REPORT TO CITY COUNCIL, NIAGARA FALLS, ONTARIO

Five irregularities in Council's decision on 14 February 2017 to close River Lane between Philip and John Streets and sell the land for $12,000 to Time Development Group, a developer intending to build high-rise condo towers

Kenneth Westhues kwesthue@uwaterloo.ca
5419 River Road
Niagara Falls, Ontario L2E 3H1
15 November 2018

Contents

Introduction: a developer's plans for his properties

The events that prompt this report began in 2016, when a developer from Markham, Ontario, bought five adjacent properties along River Road and John Street, as shown on the map on the last page. The lands were bisected by River Lane. The largest parcel lay on the east side of the lane, the remainder on the west side. What the developer wanted to do was combine the five assembled parcels, along with River Lane, into a single parcel and build on it two high-rise condo towers. The developer was operating under the name, "Time Development Group."

The problem the developer faced was that his project was contrary to the Official Plan for the area. Besides being twice the allowable height and density, the project would eliminate River Lane, which the Official Plan is premised on keeping in place. On the lane's eastern side, the Official Plan permits a 4- to 7-storey apartment building with specified setbacks. (See the 2009 OMB approval.) On the western side, zoned for single- and two-family houses, three have driveways off the lane. Closing River Lane would contravene the provisions of the Official Plan.

The standard procedure according to law, policy, and precedent

It is not unusual for a developer to seek to build something at variance with a city's Official Plan. The procedure to be followed is clear in provincial law, as well as by policy and precedent in Niagara Falls. The developer would consult with the city's Department of Planning and Development, get feedback from residents at one or more public meetings, and then make an application for appropriate amendments to the Official Plan and existing zoning.

The application would be assessed by the Planning Department in light of relevant legislation and standard principles of land-use planning. Other municipal departments, as well as related authorities like the Regional Municipality, Niagara Parks, and the Niagara Peninsula Conservation Authority, would be consulted. Eventually, the developer's application would come before City Council at a public meeting, along with a recommendation from the Planning Department either to approve or deny it. Council would make a decision, yea or nay. If yea, the city would then close River Lane, have the property professionally appraised, and sell it to the developer for fair market value. If nay, the developer might still win approval for the project from LPAT, the province's Local Planning Appeal Tribunal.

The procedure followed for the proposal to build high-rise condos on River Road

As best I can determine, Time Development Group commenced standard procedure in late May or early June of 2016, when a representative approached Alex Herlovitch, the city's Director of Planning and Development, to sound him out on the prospect of building high-rise condo towers on River Road.

Mr. Herlovitch was discouraging. In an email to me on 7 July 2016, he said he told the developer that "the heights and densities proposed far exceeded current Official Plan designation of the lands" and that "the site was too small for the density he proposed." Mr. Herlovitch said he reviewed with the developer "the intent of the policies affecting the lands, the zoning of the lands and also reviewed the Official Plan and zoning for the surrounding residential neighbourhood. I explained to him that this was a very solid residential neighbourhood with strong resident interest which had objected to the previous two development scenarios." Mr. Herlovitch said he advised the developer "to consult with the surrounding neighbourhood to determine whether or not there would be any support for his application. I told him he would have to provide sound planning rationale to substantiate any application he would intend to submit to the City."

Writing on 7 July 2016, Mr. Herlovitch said he could not remember the developer's name and had had no further contact with him. So far as I can tell, there were few if any consultations between the developer and Mr. Herlovitch until the following year, by which time the developer had secured the partial, preliminary approval of his project through a back door.

Sometime in the summer of 2016, the developer provided maps and drawings for his intended project to the City's Department of Legal Services, headed by Ken Beaman, at that time City Solicitor. Unlike Mr. Herlovitch, Mr. Beaman reacted positively to the proposal. I suspect the developer – through his solicitor, Italia Gilberti, his planner, Ryan Guetter, or his realtor, Mike MacChesney – enlisted the support of additional city officials, possibly Mayor Diodati, CAO Ken Todd, and individual Counsellors, but I have no firm evidence of this.

Mr. Beaman was the key official. By August 2016, he and Ms. Gilberti were working together toward closing River Lane between Philip and John Streets and selling the land to the developer. Ronald C. Ellens of St. Catharine's was engaged to make an appraisal of the land's market value as of 31 August 2016. The appraisal was delivered on 12 October 2016. Mr. Ellens pegged the value of the property at $11,400.

Mr. Beaman then prepared a report (pp. 8-11 of agenda) for Council's meeting of 14 February 2017, recommending that River Lane between Philip and John Streets be closed, and that the land be sold to Time Development Group for $12,000.

Councillor Wayne Thomson moved acceptance of these recommendations. Councillor Mike Strange seconded. The vote in favour was unanimous (Councillors Ioannoni and Kerrio were absent). (See minutes of meeting.)

Irregularity No.1: Amending the Official Plan in the guise of closing a disused street and selling surplus land.

The decision to close River Lane, declare the land surplus, and sell it to Time Development Group was a planning decision, an amendment to the Official Plan for the properties on both

sides of the lane. As such, the proposal to make this decision should have been handled by the standard procedures laid out in the *Planning Act* for Official Plan amendments, or even more appropriately, folded into the developer's overall application for Official Plan amendments.

Instead, the staff report (L-2017-02) described the lane as "surplus to the City's needs." The report makes no reference to the Official Plan. It says the proposal was circulated for comments to "various city departments" and to utility companies, but there is no mention of the Department of Planning and Development. Mr. Herlovitch, the Director of Planning, may not even have seen the proposal. Indeed, Mr. Herlovitch absented himself from the discussion of the proposal at the Council meeting of 14 February 2017. He took his seat only as discussion came to a close.

At that meeting (quotes are from the online video), in response to concerns voiced by Eugenia Pitre, representing the owners of 4434 Philip St., adjacent to River Lane, Mr. Beaman said, "The reason staff is recommending this is that there is no functional use for it." Nobody pointed out that this was false, that the lane was essential to existing provisions of the Official Plan for the lands on both sides. Mr. Beaman described River Lane, in an email to me the day before, as "disused." In fact, motorists and pedestrians used it every day – as indeed they do now.

At the meeting of 14 February 2017, both Mr. Beaman and Mayor Diodati emphasized that selling River Lane to the developer did not imply approval of his development plan. "I think it's important to put in, you understand," Mr. Beaman said to Ms. Pitre, "this has nothing to do with any developing proposed by the new owner." He said that the drawings "flashed around by the would-be developer have not been seen by this Council" adding that "Time Development hasn't even made a proposal. All they've done is show us a couple pictures." Similarly, Mayor Diodati said to Ms. Pitre, "As it stands today, there is no application. Right now this is just about the land, the declaring surplus of the land, and permanently closing that laneway."

What Mr. Beaman and Mayor Diodati said was partly true. Closure and sale of the lane did not imply approval of *all* the amendments to the Official Plan that construction of the high-rise condo towers would require. Council's decision did, however, give approval to the most essential amendment, namely closure of River Lane and sale of the land to the developer. It meant that the lands on the east and west sides of the lane, zoned respectively R5E and R2, would be combined and rezoned. That is why Council's decision on 14 February 2017 was a *planning* decision. It was not just disposal of surplus property.

To make the point differently: While Council's decision to close River Lane and sell the land to the developer did not formally amend the Official Plan, it made existing provisions of the Official Plan impossible to abide by. Whatever Council might decide in the future for the lands on either side of River Lane, it would not be what the Official Plan prescribes, since by Council's action, River Lane ceased to exist.

The wrongness of how city staff and City Council handled this request from the developer comes into focus by comparison to how the same request was handled in 2006, when a

previous owner of lands along this same stretch of River Lane proposed to build high-rise towers. Following standard procedure, the developer submitted a detailed application and, as part of the application, "requested the City to close, declare surplus and sell River Lane between Philip Street and John Street to add it to the project" (see pp. 42ff of agenda) The application was later abandoned, but that is beside the point here, that the matter of River Lane was dealt with as part of the amendment application, in keeping with law and policy.

Similarly, in 2012, City Council conditionally approved an application for high-rise towers on River Road in the block immediately south of the block at issue here (By-law 2012-136; see agenda), across which River Lane formerly extended. The lane currently forms part of the parking lot for the Travelodge Hotel. The by-law amending the Official Plan stated as one of the conditions, "Acquisition by the owners of the rights to that part of the Lands described as Lane Pl 294 ...." The project approved in the by-law appears unlikely to be built, but the point here is the same as above, that the matter of River Lane was dealt with as part of the amendment application, in keeping with law and policy. The cart was not placed before the horse.

Because the City Solicitor, CAO, and City Council failed to respect these precedents in the present case, but instead closed the lane and sold the land to the developer beforehand, in an end run around provincial law and municipal policy, the planning process in this instance was corrupted from the start, in the developer's favour.

As a result, when the formal application (pp. 85ff of Council agenda) was submitted to the Planning Department in the summer of 2017, Mr. Herlovitch was under pressure to recommend it, since the municipal government that employs him had already given the project partial approval and a general nod. The best Mr. Herlovitch could do was suggest modifications – modest reductions in the requested density and height – in a rearguard effort to apply standard planning principles. But the developer was understandably disinclined to acquiesce to a Planning Department it had earlier managed to sidestep. The application, along with Mr. Herlovitch's recommendations, was on Council's agenda for three successive meetings: 19 June, 10 July, and 14 August 2018. Each time, the developer requested deferral. As Mr. Guetter, the developer's planner, put it in his letter to Council of 14 August, "we require further dialogue with City Planning Staff." Meanwhile, on 29 March 2018, the developer had appealed the application to LPAT, on grounds that the city had taken too long to act on it.

It is not easy to rectify a planning process tainted by irregular procedure at the start. In the event that the developer's application is ultimately denied, the city might appropriately offer to buy the River Lane property back from the developer, for the full price the developer paid.

Irregularity No. 2: Infringing the property rights of the abutting resident landowner at 4434 Philip St., Susie Ong, proprietor of Ace of Hearts B&B

Time Development Group failed to acquire one property abutting River Lane: 4434 Philip St., a large, historic home where owner Susie Ong has operated her bed and breakfast for the past 20

years. This property abuts River Lane in two places, on its eastern side and at the back, as shown on the map at the end of this report.

By the current provisions of the Official Plan, River Lane serves as a buffer between this property and the apartment building approved in 2008 for the other side of the lane. Ms. Ong opposed that project, but she lost at both City Council and the OMB. Her consolation ever since has been that whatever might be built east of her property would at least be separated from her property by a public street, River Lane. Moreover, according to the Official Plan, the 4-storey apartment building would be set back 10 to 32 feet from River Lane – which means between 28 and 50 feet from Ms. Ong's property.

When City Council sold River Lane to the developer, Ms. Ong lost that buffer from high-density development. In the formal application the developer submitted after he gained ownership of River Lane, a 12-storey tower would rise nine feet from Ms. Ong's property line. Any planner, indeed any homeowner, can appreciate the difference between having a 4-storey building 28 to 50 feet away, and a 12-storey building nine feet away, but the latter is precisely what the developer proposes, now that he owns River Lane.

The general rule, when a municipality closes and disposes of a public road, is to offer "half of the roadway, at its centreline, to each of the bookending property owners" – as Ronald C. Ellens put it in his appraisal of the River Lane property. Had this rule been followed, Ms. Ong would have been offered half of River Lane in two places, where it abuts her property on the side and at the back. In fact, she was never offered the opportunity to buy any part of the roadway.

Mr. Beaman wrote in his report: "The proponent has advised Staff that the owner of 4434 Philip Street is supportive of the proponent's project." This was blatantly false, as Ms. Ong advised Mr. Beaman in a telephone conversation, and as Ms. Pitre conveyed to Council in her presentation on 14 February 2017.

Anticipating that Councillors might notice how Ms. Ong's property rights would be infringed by the closure and sale of River Lane, Mr. Beaman suggested the transaction could be made conditional: "In the event that Council is concerned about the interests of the owner of 4434 Philip Street, the Mayor and Clerk can be instructed not to execute the by- law closing and declaring the lane surplus until such time as arrangements satisfactory to the City have been made with the owner of 4434 Philip Street." Apparently nobody on Council voiced concern for Ms. Ong's interests. The suggested condition was not included in the motions Council passed.

A recent headline in the *Niagara Falls Review* quoted me as calling the high-rise condo towers proposal an *outrage*. The single aspect of it that best deserves that term is the infringement of the property rights of the law-abiding long-time resident and B&B proprietor next door.

Irregularity No. 3: A dubious appraisal of the River Lane property

The irregularities described above set me to wondering about the bargain-basement price for which Council sold the River Lane property to the developer, $12,000 for an area as large as two building lots. Mr. Beaman's report to Council said where this price came from: "Staff commissioned an appraisal of the subject lands from Ronald C. Ellens Appraisals Inc. who provided an estimated hypothetical value of $11,400.00 on August 31, 2016." On 19 March 2018, I asked Mr. Beaman for a copy of the appraisal report. I copied my request to members of Council.

(3a) Misleading information and reluctance to release the appraisal report

Mr. Beaman copied me on his email to Council in reply. It is dated 22 March 2018:

> Would the members of Council who are supporting Mr. Westhues in his endeavor please secure the direction of Council to instruct me to continue to spend time on this inquiry. It is not part of my job to conduct investigations on behalf of interested members of the public. Mr. Westhues is no different from any other member of the public. He does not have any special status that entitles him to more staff time than any other individual.
> The information which Mr. Westhues is seeking to have created belongs to the general public subject to solicitor client privilege. It does not belong to him. Whatever reports are generated at the direction of Council should be delivered in a public forum.
> If the majority of Council does indeed believe further inquiries are required, and those inquires include explanations of land values, then a budget will be required for retaining Mr. Ellens to explain the reasoning behind his land value. I would estimate the cost of the service at between $3,000 and $5000.

By this email, Mr. Beaman did more than grumble at my request and refuse it. He gave the impression that the document I asked for did not exist, that Mr. Ellens had not given him the normal kind of report on how he arrived at his estimated value, that the report would have to be created, and that obtaining it would be expensive.

I emailed a clarification to Mr. Beaman the next day: "I'm sorry if my request was unclear. I am not asking you to conduct any investigation, make any further inquiries, or generate any report, and I do not ask that you commission further work on this matter from Mr. Ellens." I continued:

> I'm sure that document is already in your files. In keeping with the Uniform Standards of Professional Appraisal Practice, it would be a statement, probably five or ten pages, of the assumptions, hypothetical conditions, comparables, and so on, that led Mr. Ellens to decide on the figure of $11,400 instead of some higher or lower amount.

When I received no reply from Mr. Beaman, I filed on 17 April 2018 a request for the appraisal report, the letter requesting it, and related materials under the Municipal Freedom of

Information and Privacy Act (MFIPPA). The legal deadline for the city's response passed with no reply. On 23 May 2018, I emailed Mr. Ellens, pointing out that from Mr. Beaman's email, it appeared that he, Mr. Ellens, had failed to provide an appraisal report and was in serious violation of the standards of the Appraisal Institute of Canada.

On 29 May 2018, Mr. Beaman sent me (as well as Council) Mr. Ellens's appraisal report: 38 pages plus appendices. The report was dated 12 October 2016. Mr. Beaman said, "The other documents requested must be reviewed by the Head, prior to being released."

(3b) A standard appraisal with novel use of a magical rule, "4-3-2-1"

As I began to read the appraisal document, what struck me first was a glaring error in the map reproduced on p. 4 (included at the end of the present report), which Mr. Ellens says he got from Mr. Beaman. The map bears the mark of Weston Consulting, the developer's planner, and is dated 2 July 2016. It shows, outlined in red, the developer as owning *all* properties abutting River Lane, as if Susie Ong, the owner of 4434 Philip Street, had severed the parts of her lot that abut River Lane and sold them to the developer. From the map, Mr. Ellens would have thought River Lane had just one abutting landowner. In fact there were two. Not only has Ms. Ong never sold any part of her property to the developer, she fiercely opposes his plan.

However serious the flaw in the map, Mr. Ellens can hardly be blamed for it. The fault lies with Weston Consulting, from which Mr. Beaman got the map that he passed on to Mr. Ellens.

Otherwise, from p. 1 all the way to the top of p. 36, the appraisal document looks professional, competent, defensible. Maps and photographs of the River Lane property take up many pages. So do the assumptions, caveats and qualifiers that are standard in property appraisals. Finding few comparable parcels nearby, Mr. Ellens chose as his comparables a dozen recently sold development properties elsewhere in Niagara Falls and in St. Catharine's. The price per square foot ranged from $8.00 to $19.00. As appraisers normally do, Mr. Ellens discussed how each of these properties was similar to and different from the River Lane property. By the top of p. 36, Mr. Ellens had settled on a figure of $61,250 for the part of the lane abutting lands zoned R5E, and $52,700 for the part abutting lands zoned R2, for a total of $114,000.

But the report does not end there. Suddenly, like a rabbit pulled out of a hat, there comes an 11-line paragraph about a crude, obscure rule of thumb called the "4-3-2-1 Rule," rarely used in Canada but sometimes in the United States for appraising single-family residential lots of varying depths. By this rule, the back quarter of the lot represents 10 percent of its value. Mr. Ellens applies this rule to the River Lane property, treating it as the back of the backyard of adjacent lots. He takes 10 percent of his previous figure of $114,000, and declares the value of the River Lane property to be $11,400. This is a reduction of $102,600.

In reviewing relevant literature online and consulting with experts in land appraisal, I have found no support for Mr. Ellens's application of the 4-3-2-1 Rule in this assignment. Moreover, if (however inappropriately) the rule were to be applied to the River Lane property, the parcel's

value would be calculated from the value of the abutting lots. Mr. Ellens calculated the River Lane parcel's value from his estimate of the lane's value, as if it were its own backyard. He simply divided his estimate of its value by ten – an incorrect application of the 4-3-2-1 Rule.

(3c) Conflicting evidence about when and why the 4-3-2-1 Rule was applied

In the summer and fall of 2018, while continuing to withhold the letter commissioning Mr. Ellens's appraisal, CAO Todd released to me, following my MFIPPA appeal, a series of emails between Mr. Beaman, Mr. Ellens, and Ms. Gilberti. These may illuminate why the 4-3-2-1 Rule was allowed to detract from an otherwise credible appraisal.

The delivery date of Mr. Ellens's report is clear from the date on the top of his cover letter: 12 October 2016. This same date appears in the body of the report on p. 14: "The subject property site was inspected August 31, 2016. Photographs were taken on a subsequent date. The Date of this report is October 12, 2016." Appraisers tend to be meticulous with dates.

One set of emails jibes with this delivery date. On 3 October 2016, under the subject line "River Lane Appraisal," Mr. Beaman inquires: "Hi Ron: How is this one coming?" Mr. Ellens responds the next day: "Ken, Completion anticipated next week." Mr. Beaman forwarded this exchange to Ms. Gilberti, who replied to him the same day: "Thank you!"

Other emails, however, show that Mr. Ellens was still working on his report many weeks later. On 1 November 2016, under the same heading as four weeks earlier, Mr. Beaman inquires: "Hi Ron: How are we coming on this one?" Mr. Ellens responds the next day, apologizing for the delay, attributing it to a busy year and deaths in his family. "I have everything put together to complete this report," he writes, "investigation of sales etc., and nearing completion of the narrative." He says he has calculated the square footage of the property from the sketch provided, and identified zoning. Then he writes:

> Since the lane areas abuts [sic] various properties we may also consider what is known as the 4-3-2-1 Rule which discounts the land rate (value) to reflect rear yard side yard [*sic*] areas, however, will need to investigate whether that approach is reasonable in this instance.

This email shows conclusively that Mr. Ellens did not include the 4-3-2-1 reduction in an appraisal report delivered on 12 October 2016, because three weeks *later,* he informed Mr. Beaman that he was considering the possibility of doing so. I can think of no reason why he would so inform Mr. Beaman, unless he believed his client wanted a lower estimate.

Mr. Ellens's invoice for $2,712 was dated "November 1, 2016." A bill sent two and a half weeks after completing a service seems normal. But the stamp indicating receipt by Mr. Beaman's office reads" "LEGAL SERVICES Nov 24 2016." A second stamp, "O.K. FOR PAYMENT," is dated "Nov 28/16" and initialed by Mr. Beaman.

One possible explanation for the conflicting dates is that Mr. Ellens sent Mr. Beaman an earlier version of the appraisal report on the date indicated, 12 October 2016. It did not include the 4-3-2-1 reduction, instead pegged the value of the subject property at the amount reached by the top of p. 36, $114,000. Mr. Ellens then sent Mr. Beaman the invoice for his services. Mr. Beaman found the estimate unacceptably high and held up payment of the invoice. Mr. Ellens then added the paragraph applying the 4-3-2-1 Rule, thereby reducing the estimate to $11,400. He sent Mr. Beaman in late November the revised version of the appraisal report, but neglected to change the date. On receipt of the revised report, Mr. Beaman accepted Mr. Ellens's invoice and okayed it for payment.

There may be other ways to make sense of the confusing and conflicting records released in response to my MFIPPA appeal. The above is merely the most accurate and comprehensive explanation I can think of. I do not mean to accuse anyone of wrongdoing.

My MFIPPA appeal also yielded an email from Ms. Gilberti to Mr. Beaman on 15 December 2016. She is eager for the appraisal report and asks, "Have you had an opportunity to discuss same with Ken Todd so that it can be released?" Mr. Beaman replies: "Hi Italia: I will drop it off on Monday. ($11,400)" His letter to her, enclosing the report, is dated 19 December 2016.

(3d) The missing instructions to the appraiser

Any evaluation of Ron Ellens's appraisal report, including this one, must be considered tentative and incomplete in the absence of the instructions and information he received for how to do it. These likely came from Mr. Beaman. The latter informed Ms. Gilberti on 16 August 2016: "Hello Italia: Mr. Ellens has been retained to do the appraisal." She replied the same day: "Very good, please keep me posted." Some of the instructions Mr. Ellens received, like the incorrect map reproduced at the end of the present report, may have come originally from the developer, but through Mr. Beaman, so far as I can tell. Direct contact between Mr. Ellens and Ms. Gilberti appears to have been nonexistent or minimal.

A line in her email to me of 4 June 2018, that she "had an appraisal conducted by the City's chosen appraiser," led me to think that perhaps she had given Mr. Ellens his instructions, but the emails released to me between her, Mr. Beaman and Mr. Ellens persuade me that Mr. Beaman, the official client, spelled out to Mr. Ellens what the assignment was. This would be appropriate, since the City paid the $2,712 that the appraisal cost.

The problem is that the city has refused to release the instructions and accompanying information given to Mr. Ellens. I have been requesting these materials formally for the past seven months, since I first filed the MFIPPA request and then my appeal to the provincial commissioner's office. Lorne Swartz, the lawyer assigned as mediator for my appeal, has been back and forth with the City many times this summer and fall. Mr. Todd has released numerous emails, but not the letter or email by which Mr. Ellens was commissioned to do his job, nor the accompanying materials. I believe Mr. Ellens got the incorrect map from Mr. Beaman, but that

is only because Mr. Ellens says so on p. 14 of his report and reproduces the map on p. 4. The City has not sent me that map, nor anything else Mr. Ellens received at the start.

At last on 9 November 2018, Mr. Swartz informed me that the City now takes the position that it has "no further responsive records." I take this to mean it does not possess the letter or email by which Mr. Ellens was, as Mr. Beaman put it, "retained to do the appraisal." For now, this counts as just one more irregularity in what has become a long list.

Irregularity No. 4: Selling the River Road parcel for $1.32 per square foot on the basis of an outdated appraisal, after abutting parcels sold for $55-$158 per square foot

Because market conditions can change rapidly, mortgage lenders typically limit the time of validity of a property appraisal to 30, 60, or 90 days, rarely much longer. The number of days between the effective date of Mr. Ellens's appraisal (31 August 2016) and the date of Council's decision to sell the River Lane property (14 February 2017) was 167. Whatever the faults in the appraisal, it was long past its best-before date when Council sold the property for what Mr. Ellens said it was worth. Council's decision was ill-informed, at great loss to the City.

Following standard practice, Mr. Ellens chose as his comparables properties that had sold in the preceding three years. None of the properties the developer was assembling for the River Road condo towers met this criterion. That is why Mr. Ellens looked farther afield.

But that was as of 31 August 2016. Five months later, at the end of January and on the first of February 2017, sales were completed on all five of the other properties the developer was assembling. Here is the list, along with square footage, sale price, and price per square foot, so far as I can determine using data from MPAC and Geowarehouse:

5507 River Rd.	54,000 sq. ft.	$3,100,000	$57 per sq. ft.
4427 John St.	6,500 sq. ft.	$410,000	$55 per sq. ft.
4413 John St.	6,500 sq. ft.	$550,000	$85 per sq. ft.
4407 John St.	4,400 sq. ft.	$400,000	$90 per sq. ft.
4399 John St.	4,800 sq. ft.	$750,000	$158 per sq. ft.

Presented with these comparables, all five of them abutting River Lane, no professional appraiser, neither Mr. Ellens nor anybody else, would argue that the River Lane property, on 14 February 2017, was worth a mere $12,000, or $1.32 per sq. ft. They would all say it was worth more than that. How much more would depend on how a specific appraiser would apply standard principles of the profession.

In an email to Council on 21 May 2018, before I obtained the sales data above, I offered a conservative estimate of the market value of the land on 14 February 2017: $273,000. I arrived at this figure by applying to the River Lane property the same price per square foot as Time Development Group had offered Susie Ong, the owner of 4434 Philip St., in July 2016, for a slice

of her property abutting River Lane. Since the offer was from many months before and Ms. Ong declined it anyway, my use of it as a yardstick undervalued the land.

To obtain a more accurate estimate, I consulted with Barry Lebow, one of Canada's leading authorities on land appraisal, an author, public speaker, arbitrator, mediator, and expert witness in roughly 500 court proceedings. With his permission, I quote a sentence from one of his emails to me: "Bottom line: if the developer is attempting to build to maximum density then all areas of the site are equal." By this principle, a good estimate of the value of the River Lane property can be obtained by calculating the average price per square foot the other parcels in the assemblage sold for (weighted by their size), and then multiplying by this price the square footage of the River Lane parcel. The developer paid a weighted average of $67 per square foot for the other five parcels. Multiplying this by the 9090 square feet in the River Lane parcel yields an estimated value of $609,000.

This is not the only credible way to calculate the lane's value. In fact, all areas of a development site are not quite equal. Lynchpin parcels, those without which the development could not proceed, are ordinarily worth more. The property at 4399 John St. is a lynchpin parcel in the present case. That is presumably why it sold for $158 per square foot, compared to the $55 per square foot the developer paid for 4427 John Street, a parcel on the periphery. By this logic, since the River Lane parcel was the lynchpin *par excellence*, its value should be calculated by multiplying its square footage by at least $158. This yields an estimated value of at least $1,436,000.

I am not a professional appraiser, and I make no attempt to pinpoint the exact market value of the River Lane property. I can say with confidence, however, that its market value on 14 February 2017 was between, in round numbers, $300,000 and $1,400,000. Compared to any number in this range, the actual selling price of $12,000 was peanuts.

Two conclusions follow from this analysis. First, Council wasted a public resource, squandered City-owned property, and wrongly enriched a private company in Markham, "Time Development Group." Second, Council's sale of the River Lane property for $12,000 was in violation of Section 106 of Ontario's *Municipal Act*, which forbids "leasing or selling any property of the municipality at below fair market value."

Irregularity No. 5: that the purchaser dealt with the City under an illegal name

Of all the irregularities in the city's near-giveaway of the River Lane property on 14 February 2017, the strangest is that five months earlier, the Federal Court of Canada had ordered the developer to cease doing business under the name, "Time Development Group." Summaries of 61 records in the proceeding are available online by doing a search of this name in the Federal Court database.

On 27 May 2015, a prominent, long-established real-estate developer in Markham called "Times Group" or "Times Development", whose president is Hashem Ghadaki, brought a claim for trademark infringement against a new Markham competitor that called itself "Time Development Group." Its president is Mike Wang. Mr. Ghadaki's company claimed that Mr. Wang's company was using a name so similar to its own as to cause confusion about which company was doing what, especially since both were serving the Chinese Canadian market.

In its ruling On 22 September 2016, the Federal Court ruled strongly in favour of "Times Group" and granted an injunction against further use of the name, "Time Development Group", by Mr. Wang's company.

When a court issues an injunction, most Canadians immediately cease doing whatever the court has forbidden them to do. Mr. Wang's company, however, went on doing business as "Time Development Group." This was the entity to which the River Lane property was sold. The company continued to operate under the illegal name even after the Federal Court of Appeal upheld the original judgment on 14 June 2017.

On 2 January 2018, Mr. Ghadaki's company went back to the Federal Court with a motion for civil contempt, asking that Mr. Wang's company be ordered to appear before a judge. Mr. Ghadaki's company said it had "contacted counsel for the contemnor on numerous occasions notifying the contemnor of their noncompliance to the order of the Court. However, no evidence has been provided by the contemnor regarding the correction of their noncompliance."

The Court accepted the motion and scheduled a contempt hearing for 27 March 2018, but the day before, Mr. Wang's company submitted lengthy written representations to the Court. It apologized profusely "to this Honorable Court and to the Applicants." It described the actions it had taken to comply with the order of the Court, mainly since December 2017. The company pleaded that it is not a recidivist, that it has never before been involved in trademark infringement litigation. It said that for two of its three development projects, Danforth Square and Opal Urban Towns, "sales stopped in 2016, and there have been no operating sales offices at these locations since that time. As for the Kennedy Gardens project, this project was terminated in January, 2018, and all deposits were returned to purchasers."

Mr. Wang's company pled that the process of rebranding "has now been fully completed, and all display of the Respondents' former names has permanently ceased. The Respondents now operate under the names Forme Development Group and Forme Development."

On 4 April 2018, the Federal Court accepted a statement of facts agreed by the two companies, and ruled that Mr. Wang's company would be bound by that statement in the future. Mr. Wang's company was ordered to pay Mr. Ghadaki's company about $10,000 in its additional costs for this proceeding. Beyond that, the case was closed.

In a letter to Mr. Herlovitch on 7 March 2018, Ryan Guetter, planner for Mr. Wang's intended project on River Road, clarified the situation. He identified the former "Time Development Group," what is now "Forme Development Group," as the parent company, and emphasized that the applicant for the River Road proposal is "5507 River Development Inc." He wrote, "The President for the above noted project has always been, and remains to be Mike Wang."

Since the applicant for the River Road high-rise condos project is no longer flouting the Federal Court injunction but instead abiding by it, the main lesson to be drawn may be only that this developer is relatively new in Ontario, with a track record of abandoned projects, but at the same time ready to push the envelope to get what he wants.

Recommendation

The irregularities documented in this report involve violation of the province's *Municipal Act* and *Planning Act*, deviation from standard principles of land-use planning, infringement of property rights, a flawed land appraisal, the sale of public land to a private company for much less than its market value, and that company doing business under an illegal name.

At the LPAT prehearing on the developer's application on 30 October 2018, Tom Halinksi, partner at Aird Berlis LLP, introduced himself as the City's solicitor in this matter. He has a strong background in municipal law and land-use planning. He emphasized that he will take direction in this matter from City Council.

What I recommend is that Council refer the present report to Mr. Halinksi, requesting from him a written opinion and advice on the irregularities described herein, and that Council obtain his opinion and advice before making a decision on the developer's amendment application. If Mr. Halinksi has questions for me or wants to see any of the evidence on this matter I have amassed, I will do my best to oblige.

AERIAL VIEW


PHILLIP ST
RIVER RD
JOHN ST
BLONDIN AVE
WESTON CONSULTING
planning + urban design
LEGEND
SUBJECT LANDS
SCALE
Air Photograph from Google Earth Pro
Date of photography: 2015
AIR PHOTOGRAPH
4399, 4407, 4413 JOHN ST & 5471, 5491, 5507 RIVER RD
CITY OF NIAGARA FALLS
REGIONAL MUNICIPALITY OF NIAGARA


LANDS ASSEMBLED FOR RIVER RD. DEVELOPMENT, NIAGARA FALLS, ON
Data from MPAC and Geowarehouse, map by K. Westhues, June 2018
Philip Street
1
Main parcel
Lands assembled
in
2006 or earlier
54,000 sq. ft.
Sold for $3 million
on 1 Nov. 2007
Sold for $3.1
million
on 1 Feb. 2017
$57 / sq. ft.
INCLUDED
IN PART 1
2
Sold for
$410K,
31 Jan. '17
$55/sq.ft.
3
Sold for
$550K,
Jan. '17
$85/sq.ft.
4
Sold
$400K
31/1/17
$90/
sq.ft.
5
Sold
750K
31/1/17
$158/
sq. ft.
6
LANE
River
Road
6: River Lane property
Sold for $12,000
on 14 February 2017
John Street