

INQUIRY OFFICER'S REPORT

Re: Expropriation in the Town of Carman, in the Province of Manitoba

Being the expropriation of the following lands:

LOT 2, PLAN 36538 NLTO IN NE ¼ 24-6-5 WPM

Prepared by:

GEORGE ERNEST ULYATT

Inquiry Officer

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INQUIRY OFFICER'S REPORT

1. Pursuant to Schedule "A" of The Expropriation Act, RSM 1987, C.E190, the writer was on the 19th day of June, 2018, appointed as the Inquiry Officer with respect to the known expropriation initiated by the Town of Carman.

2. By application to the Court of Queen's Bench, Justice Spivak ordered that the Inquiry Officer's report be extended to August 9, 2018, and it was subsequently extended on August 3, 2018 by the Honourable Justice Kroft to September 10, 2018, and by the Honourable Justice Spivak to October 10, 2018.

A. LANDS AFFECTED BY THE UNDERTAKING

Lands to be expropriated:

- B.** The intended expropriation affects the following lands:

LOT 2, PLAN 36538 NLTO IN NE ¼ 24-6-5 WPM

Notice of Objection filed by:

- A. VICKI BRENDA HETHERINGTON**
- B. ROBERT STEPHEN HETHERINGTON**

B. PARTIES TO THE INQUIRY PROCESS:

3. In accordance with Section 5 of Schedule “A” of The Expropriation Act of Manitoba (hereby called “the Act”), the inquiry was scheduled for Wednesday, June 21, 2018 at 10:00 a.m. at the Carman Community Hall, 60 – 1st Avenue, NW, Carman, Manitoba as the time and place for a public hearing to determine whether the intended expropriation was fair and reasonably necessary for the achievement of the Expropriating Authority. No residents at public hearing were served on the parties affected by the expropriation and upon the parties who filed objections.
4. This Inquiry Officer also caused to be published in the Valley Reader a newspaper having general circulation in the locality in which the lands intended to be expropriated are situate the notice of hearing for this inquiry pursuant to Section 6(2)(c) of Schedule “A” of the Act.
5. Pursuant to Section 6(2)(c) of Schedule “A” of the Act, the Objectors and the Expropriating Authority are parties to the hearing.
6. The parties who attended the inquiry hearing were the following:

On behalf of the Expropriating Authority, the Town of Carman:

- a) **Antoine Hacault**, solicitor for the Town of Carman
- b) **Robert Mitchell**, Mayor of Carman
- c) **Gordon Damon**, consultant to the Town of Carman

On behalf of the Objectors, **VICKI BRENDA HETHERINGTON** and **ROBERT STEPHEN HETHERINGTON** (hereinafter called “the Hetherington’s”):

- a) **James Mercury**, solicitor for the Objectors
- b) **Vicki Brenda Hetherington**
- c) **Robert Stephen Hetherington**

C. SUMMARY OF EVIDENCE

7. Mr. Hacault, counsel for the Expropriating Authority, called two witnesses, Robert Mitchell and Gordon Damon.

Evidence of Robert Mitchell

8. Mr. Mitchell testified that he had been the Mayor of Carman for approximately twelve years. He has degrees from Brandon University and the University of Manitoba, and has been an accountant in the Carman area for approximately thirty-five years.
9. Mr. Mitchell indicated that, due to requests by area residents, the Town set out on a goal to help facilitate the community in the construction of seniors' housing. Approximately six years ago, Mayor Mitchell and Shawn McCutchun, then being of Dufferin, began planning to replace the existing personal care home in Carman, Manitoba. There were many reasons to do so, some of the primary reasons being the fact that the seventy-bed facility is fifty years old and was built as a seniors' hostel for people who were relatively healthy, but struggling to remain in their present residences. The people who were in the facility years ago have moved on to assisted living and the same facility is attempting to deal with individuals with serious mobility problems, Alzheimer's, Parkinson's, the aftermath of strokes, and a host of other debilitating conditions.
10. Mr. Mitchell went on to describe that the need for personal home care beds will increase dramatically over the next twenty years, with the predictions

varying from 5,000 to 10,000 new beds being required, based on a ninety percent increase in population over 65 by the year 2036.

11. Thus, with the aging population, the community decided to explore the concept of an aging-in-place campus where there would be a new long-term personal community influence, eventual conversion to independent living and construction of full-sized assisted living apartments with some meals being provided.
12. Mr. Mitchell indicated that the project would be a phased-in project, with Phase I being the 80-bed personal care home. The second phase of the project would be the renovation of Boyne Towers to make it a usable get-away for the bachelor suites. The third phase is a constructed assisted living facility that would serve people who are in the need of personal care. The final phase would be a life lease facility where individuals would be able to have their own apartments.
13. Mr. Mitchell gave evidence that the proposed personal care home would be of great economic impact to the community, and inquiries continued with different RM's to be involved in the community.
14. In September, 2017, the Province gave the community the authorization to move forward with the phase and, as a result, proceeded to have geotechnical reports prepared to assess the impact of construction near the river. Mr. Mitchell testified that the results of the analysis had determined that the building could not be moved any closer than sixty-five feet from the top of the riverbank. Any closer would result in unstable ground which would not

allow for a proper foundation design and would compromise the building structure. Mr. Mitchell advised that there would be some changes when the plan design was completed and that the geotech investigation only included a personal care home, but not the life lease and assisted living.

15. Mr. Mitchell testified that a declaration of expropriation was passed by the Municipal council as follows:

“The Town of Carman hereby declares that it expropriates for the purpose of establishing a new personal care home and related facilities.”

Cross-examination by Mr. Mercury

16. Mr. Mercury suggested to the Mayor that the wording of the expropriation was specific as it related to the new personal care home, but was vague as to the proposed related facilities. The Mayor was vague in his response and no definitive answer was given.
17. The community continued to move forward with to looking into plans, and in 2013, the community became aware of the facility in Niverville, Manitoba. The community continued to consider different options, and in 2013, evidence was given that the individuals who were involved in the preliminary planning stage had determined that the expansion be to the west onto the Hetherington’s land.

18. Evidence was given by Mr. Mitchell that, sometime in 2013, he personally made contact with Steve and Vicki Hetherington while walking around their property. At that time, there was no indication to the Hetherington's that all of Lot 2 would need to be expropriated. Further evidence was given that 3.7 acres were being taken for the proposed undertaking, which would leave the Hetherington's 4.4 acres.
19. Evidence was given that, between the fall of 2013 and November of 2015, there appears to have been no design work for the proposed undertaking.
20. The community looked at different designs, had contact with the Province of Manitoba, the Regional Health Authority, Boyne Care Facilities and others to address all the needs, not just of the personal care home. At this juncture, Mr. Gordon Damon was retained as a consultant.
21. Mr. Mitchell had indicated that it was his recommendation to expropriate all of Lot 2 and the project could not proceed with the full taking.
22. There was continued cross-examination by Mr. Mercury on the project and evidence was given that, until such time as the Province had formally approved the plans, the project could not proceed. Mr. Mitchell had indicated that it was his recommendation to expropriate all of Lot 2.
23. Mr. Mitchell also testified that there was public consultation, three open houses with respect to the property and direct contact with the Objectors.

24. Mr. Mitchell further testified that the earlier design of the project had not changed.
25. The Mayor also confirmed that up to February of 2008, it was always the intention for a full taking of Lot 2.

Evidence of Gordon Damon

26. Mr. Damon gave evidence of his professional certifications as follows:
 - (a) President of Red River Group, a consulting firm;
 - (b) Undergraduate work in both agricultural and theological studies;
 - (c) Real estate designation through the Appraisal Institute of Canada as an accredited appraiser.
 - (d) CRA designation with the Appraisal Institute of Canada;
 - (e) Member of the Royal Institute of Chartered Surveyors, having an MRICS designation;
 - (f) Currently working on a Masters of Business Administration.
27. Mr. Damon indicated that he has served as the Mayor of Niverville and is currently the Acting Chair of the Municipal Board of Manitoba, Chair of the Payment in Lieu of Taxes Dispute Advisory Panel for the Government of Canada, and is serving on the Board of the Niverville Heritage Centre, which

is an age-in-place campus. He further served on a number of boards related to community development.

28. The evidence disclosed in the report found at Tab 19 of Carman's documents were authored by Mr. Damon.
29. Mr. Damon testified that funding would not be possible unless the developers, The Town of Carman or a subsidiary corporation had a control of the land. Mr. Damon, who had previously discussed the phasing of the age of the community, noted it was very important to be able to ensure that there is the aging-in-place concept in Carman's case and, more particularly than that, in Niverville. The reason for this is that Carman is actually focused on attracting seniors, whereas the average age in Niverville was 33, the Provincial average age is 38 and Carman's average age is 46.
30. Mr. Damon went on to explain the problems with life leases, which are only feasible if there are private developers involved. Mr. Damon pointed out that was the reason that, in Winnipeg, you see Knights of Columbus or Lions always sponsoring life lease units. These life lease units are not privately owned.
31. Mr. Damon testified that he was deeply involved with the consultants, particularly in choosing a site and the development of the particular site. Because of that involvement, some of the negotiations had been done with the Hetherington's.

32. Mr. Damon testified that there had been a geotechnical test made at the request of the Hetherington's to provide a 130-foot setback. The study has shown that they wouldn't make that development and not be able to locate at fifty feet, but only at sixty-five feet and that to change the development as a sixty-five foot setback would allow them to actually accommodate the 130-foot setback, remove everything and put through the design changes. As a result of the geotechnical studies, it was determined that there could not be a 130-foot setback with the present design models.

Cross-examination of Gordon Damon by James Mercury –

33. In cross-examination, Mr. Damon expanded his views and statistics with respect to the need of the campus base housing concept. In his testimony, Mr. Damon did indicate that, in addressing these issues, Boyne Lodge was seen as the most reasonable and sustainable site for the aging-in-place concept, and it was possible to confine the footprint as reasonably as possible.
34. Mr. Damon went on to expand on how the present project related to other projects within North America, and that initially it was not the intent to acquire all of Lot 2 (Hetherington's land), but as the project proceeded into late 2016 and 2017, it became apparent that all of Lot 2 would be required.
35. Mr. Damon indicated that their first choice was not to take all of the property, and in fact, to look to other sites that had the attractiveness of being close to downtown, being located near a school, parks and interactional school

groups, daycare groups and other adults. Mr. Damon indicated that the other age demographics made the site more appealing.

36. Mr. Damon did indicate that he had done a site inspection of the Hetherington's property. Mr. Damon indicated that, while he attended the property, he did not enter the residence. He described the Hetherington lands as a "beautiful piece of property" along the river.
37. Mr. Mercury cross-examined Mr. Damon on cost analysis, design analysis, and whether it was possible to scale back the project. Mr. Damon indicated that the present proposal, based on site designs and the geotechnical report, were not able to accommodate the concerns of the Hetherington's that the entire taking would be required.

Direct Examination of Robert Stephen Hetherington -

38. The objector, Robert Stephen Hetherington, was called as a witness on behalf of himself and his wife. Mr. Hetherington indicated that the property that is the subject matter of this expropriation was his mother and father's home and was purchased by them in 1961, being the same year he was born. Mr. Hetherington indicated that he lived there until he was 17 or 18 years of age, and that while he had worked away from the Carman area for some period of time, he had returned and operated a business called S & B Construction. S & B Construction is a business that deals with all mechanical components of the grain industry from start to finish.

39. Mr. Hetherington further testified that he married his wife in 1982 and purchased the property from his mother in 1997.
40. Mr. Hetherington indicated that he and his wife moved back to Carman in 1996. They have three children, ages 25, 34 and 35, and six grandchildren in the Carman area.
41. Mr. Hetherington indicated that his mother passed away in 2011, following which he and his wife continued to work on the property.
42. Mr. Hetherington advised that part of the equipment of S & B Construction is stored on Lot 2. One can still see the foundation of the original home in which Mr. Hetherington was raised.
43. Mr. Hetherington indicated that property has been used for many social functions, including his daughter's wedding and other recreational activities. In fact, the property is so well groomed that individuals will often think it as a public area.
44. Mr. Hetherington's vision was that he built the property at its present location for two reasons; being that he could not afford to go in any further towards the town, and also for easier access to water, sewer and hydro.
45. In the summer of 2013, Mr. Hetherington heard of the proposed construction or development around the Boyne Lodge. There had been discussions with a Kevin Smith, although there was no indication at that time that any of the land

would be taken. Sometime after, the Hetherington's met with Mayor Mitchell. Mr. Mitchell attended the property and indicated that the Town would likely need approximately 3.75 acres. In fact, Mr. Hetherington testified that Mayor Mitchell, upon examining the survey stakes, advised that he was concerned that the property was more than needed for the project. Mr. Hetherington advised that Mayor Mitchell would get back to him, but there was no further communication on that point.

46. Mr. Hetherington indicated there were public meetings in 2015. Newspaper articles in the Valley Reader indicated updates coming for Boyne Lodge replacement project.
47. In 2016, the Town of Carman formally approached the Hetherington's with a view towards attempting to negotiate a voluntary acquisition of the property. Mr. Hetherington testified that there was no indication at that time that there would be a full taking of Lot 2.
48. In 2017 and 2018, there were requests for details from the Town of Carman. Up until as recently as February of 2018, there had been no indication that there would be a fulling take of the property.
49. Shortly thereafter, the Town advised the Hetherington's that they were not prepared to make an offer on the property which included the Hetherington's retaining 130 feet of Lot 2.

50. Mr. Hetherington indicated that the reason that 130 would be a minimum is the taking of all the property would interfere with their lifestyle in that the lodge would basically be outside their door with no divide between their property and the new building. Thus, Mr. Hetherington wished to have a buffer zone.
51. Mr. Hetherington confirmed that they are in support of the development and the need for it, and is prepared to consent to a partial taking of the land.
52. Mr. Hetherington acknowledged that the Town of Carman, as early as 2014, had provided financial assistance to help cover reasonable legal and appraisal fees. Mr. Hetherington further acknowledged that his counsel had met with representatives of the Town and there had been discussions with respect to the first option to purchase.

D. REVIEW OF EVIDENCE

53. The Town of Carman is proposing to proceed with the planned accommodation for seniors in the Carman area. Approximately six years ago, the Mayor of Carman, Robert Mitchell, started a dialogue and investigative process with other rural municipalities for a joint project for seniors.
54. Carman currently has a 70-bed seniors' facility, Boyne Lodge, which is a personal care home built in 1967. At the present time, 94% of the lodge is occupied by residents with the most serious treatment needs. In order to

address the needs of individuals currently in residence and those for years to come, the concept of “aging-in-campus” was designed. This campus design was to serve the needs of the aging population and intended to service different life phases.

55. The development of an aging-in-place campus on the present site of Boyne Lodge would entail the following phases:
 - i. An 80-bed personal care home integrated into the existing structure;
 - ii. Renovation and changes of function of Boyne Towers to create a mixed housing model;
 - iii. Assisted living;
 - iv. Life leases.
56. The evidence submitted demonstrated that Carman was a logical location for the campus as it had already developed the lodge to service seniors and, in fact, had the oldest average age in the area. Extensive evidence was given as to cost. The Boyne Lodge location was preferred to other sites for reasons of cost, proximately to the downtown area of Carman and the available land.
57. The Hetherington land was a recommendation made to the Town of Carman by the consultant, and Town council did confirm the taking of the property.

58. The Town of Carman held a number of open houses with respect to the project. The objectors also had meetings with both the Mayor, Mr. Mitchell and other municipal representatives with respect to the property. Since 2014, the Town of Carman has as well funded the legal costs of the Hetherington's in order for them to better understand and work with the project.
59. The issue of the amount of taking of land by the Town of Carman was a moving target. At one point, the Mayor attended the property and examined the staking certificates, and found that there was too much property being taken. He advised that he would speak to the engineers and get back to the Hetherington's. There was no further discussion from the Mayor with the Hetherington's regarding that concern.
60. Mr. Daman gave extensive evidence as to the design of the campus and attempts to accommodate a minimal taking of land from the Objectors. The technical expert's raised issue of the proximity of construction to the river resulted the ability to take less land, according to Mr. Damon.
61. The Objectors do not object to the project per se. However, they do object to the extent of the taking. The evidence of the Objectors was that the land had been owned by the family for two generations, and the family home in which they grew up was on Lot 2, which is the proposed taking. The family home of the Hetherington's on Lot 1 hosts family functions and social gatherings, and is well-manicured property as described by Mr. Damon as "beautiful".
62. The Inquiry Officer, in the company of the parties and their counsel, did a site inspection of the property, which disclosed Lot 2 as being a mixture of trees,

bush and storage for Mr. Hetherington's company. The visual impression of Lot 1 was the same as Mr. Damon's in that it was a very picturesque and beautiful piece of property.

63. Mr. Hetherington suggested that the proposed taking of all the property and not leaving 130-foot barrier would take away the enjoyment and peaceful use of his family home.
64. Mr. Hetherington testified that, in his opinion, there was not a lot of communication between the Expropriating Authority and himself. Mr. Hetherington stated that there was a total lack of production of necessary documents which were only received shortly before the hearing. The documents provided before the hearing in early January did not contain all the records of site development plans. The Hetherington's were only notified in June 2017 that their property was being fully taken.
65. Mr. Damon testified that, if it wasn't the Hetherington property that was taken, the project would not proceed, and that the Authority had done all they could to minimize the amount of the taking. Mr. Damon's evidence was that the Town would like to proceed in the next six to twelve months and that there was financing in place for phases 1 and 2.

E. POSITION OF THE PARTIES

Position of the Expropriating Authority

66. Mr. Hacault submitted that there were only two issues for this inquiry; the first being the site selection and the second being the extent of the taking. Mr. Hacault indicated that the evidence supported the site selection, the amount of taking, and that the Municipality has met the test of balancing private versus public interest.
67. Furthermore, Mr. Hacault argued that the Town of Carman has acted in good faith and the Town of Carman has demonstrated that they have considered other sites and the amount of land required to be taken. Therefore, the expropriation should proceed.

Position of the Objectors

68. In his submission, Mr. Mercury advised that the proposed taking does not meet the test of what is fair, reasonable and necessary. Mr. Mercury indicated that the need at present is for Phase I and Phase II. It is not agreed that the taking at present is necessary for Phase III and IV.
69. Mr. Mercury suggested that what the Town of Carman was doing was a land banking scheme. This is a land assembly project that is not appropriate. Further, there have been no detailed studied and no real costing.
70. Mr. Mercury was quite adamant that there was no evidence of a requirement of the Province that the Municipality have control of this land. There was no evidence that the Town of Carman needs to expropriate all of Lot 2 to satisfy the funding requirements.

71. It was again pointed out that the Hetherington's have been deprived of the studies and reports for several years, and they've had less than two weeks to examine be provided with a reasonable opportunity to review and to engage in a meaningful dialogue.

F. JURISDICTION OF THE INQUIRY OFFICER

72. The Jurisdiction of the Inquiry Officer is set forth in Subsection 6(2) of Schedule A of *The Act* which requires that the Inquiry Officer determine if the intended expropriation is fair and reasonably necessary for the achievement of the objectives of the expropriating authority. By Statute the Inquiry Officer is obligated to do the following:
- a) Require the expropriating authority to attend at the hearing and to produce such maps, plans, studies and documents as are deemed necessary for the purpose of the inquiry;
 - b) Add any owner whose land would be injuriously affected by the intended expropriation and by the work for which the intended expropriation is required, as a party to the inquiry;
 - c) Give each party to the inquiry a reasonable opportunity to present evidence and argument and to examine and cross-examine witnesses, either personally or by his or her counsel or agent;
 - d) May inspect the land intended to be expropriated or the land of an owner referred to, either with or without the presence of the parties.

73. Furthermore, Section 6(2) also states that for the purpose of an inquiry, the Inquiry Officer is not legally bound by any technical or legal rules of evidence. The Inquiry Officer however, by Section 6(3) of Schedule A of the Act, is not to consider any matter or question relating to the following matters:
- a) The due compensation that would be payable if the expropriation is continued, or;
 - b) The advisability, expediency, legality or necessity of the objectives of the expropriating authority for the achievement of which the land to be expropriated is being acquired.
74. As a result of the notice of expropriation, there were two objectors, Vicky Brenda Hetherington and Robert Stephen Hetherington.
75. The hearings were commenced on June 21, 2018 and continued on June 22, 2018.
76. The purpose of the expropriation was to establish a new personal care home and related facilities.
77. The Objectors do not take issue with the goals of the project, but take issue as to the site selection and the amount of the taking. There is also the issue of the contact of the Expropriating Authority throughout the process.
78. It is trite law that the Inquiry Officer in order to make an informed decision, consider the alternatives to the proposed expropriation. Authority for this proposition was stated in *Parkins v R.*, (1977), 1977 CarswellOnt 1245, 13

L.C.R 306 (Ont. HCJ), affirmed: 14 L.C.R. 327, 19 O.R. (2d) 473 (ONCA),

which states:

“37 It must be borne in mind that the hearing before the inquiry officer provides the property owner with an opportunity for putting forward alternatives. The report to the expropriating authority may refer to those alternatives and give an opinion with regard to them. The inquiry officer’s report is in no way binding on the expropriating authority and that authority need not follow the advice or opinion set out in the report. Nor does the hearing before the inquiry officer in any way fetter a claim for full compensation for the land expropriated by the property owner.

...47 I repeat once again that it is important to consider the purpose or purposes of the hearing. It is to permit a person whose property it is proposed to expropriate to investigate the position of the expropriating authority and to put forward alternate proposals.”

79. Also, *Ball v Ontario Hydro* (1974), 53 D.L.R 519 (Ontario Divisional court) and *Karn v Ontario Hydro* (1977) 79 D.L.R (3d) 256 (ONCA) provided direction that an Inquiry Officer must consider alternate routes or alternatives.

80. The Inquiry Officer, in dealing with the tests at Subsection 6(2) of Schedule A of *The Act*, which states in part:

“The Inquiry Officer shall inquire into whether the intended expropriation is fair and reasonably necessary for the achievement of objectives of the expropriating authority.”

81. In the case of *Bourbounniere et al. v. The Queen* in right of Manitoba et al., 39 L.C.R. 225; The Court acknowledged that the Inquiry Officer has wide discretion and at Page 227 stated:

“Pursuant to s. 6(2) of Schedule A to The Act, at the public hearing the Inquiry Officer “shall inquire into whether the intended expropriation is fair and reasonably necessary for the achievement of the objectives of the expropriating authority”. The Inquiry Officer is given a wide discretion as to the conduct of the hearing and the evidence that he deems necessary for the inquiry. Pursuant to s. of Schedule A of The Act, the Inquiry Officer, in making his report, is required to provide a summary of the evidence, a determination for the facts, his conclusions, and “such other matters as he deems expedient and in the public interest”.

82. The word “fair” in the above section has been canvassed in previous Inquiry Reports by this Officer and the powers of the Inquiry Officer have been reviewed by the Courts.

83. The test of fairness is examined in *Walters et al. v. Essex County Board of Education* 3 (1971) O.R. 346. There was a discussion by the High Court of Justice in dealing with farmers land being expropriated, stated at 347:

“The plaintiffs, like many persons whose properties are expropriated, feel that a great hardship is being done them.”

84. The Ontario legislation uses the words “fair”, “sound” and “reasonably necessary”. The only difference between Manitoba and Ontario legislation is the word “sound”, it is not found in the Manitoba Act. The Court, in the Walters Case (at page 347 – 348) states that:

“The desirability or undesirability of this particular site is a matter to be determined solely by the Essex Board of Education. They are entrusted with wide powers of expropriation and the Legislature is entitled to assume that they will exercise these powers in the widest public interest.”

85. The Court also at page 349, made the following comments:

“In applying the words used in the Act, namely, “fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority” and lacking any judicial pronouncement as to the meaning of these words, the Inquiry Officer adopted the suggestion made by Mr. John W. Morden in the Special Lectures of the Law Society of Upper Canada, 1970, “Recent Developments in Real Estate Law”, 9. 226, where that writer had suggested, “that it would be more realistic to regard to the formula as conveying the broad standard – having regard to the objectives of the authority is this expropriation reasonably defensible.” Similarly, as to the meaning of “fair” the Inquiry Officer adopted Mr. Morden’s suggestion, “that it involves a balancing of the public interest allegedly being advanced by the expropriation with that of the private interest of the owner.”

86. Parkins (supra) in dealing with the balancing act between public versus private interests set the appropriate tests. These tests need to be restated and in the case of *Re Parkins and the Queen* (1978), 14 L.C.R. at 327 discusses the 1998 O.J. 4069 the Court in dealing with the concept of fair sound and reasonably necessary made the following comments:

“Again, giving full allowance to the applicant’s argument that expropriation matters require a strict construction approach to favour, the property owner, the legislation lays down a test of whether the expropriation is fair, sound and reasonably necessary. It is my view that this implies that some latitude has to be accorded to the expropriating authority and that the court is not entitled to substitute its opinion for that of the expropriating authority. In a case such as the present, some consideration has to be given to the practicality of the situation that confronts the expropriating authority.”

87. The test in *Parkins* has been followed by this Inquiry Officer in the past and by other Courts. *Kowal v. Ontario* (Ministry of Transportation) 200 CarswellOnt 6023, 70 L.C.R. 70 (Ont. Bd. of Inquiry) which states:

“He (speaking of the inquiry officer) may want to consider aspects of comparable costs, aesthetics, environmental impact or safety to mention just a few. What constitutes fairness, justness, and reasonable necessity will vary with the circumstances of each proposed expropriation...”

G. DETERMINATION OF FACTS AND ISSUES

88. The Town of Carman has, since at least 2013, been reviewing the development of the seniors' complex. The Mayor of Carman, Mr. Mitchell, engaged in a dialogue with neighbouring rural municipalities to explore a setting similar to the concept in Niverville; namely a seniors' complex.

89. There was a working group that retained the services of Red River Group, which prepared a report authorized by Gordon Damon on June 17, 2016. The consultant's report addressed and recommended a four-phase concept which contained the following:

Phase 1 – Nursing home – personal care home, to be integrated into an existing structure;

Phase II – Renovation and changes of the Boyne Towers to a mixed housing mall;

Phase III – Upon approval and demand of assisted living unit;

Phase IV – Life Leases

90. The report and the evidence of Mr. Damon indicated that site selection was reduced to two locations; the first being the Carman Memorial Hospital and the second being adjacent to the Hetherington's property.
91. There were a number factors that were considered in the site selection, including:
- a) The repatriation of a community asset where the current Boyne Lodge was gifted back from the Provincial Government to the community for \$1.00;
 - b) The site selection committee looked at repurposing costs, environmental impact, operational costs and a comparison of the budget between construction at the proposed site or at a second site.
92. With all these factors considered, the taking of the land from the Hetherington's was the preferable site.
93. As previously stated, the Objectors did not object to the project per se, but as to the site location and the amount of the taking from them.
94. The Objectors, who are both the owner and the occupant of Lots 1 and 2, take issue with the taking of all of Lot 2 for the project. At present, there is a treed area and a cleared area used by Robert Stephen Hetherington for his business. Also on Lot 2 is the frame from the former family home which the

Objectors' parents owned. The current residence of the Hetherington's is Lot 1, a beautifully manicured piece of property. The taking of all of Lot 2 would remove the buffer zone from the Hetherington's property.

95. The Hetherington's ask that the property may not be expropriated or that they be left with a minimum of 130-foot buffer zone.
96. The Town's analysis, that of the engineer's and the geotechnical reports provide that the development of Phases I, II, III and IV requires a full taking of approximately 7.7 acres.
97. The Objectors acknowledge that the Town of Carman has assisted them by paying their legal fees from 2014 to help understand the impact of the expropriation process and to deal with the Town of Carman. However, since 2013, whilst there have been public houses and meeting with staff and Town officials, little has been accomplished.
98. Whilst there has been some discussions and analysis, the final plans were only obtained in early June 2018, which for the first time clearly demonstrated all the land taken. Unfortunately, all the costs and analysis, although requested, have not been provided.
99. The Expropriating Authority was not providing set designs and costs, and Mr. Mercury requested same. However, no material was provided.
100. The Objectors stated their objections in their Notice of Objection as follows:
 - a) That the proposed expropriation is not fair and reasonably necessary for the achievement of the works being proposed;

- b) That the objectives of the Expropriating Authority could be achieved without taking the whole or any part there of the said lands;
- c) That the Expropriating Authority can achieve its objectives in a fair and reasonable manner without affecting in a material way the lands of the Objectors.

101. The Objectors, through Mr. Mercury, are critical of the Town of Carman expropriating private land and creating land banking and assembly. Furthermore, their argument is that there have been no detailed studies or reports, and certainly no evidence of the need of a life lease or independent living sites. It is acknowledged that funding for Phase I and II are in place, but Phase III and IV are not.

102. Mr. Mercury cited this Inquiry Officer's report respecting Rapid Transit and the City of Winnipeg as stating:

“The City, the Expropriating Authority, has an upper hand and have reports, studies and experts readily available. The Objectors are disadvantaged as not having these reports, studies and experts readily available, and thus, the Inquiry Officer has to grant the Objectors considerable leeway to make inquiries to challenge and read into evidence as to alternate options. As previously stated, the Inquiry is obligated to consider all alternatives to any proposed expropriation. The Inquiry process allows the public to participate and hold the Expropriating Authority...”

H. FINDINGS

103. It is true that the Hetherington's have not properly been provided with all the documentation inasmuch some has yet to be prepared. Also, it should be noted that whilst the project had its conception in 2013, matters did not start

moving forward until 2016 following the report of the consultant. However, it is only in the past year that approvals were received from the appropriate regulatory funding authorities that the approval process has moved along. Thus, while initially moving at a sluggish state, it has now moved into fast forward.

104. The Town of Carman has been forthright with the Hetherington's and the community at large by holding public houses and publishing a number of articles in the local newspaper. Furthermore, both the Mayor, Mr. Damon and other officials have met with the Hetherington's to discuss the expropriation.
105. In the present circumstances, the Objectors have not advanced a secondary site for the project, nor have they produced any documents or calculations challenging the cost analysis.
106. An issue, although not deeply covered, was that the objection to the expropriation may be more narrowly defined as to the present taking. Thus, Mr. Mercury advanced the land banking scheme.
107. The Objectors have not provided sufficient evidence to support their objection to the Town of Carman in moving forward as the Town has considered various locations, concepts and the impact of the senior campus on the community and the interaction of the senior's complex with other groups within the area.
108. Therefore, this Inquiry Officer finds the proposed taking of the Objectors' property to be fair and reasonably necessary for the achievement of goals of

the Expropriating Authority, and the Town of Carman has met the test of the balancing of public versus private interests.

I. CLOSING COMMENTS

109. The Town of Carman has undertaken an enlightened project to realize the pending realities of an aging population. At the present time, final designs have not been approved for Phases III and IV of the undertaking, It is hoped that the Town and the Hetherington's would work cooperatively towards a resolution that would either not take all the land proposed and provide a buffer zone of 130 feet. One would hope that the parties can develop an agreement that the land not being used at present could be leased back at a nominal rent with the Hetherington's having an option to purchase prior to any sale of the land to a third party.

Date: October 6, 2018.

Submitted by G.E. Ulyatt

Inquiry Officer.