IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Thunderbird Entertainment Ltd. v. Greater Vancouver Transportation Authority,* 2011 BCSC 636

Date: 20110516
Docket: S070969
Registry: Vancouver

Between:

Thunderbird Entertainment Ltd.

Plaintiff

And

Greater Vancouver Transportation Authority

Defendant

Before: The Honourable Madam Justice Ballance

Reasons for Judgment

Counsel for the Plaintiff:
Counsel for the Defendant:
Place and Date of Trial:

Place and Date of Judgment:

INTRODUCTION

[1] The plaintiff, Thunderbird Entertainment Ltd. ("Thunderbird"), is one of five owners of a large parcel of

land located in Langley, British Columbia (the "Property"). The Property is the site of the massive theatre complex aptly named "*The Colossus"*.

[2] A number of years ago, the defendant, TransLink, undertook what came to be known as the Golden Ears Bridge project with a view towards replacing the outdated Albion Ferry crossing of the Fraser River. It was envisioned that the new bridge, together with a network of upgraded highways leading to and from it, would meet the regional and local traffic needs of the municipalities of Langley, Surrey, Maple Ridge and Pitt Meadows. TransLink was responsible for the design, construction, operation and maintenance of the bridge and its expanded road system.

[3] In July 2006, TransLink expropriated a strip of 21,420 square feet lying along the western boundary of the Property bounded by 200th Street, a major arterial road in Langley and primary link to the new bridge. In this action, Thunderbird seeks compensation in excess of the amount that it has already been paid by TransLink in respect of that partial taking.

[4] The parties agree that the outcome of this case will turn on the determination of four chief issues posed as questions. They will be better understood once the evidence has been summarized. Having said that, however, it is helpful to appreciate at the outset that the essential thrust of Thunderbird's claim is that severance of

the taken strip caused injurious affection to the remainder of the Property. Expressed simply, the nature of the injurious affection is said to be the disproportionate loss occasioned by the requirement that the smaller post-expropriation parcel continue to accommodate the number of parking stalls mandated by the long-term lease governing the Colossus, thereby shrinking the land available for potential future development more than was simply proportional to the loss in land area.

[5] TransLink disputes that there has been injurious affection and counters that the advance payments actually exceed the maximum compensable amount to which Thunderbird is entitled pursuant to the *Expropriation Act*, R.S.B.C. 1996, c. 125 (the "*Act* ").

BACKGROUND

Early development and the Theatre Lease

[6] Stan Silverman is the long-time president and a director of Thunderbird. With 35 years of experience in the real estate development business, he has been the development manager and is the person responsible for the design and planning of the Property. He has done more development in Langley over the last 30 years than any other developer.

[7] In the mid-1980s the Property was essentially a rural field and home to an equestrian facility and Keg restaurant. In 1998, it was rezoned to allow commercial

development including the Colossus and related and/or supportive entertainment facilities, restaurants, office space and specialized retail uses. Residential use was not permitted. Accompanying this comprehensive zoning was the issuance of a 1998 development permit which included a site plan governing the siting of buildings and parking. There was no direct access to the Property from 200th Street.

[8] The 1998 development permit plan originally envisioned the creation of a California-style, open air mall or "spine" of buildings to the south of the Colossus. I accept that this style of development represented Thunderbird's choice of development form and was not central to Langley's approval of the 1998 development permit. The buildings and structures were not to cover more than 40% of the total lot area. The area that was eventually expropriated is shown on that plan as surface parking.

[9] The evidence establishes that, at that time, the project to bridge the Fraser River had not taken any form nor had designs on any particular real estate, and that Langley did not anticipate the implementation of a crossing for at least another twenty years.

[10] In August 1998, Thunderbird (as the general partner of a limited partnership) entered into a lease with Famous Players Inc. (now Viacom) in relation to the Colossus (the "Theatre Lease"). Of particular interest in

this action is paragraph 6.2 of the Theatre Lease, which stipulated a minimum number of parking stalls as follows:

> 6.2 Parking Facilities
>
> The Landlord shall at all times during the Term maintain Parking Facilities in the Development comprising no less than 1,733 parking stalls allocated to the Theatre and sufficient other parking stalls to comply with all municipal and other governmental requirements in respect of all premises in the Development (such 1733 and other parking stalls being herein collectively referred to as the "Minimum Number of Parking Stalls"), and shall ensure that such Parking Facilities are open, accessible and available for use by the Tenant and its patrons, free of charge, during all normal business hours and in any event at all times when the Theatre is open for business and for a reasonable time after the end of the Tenant's operating hours subject to reasonable disruption by the Landlord consistent with the prudent operation and maintenance of the Development and provided that the Landlord shall complete such work with a minimum of interference of the Tenant's operations. Without limiting the generality of the forgoing, the Landlord shall at all times during the Term maintain the areas shown as parking areas on the Site Plan as part of the Parking Facilities for the Development. Notwithstanding the foregoing, so long as the Landlord at all times during the Term maintains the Minimum Number of Parking Stalls as free, generally available stalls, the Landlord may:
>
> (a) implement valet parking arrangements for tenants;
>
> (b) utilize part of the Parking Facilities for a

"park and ride" facility and charge for such facility;

(c) operate any Parking Facilities which are located beneath any building in the Development as a commercial parking facility, charge for parking therein, regulate parking therein and close off such parking after normal business hours;

(d) establish one or more areas within the Parking Facilities for parking by the Tenant's employees, and employees of other tenants in the Development, in which event the Tenant will cause its employees to park in such areas and provide to the Landlord the license plate numbers of all of its employees, and the Landlord shall be authorized to cause any employee vehicles which are not parked in areas so designated to be towed at such employee's expense;

(e) acting reasonably in accordance with good retail/centre or retail/mixed use centre practice, designate various parking stalls for short-term or time-limited parking or as loading stalls, in order to discourage long-term parking in such stalls;

(f) with the Tenant's consent, such consent not to be unreasonably withheld, implement such other arrangements or regulation of the Parking Facilities in accordance with good retail/centre or retail/mixed use centre practice, as the case may be, including without limitation charging for parking; and

(g) allow portions of the Common Area Improvements including the Parking

> Facilities, to be used for temporary special events to attract customers of the Development.

[11] The word “Development” appearing in the Theatre Lease, including in s. 6.2, is a defined term referring to all of the lands, buildings and improvements as shown on an appended site plan.

[12] As noted, and it is key, the number of parking spaces required under the Theatre Lease was much greater than those required under the applicable bylaw. The Theatre Lease also stipulated that any alteration or expansion of the “Development” was not to materially impair the existing surface parking facilities.

[13] To the best of Mr. Silverman’s knowledge, the site plan attached to the Theatre Lease indicated that of the 1,733 parking spaces allocated to the Colossus, 1,599 of them were to be concentrated in the northern region of the Property.

[14] As it transpired, the Colossus complex was the only building to be constructed on the Property under the 1998 development permit. Mr. Silverman testified it became apparent that the open-air design contemplated under that permit did not hold appeal within the Langley leasing community and, therefore, little progress was made in implementing it. According to him, commercial tenants wanted the more standard development format, being a

standalone building pad with adjacent parking.

[15] I accept Mr. Silverman's evidence that in around 1998 or so, and in any event long before he learned about the prospect of the TransLink expropriation, he had discussions with Boston Pizza about it leasing a standalone restaurant pad on the Property, and negotiated lease rates with it. I accept further that those lease rates ended up forming part of the lease that was eventually executed between those parties many years later.

[16] At some point before the fall of 2000, TransLink and Langley corresponded about TransLink's construction of a new interchange at 200th Street and Highway 1, and the proposed crossing of the Fraser River. At that time, multiple locations for the proposed river crossing were identified and Langley continued to be thinking of 2021 as the likely time horizon.

Events in 2002-2003

[17] In 2002 and possibly continuing into 2003, the BC Transportation Financing Authority ("BCTFA") upgraded the 200th Street interchange. It sold its existing park and ride facility and approached Thunderbird about the prospect of establishing a replacement facility consisting of a major parking area and bus turnaround on the Property. It was intended that the new park and ride depot would occupy a large portion of the undeveloped northwest corner of the Property adjacent to 200th

Street. Thunderbird was interested.

[18] I accept Mr. Silverman's evidence that, in his mind, the park and ride option had commercial value because it brought transit users to the site mainly in the daytime and theatre-goers mainly in the evening, with little potential for conflict in their respective parking needs. It was understood that a number of parking spaces, possibly as many as 115, would be lost as a result. Mr. Silverman testified, and I accept, that Famous Players considered the park and ride enterprise sufficiently beneficial to justify the sacrifice of those stalls.

[19] Although Thunderbird had not fully committed to the park and ride proposal, as the prospect of it gained momentum, it agreed to dedicate a strip of its 200th Street frontage, without compensation, for use as a deceleration lane. I find that the blacktop company working with or for the BCTFA got ahead of itself and, following its own timetable, forged ahead with the deceleration lane and construction of the right-in and right-out access to the Property.

[20] In the summer of 2002, Thunderbird sought a rezoning to allow for the envisioned park and ride facility.

[21] Mr. Silverman testified, and I accept, that it became obvious to Thunderbird that the California mall style development was not working and that the Colossus was effectively sitting in a stalled development. Consequently,

Thunderbird wished to change the development form situated around the Colossus and “clean up title” as Mr. Silverman put it. With that in mind, in April 2003 Thunderbird sought Langley’s preliminary review of a proposed subdivision to create separate lots on the Property. That triggered the need for Thunderbird to provide Langley with a traffic study concerning access to and from the site via 200th Street. Over the course of the ensuing months, Mr. Silverman met numerous times with Langley staff to discuss Thunderbird’s applications.

[22] Mark Bakken is a lawyer with considerable background and experience in real estate law. He has acted as Langley’s chief administrative officer for more than 14 years.

[23] As part of his duties throughout the material time frame, Mr. Bakken convened with the Mayor on at least a weekly basis, and met regularly with members of Langley council and staff. He attended the majority of some 40-50 weekly council meetings each year as well as many weekly meetings of various committees. Mr. Bakken often led and participated in presentations to Langley council on issues pertaining to zoning, property development and subdivision. Accordingly, he is very familiar with Langley’s views on property development within the Township.

[24] Mr. Bakken also participated in meetings with various TransLink personnel with regard to the Property itself. He testified as to the course of events leading to

Thunderbird's development approvals in 2005 and the backdrop to the expropriation.

[25] Mr. Bakken was in every respect a credible witness. He was wholly independent in this proceeding, having nothing to gain from the evidence he gave. I consider his testimony to be reliable and note that much of it corroborated Mr. Silverman's evidence on several key matters. Having raised the matter of credibility, this is a convenient place to remark that the testimony of other witnesses and several documents in evidence also supported important aspects of Mr. Silverman's evidence, and that I found him to be a forceful and credible witness and reliable historian.

[26] During the fall of 2003, Langley solicited input from TransLink and individuals within the Ministry of Transportation in connection with Thunderbird's proposed subdivision application, and specifically with respect to the widening of 200th Street. Mr. Bakken explained that it was pretty much routine for Langley to circulate development proposals to interested agencies for comment. More specifically with respect to TransLink, Langley wrote to it on July 28, 2003 and sought its input as to the preconditions TransLink might recommend be imposed in respect of Thunderbird's subdivision application. The penultimate sentence of that letter reads: "Please note that this subdivision application provides [Langley] the opportunity to obtain any required road widening

dedications along the roads fronting the proposed subdivision." Mr. Bakken confirmed that by this stage the bridge project had come further along and Langley was working in conjunction with TransLink.

[27] After receiving TransLink's plan showing incremental six lane, right-of-way needs along the 200th Street frontage of the Property, Langley staff recommended that Langley amend its tentative approval letter of Thunderbird's subdivision to specifically reference the TransLink widening plan and "... require that the incremental widening area shaded on the TransLink plan be protected by a no-build (including no parking, patio, landscape, walkway or signage areas) restrictive covenant as a condition of final subdivision approval." To that end, it wrote to Thunderbird on November 12, 2003 incorporating the road requirements urged by TransLink associated with its Fraser River crossing project. In that letter, Langley sought a statutory right-of-way or, alternatively, a restrictive covenant with respect to the area that was ultimately taken. Langley's letter invited Thunderbird to discuss and resolve the matter of that right-of-way and restrictive covenant directly with TransLink if it wished to do so, as an alternative to the foregoing.

[28] After their meeting with Mr. Bakken on December 3, 2003, representatives of TransLink decided that TransLink should initiate discussions with Mr. Silverman as soon as

possible in relation to the acquisition of the desired parcel.

Thunderbird's awareness of the project

[29] By now Mr. Silverman had become aware that the bridge project was anticipated to proceed sooner rather than later. He understood that it would necessitate the widening of 200th Street, and that there was a realistic prospect that some of the Property could be expropriated to fulfil that need. According to Mr. Silverman, given that potential, Thunderbird was no longer prepared to host the park and ride because it could not afford to relinquish parking spaces and developable land sufficient to accommodate both the park and ride facility and an expropriation.

[30] I accept Mr. Silverman's evidence that in very short order it was explained to Langley and TransLink that the land taken up by the Colossus in conjunction with the parking stall stipulation under the Theatre Lease meant that the remaining land available for pad building was at a premium. I find too that Mr. Silverman made both Langley and TransLink aware that Thunderbird was not willing to accept the park and ride to its site until it determined the impact of TransLink's bridge project. He further informed them that if Thunderbird was compelled to dedicate the land or provide a right-of-way to facilitate the additional northbound lane, it would withdraw its application and TransLink would have to acquire the desired parcel.

Events in 2004

[31] By early spring 2004, or perhaps sooner, Thunderbird resolved that it would not accommodate the park and ride exchange on the Property. That structure was eventually constructed across the street on 91A Avenue.

[32] The access point off 200th Street built for the park and ride emptied directly into an area of parking stalls. Mr. Bakken recalled there was significant debate about whether Langley would still permit access off 200th Street when it was confirmed the park and ride was not going forward. The evidence establishes that no one wanted to pay to take it out. Thunderbird eventually placed concrete abutments in front of the 200th Street access to prevent traffic because it was not prepared to forego the use of those parking spaces.

[33] In March 2004, Thunderbird applied to Langley for a comprehensive redevelopment of the Property and a proposed amendment to the northwest Langley Official Community Plan (the "OCP") for rezoning to permit a broader range of uses, including high-density residential development in the mid-village and south regions in addition to the existing and proposed commercial development on the north. The proposed redevelopment called for a new development permit which contemplated eight freestanding commercial, restaurant and entertainment buildings in the northern sector and new

access to the site from 200th Street.

[34] Langley provided copies of preliminary plans for the redevelopment to TransLink asking it to advise of the requirements that it was "... recommending be imposed as a condition of this application proceeding."

[35] According to Mr. Bakken, upon learning of Thunderbird's strong opposition to volunteering the parcel, Langley regarded itself somewhere in the middle between TransLink and Thunderbird in the sense that it wished to support TransLink as best it could, but was not inclined to embark on steps that might attract liability to the Township. In time, Langley made it clear to TransLink representatives that it would not compel Thunderbird to volunteer the desired parcel as a prerequisite to approval of the redevelopment. It was understood that TransLink would broach the matter directly with Thunderbird. Accordingly, TransLink initiated discussions with Thunderbird.

[36] Meanwhile, Mr. Silverman and various Langley staff continued their ongoing discussions about the proposed development and TransLink's desire to secure the strip of Thunderbird's land for its road widening. In the course of those discussions, Langley came to suggest that, rather than dedicating the land or granting a statutory right-of-way, Thunderbird consider a no-build agreement relative to the proposed area. I accept Mr. Silverman's evidence that the idea struck him as a sensible compromise

because Thunderbird was not prepared to donate the desired parcel or grant a right-of-way or lose its entitlement to claim compensation in the event that an expropriation went ahead. He testified that based on the foregoing, Thunderbird altered its development plan by moving building pads and parking approximately 15 meters eastward from 200th Street and out of the parcel that TransLink planned to use.

[37] Langley saw positives in Thunderbird's applications. In July 2004 Langley staff recommended that council give first and second readings to the OCP rezoning bylaw, subject to Thunderbird satisfying certain conditions. Among those conditions were the creation of rights-of-way for utilities and greenways, registration of various restrictive covenants regarding fire suppression requirements, and securing a linkage between developments on various parts of the site and in connection with access to and from the Property. A dedication to Langley of environmental areas adjacent to Latimer Creek was also requested.

[38] The staff report identified the additional widening of 200th Street for the future lane connections to the new bridge as an unresolved policy issue with regard to the Property. In this context, it recorded that Thunderbird was not willing to volunteer the widening dedication as part of the redevelopment without compensation, but had agreed to locate four of the commercial pads in the northern

sector a sufficient distance back from 200th Street so as not to jeopardize future TransLink land acquisition requirements. The report also mentioned Thunderbird's position that if it was made to dedicate the desired strip without compensation, it would withdraw its redevelopment application.

[39] By letter of August 13, 2004, TransLink tried to further enlist Langley's assistance to "reduce the property acquisition costs for widening 200th Street". In this regard, it asked Langley to require that Thunderbird donate the portion of the Property needed for the project, or otherwise ensure that no improvements were permitted within that area, as a condition of approving the proposed development. In that letter, TransLink describes the widening of 200th Street as a commitment that it has undertaken.

[40] By letter dated August 18, 2004, Langley informed TransLink that staff had recommended a no-build set-back to be administered through specific development permit siting requirements, and not intended to be secured by a right of way or restrictive covenant. Mr. Bakken testified that this letter amounted to Langley making it clear to TransLink that a dedication or right of way in respect of the desired parcel was not going to be made a condition of the approval process or issuance of the development permit.

[41] In its August 2004 report, Langley staff reported

that because Thunderbird would not allow the no-build area to be obtained by right-of-way or protected through a restrictive covenant, it would need to be secured solely through the siting provisions of the development permit. Staff described this option as providing "TransLink the opportunity to acquire the land it needs for widening at a later date, either through purchase or, as a last resort, expropriation". The report further noted that a total of 1,500 parking spaces were proposed for the north village component of the Property, being 272 spaces more than the zoning bylaw requirement. Langley staff recommended that the commercial pads be placed a sufficient distance back from 200th Street to allow for the future land acquisition. It is noteworthy that Langley staff were not purporting to require that Thunderbird donate or give a restrictive covenant in respect of the desired parcel as a prerequisite to obtaining approval.

Dealings with Famous Players – 2004

[42] Some months prior to October 2004, Thunderbird communicated with Famous Players about its rezoning and subdivision applications and sought its approval to a preliminary site plan prepared in June 2004 as required by the terms of the Theatre Lease. On October 28, 2004, Thunderbird updated Famous Players on the status of the redevelopment. In doing so, it drew attention to the fact that although the original site plan had shown 1,599 of the 1733 parking spaces situated to the area north of Latimer

Creek (the north village), the current plan contemplated only 1,500 stalls in that region. In attempting to persuade Famous Players to approve the new site plan, Thunderbird explained that because it had reduced the site area of new development and had situated the buildings along the roadways, the parking spaces available were in almost identical ratios, and the proposed plan offered more convenient parking to Colossus customers.

[43] By letter dated November 18, 2004, Famous Players consented to Thunderbird's redevelopment site plan. It also acknowledged that Thunderbird's obligation relative to parking was relaxed to provide surface parking stalls within the development as a whole "more or less" as shown in the site plan, including approximately 1500 stalls in the north component.

Master Municipal Agreement - May 2005

[44] The roles of TransLink and the involved municipalities, including Langley, relative to the project were set out in a master municipal agreement dated effective May 2, 2005. In paragraph 3.4, Langley agreed that if the opportunity were to arise in connection with the development of the Property, Langley would take reasonable steps within its capacity and powers to preserve the possibility for the expansion of such portion of 200th Street from four lanes to six. Mr. Bakken explained that Langley was merely committing to operate

within the scope of its jurisdiction to help facilitate the project.

The Covenant, 2005 Development Permit and Statutory right-of-way

[45] I accept Mr. Silverman's evidence that late in the course of the ongoing negotiations, Langley sought a restrictive covenant to be imposed by a municipal officer over the proposed set-back area off 200th Street. Thunderbird agreed to it. To that end, in June 2005, Thunderbird (and its co-owners) executed a restrictive covenant (the "Covenant") over a parcel fronting 200th Street, which roughly coincided with the 15 meter set-back designated in the pending 2005 development permit and approximated the parcel that was ultimately expropriated by TransLink. Mr. Bakken characterized the Covenant as a restatement of the set-back process already underway in the pending development permit.

[46] The Covenant recites that Langley wishes to ensure there is no building on the Property within a specified area and provides, in relevant part:

> ... the parties hereto covenant and agree that the said Property will not be used or built on except in accordance with this Covenant as follows:
>
> i. The construction of any buildings, structures, patios, signage or the installation of landscaping (other than grass), walkways or parking in the Covenant area is prohibited.

ii. The Property will not be developed or redeveloped in any manner other than that approved in writing by [Langley] or that manner in existence at the time of entering into this Agreement, unless the provisions herein provided for have been complied with.

[47] Also of interest is subparagraph 1(j) which contemplates the amendment of, addition to, or discharge of the Covenant provided it is executed in writing by all parties.

[48] More or less concurrently with the execution of the Covenant, Thunderbird (and its co-owners) granted a statutory right-of-way in Langley's favour for the construction and maintenance of a public trail and pathway through the Property and a covenant restricting ingress and egress to the site. A temporary right-of-way authorizing TransLink to utilize a portion of the remainder for the purpose of carrying out the road widening project and related works was also signed. Upon its expiration, the rights of use enjoyed within the temporarily encumbered area reverted to the owners.

[49] Thereafter, the amendment to the OCP, rezoning and the development permit were adopted by Langley and a new development permit issued in respect of Thunderbird's proposed redevelopment of the north and mid-village components of the Property.

[50] The 2005 development permit allowed for pad

buildings along the periphery, except that it stipulated that buildings located adjacent to 200th Street were to be set back a minimum of 15 metres or other such distances determined by the director of engineering to accommodate the future widening of 200th Street. The site area covered by buildings under the 2005 development permit totalled 151,730 square feet, of which 103,300 was occupied by the Colossus.

[51] The bylaw enacted to amend the OCP contained general guidelines regarding parking and traffic/pedestrian circulation. In describing the overall objective of the development permit as it pertained to parking, the amendment bylaw stipulated that crime prevention and child-friendly principles be applied to all buildings and parking lots, that landscaping screen parking areas, and that additional landscaping be provided within parking lots. More particularly, the bylaw provided: (1) underground or enclosed parking was to be encouraged for residential uses and designed in accordance with crime prevention principles; (2) that common parking be located primarily in the interior of the site; (3) parking lots were to provide a pedestrian pathway network through the parking area to provide convenient and safe pedestrian access between buildings, parking areas, sidewalks and adjoining streets; and (4) wherever possible, the pathway system should incorporate landscaping.

Amendment to the Theatre Lease

[52] Effective July 12, 2005, the Theatre Lease was formally modified in a number of respects, including a reduction in the mandatory number and allocation of surface parking stalls. In this regard, the definition of "Parking Facilities" was amended so as to exclude parking structures and facilities to be built as part of the south region of the Property and those constructed relative to building "E" in the north component. The opening sentence of s. 6.2 of the Theatre Lease concerning parking facilities was deleted and replaced with the following:

> The Landlord shall at all times during the Term maintain Parking Facilities in the Development comprising that total number of surface parking stalls, more or less, as shown on the Site Plan within the Development as a whole, which shall include approximately 1500 surface parking stalls in the North Component, with the Tenant having the right to use the surface spaces in the South Component, as and when requested (such 1500 and other parking stalls being herein collectively referred to as "minimum Number of Parking Stalls") and shall ensure that such Parking Facilities are open, accessible and available for use by the Tenant and its patrols, free of charge, during all normal business hours and in any event at all times when the Theatre is open for business and for a reasonable time after the end of the Tenant's operating hours subject to reasonable disruption by the Landlord consistent with the prudent operation and maintenance of the Development and provided that the Landlord

> shall complete such work with the minimum of interference with the Tenant's operations.

[53] This amendment brought about important changes regarding parking. First, Colossus parking was now confined to the northern component rather than throughout the entire Property. Second, the surface spaces were no longer allocated specifically to the Colossus. Third, Thunderbird was released from its obligation to ensure that there were sufficient parking spaces over and above those at one time allocated to the Colossus, with respect to any new buildings. Finally, the number of surface stalls was now described as being "approximately 1,500".

The Partial Taking

[54] The vesting notice for the expropriation was filed in the land title office on July 12, 2006. The land taken by TransLink was slightly less in scope, but otherwise the same, as the parcel charged by the Covenant.

[55] Construction of the bridge project was officially launched on June 27, 2006. The Golden Ears Bridge opened to traffic nearly three years later.

[56] After the expropriation, TransLink paid Thunderbird the sum of $580,250 over two instalments, representing $556,900 for the parcel taken, and $23,350 for the market value of the temporary statutory right-of-way.

The Experts

1. Rick Jones and Carl Nilsen – Thunderbird's experts

[57] Thunderbird tendered Rick Jones as an expert in urban planning. Mr. Jones is a principal of Urban Design Group Architects Ltd. He has 34 years of experience in designing and planning development projects, the majority of which are shopping centres and commercial retail developments, and also include theatre entertainment complexes. At the time of the trial, Mr. Jones had three ongoing projects that involved theatre complexes and restaurants. He also has prepared designs for many restaurants of various types.

[58] Thunderbird also relied on the expert opinion of Carl Nilsen, a senior real estate appraiser with extensive valuation experience, and the general manager of the Altus Group Ltd.

[59] The parties agree that the relevant valuation date is July 12, 2006.

[60] Prior to the commencement of this lawsuit, Thunderbird retained Mr. Jones to prepare the plan for the site in respect of the 2005 redevelopment. It was his site plan that was submitted to Famous Players and approved by it in 2004, before the formal amendment of the Theatre Lease.

[61] After the expropriation, Mr. Jones was asked to assist Mr. Nilsen by drawing plans depicting the location, number and size of development pads in the northern component of the Property before and after the taking. Mr. Jones prepared his site plans with the stated objective of maximizing the available buildable area consistent with Mr. Nilsen's determination of the highest and best use of the Property, and assist Mr. Nilsen to better delineate the particulars of the highest and best use as a foundation for assessing value. Mr. Jones's designs are intended to be used in tandem with Mr. Nilsen's appraisal.

[62] Mr. Jones's site plan of the pre-expropriation scenario assumed that the taking had not occurred and that the set-back area and the Covenant did not exist (sometimes referred to as the "Before Plan"). His post-expropriation scenario was intended to reflect the northern part of the Property as it stood after the taking. Mr. Jones prepared two core after plans. The second version was relied upon by Mr. Nilsen in his appraisal. I will sometimes refer to this version as the "After Plan". To maintain consistency of design Mr. Jones used the same site-planning criteria in the before and after plans.

[63] The presentation of Mr. Jones's written report was somewhat unusual in that it took the form of a letter from Thunderbird's counsel addressed to Messrs. Jones and Nilsen, purporting to express and confirm their respective

views and certain statements. During his testimony Mr. Jones verified, and I am satisfied, that insofar as the contents of that letter refer to what he advised or to his opinion, the letter accurately represents his opinion.

[64] In Mr. Jones's view, the location of a building pad matters to prospective lessees in the sense that higher lease rates would be obtained for those fronting 200th Street than for those on the eastern side of the site with less visibility. That observation was not disputed. Mr. Jones also observed that the size of pads were important, noting, for example, that family-type higher end restaurants generally seek building pads ranging from between 4,000 and 8,000 square feet and prefer the free-standing model. The 2005 development permit plan provided for four buildings or five pads along the 200th Street frontage. Mr. Jones believed that additional building pad space along that prime corridor could have been accommodated under that plan. In order to achieve design optimization, he placed five buildings or six pads along 200th Street in his Before Plan and eliminated the drive-through restaurant in order to gain more parking and enhance building space.

[65] In carrying out his task, Mr. Jones was asked to assume that several matters were fixed, such as the location of the Property, and specifically that the west side of it fronted the high-traffic thoroughfare of 200th Street, that the zoning in place allowed for a wide variety of

commercial, entertainment and retail uses, and that it was compulsory to maintain 1,500 parking spaces. Also inflexible for Mr. Jones's purposes were the existence of: (i) the Colossus complex; (ii) the site entrance points to the Property established by Langley and the Ministry of Transportation; and (iii) the public trail/pathway running along the south end of the northern area. At the time of Mr. Jones's assignment, four pads were leased to restaurant tenants. The existence of those leases was not to constrain his designs.

[66] As instructed, Mr. Jones also proceeded on the assumption that the location, number and size of the building pads authorized by the 2005 development permit plan could be altered. In that regard, he explained that in the course of preparing the 2005 development permit plan, he had participated in numerous discussions with Langley staff and based on those he understood that Langley would be very amenable to granting amendments to the plan. In Mr. Jones's experience, Langley's flexible attitude was typical and reflected the fact that a development permit is ordinarily considered to be a general concept plan in that it is recognized that it will be modified to a certain extent during the life of the development process. Mr. Silverman persuasively testified to similar effect.

[67] Mr. Jones emphasized that it is vital for a site of this kind to have appropriate internal roadways or drive aisles

to promote uninterrupted traffic flow. To his mind, the access and egress points and the internal road pathways of the northern area presented natural site boundaries. On his plans therefore, he notionally carved up the northern component into nine discrete areas and numbered them 1 through 9. Areas 1 and 7 comprise the prime real estate running alongside 200th Street.

[68] In both scenarios, Mr. Jones concentrated as much building as possible in the more desirable areas 1 and 7 which bound 200th Street so as to minimize the loss in buildable area in that higher value area. The total building square footage in the Before Plan was 63,944.85, plus the Colossus theatre. The total building square footage in the After Plan was 52,330. The overall difference in buildable area between the two plans is a reduction of 11,614.85 square feet in the After Plan. The loss of building area in the After Plan can be broken down more specifically as follows:

A. Portion fronting 200th Street;

Area 7: (1) building A: loss of 1,036 sq. ft.
(2) building K: loss of 2,304 sq. ft.
Area 1: no reduction

3,340 sq. ft

B. Eastern side/Rear of site

Area 3 (1) building H: loss of 113.85 sq. ft.
Area 9 (1) building J: loss of 8,161 sq. ft

8,
274.85 sq. ft

Total: 1
1,614.85 sq. ft

[69] Mr. Jones also underscored the importance that parking plays in the requirements of restaurant tenants attracted to a site of this kind. A critical factor influencing his designs in both scenarios were the parking ratios established by what Mr. Jones described as lessee demand. This was, by far, the most controversial aspect of his opinion.

[70] Mr. Jones testified that different market segments, such as restaurants, have their own peculiar minimum parking standards that relate to their individual business plans, over and above the prevailing bylaw parking stall standards. In his experience, restaurant tenants want a certain ratio of parking stalls per square feet of building area located in proximity to their facility to ensure that their patrons have conveniently located parking. Based on this lessee demand factor, Mr. Jones applied the following parking criteria to his site planning:

(a) for restaurants – a minimum of 7 parking stalls per 1,000 square feet of building area located in proximity to the building (i.e. between the building pad and the closest internal road);

(b) for retail space – 1 stall per 215.2 square feet

> of building area, located in proximity to the building.

[71] According to Mr. Jones, the 7 per 1,000 square feet parking ratio represented a minimum level by which a standalone restaurant could adequately service its needs. He testified that a neighbouring Keg restaurant used a ratio of 9.37 per 1000 square feet and that a nearby Starbucks and Tim Hortons used 8.9. Mr. Jones was also aware of restaurateurs that were either buying or interested in purchasing additional surrounding land in order to accommodate parking at a rate closer to 10‑12 stalls per 1,000 square feet of building.

[72] Mr. Jones applied different parking ratios for areas 1 and 7. In the Before Plan, he used 7.18 parking stalls per 1,000 square feet for area 7, and 11.8 spaces per 1,000 in respect of area 1. His logic in doing so was that given the desirability of maximizing building along 200th Street, it was reasonable and preferable to allocate more parking to the eastern portion of area 1 than to area 7. Mr. Jones explained that the configuration of the buildings and angle of the Property in the After Plan prevented him from employing identical parking ratios in the post-expropriation world. Accordingly, in the After Plan he used the ratio of 7.31 parking stalls per 1,000 of building square feet for area 7 observing that that difference would account for only two cars. For area 1, he applied a parking ratio of 10.25 rather than the 11.8 ratio.

[73] Mr. Jones testified that the peak time for theatres is during the evening. He gave persuasive evidence about which of the areas of the northern site would fill up first with the theatre-goers based on the positions of the entrances to the Colossus. He testified that restaurants tend to generate their largest income on Friday and Saturday nights, putting their parking requirements in direct competition with the Colossus on those evenings. Parking availability became a more acute problem when the needs of employee parking were taken into account. Drawing on his lessee demand ratios, Mr. Jones also provided detailed calculations during his testimony indicating that if the restaurants located in area 7 in the Before Plan were at full capacity, there would not be enough parking stalls to satisfy them and the Colossus patrons. He explained that he attempted to address these overlapping parking demands in his plans given that the Colossus and other tenants have to work together as a functioning and complementary unit.

[74] Mr. Jones testified that it was not viable to free up parking space in areas 1 and 7 by simply moving the internal access road off 91A Avenue further to the east. He explained that the distances between the site entrances were critical and that the manipulation of the internal road design would likely create convoluted traffic patterns and lead to a problematic effect known as weaving. There was no cogent evidence to the contrary.

[75] Mr. Jones was cross-examined at length about the legitimacy of the lessee demand and associated parking ratios that he applied in his designs. He agreed that he had not personally undertaken a survey or referred to any other external data recording market demands for restaurant parking in the area. In the course of cross-examination TransLink's counsel explicitly stated that he was not debating the 7 per 1,000 figure, but only which parking spaces qualified as being sufficiently near or convenient so as to be included within the count.

[76] During the course of this exchange, counsel for TransLink pressed Mr. Jones as to the propensity and reasonableness of a prospective restaurant customer parking slightly further afield than the distance allowed in Mr. Jones's notion of convenient parking. While he agreed in principle with the proposition that a restaurant patron could conceivably park across an internal road or otherwise beyond the boundaries that he believed delineated the line for convenient proximity to the destination restaurant or in an area that might be regarded as "near", Mr. Jones remained steadfast in his view that patrons would be unlikely to do so. He further noted that the crossing of internal drive aisles raised safety concerns in addition to proximity issues.

[77] Mr. Jones agreed that the two leases of the four pads in area 7 currently leased to chain restaurants which he had reviewed did not contain a provision guaranteeing

to the restaurant tenant a certain number of parking stalls in close proximity or otherwise. He also agreed that under those leases Thunderbird had reserved the power to change the parking at any time if it chose to do so.

[78] Mr. Jones readily acknowledged the rather obvious proposition, flowing from pure arithmetic, that it would be possible to maintain precisely the same amount of building space in areas 1 and 7 in the After Plan as is shown in the Before Plan, by shifting the required parking further east on the site. Although he agreed that the main ramification of that movement would be the elimination of convenient parking at the 7 per 1,000 ratio, he also voiced concern that there could be building permit difficulties over the residual space that would then exist between the buildings.

[79] Turning to Mr. Nilsen, he opined on the loss in market value to the Property as a result of the expropriation as well as the market value for the temporary statutory right-of-way over the construction period. His written report is lengthy and its contents are dense and complex.

[80] As with Mr. Jones, a crucial premise underlying Mr. Nilsen's analysis is that the amended Theatre Lease obligated Thunderbird to make available 1,500 surface parking stalls on the northern site, whether the expropriation had occurred or not and regardless of any other development. As mentioned, an integral tool in

Mr. Nilsen's valuation is the use of the Before Plan and the After Plan showing Mr. Jones's design of the optimized buildable area in the before and after worlds, taking into account 1,500 mandatory parking stalls.

[81] Mr. Nilsen was instructed to proceed on the footing that the Covenant was a factor to be excluded in determining market value pursuant to s. 33 of the *Act*.

[82] In Mr. Nilsen's opinion, the effect of TransLink's expropriation was two-fold:

1. reduction of the size of the land area available for development by the area of land expropriated; and

2. injurious affection to the remainder in the form of a disproportionate reduction of buildable area and associated net developable land area (as he defines those terms) of the northern portion of the site caused by the unchanged need to maintain 1,500 surface parking stalls after the taking.

[83] In reaching his opinion, Mr. Nilsen determined that the highest and best use of the Property, whether it be vacant or improved, is as a commercial entertainment facility with the potential for further development of associated retail/commercial uses. That point is not contentious between the appraisal experts. The main

controversy between them, and hence the parties, is with respect to Mr. Nilsen's opinion that, although the highest and best use was not altered post-taking, the expropriation nevertheless had the effect of disproportionately decreasing the development potential of the northern sector because of the need to maintain the 1,500 parking stalls, and thereby produced harm and a loss beyond the market value of the land taken.

[84] At common law, there are two recognized methods of determining compensation with respect to partial takings of land. One is based on the before and after model; the other is known as the summation or aggregate technique. Mr. Nilsen used the former approach. Dale Hooker, the expert valuator tendered by TransLink, used the latter.

[85] As the descriptor suggests, a before and after valuation compares a property's development potential and value in the pre-expropriation scenario to its value in the post-expropriation circumstances. The before scenario is typically intended to look at how the land would have likely developed in the absence of the project in respect of which the land has been expropriated.

[86] Mr. Nilsen treated the Property as comprising two principal components of value. One was represented by the Colossus and its associated lands; the other were the lands available for further building development. His methodology relied on the use of a number of defined

terms. “Buildable area” referred to the area of the building footprint that could be constructed on the site, other than the Colossus. Mr. Nilsen explained that when a pad building is constructed, a certain amount of land area apart from the footprint is required for things like parking, driving aisles and landscaping. His concept of “net developable land area” corresponds to this notion of the need for an expanded area to fully accommodate the buildings (other than the Colossus) before and after the taking. The quantification of the net developable land area is essential to Mr. Nilsen’s assessment of the injurious affection claim. The legitimacy of its application is controversial.

[87] Because Mr. Nilsen determined that the land available for further development had different characteristics depending on its location within the site, for valuation purposes he notionally divided the northern parcel into two sub-areas: the front portion and the rear portion. In that construct, the front portion ran along 200th Street and the rear parcel was located at the eastern part of the site. He then separately calculated the net developable land area for the front portion and the rear portion.

[88] From Mr. Nilsen’s standpoint, several ingredients influenced the building area and hence, the associated net developable land area. They included considerations such as the size of the building pads, traffic layout, parking

ratios and the configuration of the pad buildings themselves. The interplay between the size of the pad and the layout for parking was also taken into account.

[89] The amount of land area necessary to support the building is determined by applicable municipal zoning (e.g. parking and set-back requirements) and market factors (e.g. site design and parking requirements). Mr. Nilsen acknowledged that parts of the expropriated parcel, such as the portion encumbered by a public trail and an internal bisecting road, were not considered developable and were therefore not considered by him in estimating the net developable land area in the before scenario.

[90] With reference to parking ratios and pad layouts, Mr. Nilsen relied on and echoed Mr. Jones's opinion that prospective restaurant tenants have requirements about parking volume and location. He testified that those lessees would require adequate stalls within the boundaries formed by the internal roads.

[91] Mr. Nilsen noted that the entrance points into the Property were established by Langley, and that the road separating area 1 from the rest of the development was fixed by the Ministry of Transportation. He reasoned that it would, therefore, be difficult to alter the internal road network to accommodate development of the pad buildings. Consequently, the internal roads were taken as fixed and remained constant in both scenarios.

[92] Another vital factor identified by Mr. Nilsen was the location of the pad buildings. He agreed that Mr. Jones's concentration of the pads along 200th Street was justified so as to reflect the reality that buildings situated there had a superior exposure and would demand higher rents in the market place than those located in less prominent locations on the site. That notion of value differential is not contentious.

[93] Mr. Nilsen defined the net developable land area of the front portion as being the land between the internal circulation roads and the site boundaries to the north, the west (200th Street) and the south. The front portion captured areas 1 and 7 of Mr. Jones's site plans. Mr. Nilsen's construct of the net developable land area of the front parcel did not include the access road off 200th Street or the pedestrian walkway. Drawing on the Before Plan and the After Plan, Mr. Nilsen determined that the net developable land area for the front portion in the before situation was 189,204 square feet, which decreased to 170,513 square feet in the after situation. He calculated the loss of the net developable land area to the front portion stemming from the expropriation as the difference between those figures, being 18,691 square feet. The estimated loss in building area was 3,340 square feet.

[94] Mr. Nilsen was not able to identify the net developable land area for the rear using the same method

as for the front. The net developable land area of the rear portion was, in effect, the remainder left to be developed (corresponding to areas 2-6, 8 and 9) once development of the front had been maximized, constrained by the necessity of maintaining the 1,500 parking stalls. Mr. Nilsen, therefore, followed a modified approach in ascertaining the net developable land area of the rear portion. First he measured the reduction in building area relative to the two building pads located on the rear portion (buildings H and J) on account of the taking. That calculation yielded a loss of 8,275 square feet in buildable area (23,831 ft^2 in the before scenario minus 15,556 ft^2 in the aftermath). He then used what he regarded as an appropriate site coverage ratio, which reflects the ratio of building coverage to land area, to estimate the approximate amount of land area which would be required for parking in the before and after. In determining the applicable ratio for the purpose of estimating the net developable land area of the rear portion, he considered the site coverage ratio for parking set by municipal zoning and those used in other developments in the vicinity to the Property, and concluded that the ratio of 0.33 was appropriate.

[95] Applying the site coverage ratio of 0.33, Mr. Nilsen calculated the net developable land area of the rear in the before scenario as 72,215 square feet and in the after circumstance as 47,139 square feet. Employing the foregoing methodology, he concluded that the rear portion

of the northern parcel suffered injurious affection in the form of the loss of 25,076 square feet in net developable land area. He further opined that there was no positive impact or benefit accruing to the value of the land after the expropriation so as to diminish or set off the injurious affection. I will return to that aspect of Mr. Nilsen's opinion when I address Issue 3.

[96] The next segment of Mr. Nilsen's analysis valued the land taken and the injurious affection to the remainder that he linked to the expropriation.

[97] Based on market data of the sales of vacant land comparables, adjusted for the date of sale, location, site size, zoning and other relevant features, Mr. Nilsen found that the comparables at the lower end of the scale were mostly interior lots or had inferior potential uses. In light of that, he concluded that a valuation toward the upper end of the comparables range namely, the amount of $34/square feet, applied to the front portion.

[98] It is common ground between the appraisal experts that, for a host of reasons, including the inefficiencies typically inherent in larger land assemblies, smaller parcels sell for higher *pro rata* prices than do larger ones, like the Property. For the most part, the size of the comparables relied on by Mr. Nilsen corresponded to the size of the front and rear portions (approximately six acres together) rather than the size of the entire Property. He adjusted his comparables for size to the front and rear

areas at the rate of 7.5%. Mr. Nilsen acknowledged that had he been adjusting to the full size of the Property, a downward adjustment closer to 20% would have been appropriate. Mr. Nilsen's approach to size adjustment is also contentious.

[99] As a means of providing additional evidence of the market value of the front portion, Mr. Nilsen also appraised it based on a land residual analysis. That approach evaluates the value of land in a completed state after deduction of all development costs and basically entails estimating the achievable rent and capitalizing that projected revenue stream using an appropriate rate of return. Thunderbird tendered the expert report of John Charlesworth, a professional quantity surveyor, to be read in conjunction with this aspect of Mr. Nilsen's appraisal. For purposes of the land residual analysis valuation of the front portion of the site, Mr. Charlesworth opined that the development servicing costs totalled $2,396,683.37, allocated to certain parts of the site. TransLink did not require Mr. Charlesworth for cross-examination, and I accept his calculations as valid.

[100] Applying the residual land model, Mr. Nilsen estimated the market value of the front portion to fall slightly below $32 per square feet. He adjusted that figure upward to $34/square feet as a means of reflecting the higher densities that could have been achieved in the before state.

[101] Although Mr. Nilsen ultimately favoured the direct comparison approach as superior, he concluded that both appraisal models supported a valuation of $34/square feet for the front portion before and after the taking. Applying that valuation to his calculation of net developable land area for the front parcel (189,204 ft^2 x $34), Mr. Nilsen estimated the pre-taking value of the front portion at $6,432,936.

[102] Turning to the valuation of the rear portion, Mr. Nilsen concluded that its value was $27.50 per square foot in both scenarios based on the direct comparison method. He explained why use of the residual land valuation was not available with respect to the rear. Applying that *pro rata* valuation to his calculation of net developable land area for the rear (72,215 ft^2 x $27.50), Mr. Nilsen estimated the pre-expropriation value of the rear parcel to be $1,985,913.

[103] Based on the foregoing, Mr. Nilsen estimated the collective value of both notional parcels in the before scenario as $8,418,849.

[104] Mr. Nilsen then went through the same mathematical exercise with respect to the after scenario. In the regard, he calculated the post-expropriation value of the front parcel as $5,797,442 (170,513 ft^2 x $34). The difference between the before and after valuations of the front produced a loss in value equivalent to $635,494 ($6,432,936 – $5,797,442). He

calculated the post-expropriation value of the rear parcel to be $1,296,323 (47,139 ft^2 x $27.50). Applying the same methodology resulted in a loss in value with respect to the rear parcel of $689,590 ($1,985,913 – $1,296,323, or 72,215 ft^2 – 47,139 ft^2 = 25,075 ft^2 x $27.50).

[105] In the end, Mr. Nilsen concluded that the direct loss due to the taking affected the front portion only, and that the injurious affection was confined solely to the rear parcel of the remainder.

[106] Mr. Nilsen next determined the *pro rata* value of the parcel as if vacant taking into account the provisions of s. 40 of the *Act*. In doing so, he first estimated the *pro rata* value of the Property as a whole, pursuant to s. 40(3) of the *Act*. Utilizing the direct comparison approach, he estimated such value at the midpoint of the range, being $27.50 per square foot. Mr. Nilsen then compared that value with the value of the land taken as calculated on the basis previously described, so as to ascertain the difference. Because Mr. Nilsen concluded there was no injurious affection to the front portion of the remainder, the difference between the value of the front before and after the taking was considered to equate to the value of the land taken namely, $635,494. That figure worked out to a *pro rata* value of $29.67 per square foot of the area taken, indicating that the *pro rata* value of the land taken differed from the *pro rata* value of the land taken as a whole as if vacant. In the end, Mr. Nilsen's

final estimate of the value of the land taken reflected such difference in accordance with the provisions of s. 40(5). His final estimate was $635,494 rounded to $635,000. Adding that amount to Mr. Nilsen's estimation of loss in value related to the injurious affection to the rear parcel of the remainder, rounded to $690,000, produced an aggregate loss of $1,325,000, exclusive of interest.

[107] Mr. Nilsen separately valued the temporary statutory right-of-way adjacent to the taking. He was instructed to assume that it was in place for 32 months commencing with the registration of the vesting notice. He also assumed an annual rate of return of 10% of the underlying land value. Based on those assumptions, and applying the *pro rata* market value of $27.50 relative to the encumbered area, Mr. Nilsen calculated a notional rent payable, and hence the value, at $31,607, which he rounded down to $31,600.

[108] Adding that figure to his other calculations of loss, yielded an aggregate loss of $1,356,607, without interest.

3. Dale Hooker and Jay Wollenberg – TransLink's experts

[109] Mr. Hooker has been an accredited real estate appraiser since 1972. Like Mr. Nilsen, he has impressive credentials and is well-qualified to perform valuations of a wide variety of properties located throughout the Lower Mainland and Fraser Valley regions.

[110] TransLink relies on Mr. Hooker's opinion in support of its position that the expropriation caused no injurious affection to the remaining lands, and even if it did, the resultant benefits accruing to the remainder more than offset such damage. TransLink also places weight on his opinion that the Covenant should not be excluded from consideration when estimating the market value of the undeveloped strip that was taken.

[111] Mr. Hooker provided two reports. The initial one, dated October 31, 2007, predated Mr. Nilsen's report. His second report dated February 12, 2010 was an addendum to his first and in partial rebuttal to Mr Nilsen's report.

[112] In his 2007 report, Mr. Hooker acknowledged that because it is considered to be all encompassing, the before and after technique which is outlined in the opening of s. 40(3) of the *Act* and was employed by Mr. Nilsen, is often the preferred way to value partial takings. He explained, however, that the lack of a reasonable volume of sales data of comparables can compromise the reliability of the before and after model. In his view, it was not practical to utilize it in this case mainly because of the absence of what he considered to be useful sales comparables. A second reason was because the expropriated area represents such a small section of the Property.

[113] Mr. Hooker decided that the summation or aggregate valuation provided a superior

methodology. The first step of that approach involves estimating the market value of the land taken with reference to comparables, adjusted to reflect dissimilarities in basic characteristics. Mr. Hooker reviewed sixteen comparables, the majority of which were less than 5.2 acres in size. Acknowledging that larger parcels generally command a lower price per square foot than do smaller ones, he adjusted the comparables for size and made additional adjustments he considered appropriate.

[114] Mr. Hooker's adjusted comparables indicated a span of values of between $17.69 and $27.87 per square foot, with the majority of them suggesting an even tighter range of between $23.01 and $27.84 per square foot. He concluded that $26.00 per square foot represented the price that the Property would reasonably command as though vacant as at the date of the taking. Multiplying that figure by the square footage of the Property produced a rounded aggregate value of $23,172,000, absent improvements (*i.e.* vacant), as the value of the Property before the partial taking.

[115] Although Mr. Hooker shared Mr. Nilsen's opinion that the highest and best use of the Property as at the date of the taking was as a commercial development site anchored by the existing Colossus in accordance with the prevailing zoning and as envisioned in the 2005 development permit, he estimated the market value for the

whole of the Property as though it were vacant. Thunderbird insists that represents an insurmountable flaw in Mr. Hooker's valuation because the Property is obviously not vacant. It is home to the Colossus complex which Mr. Silverman says, and I accept, accounts for the vast majority of its value.

[116] In the next step, Mr. Hooker purported to estimate the market value for the expropriated interest. However, as I understand his report, what he effectively did was carry out the second calculation set out in s. 40(3) of the *Act* which establishes a minimum amount of compensation to be paid to a landowner in respect of a partial taking. Section 40(4) of the *Act* makes it clear that in performing that statutory calculation the land is to be valued as though it were vacant. Applying that mathematical calculation yielded a floor value of $556,900 in respect of the taken portion.

[117] Mr. Hooker next turned his mind to s. 40(5) of the *Act* and concluded that the area of the taking captured land that was no more or less valuable than the average value of the land that was not taken. Accordingly, he concluded that no adjustment to his estimation of market value of the taken portion was warranted pursuant to s. 40(5). Specifically, Mr. Hooker made no adjustment or reduction in the value to reflect any lesser utility or appeal resulting from the Covenant. As will be seen, in his 2010 addendum report, Mr. Hooker altered his view.

[118] The second branch of Mr. Hooker's evaluation considered the impact of the taking on the market value of the remaining lands pursuant to s. 40(1)(b)(ii), that is, injurious affection. In this context, he stated that the taking did not result in changes in access to the Property nor did it physically impact the existing buildings or parking facilities. It is significant that Mr. Hooker's reference to parking requirements was to those contained in the governing bylaws and not the more demanding requirement imposed under the amended Theatre Lease. Indeed, Mr. Hooker did not take the parking stall provisions of the amended Theatre Lease into account in performing his valuation and proceeded on the basis that they had no effect on the value of the portion taken and were not relevant to the issue of injurious affection to the remainder. Thunderbird contends that ignoring the reality of its contractual parking stall obligation is another grave flaw in Mr. Hooker's appraisal which discredits the reliability of his entire valuation.

[119] Mr. Hooker noted that in the 2005 development permit plan, eight commercial buildings (in addition to the Colossus) were all to be sited on the portion of the Property which now comprised the remainder. While he acknowledged that the buildings along 200th Street would be closer to the widened roadway post-expropriation, in his view the taking had no impact on the development potential of the remainder. In his view, the ability to construct the commercial buildings sited in the 2005

development permit plan remained unchanged and would be no smaller, less desirable or less valuable post-expropriation. On p. 55 of his 2007 report Mr. Hooker concluded with these remarks:

> If not for the taking it may have been possible to gain approvals for more building area on the subject property due to the larger site area. Nevertheless, it is important to note that the reduced size and slightly changed configuration of the subject property after the taking has had no impact on future use potential for the remainder except as the land area taken added to this potential on a pro-rata basis in the "before" scenario. The contributory value of any potential building area lost to the taking is therefore internalized in our estimate of market value for the land taken, pursuant to Section 40(1)(a). [underlining in original]

[120] In valuing the temporary right of way, Mr. Hooker assumed an annual rate of return of 10%, as had Mr. Nilsen. At the time that he made his computation, it was anticipated that the interest taken would be returned to Thunderbird after 25 months. Based on those assumptions and applying a market value of $26 per square foot, Mr. Hooker calculated a value of $23,346 for the temporary statutory right-of-way, bringing Thunderbird's total compensation to $580,250.

[121] Jay Wollenberg is an urban planner, experienced in the zoning and development approval processes in British Columbia. He has worked directly for developers and with municipalities alike. Mr. Wollenberg was tendered by

TransLink to draw on his experience as an expert and outline for the Court the typical negotiating process and the customary “trade-offs” that pass between the participants.

[122] As mentioned, a chief point of controversy in this case is whether the Covenant ought to be taken into account in assessing market value. That, in turn, raises the question of how the Property came to be affected by the Covenant and, more particularly, whether the land subject to it was voluntarily dedicated by Thunderbird as part of the give and take dynamic connected to obtaining approval of its 2005 comprehensive rezoning and development application.

[123] In discussing the usual interplay between a municipality and property developer within the development approval structure, Mr. Wollenberg observed that a municipality has a high degree of discretion to decide whether to approve or reject development proposals, land uses and proposed changes in zoning and in the regulation of the form and character of development generally. He noted that when dealing with developers, municipalities almost always harness their powers under the applicable legislation to achieve benefits seen to be in the public interest.

[124] Mr. Wollenberg reviewed and provided commentary on the historical aspects of the development approval process that he considered to be material, from the

original 1998 comprehensive zoning and development approval for the spine layout, through to completion of the series of 2005 approvals.

[125] Based on his review of the materials, but without any direct knowledge of the particular case, Mr. Wollenberg came to the view that in negotiating with Thunderbird, Langley used its discretionary authority in order to achieve a package of public benefits. He identified those benefits as taking various forms, such as public trails and the protection of an environmentally sensitive area. In his view, the land represented by the Covenant was also included among those benefits, and that its existence effectively prevented the use of that parcel of land for buildings and parking from its inception in 2005 onward. He said it was normal that some of the requirements culminating in the granting of the Covenant originated from requests made by external agencies, such as TransLink, to whom Thunderbird's applications were circulated by Langley for input. Mr. Wollenberg inferred that Thunderbird was motivated to confer public benefits upon Langley, and did so voluntarily, because it wanted to achieve the private economic benefit that would flow from the approval to move forward with its development.

[126] In Mr. Wollenberg's opinion, Langley elected to use its ability under rezoning, development permit and subdivision approval processes to ease the acquisition of land for the widening of 200th Street, with Thunderbird's

voluntary compliance in exchange for benefits in the form of rezoning and subdivision approval. He went so far as to conclude that because the limitations were part of the *quid pro quo* that characterizes municipal approvals, Thunderbird could be said to have been compensated for the effect of the Covenant by way of the benefits it gained via approval of the desired rezoning and redevelopment.

[127] From Mr. Wollenberg's perspective, Langley and Thunderbird had together created the circumstance which paved the way for TransLink to acquire the parcel that had already become severely limited in terms of its use and development potential. He concluded with the opinion that any negative impact on the development potential of the remainder flowed from the Covenant which came about with Thunderbird's consent, and that no additional ill-impact resulted from TransLink's partial taking.

[128] In cross-examination, Mr. Wollenberg acknowledged that his report essentially reflected his view as to how municipalities tend to act in the "usual" development process. He agreed that municipalities can and do exercise their powers in respect of zoning applications with reference to a variety of criteria other than extractions from a developer, including public interest factors such as whether a development is desirable to the community from a land use or other economic perspective (e.g. job creation), or to clean up a gateway area.

[129] While I accept that Mr. Wollenberg is qualified to

testify about the typical “to and fro” between a land developer and municipality within the development approval paradigm, he had no direct knowledge of the circumstances in this case. He was not involved in the Thunderbird project and did not speak to anyone at Langley about it. More specifically, he had no real knowledge of the manner in which Langley might have been motivated to exercise its discretionary powers vis-á-vis the Thunderbird redevelopment project, other than what he had deduced from the documents provided to him. In that regard, it should not be overlooked that he did not have the benefit of a full review of all of the TransLink correspondence. Additionally, Mr. Wollenberg agreed that he had not directed his mind to the provisions of s. 33 of the *Act*. Accordingly, his opinion ought not to be taken as pertaining to the application of that section.

[130] After completion of his 2007 appraisal, Mr. Hooker became aware of the conclusions reached by Mr. Wollenberg and prepared an addendum report dated February 12, 2010.

[131] Mr. Hooker shared Mr. Wollenberg’s observations that local governments frequently obtain public benefits, such as dedications for a future road widening, from developers who are seeking rezoning, subdivision and/or development approvals, even in the absence of an imminent project. As noted previously, in his 2007 report, Mr. Hooker did not discount the value of the expropriated

land based on any impairment caused by the existence of the Covenant. However, after reflecting on the contents of Mr. Wollenberg's opinion, he changed his mind and formed the fresh opinion that the Covenant should not be excluded from consideration when estimating the market value for the land taken under s. 33 of the *Act*. He echoed Mr. Wollenberg's view that the Covenant did not come about as a result of the expropriation but, rather, was freely given by Thunderbird prior to the taking as part of the negotiations underlying its desired comprehensive redevelopment project.

[132] Mr. Hooker opined that the functional utility of the parcel had already been fixed by the 2005 development permit and the Covenant which put the rentable area elsewhere on the site. He reasoned that when the Covenant was taken into account, it became clear that the taken portion was already restricted as to its use and merely remained as a buffer region between the pads on the remainder and the traffic on 200th Street. Those conclusions informed Mr. Hooker's new view that the expropriated portion was not an equal contributing part of the whole under the *Act* under s. 40(5).

[133] In the result, Mr. Hooker determined that the value of the taken parcel should be discounted by a factor of 50%. In other words, he came around to the opinion that TransLink had overcompensated Thunderbird for the expropriated parcel.

[134] In his addendum report, Mr. Hooker queried the legitimacy of Mr. Nilsen's factual assumption that, in the absence of a scheme, Langley would have necessarily granted the desired access off 200th Street or the rezoning and development approvals without requiring a road dedication to allow for future expansion of 200th Street. However, in cross-examination it was established that, like Mr. Wollenberg, Mr. Hooker had not been party to the negotiations and simply did not know what Langley would have done one way or the other. He also acknowledged that he had relied entirely on Mr. Wollenberg's opinion in reaching his subsequent opinion that the Covenant ought to have been taken into account.

[135] Mr. Hooker disagreed with Mr. Nilsen's opinion that there had been a disproportionate loss, characterizing such loss as speculative, and maintained that no injurious affection had occurred. According to Mr. Hooker, even if there had been a disproportionate loss of the kind put forth by Mr. Nilsen, the negative impact on market value would have been more than offset by the positive effects of the bridge project.

[136] Both valuation experts acknowledge that positive effects from the expropriation, and the Golden Ears Bridge project for which it was acquired, are to offset any injurious affection that the expropriation has brought to the site. Their disagreement centers on whether benefits

have indeed accrued. The question of betterment is given more fulsome treatment below under Issue 3.

[137] I move next to Mr. Hooker's estimation of the value of the temporary statutory right-of-way. Like Mr. Nilsen, Mr. Hooker proceeded on the basis of a notional rent of 10% of fee value annually. Using his $26 per square foot valuation, multiplied over 25 months, he concluded the value to be $23,346, as compared to Mr. Nilsen's figure of $31,600.

Legislative Framework

[138] Part 6 of the *Act* contains provisions dealing with the entitlement to compensation in respect of an expropriation and various formulae to be used in the calculation of compensation. Of particular relevance in this case, in addition to the definition of market value found in s. 32, are s. 33 (which stipulates factors that are not to be taken into account in determining market value), s. 40 (which speaks to compensation for partial takings of land) and s. 44 (which addresses the adjustments to compensation to account for special benefits conferred upon the land owner in consequence of the taking). Those sections are reproduced below:

> Definition of market value
>
> 32 The market value of an estate or interest in land is the amount that would have been paid for it if it had been sold at the date of expropriation in the open market by a willing seller to a willing buyer.

Exclusions from market value

33 In determining the market value of land, account must not be taken of

(a) the anticipated or actual purpose for which the expropriating authority intends to use the land,

(b) an increase in the value of the land resulting from a use that, at the date of expropriation, was capable of being restrained by a court,

(c) an increase in the value of the land resulting from improvements made to the land after the expropriation notice under section 6(1)(a) or order under section 5 (4) (a) has been served, but not including improvements that are necessary to preserve the value or state of the land,

(d) an increase or decrease in the value of the land resulting from the development or prospect of the development in respect of which the expropriation is made,

(e) an increase or decrease in the value of the land resulting from any expropriation or prospect of expropriation,

(f) an increase or decrease in the value of the land due to development of other land that forms part of the development for which the expropriated land is taken, or

(g) any increase or decrease in value of the land that results from the enactment or amendment of a zoning bylaw, official community plan or analogous enactment

made with a view to the development in respect of which the expropriation is made.

...

Partial takings

40 (1) Subject to section 44, if part of the land of an owner is expropriated, he or she is entitled to compensation for

(a) the market value of the owner's estate or interest in the expropriated land, and

(b) the following if and to the extent they are directly attributable to the taking or result from the construction or use of the works for which the land is acquired:

(i) the reduction in the market value of the remaining land;

(ii) reasonable personal and business losses.

(2) If a person claims business losses under subsection (1), the losses must not, unless the person and the expropriating authority otherwise agree, be determined until at least 6 months after the loss was sustained.

(3) If part of the land is expropriated, the amount of compensation payable in respect of the matters referred to in subsection (1) (a) and (b) (i) may be established by determining the market value of the area of all of the land before the date of expropriation and subtracting from it the market value of the land remaining after the expropriation occurs, but in no case, subject to section 44, must compensation be less than the amount determined by multiplying

the ratio of the area of the land taken to the area of all of the land before it was taken, times the value of the land before it was taken with the appropriate reduction if the interest expropriated is an easement, right-of-way or similar interest less than the fee simple interest.

(4) For the purposes of the second calculation referred to in subsection (3), the value of the land before it was taken is the value of the land only, having no regard to improvements on the land.

(5) If, in the case of a partial taking, the character and use, or potential use, of the land before it was taken varies such that the land that was taken was, before the taking, more valuable or less valuable than the average value of the land that was not taken, the court may, after making a determination under subsection (3), make an adjustment to reflect that value accordingly.

(6) For the purposes of this section, expropriation of part of the land of an owner occurs only if

(a) he or she retains land contiguous to the expropriated land, or

(b) he or she owns land close to the land that was expropriated, the value of which was enhanced by unified ownership with the land expropriated.

...

Work or use benefitting claimant

44 (1) If part of the land of an owner is expropriated, and the expropriation or the construction or use of works by the

> expropriating authority are of special benefit to that owner or to his or her remaining land beyond any general benefit to any other owner benefited by the expropriation or the construction or use, there must be deducted from the amount of compensation payable to that owner the estimated value of the benefit.
>
> (1.1) If part of the land of an owner is expropriated, and the expropriation or the construction or use of the works for which the expropriated land was acquired are of any benefit to that owner, the estimated value of the benefit must be deducted from the amount of compensation otherwise payable to that owner, under section 40 (1) (b) (i), for the reduction in the market value of the remaining land, whether or not any other owner is benefited by the expropriation of the expropriated land or by the construction or use of the works.
>
> (2) If works are not constructed or used within a reasonable period of time, the owner may apply to the court for an appropriate adjustment of compensation.

Issues

[139] As mentioned, the main dispute is whether the expropriation caused injurious affection to the remainder of the Property and, if so, the proper mode of valuation of it. There are numerous related and sub-issues and the parties have agreed that the outcome of this case will depend on the answers to the following four questions:

1. Is the Covenant to be taken into account in

determining the market value of the Property in light of the surrounding circumstances and s. 33 of the *Act*?

2. Has Thunderbird established a reasonable expectation that the Before Plan, showing Thunderbird's redevelopment plans had the expropriation not occurred, would have been approved?

3. Has TransLink established an increase in the value of the Thunderbird site as a result of betterment from the TransLink project that offsets any injurious affection that the expropriation may have caused to the site?

4. Should an adjustment be made to the appraised value of the Property based on the rate of absorption of Thunderbird's redevelopment pads relative to the comparables?

[140] I found it challenging to neatly divide the analysis into these four compartments as there are varying degrees of factual overlap among them, particularly with respect to Issues 1 and 2. Accordingly, while I have attempted to address the issues separately, they do not stand in isolation as discrete categories.

DISCUSSION

Issue 1: Is the Covenant to be taken into account in determining compensation?

[141] A fundamental step in the determination of compensation for the partial taking is to determine the market value of Thunderbird's interest in it. Section 33 of the *Act* is designed to exclude from the market value analysis any increase or decrease in value resulting from certain factors. The determination of whether the Covenant ought to be excluded from consideration under s. 33 of the *Act* is for the Court to answer in light of the statute, applicable authorities and the evidence.

[142] It is a well-established principle of expropriation law that neither the property owner nor the expropriating authority should be permitted to reap a windfall or an unfair advantage over the other. Accordingly, at common law compensation is to be determined based on a consideration of the circumstances as if the scheme, under which the expropriating power was exercised, does not exist. This central principle has been upheld by the courts in a wide array of contexts and has effectively been codified in s. 33 of the *Act* which excludes certain considerations from the assessment of market value of the land taken: *Cunard v. The King* (1910), (1911) 43 S.C.R. 88; *McKee v. Province of Alberta* (1967), 16 L.C.R. 35 (Alta S.C. Trial Div.) [*McKee*]; *Clements v. Penticton (City)* (2003), 79 L.C.R. 161 (B.C.E.C.B.); *Teubner v. Minister of Highways (Ontario)* (1965), 50 D.L.R. (2d) 195, [1965] 2 O.R. 221; *Kramer v. Wascana Centre Authority*, [1967]

S.C.R. 237; *Re Burkay Properties Ltd. and Wascana Centre Authority* (1972), 2 L.C.R. 9 (Sask. C.A.), rev'd (1973) 4 L.C.R. 59, [1973] S.C.R. vii.

[143] The decision in *McKee* provides a useful illustration. In that case, it was understood that in the course of its future expansion, the University of Alberta campus would move into a region where the subject property was situated. The Province declared the area to be a public works area and froze development within it. It subsequently expropriated the land on behalf of the University and then asserted that the calculation of compensation should be impacted by the development freeze. Milvain J., relying in part on the decision of this Court in *Re Electric Power Act; Re Nanaimo Duncan Utilities Ltd.*, [1950] 3 D.L.R. 461, stated at p. 38:

> ... when land has been given an artificial depreciation in value by a public authority which intends to take it over, that then, and in such event, no Court, in fixing compensation, is bound immutably to that artificially decreased value, brought about by the authority which, in fact, is now doing the expropriation. If such were the case it would mean that, in law, the public authority which can move, as was done in this case, to freeze property for a purpose, could, in effect, at that moment, expropriate the property for its own use but not pay the owner for it until some future time when it sees fit to actually expropriate; and to do so, on the basis of the depressed value, the factual act of expropriation through the freezing had given the property.

[144] Milvain J. measured the value of the property as though the freeze order was not in existence.

[145] The principle expressed by Milvain J. in *McKee* was later captured by the Alberta legislature in s. 43(e) of the governing expropriation statute, and was extended by inclusion of the phrase “analogous enactment made with a view to the development under which the land is expropriated”. That section finds a similarly worded counterpart in s. 33(g) of the *Act*.

[146] Milvain J. subsequently addressed the interpretation of s. 43(e) of the Alberta statute in *Romaniuk v. City of Edmonton* (1977), (1978) 12 L.C.R. 293 (Alta. T.D.) [*Romaniuk*]. Endorsing a broad reading of s. 43(e), he held that the phrase “analogous enactment made with a view to the development under which the land is expropriated” contained within that section, covered a pre-expropriation land freeze imposed by one authority (Minister under the relevant provincial statute) which was subsequently taken by a different authority (City of Edmonton).

[147] *Romaniuk* supports an extension of the common law rule to expropriations carried out by one authority, where the zoning regulation has been enacted by another. The critical feature is the existence of a causal connection between the two acts.

[148] Several years later in *The Queen (B.C.) v. Tener*,

[1985] 1 S.C.R. 533, Estey J. succinctly articulated the common law rule at p. 557: "... a taker may not, through the device of zoning, depress the value of property as a prelude to compulsory taking of the property for a public purpose".

[149] The compulsory establishment of a causal link was addressed by our Court of Appeal in *Vision Homes Ltd. v. Nanaimo (City)* (1996), (1997) L.C.R. 107 [*Vision Homes*]. There, the City of Nanaimo had passed a number of bylaws including a general official community plan, which designated the claimants' land for the extension of a highway. Some years later, the City expropriated a portion of that property for the purpose of enlarging a highway.

[150] An issue arose as to whether the official community plan should be taken into consideration in valuing the land. The Expropriation Compensation Board concluded that s. 32(g) of the statute (the predecessor to s. 33(g) of the *Act*) required that it ignore the official community plan because its provisions were made with a view to the very development in respect of which the expropriation was made.

[151] On appeal, the City asserted that the Legislature only intended to exclude from determination of market value before the taking, bylaws that were passed for the specific purpose of downsizing or freezing the land so as to facilitate the development for which the expropriation is ultimately made, and not bylaws established independent

of the expropriation. The Court of Appeal held that neither the wording of s. 32(g) nor the relevant case authorities justified the restrictive interpretation urged by the City, and rejected its argument. The Court clarified that the vital issue was not constrained to whether the bylaws are made with a view to the expropriation *per se*, but rather was whether the bylaws were passed "with a view to the development in respect of which the expropriation is made", as set out in the closing phrase of s. 32(g).

[152] In the course of its judgment, the Court quoted with approval statements from the board decision to the effect that had there been no official community plan provisions, there would have been no requirement for dedication of the road when a rezoning application was made, and no requirement to build the road when the applications for subdivision and building permit were submitted after rezoning, and that the works and services requirements of the subdivision and building bylaws with respect to the road were, therefore, also to be ignored. The important point that received apparent endorsement by the Court of Appeal is that it is not simply the bylaw or enactment that is to be ignored, but also the requirements made further to the bylaw or enactment. Exclusion from consideration extended beyond merely the bylaws that were causally connected to the project, to encompass rezoning, subdivision and building permit requirements made further to those bylaws.

[153] In *Vision Homes*, the Court emphasized that the

issue is one of sufficient nexus or causal connection between the pre-existing bylaw plans or other enactments, and the expropriation or development in question. It reminded that whether there is causation is a question of fact. (See also, *Clements v. Penticton (City)* 2005 BCCA 212.

[154] In *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32 [*Dell*], the landowner was in the business of property development and was seeking approvals for residential development. The transit authority was in the process of choosing one of two sites for the construction of a new transit station, both of which were situated on the owner's acreage. The City of Mississauga withheld the necessary approvals for the development of the property pending a decision from the transit authority as to which portion it would be acquiring. The time taken by the transit authority to reach a final decision as to the acreage it required for the station delayed the owner's development of the remainder of the land for approximately two years. Once the transit authority made its decision and expropriated, the developer sought damages for delay in carrying out its land development business.

[155] Although the discrete issue in *Dell* concerned the recovery of damages for delay in carrying on business said to be occasioned by expropriation proceedings, the decision is instructive of the larger principle.

[156] In *Dell*, the Ontario Municipal Board found that the

landowner's damages resulting from the delay in expropriation were recoverable under the statute as disturbance damages. It concluded that the property owner was entitled to damages caused by the delay as if they had arisen from the expropriation itself.

[157] The primary question before the reviewing court was whether the award of damages was consistent with the governing legislation and its underlying policy. The court held there had been no disturbance within the meaning of the statute in this case because the landowner did not move or take any action prior to or following the expropriation that would lay a foundation for such a claim. It further concluded that damages due to delay could not be properly characterized as injurious affection because they were not caused by the construction or the use of the transit station as stipulated under the legislation. On appeal, the court upheld the finding of the lower court that damages were not compensable under the legislation.

[158] On further appeal to the Supreme Court of Canada, the transit authority resisted the claim for delay on two grounds. First, it asserted that it had not itself caused the delay, but rather had made various requests of the City which, in turn, had made its own independent judgment. Second, it argued that development delays are caused by many factors inherent in development at large, and hence are not compensable.

[159] The Supreme Court rejected both arguments and

overturned the decision of the lower court. For our purposes it bears emphasizing that the Court dismissed as an artificial distinction, the argument of the expropriating authority that delay had been occasioned by the independent decision of the City which the expropriating authority had simply requested.

[160] Cory J., speaking for the majority, reiterated the essential principles of the interpretation of expropriation statutes. At para. 20, he clarified:

> The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected. This principle has been stressed by eminent writers and emphasized in decisions of this Court. [references and citations omitted.]

[161] The Court reasoned that because expropriation legislation is a remedial statute, it must be given a broad and liberal interpretation consistent with its purpose, stressing that substance and not form is the governing factor. *Dell* endorsed a broad and purposive manner of interpretation of the expropriation statute to comply with the overriding legislative objective namely, to fully compensate – that is, fairly and properly indemnify – a landowner whose property has been taken by government authority.

[162] In the course of its analysis, the Court explained that the meaning of “expropriation” extends beyond the mere transfer of title in that it signifies the process of taking the property for the purpose for which it is required. Consequently, a significant factor is whether events that depressed the value of the expropriated land were part of the expropriation process in the sense of being a step in the acquisition of the lands (para. 37, *Dell*).

[163] The *Dell* Court supported the causal approach to damages.

[164] In *Devick v. British Columbia (Minister of Transportation and Highways)* (1998), 156 D.L.R. (4th) 528, 63 L.C.R. 193 (B.C.C.A.) [*Devick*, cited to the D.L.R.], the Minister of Transportation expropriated roughly 122 acres of ranch land for a highway expansion. At the time of the taking, there was little commercial development of the subject land. The landowner had applied for the rezoning of its lands on a number of previous occasions. The applications had been refused because of the shadow cast over the property for nearly twenty years by the Minister’s position that there should be no rezoning of lands which could be needed for highway improvement.

[165] When it came time to determine compensation, the Minister argued, and the governing board held, that the land owner had not met the onus of persuading it that, absent expropriation, there was a reasonable expectation that the agricultural land would have been rezoned for

commercial use. In arriving at this conclusion, the board placed considerable weight on the past failure of the owner's rezoning applications and the fact that a planner had not been called to give opinion evidence regarding the possibility or probability of a rezoning bylaw being adopted.

[166] In *Devick*, the Court of Appeal observed that the board's ruling had predated the Supreme Court of Canada's decision in *Dell*. It also noted that the expropriation legislation in British Columbia was somewhat more favourable to a landowner than was the Ontario statute considered in *Dell*, in that there was no Ontario equivalent to s. 32(d) (now s. 33(d)), of the *Act*. While acknowledging that the facts in *Dell* were very different than those before it, the *Devick* Court found that the underlying reasoning in *Dell* supported the landowner's contention that the lands in question had been prevented from becoming available for development by the position taken by the Ministry.

[167] In allowing the appeal, the Court commented that the board's emphasis on the absence of opinion evidence was a "most doubtful" basis for drawing the inference against the landowner (para. 22). It remarked further that the board may have imposed an excessively onerous burden on the landowner by suggesting that it was required to show that the failure to obtain rezoning was based solely on the Ministry's intentions (para. 28). That

point to the side, the Court concluded that had the board not committed those errors in the treatment of the evidence and especially had it not failed to have proper regard to the considerable body of oral evidence that the owner had provided about the cloud cast over the property for nearly twenty years by the Minister's position, the board would have found that a reasonable expectation of rezoning existed at the time of the taking.

[168] In *286684 B.C. Ltd. v. Colwood (City)* (1999), 66 L.C.R. 148 (B.C.E.C.B.), the municipality's official community plan bylaw showed an area for a proposed road crossing along private property. In due course, the municipality expropriated a portion of the property within that area for underground sewage piping and not for the proposed road. The municipality argued that a key factor distinguishing the case from *Vision Homes* was that the development that resulted in the expropriation was a sewer and not the road designated in the official community plan.

[169] The board regarded that distinction as overly subtle. It reasoned that pursuant to s. 33(g) of the *Act*, and following *Vision Homes*, it ought to blind itself to the existence of a restriction created by the governing official community plan prior to expropriation which threw a shadow on the development potential of the property. The board also warned of the problematic implications of the argument advanced by the municipality, stating at p. 157:

> If it were generally proper for a municipality to anticipate a road in its high-level planning processes, and then to take only a small piece of that road for an underground pipeline, while arguing that the taking had no value because of the general knowledge of the future road, the municipality would have found a way of circumventing the statutory requirement of proper compensation. In the first stage, a narrow expropriation just for a sewer, little value would be paid because of the anticipation of the road development. Then, if there is a subsequent expropriation for the road, the municipality could again argue for little compensation, this time on the ground that the sewer easement already restricted use of the area. When looked at this way it is clear that the roadway and utility corridor is really one project, and should be seen as such. The board therefore declines to make a distinction between the "development" and the roadway anticipated in the [official community plan]. The board accepts that by section 33(g) of the Act it ought not to take into account any change in value caused by the [official community plan's] location of Wilfert Road as crossing the subject property.

[170] TransLink's position is that Thunderbird's agreement not to develop on the parcel that was ultimately expropriated and its decision to grant the Covenant came about as part of the give and take in its redevelopment negotiations with Langley. It contends that Langley's approving officer acting in the public interest was entitled to impose that requirement as a prerequisite to Langley's approval of the development, and did so in this case.

[171] TransLink also says that the "development" in respect of which the expropriation was made within the meaning of s. 33(d) of the *Act* was the increase in size and/or capacity of 200th Street from two travel lanes to three in each direction. It characterizes the widening of 200th Street as being part of incremental changes in northwest Langley that started in the year 2000 and continued thereafter, and were driven by multiple factors, such as the Golden Ears Bridge project, the Highway 1 interchange, the planned growth of a neighbouring town centre and the expansion of the Port Kells commercial and industrial area. TransLink asserts that, given the above, after 2000 the widening strip would have likely been protected, perhaps even dedicated, in any redevelopment of the Property, rendering the expropriated area unavailable for development in any event.

[172] The evidence does not support TransLink's assertion of a need for six lanes on 200th Street outside of the context of the Golden Ears Bridge project. In its report dated August 16, 2004, Langley recorded that TransLink had advised it that additional widening was required on the east side of 200th Street to accommodate future connections to the bridge crossing the Fraser River. Also material is the fact that the deceleration lane was constructed as part of the interchange project a short time prior to the expropriation project. It is reasonable to infer that had there been any realistic prospect of a 200th Street widening unconnected to TransLink's bridge project, it

would have been raised in relation to the park and ride project. There was no evidence that it had been.

[173] The widening of 200th Street was not a Langley project. TransLink asked Langley to require that Thunderbird dedicate the desired strip for the extra lane as a condition of the approvals of its redevelopment applications. TransLink's own materials specifically say that it was making that request to reduce the cost of acquiring the land that it wanted for its project. There was no suggestion in the correspondence that the road widening was in any way connected to Langley's policies, bylaws or its own project. The contents of the May 2, 2005 master municipal agreement and the fact that it was TransLink who provided the exact alignment of the expropriation, further reflect that it was a TransLink project.

[174] It is true that in its initial responses to Thunderbird, Langley included the requirement sought by TransLink . However, from the time that Mr. Silverman learned of TransLink's intended acquisition of the parcel, Thunderbird was unwavering in its refusal to dedicate the land as a condition to its proposed redevelopment scheme and in its position that it would withdraw its applications if such a prerequisite were foisted upon it.

[175] I accept Mr. Bakken's uncontradicted evidence that Langley would only refuse a development permit if it failed to comply with the development permit guidelines and not as a means of extracting unrelated benefits from a

developer. He also made clear that as part of the overall negotiations, Langley customarily attempted to facilitate a voluntary giving up of things by the developer for the benefit of the community, rather than impose demands on the developer. Langley had no objection to the Thunderbird development project and was generally supportive of it.

[176] Mr. Bakken testified that Langley did not make the issuance of the 2005 development permit or approval of rezoning contingent on Thunderbird granting the Covenant. He explained, however, that at the same time, Langley was not prepared to let Thunderbird build in the path of the coming expropriation. According to Mr. Bakken, the incorporation of the site-specific set-back feature into the 2005 development permit enabled Thunderbird to proceed with development rather than await the anticipated expropriation.

[177] In light of Thunderbird's response that it would wait out the expropriation if it were compelled to dedicate the parcel, I find that Langley reconsidered its position and thought better of attempting to impose the dedication as a precondition to approval as desired by TransLink. At the end of the day, Langley was willing to coordinate efforts with TransLink aimed at having Thunderbird volunteer the land, but was not prepared to demand that Thunderbird volunteer it as a prerequisite to granting approval to the redevelopment applications.

[178] Langley invited Thunderbird to deal directly with

TransLink on this issue because it was understood that it was a TransLink project and that Langley did not have to participate in those discussions. Negotiations ensued between TransLink and Thunderbird regarding the potential sale to TransLink of the desired lands, but they were not successful.

[179] There was a heavy focus at trial on the powers of municipalities to regulate the use of land and buildings through zoning bylaws and other development related approvals, and the scope of the discretion of municipal approving officers generally. TransLink proffered evidence through Mr. Wollenberg as to what municipalities have the power to require in respect of zoning, development permits and subdivision. In his testimony, Mr. Bakken described the parameters that guide Langley in the exercise of its statutory powers and the scope of those powers.

[180] An issue arose as to whether Mr. Bakken's understanding of those matters was entirely correct. I find that even if he was mistaken (and I am by no means finding that to be the case) nothing turns on it; the importance of his evidence concerns the basis upon which he operated on behalf of Langley in relation to the material events and the basis upon which he understood Langley comported itself. It was common ground that Mr. Bakken was not able to speak to what was in the mind of the approving officer in relation to the granting of approval to Thunderbird's applications or as concerns the imposition

or terms of the Covenant. Nor was Mr. Wollenberg. In closing submissions, counsel for both parties shared the view that the entire issue was somewhat of a red herring. I agree.

[181] During trial, I commented that a number of aspects of Mr. Wollenberg's opinions amounted to or were perilously close to factual findings, masquerading as opinion. However, the admission into evidence of his opinion was not objected to at trial on that or any other grounds. That observation aside, while I do not doubt the accuracy of his evidence concerning the customary tradeoffs that generally occur between a municipality and a developer with respect to the development approval process, it goes no further than that. The obvious implication of his evidence to the effect that inclusion of the set-back in the 2005 development permit and the Covenant were the products of such *quid pro quo* in this particular case and thus unconnected to the taking cannot be sustained in the face of the totality of the documentary evidence and the testimony of Mr. Silverman and Mr. Bakken, which I accept.

[182] Because Mr. Hooker's opinion that the Covenant should not be excluded from consideration of market value was built entirely on Mr. Wollenberg's hypothesis, it has no independent value.

[183] The probabilities of the situation amply establish that when faced with the reality of the impending

expropriation, Langley and Mr. Silverman decided that the most sensible arrangement would be for Thunderbird to alter its proposed development by moving the building pads fronting 200th Street outside of the parcel that TransLink wished to acquire. They recognized that it made no sense for Thunderbird to obtain an approval for pads that would be expropriated in due course, and that could therefore never be leased, only to go through the process of preparing and submitting a fresh application to re-site the pads after expropriation.

[184] Thunderbird's redevelopment plan was not for the construction of a specific large building along 200th Street. It simply established footprints for pads to be developed over time that could be and, based on the evidence of Mr. Silverman, Mr. Bakken, Mr. Jones and Mr. Nilsen, I accept often are, shifted around from time to time. I find that Thunderbird was not concerned about the inclusion of the no-build set-back in the 2005 development permit plan because it was understood that it would not preclude it from subsequently obtaining a fresh development permit allowing another form of development, should Thunderbird wish to do so.

[185] I further accept Mr. Silverman's evidence that he was likewise not bothered by the Covenant. He had understood from his discussions with Langley staff that Langley was seeking the Covenant solely because TransLink was pressing it to do so. With that understanding in his mind and based on his decades' long

track record of positive dealings with Langley, and having regard to the context in which the Covenant originated, Mr. Silverman was confident that if the TransLink project fell away, Langley would readily give its approval to re-site the buildings or formally release the Covenant. In all the circumstances, there was a reasonable basis for Mr. Silverman to proceed on that footing. In this regard, I consider it material that the Covenant expressly empowered Langley to approve development and redevelopment in the no-build area, and authorized the parties to amend its terms by agreement. Neither Mr. Wollenberg nor Mr. Hooker had considered those provisions of the Covenant in reaching their collective opinion that it should not be excluded from consideration in this case. The fact that after the expropriation, Langley partially released the Covenant to the extent that it applied to the portion of the area that was ultimately not required by TransLink, fortifies Mr. Silverman's evidence and forcefully supports the view that the Covenant was causally linked to the expropriation.

[186] There is little doubt that in the normal course a property owner has a duty to mitigate for the injurious affection arising out of a partial taking: *Gordon v. North York Bd. of Education*, [1954] O.R. 863, 869 (C.A.); *Kildonan Concrete Products Ltd. v. City of Winnipeg* (1974), 6 L.C.R. 119 at 125 (Man. Arbit.), rev'd on other grounds (1974), 7 L.C.R. 43 (Man. C.A.). In *Dell*, the landowner was not in a position to mitigate because the

transit authority wanted the entire site. In the case at hand, however, TransLink had identified the desired strip long before it filed the notice of expropriation.

[187] I am satisfied that, as a matter of prudence and with mitigation at the forefront, Thunderbird agreed to move the location of its development pads on the 200th Street corridor so they would not stand in the way of the coming expropriation in order to enable Thunderbird to avoid the delay in development that would have otherwise occurred. It was a common-sense, businesslike response to accommodate the inevitable taking and a far cry from Thunderbird having freely given up development of the strip as part of the approval process as alleged by TransLink. In proceeding that way, Thunderbird accepted paperwork confirming that form of development without volunteering the land in question. The preponderance of the evidence establishes that the Covenant was little more than a late in the day belt and suspenders mechanism to record on title that Thunderbird would not be building in the shadow area.

[188] That Thunderbird took prudent steps to mitigate its loss in the face of the expropriation ought not to foreclose or in some measure diminish its right to compensation so long as it is able to demonstrate causation. It does not serve the public interest to compel landowners to await expropriations and then sue for full compensation in circumstances where they are able to proceed, as

Thunderbird did, so as to reasonably accommodate the project and leave compensation to be determined at a later date.

[189] The *Act* is remedial in nature and aimed at fairly indemnifying citizens whose property has been taken by government authority: *Dell*. In *Vision Homes*, the Court specifically considered the question of whether development prerequisites that relate to an expropriation project are to be taken into account, and stated that the exclusion from consideration applies not only to bylaws that are causally connected to a project, but also to rezoning, subdivision and building permit requirements made further to those bylaws. In *Devick*, the same point was made in holding that an owner's recovery is not negatively impacted by events such as development refusals that occur during the "shadow period" during which an expropriation project is pending, provided the causation tie is made out.

[190] In summary, I find that the widening of 200th Street was one step in TransLink's larger bridge project. I find too that the set-back in the 2005 development permit and the Covenant came about as a result of a collaboration between Langley and Thunderbird who shared a common purpose to ensure that the portion identified by TransLink for the acquisition of its project would remain available for its future use relative to the project, while at the same time enabling Thunderbird to move forward with its redevelopment. When the surrounding circumstances are

known, it cannot be fairly said that the imposition of the set-back in the 2005 development permit or the Covenant were independent of TransLink's expropriation and would have even arisen in its absence. To the contrary, the preponderance of the evidence amply demonstrates that the set-back and the Covenant were causally connected to the expropriation. Expressed in slightly different terms, I find that in all probability, had there been no expropriation, there would have been no such set-back or Covenant. Founding the analysis on the core principle of causation clarifies that Thunderbird's recovery must not be compromised by the existence of the Covenant.

[191] Thunderbird has discharged its onus in relation to this issue. By virtue of the application of the common law principles and ss. 33(d) and (e) and further to s. 33(g) of the *Act*, the Covenant is not to be taken into account in calculating the compensation owing to Thunderbird.

Issue 2: Has Thunderbird established a reasonable expectation that the Before Plan which shows Thunderbird's redevelopment plans had the expropriation not occurred, would have been approved?

[192] Section 40 of the *Act* addresses the determination of compensation in respect of partial takings. Of necessity, that determination frequently involves constructing a hypothetical before world and assessing whether there was a reasonable expectation that it would have come about. Oftentimes in expropriation

compensation cases, the issue of what would have happened in the "without expropriation" scenario hinges on a battle of planners and their respective theories as to what the particular municipality would and would not have done in a particular case.

[193] In the case at hand, TransLink offered the evidence of a planner through Mr. Wollenberg. I reiterate my earlier assessment of the general lack of utility of Mr. Wollenberg's evidence and find that it applies equally in relation to resolving Issue 2. Mr. Wollenberg had no knowledge of Langley's objectives, motivations or views in relation to the development of the Property beyond what the face of the documents indicated. Not only did the relevant documents not tell the full story, I have concluded that, on balance, they support Thunderbird's contention that the set-back designation in the 2005 development permit and the Covenant would not have arisen in the absence of the taking. In other words, in the before world the expropriated parcel was available for Thunderbird's use.

[194] Despite the fact that its own people were directly involved in the matter at the time, TransLink did not call witnesses who could have provided first hand testimony to contradict the evidence of Messrs. Silverman and Bakken, who were directly involved.

[195] Counsel for Thunderbird submits that rather than lead direct evidence on the matter, TransLink sought to

advance a “kitchen sink” collection of unsupported theories of the reasoning behind Langley’s actions relative to the project and its approval of the rezoning of the lands, largely by way of cross-examination. Some of the elements of those theories include an assertion (i) that the widening of 200th Street was a Langley project, (ii) that Langley would have required a third lane on 200th Street for its own reasons irrespective of the Golden Ears Bridge project, and (iii) Langley was only prepared to rezone the lands based on a negotiated deal. I have already rejected each of those arguments.

[196] Another disputed factual issue is which pre-expropriation development plan represents Thunderbird’s “authentic” before plan. Answering that question requires an examination of the motivation that drove Thunderbird’s decision to scrap the park and ride facility in favour of its 2005 redevelopment proposal.

[197] TransLink submits that when Mr. Silverman got wind of the TransLink project in late 2003 and realized that the enlarged 200th Street would soon be joining a primary regional transportation system and connecting the Property with another community, Thunderbird’s development plans shifted in a significant fashion. It contends that Thunderbird decided to take advantage of the impending expropriation and the enhanced desirability and value of building exposure along 200th Street it is said to have triggered. TransLink asserts that prior to that turn

of events, Thunderbird had attached no particular importance to the 200th Street frontage as demonstrated by its willingness to have the park and ride facility encumber a substantial part of the northwest corner of the Property. I note parenthetically that this submission seems at odds with TransLink's argument that from 2000 onward there were many initiatives at play apart from the Fraser River crossing project originating within Langley that could have resulted in the enlargement of 200th Street.

[198] In any event, in support of its theory TransLink emphasizes that when Thunderbird submitted its application to Langley to permit the park and ride, there were no building pads shown on the site plan.

[199] TransLink says that Thunderbird's new development proposal which placed buildings along the 200th Street corridor and overlapped, at least to some extent, the location of the proposed park and ride facility, is illustrative of Thunderbird's changed course of action. It asserts that Thunderbird's preservation of the use of the access road off 200th Street and the ultimate integration of it into its 2005 redevelopment plans, is likewise revealing.

[200] TransLink argues that these examples, among others, show that Thunderbird's true "before plan" was the park and ride application. Linked to that contention is TransLink's further submission that once the bridge project had come to the fore, Mr. Silverman "worked the

expropriation" with Langley in such a way as to cram the parking and other encumbrances into the northern sector and thereby confer an enormous upside to the redevelopment of the midsection, elevating Thunderbird to a superior position as a result of the taking.

[201] I find that it does not necessarily follow from the fact that Thunderbird's park and ride development permit did not incorporate building pads, that none were envisioned by Thunderbird, or that Thunderbird had no interest or intention in developing freestanding pads on the 200th Street perimeter in connection with that development.

[202] Mr. Silverman had always understood that there would probably be a bridge crossing of the Fraser River at some point in the future which could have implications for 200th Street. By the time that Thunderbird was entertaining the park and ride proposal, the market had already given a lacklustre reception to the spine layout development style. I find that Thunderbird was well aware of the unfavourable market response and planned to change the form of development on the northern parcel before TransLink's project was announced, and to that end had negotiated with Boston Pizza and settled on future rental terms. I am satisfied on the evidence that when Mr. Silverman learned of the imminence of the bridge project, Thunderbird had not fully committed to the park and ride deal, and that the park and ride plan had not

been fully developed at that stage. The site plan Thunderbird submitted in respect of the park and ride facility and bus depot did not capture the totality of its building plans in the northern sector, including along 200th Street.

[203] Mr. Silverman credibly explained that the shift away from the park and ride was made because that endeavour, in conjunction with the expropriation, would leave insufficient land available for building development, and thus the Property could not accommodate both. He testified that without the building pads, Thunderbird would not be in a position to capitalize on the value created by the park and ride. I accept that. Also noteworthy is that there is no evidence that the park and ride development would have been incompatible with the placement of building pads or would have precluded them.

[204] Mr. Silverman was confident that the development permit could be modified with little fuss and regarded it – in my view reasonably – as a flexible initial template. He is an experienced and shrewd businessman and a successful developer. I accept that Thunderbird intended to commercially capitalize the site if the park and ride facility went through, which included the development of freestanding pads on the 200th Street frontage.

[205] Additionally and contrary to TransLink's submissions, 200th Street was already a major road before the project. All of the witnesses said so, including

Mr. Hooker. That evidence further undercuts TransLink's assertion that the placing of building pads along 200th Street only became attractive to Thunderbird because Mr. Silverman believed the expropriation project would transform 200th Street into a main arterial road.

[206] I reject TransLink's theory that upon learning of TransLink's interest in the Property, Thunderbird radically changed its development plans for the Property in order to take advantage of the changes that would be brought about with the widening of 200th Street and the bridge crossing. Here I would add that I found nothing of importance turned on the fact that the Theatre Lease contemplated the prospect of a park and ride depot, or that at trial Mr. Silverman did not recall the inclusion of that term in that document.

[207] TransLink's alternative, though related, submission seems to be that the real before plan was the 2005 development permit which incorporated the 15-metre set-back, as distinct from Mr. Jones's optimized design laid out in the Before Plan.

[208] Mr. Bakken and Mr. Silverman both credibly recounted the course of events that led to Thunderbird's development approvals, including the designated set-back in the 2005 development permit and the Covenant. I have concluded that the set-back, which essentially corresponds to the expropriated area, was a mode of mitigation in response to and causally connected to the

pending expropriation.

[209] In speaking to the 2005 development permit plan, Mr. Bakken described Langley as generally open to a variety of changes to development on a commercial site like the Property. He confirmed that, for the most part, Langley restricts its focus on whether the new development form meets the applicable zoning parameters. According to Mr. Bakken, Langley's review of siting in the context of a development permit application deals with ensuring that traffic flow on site is safe and other such technical matters; siting is not used to preclude the use of areas of land. Additionally, and as mentioned earlier, Mr. Bakken clarified that Langley's approach was that it was only able to refuse a development permit if it did not comply with the applicable guidelines and would only attach conditions which reflected those guidelines.

[210] In terms of zoning, Mr. Bakken testified that the 2005 zoning in connection with the northern segment of the Property was not substantive from Langley's perspective because the Colossus and restaurant and retail uses were already permitted and the 40% site coverage density had already been fixed. He agreed that, if anything, it amounted to a mild down-zoning in that it imposed a 5,000 square feet cap on retail buildings that had not applied previously. Mr. Bakken also clarified that a rezoning would not have been required in order to change the 1998 open air mall development to the 2005

freestanding restaurant pad format. As mentioned, he testified that Langley was supportive of Thunderbird's overall redevelopment project so long as there were terms included to protect the commercial centres already in place. Langley favoured rezoning of the southern component, in particular, because it was seen as creating a positive gateway to the Walnut Grove neighbourhood.

[211] Mr. Bakken stated there was nothing preventing Thunderbird from applying for a fresh development permit for any other form of development in the future if it wished to do so. I accept Mr. Silverman's evidence to the effect that the 2005 development permit plan was prepared to obtain a development permit with the knowledge that it could be readily adjusted as tenants came along.

[212] Mr. Bakken noted that the Before Plan was consistent with the applicable zoning, including its permitted uses and the 40% site coverage. He could not see any inconsistency in the Before Plan with the development permit guidelines contained in the OCP and, indeed, there was no evidence of any such inconsistency or incompatibility. Mr. Silverman's evidence in this area, which I also accept, was consistent with Mr. Bakken's on all key points.

[213] Mr. Silverman further testified that had the expropriation not occurred, Thunderbird would have proceeded with the Before Plan. Based on his longstanding experience as a developer dealing with

Langley and the ongoing discussions in which he engaged with Langley during the material period, he said he was confident that the Before Plan would have been approved.

[214] During his evidence in chief, Mr. Bakken testified that drawing from his daily involvement with Langley staff and regular interfacing with the Mayor and council, he believed it likely that Langley would have approved a development permit for the Before Plan had it been put before council in the absence of the expropriation project. Mr. Bakken had articulated the same view of what would have probably unfolded in the hypothetical before world had the taking not happened, in a letter addressed to Thunderbird subsequent to the expropriation. Counsel for TransLink objected to the admission of Mr. Bakken's testimony as inadmissible opinion evidence. In the interests of time, I allowed the evidence to be given and cross-examined upon on the basis that I would reserve my ruling on admissibility until these reasons for judgment.

[215] Mr. Bakken was not called as an expert. His contentious view on this pivotal point was not formed from any personal knowledge; it was clearly an inference that he made about the outcome of a hypothetical event in which he would not be the decision maker. That is an opinion.

[216] The jurisprudence establishes circumstances where lay witnesses will be permitted to present their observations in the form of an opinion. The admissibility

of such evidence is a matter of judicial discretion, to be exercised in accordance with the animating evidentiary principles. An exceptional instance that frequently arises was endorsed by the Supreme Court of Canada in *Graat v. The Queen*, [1982] 2 S.C.R. 819 [*Graat*]. There, the Court held that a lay witness may express an opinion where he or she is "merely giving a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly" (p. 84).

[217] In this case, Mr. Bakken's opinion does not stem from any personal observation or fact *per se*. He merely offered his judgment as to what an approving officer would likely do if presented with a plan – a plan that had in fact never been presented. At the same time, he readily admitted that there were technical issues at play which he was not able to speak to relative to the likelihood of Langley's approval of the pre-taking scenario designed by Mr. Jones. Mr. Bakken's belief, although grounded in his years of work experience, amounts to speculation about what another might do in a hypothetical set of circumstances. It is qualitatively different from the nature of the compendious statement contemplated in *Graat* and is not admissible.

[218] It was clear from Mr. Hooker's testimony on cross-examination that he had no special insight or knowledge about whether Langley would have likely approved the Before Plan or granted access off 200th Street in the

absence of the road widening.

[219] As part of Thunderbird's refinancing for the redevelopment, an evaluation of the Property was prepared as at January 1, 2005 on the assumption that Langley's approval would be forthcoming. The report was not admitted into evidence for the truth of its contents. In cross-examination, Mr. Silverman appeared to agree to the proposition put to him that the preliminary site plan appended to the appraisal anticipated the addition of only seven buildings to the northern component, four of which were to be situated alongside the 200th Street corridor. Although the body of that appraisal refers to seven buildings, the site plan attached to it and the detailed valuation calculations within it clearly contemplate the construction of nine commercial pads, five of which were intended to front 200th Street.

[220] Mr. Nilsen noted that he could have used the 2005 development permit plan as the before scenario for the purpose of his appraisal. However, because it was not an optimized design and the after plan would be, it would not be comparing apples to apples, and would give a skewed result.

[221] Section 40(3) provides that the loss for injurious affection can be established by calculating the market value before the taking and subtracting from it the market value post-expropriation. I agree with Thunderbird's proposition that fulfilling that calculation is largely an

appraisal exercise which involves a comparison of what was viable in the before scenario with what is viable in the aftermath. In order to be treated as valid within that context, a before plan does not require that the development potential it shows has actually been the subject of a permit application. Likewise, the after scenario does not have to have been the subject of a permit application in order to be accepted for compensation purposes.

[222] It is clear that Thunderbird would not have been able to compel Langley to approve the Before Plan. However, that overstates Thunderbird's burden. It is not required to prove that the Before Plan would have been approved in fact. Instead, the hypothetical "before" world is frequently assessed by reference to the reasonable expectations in the circumstances: *Devick*. Vital to the issue of whether there was a reasonable expectation of approval of the Before Plan is the fact that the 2005 development permit had been approved by Langley. Taking the set-back out of the comparison, that development permit plan and the Before Plan are far more similar than they are different in design detail and concept. The difference (apart from the designated set-back) is that in the optimized Before Plan, 3,630 square feet of building was added along 200th Street. In my opinion, that significant factor taken together with Mr. Bakken's admissible evidence and the credible testimony of Mr. Silverman, satisfies me that

there was a reasonable expectation that the Before Plan would have been approved. Indeed, I find that the balance of probabilities favours that the most reasonable inference to be drawn from the totality of the evidence is that the Before Plan would have been approved, in absence of the expropriation.

[223] I next address in greater depth the opinion evidence of Mr. Jones and the appraisers, and the question of whether there has been injurious affection.

[224] In closing argument counsel for TransLink submitted that Mr. Jones's construct of lessee demand and his companion parking ratios do not stand up to scrutiny and at their core are little more than baseless "judgment calls". More specifically, TransLink disputes the proposition that a restaurant lessee demands a parking ratio of seven stalls per 1,000 square feet of building. It also complains that Mr. Jones was unreasonably inflexible - even arbitrary - in his assessment of what constituted "near" or "convenient" parking for any particular restaurant tenant, which was founded on nothing more than his subjective point of view, devoid of any verifying market data. To bolster its argument TransLink points to the fact that there was no evidence that any restaurant tenant, including at least two of the four (and possibly all four) who had leased pads on the site, required commitment of a parking space ratio or proximate parking as a term of their respective leases. TransLink went so far in its

criticism of Mr. Jones to suggest that he had been untruthful in his testimony about parking ratios demanded by the market. Counsel for TransLink admonished that his parking ratio for retail space was nothing more than a parroting of the applicable bylaw and urged that further unravelled his credibility and the reliability of his opinion.

[225] I do not validate TransLink's aspersions nor share its negative assessment of Mr. Jones's credibility or reliability.

[226] In my view, Mr. Jones carefully and thoroughly explained the rationale behind the parking ratios he applied to his designs. His evidence demonstrated that he has extensive experience and specialized knowledge in relation to the development of restaurants, including the specific parking requirements of that market segment, in multi-use complexes like the Thunderbird site. On account of his vast relevant experience and special knowledge, I consider Mr. Jones to be an informative resource and expert as to the demands of that market. Within the parameters of his expertise he has come to know what does and does not work for the restaurant lessee market. I am satisfied that his testimony about the parking demands of restaurant tenants was grounded in his years of relevant experience, and that his expertise has equipped him to reliably opine on parking ratios typically demanded by restaurateurs in sites similar to the Property.

[227] More than that, Mr. Jones gave persuasive concrete examples regarding the parking ratios of nearby restaurants and eateries in support of his restaurant parking ratio. He also satisfactorily explained his use of the blended bylaw rate for retail purposes and had plainly not adopted it indiscriminately, as TransLink suggested was the case. In my view, it is notable that TransLink offered no planning evidence to contradict Mr. Jones's opinion.

[228] During cross-examination Mr. Jones was probed at length about whether a potential restaurant customer might park outside the boundary dictated by his ratio and walk across a drive aisle or internal road to a destination restaurant. Debating the parking inclinations of restaurant patrons failed to address the fundamental point made by Mr. Jones, and endorsed by Mr. Nilsen, that the parking ratio represents the restaurateurs' demand. The ratio is intended to reflect what the prospective tenants of the pads demand in terms of parking and it is their demands that have relevance.

[229] The fact that the current pad leases evidently do not contain explicit provisions regarding the lessees' entitlement to a customer parking ratio has given me some pause. Because those leases were not in evidence, I did not have the benefit of knowing the entirety of their contents. I acknowledge that an inference that can be drawn from the absence of such a lease provision is that

restaurant tenants do not regard the feature of proximate parking to be as crucial as Mr. Jones has portrayed it. However, in my view, that inference cannot be said to be the only one to be reasonably taken from the whole of the evidence. Equally as plausible is the inference that those tenants felt sufficiently confident that their parking needs would be met by reference to the siting of the building pads, the parking layout and the number of stalls shown in the approved 2005 development permit plan.

[230] I decline to infer that the absence of a provision guaranteeing parking to the restaurant lessees in two or more of the current pad leases indicates that restaurant tenants do not treat the volume and placement of parking stalls with the high importance that Mr. Jones has attached to it. In all the circumstances, I conclude that Mr. Jones did not overstate or incorrectly state the lessee demand or parking ratios relative to a site of this kind. Nor, in my view, did he place an unwarranted emphasis on the need to design the entire northern component as a cohesive functioning unit in order for the plan to be viable. I accept Mr. Jones's opinion on the matter.

[231] In sum, I found that TransLink's attempts to discredit Mr. Jones's veracity, his overall credibility and the reliability of his opinion evidence were without effect. In my view, he provided comprehensive design plans for the before and after scenarios which took into

account, among other concerns, a legitimate parking ratio based on valid lessee demand.

[232] TransLink levelled criticism of Mr. Nilsen's opinion across the board, and asserts that the injurious affection claim is irreparably flawed at several levels. For starters, it cautions the Court to take care because he used the words "subject property" inconsistently; at times, they referred to the Property at large and at other times to the front or rear portions only. TransLink was also disapproving of Mr. Nilsen's overall approach to valuation and especially the constructs he employed to justify the injurious affection allegation. It contends that Mr. Nilsen does nothing more or less than identify that Thunderbird was left with fewer square feet of building area to rent after the taking, and says that it paid for that taken strip.

[233] TransLink argues that the unadorned effect of Thunderbird's position is to say that it is entitled to be paid for the land taken, plus payment for the present value of a future income stream in respect of a building that it is no longer able to build on that land. It urges that a careful dissection of Mr. Nilsen's analysis reveals that he is double or possibly treble counting because TransLink has already paid for the land lost with all of its present values and attributes. TransLink's companion assertion is that there is no compelling evidence to show that the remainder suffered a diminution in value beyond that which is associated with the land taken and the

consequential building area thereby acquired. In developing this line of attack, TransLink offered as an illustration of the absence of injurious affection, that the difference between the building areas in the Before Plan and the After Plan was less than the land taken, and hence was paid for. A facet of that argument appeared to be that if Thunderbird is unable to demonstrate a square footage loss beyond that of the area taken, there can be no disproportionate loss because the land taken has been paid for.

[234] Counsel for Thunderbird asserts that TransLink's example actually demonstrates the converse of injurious affection because based on such logic, the loss of building square footage would equate to about two-thirds of the usable portion of the expropriated parcel and that would exceed the maximum site coverage of the Property. Therefore, counters Thunderbird, it would not be legally permissible to fit all of that lost building area into the taken land. Also noteworthy is that TransLink's calculation does not take into account that the Property is a functioning site with an existing theatre complex and that the lost building area must be configured in a layout that achieves tenant needs. As it was with many of its criticisms of Mr. Nilsen's methodology, TransLink offered no appraisal evidence to support its assertion that the lost building area could have been accommodated within the actual area of the taking. Certainly, Mr. Hooker did not address the before and after scenarios in that context or in

any other. At times during the development of its submissions, counsel for TransLink placed weight on the fact that Mr. Nilsen's calculation of the loss of the net developable land area for the front parcel roughly corresponded to the square footage of the taken parcel (subtracting access, creek set-backs and trails). The near approximation of those areas is pure coincidence.

[235] TransLink contends that Mr. Nilsen's creation of the front and rear portions promoted a valuation fiction which he used as a springboard to mount Thunderbird's injurious affection claim. It argues that valuing the front portion as though it existed and adjusting the comparables to that non-existent parcel, with non-existent internal access, distorted the appraisal process. TransLink asserts that Mr. Nilsen's ill-conceived approach was further aggravated by his use of comparables of significantly smaller parcels, which it says were not adequately adjusted for the size differential relative to the whole of the Property.

[236] I found that Mr. Nilsen gave credible and persuasive answers to the forceful cross-examination aimed at exposing the alleged deficiencies in his report, including those described above. I accept his reasoning that a comprehensive appraisal had to recognize that a significant portion of the Property is occupied by the Colossus and thus could not be developed in either scenario. He explained that he created and valued the

front and rear parcels in order to determine the value of the land available for development which, by definition, excluded the Colossus in the before and after worlds, and took care to acknowledge that TransLink had indeed paid for a portion of it. While a buyer would not be able to purchase the front and rear parcels individually, that does not mean that the value of those undeveloped portions does not correspond to the value of a separate parcel of that size with the same development potential. There was no evidence to suggest that the market would pay a different amount for the acreage of available developable land surrounding the fully developed Colossus area, than it would for a standalone parcel. It is common ground that the front part of the northern component is worth more than the rear, and Mr. Nilsen's methodology was intended to reflect that reality as well.

[237] Given the unique features of the northern parcel of the Property and the limitations on the available land for development, I am not persuaded that there is anything fundamentally wrong with valuing the area capable of being developed separately from the already developed region where the Colossus is situated. Indeed, that strikes me as a more nuanced and superior approach than that taken by Mr. Hooker. I am similarly not persuaded that Mr. Nilsen's use of smaller sized comparables adjusted for size by 7.5% relative to the combined size of the front and rear acreage, as distinct from the much larger acreage of the entire Property, was defective.

[238] TransLink also challenges the validity of Mr. Nilsen's application of a 0.33 site coverage ratio. It argues that because the Property uniquely already has 1,500 parking stalls, which exceeds the number required under applicable bylaw, it is unnecessary to incorporate a parking area around the buildable footprint. It insists that every time a building is constructed on the northern site, it will not be necessary to add extra land for surrounding parking to that footprint because it is already there. At one point counsel for TransLink submitted that the actual site coverage ratio ought to be in the neighbourhood of 50% to 60% on the basis that a building on the northern component would only require space for loading bays and the like, and not parking. However, later in submissions I understood counsel to only concede a ratio of between 80% to 90%. No appraisal evidence was tendered to support those asserted ratios.

[239] Counsel for TransLink offered a "waterbed effect" analogy as a means of discrediting the 0.33 site coverage ratio, and to illustrate the point that because the 1,500 parking stalls is a constant, if parking is taken out in one place it will simply emerge in another, much the way displacing a waterbed in one area will simply shift the volume of water to another. I have accepted the opinion of Mr. Jones as to the parking demands of restaurant tenants who would be interested in leasing at a site of this kind. As observed earlier, the issue is not whether one or more of counsel or the experts or a "reasonable customer"

might be willing to walk across internal roads or driveways from a parking spot to the destination restaurant. As persuasively emphasized by both Messrs. Jones and Nilsen, the key in this valuation exercise is what the prospective restaurant tenants want. If the prospective restaurateur demands a certain amount of parking which corresponds to the size of its restaurant and reflects its perception of being located near to it, then providing parking outside of that desired zone is equivalent to providing virtually no parking at all. TransLink's waterbed theory that one only needs to manipulate the parking toward the rear of the site in order to accommodate maximum building along 200th Street with the square footage of the pads remaining constant in both scenarios, is blind to that crucial point. I am persuaded that Mr. Nilsen's site coverage ratio is valid.

[240] TransLink disputes Mr. Nilsen's valuation of $34 per square feet for the more desirable front parcel situated along 200th Street. It contends that it is logically inconsistent with his *pro rata* estimation of land value of $27.50 per square feet which he determined for the Property as a whole as if it were vacant because in valuing the front parcel, he basically disregarded the Colossus in any event. It seems to me that TransLink's complaint stems from a comparison of apples to oranges. Mr. Nilsen's appraisal of $34 per square foot for the front portion applied to the net land area established by Mr. Nilsen in order to compare the value of the net

developable lands fronting 200th Street as shown on the Before Plan and After Plan. The $27.50 *pro rata* valuation pertained to the value of the land across the Property as a whole as if it were vacant. To this I would add that my reading of Mr. Nilsen's report is that he did not include the Colossus in the net developable land area because it obviously is not land available for development. But he did not ignore its existence entirely, and acknowledged in his report that the front portion benefited from proximity to it. I am not persuaded there is an inconsistency of any moment.

[241] Valuation in this instance was a complex exercise. TransLink offered no cogent appraisal evidence to discredit the front and rear portion constructs devised by Mr. Nilsen as a means of valuing the developable portion of the northern component or the site coverage ratio that he determined. For the purposes of the *Act*, there may well be more than one acceptable way to appraise property which comprises both developed land and surrounding undeveloped acreage. In light of the existence of the Colossus and Thunderbird's contractual requirement to build approximately 1,500 parking stalls (which I have determined allows for only very slightly fewer than 1,500), and given the acknowledged higher value of the land bounding 200th Street, and the current positions of the internal roadways, I am satisfied that Mr. Nilsen's notional front and rear parcels and the separate valuation of them and his approach to valuation

represents a *bona fide* method of appraisal in this case.

[242] In contrast, I have doubts that Mr. Hooker actually performed the steps that he said were the elements of the summation appraisal method. He appears to have simply performed the second statutory calculation laid out in s. 40(3), which merely establishes the minimum compensation. Those failings, in conjunction with his failure to contend with Thunderbird's contractual obligation to provide parking spaces, have the cumulative effect of undermining the reliability of his appraisal. In the end, I prefer the contours of Mr. Nilsen's more meticulous and thoughtful valuation, and have more confidence in its accuracy.

[243] TransLink criticizes further that the Before Plan and the After Plan are based on the erroneous assumption that there must be exactly 1,500 parking spaces on the northern component. Under the amended Theatre Lease, Thunderbird's commitment is to something less definite namely, to "approximately 1,500" parking stalls. There is some merit to this criticism. Having said that, however, I wish to be clear that this does not reflect poorly on the credibility of Mr. Jones or Mr. Nilsen as they were instructed to assume that 1,500 parking spaces was fixed. As explained below, I find that the application of 1,500 parking stalls as an absolute by Mr. Jones and Mr. Nilsen does not undercut the analytical foundation of Thunderbird's injurious affection claim, nor reduce the

compensation that it gives rise to in any significant way.

[244] The precise scope of the description of "approximately 1,500" parking spaces is unclear - does it mean 1,490, 1,510 or some other figure? No one from Famous Players was called to explain the interpretation it placed on that lease term or its expectation in that regard. In its ordinary sense, the word "approximately" means nearly or almost and its placement in the subject provision serves to modify the requirement of 1,500 parking spaces in that limited way.

[245] TransLink says that Thunderbird did not meet the original parking commitment to provide 1,733 stalls, and there had been no complaints by Famous Players, much less negative repercussions, flowing from its apparent breach. Building on that, it suggested that it was reasonable to infer that Famous Players had allowed Thunderbird to take a rather laissez-faire approach to its obligation to provide parking and would likely continue to do so. Thus, argued TransLink, it was conceivable for Thunderbird to provide less than 1,500 stalls without being in breach of the amended Theatre Lease.

[246] The evidence establishes that 1,733 parking stalls had not been built on the Property prior to the amendment of the Theatre Lease. The governing site plan shows that 1,599 stalls were to be provided in the northern area around the Colossus, and I find that not all of those spaces had been built. Even so, Mr. Silverman did not

agree that Thunderbird had failed to comply with its parking stall obligations under the Theatre Lease. He explained that the requirement to build the 1,733 spaces extended to the entire site and completion of them was not required until the Property as a whole had been fully developed. According to him, when the spine form of development did not proceed, it was understood that a change in development form would be adopted and, therefore, it made no sense to complete the parking stall build-out that was connected to the unsuccessful spine model. I accept Mr. Silverman's evidence on this point and add that the use of the defined term "Development" in the Theatre Lease parking provision is consistent with his understanding. As well, Famous Players had given up a number of stalls as part of a conscious business decision in exchange for the benefits it perceived would accrue from that development.

[247] I reject the contention that Famous Players has historically taken a relaxed approach to Thunderbird's contractual commitment to provide parking and the evidence does not point to any current increased leniency on its part. On balance, the evidence as a whole falls short of demonstrating that Thunderbird could provide considerably fewer than 1,500 parking spaces without being considered to be in breach of the amended Theatre Lease.

[248] I am aware that any adjustment to the 1,500 stalls

on Mr. Jones's designs or in relation to Mr. Nilsen's construct of net developable land area would apply equally to the Before Plan and the After Plan.

[249] In all the circumstances, I think that in quantifying Thunderbird's claim for injurious affection a very minor allowance ought to be made to reflect that on an ordinary reading of the parking stipulation in the amended Theatre Lease, slightly fewer than 1,500 parking spaces could be provided by Thunderbird without being non-compliant. I would consider the adjustment to be extremely modest - something just better than a *de minimis* adjustment. I will elaborate the point below.

[250] I accept Mr. Nilsen's opinion that the value of the land taken was $635,000. I also accept his injurious affection quantification of $690,000, subject to the following modification. As I mentioned, I find that a small adjustment ought to be made to reflect my finding that Thunderbird is able to provide slightly fewer than exactly 1,500 parking stalls without being in violation of the amended Theatre Lease. I am not able to express that very modest adjustment through a mathematical formula or by means of a modification to Mr. Jones's design plans or to Mr. Nilsen's site coverage ratio or detailed appraisal calculations. Of necessity, it is the product of an assessment and not a precise mathematical reckoning. Using the best judgment I am able, I find that a reduction in Mr. Nilsen's calculation of loss for injurious

affection of 5% ought to be applied, resulting in compensation for that loss in the amount of $655,500.

[251] TransLink argued that injurious affection of the kind formulated by Mr. Nilsen was not directly attributable to the expropriation as required under s. 40(1)(b)(ii). The authorities establish that the words "result from" also appearing in that section support a broader view of causation than "directly attributable" may imply: *Bayview Builder's Supply v. British Columbia (Minister of Transportation and Highways)*, 1999 BCCA 144, additional reasons 1999 BCCA 320; *Sequoia Springs West Development Corp. v. British Columbia (Minister of Transportation and Highways)* (2000), 69 L.C.R. 1 (B.C.E.C.B.), additional reasons (2000), (2001) 71 L.C.R. 153, appeal allowed on the issue of the costs thrown away 2003 BCCA 8, 78 L.C.R. 1.

[252] It is Thunderbird's burden to prove injurious affection to the remainder caused by the expropriation: *Yin Wan Enterprises v. City of Richmond*, 2008 BCSC 146. I conclude that it has done so.

Issue 3: Has TransLink established an increase in the value of the Thunderbird site as a result of betterment from the TransLink project, that offsets any injurious affection that the expropriation may have caused to the site?

[253] Benefits and advantages that accrue to the remaining lands as a result of the use made of the

expropriated parcel are to be taken into account and set off against any compensation flowing from the injurious affection. Benefits may be general or special. Section 44 of the *Act* effectively provides that only special benefits to the remaining land are to be set off against injurious affection.

[254] TransLink bears the onus of establishing the presence of actual or potential benefit or advantage to the remainder of the Property derived from the bridge project and works and that such advantage increased the value of the remainder: *Lafleche v. Ministry of Transportation and Communications* (1975), 8 L.C.R. 77 at 86 (Ont. Div. Ct.); *Diesel Equipment Ltd. v. Ministry of Transportation and Communications* (1977), 13 L.C.R. 24 at 30 (Ont. L.C.B.).

[255] Accepting for the purposes of argument that there has been a disproportionate loss in net developable site area arising from the expropriation as calculated by Mr. Nilsen, Mr. Hooker opined that several benefits stemmed from the bridge project. In his view, the culmination of those benefits served to offset any compensable injurious affection to the remainder. Mr. Hooker enumerated the positive impacts as follows: (i) significantly expanded trade area; (ii) significantly increased exposure of the Property; (iii) market anticipation of increased rental values; (iv) lower vacancy/collection losses; and (v) enhanced reversionary interest in the land component. Mr. Hooker

considered that these positive factors increased the post-expropriation market appeal of the remainder in terms of investment quality. As well, he took the view that the restaurant leases which he understood were negotiated close to the date of expropriation, when the market was well aware of the project, would not necessarily have come to fruition in the absence of the project.

[256] As a means of attempting to quantify the value of these effects, Mr. Hooker discussed the impact on the capitalization rate, which is what the market wants on its return on the investment in land. In his view, the positive effects triggered by the expropriation placed downward pressure on the required overall capitalization rate for prospective purchasers. He provided an illustration to demonstrate that even a small downward swing in that rate after the taking (for example, a quarter percentage point) could radically impact market value and effectively offset Mr. Nilsen's valuation of the injurious affection. Indeed, on Mr. Hooker's computations a reduction of a merely 0.1% in the overall capitalization rate would more than absorb the estimate of injurious affection to the remainder.

[257] Mr. Nilsen agreed that it would only take a tiny reduction in the overall capitalization rate to obliterate his determination of loss caused by the injurious affection. However, he criticized that it was highly misleading to apply the overall capitalization rate to the

entire income stream generated by the tenants on the northern parcel. This is because the vast majority of that revenue (90% to 91%) derives from the Colossus and, therefore, is fixed by the amended Theatre Lease which runs for eighteen years following the expropriation, with two five-year rights of renewal. I share Mr. Nilsen's view that by failing to address that important reality and other issues related to the capitalization rate, Mr. Hooker did not provide a meaningful illustration of the point that he sought to make. I lack confidence in Mr. Hooker's opinion concerning the overall capitalization rate and the illustrations he purports to connect to it.

[258] In Mr. Nilsen's experience, identification of a trade area and increased exposure of a property, and the sales that it may potentially generate by a particular project, is a deeply complex task. While he agreed with Mr. Hooker that exposure is important to commercial properties such as the Property, he emphasized that it is not a given that anticipated increased traffic would result in higher values. He testified that the question of whether more traffic driving past the site would translate into any betterment in the form of an increased use at the site would be a function of the interplay of market supply and demand. In developing that point, Mr. Nilsen cautioned that it is meaningless to simply rely on an increased population in a trade area without providing an analysis of the propensity of the subject property to actually attract business. He noted that within the framework of that

analysis, factors such as the toll charges on the Golden Ears Bridge, the impact of the availability of existing and proposed facilities in the expanded trade area and the nature and degree (existing and in the future) of competition in the trade area would have to be taken into account.

[259] By and large, Mr. Hooker spoke only to the demand side of the equation and not to the equally important reality of the additional supply within the increased trade area, including the addition of competing businesses north of the bridge. Indeed, he agreed that he did not know how traffic on 200th Street south of Highway 1 compared to traffic along that road north of Highway 1.

[260] Further, Mr. Hooker did not delineate trade areas or address how the asserted increase in trade area could have a meaningful impact on the Property in light of factors such as: the existence of a competing ten-screen movie theatre immediately north of the bridge, the limitations on the Thunderbird site due to the 5,000 square foot cap which was imposed so as to not to compete with the Walnut Grove community shopping centre or the regional centre at Willowbrook; the cost of the return toll over the bridge; and the fact that the Property did not have any unique restaurants that would draw customers from throughout the region and has not been able to attract them. In this context, I refer to Mr. Silverman's evidence,

which I accept, that the project has not affected Thunderbird's lease rates or leasing activity.

[261] It also bears repetition that, prior to the taking and in the absence of the scheme, 200th Street was a major arterial roadway connecting rapidly growing industrial areas, and the expanded residential communities of Walnut Grove and Fort Langley with the Trans-Canada Highway and points beyond. The evidence establishes that most of the traffic moving over the Golden Ears Bridge would not run along 200th Street in front of the Thunderbird site. Instead, it flows west over the Port Kells connector that runs to and from Vancouver and the other municipalities to the west, and to and from Surrey and the U.S. border.

[262] I also found persuasive Mr. Nilsen's point to the effect that the anticipation that the project will result in new development opportunities on both sides of the bridge is also a factor that has the potential to offset any positive benefits and should have been considered.

[263] In Mr. Nilsen's opinion, the positive impacts identified by Mr. Hooker over and above the increases in trade area and exposure did not of themselves constitute additional betterment items. Rather, they would be the result of such increases.

[264] Mr. Wollenberg provided selected raw data in relation to communities on the north side of the bridge

relative to communities on the south side. That evidence did not form the basis of Mr. Hooker's opinion and there was no opinion evidence tendered as to the implications of such data. In the result, it was of negligible assistance.

[265] Mr. Nilsen's criticisms of Mr. Hooker's betterment thesis were persuasive and, I think, legitimate.

[266] In the end, I find that TransLink has failed to discharge its onus. It neither established actual or potential benefit or advantage, nor correlated any such positive impact with an increase in the value of the remainder.

Issue 4: Should an adjustment be made to the appraised value of Thunderbird's lands based on the rate of absorption of Thunderbird's redevelopment pads relative to the comparables?

[267] In Mr. Hooker's opinion, if injurious affection to the remainder had occurred, the resulting loss of rental income would not be fully realized until all commercial pads had been leased at some undetermined future point in time. That being the case, he concluded that it is probable that the market would discount the impact of that notional loss in buildable area at the expropriation date. TransLink relies on Mr. Hooker's opinion for its contention that there should be a downward adjustment to the appraisals, given that some of Thunderbird's pads have not yet been built out.

[268] Mr. Nilsen agreed with the basic premise that the loss in land value is a function of the loss in future income resulting from the ability to develop less building area after the taking. However, he challenged the validity of making such an adjustment in this case on the basis that any effect on value of absorption has already been reflected in the purchase price of sites with similar development potential and, therefore, no additional discounts are warranted. He elaborated that the price paid for the comparables had factored in their development potential which does not require that a purchaser have plans for immediate development. According to Mr. Nilsen, the fact that construction might not commence immediately on development pads is something that the Property has in common with a number of the comparables used by both himself and Mr. Hooker. Also material was his evidence that the Thunderbird site was in an advanced development stage relative to the comparables because development and building permits had already been issued. As well, he noted that the majority of the comparables sited by Mr. Hooker had not been fully built out at this point in time either, and that some of them were completely undeveloped.

[269] Emphasizing that market conditions dictate the extent to which the market might reflect absorption, Mr. Nilsen opined that it was unlikely that the market would have applied a discount in 2006 because the market was very active at that time and experiencing price

increases of around 1.5% per month before and after the taking.

[270] Thunderbird's business strategy is relevant to the issue of absorption. In reaching his opinion, Mr. Hooker assumed that the delay in development was due to an absence of a market for the pads. As an aside, his reasoning seemed incompatible with his assertion that the project had bettered the Property. In any case, Mr. Hooker had no knowledge of Thunderbird's strategic planning for the site.

[271] I accept Mr. Silverman's evidence to the effect that the significant revenues generated by the Colossus afforded Thunderbird the luxury of following the business plan of adopting a self-imposed holding pattern in order to focus on attempting to lease to one of the acknowledged three destination restaurants. He credibly explained that during that period, Thunderbird received a number of inquiries from other potential lessees which it chose not to pursue. Thunderbird was ultimately unable to land the desired tenant and subsequently revised its strategy and began to lease the pads. Mr. Silverman agreed that in hindsight he may have been rather optimistic in 2006 in this regard. However, I accept that does not provide a sound basis to adjust the comparables downward where the economy declines after an expropriation any more than an upward adjustment should be made if the market moves the other way.

[272] The preponderance of the evidence establishes that the fact that the site is not fully leased at this stage reflects a deliberate business strategy undertaken by Thunderbird and not the absence of a market for the pads that would justify a downward adjustment in value.

[273] I conclude that no adjustment should be made based on the rate of absorption.

Temporary Statutory Right-of-Way

[274] TransLink provided evidence of the cost of work done in the area which it says was carried out to accomplish access that Thunderbird sought and obtained, but was not required for the project. It contends that, had there been no expropriation, those costs, which exceed $42,000, would have been borne entirely by Thunderbird. As those costs exceed both appraisers' estimation of the notional rent for this previously occupied area, TransLink argues there should be no compensation in respect of it. I disagree.

[275] The evidence indicates that that work relates to the destruction of the access point that had already been fully constructed in the context of the construction of a three-lane 200th Street. There is an insufficient evidentiary basis to support the contention that this cost would have been out of Thunderbird's purse.

[276] I conclude that the value of the temporary statutory

right-of-way is $31,607.

SUMMARY

[277] The answers to the issues posed by counsel are:

Issue 1: No.

Issue 2: Yes.

Issue 3: No.

Issue 4: No.

[278] The loss in value of the land taken is $635,000. The loss in value related to the injurious affection to the remainder is $655,500. The value of the temporary statutory right-of-way is $31,600. Thunderbird is entitled to payment of the aggregate of these sums namely, $1,322,100, less the amount it has already received. It is also entitled to an order for the payment of interest pursuant to the *Act*. If the parties are unable to agree as to its calculation, they have liberty to apply.

[279] Section 45 of the *Act* confers discretion on the Court in respect of costs, unless the amount awarded is more than 115% of the amount paid by the expropriating authority. In the event that the parties are unable to agree on costs, they may provide written submissions no later than August 15, 2011. I will leave it to counsel to schedule a suitable timetable to exchange their submissions in advance of that deadline.

_____“Ballance J.”_____ Madam Justice Sandra Ballance