shop. An architectural feat for its time, the massive repair shop consisted of steel trusses and a travelling crane system that could lift and move 350 tonne locomotives across the large structure.

[2] The building still stands as a reminder of Stratford's rail history. The property changed hands many times in its century-long life—to the Canadian National Railway, then to Cooper-Bessemer for its factory, to the City of Stratford (the "City"), and then to a series of numbered companies with plans to redevelop the property. In 2009, the City acquired the property one final time by expropriation, which is what brings this matter to the Tribunal.

[3] At the time of expropriation, the property was owned by 1353837 Ontario Inc. ("135" or "Claimant") with Lawrence Ryan as its sole shareholder, director, and officer. Mr. Ryan envisioned a project to redevelop the property into a mixed-use destination by reusing the existing building for a waterpark, retail "heritage street", dance barn, and movie theatre, and by constructing a new tower to house a hotel and condominium. Mr. Ryan passed suddenly and unexpectedly in 2019 and his widow, Wendy Ryan, became president of 135. Mr. Ryan's vision for the property was carried into this compensation hearing by his immediate family and the consultants he worked with over the years.

[4] The Tribunal is tasked with determining the amount of compensation the City owes to 135 in accordance with the *Expropriations Act*, R.S.O. 1990, c. E.26, as amended (the "Act"). There are two main issues for the Tribunal to decide in this case:

1. What is the market value of the subject property?

2. What, if any, disturbance damages are owed to 135?

[5] At the heart of the dispute between the parties is the value of the former locomotive repair shop (the “building” or the “main building”). The Claimant sees significant value in the building—it was central to 135’s project—and the City sees none. There is no question that at the time of expropriation the building required significant repairs. The property, given its history, was also known to be contaminated and would require remediation for any redevelopment, though the parties disagree on the likely costs of remediation. All of this leads to a significant rift between the parties of more than $22 million for market value: the City believes the property was worth $290,000 at the time of its 2009 expropriation, while 135 claims a value of $22,700,000.

[6] The parties’ disagreement on disturbance damages is also significant. 135 claims a total of $1,062,569 for business losses, wasted development costs, and executive time.[1] The City denies the claims for business losses and executive time and submits that, at most, $51,683 is owed to 135 to compensate for wasted development costs.

[7] Before addressing the two main issues, it is necessary to provide context for this Claim. The road to this compensation hearing was long, complicated, and hindered by many factors. These two parties have long been involved in litigation outside of this proceeding, including before the Ontario Superior Court of Justice, the Ontario Labour Relations Board, and the Health Services Appeal Board. There were many procedural steps requiring the Tribunal’s adjudication to bring this Claim to a compensation hearing.

[8] The Tribunal will therefore first provide a description of the subject property and its surrounding area, followed by a description of 135’s involvement in the property, including its project. The Tribunal will then summarize the expropriation process, and next will outline the procedural history at the Tribunal from the time the Claim arrived in 2012. Finally, to complete its introduction, the Tribunal will provide a description of the compensation hearing including key rulings made throughout.

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[1] There were revisions to these figures during the hearing. This figure reflects the Claimant’s closing submissions and is comprised of a claim of $268,000 for wasted development costs, $638,889 for lost profits, and $155,680 for executive time ($155,000 for Mr. Ryan and $3,680 for Mrs. Ryan).

The Expropriated Lands and Surrounding Area

[9] Situated just outside Stratford's central business district, the subject property is 11.42 acres in area—by far the largest single land assembly in the downtown core. The site is located at 350 Downie Street and has an irregular shape owing to previously being part of the property to the north. Those adjacent lands are the subject of ongoing litigation between the parties and are referred to in the record as the "St Patrick Street Parking Lot" or the "Disputed Lands". The Disputed Lands are now home to a University of Waterloo campus and sit between the subject property and St. Patrick Street, leaving the Expropriated Lands with access to Downie Street at its south east corner.[2]

[10] On its southern side, the Goderich-Exeter Railway runs the length of the site, parallel to St. David Street. There is a short road, Cooper Street, off St. Patrick Street that partially flanks the Expropriated Lands on the west side, and the Tribunal understands there is a difference in grading between Cooper Street and the property. While Cooper Street and Downie Street are currently the only means to access the property, it historically enjoyed access to St. Patrick Street when part of the larger parcel with the Disputed Lands. Access was a minor point of dispute between the parties and will be discussed later in this Decision.

[11] At the time of expropriation, the immediately surrounding area consisted of the St. Patrick Street parking lot and a YMCA building to the north. There is a residential area to the south of the property on the other side of St. David Street with single detached homes.

[12] Beyond St. Patrick Street, the downtown core is to the north and largely consists of two to three-storey buildings with a variety of shops, restaurants, and services at the street level and some residential units in upper levels. The City's civic centre is also located in the downtown core, a short walk or drive from the Expropriated Lands. The

[2] There are references throughout the record to the "Cooper Site" or the "CNR Site" as the former site that included the Disputed Lands and the Expropriated Lands. For clarity, any references in this Decision to the "Expropriated Lands" or "subject property" or "site" means the land actually taken by the City. These lands are comprised of Part 13, 16, and 17 on Plan 44R-3154, and also defined as Parts 1 to 4 inclusive on the expropriation plan registered as Plan PC71878 on June 15, 2009.

land use planning experts in this hearing agreed that Stratford boasts a model downtown, one that has successfully conserved its history through a heritage conservation district and in which a variety of shops and restaurants thrive.

[13] The location of the property, its irregular shape, and its extraordinary size in downtown Stratford are best captured on the following figure:

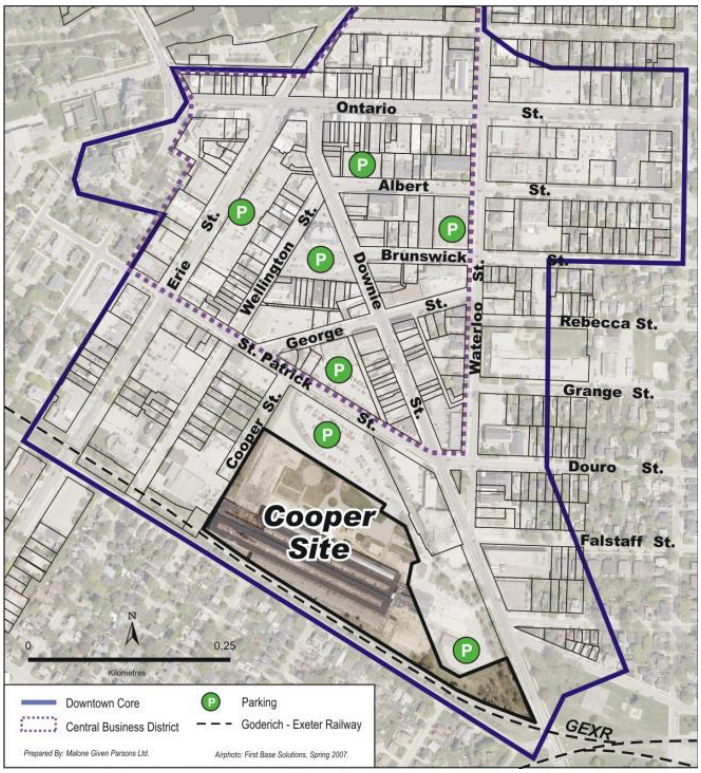


Figure 1: Location Map (from Malone Given Parsons' Land Use Evaluation; Exhibit 7C at p. 164)

[14] There have been several buildings on the Expropriated Lands as part of its rail history and later occupation by Cooper-Bessemer. A fire destroyed part of the building, the former tender shop, in 2003. The main building remained at the date of expropriation, along with an attached wooden structure that once housed a tube shop. The City demolished the former tube shop building after the expropriation. The buildings are shown on Figure 2 for ease of reference.

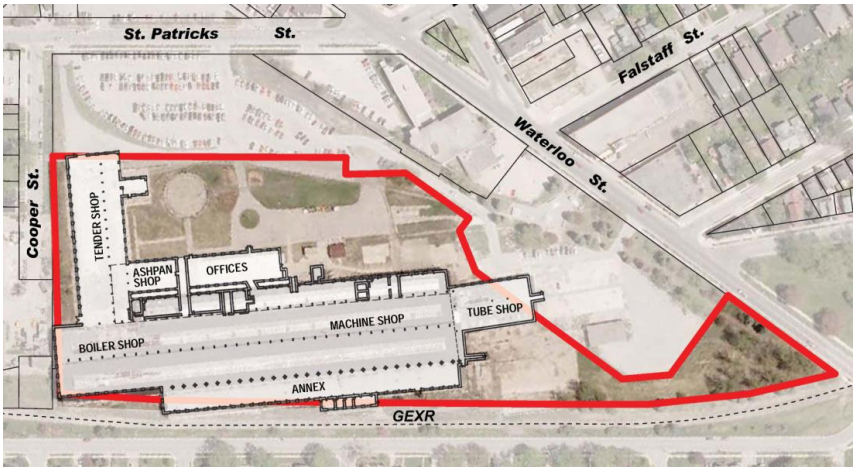


Figure 2: Former locomotive shop on the Expropriated Lands (from Exhibit 7C at p. 167)

[15] Constructed of riveted steel between 1907-1909, the main building contains some 160,000 square feet of open space with steel columns, trusses, and at least one mezzanine level. There is an addition to the main building along its southern edge that was constructed in 1949.

[16] In addition to the active rail line and some partially covered tracks that would bring locomotives into the property for servicing, a rail turntable remained at the site at the date of expropriation as a reminder of the property's rail history.

135's Involvement in the Expropriated Lands and its Project

[17] There were many changes in ownership in the Expropriated Lands since Cooper-Bessemer vacated the property in 1989. As the Claimant in this proceeding, 135's ownership of the Expropriated Lands is most relevant to the Tribunal. However, Mr. Ryan's involvement with previous owners of the property and their various development plans for the Expropriated Lands were discussed frequently throughout the hearing. In that regard, the following ownership timeline provides useful context:

> **1996**: The City sold the Expropriated Lands to 1101644 Ontario Limited ("110"). Mr. Ryan was involved with 110 as a project manager to advance its plans to redevelop the property as the "Stratford Resort and Spa".

1997: 110 defaulted on its loan obligations and its interest in the Expropriated Lands was transferred to 1221025 Ontario Limited (“122”) pursuant to power of sale proceedings. 122 entered into an agreement with 135, Mr. Ryan’s corporation, for the management of 122’s development project.

2001: 122 defaulted on its loan obligations and 135, as a creditor of 122, acquired its interest in the property through foreclosure proceedings.

2005: 135 received a mortgage, registered against the Expropriated Lands for $5,000,000 by Republic Mortgage Investment Corporation (“Republic”).

[18] There were various redevelopment concepts for the property that evolved with its changing ownership. None came to fruition.

[19] Mr. Ryan had his own vision for the redevelopment of the property. He worked on a concept—referred to as the “CNR Centre” or “Ryan’s Railway Centre” throughout the hearing—that centred around the reuse of the main building. It also contemplated construction of a new tower building over the former tender shop area to house a hotel and condominium units, which was the subject of some discussion between Mr. Ryan and Marriott Hotels of Canada (“Marriott”).

[20] Though it appears that the project components changed over time, they consistently included the adaptive reuse of the main and tube shop buildings to house a variety of uses. Mr. Ryan envisioned the main building to include an indoor shopping area in the form of a “heritage street” with retail and service shops along an interior corridor with office space above. The corridor would also be able to host events, for example, antique car shows. At the eastern end of the building, the former tube shop space would house a farmer’s market.

[21] Walking along the interior corridor toward the former tender shop area, one would find a movie theatre, a dance barn and—the subject of much debate during this hearing—an indoor water park. A food court would connect the main building and its

heritage street to the 16-storey hotel and condominium tower, which would include five levels of underground parking. There was also an outdoor concert stage contemplated. Throughout the development, Mr. Ryan intended interactive museum elements to pay homage to the property's rail history.

[22] There were two visual exhibits frequently referred to during the hearing that best illustrate what Mr. Ryan had in mind. The first is an elevation drawing:



Figure 3: East Elevation of Ryan's Railway Centre (from Exhibit 23 at p. 14)

The second is a concept floor plan showing the variety of uses contemplated:

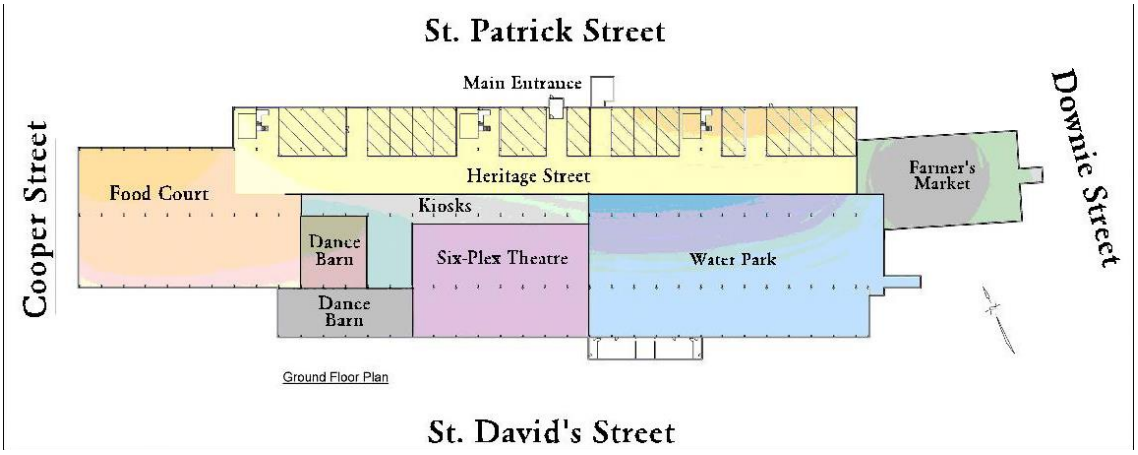


Figure 4: Concept floor plan for Ryan's Railway Centre (from Exhibit 23 at p. 18)

[23] The project never came to be for reasons that will be discussed in the analysis of this Decision. Though counsel for the Claimant and City disagree on the feasibility of the project, they, and every witness who encountered Mr. Ryan, agree on this: his enthusiasm for this project and his tenacity in pursuing it are undeniable. It was unfortunate not to be able to hear from Mr. Ryan himself during this hearing. His enthusiasm for the project was clear to the Tribunal from the testimony of his family members and consultants.

The Expropriation Process

[24] The process of expropriation is often a lengthy one. In this case that process was the subject of previous adjudication by the Tribunal in its Decision issued on October 14, 2016 (the "October 2016 Decision"). There the Tribunal determined that the scheme of expropriation—the City's purpose in acquiring the lands—was to develop a University of Waterloo campus (the "UW Campus"). The Tribunal also determined that the start date of the scheme could be no earlier than October 16, 2006, and that the precise date would be determined in this compensation hearing. Accordingly, the Tribunal will outline the chronology of events leading to the expropriation, beginning with the UW Campus opportunity.

The UW Campus Opportunity

[25] The City, the Stratford Shakespearean Festival of Canada (the "Festival"), and the University of Waterloo ("UW") entered into a Memorandum of Understanding on October 16, 2006. It indicated that the parties would jointly explore: (i) the possibility of establishing a UW Campus in Stratford; (ii) opportunities to acquire land and secure capital for construction; and (iii) opportunities to establish academic programs on the new campus.

[26] Because the development of the UW Campus was subject to obtaining funding, the City began the work of securing funding commitments from the Federal and Provincial governments. This continued through 2007, and it was not until March 31,

2008 that the Provincial government confirmed a capital grant to support the development of the campus.

[27] Meanwhile, the City reviewed potential sites for the campus. It began this task in 2006 by reviewing a list of its available industrial land, both publicly and privately owned, which included the 17-acre Cooper Site, consisting of the 11.42-acre subject property and the Disputed Lands.

[28] The City and UW held a public information meeting on December 7, 2006. Mr. Ryan attended that meeting and, as the minutes reflect, “offered to discuss a partnership for the new campus involving his land.”

[29] Following the public information meeting, City and UW representatives met on January 29, 2007 to discuss the campus. Ronald Shaw, the City’s Chief Administrative Officer at the time, recalled, and his meeting notes reflect, that of the potential sites discussed, the Stratford fairgrounds site seemed to make the most sense. He did not recall any discussion about the Cooper Site at that meeting. A City Engineering and Public Works Memorandum dated February 1, 2007 discusses the three sites reviewed during the meeting, which did not include the Expropriated Lands.

[30] The City’s then Director of Building and Planning, Barb Dembek, prepared a planning and servicing analysis of those potential sites and reviewed them with UW representatives during a meeting on or about February 14, 2007. It appears, from Mr. Shaw’s review of Ms. Dembek’s file, that there was a discussion about the Cooper Site as a potential location for the UW Campus during that meeting.

[31] There was more discussion about the Cooper Site as a potential location on April 27, 2007, in a meeting with City and UW representatives, which Mr. Shaw attended. The UW representatives were interested in the site because of its downtown location. Mr. Shaw testified that the possibility of expropriation was discussed and that he had reservations about considering that site because of the difficulties of the expropriation process. Mr. Shaw recalls, and his notes reflect, that the University was still interested

in the property, and that City staff would continue to look into other potential sites.

The City's Decision to Expropriate

[32] Nearly one year later, on April 3, 2008 during an *in camera* meeting, the City's Committee of the Whole determined that the Cooper Site was the preferred site for the UW Campus, based on its size and downtown location. The Committee directed City staff to authorize an agent to prepare an offer to purchase 135's property.

[33] Mr. Shaw explained that because the City was already involved in other litigation with 135, it decided to retain a law firm to make an anonymous offer to purchase the property. The City's anonymous offer was made on or about April 22, 2008 to purchase the property for $5 million, subject to review of the site for environmental issues. The offer was neither accepted nor answered with a counter-offer. Mr. Shaw reported back to the Committee of the Whole on May 12, 2008 in another *in camera* meeting and made no recommendation at that time.

[34] It appears that 135 received other offers during this time period from various corporate entities, in a similar purchase price range. While 135 insists that the City was behind these offers, the City denies this. There was no evidence during the hearing to link those offers to the City.

[35] The University continued to express a strong preference for a downtown location for its Stratford campus. On December 8, 2008, City Council instructed its legal counsel to prepare the materials necessary to commence expropriation proceedings for 135's property. Mr. Shaw testified, and the record reflects, that this was the first public notice of the City's intention to expropriate 135's lands. Mr. Ryan was notified by email the next day of the City's intention to expropriate.

[36] The following day, December 10, 2008, 135 commenced a motion in the Superior Court of Justice seeking an injunction to prevent the City from proceeding with the expropriation. That motion was later adjourned at Mr. Ryan's request.

[37] On December 15, 2008, the City passed a by-law to authorize an application for approval to expropriate the property as the Act requires. Notice of the application for approval was provided to the registered owners on January 23, 2009 and was published in the newspaper during the week of January 26, 2009.

[38] The litigation between the parties continued to unfold during this time. However, because 135 did not request a hearing of necessity under the Act, as it is permitted to do, the City continued with the expropriation process.

[39] Despite its earlier motion for an injunction, 135 served a motion on May 5, 2009 asking the Court to expedite the expropriation process and to require the City to make a minimum offer of $5 million in compensation.

[40] City Council passed a by-law to expropriate 135's lands on May 25, 2009. The Plan of Expropriation was registered on June 15, 2009, with the City serving its Notice of Possession on June 16, 2009 (indicating a possession date of September 18, 2009) The Court dismissed 135's motion to expedite the expropriation process on June 23, 2009.

[41] The City served 135 with an offer of compensation in the amount of $500,000 on or about September 11, 2009. This amount was based on an appraisal report prepared by Mr. Bower.

Events Following Expropriation

[42] On September 17, 2009, the day before the City was to take possession of the property, 135 commenced an application in the Superior Court of Justice in Kitchener to extend the possession date indefinitely. The City commenced a counter-application in Stratford on October 22, 2009, requesting the Court to set a firm possession date of no later than December 1, 2009. 135 was unsuccessful in a motion to strike the City's counter-application, and the City was successful in its motion to consolidate 135's possession application with the counter-application and have it transferred to Stratford.

[43] The City and 135 ultimately resolved these applications through Minutes of Settlement on January 10, 2010 (the “Minutes”). The Minutes also included Republic because it held a mortgage against the Expropriated Lands. Pursuant to the Minutes, the City paid $4.5 million in respect of the expropriation, without prejudice to a final determination of compensation by the Tribunal.

[44] Of the $4.5 million compensation plus interest required by the Minutes, the City paid $589,208.84 to 135 and $4,277,920.84 to Republic.

[45] Republic released its claim for compensation under the Act and was not a party to this proceeding.

[46] The City took possession of the Expropriated Lands on February 9, 2010.

The Claim and its Procedural History

[47] This Claim has nearly a decade-long history, having been filed with the Ontario Municipal Board (“OMB” or “Board”) in 2012. Since that time, the Tribunal has issued 18 decisions on a variety of procedural matters and motions. This Member issued 14 of those decisions since becoming involved in case management of the file in 2015, and later becoming seized following a partial summary judgment disposition in the October 2016 Decision.

[48] The procedural road to this compensation hearing has been unusually long for several reasons.

[49] There were many unique procedural steps and requests made of the Tribunal, beginning with the former Executive Chair ordering a stay in the proceeding so that the parties could attend at the Board of Negotiation. When the parties returned to the Tribunal, there was a series of Case Management Conferences (“CMCs”) and motions before the former Executive Chair, who ordered that 135’s Notice of Arbitration and Statement of Claim be stricken and replaced with an Amended Notice of Arbitration and

Statement of Claim that did not seek compensation for the Disputed Lands.

[50] The former Executive Chair held another teleconference to settle a dispute as to whether the Claimant complied with the Board's earlier order in its over 400-paragraph Notice of Arbitration and Statement of Claim. The Board found that it did and required the City to file its Reply.

[51] This Member began case managing the file in June 2015. At that time, the City brought an unsuccessful motion to stay the proceeding (due to proceedings in the Ontario Superior Court of Justice), and the Claimant also brought a motion to establish the Procedural Order. The City advised of its intent to bring a motion for partial summary judgment, and the Tribunal provided direction in that regard.

[52] The motion for partial summary judgment was heard over two days in December 2015 and January 2016 and resulted in the October 2016 Decision. A key finding in that decision was that the scheme, or purpose, of the expropriation was to establish a Stratford campus for the UW Campus. The Tribunal also found that this scheme could have commenced no earlier than October 16, 2006, the day the City, UW, and the Festival entered into a Memorandum of Understanding with respect to the campus. The precise date of the scheme was left to be determined in this compensation hearing.

[53] The Tribunal dismissed the following allegations and claims as set out at paragraph 60 of the October 2016 Decision:

a. All allegations and claims for losses arising from alleged damages or interference with the Expropriated Lands that pre-date October 16, 2006, are dismissed.

b. All allegations and claims that the City breached and / or interfered with the 1996 Agreements are dismissed. All allegations and claims relating to the 'Project' are amended to include only the Expropriated Lands;

c. All allegations and claims asserted that City and other officials wrongfully interfered with the Claimant's use and development of its lands are dismissed.

[54] The proceeding was then held in abeyance for two years while the Claimant pursued appeals of the October 2016 Decision. The Divisional Court released its decision dismissing the appeal on January 3, 2018. After the Ontario Court of Appeal denied leave to appeal the Divisional Court's decision, the Claim resumed at the Tribunal with a CMC in November 2018.

[55] During that CMC, the Tribunal scheduled dates for the compensation hearing and provided direction on the Procedural Order. The parties later required another CMC for adjudication of various clauses and dates in the Procedural Order, which the Tribunal provided in its Decision issued in April 2019. They also advised the Tribunal that they could not agree on a Discovery Plan, and the Tribunal directed them to file written motion materials on the disputed issues. The Tribunal issued its Decision establishing the Discovery Plan in May 2019 to enable the parties to proceed to discoveries as planned later that month.

[56] Each party filed a motion to compel following discoveries. These motions required the Tribunal's disposition on some 100 refusals, undertakings, and under advisements. Those motions were filed in September 2019, prior Mr. Ryan's death in December 2019. The Tribunal's Decision on the motions was issued in June 2020. In that Decision, the Tribunal put the parties on notice that the Province's Emergency Order and suspension of timelines due to the global pandemic would not apply in this case. The Tribunal scheduled a CMC with the parties in September 2020 to reschedule the hearing and to revise dates as necessary in the Procedural Order.

[57] Three more CMCs were necessary to resolve procedural matters leading to this compensation hearing. The first took place in December 2020 arising from a mutually missed date for exchange of witness statements and expert reports: the City had its reports ready and declined to exchange them when it learned the Claimant's reports

were not ready. The Tribunal directed witness statements and expert reports to be exchanged within two weeks and declined to entertain the possibility of adjourning the scheduled hearing.

[58] The Procedural Order contemplated the next CMC to settle the hearing format and related logistics, given the ongoing uncertainty around the pandemic.

[59] The Tribunal held one final CMC in April 2021, shortly before the compensation hearing, to assist the parties in finalizing a hearing plan. It continued the CMC over a second day in order to provide its disposition on 135's motion to admit and grant leave to read in certain portion's of Mr. Ryan's affidavit evidence and certain answers given on examinations for discovery.

[60] Another complication during the life of this Claim was the parties' involvement in litigation before the courts and other tribunals. Of note in this proceeding is the parties' litigation in the Superior Court of Justice regarding the Disputed Lands, which prompted the City to bring a motion to stay this proceeding in 2015. The acrimony between these parties was pronounced at nearly every stage of this proceeding, including within the large volumes of correspondence counsel would copy to the Tribunal prior to every hearing event.

[61] Finally, circumstances beyond the control of the parties have delayed this hearing. Mr. Ryan's sudden passing caused understandable complications for the Claimant. The pandemic then resulted in a cancellation of Tribunal hearings, including this one, which was originally scheduled for June 2020.

[62] Despite the Claim's procedural history, the Tribunal was impressed by the collaborative efforts of all counsel to prepare for an organized, efficient, and successful video hearing. Counsel prepared a detailed Electronic Hearing Protocol that was essential for this five-week hearing involving the remote testimony of 31 witnesses. They also prepared a detailed hearing plan for the five weeks and adhered to the schedule. Their organization of tens of thousands of pages of digital documents—with

the use of well-organized joint document briefs, compendiums, and a reasonable and mutually agreeable protocol for cross-examination documents—was exemplary.

This Compensation Hearing

[63] The Tribunal heard testimony from 31 witnesses and two days of closing submissions in this 26-day video hearing. Of the witnesses, the Tribunal qualified 19 to provide expert opinion evidence. Two groups of experts testified in panels. For ease of reference the witnesses are listed below, in the order in which they testified, with their qualification or testimony as a fact witness noted.

Witnesses called by the Claimant	
Wendy Ryan	Fact witness: Spouse of Mr. Ryan and President of 135.
Patrick Ryan	Fact witness: Son of Mr. and Mrs. Ryan
Robert Ritz	Fact witness: Architect involved in 110's project for the subject property (the Stratford Resort & Spa).
Grant Diemert	Fact witness: Architect who worked with 135 when it owned the property.
Dean Robinson	Fact witness: Journalist and local historian who has written about Stratford's rail history.
Dennis Gauthier	Fact witness: Vice President of Project Development at Rosati Construction Inc.; the Rosati Group was involved in discussions about 135's project and proposed to be its construction manager.
Jeff Wilmer	Fact witness: A retired professional planner who worked with 135 on the project in the early 2000s.
Robert Dragicevic	Qualified by the Tribunal to provide opinion evidence in the area of land use planning.
Richard Rush and Tom Williams (XCG Consulting Limited or "XCG")	Qualified by the Tribunal to provide opinion evidence with respect to environmental engineering and remediation, and testified as a panel.
Gary Eagleson	Fact witness: Formerly with the Business Development Bank of Canada and prepared a feasibility report and business plan for the Stratford Resort & Spa.
James Tate	Qualified by the Tribunal to provide opinion evidence in the areas of market analysis and market opportunity assessment.

Guy Lefebvre	Qualified by the Tribunal to provide opinion evidence in the area of architectural and building surveying.
Jeffrey Price and James Theodorlis (Morrison Hershfield or “MH”)	Qualified by the Tribunal to provide opinion evidence in structural engineering matters, including assessing building condition and to the *Ontario Building Code*, and testified as a panel.
Farooq Arshad	Qualified by the Tribunal to provide opinion evidence in the areas of infrastructure engineering and municipal servicing.
Paul Harris	Fact witness: An engineer formerly with Thomas P. Rylett Limited Consulting Engineers (“Rylett”), who, at Mr. Ryan’s request, had prepared two estimates for the cost of replacement of the building.
Jim Ryan	Qualified by the Tribunal to provide opinion evidence as a quantity surveyor with respect to cost consulting.
John Porter	Fact witness: The Tribunal declined to qualify Mr. Porter to provide opinion evidence regarding construction cost estimating, for the reasons following this table.
Beverly Climie	Fact witness: An accountant who has provided services to 135.
Dawson Coneybeare	Qualified by the Tribunal to provide opinion evidence regarding business loss valuation matters.
John Simmons	Qualified by the Tribunal to provide opinion evidence with respect to real estate appraisal and land valuation.
Witnesses called by the City	
David Atlin	Qualified by the Tribunal to provide opinion evidence in the area of real estate valuation and appraisal, with particular expertise in expropriation appraisal matters.
Glenn Tautrims	Qualified by the Tribunal to provide opinion evidence in the areas of business valuation and accounting.
Michael Pond (Read Jones Christofferson or “RJC”)	Qualified by the Tribunal to provide opinion evidence in the area of structural engineering including as it relates to the assessment, rehabilitation and adaptive reuse of existing and historic buildings and the *Ontario Building Code*.
Gregory Brooks (GHD Limited or “GHD”)	Qualified by the Tribunal to provide opinion evidence in the area of environmental engineering, including with respect to remediation of contaminated properties.

Edward Dujlovic	Qualified by the Tribunal to provide opinion evidence in the area of infrastructure engineering, municipal engineering and municipal servicing.
Lee Parsons	Qualified by the Tribunal to provide opinion evidence in two areas: (1) land use planning; and (2) market analysis and market economy.
Qaiser Mian	Qualified by the Tribunal to provide opinion evidence in the area of hotel market and as a financial analyst.
Ronald Shaw	Fact witness: The City's Chief Administrative Officer at the time of expropriation.
Ray Bower	Qualified by the Tribunal to provide opinion evidence in the area of real estate appraisal.

[64] There were several objections throughout the hearing. Many of them related to witnesses who were not on 135's original witness list and therefore were not involved in the exchange of witness statements as required by the Procedural Order. This matter was discussed in the final CMC held five days before this hearing. In that CMC, the Tribunal provided direction on the hearing plan, which included the new witnesses. The Tribunal declined to rule on the merit of including the new witnesses at that late stage, as it appeared they could be scheduled within the allotted hearing time and the City's concerns could be partially resolved by allowing it to file a reply witness statement from Mr. Dujlovic. The parties proceeded to the hearing on this basis, with the City reserving its right to make related objections during the hearing. Those objections and the Tribunal's rulings are summarized in the next sections.

Mr. Porter

[65] Mr. Porter was one of the witnesses who was not included on the Claimant's original witness list and in the December exchange of witness statements and reports. The Claimant filed a witness statement for Mr. Porter as part of its reply filings on March 12, 2021, entitled 'Expected Testimony of John Porter'. It appeared, from this six-paragraph statement, that Mr. Porter would testify as a fact witness. There was no indication otherwise in the statement nor was there a curriculum vitae or Acknowledgement of Expert's Duty form filed for Mr. Porter.

[66] When Mr. Porter was called to testify, Mr. Doherty requested that the Tribunal qualify Mr. Porter to provide opinion evidence regarding construction cost estimating. Mr. Williams objected on the basis that Mr. Porter was put forward as a fact witness and that the City had only received notice of the Claimant's intention to qualify Mr. Porter as an expert a short time before the hearing. Mr. Doherty indicated that Claimant's counsel assumed the City took no issue with the qualification, as they had not indicated an objection leading up to the hearing. He also submitted that this was a similar situation to Mr. Arshad, another of the Claimant's witnesses, who had also filed an expert report only in reply in order to respond to issues raised by the City's witnesses in their reports.

[67] The Tribunal declined to qualify Mr. Porter to provide opinion evidence. Like counsel for the City, the Tribunal had assumed, based on the filings, that Mr. Porter was proposed as a fact witness. The Tribunal found that to qualify Mr. Porter would undermine the purpose of the Procedural Order, as there was no expert report from Mr. Porter and therefore no opportunity for the other experts to review and respond to his report. Qualifying him would also be contrary to the purpose of experts' meetings, which are intended to identify areas of agreement and narrow the scope of issues for the Tribunal's adjudication. Unlike Mr. Arshad, who had filed an expert report in reply, and to which the City was permitted to file a reply from Mr. Dujlovic, Mr. Porter's opinion evidence would be prejudicial to the City. The Tribunal therefore allowed Mr. Porter to testify only as a fact witness.

[68] Based on Mr. Porter's witness statement, which contained proposed figures for construction cost estimates, the City later introduced a pro forma prepared by Mr. Parsons that used Mr. Porter's figures. The Tribunal admitted the pro forma over the objection of Claimant's counsel. The Tribunal did so on the basis that the pro forma was an update to Mr. Parsons' earlier filed witness statement that used information from Mr. Porter that was not available when Mr. Parsons prepared his original and reply witness statements.

Mrs. Climie's Financial Statements

[69] The next significant objection from the City related to the Claimant's compendium for Mrs. Climie's examination-in-chief. As 135's accountant, Mrs. Climie prepared various financial statements for the business, including general ledgers and balance sheets. Some of these were included with her originally filed witness statement in December 2020 and the business valuation experts had the benefit of these when they prepared their Agreed Statement of Facts and their own witness statements. The Claimant's compendium, however, appeared to include revised versions of some of these financial statements, as well as documents the City had not seen, meaning that the City's business valuation expert, Mr. Tautrims, did not have an opportunity to review and comment on them.

[70] Each party provided detailed submissions on this issue and the Tribunal stood down the hearing to allow time for counsel to: (1) determine the dates of the documents in question; (2) identify whether any of these documents were also included in the Joint Book of Financial Statements filed prior to the hearing; and (3) identify whether any of these documents were referred to by the Claimant's business valuation expert, Mr. Coneybeare. The Tribunal then heard submissions from counsel on these three points, which revealed an unfortunate oversight by counsel for the City at the root of the objection.

[71] The Claimant's counsel wrote to the City's counsel in January of 2021, following the December exchange of witness statements, indicating that it would be serving a supplementary affidavit of documents including documents relied upon in the December expert reports. Claimant's counsel took a similar approach in March 2021, which was after experts' meetings in February 2021. The Tribunal ruled that if an expert relied on any of Mrs. Climie's documents for their report filed in December 2020, such documents should be admitted into evidence. Specifically, the Tribunal found that the documents served pursuant to counsel's January 2021 correspondence should be admitted because they related to the December reports. To the extent that an expert may have relied on these documents, the Tribunal found them relevant to the testing of that

expert's opinion evidence before the Tribunal.

[72] Throughout the hearing and its rulings on similar objections, the Tribunal acknowledged that there is a natural evolution and, ideally, a narrowing of issues before the Tribunal as the evidence unfolds, including an expert's response to testimony of another expert and the compilation or tabulation of previously tendered evidence for ease of reference. This acknowledgement formed the basis of the next two categories of the Tribunal's rulings.

Summaries and Calculations

[73] During its cross-examination of Mr. Simmons, the Claimant's appraiser, the City introduced a table prepared by its environmental engineer, Mr. Brooks. This table summarized the several environmental reports regarding contamination and proposed remediation of the Expropriated Lands. The document showed, in table form, the author of each environmental report, the estimated cost of remediation, a descriptive summary of each report, and whether the report was based on the building remaining or being removed. Counsel for the Claimant objected to the document on the basis that it was a new document that went beyond a mere tabling of already available information, and that it appeared to include commentary from Mr. Brooks, who had not yet testified in the hearing.

[74] The City confirmed that the table contained some of Mr. Brooks' commentary in the fourth column. On that basis, the Tribunal ruled that the table could be admitted as a reference aid with the column containing Mr. Brooks' commentary redacted. The full document with commentary could be introduced during Mr. Brooks' testimony, subject to objection from the Claimant. It was later introduced through Mr. Brooks without objection, and the redacted version was used during Mr. Simmons' cross-examination.

[75] Counsel for the Claimant also objected to two sets of calculations performed by the City's witnesses. The first was admitted by the Tribunal as described in the previous section—Mr. Parsons' updated pro forma using Mr. Porter's construction cost estimate

figures. The second was a set of calculations Mr. Atlin performed based on Mr. Porter's numbers as well as numbers that were included in Mr. Simmons' reply witness statement. These were included in the City's compendium for Mr. Atlin's examination-in-chief. Mr. Aburto objected on the basis that Mr. Simmons had already testified and that these calculations had not been put to him. The Tribunal ruled that the calculations based on Mr. Porter's figures, which were not previously available to Mr. Atlin, could be admitted. However, the Tribunal agreed with Mr. Aburto with respect to the calculations that had not been put to Mr. Simmons and directed the City to remove those calculations from the document.

Plans, Drawings, and Reply

[76] During the course of the hearing, Mr. Parsons prepared two drawings based on a development scenario Mr. Simmons relied on in his appraisal. The first was a conceptual graphic to demonstrate where density could be deployed on the site. The second was an overlay to show the boundary of the Expropriated Lands as compared to the concept plan prepared by Grant Diemert, which related to one of Mr. Simmons' development scenarios. The Tribunal admitted these drawings as graphic depictions of information provided in the previously filed witness statements, and on the basis that there was an opportunity for the Claimant to reply, if necessary.

[77] Mr. Aburto requested Mr. Parsons' notes during examination-in-chief, based on the Electronic Hearing Protocol that is incorporated into the Procedural Order. Paragraph 1.6 prohibits expert witnesses from including new evidence in their outline and indicates that the outline may be required to be produced to the parties and Tribunal upon request. The Tribunal did not require Mr. Parsons to produce his notes, given that Mr. Parsons was referring to information provided during the course of the hearing. Like all witnesses in this proceeding, Mr. Parsons was asked questions about the testimony of other witnesses and responded to same. The Tribunal found that this is not the type of situation anticipated in the Electronic Hearing Protocol that would justify the production of expert notes.

[78] A group of the Claimant's witnesses collaborated to prepare a new plan in response to Mr. Parsons' drawings, which was the focus of the Claimant's reply case. Counsel for the City expressed great concern about the new Diemert plan being admitted into evidence when it was put to Mr. Parsons in his cross-examination. The Tribunal admitted that plan over the City's objections to recognize the evolving nature of issues over the course of a hearing and to allow a response to the new drawings prepared by Mr. Parsons.

[79] Four witnesses were called in the Claimant's reply case: Messrs. Diemert, Dragicevic, Williams, and Simmons. The City's concerns about the new plan prepared by Mr. Diemert grew during the reply case. Ultimately, the Tribunal ruled that the reply witnesses—who appeared to have input into and knowledge of the Diemert plan—would testify as a panel, such that they would each complete their evidence-in-chief, and the City would cross-examine each reply witness individually with the others excluded. Neither party objected to this approach.

ISSUES AND ANALYSIS

[80] The compensation 135 claims for the City's expropriation relates to the market value of the Expropriated Lands and to disturbance damages. These categories of compensation are established in s. 13 of the Act:

> **Compensation**
>
> **13** (1) Where land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act.
>
> **Idem**
>
> (2) Where the land of an owner is expropriated, the compensation payable to the owner shall be based upon,
>
> (a) the market value of the land;
>
> (b) the damages attributable to disturbance;
>
> (c) damages for injurious affection; and
>
> (d) any special difficulties in relocation,

> but, where the market value is based upon a use of the land other than the existing use, no compensation shall be paid under clause (b) for damages attributable to disturbance that would have been incurred by the owner in using the land for such other use.

Subsections 13(2)(a) and (b) are applicable in this case. There is no claim for injurious affection nor relocation.

[81] As will be described in more detail in the Tribunal's analysis, compensation for market value requires the Tribunal to determine the amount the land might be sold for in a transaction between a willing seller and a willing buyer, in accordance with s. 14 of the Act. This entails a determination of the highest and best use of an expropriated property, which is the use that is legally permissible, physically possible, financially feasible, and maximally productive.

[82] Disturbance damages are compensation for costs that are the natural and reasonable consequences of the expropriation. In this case, the Claimant is requesting three categories of those damages. The first is for business losses, based on 135's lost profits from rents it might have collected had it not been for the expropriation. This category of losses requires the Tribunal to determine the start date for the scheme of the expropriation, the UW Campus, in order to establish the date from which business losses are compensable. The second category of disturbance damages 135 claims is for costs it spent on its development that became wasted because of the expropriation. The third category is a claim for executive time for Mr. and Mrs. Ryan, as 135 claims that they diverted time from the business because of the expropriation.

[83] Therefore, the issues the Tribunal must determine to arrive at compensation in this case are as follows:

1. **What was the market value of the Expropriated Lands as of the date of expropriation, June 15, 2009?**

    a. ***What is the highest and best use of the subject property, based on uses that are***

i. Legally permissible;

ii. Physically possible;

iii. Financially feasible; and

iv. Maximally productive?

b. What is the appropriate market value based on the highest and best use?

2. What damages, if any, are compensable for disturbance?

a. What is the start date of the scheme of the expropriation and what is the amount of business losses suffered by the 135 due to the expropriation?

b. What is the amount of costs thrown away on 135's project due to the expropriation?

c. What is the amount compensable to Mr. and Mrs. Ryan for executive time?

3. If interest is owed, should the Tribunal exercise its discretion to vary the statutory interest rate?

[84] The Tribunal will first address the issues and sub-issues related to market value.

1. Market Value

[85] Market value is defined in s. 14 of the Act as the price a property might realize in a market transaction between a willing seller and a willing buyer:

> **Market value**
>
> **14** (1) The market value of land expropriated is the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer.

There is an important qualification in s. 14(4)(b), which provides that the scheme, or purpose of the expropriation, should be disregarded when determining market value:

> **Idem**
>
> (4) In determining the market value of land, no account shall be taken of,
>
> (a) the special use to which the expropriating authority will put the land;
>
> (b) **any increase or decrease in the value of the land resulting from the development or the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation**; or
>
> (c) any increase in the value of the land resulting from the land being put to a use that could be restrained by any court or is contrary to law or is detrimental to the health of the occupants of the land or to the public health. [Emphasis added].

This means that the Tribunal must disregard any increase or decrease in value of the Expropriated Lands due to the development of the UW campus.

[86] Appraisers rely on definitions of market value that elaborate on s. 14 of the Act, including from the Canadian Uniform Standards of Professional Appraisal Practice ("CUSPAP") and International Valuation Standards. CUSPAP refers to a prudent and knowledgeable buyer and seller:

> The most probable price which a property should bring in a competitive and open market as of the specified date under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus.

The International Valuation Standards' definition is similar and refers to an arms-length transaction:

> Market value is the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arms-length transaction after proper marketing

> wherein the parties had each acted knowledgeably, prudently and without compulsion.

[87] In determining market value, the Tribunal has the benefit of the opinion evidence of two appraisers: Mr. Simmons for the Claimant, and Mr. Bower for the City. Mr. Bower prepared an appraisal report in 2009 to produce his opinion of value as of the date of expropriation. While Mr. Simmons was retained by 135 in 2009, his involvement at that time was limited to a technical review of Mr. Bower's report. His appraisal report with his opinion of value was prepared in 2020. In addition to Mr. Bower and Mr. Simmons, the Tribunal heard from Mr. Atlin, who was called by the City to comment on Mr. Simmons' appraisal report. Mr. Atlin's report provided his commentary on Mr. Simmons' report and did not include an opinion of value.

[88] There is more than a 22 million dollar difference in opinion in this case on the market value of the Expropriated Lands. Mr. Simmons, the Claimant's appraiser, believes that the property is valued at $22,700,000. Mr. Bower, the City's appraiser, arrived at a market value of $4,300,000, assuming that there were no environmental issues associated with the property and that it was available for immediate development in 2009. Once he accounted for the costs of environmental remediation on the property, he arrived at a negative market value. He then developed a speculative value for the property based on its prior transactions, leading to his final opinion value of $290,000.

[89] Despite the chasm between the appraisers, Messrs. Simmons and Bower share some important areas of agreement. They generally agreed on the principles of appraisal to be followed in arriving at an opinion of value, including definitions for market value and the highest and best use of a property. They also both used a direct comparison approach to analyze sales of comparable properties and arrive at a value for the Expropriated Lands, even using several of the same comparables.

[90] They agreed that the property is contaminated and that remediation costs should be deducted in arriving at an opinion of value. At a high level, they even agreed that the highest and best use of the Expropriated Lands is for some form of mixed-use commercial and residential development, and that a typical purchaser would therefore

likely be a developer.

[91] The principal point of disagreement between Messrs. Simmons and Bower is the value of the building. Mr. Simmons attributes significant value to the structure which leads him to a highest and best use of the property that includes the building ("as improved"). Mr. Bower reached the opposite conclusion and valued the property without the building ("as vacant"). This disagreement—about whether the building has any value—is a significant fork in the road, with each appraiser choosing a different route and employing a unique approach to arriving at his opinion of value.

[92] The Tribunal therefore finds it most useful to begin its analysis with the broader concepts of market value and highest and best use upon which these appraisers agreed, which then leads to a discussion of each appraiser's approach.

a. Highest and Best Use

[93] The highest and best use is based on the idea that the price paid for a property reflects its most profitable use. All three appraisers referred the Tribunal to similar definitions, all of which include four criteria to be considered in determining the highest and best use. These are concisely set out in a definition from the Appraisal Institute:

> The reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value. The four criteria the Highest and Best Use must meet are legal permissibility, physical possibility, financial feasibility and maximum profitability.

The appraisers agreed that a highest and best use analysis must consider what is legally permissible, physically possible, and financially feasible on a property. Once those uses are identified, the appraisers agreed that the fourth criterion, the use that is maximally productive—the most profitable one—can be identified. As Mr. Atlin described it, the highest and best use analysis is like a three-legged stool: if one of the legs of legally permissible, physically possible, or financially feasible is kicked out, the stool will fail and the most profitable use cannot be identified.

[94] The appraisers also agreed that an analysis of highest and best use must consider the property as vacant (without the building) and also as improved (with the building). Both Messrs. Simmons and Bower followed this approach to consider highest and best use as vacant and as improved. They arrived at opposite conclusions. Mr. Simmons concluded that the highest and best use is as improved, that is, it includes the building, while Mr. Bower sees no value in the building and believes the highest and best use is as vacant.

[95] Although Messrs. Simmons and Bower agreed that the highest and best use of the Expropriated Lands is for a mixed-use development involving commercial and residential components, they part ways significantly on the details of such a development and the inclusion of the building. Mr. Bower opted for a general description of a mixed-use development. In contrast, Mr. Simmons put forward three possible development scenarios.

[96] All three scenarios are similar to 135's project and contemplate development of approximately 1.5 million square feet over phases. Each scenario includes the reuse of the building and a mix of uses similar to what Mr. Ryan envisioned. The Claimant submitted that it was only Mr. Simmons' second scenario that was based on 135's project. This second scenario is the one Mr. Simmons prefers, as, in his view, it makes the most sense. Having reviewed Mr. Simmons' reports and testimony in detail, the Tribunal finds this to be a distinction without a difference. The slight differences among the three scenarios become apparent only when Mr. Simmons assesses their market value. Mr. Simmons does indeed indicate that only his second scenario is based on 135's project. However, it is clear in his reports and testimony that he is referring to 135's project throughout his highest and best use analysis. Therefore, any references to 135's project and Mr. Simmons' development scenarios in the Tribunal's analysis should be taken as one and the same.

[97] Mr. Atlin's comparison of the highest and best use analysis to a three-legged stool was referenced frequently during the hearing as a useful analogy. In the context of

this case, the Tribunal views each leg of the stool as a composite of evidence from multiple witnesses in a variety of disciplines in support of the appraisal evidence. The legally permissible leg consists of the opinion evidence of the two land use planning witnesses. The physically possible leg is wider-ranging, involving evidence regarding site access and servicing, structural engineering, and environmental remediation. The financial feasibility leg includes evidence on the economic conditions at the time of expropriation, and the market for the highest and best use proposed by each appraiser, including the hotel market.

[98] There are many areas in which the appraisers disagreed in this case, but the critical one in is the value they place on the opinions of other experts in their respective highest and best use analysis. Mr. Bower relied on the expert reports that were available at the time of expropriation, when he completed his report, and accepted those opinions because they were beyond his area of expertise. By contrast, Mr. Simmons was critical of Mr. Bower's acceptance of expert opinions. It became apparent during Mr. Simmons' testimony that he relied on no experts and merely referred to their reports as supportive of his own conclusions.

[99] The difference in approach between Mr. Simmons and Mr. Bower is apparent at every stage of the highest and best use analysis, beginning with what is legally permissible on the property.

i. Legally Permissible

[100] To understand what is legally permissible on a property, it is necessary to consider the land use planning policies and controls in place at the date of expropriation. The City of Stratford's Official Plan and Zoning By-law in force at the time of the 2009 expropriation governed what could legally be developed on this property.

[101] There was generally agreement among the experts in this hearing that this 11.42 acre property in downtown Stratford enjoys broad planning permissions and is ripe for redevelopment. The two land use planning witnesses—Mr. Dragicevic for the Claimant

and Mr. Parsons for the City—agreed that Stratford is blessed with a vibrant and thriving downtown, with a variety of shops, restaurants, and small businesses, and successful conservation of its low-scale historic buildings. This compact, walkable, and bustling downtown is a model of a healthy core area in southwestern Ontario.

[102] This rare downtown site is essentially a blank canvas. Mr. Dragicevic envisioned two general scenarios for the site's redevelopment. The first aligns with 135's project involving adaptive reuse of the building and a new hotel building. The second contemplates demolishing the building and including a mix of uses on the site to achieve its maximum density potential. He repeatedly emphasized that these are general development concepts and that he has not analyzed nor prepared a specific development plan. Mr. Parsons agreed that the site offers many opportunities, though he disagreed as to whether developing the site to its maximum density potential would represent good land use planning. He also believed, from a market perspective, that such development is not feasible, as will be discussed in the financial feasibility section of this Decision.

[103] Messrs. Dragicevic and Parsons agreed that while the site presents a broad range of possibilities there are three important caveats to its redevelopment. First, any development would need to take into account the existing rail line; the planning experts agreed that specific noise and attenuation measures would depend on the development plan and that these would be implemented through the site plan approval process. Second, there may be a need for an amendment to the Zoning By-law or a minor variance application for relief from the By-law's height and parking requirements, again dependent on a specific development plan. Third, any development plan would need to either comply with the restrictive covenant registered against the property, or receive waiver or amendment from its requirements. There was little dispute about the application of the covenant among the experts, and so the Tribunal will discuss it first before moving to the more contentious matters of the rail line and Zoning By-law.

The Restrictive Covenant

[104] When the City transferred the property to 110 in 1996, it put a restrictive covenant in place to limit the type and square footage of retail and other development that could be undertaken. It reads as follows:

> That the lands hereby transferred shall be used by the transferee, and its successors and assigns in title to the lands, only for hotel, spa, theatre, conference centre, restaurant, lounge, office, shop and retail purposes, such shop and retail purposes not to exceed 35,000 square feet in aggregate, and with no single shop or retail use being greater than 5,000 square feet.

[105] Mr. Dragicevic and Mr. Parsons agreed that the covenant was intended to protect existing businesses in the downtown core while encouraging redevelopment of this site. They agreed that the covenant's restriction on retail space reflected the City's interest in maintaining a healthy economy by restricting new retail that could negatively affect the existing downtown retail function. In other words, the covenant was the City's attempt to achieve economic balance in its downtown.

[106] They and the appraisers also agreed that the City would likely amend or waive this covenant if presented with an appropriate redevelopment proposal. They further agreed that the amendment or waiver of the covenant is entirely at the City's discretion and would require a resolution of its Council.

[107] The covenant therefore did not impact the opinion of value of either appraiser. It becomes relevant only in the broader discussion of what could occur on this property from a land use planning perspective.

The Rail Line

[108] Messrs. Dragicevic and Parsons arrived at a significant point of agreement regarding the rail line in their Statement of Agreed Facts. They agreed that development located along the rail line would be required to account for its presence. Notably, they agreed that public safety requires consideration of a setback from the rail line for any

sensitive uses. They also agreed that the area adjacent to the rail line—an area currently occupied in part by the main building—could be used for a range of uses, including structured parking.

[109] Section 8.2 of the City's Official Plan was applicable at the time of expropriation. After describing the three rail lines that pass through the City, including the GEXR line adjacent to the Expropriated Lands that is not classified, the section provides context for the policies that follow. It discusses the Rail Noise, Vibration and Safety Impact Policy that was jointly formulated by CN Rail and Canadian Pacific Railways, noting that

> [i]ncreasingly, CN insists municipalities incorporate its measures into their official plans…to ensure that residential development and places of public assembly are adequately protected from the potential impacts associated with the development of lands lying in close proximity to railway corridors.

The introduction goes on to reference setbacks, berming, fencing, building design and construction standards as potential measures to mitigate rail impacts.

[110] There are then two goals and objectives for lands adjacent to railways. Both seek to address railway impacts on nearby residents and places of public assembly:

> i) To mitigate the impact of railway noise and vibration on nearby residents and places of public assembly.
>
> ii) To minimize the possible impact from train operations which may affect nearby occupied dwellings or other places of public assembly.

[111] There are five sections of policy that flow from these goals and objectives. The first, policy 8.2.1, requires attenuation measures to buffer new residential development and places of public assembly from railway uses in noise sensitive and vibration sensitive areas. The next two policy sections, 8.2.2 and 8.2.3, identify the noise and vibration sensitivity areas, respectively.

[112] Both noise and vibration sensitivity areas are shown on Schedule "D" to the OP and both are clearly depicted to apply to the Expropriated Lands. Policy 8.2.2 refers to noise sensitivity areas as lying within 300 metres ("m") of the CN railway as shown on

Schedule “D”. There are references to the “CN railway” in the rest of the section 8.2 policies. While the Tribunal notes that the GEXR rail line adjacent to the Expropriated Lands was sold by CN in 1992, a contextual reading of section 8.2 of the OP, along with the depiction on Schedule “D”, makes clear that these policies also apply to the GEXR. This interpretation is consistent with the evidence of both land use planning witnesses during the hearing.

[113] The whole of the Expropriated Lands is within the noise sensitivity area, which has two implications for potential development. First, the City would consult with the Ministry of the Environment and Energy and the owner / operator of the railway, and would then determine whether the proponent should undertake a noise evaluation study, including recommendations for any necessary noise reduction measures (policy 8.2.2(a)). Second, a proponent would have to submit a detailed acoustical design study as a condition to the approval of residential development or a place of public assembly where the noise evaluation demonstrated such a need, and that design study must be included in an applicable subdivision condominium agreement (policy 8.2.2(b)).

[114] Part of the Expropriated Lands is also within a vibration sensitivity area as it is within 75 m of the railway. In accordance with policy 8.2.3, the City has discretion to require the proponent to provide an engineering study regarding ground-borne vibration levels, including identifying vibration impacts and mitigation measures “to be applied in consultation with and to the satisfaction of the owner / operator of the railway” (policy 8.2.3(a)). Any necessary attenuation measures are required to be provided for in draft plan of subdivision or condominium approval (and any related agreement) or other development agreement (policy 8.2.3(b)).

[115] Policy 8.2.4 lists additional mitigation and safety measures that may be required for proposed residential development or places of public assembly within 300 m of the railway. These include, as examples listed in the policy, increased setbacks, berms, and security fencing. There is also potential for a warning clause to be registered on title to the property, in accordance with policy 8.2.5 to alert future owners that rail operations

“may adversely affect the living environment and enjoyment of the residents.”

[116] Neither planner provided a detailed analysis of the implications of the rail line on the deployment of a development on the site for one important reason: there was no detailed development plan for them to analyze. This was not part of their scope in determining generally what could be done on the site, given provincial policy, the Official Plan, and Zoning By-law provisions in place at the time of the expropriation. Their planning opinion evidence was proffered in support of the highest and best use analysis and appropriately focused on general development concepts that could work on the site.

[117] Mr. Parsons, however, did conduct a site analysis to arrive at an estimated building envelope for the property. He has significant experience working with rail operators and their proximity guidelines. Based on the guidelines, it is his opinion that a minimum building setback of 30 m and a berm height of 2.5 m would be required for the development of the Expropriated Lands. This would impact approximately 3.2 acres of the 11.42 acre property, resulting in a building envelope of 6.77 acres. Mr. Parsons illustrates this in Figure 9 of his report, noting two irregularly shaped areas of the property that, in his opinion, have insufficient site geometry and should not be included in the envelope. The figure also illustrates other setbacks as required in the Zoning By-law that are within the 30 m setback. While the resulting building envelope is 6.77 acres, Mr. Parsons explained that the developable area is actually larger because surface parking could be located behind the safety berm.

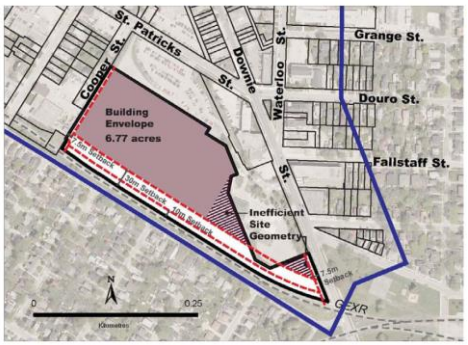


Figure 5: Mr. Parsons' proposed building envelope (Exhibit 7C at p. 176)

[118] Despite the agreement of the planning witnesses that the rail line would need to be addressed in a development proposal, there was a bewildering argument that arose late in the hearing, during Mr. Aburto's cross-examination of Mr. Parsons. The proposition appeared to be that since the GEXR line is not classified in the Official Plan, it would not be considered a secondary line (as Mr. Parsons indicated in his report) and therefore the noise and attenuation measures would not apply.

[119] Claimant's counsel advanced a related theory that, because the rail attenuation measures are contained in the OP, they would not be triggered through a site plan application. The Tribunal finds these arguments to be overly technical and without merit because they run contrary to the agreed upon evidence of the planning witnesses. Both planning witnesses spoke about the safety concerns of an adjacent railway that became even more pronounced after a fatal crash in Mississauga. They agreed that the rail line would need to be considered in a development proposal and that this would happen at the site plan stage.

[120] The Tribunal also notes that if a development proposal required a Zoning By-law amendment—be it for height or parking—that amendment would be required to conform with the OP by virtue of s. 24 of the *Planning Act*. Even if relief from height or parking standards could be achieved through a minor variance application, variances are required to maintain the general intent and purpose of the OP in accordance with s. 45(1) of the *Planning Act*. Given this Tribunal's frequent adjudication and expertise in land use planning matters, it cannot imagine a scenario in which ignoring an adjacent and active rail line in a development proposal could be considered good land use planning in the public interest.

[121] The Tribunal accepts, based on the evidence of both Mr. Dragicevic and Mr. Parsons, and its reading of the applicable OP policies, that the rail line would need to be taken into account in any redevelopment of this site. Turning now to the appraisal evidence on this aspect of the legally permissible part of the highest and best use test, there is another critical difference of opinion.

[122] Mr. Bower acknowledges that the rail line would need to be considered in a development proposal with attenuation and mitigation measures put into place. He noted that while there would be implications for setback areas, that there are a variety of possibilities to appropriately distance any development on the site from the rail line and to potentially use setback areas for parking, access, or open space. This is in line with what the Tribunal heard from the two planning witnesses. Mr. Bower accordingly assumed that the proximity to the rail line would not have any negative effect on the value of the Expropriated Lands.

[123] In contrast, Mr. Simmons makes two very different assumptions about the rail line that, in significant part, lead to his decision to rely on an “as improved” highest and best use that retains the building. First, he assumes that the presence of the rail line essentially sterilizes the site from any meaningful amount of new development. Second, he then assumes that if the building remains, the rail line would not need to be addressed because the existing building is immune from the OP noise and attenuation policies put in place long after its construction. He supports his opinion not by reference to the land use planning experts, but by his own assessment, including a telephone call he made to GEXR in which he learned that the line traffic consists of one train a day travelling at a speed of no more than 40 kilometres per hour.

[124] Based on the consistent land use planning opinion evidence regarding the rail line, the Tribunal finds that Mr. Simmons’ assumptions about the rail line are deeply flawed. During cross-examination, Mr. Dragicevic was questioned about this very issue, that is, whether the rail line would need to be considered if the building remained and was adaptively reused. He agreed that several of the uses proposed in 135’s project, and therefore Mr. Simmons’ development scenarios, are places of public assembly that would trigger the implementation of the OP rail policies. The dance barn, movie theatre, water park, and indoor shopping area would all require some measures to address noise and safety, as would any residential or hotel component.

The Zoning By-law

[125] The Zoning By-law permits a variety of uses on the subject property in its Central Commercial (C3-2) designation. These include retail, restaurants, services, offices, hotel, theatre, recreation, entertainment, apartment, institutional and warehouse uses. Though an exception to the Zoning By-law also permits industrial uses on the property, the planning witnesses and appraisers agreed that this downtown location is not suited to modern industrial use, which requires convenient highway access. Nor does industry fit within the City's Official Plan vision for its downtown core.

[126] In addition to its broad array of permitted uses, the Zoning By-law does not place any limit on the density of development on the site. As both planners pointed out, the form and scale of development is informed by the Zoning By-law's performance standards. Generally speaking, a zoning by-law requires minimum setback areas from adjacent properties, a minimum amount of parking spaces depending on the use of the property, and a maximum height. The By-law's requirements regarding height and parking were relevant and disputed in this case—though not by the land use planning witnesses.

[127] The dispute related to whether Mr. Simmons' second and preferred development scenario could provide the By-law's minimum required parking spaces and whether it would require an amendment to the By-law for height. Once again, the Tribunal must point out that the land use planners discussed general development concepts that did not get into the details of height and parking. It was not until the Claimant's reply case that the Tribunal was presented with a concept drawing to demonstrate how Mr. Simmons' chosen development scenario could be achieved on the site.

[128] The Tribunal agrees with Messrs. Dragicevic and Parsons that there a variety of ways in which development could be deployed on the site. Some may require relief from the Zoning By-law and others might not. Mr. Simmons' second development scenario, which is 135's project, most certainly would.

[129] The scenario contemplates 1.5 million square feet of development on the site. The existing main building accounts for approximately 190,000 square feet of that figure. In the plan Mr. Diemert prepared late in the hearing, in consultation with Messrs. Dragicevic and Williams, a 17-storey hotel condominium building is contemplated, as well as two 5-storey parking buildings, a 5-storey residential building, and a 5-storey commercial building. The plan shows that 1001 parking spaces are required by the Zoning By-law and 1009 are provided, though some calculation errors were brought out in Mr. Dragicevic's cross-examination during reply.

[130] The Tribunal accords little weight to this plan that appeared to be hastily prepared in response to Mr. Parsons' evidence. It is, just like all of Mr. Simmons' development scenarios, a concept or idea for the site. The Tribunal accepts that the amount of development Mr. Simmons contemplates can be achieved on the site. That does not mean that it should be done, or that a knowledgeable, prudent and willing buyer would wish it to be done. It may be possible. However, considering the history of the site, the restrictive covenant, and the applicable statutory and policy land use planning framework, the Tribunal does not find such a development to be probable (See *Re Farlinger Developments Ltd. v. Borough of East York*, 1975 CarswellOnt 455, 61 D.L.R. (3d) 193).

[131] There is an open question as to whether a zoning by-law amendment would be required for 135's project and Mr. Simmons' preferred scenario, which involves a 16- or 17-storey hotel and condominium tower. Mr. Parsons' opinion is that a zoning by-law amendment would certainly be required for the height, as the maximum permitted height is 15 m or four storeys. Mr. Dragicevic was careful not to express an opinion on this issue, only going so far as to say that it is a matter of legal interpretation as to whether a zoning by-law amendment would be required. He indicated that one may be required depending on the chosen legal interpretation, or that it may be possible to obtain relief through a minor variance.

[132] Despite not having an interpretation from its land use planning witness, the

Claimant advanced the theory that the site enjoys an exception to the 15 m height limit. The exception would allow a tower of any height to be constructed, so long as it no more than five per cent of the lot area or, if it is attached to the roof of a building, it is no more than 10 per cent of that roof area. The Claimant bases this interpretation on the site-specific exception set out in s. 14.4.2(d) of the Zoning By-law:

> Height Exceptions
>
> Nothing in this By-law shall apply to restrict the height of the following structures:
>
> i. an antenna
> ii. a barn
> iii. a belfry
> iv. a chimney
> v. a church spire
> vi. a clock tower
> vii. an elevator or stairway penthouse
> viii. a flag pole
> ix. a hydro-electric transmission tower
> x. an ornamental structure
> xi. a radio antenna
> xii. a silo
> xiii. a steeple
> xiv. a structure containing heating, cooling, or other mechanized equipment pertaining to a building
> xv. a tower
> xvi. a water tower, or
> xvii. a windmill
>
> provided that no such structure, other than a public use, occupies in excess of five (5) per cent of the lot area of the lot where such structure is located or, where such structure is located on the roof of a building, ten (10) per cent of the area of such roof.

[133] This site-specific exception for “towers” was the result of a settlement between the City and the Claimant in a 2002 OMB appeal concerning the City’s new comprehensive Zoning By-law. Prior to that new by-law, the City’s 1979 Zoning By-law listed “a tower” as a structure that would be exempted from height restrictions. The new comprehensive Zoning By-law changed the word “tower” to “tele-communications tower”. 135 appealed the City’s passing of the new Zoning By-law, leading to the 2002 OMB hearing.

[134] In the 2002 OMB hearing, the City and 135 agreed to a site-specific exemption. The effect was that, for 135's property, the list of structures exempt from the by-law's height restrictions would include "a tower" instead of "tele-communications tower". It is clear from the record and testimony during this hearing that 135 took the position that this meant a hotel and condominium tower could be constructed of unlimited height, provided it met the five and ten percent coverage requirements. Neither the planning evidence before the Tribunal nor the Tribunal's own reading of the Zoning By-law support such an interpretation.

[135] As Mr. Parsons explains, the Zoning By-law defines a 'building' as a structure with walls and a roof that is used for people, animals, or items:

> 2.17 BUILDING means any structure, or part thereof, consisting of walls and a roof which is used or intended to be used for the shelter, accommodation or enclosure of persons, animals or chattels, and includes any structure defined as a building in the Building Code Act, or in the Corporation's Building By-law, but does not include any vehicle as defined herein other than a vehicle which has been permanently placed on land and is not intended for use as a vehicle.

The Zoning By-law, in Mr. Parsons' opinion, clearly distinguishes between a building and a structure, with a structure being more generally defined in s. 2.160:

> 2.160 STRUCTURE means anything constructed or erected, in whole or in part, which is located on, or in, the ground, or attached to something located on, or in, the ground, and includes anything pre-made or prefabricated, but does not include a fence, sign, railway line, or any hard surface located directly on the ground.

He notes that while there are certain structures identified in the s. 14.4.2(d) site-specific exemptions, it is not apparent that these would be classified as buildings as defined elsewhere in the Zoning By-law.

[136] There are additional provisions that support Mr. Parsons' interpretation. Section 14.2 sets out the required performance standards for the zone and refers to a "Maximum Building Height" of 15 m. The definition section of lists 'Building Height' and refers the reader to 'Height' for that definition. That definition then refers to buildings and

structures as separate items, noting that there can be exceptions for height in the Zoning By-law:

> 2.71 HEIGHT, when used in reference to a building or structure or any part thereof specifically referred to herein, means the vertical dimension between the average grade at the base of such building or structure and the highest point of such building or structure or part thereof, exclusive of any height exceptions as referred to herein.

[137] The Tribunal agrees with Mr. Parsons that the Zoning By-law's different treatment of 'building' and 'structure' is significant. When reading these provisions together, the Tribunal finds that the height exceptions apply to a specific list of structures that are not buildings with four walls and a roof intended to accommodate people, animals, or things. The maximum building height is 15 m with exceptions for a list of structures that may be attached to a building or affixed to the property itself.

[138] These site-specific exceptions include the list used in the City's 1979 Zoning By-law. It is inconceivable to the Tribunal that the City of Stratford, with a population of approximately 32,000 in 2009, would have been contemplating and intending buildings of unlimited height in its 1979 Zoning By-law. The Tribunal notes that while the Board approved the site-specific exemption put to it on consent of the parties in the 2002 hearing, there was no adjudication or consideration of this interpretation issue in the Decision. Having reviewed the Zoning By-law applicable at the time of expropriation and Mr. Parsons' evidence, the Tribunal concludes that any redevelopment of the site with a building height exceeding 15 m would not comply with the Zoning By-law.

[139] The question then becomes whether a proposed height greater than 15 m could be handled by way of a minor variance application or a zoning by-law amendment. The planning witnesses agreed, and the Tribunal concurs, that either is possible and depends on the specific proposal. In this case, the proposal at issue is Mr. Simmons' preferred development scenario, based on 135's project, which seems to include a height of 16 or 17 storeys. This is 12 or 13 storeys higher than what the Zoning By-law allows.

[140] The City Planning Department had advised Mr. Ryan on at least one occasion that a zoning by-law amendment would be required. The Tribunal, again based on its experience in adjudication of minor variance and zoning by-law amendment appeals, has difficulty imagining a three-fold height increase being considered a minor variance to the Zoning By-law.

[141] It is not unusual for the Tribunal to be required to undertake a hypothetical land use planning exercise in a highest and best use analysis. In this case, the land use planning evidence only generally and briefly addressed the question of whether such a zoning by-law amendment would be approved. Mr. Dragicevic indicated that he could envision either of his options for redevelopment (one that included reuse of the building and one that did not) as being deployed in a way that constituted good land use planning. Admittedly, he was not assessing scenarios with specific heights attached to them. Even when called in reply to comment on the new concept plan Mr. Diemert prepared, Mr. Dragicevic expressed no opinion as to whether the concept represented good land use planning. He emphasized that the plan is a concept, one that, in his view, demonstrates one of many possibilities that could work on a site with such broad planning permissions.

[142] Mr. Parsons, when presented with the Claimant's concept plan during his cross-examination, had very little time to review it. His reaction, however, was the same as he articulated in his 2009 report when he considered 135's project. He considered it to be overdevelopment of the site that in no way represented good land use planning. From a compatibility perspective, Mr. Parsons explained that this is a downtown characterized by two- to three-storey buildings abutting the street with small shops, restaurants, and services. Any development of this site would need to consider this downtown fabric in its siting and building design elements.

[143] The Tribunal appreciates that 135's project, be it through the pre-expropriation iterations of the concept or the revised concept presented late in this hearing, is still at the concept stage. It is not at the stage of detailed design that would consider fit and

transition with its low-scale downtown surroundings, as well as the single detached residences to the south. The Tribunal also understands that architectural elements of a tall building, including deployment of its podium, tower, massing, setbacks and stepbacks, can go a long way to provide an acceptable transition to adjacent buildings to mitigate adverse impacts. Bearing that in mind, to envision approval of a 16- or 17-storey building in low-scale downtown Stratford requires an extraordinary stretch of the land use planning imagination.

[144] It is safe to assume, based on the City Planning Department's advice to Mr. Ryan as reflected in the record and discussed during the hearing, that the City would have refused an application to amend the Zoning By-law for a height of 16- or 17-storeys. That refusal would likely have been appealed to the Tribunal (or, more accurately at the time of expropriation, its predecessor, the Ontario Municipal Board). For all of the reasons discussed above, the Tribunal finds that such an appeal would have been unlikely to succeed.

[145] Messrs. Simmons and Bower agreed that a zoning by-law amendment may be required for a height exceeding four storeys, though Mr. Simmons spends some time in his report discussing the 2002 OMB hearing and the Claimant's theory that tower height is not limited by the Zoning By-law.

[146] The Tribunal finds that the appraisers' high level agreement of a highest and best use of a mixed commercial and residential development is supported by the land use planning evidence and is legally permissible. Though Mr. Simmons' preferred development scenario is not, the Tribunal appreciates that this is a development concept. A potential purchaser may choose to pursue a different concept. However, the Tribunal also notes that the only illustration to demonstrate how Mr. Simmons' 1.5 million square feet of development can be achieved on the site contemplates a 17-storey hotel and condominium tower. This was the plan Mr. Diemert prepared during the hearing.

[147] There is no question that there are broad planning permissions for this unique

downtown property. All three appraisers agreed that the prudent and knowledgeable buyer—in this case, a developer interested in redeveloping the Expropriated Lands—would want to build to the maximum permissions as supported by the market. The Tribunal will discuss this in the third component of the highest and best use analysis, financial feasibility. Before that, the Tribunal will consider the physically possible component of the highest and best use analysis.

ii. Physically Possible (Access and Servicing, Structure, and Environment)

[148] This second criterion of the highest and best use analysis looks at the size, shape, area, terrain, soils, and accessibility of the subject property and how those elements affect potential development. It also considers the built elements of an improved property to consider whether their present use should continue or be adapted.

[149] In this case, there is agreement among the experts that any of the development concepts, including 135's project and Mr. Simmons' related scenarios, are physically possible. The issue is the cost associated with them, and this relates to three specific areas: access and servicing, the reuse of the building, and environmental remediation.

Access and Servicing

[150] Access and servicing was the least contentious issue in this hearing. While there was initial debate about the existence of a prescriptive easement in favour of the Expropriated Lands over the Disputed Lands, it became clear by the end of the hearing that this is a determination the Tribunal need not make. The parties generally agree on access, servicing, and their implications in the highest and best use analysis.

[151] With respect to access, the Expropriated Lands have access at Downie Street. Cooper Street is another possible access point, though it is at a different level than the property and access would take some grading work. Depending on the type of development, access to St. Patrick Street, as the property historically enjoyed, would be ideal. All agreed that this could be negotiated with the City in the face of an appropriate development.

[152] Servicing is available at the site but it is an open question whether existing services could support the type of development Mr. Simmons contemplates. At best it could, and at worst there would be required upgrades and a cost associated with them. Appropriate servicing is physically possible and it may come at an additional cost. There would also be some negotiation with the City with respect to servicing for the site, which could include easements from the City for servicing to be run from St. Patrick Street.

[153] The Tribunal heard nothing about servicing that would deter a potential purchaser, especially a developer who would be accustomed to dealing with municipal servicing requirements in a project. Neither appraiser deducted for this possibility and the Tribunal sees no need to go any further to analyze potential costs of servicing associated with an undetermined development scenario.

Reuse of the Building

[154] The building that remains on the Expropriated Lands is, by all accounts, a unique structure. With a footprint of approximately 160,000 square feet, it is exceptionally large. It is constructed generally of riveted steel and arranged with four large bays that are open from the ground to the roof structure, except for the north bay, which contains a mezzanine level. Each bay has a long rectangular footprint, ranging from 580 to 780 feet in length. The highest bay is 67 feet to its peak, with two of the bays 50 feet high to their peaks and the 1949 addition bay, next to the highest bay, at 38 feet tall. This addition is constructed of rolled structural steel sections, as compared with the other bays that are riveted built-up steel construction.

[155] There are main roof trusses spanning in the north-south direction across each bay supported by steel column sections, spaced approximately 22 feet apart along the length of the building. The roof deck is supported by purlins that span between the trusses. There are large plate girders remaining in the building that would have supported the locomotive carrying cranes.

[156] Although the building is generally constructed above grade, there are several pits

of unknown depths throughout its footprint. Some of the pits are filled with sand and train rails. The floor slab consists of both unreinforced and reinforced concrete with thicknesses that vary between 8 and 20 inches.

[157] The exterior of the building appeared to have originally been constructed with concrete walls tied to the building columns with large window openings. At the time of expropriation, many windows had been removed and boarded with plywood. The window openings near the west end of the building were filled with concrete blocks and a brick veneer installed on the north face of the building from grade level to half the height of the building. In areas where other sections of adjoining building had been demolished, corrugated metal siding was installed to enclose those areas.

[158] The structural and environmental engineering experts agreed that the building contains flaking lead based paint and asbestos. Both would need to be abated if the building were reused, and asbestos would need to be abated even if the building were demolished.

[159] While the utility and value of this building is at the core of the dispute between the parties, there is some high level agreement among their experts respecting the building. All agreed that reuse of the building is physically possible. They disagreed on two intertwined points: (1) the extent of repairs and upgrades required for reuse of the building; and (2) the costs of those repairs and how this relates to the value of the building. The second point relates more to the financial feasibility criterion and will be discussed there. This section of the Tribunal's analysis will focus on the state of the structure itself and the repairs required for its reuse, including the estimated costs of such repairs, without dealing with how those costs relate to feasibility.

[160] The Tribunal heard from three structural engineering experts. Messrs. Theodorlis and Price, from Morrison Hershfield Limited ("MH"), were retained by the Claimant and testified as a panel. Mr. Pond is with Read Jones Christofferson Ltd. ("RJC"), retained by the City. Both firms prepared reports regarding the building.

[161] RJC prepared two reports: a 2010 report assessing the physical condition of the east building (the former tube shop) that is now demolished as recommended by that report; and a 2012 “Building Condition Assessment Report,” for which Mr. Pond was the engineer-of-record.

[162] MH also prepared two reports, both authored by Mr. Theodorlis in 2009, after the expropriation. The first was a “Structural Overview of Building” and the second was a “Structural Building Condition Report – Steel Structure & Concrete Exterior Frame.” Mr. Theodorlis testified as to his walk through of the building and related 2009 reports, and Mr. Price testified as to MH’s review of the many structural engineering reports that have been prepared for this property.

[163] There are several points of agreement among the structural engineering experts. The first, and most significant, is that they agreed that RJC’s 2012 Building Condition Report involved a more thorough study of the building’s structural condition, including deterioration and damage to structural elements. As a result, MH took no exception to any of RJC’s factual field observations.

[164] Next, the structural engineers agreed that the October 2003 fire that destroyed the tender shop affected only the northwest portion of the main building. They agree that the structural damage caused by the fire appears to have included loss of wood roof decking, warping of steel roof purlins and some steel truss top chords. In their shared opinion, the structural damage caused by the fire affected approximately 10 per cent of the main building’s roof area.

[165] They agreed that overall, with the exception of the fire-damaged area of the main building, the levels of deterioration and damage RJC observed in 2012 did not pose an immediate structural safety hazard. There was no dispute that the east building was in a poor condition and should have been demolished, though it was planned to be a farmer’s market as part of 135’s project.

[166] One of the difficulties with the structural engineering reports is that while MH

prepared reports in 2009 just after the expropriation, there was no detailed field study of the building until RJC's 2012 report, three years after the expropriation. This makes the Tribunal's task—to recreate the conditions at the time of the expropriation in order contemplate what a willing seller and buyer would have done at that time—a challenging one.

[167] The structural engineering experts openly acknowledged this difficulty and attempted to find some areas of agreement pertaining to this in their Agreed Statement of Facts. They agreed that there was no evidence of any settlement of the building foundations between 2009 and 2012. They also agreed that, aside from the fire damaged area, the building's principal deficiency in 2009 was a lack of protection. As they explain in their Agreed Statement of Facts, the absence of a watertight roofing system would have led to continued deterioration of the steel structure from environmental exposure.

[168] They then agreed that for the interior areas of the building that were protected from the weather and elements, it is likely there was little change in the structural condition between 2009 and 2012. In areas that were not protected, they agree that there was likely some incremental ongoing deterioration of the structure. They also agreed that the precise amount and type of deterioration for exposed areas between 2009 and 2012 cannot be determined. Accordingly, the Tribunal was presented with no evidence on that point. Mr. Pond's opinion is that the extent of deterioration between 2009 and 2012 was not likely to have been substantially different. The MH witnesses questioned his opinion but offered no contrary evidence.

[169] Finally, they agreed that the technical feasibility of reusing the existing building structure without structural modifications and perhaps reinforcing depends on the proposed use.

[170] They generally agreed that if the use of the building were to change or the building renovated, the Ontario Building Code (the "Code") would require a structural adequacy check to determine if the structural performance level would be reduced.

Although Mr. Price and Mr. Pond disagreed as to whether the building would have been required to be updated to meet the version of the Code in effect in 2009, they agree that this is entirely dependent on a specific development plan.

[171] It also became clear during Mr. Pond's cross-examination that he was not making a blanket statement about the building having to be upgraded to meet the Code. He explained that some elements of the repair strategy, such as the roof, would require approval by the building department and may then engage the Code. He agreed with Mr. Price's evidence that if the load were not changing and the roof were being replaced, Code compliance may not be required. He also explained that in his experience a new roof for this century-old building would likely weigh more than the old one. This is an extensive renovation with implications for building load, which would require Code compliance.

[172] The key findings in RJC's report were undisturbed through the MH witness' testimony and in Mr. Pond's cross-examination. The only question raised about RJC's findings related to the assumed material yield strength used to test the structural adequacy of the existing steel purlins. Yield strength is the stress level at which large deformations will occur in the steel under constant stress. Mr. Price likened steel to an elastic band; when it reaches the yield level it stretches constantly and is no longer elastic. Simply put, load levels need to be kept below that yield level. As Mr. Pond explained, steel begins to yield, or deform, before it actually breaks. The break is called an ultimate strength and the yield strength is something less than that.

[173] MH tested the steel in 2009 to determine whether the tender shop fire had reduced its strength. In finding that it had not, MH identified a yield strength of between 37.9 to 43.9 kips per square inch of pressure ("ksi"). RJC performed similar tests to determine the steel yield strength, however it did not report an actual yield strength and instead assumed one of 28.9 ksi. Mr. Price explained that MH had no concern with the value RJC used and agreed it was a reasonable assumption in the absence of testing. He simply noted that it would have been interesting to see what would have happened if

RJC had used a more favourable value.

[174] Mr. Pond testified that RJC relied on a specification for historic steel, which identified using 50 per cent of the ultimate strength to establish the yield strength. Mr. Pond testified that when he reviewed the reports from RJC's material lab testing, he noticed that yield strengths higher than 50 per cent were reported in the building. He could not recall why RJC chose to retain the 50 per cent ultimate strength. His theory was that they would have erred on the side of caution, as engineers do when dealing with historic buildings, as there are significant implications for safety and liability.

[175] Regardless of RJC's rationale for using the more conservative figure, there was no evidence nor suggestion that it undermines any of RJC's findings. On the contrary, MH agreed with the findings in RJC's report, acknowledging that RJC conducted a more thorough study of the building. Mr. Price testified that RJC's level of detail compared to MH was not surprising, given that RJC had spent days closely examining the building's structural elements, while Mr. Theodorlis had just done a walk-through of the building when he visited in 2009.

[176] The structural engineering experts agreed that the warping of purlins and trussing in the fire damaged part of the building—approximately 10 per cent of the building's roof area—is structurally significant. They also agree that this would certainly need to be addressed as part of the reuse of the building.

[177] Mr. Pond was the only witness to provide evidence concerning the repairs required to bring the building back to a state of occupancy. He presented three strategies to address RJC's observed levels of deterioration in the main building and estimated costs for each. He explained that RJC arrived at its estimated costs by using past costing information it keeps in a database. Using that data, he prepared a Class D cost estimate that includes a 20 per cent contingency. During cross-examination, Mr. Pond acknowledged that a Class D estimate can vary significantly.

[178] The first option was essentially to do nothing but install a perimeter security fence

around the property. This would allow the building to continue to deteriorate while addressing public safety. RJC estimated this cost to be $375,000 in its 2010 report. The City installed a fence in 2015 for $100,000. Though this is post-expropriation information that would not have been available to a potential purchaser in 2009, Mr. Pond explained that he was not involved in the actual fencing project and could not speak to the cost.

[179] The second option was to rehabilitate the building and is broken into two sub-options. Both assume that there would be no change in use of the building, meaning that it would be suitable for industrial or a similar use. The first sub-option would simply mitigate any further deterioration by addressing all observed levels of deterioration, and re-cladding or re-roofing the building, for an estimated cost of $4,372,375 in 2009. To bring the building to a state of occupancy requires an additional estimated cost of $9,159,373 in order to introduce new power, lighting, conditioning, and plumbing. Therefore, for the building to be occupied for an industrial or similar use, Mr. Pond estimated a total cost of $13,531,748.

[180] The third option called for demolition of the main building. This is the option RJC recommended in its report, acknowledging the current state of the building and its limited salvage value. To demolish the entire building—including the foundations and the above grade superstructure—is a 2009 estimated cost of $1,130,786. The majority of that amount is for the demolition of the building slab. RJC estimated, in its 2012 report, that if the slab were retained, the demolition cost would decrease to $470,000.

[181] Mr. Pond testified that any adaptive reuse of the building would require significant upgrades well beyond the costs contemplated in RJC's option to bring the building to basic occupancy. The Tribunal heard evidence on this from Mr. Parsons, as will be discussed in the financial feasibility analysis.

[182] In summary, the evidence before the Tribunal regarding the 2009 state of the building was that it needed significant repairs. The experts agreed that these repairs are structurally significant. Mr. Pond's evidence regarding the structural state of the building was not contradicted and the Tribunal accepts it as such. Probable costs of repair will

be addressed in the financial feasibility section, following the discussion regarding environmental remediation.

Environmental Remediation

[183] This is a contaminated property. The three environmental engineers who testified agreed on the types of contaminants and their extent of contamination on the Expropriated Lands. They also agreed that the cost of remediation depends on the specific development plan for the property because that plan will dictate how much contaminated soil can be reused on site and how much must be removed and trucked away to a disposal site. Perhaps their most significant point of agreement is that the use of a risk assessment is the most cost effective approach to address the site's environmental conditions.

[184] They mainly disagreed on the impact of the contamination on the actions of a knowledgeable and prudent purchaser. This relates to the extent of remediation they believe a purchaser would wish to undertake, including its related costs. While they agreed that there is also contamination on the adjacent Festival Hydro property, they disagreed as to whether the source of it was Festival Hydro's own underground fuel storage tanks or the Expropriated Lands. This led them to disagree as to whether a potential purchaser would discount the remediation costs for the Festival Hydro property from the purchase price for the subject property. They also disagreed as to whether a purchaser would have relied on brownfield funding to compensate for some of the remediation costs.

[185] The Tribunal will first outline the background relevant to the site's contamination, the proposed risk assessment strategy, and will finally turn to the estimated costs of remediation and how they might have influenced a transaction between a willing buyer and willing purchaser. It is important to note that the remediation strategy is also tied to whether the building is retained; the environmental engineers agreed that preserving the building itself is a risk management strategy in that there would be no need to excavate and dispose of the contaminated soils beneath.

History of the Expropriated Lands and its Contamination

[186] Several consultants have prepared reports regarding remediation of the Expropriated Lands, some of which date back to the City's prior ownership of the property in the early 1990s. Mr. Ryan retained XCG Consultants Ltd. ("XCG") in 2009 to conduct a review of these many studies. Mr. Rush took the lead on that project and report, and Mr. Williams provided oversight; they testified as a panel during this hearing.

[187] Mr. Brooks, who was called as a witness for the City, was also retained in 2009 regarding the Expropriated Lands. At that time he was with Conestoga-Rovers & Associates Limited ("CRA"), which later merged with GHD Limited ("GHD"). The scope of his retainer was to provide a peer review of a remedial cost estimate for the Expropriated Lands prepared by R.J. Burnside & Associates Limited ("Burnside").

[188] The environmental engineers agreed that the past operations at the site resulted in contamination. These were the Grand Trunk Railway's locomotive repair shop beginning in 1871, followed in 1959 by Cooper-Bessmer's fabrication and maintenance of large internal combustion and jet turbine engines for the oil and gas pipeline industry until 1989. There were a number of underground and aboveground storage tanks on the property for petroleum hydrocarbons. Based on previous environmental investigations, it was known at the time of expropriation that the operation of these storage tanks had contaminated soil and groundwater in some areas of the property.

[189] In addition to the storage tanks, there were also many floor pits in the building (as noted by RJC). These would have housed machining equipment and their associated chemicals and wastes, including petroleum hydrocarbons, solvents, and other chemicals.

[190] The resulting contamination of soil and groundwater is above the applicable Ministry of the Environment ("MOE") standards. Fill material across the property contains slag, cinders, coal, brick fragments, metal debris, glass, and wood—all of which Mr. Brooks described as being typical of old railway lands.

Risk assessment and Remediation of the Expropriated Lands

[191] Like many of the issues in this compensation hearing, the potential remediation of the Expropriated Lands is intertwined with the building and whether it would be retained by a purchaser. Mr. Brooks and Burnside in all of their 2009 reports assumed that the existing building would be removed. In contrast, XCG, when it was retained by 135 in 2009, assumed that the building would remain as contemplated in 135's project. GHD, in its reply to XCG's witness statement, considered three remediation strategies based on the building remaining. Before discussing the remediation strategies, the Tribunal finds it helpful to review the common ground between XCG and GHD regarding risk assessment and remediation.

[192] GHD and XCG agree that a potential purchaser, in the normal course of due diligence in June 2009, would have assessed the property's soil and groundwater conditions in the context of Ontario Regulation 153/04 (the "Regulation"). This means that the applicable soil and groundwater standards are the Regulation's Table 2 standards. They agree that the Regulation allows for the use of a risk assessment approach to set property-specific standards and that this is the most cost effective approach to address the property's environmental conditions. The approach is more cost effective because it allows for a tailoring of risk-based site specific cleanup criteria rather than relying on the more generic Table 2 standards.

[193] Both consulting teams agreed that a potential purchaser would retain an environmental engineering consultant to complete the following tasks prior to closing on a purchase of the property:

- Complete an updated or new Phase I Environmental Site Assessment ("ESA") in accordance with the *Canadian Standards Association Phase I ESA Standards, Z768-01*;

- Complete a Phase II ESA in accordance with the Canadian Standards Association Phase II ESA Standards, Z769-00;

- Develop cost estimates to remediate the property to meet the Regulation's applicable Table 2 soil and groundwater standard; and

- Evaluate the benefit of conducting a risk assessment to develop property specific soil and groundwater standards.

GHD and XCG are reasonably close in their cost estimates for these four items, with GHD at $330,000 and XCG at $271,000. The difference is that GHD's figure includes the cost of a remedial action plan and XCG's does not.

[194] They next agreed that the development of the property would require the filing of a Record of Site Condition ("RSC") in accordance with the Regulation. Their estimated costs for this are in line. GHD estimates $260,000, very nearly the midpoint of XCG's estimated range of $214,000 to $314,000.

[195] GHD and XCG agreed that a potential purchaser planning to restore the building would need to plan on asbestos and lead based paint abatement. XCG did not provide a cost for these items because they assumed the costs were accounted for by another expert and they did not want to double count them. They are addressed in Pelican Woodcliff's estimate, which was prepared for a different purpose, and will be discussed in the financial feasibility analysis.

[196] GHD's uncontradicted estimate for sandblasting and abatement of lead based paint is $600,000. Of that, the abatement cost is $100,000 and sandblasting is $500,000. These costs would only be incurred if a purchaser wished to restore the building.

[197] Regardless of restoration or demolition, a potential purchaser would need to account for asbestos abatement, which GHD estimates at $250,000. This figure was also uncontradicted.

[198] Therefore, a potential purchaser who is interested in keeping the building and

doing no excavation is looking at costs in the range of $1,335,000 (XCG's low estimate) and $1,440,000 (GHD's estimate). This is before the purchaser decides how they might develop the rest of the site.

[199] A purchaser not interested in keeping the building would deduct the $600,000 related to lead based paint sandblasting and abatement and would incur Mr. Pond's demolition costs ($1,130,786), plus Mr. Brooks' $250,000 for asbestos abatement. Where the costs go from there depends on the development plan for the site.

[200] In this regard, the environmental engineering experts agree on the following points:

- Any below grade development, including underground parking structures, would require excavation of contaminated soils and disposal off site, or on-site management if possible;

- A potential developer's chosen remediation approach to address the property's known soil and groundwater impacts depends entirely on the nature of the development; and

- The remedial cost estimates prepared by both XCG and GHD are not dependent on the property being redeveloped for residential use.

[201] When XCG and GHD prepared their Agreement Statement of Facts, they had each prepared a witness statement that relied on an opposing premise: XCG assumed the building would be retained, and GHD assumed it would not. As a result, their initial cost estimates could not be meaningfully compared.

[202] Their estimates evolved by the time of the hearing. GHD's reply report provided cost estimates based on restoring the building—as contemplated in 135's project and Mr. Simmons' development scenarios, and as relied upon by XCG. XCG revised its estimates in its reply to address Mr. Simmons' chosen development scenario.

Specifically, XCG had not accounted for the remediation costs associated with the below grade excavation 135's project would require for the hotel building and its levels of underground parking. They still did not account for asbestos and lead based paint abatement, even in reply, because they believed it was accounted for by another expert.

[203] The environmental engineering experts' reply estimates are most helpful to the Tribunal as an "apples to apples" comparison. Here again, at a high level, there is not a significant difference in the cost estimates for remediation based on the first phase of Mr. Simmons' development scenario (the main building and new hotel and condominium tower with underground parking). Mr. Brooks estimates remediation costs of approximately $4.3 million, including costs for disposal of contaminated soil from the proposed underground parking structure. The Tribunal understands from Mr. Williams' testimony that XCG's estimate, once accounting for asbestos and lead based paint abatement, is between $3.8 – 4.2 million, in line with GHD.

[204] XCG seems to end its analysis there, while Mr. Brooks goes on to consider the implications of Mr. Simmons' second phase of development, which anticipates development of an additional 897,717 square feet of space. Mr. Brooks' estimates approximately $6.6 million for costs for disposal of contaminated soils for construction of the underground parking structure and the additional second phase building area.

[205] XCG questioned Mr. Brooks' estimates but provided no evidence to the contrary. Mr. Williams emphasized that there are many options available to a developer to use contaminated soil on site instead of the more expensive option of removing it and disposing of it off site. He testified that the approach is entirely dependent on a detailed development plan, including analysis of various grading options. As an example, he described the possibility of raising the whole or portions of the site to a higher level using the excavated contaminated soils, as well as using it for a berm if one is required adjacent to the rail line.

[206] Mr. Brooks agreed that some of the excavated contaminated soil could be used for a berm, and to that end he undertook detailed calculations to estimate how much soil

could be used in such a berm. The result, in his opinion, is that there would still be a significant amount of contaminated soil to account for in Mr. Simmons' scenario. He disagreed with Mr. Williams that the contaminated soil could be used to raise the level of the site through grading when the question was put to him in cross-examination. He explained that the fill materials consist of coal, slag, brick, debris, and glass—all materials that have no geotechnical properties to lend the necessary stability to sustain the loads of buildings or other site elements, such as an interior road.

[207] Mr. Brooks emphasized the difference between an owner's view of what it can and should do with a contaminated property and that of a developer who acquires the property to build a significant project. In his experience, developers will spend effort to manage soil on a property to the extent that it is reasonable. Mr. Brooks' opinion is that to build a site, it is necessary to have good, clean, compactable engineered fill materials. Beyond that structural concern, he could not see a developer building a marquis project, like that envisioned by Mr. Ryan and relied on by Mr. Simmons, and then spread contaminated fill all around the project. This is related to the notion of stigma, which was a significant point for Mr. Bower and Mr. Parsons in their evidence.

[208] Mr. Brooks was comprehensive and reasonable in his testimony. The Tribunal found his testimony to be more convincing than Mr. Williams' because it was more detailed and no flaw was identified in his cost estimates, even when he was accounting for the remediation costs associated with 135's project. While both Mr. Brooks and Mr. Williams have extensive experience in the development industry, there were critical errors and oversights in XCG's estimates. They did not account for asbestos and lead based paint, based on a misunderstanding of the purpose of Pelican Woodcliff's evidence, which led to an incorrect assumption that those figures were already accounted for. Overall, the Tribunal finds Mr. Brooks' cost estimates to be more reliable.

[209] Mr. Brooks was the only witness to provide any evidence on the cost of environmental remediation if the building were to be demolished, whereas XCG took it as a given that the building would remain. This reflected the scope of their retainer,

having been retained by 135 in 2009 to provide a review of the various environmental studies and reports with 135's project in mind. Even with that limited scope, XCG failed to fully consider the implications of 135's project—and by extension Mr. Simmons' chosen scenario—on environmental remediation. Accordingly, the Tribunal prefers Mr. Brooks' evidence on the costs of remediation.

[210] With respect to the remediation options if the building were to be demolished, the Tribunal accepts Mr. Brooks' uncontradicted estimates. Mr. Williams testified that Mr. Brooks' assumptions and corresponding estimates seemed reasonable, except for Mr. Brooks' assumption in his second approach that 50 per cent of the contaminated soil (34,500 cubic metres) would need to be disposed of off site. Mr. Williams did not disagree with any of Mr. Brooks' calculations, but pointed out that he could not calculate these figures without a detailed grading plan for the site. Mr. Brooks' three approaches and their corresponding estimates in 2009 dollars are as follows:

- **Approach 1 - $16,916,900**: Remediation of the site to a "clean" condition involving excavation and off-site disposal of all of the fill material down to the underlying native clay silt, and remediation of groundwater to MOE Standards.

- **Approach 2** - **$10,140,900**: Risk assessment with 50 per cent of contaminated fill material disposed of off site (to reflect Mr. Parsons' opinion that a developer would likely target a 50 per cent building coverage ratio).

- **Approach 3** - **$7,108,750**: Risk assessment with a screening berm constructed with 19,500 cubic metres of contaminated fill along the rail line boundary of the site and 18,750 cubic metres of contaminated soil disposed of off site (again assuming a 50 per cent building coverage ratio).

[211] Mr. Brooks testified that these estimates are based on the environmental reports that were available prior to the date of expropriation. He advised the Tribunal that the post-expropriation environmental information a prudent purchaser would have obtained during their due diligence period resulted in a slight increase to the above estimates.

This is due to a post-2009 identification of more asbestos, based on an asbestos survey, than previously thought and the discovery that petroleum hydrocarbons in the groundwater were less than previously identified, which then removed the cost of their remediation. The net result is a slight increase in the estimates, which would range from $7,163,750 to $16,641,900 in 2009 dollars.

[212] Each of GHD's three approaches include the remediation costs related to the neighbouring Festival Hydro property, estimated at $900,000. This is based on Mr. Brooks' opinion that a prudent and knowledgeable purchaser would account for the risk of this offsite contamination when arriving at a purchase price, as discussed in the next section.

[213] The environmental engineers had very different ideas on what environmental contamination would mean to a prospective buyer. Mr. Williams assumes that a developer will take the lowest cost approach to remediation. While cost is no doubt a significant factor, looking at cost alone disregards other critical considerations as raised by Mr. Brooks, including the feasibility of building a structure or interior road on contaminated fill from a structural standpoint. Stigma is another factor Mr. Brooks considered, as did Messrs. Bower and Parsons.

[214] The Tribunal finds compelling Mr. Brooks' point that the perspective of an owner of a contaminated property—in this case 135 when it retained XCG in 2009—differs considerably from that of a prospective purchaser, or developer, who is contemplating purchasing the contaminated property and accepting the associated risk. A developer who does not yet own the liability, according to Mr. Brooks, is likely to take a conservative approach to remediation. He explained that it is well known in the development industry that remediation costs typically exceed what is estimated. While the engineers rely on testing samples, they are just that, and Mr. Brooks testified that it can be a completely different story once the ground is opened. He also testified as to the financing implications, which may not be a consideration for an owner because they already own the property, but a developer would likely have to secure financing and

satisfy its lender regarding remediation. The notion of the risks a buyer might be willing to take is an important consideration in the next area of disagreement, regarding offsite contamination.

Offsite Contamination: The Festival Hydro Property

[215] There are also known petroleum hydrocarbons in the soil and groundwater at the southwest corner of the Expropriated Lands along its boundary with Festival Hydro . The difficulty here is that there are potential sources of petroleum hydrocarbons existing on both properties. In 2005, the MOE prepared a letter indicating that it was not possible to determine the source.

[216] Mr. Brooks took the Tribunal through a detailed analysis of the applicable test pit logs in support of his opinion that it is very likely there is offsite migration of contaminants from the Expropriated Lands to the neighbouring Festival Hydro. His opinion is that the petroleum hydrocarbons, or “free product”, extend from the west end of pit 7 and pit 6, the part of the main building closest to the Festival Hydro property. Mr. Brooks believes that there could have been leaks from these pits that caused a groundwater impact, based on groundwater flows in this area of the property.

[217] He noted in particular the testing logs for test pit 50, located just to the north west of pit 7, which shows a total petroleum hydrocarbon concentration of 14,232 per kilogram above the water table. He explained that the groundwater in this area exists at a depth of 2.6 m below grade, and so seeing such a concentration of petroleum hydrocarbons above the water table strongly suggests they emanated from the Expropriated Lands. Based on the existence of the pits, old lines with greasy material, petroleum hydrocarbons above the water table, and groundwater that flows onto the Festival Hydro property, Mr. Brooks believes it would be prudent to advise a purchaser that there is very likely some offsite contamination from the Expropriated Lands.

[218] Mr. Brooks was thoroughly tested on his opinion during Mr. Doherty’s cross-examination, which involved an extensive review of bore hole and test pit logs. These

show more significant hydrocarbon impacts on the Festival Hydro property. Mr. Doherty asked Mr. Brooks how he reconciles that information with his conclusion that pits 6 and 7—located on the Expropriated Lands—caused the contamination on the Festival Hydro property and went nowhere else on the Expropriated Lands. Mr. Brooks maintained his opinion that the contaminants are flowing in the direction of the groundwater, meaning that the three or four test pits in that direction show the most significant amount of contamination, as he would expect. In contrast, he would expect borehole 15 to be clean, as it is, because it is located to the east of pit 7 and upgradient.

[219] XCG believes that the source is more likely to be the storage tank on the Festival Hydro property. Mr. Rush testified that, in preparing his review report in 2009, he reached the conclusion based on the many reports he reviewed that it was unlikely, if not impossible, that the source of petroleum hydrocarbons could be identified. However, XCG would not advise a potential purchaser to consider the cost of offsite remediation in their purchase price. During cross-examination by Ms. Skinner, Mr. Rush testified, based on his review of every borehole log, groundwater flow cannot be predicted in the traditional sense because this is not a consistent, gravelly aquifer. There are pockets of oily substance within the soil structure in the southwest corner of the Expropriated Lands, which he explains as providing preferential pathways that the hydrocarbons can use to flow in the opposite direction of groundwater.

[220] Mr. Brooks disagreed for two reasons: (1) petroleum hydrocarbons flow in the direction of groundwater and it would mean they have travelled uphill to get to the Expropriated Lands; and (2) there was no evidence of a leak from the Festival Hydro tank when it was replaced in 1988.

[221] During the Claimant’s reply case, Mr. Williams presented a new theory to the Tribunal. He considered the speed at which the groundwater travels in the impacted area, based on Burnside’s reports, and concluded that it would take 200 years for the groundwater to travel from pit 7 to the Festival Hydro property, and 100 years for it to travel from Pit 6. He agreed on cross-examination that there are higher flow velocities in

permeable areas, meaning that groundwater at the top of the till could travel faster. However, in his opinion, even though boreholes 14 and 15 in the impacted area show that the groundwater level is in the till, he believes this might be perched water table that is not travelling anywhere.

[222] The Tribunal finds it troubling that Mr. Williams raised this theory in reply. Certainly, it is within the scope of proper reply in answer to Mr. Brooks' testimony about the offsite contamination, which was more detailed than in his witness statement. However, Mr. Rush was responsible for studying and reviewing all of the previous environmental reports, including studying all of the borehole and test pit logs and this theory did not arise during his testimony. Additionally, Mr. Williams' 100-year travel estimate from Pit 6 does not resolve the issue of offsite contamination, given that the Grand Trunk Railway was in operation at the site in 1871 and no evidence was proffered to indicate specific activities taking place on the site at that time that may or may not have resulted in contamination.

[223] Having reviewed all of the evidence relevant to offsite contamination, the Tribunal concludes that there would be uncertainty for a potential purchaser. In 2009, many environmental reports would have been available to the purchaser, none of which determined the source of offsite contamination. On the contrary, the conclusion was that it was very unlikely to be determined, or even impossible to determine.

[224] Mr. Rush acknowledged this in his evidence but expressed his own opinion that the contamination is more likely to be from the Festival Hydro property. Mr. Brooks concludes the opposite, but not definitively. Rather, Mr. Brooks conducted a careful analysis of the issue in order to consider what his advice would be to a potential purchaser. He concluded that is there is a risk that the offsite contamination is from the Expropriated Lands, and there may be associated remediation costs. The implication is that at some future time, the purchaser could be facing remediation costs or even legal action. The Tribunal agrees with Mr. Brooks that that a knowledgeable and prudent purchaser would consider this in arriving at a purchase price. There was no dispute

about Mr. Brooks' estimate of $900,000 for the costs associated with remediating the offsite contamination.

Brownfield Funding

[225] XCG and GHD also discussed whether a prudent and knowledgeable purchaser would count on receiving brownfield funding. The City had a funding program in place in 2009 through its Brownfield Community Improvement Program but it had not been yet been used. Mr. Williams testified that a developer would factor brownfield funding into what they were considering spending on remediation but would ultimately consider it to be a bonus. Mr. Brooks disagreed, testifying that in his experience, brownfield programs were in their infancy in 2009 and that he did not have any developer clients who would have counted on brownfield funding, as he did not know of any who had received such funding in 2009.

[226] Neither XCG nor GHD accounted for brownfield funding in their cost estimates. While there was much speculation during the hearing as to whether a developer for this property in 2009 would have been successful in obtaining brownfield funding, the Tribunal finds that this is not a material issue. Neither Mr. Simmons nor Mr. Bower accounted for brownfield funding in their opinions of value. They agreed, as did Mr. Atlin, that a developer would consider the funding a bonus after purchasing the property and would not account for it in negotiating a purchase price. There is therefore no need for the Tribunal to make any determination with respect to brownfield funding.

[227] To summarize on the physically possible aspect of the highest and best use test, the structural deficiencies in the building and the environmental contamination can all be remedied. It is physically possible, though there are significant costs involved. This leads to the third component of the highest and best use analysis, financial feasibility.

iii. Financially Feasible

[228] At this stage of the highest and best use analysis it is necessary to consider potential or existing uses of the Expropriated Lands to determine which are likely to

produce a return equal to or greater than expenses and financial obligations. Any use that would produce a positive return is considered financially feasible. Again, at a high level, there is agreement that a mixed-use commercial and residential highest and best use is financially feasible. The dispute about financial feasibility relates to Mr. Simmons' development scenarios.

[229] There was no feasibility study tendered in support of the Claimant's case. Mr. Tate provided a 'Market Opportunity Assessment' and agreed that he did not assess the financial viability of 135's project. Mr. Tate further agreed that Mr. Parsons did assess the financial viability of the Project. There were in fact only two pieces of evidence in the Claimant's case that came anywhere near addressing feasibility: (1) an internal feasibility pro forma prepared by Marriott in 2003 for a 104-room Residence Inn that went no further; and (2) figures that were included in Mr. Simmons' reply witness statement and subsequently analyzed by Mr. Atlin. Mr. Parsons, as part of his dual qualification in this hearing, provided evidence on the market analysis and market economy (in addition to land use planning) as part of the City's case. The City also called Mr. Mian to testify as to the 2009 hotel market.

[230] The Tribunal will address feasibility in more detail following a discussion of the 2009 economic conditions that provide context for the feasibility analysis.

Economic Conditions in 2009

[231] In considering the price the expropriated land might be expected to realize in a transaction between a willing seller and wiling buyer, it is necessary to look at the market conditions at the time of expropriation. The appraisers considered the national, regional, and local markets, as did Mr. Parsons in his market analysis.

[232] There was much discussion during the hearing about economic events in the United States and whether they would have influenced a prospective developer of the Expropriated Lands. Mr. Parsons described the economic crisis in detail in his witness statement and testimony. He describes the growth of subprime mortgage credit as the

cause, driven by demand from Wall Street investors for mortgages, which led to a high amount of unregulated mortgage lending. The catalyst was the bankruptcy of Lehman Brothers on September 15, 2008, the largest bankruptcy filing in history. Failures of prominent American and European banks followed.

[233] As Mr. Parsons describes it, from there was a ripple effect in the US and Canadian economies. He referenced the US government's bailout of General Motors, Ford, and Chrysler in 2008, followed by Chrysler filing for bankruptcy in April 2009 and General Motors following suit in June 2009.

[234] In an effort to reverse the downturn in Canada, the government unveiled a two-year stimulus package of $35 billion to encourage spending and investment, introduced six months prior to the expropriation in January 2009. There was a significant drop in the number of building permits issued for new residential units in Canada in 2009—down 19.9% from 2008, and 32.5% from 2004, a peak construction year. The number of new residential units in the first quarter of 2009 was at a low not seen since 1996. Non-residential construction fared a little better, with a modest increase in institutional and commercial building construction in April 2009.

[235] Mr. Bower also noted declines of real gross domestic product (GDP) in 2009 leading to the time of expropriation, with decreases of 0.1 percent in February, 0.3 per cent in March, and 0.1 per cent in April. He testified that there is typically a three-month lag in GDP reporting, meaning that the April figure is the most recent one a potential purchaser would have in June 2009. There were more pronounced declines between November 2008 and January 2009. He explains that declines in the manufacturing, energy, and retail sectors contributed to the April decrease but that increases in the activities of real estate agents and brokers and wholesale trade mitigated the drop.

[236] Mr. Bower attributes the increase in real estate activities to a healthy home resale market, which increased the output of real estate agents and brokers by 8.2 per cent in April. This was a 28 per cent gain from January 2009, but still six per cent below this industry's September 2008 peak level. Residential building construction fell 1.1 per

cent in April 2009, though non-residential construction increased by 1.2 per cent. Mr. Bower testified that he did not know whether this national increase continued into June 2009. Regardless, taken as a whole, he testified that all of the major indicators with respect to GDP pointed to a stalling Canadian economy.

[237] There were impacts at the provincial level as well, which differed in some ways from the national picture. Employment dropped in Ontario by 243,000 between October 2008 and May 2009. This was the province's largest seven-month decline since the early 1990s recession. Mr. Simmons cites an increase in Ontario's unemployment rate to 7.2 per cent by the end of 2008, with the national rate at 6.6 per cent.

[238] Ontario's real GDP declined significantly in the fourth quarter of 2008 due to the sudden downturn of the global economy, by 1.4 per cent (5.6 per cent annualized), as compared to the Canadian GDP decrease of 0.8 per cent (3.4 per cent annualized). By way of comparison, the US decline for the same quarter was 1.6 per cent (6.2 per cent annualized). In Ontario, the decline corresponded to drops in consumer spending, residential construction investment spending, and non-residential construction business investment.

[239] Mr. Bower notes that the decline of real consumer spending was the first in five years, falling one per cent in the fourth quarter of 2008. The drop in residential construction investment spending was 7.2 per cent, due in large part to a 26 per cent decline in real estate transfer costs. This, Mr. Bower explains, reflects the sharp drop-off in home resales in Ontario, a difference from the national picture. Residential construction investment fell one per cent overall in 2008, which was the first annual decline since 1998. Though there was a significant decline in home resales, there was a 1.8 per cent gain in new housing construction and a 2.1 per cent increase in renovation spending.

[240] Non-residential construction spending also declined in Ontario, by 2.7 per cent in the final quarter of 2008. It had declined in each quarter that year, due to weaker building construction investment. The annual decline was 0.5 per cent, which followed

three years of growth due in part to investments in major engineering projects in the electrical utilities sector.

[241] What did all of this mean for Stratford? The appraisers agreed that Stratford has enjoyed a relatively stable economy as compared to the provincial picture. Its economic base is diversified, but consists of two main and unique components: manufacturing and tourism. The Stratford Festival is well known and is a significant tourist draw in the spring and summer months. It brings some 500,000 people to the city during its season.

[242] Stratford is also home to several international companies that manufacture a variety of products, including automotive parts, aerospace components, precision bearings and industrial machinery.

[243] Despite its relative economic stability, Stratford was not immune to the effects of the 2008 economic downturn. The Festival ran an operational deficit of $2.6 million that year, its first in 15 years. Residential and commercial construction activity decreased in 2008 as reflected in a decreased number of issued building permits. Though overall, the 2008 value of construction was similar to, and in some cases higher than, the 2007 value. For example, only 75 new residential permits were issued in 2008 and these reflected a construction value of approximately $39.7 million, significantly higher than the 2007 construction value of $22.2 million for 105 permits.

[244] There was also a slight decrease in the total commercial square feet created in 2008 from the previous year. However, what is more telling is the annual average of new commercial square footage created in Stratford. Mr. Bower undertook this analysis looking at how much commercial space was created and demolished in each year between 2000 to 2008. He found that on annual average, approximately 33,587 square feet of commercial space is created in Stratford. Put another way, it can be safely assumed that Stratford’s economy can absorb that amount of commercial space in a given year.

[245] Mr. Simmons notes that commercial development in Stratford has been

inconsistent in growth, and that there is limited demand for commercial development. As he indicates on page 18 of his witness statement,"[t]here is a limit to the market demand for additional restaurants, Wal-Mart's, chain food and hardware stores, and shopping centres, etc."

[246] All of this, in Messers. Bower and Parsons' shared opinion, created uncertainty in the marketplace. A potential purchaser in June 2009 would see an economy in decline and would have no certainty as to when the trend would move upward. They agreed that a developer would not see this as a time to take on a large-scale, risky development. Mr. Simmons disagreed. This difference of opinion is reflected in how each of the appraisers address financial feasibility in their respective opinions of value.

Financial Feasibility of Potential Developments on the Expropriated Lands

[247] Both Mr. Simmons and Mr. Bower each considered a highest and best use that was vacant and as improved (including the building), each reaching an opposite conclusion as to whether the highest and best use included the building.

Feasibility of the "As Improved" Property (Retaining the Building)

[248] The appraisers agreed that it is not financially feasible to continue the existing industrial use of the building because there is no longer demand for industrial use at this downtown location. The land use planning witnesses also agreed that industrial use does not make sense on this property. The question is whether it is financially feasible to modify the existing building to suit a new use.

[249] In his financial feasibility analysis, Mr. Simmons cites the great confidence Mr. Ryan had in the concepts he developed and pursued for the property over a ten-year period. He noted the history of previous owners who had also pursued a concept for a major hotel including entertainment and spa facilities. He notes that there were no major chain hotels in Stratford and that Mr. Ryan saw this as a great opportunity.

[250] Mr. Simmons emphasizes the water park component of the concept, noting that Mr. Ryan had consulted with a water park company over the years. He then cites two examples of water park and hotel developments, Great Wolf Lodge in Niagara Falls and the now closed Wheels Inn in Chatham. He also mentions a water park in Windsor. Mr. Simmons discusses Stratford's tourist draw and concludes that a water park and hotel concept would attract additional tourists to Stratford.

[251] In support of his conclusion, Mr. Simmons refers to discussions Mr. Ryan had with Marriott. He refers to a 2008 letter of intent from Sonoma Hospitality Group LLC to manage a 72-room Marriott Residence Inn, noting again the owner's confidence in the project, at page 63 of his witness statement:

> Clearly, the owner had full confidence in the economic viability of their project, despite the numerous setbacks over many years. Based upon information provided by the owner, the first phase of the proposed development appeared to be financially feasible. It would take full advantage of the contributory value and significance of the existing building shell.

[252] Marriott's interest in developing a hotel on the property never materialized. It appears from correspondence in the record that Marriott required a detailed feasibility study. No feasibility study was in evidence in this hearing, though there was an invoice that referred to a feasibility study. The sole basis for Mr. Simmons' opinion that a branded hotel would be financially feasible on the subject property was Mr. Ryan's confidence in the project.

[253] The Tribunal heard testimony from Mr. Mian, an expert in the hotel market, who was called by the City. He provided a useful overview of the hotel industry and trends in the decade leading up to the expropriation. Based on his analysis of the relevant data from that time, he concluded that a 72-room Residence Inn would not have been viable from a qualified demand perspective. He testified that the hotel industry—on the whole and in southern Ontario—was also impacted by the 2008 economic downturn.

[254] Mr. Mian explained that while there is a high level of seasonal demand for hotel

rooms in Stratford during the Festival's season, there is a low level of occupancy overall, meaning that there is an oversupply of hotel rooms in the city. Mr. Mian completed an analysis of a competitive set of 14 branded hotels in London—less than an hour's drive from Stratford—as there were no branded hotels in Stratford at the time of expropriation. He noted that demand for hotel rooms declined in 2009 because of the financial crisis. Overall, he concluded that Stratford, with an average occupancy rate of 40 per cent, could not compete with the competitive set of branded hotels because a healthy hotel market requires 60 to 65 per cent occupancy.

[255] Mr. Mian also testified that during the financial crisis, financing was only available to the very best hotel projects. Even in downtown Toronto, he noted, hotel projects were delayed or cancelled during that time.

[256] Although Mr. Tate concluded that there would be opportunity for a new hotel in Stratford in 2009, he focussed only on existing hotel inventory. He did not consider the occupancy of these hotels nor the demand for hotel rooms in 2009. The Tribunal therefore prefers Mr. Mian's more detailed evidence, which was wholly undisturbed during cross-examination.

[257] Mr. Simmons also cites Mr. Tate's report as support for the financial viability of 135's project. Mr. Tate himself agreed that he did not assess the financial viability of the project, and that Mr. Parsons did. When questioned on this point during cross-examination by Mr. Williams, Mr. Simmons agreed that Mr. Tate's report does not refer to feasibility. He also clarified that he did not actually rely on Mr. Tate's report in support of his own conclusion on financial feasibility. Rather, he found it to confirm his own conclusion that the project was feasible.

[258] Though Mr. Simmons concludes that the as improved highest and best use of the property is for the restoration and repurposing of the main building with a mixed-use tower form of development, in line with 135's project, he acknowledges that a theoretical buyer may not necessarily share those plans. He notes that the Official Plan and Zoning By-law provide for a broad range of opportunities on the site.

[259] The first time Mr. Simmons makes an attempt at more closely considering financial feasibility of this as improved use of the property is in his reply report. At paragraph 5.24 of his report he refers to some example figures, including a cost of $175 per square foot to include hard and soft construction costs. He gets to a net rent of $16.50 per square foot using a capitalization rate of 7.5 per cent. That is the extent of his analysis. He indicates that once a developer knows their construction costs, including their profit margin, and the market rental rate, they can estimate how much they can afford to pay for the site by deduction.

[260] Mr. Atlin completed calculations based on Mr. Simmons' figures, but used a lower per square foot construction rate as suggested by Mr. Porter, at $150 per square foot. Mr. Atlin's opinion is that construction costs are much higher, but he performed the calculation using Mr. Porter's lower figure to test the reasonableness of Mr. Simmons' conclusion that the as improved use is financially feasible. He arrived at a negative implied land value: -$43.00 per square foot. This supports his conclusion that Mr. Simmons has not met the financial feasibility component of the highest and best use analysis.

[261] Mr. Bower also reached the conclusion that the as improved use of the property is not financially feasible due to demand and the expense of repurposing the building. From a demand perspective, he emphasized Stratford's annual average of 33,000 new commercial square feet. He found the 181,000 square feet of commercial space entailed in reuse of the building to be highly improbable in a city that sees less than one-fifth of that amount of new commercial space in a given year. Mr. Bower also relied on Mr. Parsons' conclusion that 135's project was not financially viable.

[262] Mr. Parsons' estimates for adaptive reuse of the structure range from $200-300 per square foot, resulting in a total cost between $34 million and $51 million. Mr. Parsons testified that these figures came from publicly available data regarding other adaptive reuse projects, including Toronto's Wychwood Barns and Brickworks. He pointed out that the Brickworks project was originally estimated at $250 per square foot

and was completed at approximately $1000 per square foot. He acknowledged that while there could have been changes in direction during the project, there is often uncertainty and higher costs associated with adaptive reuse projects.

[263] Mr. Parsons was questioned about this extensively during cross-examination, but his testimony was undisturbed. The Tribunal also notes that, while Mr. Bower did not have RJC's report available to him when he prepared his 2009 appraisal, RJC estimated significant costs of approximately $13.5 million just to bring the building to a state of occupancy. Mr. Pond was clear that this does not anticipate any adaptive reuse of the building, which, based on his experience with adaptive reuse projects, would be considerably more expensive.

[264] Mr. Simmons' perceived value of the main building appeared to the Tribunal to weigh heavily in his opinion that the as improved condition of the property is a financially feasible use. In support of this he first referenced the historic value of the building, which in his view makes it worthy of restoration. Undoubtedly the building played an important role in the rail industry in this part of Ontario. However, it has not been designated by the City under the *Ontario Heritage Act*. The Expropriated Lands in fact lie just outside of a heritage conservation district that encompasses the city's historic core.

[265] Mr. Simmons also relied on the Rylett reports in determining that the building contributes to the market value of the property ("contributory value"). Mr. Harris of Rylett had prepared two reports, both at 135's request, to estimate the cost to construct a building of the same type and construction. In 1997, he estimated that cost to be between $17 and $18 million. He provided a subsequent report in 2000 for the same purpose, this time concluding that the estimated construction cost of the existing building would be approximately $9.5 million. From these reports Mr. Simmons derived a $7.5 million contributory value for the main building.

[266] Mr. Harris testified under summons in this hearing. Though he is an engineer, he testified as a fact witness. The Tribunal found him to be genuine in his testimony and

quite candid about what he simply could not recall. He testified that it was puzzling to him that the two reports, which appeared to conduct the same exercise, had vastly different estimates over a three-year period. He could not recall why that would have been, and he advised the Tribunal that he wished he could shed more light on this issue. Given the unexplained difference in the cost estimates in these reports, the Tribunal finds them to be unreliable.

[267] Despite Mr. Harris' testimony, Mr. Simmons continued to lend some credence to the Rylett reports throughout the hearing. He also acknowledged, in his reply witness statement, a more recent report prepared by Mr. Jim Ryan of Pelican Woodcliff, a quantity surveyor with experience in cost consulting.

[268] Mr. Jim Ryan was retained by the Claimant to determine a cost benefit of the existing building shell for an owner wanting to reuse the building. He relied on the three dimensional steel survey that Mr. Lefebvre had conducted and on the information in RJC's report to arrive at his cost estimate. He ultimately arrived at a net benefit of $5.8 million dollars for an owner who wished to reuse the existing building rather than starting over and constructing the same building. This final figure was adjusted only slightly from his original estimate of $5.9 million at the time witness statements were exchanged. He revised it when he learned of lead based paint in the building. His original estimate already included sandblasting the steel, and so he added $130,000 for abatement. This is consistent with Mr. Pond's and Mr. Brooks' figures.

[269] Mr. Jim Ryan's testimony was compelling and unchallenged in cross-examination. He was forthcoming about the fact that the entire exercise he performed is premised on the assumption that an owner of the property would want to have a building just like the existing main building, and would therefore consider the cost savings in using the elements of the structure that can be reused. He offered no opinion as to whether a prudent purchaser would take this position, as that was not part of the scope of his work. The Tribunal accepts that an owner with the goal of having the same building on the Expropriated Lands would consider this $5.8 million to be a cost savings

over new construction.

[270] Mr. Simmons had not reviewed Pelican Woodcliff's report and did not consult with Mr. Jim Ryan when he prepared his original witness statement. He addressed Pelican Woodcliff's estimate in his reply report by taking the midpoint between their original $5.9 million and Mr. Simmons' $7.5 million from his original witness statement to arrive at a figure of $6.7 million for contributory value of the main building shell and footings.

[271] There is a flaw in Mr. Simmons' logic, in that he assumes a potential purchaser would want to repurpose the building. In making this assumption, he has no regard for the costs of doing so.

[272] As Mr. Atlin testified during cross-examination, when Mr. Aburto put the notion of contributory value to him, the potential for contributory value is an economic test. He explained that first, a developer would need to know the financial viability of their project, and would then need to know if the building contributes to the viability, and to what extent. To accomplish this and understand if the building has any economic value, a developer would need to do a financial feasibility analysis. This is not an exercise Mr. Simmons undertook. He testified repeatedly that such an analysis would be nothing more than a "fun with numbers exercise." The only feasibility analysis was in the form of Mr. Parsons' pro forma, which Mr. Simmons dismissed as irrelevant to his analysis. Mr. Simmons also testified that feasibility was built into his analysis by virtue of the comparable sales, a concept the Tribunal will discuss later with reference to the those sales.

[273] Like Mr. Atlin's calculations using Mr. Simmons' and Mr. Porter's figures, Mr. Parsons' pro forma results in a negative net present value when assessing the potential costs associated with repurposing the building for 135's project against the projected income from commercial uses, including the hotel and water park, and the sale of condominium units. He projects a total of approximately $112 million in capitalized value of all sales and rental income. On the expense side, he calculates the development

costs at approximately $201.3 million (excluding land value), to arrive at the negative net present value of $89.2 million.

[274] Even when Mr. Parsons' uses Mr. Porter's lower construction figure of $150 per square foot, the net present value ends up in the negative by $59.75 million. Either way, as Mr. Parsons testified, this project still ends up being out "on the money".

[275] Mr. Parsons' estimates were not contradicted. His assumptions were generous and weighed in favour of a successful project. Most significantly, he assumed that there would be a market for 135's project, when, in his opinion, there is not a market for this type of project in Stratford.

[276] Mr. Parsons' market opinion is based on detailed analysis of retail, hotel, office, and other commercial activity in Stratford. He also has significant experience in Stratford, having been retained to complete a retail market study and his related involvement in an OMB hearing pertaining to the development of a Wal-Mart in Stratford. The Tribunal accepts Mr. Parsons' conclusion that the redevelopment of the Expropriated Lands in 2009 would have presented opportunities to build on the strengths of the downtown with small-scale retail shops, restaurants, and services. To recognize this exceptional downtown, the redevelopment would need careful attention to design, ideally with exterior, street-facing shops.

[277] On that point, Mr. Parsons believes there would be no market in Stratford for the 'heritage street' 135 envisioned in its project. Stratford already enjoys a walkable, low-scale downtown with a variety of shops and restaurants in its authentic historic buildings. He also cited the many failed examples of downtown shopping malls in Ontario. The Tribunal agrees with Mr. Parsons that shoppers in Stratford's downtown are unlikely to be attracted to an interior shopping area that is attempting to replicate authentic buildings that exist minutes away.

[278] The Tribunal also accepts Mr. Parsons' and Mr. Mian's shared opinion that a hotel at this location in 2009 was unlikely to succeed. There was no evidence to the

contrary.

[279] Mr. Parsons also testified that the high density residential market is relatively limited and weak. Stratford averages 34 such units per year. The Tribunal agrees with Mr. Parsons that it is unlikely the Stratford market would absorb a large-scale high-density development on the subject property.

[280] Similarly, the overall size of 135's project, at 1.5 million square feet as articulated by Mr. Simmons, is difficult to imagine in downtown Stratford. To put this into context, as Mr. Atlin did: Toronto's Yorkdale Shopping Centre is approximately 2 million square feet in area, and Bramalea Centre is 1.5 million square feet. Though Stratford sees some 500,000 tourists during Festival season, this was a city with a population of approximately 32,000 people in 2009. As Ms. Skinner submitted, Mr. Simmons' preferred scenario includes more commercial space than the whole of downtown Stratford, clearly contrary to the intent of the City's restrictive covenant.

[281] The Tribunal finds Mr. Bower's conclusion, that it is highly unlikely a purchaser would consider renovating the existing structure, to be sound. Mr. Simmons did not perform any analysis of the estimates and figures available in other expert reports in concluding that an as improved use is financially feasible. Instead, he relied on blanket assumptions about tourism and on Mr. Ryan's confidence in his project.

Feasibility of the Use of the Property "As Vacant" (Building Demolished)

[282] Messrs. Simmons and Bower agreed that some form of mixed-use redevelopment on the Expropriated Lands—without the building—could be financially feasible and meet the highest and best use test. Mr. Simmons, however, notes that the high cost of demolition and site preparation would be the primary deterrent to a viable development.

[283] These two appraisers also agreed that it is not possible to develop the precise financial feasibility in a vacant scenario because there are too many possibilities for

redevelopment. As Mr. Bower explains, the large site could accommodate several independent but compatible uses. It could also be divided into smaller parcels. Like Mr. Simmons, Mr. Bower acknowledges that there would be costs to demolish the building and remediate the property. However, Mr. Bower notes that development would occur at time when physically possible and financially feasible.

[284] The Tribunal agrees with the appraisers that an as vacant scenario yields broad possibilities for a financially feasible mixed-use development.

iv. Maximally Productive

[285] Once the uses that are legally permissible, physically possible, and financially feasible are identified, the use that produces the highest land value consistent with the market rate of return is selected as the maximally productive use. Again, both appraisers agreed at a high level that some form of mixed-use development meets the first three components of highest and best use, and therefore would be maximally productive.

[286] Mr. Atlin's three-legged stool analogy is helpful at this stage of the analysis. As he explained, if one of the three legs fails, the stool will fail. All three appraisers agreed that the order of analysis is important. An appraiser must consider the first three elements—legally permissible, physically possible, and financially feasible—before they can select the maximally productive use.

[287] Mr. Simmons, in both his as vacant and as improved analyses considered the maximally productive component before addressing feasibility. He testified that this was a simple error, that the sections were inadvertently reversed in his witness statement. The Tribunal can accept that this may have been an error in the organization of the document. However, it is apparent that Mr. Simmons did not consider financial feasibility before determining that 135's project is the maximally productive highest and best use, for the reasons earlier discussed. Nowhere does he justify, from a financial perspective, the feasibility of a 1.5 million square foot redevelopment of the subject property.

b. Value Conclusion

[288] Having considered all of the evidence relevant to the four criteria in the highest and best use analysis, the Tribunal now turns to the appraisers' opinions of value in order to determine the market value of the Expropriated Lands. The Tribunal must first settle the issue as to whether the highest and best use is as vacant or as improved, and then will examine each appraiser's valuation approach.

Vacant or Improved?

[289] As discussed in the highest and best use analysis, Mr. Simmons relied on a number of incorrect assumptions in arriving at his conclusion that the highest and best use is as improved with the existing building and as intended for 135's project. The Tribunal's overall impression of Mr. Simmons' evidence—both as reflected in his written witness statements and his testimony—was it that it did not consider the perspectives of a prudent and knowledgeable buyer and seller. Instead, his evidence was narrowly focused on the perspective of one particular seller: Mr. Ryan. This is contrary to the Tribunal's task pursuant to the Act, which must consider both the willing seller and the willing buyer and, as the appraisers agreed, assume that both are knowledgeable and prudent.

[290] Mr. Simmons was so committed to Mr. Ryan's vision for the property that it led him to disregard key components in the highest and best use analysis. He disregarded land use planning evidence and made an incorrect assumption about the rail line, that it would nearly sterilize the property from development if the building were removed. He made no attempt to assess financial feasibility of a specifically defined project in his highest and best use analysis, instead assuming that it was feasible because Mr. Ryan thought so. He did not consider any potential costs of repurposing the building and made incorrect assumptions about its contributory value and the cost of demolition. Mr. Simmons had very little interest in the evidence of other witnesses in this hearing and held rigidly to his positions. He similarly did not show much interest in the opinions of the Claimant's own experts. He merely referenced their reports to confirm his already

formed conclusions.

[291] The Tribunal also found that during Mr. Simmons' lengthy cross-examination by Mr. Williams, spanning three days of the hearing, he was rigid in his conclusions even when confronted with evidence that contradicted them. Many of his recollections were vague and unreliable. His review of expert reports relevant to the highest and best use analysis was cursory, at best, and led to incorrect assumptions.

[292] Overall, the Tribunal found Mr. Bower to be more comprehensive and reasonable in his analysis and testimony. The Tribunal agrees with Mr. Bower that a prudent and knowledgeable purchaser—in this case, a developer—would not see value in the main building after investigating the costs of reuse. The relatively low cost of remediation if the building is retained (approximately $1.4 million without any excavation) is nowhere near enough to compensate for the cost to bring the structure back to a state where it can be occupied for an industrial or similar use (approximately $13.5 million), let alone adaptively reused as a mixed-use development (estimated at more than $34 million).

[293] Certainly, the Tribunal can imagine that there could be a motivated developer who appreciates the building's history and would like to invest in its reuse. The previous owners of the property, including Mr. Ryan, fit into this category. Yet such a project never happened. Mr. Ritz, who was the architect involved in planning the Stratford Resort and Spa, testified as to how the estimated costs had nearly tripled during his involvement with that project. Neither he nor Mr. Eagleson, who looked at feasibility on behalf of the Business Development Bank of Canada, were surprised the project did not happen. The Tribunal credits Mr. Ryan and the previous owners with an impressive and creative vision. It was unfortunately one that could not be realized; it was not feasible—neither from a land use planning nor a financial perspective.

[294] The Tribunal agrees with Mr. Bower that the highest and best use of the property is as vacant. Although the Tribunal has identified its reservations about Mr. Simmons' evidence, he did provide an opinion of value for the land alone, and so the Tribunal will proceed with its analysis of each appraiser's valuation.

Valuation Approach

[295] Both Mr. Simmons and Mr. Bower chose the direct sales comparison approach to value. This is the most common technique for valuing land and it is the preferred method when comparable sales are available. This is problematic for a property that all three appraisers agreed is atypical. There were no sales that were similar to this property prior to the date of expropriation. As a result, both Messrs. Simmons and Bower had to look mainly to properties beyond Stratford in southwestern Ontario. They used many of the same properties as their comparables, including two sites in Windsor that were developed for big box retail (a Lowe's and Home Depot), and a site in Leamington, a town with a similar population to Stratford and a summer tourist draw. There were also two properties in Stratford that both appraisers used, but they agreed that these were not ideal comparisons for the subject property.

[296] Mr. Atlin articulated the difficulty in using the direct sales comparison approach in a case like this one. He testified that in most cases, the approach works well. The comparisons are similar to the subject, which then allows the appraiser to assume that the feasibility analysis is built into those comparable sales. In other words, the purchaser of those properties has already conducted their own feasibility analysis and has negotiated a purchase price that corresponds to their conclusion that their intended use of the property is feasible. They have figured out their costs and their rate of return, and arrived at a price for the land based on that assessment.

[297] The problem in an atypical case—when none of the comparables really compare to the subject—is that the appraiser cannot assume the feasibility analysis is built into the comparable sales. This is obvious in a case like this, where the subject is an 11.42 acre property in downtown Stratford, and many of the comparables were for big box retail developments in mid-sized cities. They simply do not compare. As Mr. Atlin explained it, the appraiser, likely with a team of experts, must conduct a more detailed feasibility analysis for an atypical property like this one.

[298] The other difficulty in this case is that, while Mr. Simmons purported to use the

direct sales comparison approach, he significantly modified it from the traditional approach. He did this to account for the uniqueness of the property. In fact, Mr. Simmons' attribution of value to the main building as a separate item resembled the cost approach, which, as Mr. Simmons defines it, estimates the reproduction cost of the building, then deducts for physical depreciation, functional obsolescence, and economic obsolescence. It is an approach that both he and Mr. Bower expressly rejected in their appraisal reports as being inappropriate for this property. However, it appeared, as Mr. Atlin pointed out, that Mr. Simmons has actually undertaken an incomplete cost approach by including a value for the building.

[299] Messrs. Simmons and Bower also used different units of comparison within their respective direct sales comparison approaches. Mr. Bower used a price per acre because that is the basis upon which the comparable sales traded. Mr. Simmons used a price per buildable square foot to reflect the as-built density of the comparable sales, and then he added to that the potential density that could be achieved on that site (if such information was available for the comparable).

[300] All three appraisers testified that the buildable square foot approach is typically reserved for high-density developments in large cities. It is a common approach in Toronto, for example. Mr. Simmons testified that while he did not recall using such an approach for a town the size of Stratford, he thought it was the best fit for a property in a downtown area with significant density potential.

[301] Mr. Atlin agreed with Mr. Bower that the unit of comparison should reflect market activity: if the properties were sold on a per acre basis, then the unit of comparison is per acre. In this case, all of the comparable sales, which reflect what was happening in the market at the time of the expropriation, were priced on a per acre basis. This means that willing sellers were selling by the acre, and willing buyers were buying by the acre. There can be no clearer indication of what a knowledgeable and prudent seller and buyer would be considering when negotiating a price. There is no indication that they would have considered a price per buildable square foot in the 2009 market.

[302] Messrs. Simmons and Bower's selections of different units of comparison is part of what leads to the dramatic difference between their respective opinions of market value. Mr. Simmons also made adjustments to the comparables, which is an acceptable approach, adjusting for both time (because the sales pre-dated the June 2009 valuation date) and making more subjective adjustments acknowledging comparable properties' inferior or superior elements (for example, adjusting upward for a corner property).

[303] Based on the comparable sales, Mr. Simmons arrived at an average of $45 per buildable square foot of development in a first phase. For each of his three development scenarios, he multiplied this amount by the total anticipated area for the first phase. He discounted this amount in his second scenario to account for the five years it would likely take to complete the first phase of development. He then used a $25 per buildable square foot for the subsequent phases of development in each scenario, discounting by 10 per cent for a five-year build out, and by 12 per cent for a third phase in a likely 30-year build out. He then added the amounts for each phase to arrive at a value for each scenario. The values range from $17.9 to $19.2 million. He selected the lower end of that range, $18 million as his land value.

[304] He then added his $6.7 million contributory value for the building. From that Mr. Simmons deducted $2,000,000 for environmental remediation, which he had rounded up from XCG's original estimate and did not modify during the hearing. His total estimated market value is $22,700,000.

[305] Mr. Bower opted not to adjust for time, noting the difficulty in doing this when the comparables are located in different real estate markets that may have different economic conditions. He also preferred not to consider subjective adjustments based on the inferior or superior elements of the comparable properties. Instead he used statistical analysis on his twelve comparables to average them. From the twelve, he decided on nine that were most comparable to the subject property, then ultimately five. His opinion was that his two comparables in Leamington were most comparable to the subject property, given the town's similar size and tourist draw when compared with

Stratford.

[306] To arrive at his market value, Mr. Bower focused on his five emphasized sales. One was located in Stratford, one was in Windsor, two were in Leamington, and one was in Woodstock. They have an average per acre price of $304,975 and a median of $336,032. Based on those figures, Mr. Bower rounded up and assumed a per acre value range between $350,000 to $400,000. When multiplied by the subject property's 11.42 acres, it results in a range of $3,997,350 to $4,568,400. Mr. Bower took the midpoint and rounded up to arrive at his $4,300,000. This value assumes that the property is free of environmental contaminants and is ready for immediate development.

[307] Mr. Bower spent considerable time in his report and testimony discussing defective properties and the stigma associated with contaminated properties. Mr. Parsons discussed stigma as well, as a potential problem when it comes to marketing the property, even after its eventual redevelopment. Mr. Brooks also discussed this, based on his experience of developers and lenders sometimes preferring an entirely clean site.

[308] There is no dispute that environmental remediation costs should be deducted from market value and this is an approach the Tribunal has taken before (*Masae Ltd. v. Toronto (Metropolitan)*, 1992 CarswellOnt 4725, 49 L.C.R. 1 (*Masae*)). Once Mr. Bower factored in the potential costs of remediation, based on the Burnside and CRA estimates that were available to him when he prepared his 2009 report, he realized that even the lowest estimate for environmental remediation put his market value in the negative.

[309] Mr. Bower did not have the benefit of the updated environmental engineering evidence when he prepared his 2009 report. At that time the remediation estimates ranged from $6.3 to $20.3 million, and clearly put his $4.3 million market value in the negative once deducted. It therefore was not necessary for him to also deduct building demolition costs, which is also acceptable practice in an expropriation case (*Masae*). However, though GHD's updated figures range lower than CRA's 2009 figures, between

$7.1 to $16.9 million, these would have the same effect on Mr. Bower's market value by putting it in the negative, regardless of which remediation option a potential purchaser selected.

[310] The Tribunal accordingly agrees with Mr. Bower that a speculative value is appropriate for this property. Mr. Bower explained that speculative value is significantly less than the value of the property as though free of contaminates, but it recognizes that the possibility of protecting the purchaser from liability beyond their initial capital investment. He testified that a developer may purchase a property with a speculative value because they think that they will be in a position to solve the environmental problem in the future, or that there could later be a less expensive method of remediation identified.

[311] Mr. Bower acknowledged a problem with the speculative value when questioned by the Tribunal. There are no standards or guidelines as to how an appraiser should arrive at one. Mr. Bower testified that he struggled with this.

[312] Speculative values have sometimes been accepted by the Tribunal and sometimes they have not. There are two other cases, both in Windsor, where Mr. Bower proposed a speculative value. The Tribunal accepted his value in the *Shergar* case, which involved an atypical property, a former rail property, with a water lot component and no road access.[3] It rejected his approach in the *Paciorka* case, which turned on the applicability of the *Provincial Policy Statement* and the scheme of the expropriation.[4] The facts of neither case are analogous to this one. The Tribunal only infers from them that whether a speculative value is acceptable is entirely dependent on the circumstances of the case and the property being valued.

[313] The Claimant submits that the Tribunal should reject Mr. Bower's methods

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[3] *Canadian Pacific Railway Company v. Windsor (City)*, 2016 CarswellOnt 8507, 1 L.C.R. (2d) 280. A portion of the *Shergar* decision—dealing with costs and interest—was reheard by a different panel of the Board. The rehearing decision did not disturb the Board's award of compensation based on a speculative value.

[4] *Paciorka Leaseholds Limited v. Windsor (City)*, 2020 CarswellOnt 1765 (*Paciorka*).

because they were rejected by the *Paciorka* panel. Given the entirely different circumstances in *Paciorka*, the Tribunal sees no basis to reject Mr. Bower's opinion in this case. The findings of the *Paciorka* panel were necessarily relevant to that case and the Tribunal does not find that panel's preference of another appraiser's evidence over Mr. Bower's to be an outright rejection of his appraisal methods.

[314] To arrive at his speculative value in this case, Mr. Bower analyzed two former transactions for the property that he considered speculative. He noted that both occasions appeared to acknowledge the fact that the property has a significant environmental problem.

[315] The first transaction was from Tara (Oxford) Inc. to 122 for $225,000 in 1997. The second was the foreclosure in which 135 took possession in 2002. In doing so, Mr. Ryan signed the land transfer tax affidavit to indicate a value of $250,000. Based on these two transactions, Mr. Bower indexed them using the Ontario Consumer Price Index, which indicates an increase of approximately 16 per cent and leads to his speculative value of $290,000.

[316] Counsel for 135 argued that these two transactions were not arms-length and should not be considered. It is true that Mr. Ryan was involved in both numbered companies. However, to accept the Claimant's submission would also require the Tribunal to accept that Mr. Ryan was intentionally dishonest in the land transfer tax affidavit. The Tribunal also understands that the assessed value of the property at the time of expropriation was $323,000. Its assessed value had decreased by almost half of its 2003 assessed value of $635,000. There were suggestions during the hearing that this was due to the tender shop fire and the condition of the building. While the appraisers agreed that assessed value is not the same as market value, the significant decrease in this property's assessed value is notable.

[317] The costs that a knowledgeable and prudent purchaser would incur to redevelop this property are extraordinary. The purchaser would have to be a developer, and likely a sophisticated one at that. In the unsteady economic climate following the 2008

financial crisis, it seems to the Tribunal likely that a developer would purchase this property at a speculative value and wait for an improved economic situation while refining its plans for the site. The Tribunal therefore accepts Mr. Bower's speculative value of $290,000.

Summary on Market Value

[318] As the Tribunal noted early on, the parties' disagreement as to the value of the building itself explains much of their difference with respect to market value. The Claimant fervently argued that the Tribunal must find contributory value for the building. Because the Tribunal in previous cases has accounted for building conditions and demolition costs (*Masae*), it must, in the Claimant's submission, also consider the positive value of the building. No doubt such value existed for Mr. Ryan, who dreamed of a project that would restore and bring new life to the building. Mr.Ryan's perceived value infiltrated Mr. Simmons' appraisal. The problem with this approach is that it narrowly focuses on the perspective of one potential seller: Mr. Ryan. It has no regard for the willing, knowledgeable, and prudent buyer and seller that the Act demands.

[319] To accept the Claimant's position on market value would require the Tribunal to imagine a knowledgeable and prudent buyer with Mr. Ryan's vision for the property and unlimited resources to see it through. That buyer would have to be willing to advance a project larger and more complex than Stratford had seen in 2009. The buyer would have to be prepared to pursue a project that exceeds not only the commercial space in downtown Stratford but also the amount of such space Stratford absorbs in a given year. That buyer would have to accept the potential risk associated with contamination on a neighbouring property. The buyer would be doing all of this following a financial crisis and a time of economic uncertainty. By no means could such a buyer be described as prudent.

[320] On the whole, the Tribunal finds the City's evidence to appropriately reflect the task the Tribunal has been given under the Act. Mr. Bower was more comprehensive than Mr. Simmons in considering the information that would be available to a purchaser

in 2009. He carefully considered the implications of the state of the building and the extent of environmental remediation. He relied on Mr. Parsons' assessment of the market and feasibility in ruling out an as improved scenario. While he did rely on a structural engineering report that was questionable[5], in that no inspection of the building had been done and it included only aerial photographs, this was what Mr. Bower had available to him at the time of the expropriation. More importantly, the RJC report, which is the most thorough of the structural engineering reports available to the Tribunal, did not paint a better picture of the building's condition with respect to the costs involved to bring it back to occupancy.

[321] Mr. Simmons, in contrast, was uninterested in the opinions of other experts. He referred to them only when they confirmed his own conclusions. His understanding of some of the key components within the legally permissible and physically possible criteria of the highest and best use analysis was incorrect. He incorrectly assumed that if the building were retained, the existence of the rail line could be ignored in the redevelopment of the site. He made vague references to the expense associated with demolition without having reviewed or considered the detailed estimates provided by RJC.

[322] Most troubling of all was Mr. Simmons' assumption that his highest and best use was feasible based on Mr. Ryan's enthusiasm for the project and a past discussion with Marriott that yielded no results. Mr. Simmons also inferred feasibility from the comparable sales, which, in a typical case where the comparables are similar to the subject, is an acceptable approach. All three appraisers agreed that the subject property is atypical and that the comparables do not compare to the subject. The Tribunal finds Mr. Atlin's testimony compelling with respect to atypical properties, and in particular his caution that feasibility cannot be inferred in a case like this. There must be more detailed feasibility work for an atypical property. In this case, the only feasibility analysis came from the City's witnesses. That evidence demonstrates that an as improved highest and best use for the property is not feasible, nor are any of Mr. Simmons'

[5] This report was completed by Jablonsky Ast. The report was in evidence, however the author did not testify during the hearing.

development scenarios, which contemplate approximately 1.5 million square feet of development.

[323] The Tribunal necessarily accepts Mr. Bower's as vacant opinion of value for the property. It is notable that Mr. Simmons and Mr. Bower agreed that the as vacant highest and best use is some form of mixed-use development. The Tribunal also accepts Mr. Bower's opinion of value, based on a per acre price that reflects 2009 market activity. However, the Tribunal also agrees that it is necessary to deduct the costs of environmental remediation and demolition. The Tribunal prefers Mr. Brooks' more thorough evidence regarding environmental remediation and its likely costs. The Tribunal found that he considered the perspective of a knowledgeable and prudent buyer and seller, whereas XCG was focused on 135's project. If the Tribunal were to rely on Mr. Brooks' lowest cost estimate, even it would yield a negative market value before deducting the costs of demolition, just as Mr. Bower found when he relied on the previous environmental reports in 2009.

[324] In these circumstances, the Tribunal agrees with Mr. Bower that a willing seller and buyer in 2009 would likely have arrived at a speculative value. The Tribunal accepts the $290,000 Mr. Bower proposed for this value.

[325] Having determined the market value for the property, the Tribunal now turns to 135's claim for disturbance damages.

2. Disturbance Damages

[326] The Act entitles a claimant to disturbance damages, defined in s. 18 as "reasonable costs as are the natural and reasonable consequences of the expropriation."

[327] In this case, 135 claims $1,055,680 in disturbance damages broken down into these three categories:

- Lost profits (lost rents) in the amount of $638,889;

- Wasted development costs in the amount of $268,000; and

- Executive time in the amount of $155,680 ($152,000 for Mr. Ryan and $3,680 for Mrs. Ryan).

[328] The Tribunal's determination of disturbance damages in this case is complicated by a lack of financial records. By all accounts, 135 did not maintain organized and complete financial records. Mrs. Climie, who, during the hearing itself, was still trying to piece together 135's financial picture, testified as to the many difficulties she encountered as the company's accountant. She explained that Mr. Ryan held much of 135's financial information in his head. He was selective about the information he provided to the accounting firm, which Mrs. Clime believed was due to the ongoing litigation in which 135 was involved. She also testified as to the use of company funds for the expenses of Mr. Ryan's other companies, the Ryan family farm, and personal expenses.

[329] There was also a lack of specificity in 135's claim for disturbance damages leading up to this hearing. The wasted development costs and lost profits eventually came through Mr. Coneybeare's reports and testimony. The claim for executive time was particularized in a letter from Mr. Doherty. There are no records or timesheets in support of the claim for executive time.

[330] The Tribunal will discuss each category of claimed disturbance damages separately. Because, as will be discussed below, the issues of the commencement date of the scheme and business losses are intertwined, the Tribunal will discuss them together.

a. Commencement of the Scheme and Business Losses

[331] The Courts and Tribunal have recognized that the expropriation process is a

lengthy one. There is often a long period of time between when the threat of expropriation becomes known and when the land is actually taken. This “shadow period”, or delay in the expropriation process, can result in damages for a claimant and these are compensable under the Act.

[332] The application of this principle is best illustrated by the Supreme Court of Canada’s decision in *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority*, [1997] 78 1 S.C.R. 32 (*Dell*), which relied on a Privy Council decision in *Director of Buildings & Lands v. Shun Fung Ironworks Ltd*., [1995] 2 A.C. 111 (*Shun Fung*).

[333] The *Dell* Court upheld the Ontario Municipal Board’s determination that the claimant’s damages resulting from the delay in the expropriation process were recoverable as disturbance damages under the Act. Dell Holdings planned to develop land it owned in Mississauga and sought approvals from the municipality for a residential development. The municipality withheld the approvals because GO Transit was considering using part of Dell’s land for a new transit station. This had the effect of freezing Dell’s development for more than two years, and the Court relied on the reasoning in *Shun Fung* to allow damages:

> The situation described in [*Shun Fung*] is very similar to the one at bar. Dell suffered damages because its development business was curtailed for more than two years while the Authority determined which portion of its land was needed for the GO Station. The increased costs of Dell’s development business during the waiting period between the announcement of potential expropriation and the actual taking of the land were caused by the expropriation. (para. 45)

[334] Counsel for the Claimant correctly points out the purpose of the Act, as articulated by the *Dell* Court and underpinning the reasoning in cases that have followed. The Act is intended to make the claimant, who has been subject to one of the ultimate exercises of governmental authority, whole:

> The whole purpose of the *Expropriations Act* is to provide full and fair compensation to the person whose land is expropriated. It is the taking of the land which triggers and gives rise to the right to compensation. (*Dell*, at para. 33).

[335] The Board applied the reasoning in *Dell* to award a claimant disturbance damages for lost rents in *Pitblado v. Oakville (Town)*, 2005 CarswellOnt 6382; 88 L.C.R. 121 (*Pitblado*). That claimant, who owned a commercial plaza, sought disturbance damages dating back to the early 1970s, arguing that was when his rentals started to be impacted by the imminence of expropriation. The Town responded that the threat of expropriation could not have been earlier than 1982, when the Town sent a form letter to owners, including the claimant, advising of potential acquisition of their properties. In making an award for the lost rents, the Board found that because the Town published its first formal notice of its intent to expropriate in 1989, it would award damages for lost rents starting in that year.

[336] The Board distinguished between 1982 as "the first time owners would have come to appreciate, beyond rumour and speculation, that their lands *might* be needed and perhaps the subject of an expropriation" (para. 75; emphasis in original) and 1989 as the formal notice of the Town's intention to actually expropriate. It is also important to note that there was evidence in that case that the plaza generally enjoyed full occupancy as reflected in both signed and unsigned leases.

[337] As in *Dell* and the cases that followed, it is necessary to determine when the threat of expropriation or shadow period begins, in order to determine the amount of disturbance damages that are recoverable. The start date of the scheme was a matter left for this hearing, though the Tribunal decided in the October 2016 Decision that it could be no earlier than October 16, 2006. 135 argues that that is the date when the scheme commenced, while the City submits that scheme commenced no earlier than April 2008, when the City made an anonymous offer to purchase the property from 135, and that no shadow was actually cast over the property until December 2008, when the City publicly announced its intention to expropriate.

[338] Mr. Coneybeare took the October 16, 2006 date as given in his witness statements, and during cross-examination testified that he is aware that date is yet to be determined by the Tribunal. He calculated lost rents in the amount of $638,889 between

October 16, 2006 and the 2009 expropriation. Because 135 did not actually have tenants during this time period, Mr. Coneybeare used a proposed rental agreement, dated in 2005 and between Sifto Salt and 122, to calculate what 135 could have earned in rent for this nearly three-year period. The agreement was unsigned and drafted by CBRE, a leasing company retained by 135. That lease never came to be and Mr. Coneybeare testified during cross-examination that he had no knowledge of whether Sifto ever intended to enter the agreement.

[339] Mr. Coneybeare and Mr. Tautrims agreed that the property had no tenants and no rental or other income of any significance. There appears to have been one tenant in 2003, Tom Finlay, who stopped payment on his rent cheques in the spring of 2003 for unknown reasons. It is also unclear what rent he ever paid, though Mr. Ryan, in a 2005 examination for discovery, speculated that the amount was not much, perhaps $500 or $1000 per month.[6]

[340] Even if the Tribunal were to accept 135's submission that the scheme commenced in October 2006, it cannot in the law find any justification to award the damages it claims for business losses. 135 had no tenants nor rents to speak of at any time in its alleged shadow period. Nor could it have. The property suffered damage as a result of the tender shop fire in October 2003. The main building was left open to the elements in areas. It was not connected to municipal services. These circumstances existed independently of the expropriation or the threat of expropriation.

[341] The Tribunal is charged with making the claimant whole under the Act. What exists in this case is a Claimant who owned a damaged building with no tenants long before the possibility of expropriation was on the horizon. Counsel for the Claimant argues that the actual rents are irrelevant, as 135 lost the opportunity of renting the property due to the threat of expropriation. There is no legal authority in support of such a proposition, nor are there any facts to support such a finding. In fact, the Tribunal finds that making such a leap would be contrary to the Act and to *Dell*. It would require this

[6] Exhibit 40, Tab 7, Questions 438-448.

Tribunal to imagine a building capable of being rented to a hypothetical tenant and would result in a significant windfall to the Claimant. That is clearly not the intent of the Act.

[342] Additionally, the Claimant cannot point to a date when a shadow actually materialized on the property. While the Tribunal appreciates Mr. Doherty's submission that it is difficult to determine this without Mr. Ryan, the Act and authorities interpreting it require this missing connection. There must be a clear link between the threat of expropriation and the damage it causes—for example, the costs of delay in *Dell*, or the lost rents in *Pitblado*. There is no such connection in this case.

[343] The Claimant offered no evidence in support of the scheme commencing on October 16, 2006. While that is the date that the City, the Festival, and UW entered into the Memorandum of Understanding to establish a campus in Stratford, there is no mention of 135's property in that document. The first mention came from Mr. Ryan himself, at a public meeting on December 7, 2006, where he suggested a potential partnership with UW involving his land. 135 submits that because Mr. Ryan was then precluded from discussions with UW, this supports the Memorandum of Understanding as the scheme commencement date, or in the alternative, December 2006 at the latest.

[344] Mr. Shaw, the City's former CAO, was the only witness to offer a detailed chronology of events, summarized earlier in this Decision. His evidence on the timing of events related to the expropriation was not challenged during cross-examination. The Tribunal accepts his evidence that City staff were internally reviewing sites for the campus through 2007 and began considering 135's property as a potential site during that time.

[345] There is no evidence that Mr. Ryan nor the public would have been aware of these discussions and the potential interest in 135's property. 135 argues that it became aware when UW was no longer interested in pursuing discussions of a partnership with Mr. Ryan. 135 then received the anonymous offer (from the City) to purchase the property in April 2008 and a series of other offers. The Tribunal can accept that, by

then, Mr. Ryan may have suspected that the City might attempt to acquire his lands by other means, including expropriation, just as the claimant in *Pitblado* may have suspected the possibility of expropriation based on the Town's form letter.

[346] In this case, the City did not decide to attempt to acquire 135's property until April 3, 2008 during an *in camera* meeting. The anonymous offer followed and was not publicly known; it was known only to 135.

[347] Even so, this did not stop 135 from pursing its plans for the property through 2008, including:

- Purchasing a sign to advertise leasing of the property in May 2008;
- Hiring Rosati Construction to build a stage at the site during the summer of 2008 as part of the Ryan's Railway Centre plan;
- Continuing an engagement with DTZ Barnicke to market for tenants; and
- Planning by Mr. Patrick Ryan to open a paintball club at the property.

[348] Based on its review of the record and testimony during the hearing, the Tribunal accepts the City's submission that the scheme commenced when it decided to acquire the property in April 2008 and sent an anonymous offer to the Claimant. However, unlike in *Pitblado*, there is no evidence of a shadow ever materializing over 135's property. There were no rents to be lost and no possibility of tenants on the horizon. The threat of expropriation clearly had no impact on 135's activities on the property because it continued to pursue its project until the City announced its intention to expropriate. Accordingly, the Tribunal rejects 135's claim for business losses.

b. Costs Thrown Away / Wasted Development Costs

[349] Disturbance damages can also include costs incurred by a claimant pursuing

development on its property that later become costs thrown away because the property is expropriated. This is where 135's lack of financial record-keeping and comingling of funds among various corporate entities and personal funds makes matters complicated. Many of 135's accounts remained unpaid at the time of this hearing. The fact that Mrs. Clime was still reconstructing 135's financial records means that both business loss experts—Mr. Coneybeare for the Claimant and Mr. Tautrims for the City—were having to review and revise estimates during the hearing.

[350] While 135 originally claimed $314,000 in wasted development costs, Mr. Coneybeare reduced the figure to $268,000 after meeting with Mr. Tautrims.

[351] Mr. Tautrims originally estimated 135's wasted development costs at $5,644. He allowed $4,220 for an invoice from Scutt Signs. Mr. Tautrims allowed this expense on the assumption that the sign, used to advertise the property for leasing, was related to 135's development. He also allowed an invoice for $1,424 for the purchase of landscaping stones because the purchase relates to the exterior of the building.

[352] It was not until this hearing that Mr. Tautrims received Mrs. Climie's updated financial statements. He reviewed those statements and provided an alternative calculation to allow any amounts that Mrs. Climie had indicated were paid. Based on his review of those statements, his opinion is that 135 is eligible for, at most, $51,683 in wasted development costs. He cautioned the Tribunal that this assumes that the invoices were actually paid and that they related to 135's development, though many of the invoices were addressed to other individuals or corporate entities.

[353] For the purpose of arriving at an alternative figure, he assumed Mrs. Climie's ledger was done correctly, though he noted Mrs. Climie's repeated caution that these documents were still in draft form. They are subject to change because she is still missing bank statements and is seeking Mrs. Ryan's assistance in properly classifying the expenses. This is significant because many of the invoices were addressed to Mr. Ryan personally, to other corporate entities, and some were to 'cash' or unidentified. There is no way to determine whether they were used for 135's project.

[354] Much was made in the Claimant's submissions of Mr. Tautrims adjusting his figure. Given the gaps in 135's financial records as described by Mrs. Climie, the Tribunal appreciates the difficulty in piecing together 135's financial picture. The financial records were being updated even during the course of this hearing and the Tribunal cannot draw a negative inference from either Mr. Coneybeare or Mr. Tautrims adjusting their figures as Mrs. Climie provided new financial information. Nor does the Tribunal fault Mrs. Climie for working with the deficient records she had been given.

[355] Mr. Coneybeare's $268,000 in wasted development costs can be divided into two categories:

a) $131,000 in expenses he believes are supported by invoices and detailed on Schedule 5R of his report; and

b) $137,000 for expenses incurred using advances under the Republic mortgage and reflected in Schedule 6R of his report.

[356] With respect to the first category, Messrs. Coneybeare and Tautrims agreed that these expenses should be supported by invoices. They have two major areas of disagreement within this category. The first relates to equipment purchases and the second relates to expenses that Mr. Tautrims believes were required to attract tenants and do not qualify as wasted development costs.

[357] The equipment consists of a scissor lift and a Bobcat, with a total claimed value of $23,999. Both were purchased by the Ryan's farm company, Sydenham Deer Farm, and may have been used at the Expropriated Lands. The Ryan family is still in possession of the lift but Mrs. Ryan believes the Bobcat was left at the Expropriated Lands. Because the purchaser of this equipment was not 135 and the Ryan family is still in possession of the lift, the Tribunal agrees with Mr. Tautrims that the cost of equipment cannot be characterized as a wasted development cost for 135 and is therefore not compensable under the Act.

[358] The expenses that Mr. Tautrims believes were required to attract tenants are for cleaning the building, generator / diesel fuel, signage, advertising, printing, and other expenses (including drilling a well for the property). After receiving Mrs. Climie's ledger's Mr. Tautrims noted the amounts that were alleged to be paid for each of those expense categories. He also accounted for $19,020 in sales of salvaged material from the building that is shown in the ledgers and deducted them, noting that he and Mr. Coneybeare agreed that it is necessary to account for any revenues associated with claimed costs.

[359] Because Mr. Coneybeare is of the opinion that all of the expenses related to 135's development plans—and not to attract tenants—Mr. Tautrims proposed that 50% of the costs could be compensable as wasted development costs, which is a total of $51,683. He cautioned that the Tribunal would have to find that 135's development was feasible in order to compensate for those expenses.

[360] The Tribunal finds Mr. Tautrims' analysis of these expenses to be more thorough than that of Mr. Coneybeare. Mr. Tautrims scrutinized the ledgers and invoices in a way that Mr. Coneybeare did not. Significantly, Mr. Coneybeare did not concern himself with the fact that many invoices are not addressed to 135. He also took as given that all of the invoices have been paid when there is no evidence that many of them have been paid. If the Tribunal were to accept Mr. Coneybeare's approach and his proposed figure, it would very likely be compensating 135 for costs it did not incur, contrary to the Act.

[361] Mr. Coneybeare similarly made a blanket assumption that all expenses for cleaning the building related to 135's development.

[362] In Mr. Tautrims' opinion, the costs associated with cleaning up after a fire, as well as for a generator and diesel fuel, and drilling a well are the normal costs of doing business. Mr. Coneybeare believes otherwise, that these costs were necessarily incurred by 135 to pursue its development plan.

[363] The Tribunal finds Mr. Gauthier's evidence to be of assistance here. He testified

that Rosati and Mr. Ryan planned a phased renovation and build-out, where they would complete a unit, lease it, then move onto the next. The plan was to start with a general store, and while closing off the rest of the building, to use the completed portion to attract future tenants. It is an approach that Rosati has previously used, and the Tribunal accepts that Rosati and Mr. Ryan believed the approach could work.

[364] The Tribunal must take care not to import the feasibility requirements of the highest and best use analysis into its analysis of wasted development costs. It is true that the Tribunal determined the project not to be feasible in the context of the highest and best use analysis, which has at its core a hypothetical knowledgeable and prudent buyer and seller. The same scrutiny does not apply to an actual owner's expenses on a development plan it believes feasible.

[365] It is also necessary to recognize—as many witnesses testified—that 135's plan was in the concept stage. The development process is an iterative one. Plans change. It is possible that if 135 and Rosati proceeded to work on the building, the plans for the project would have evolved.

[366] There is also the problem of the building being used for other purposes unrelated to the development. Mr. Patrick Ryan lived in the building for a period of time to provide security services. There is no breakdown to indicate the costs associated with his habitation and use of the building, nor for the storage uses that occurred in the building.

[367] 135's financial picture is incomplete at best. Because of 135's disorganized record keeping and practice of comingling funds, it is impossible to determine whether invoices addressed to parties other than 135 were used for 135's project. For example, several invoices were addressed to the Ryans' farm corporation and others to Bemar Construction, another of Mr. Ryan's companies, which was involved in other projects and in litigation.

[368] The Tribunal therefore accepts that only some of the claimed expenses were incurred to advance 135's project and finds that Mr. Tautrims' alternative total of

$51,683 is an appropriate amount to award for wasted development costs.

[369] The second category Mr. Coneybeare claims are advances for the Republic mortgage. Republic advanced over $2 million in funds and of that Mr. Coneybeare identified about $71,000 that he thought might relate to wasted development costs. Both Mr. Coneybeare and Mr. Tautrims referred to a lack of records to demonstrate where the Republic funds went.

[370] Of the $71,062 Mr. Coneybeare identified as potentially wasted development costs, Mr. Tautrims points out that $54,000 were payments made to cash. There is no evidence to show where those funds went, let alone to demonstrate that they were used for 135's project. If they were used for the project, it is possible that they were used to pay invoices that were otherwise claimed in Mr. Coneybeare's expense category and would be double counted if allowed. The remainder of the Republic advances consists of amounts paid to law firms and other consultants. The Tribunal agrees with the City that there is no evidence these amounts in any way related to 135's project.

[371] Therefore, the total compensable as wasted development costs is $51,683.

[372] The Claimant advances an unusual alternative claim for interest. It submits that if interest is not awarded on the market value of the land pursuant to s. 33 of the Act, it should be awarded additional disturbance damages of at least $633,000 in financing costs incurred by the Ryans' related farm properties as a result of the expropriation. These are interest costs paid by the farm companies on behalf of 135 after the expropriation. Mr. Coneybeare included four short paragraphs regarding this claim in his report, noting that he did not include this in the claim for disturbance damages because interest owing pursuant to s. 33 of the Act would exceed and possibly duplicate the interest expenses incurred after the date of the expropriation. Mr. Coneybeare provided no justification for such an award, nor did he expressly endorse it in his testimony.

[373] The Tribunal agrees with the City that there is no basis in the law for such an

award. There is no entitlement to interest on disturbance damages in the Act. Even if the financing costs of the farm companies were somehow compensable under the Act, the Tribunal was presented with no evidence to demonstrate that these expenses were a natural and reasonable consequence of the expropriation.

c. Executive Time

[374] Though the Act does not specifically provide compensation for executive time, it has been accepted by the Tribunal and its predecessors as a type of disturbance damage. Awards of executive time are discretionary and often nominal. Their purpose is to compensate a claimant for time it had to divert from running its business to deal with the expropriation.

[375] At the high end, the Tribunal has awarded $26,000 for executive time where a claimant sought $79,600 (*Paciorka Leaseholds Ltd. v. Windsor (City)*, 2009 CarswellOnt 7738, 99 L.C.R. 269). That claim was supported by a detailed time log showing 796 hours, at a value of $100 per hour, spent over seven years. The Board found only one-third of the amount reasonable because the balance was a duplication of efforts to attend legal and expert meetings.

[376] The Board awarded a similar amount of compensation for executive time in a case where there was no suggestion that the claim was inflated, giving the claimant $26,865 for executive time at a value of $100 per hour (*Captain Developments Ltd. v. Ontario (Ministry of Transportation)*, 1993 CarswellOnt 5166, 50 L.C.R. 176).

[377] At the other extreme, the Tribunal has denied claims for executive time when there is no evidence that time was lost from the business. (See *Foisy et al. v. City of Glouster*, 1985 CarswellOnt 2158, 34 L.C.R. 350 and *Bernard Homes Ltd. v. York Catholic District School Board*, 2004 CarswellOnt 3008, 83 L.C.R. 176). Claims for executive time have also been reduced when the claimed hourly rate is found to be inflated (*Moto-Match Centres Ltd. v. Toronto (Metropolitan)* 1984 CarswellOnt 1869, 30 L.C.R. 326).

[378] In this case, 135 claims executive time for both Mr. Ryan ($152,000, consisting of 2000 hours at $76 per hour) and Mrs. Ryan ($3680, being 160 hours at $23 per hour). The City submits that there is a threshold problem here, that is, that the corporate claimant cannot claim executive time for individuals. Beyond that, the City submits there is no evidence that 135 was paying for the Ryans' time or that it incurred any losses because their time was diverted from the business.

[379] The City relies on Board's decision in *Moto-Match*. In that case, the corporate claimant's secretary and president each made a claim for executive time. The Board allowed the claim, at a reduced amount, for the company secretary who had drawn an annual salary from the company. The reduced amount the Board awarded was based on the hourly rate it calculated from the annual salary and the number of hours worked per week. Conversely, the Board denied the claim for executive time for the company president (Mr. Gutmann), who had never drawn, nor was he entitled to, any remuneration from the company. In making its finding, the Board acknowledged that while Mr. Gutmann had performed work for the company, his time cost the claimant nothing (para. 23).

[380] It is true that both cases involved had only one claimant—a corporation. However, there are three key distinctions between the facts in *Moto-Match* and this case. The first distinction is that 135 had a sole shareholder, director, and officer, Mr. Ryan (and Mrs. Ryan as President since the time of his death). The corporate claimant in *Moto-Match* had two individuals with positions in the corporation; one drew a salary and one did not, and that distinction factored into the Board's decision to compensate executive time to the salaried one and not the other.

[381] In this case, Mr. Ryan was 135. He was its sole officer, shareholder, and director. There were no employees to perform the function of the business and pursue 135's project. Mr. Ryan was it.

[382] The second distinction is that the *Moto-Match* panel had evidence that one of the individuals claiming executive time drew a salary, and from that was able to arrive at an

appropriate award for executive time. There are no such records in this case. The Tribunal can only infer that some of the transferring of funds among various corporate entities and the Ryans personally was an attempt at compensation for work done. Mr. Ryan referred to reimbursement for his in-kind work in affidavits and examinations for discovery transcripts. Here again, the deficiency in 135's record-keeping and its practice of comingling corporate and personal funds is a problem.

[383] The third distinction is that the claims for executive time in *Moto-Match* included some attempt to quantify the hours spent away from the business on matters related to the expropriation. In that case, and in many of the submitted authorities, there was at least some attempt to explain what the individuals spent the time on and how that caused a loss for the business. None of that exists in this case.

[384] In this case, the Tribunal does not find the corporate status of the Claimant to preclude a claim for executive time by an individual involved in the corporation. Mr. and Mrs. Ryan could be eligible for executive time as named officers in the corporation. However, the Tribunal does find that the nature of 135's business precludes such a claim.

[385] By Mr. Ryan's own affidavit evidence, and as confirmed by testimony of witnesses during the hearing, 135 had a single purpose: to advance the project. The project was synonymous with the Expropriated Lands, in particular the building. Without the property, there could be no project. From the time of expropriation 135 had no business to attend to. There can therefore be no evidence to show that the expropriation caused Mr. or Mrs. Ryan to divert their attention from any of 135's business.

[386] Even if there were such evidence, the details of the executive time claim in this case are sparse and wholly unreliable. Mr. Coneybeare calculated the amounts claimed for Mr. and Mrs. Ryan, not based on what they were paid by 135, but by what he believes they should be paid for the functions they performed and their respective levels of experience.

[387] There is a complete absence of evidence regarding Mr. and Mrs. Ryan's duties with the business and how they were diverted from those duties because of the expropriation. Mrs. Climie and Mrs. Ryan testified generally as to the time Mr. Ryan spent "on the expropriation," indicating that he always seemed to be doing something relating to the expropriation. Mrs. Ryan testified that Mr. Ryan would often miss holidays, birthdays, and family functions because he was working on something to do with the expropriation. No doubt this was a difficult circumstance for the family.

[388] The problem, however, is that Mr. Ryan (and 135) was involved in a multitude of litigation outside this expropriation proceeding. Some of that litigation relates to the subject property but not to the expropriation. Undoubtedly there would have been overlap. When combined with a complete absence of accounting for Mr. and Mrs. Ryan's time, the Tribunal cannot accept that the 2000 hours claimed for Mr. Ryan related only to the expropriation. The Tribunal sees no reliable basis upon which to exercise its discretion to allow compensation for executive time.

3. Costs and Interest

[389] Costs awards are determined in accordance with s. 32 of the Act and are dependent on the amount offered by the authority. Where the Tribunal awards an owner 85% or more of the amount offered by the authority, s. 32(1) requires the Tribunal to make an order directing the authority to pay the reasonable legal, appraisal and other costs incurred by the owner for the purpose of determining compensation.

[390] Conversely, where the amount awarded by the Tribunal is less than 85% of the amount offered by the authority, s. 32(2) affords the Tribunal discretion to make an order for the payment of costs as it considers appropriate.

[391] The parties agreed that submissions regarding the applicability of s. 32 shall be made following the Tribunal's determination of compensation in this Decision. The Tribunal will remain seized for the purpose of determining costs in accordance with s. 32 of the Act and will establish the procedure, including a hearing date, to fix the

costs associated with this Claim.

[392] The parties also made submissions regarding interest in the event interest is owed on an amount outstanding for the market value of the property. Section 33 of the Act sets the interest rate at 6%, but it allows the Tribunal to vary the interest rate where it is of the opinion that any delay in determining compensation is attributable to either the owner or the expropriating authority.

[393] There would be no amount outstanding based on the market value the Tribunal has determined in this case. The amount is less than the $589,208.84 the City paid to the Claimant on February 9, 2010, which does not include the more than $4 million it paid to Republic Mortgage. The City indicated, in its submissions, that out of respect for Mrs. Ryan and her family, it is not taking the position that it be repaid any overpaid funds.

[394] Even if the determination of market value resulted in interest owed, the Tribunal has difficulties with the City's request to vary the statutory interest rate because of delays occasioned by the Claimant. If the Tribunal were to entertain such a request, it would require a month by month accounting and analysis of the source of every delay in this decade-old Claim. The Tribunal agrees with Mr. Aburto's submission that this is not the intent of the Act. Having been seized of the matter for six years, the Tribunal has observed delays occasioned by both parties, as well as delays beyond the control of either of the parties or the Tribunal.

CONCLUSION

[395] In arriving at its decision, the Tribunal has carefully considered the evidence and submissions it heard during the hearing, as well as the extensive record. While the Tribunal acknowledges the tremendous tenacity of Mr. Ryan in pursuing 135's project, it is necessarily focused on its obligations under the Act. The reliance of many of the Claimant's witnesses on Mr. Ryan's confidence and enthusiasm for the project provided a very narrow perspective to the Tribunal; far narrower than the Act requires when

considering a hypothetical transaction between a willing seller and buyer.

[396] By focussing on Mr. Ryan's perspective, the Claimant's key witness, Mr. Simmons, overlooked the structural repairs and downplayed the environmental remediation the property requires. These would most certainly give pause to a knowledgeable and prudent buyer and would have to be taken into account in their negotiations with a knowledgeable and prudent seller.

[397] With respect to the claim for disturbance damages, 135's evidence was lacking. There was no evidence of any business loss nor executive time. The state of 135's financial records made it difficult to determine a precise amount for wasted development costs, and so the Tribunal accepted Mr. Tautrims' alternative approach – to allow some of the claimed costs as relating to the development rather than the cost of doing business—as a reasonable one in the unusual circumstances of this case.

ORDER

[398] The Tribunal makes the following award of compensation:

Market Value	$290,000
Disturbance Damages	
Business Loss	nil
Wasted Development Costs	$51,683
Executive Time for Lawrence Ryan	nil
Executive Time for Wendy Ryan	nil
Total	**$341,683**

“S. Jacobs”

S. JACOBS
VICE-CHAIR

The Conservation Review Board, the Environmental Review Tribunal, the Local Planning Appeal Tribunal and the Mining and Lands Tribunal are amalgamated and continued as the Ontario Land Tribunal (“Tribunal”). Any reference to the preceding tribunals or the former Ontario Municipal Board is deemed to be a reference to the Tribunal.