Docket: 2016-1473(IT)G

BETWEEN:

STELLARBRIDGE MANAGEMENT INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 10, 11, 12 and 13 and November 5, 6, 7 and 8, 2018, at Toronto, Ontario

Before: The Honourable Justice Dominique Lafleur

Appearances:

Counsel for the Appellant:	David C. Nathanson, Q.C. Adrienne Woodyard (April 10 to 13, 2018 only) Ashley Boyes (November 5 to 8, 2018 only)
Counsel for the Respondent:	Dominique Gallant Laura Rhodes

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2010 taxation year, the notice of which is dated January 10, 2014, is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 13th day of June 2019.

"Dominique Lafleur"

Lafleur J.

Citation: 2019 TCC 134
Date: 20190613
Docket: 2016-1473(IT)G

BETWEEN:

STELLARBRIDGE MANAGEMENT INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lafleur J.

I. OVERVIEW

1. Appeal

[1] This appeal concerns the determination of the fair market value as at June 30, 2010, (the "Valuation Date") of land inventory (the "Land") held by Stellarbridge Management Inc. ("Stellarbridge" or the "Appellant") and located in the town of Bradford West Gwillimbury, Ontario ("Bradford" or the "Town"). Stellarbridge bought the Land on November 26, 2006, for an amount of $7.3 million. In computing its income for the 2010 taxation year, Stellarbridge deducted, in accordance with subsection 10(1) of the *Income Tax Act* (R.S.C. 1985, c. 1 (5th Supp.), as amended) (the "Act"), an amount of $1.91 million (the "Deduction") on account of the diminution of the fair market value of the Land in relation to its cost. Stellarbridge was of the view that the fair market value of the Land as at the Valuation Date was $5.39 million.

[2] The Minister of National Revenue (the "Minister") reassessed Stellarbridge and disallowed the Deduction. By Notice of Confirmation dated March 11, 2016, the Minister confirmed the reassessment on the basis that the fair market value of the Land as at the Valuation Date was $8 million. In her Amended Reply, the Respondent takes the view that the fair market value of the Land as at the Valuation Date was not less than an amount of $7.3 million. According to the

Respondent, because the fair market value of the Land as at the Valuation Date was not less than its cost, Stellarbridge was not entitled to the Deduction.

[3] At the hearing, the parties called five witnesses, namely Mr. Galliano Tiberini, president of Stellarbridge, Mr. Geoff McKnight, the town manager or chief administrative officer of Bradford, as well as three expert witnesses (Mr. Galluzzo, Mr. Carlson and Ms. Otway).

[4] In these reasons, all references to statutory provisions are to the Act, unless otherwise indicated.

II. BACKGROUND

1. Partial Agreed Statement of Facts

[5] The parties filed a Partial Agreed Statement of Facts, which reads as follows:

> The Plaintiff and the Defendant by their respective Solicitors, agree to the following facts provided that such admissions are made for the prupose of these proceedings only.
>
> 1. The Appellant is incorporated under the laws of the Province of Ontario. Its head office is located at 111 Credistone Road, Concord, Ontario, L4K 1N3.
>
> 2. The Appellant's business includes the business of acquiring, developing and selling land for residential housing.
>
> 3. Throughout its taxation year ended June 30, 2010 (the "2010 taxation year"), the Appellant held certain land inventory located in the Town of Bradford, West Gwillimbury, Ontario (the "Land").
>
> 4. The Land was purchased by the Appellant on November 26, 2006, for a price of $7,300,000.
>
> 5. The size of the Land is approximately 120.29 acres.
>
> 6. The net developable land area of the Land is approximately 72.71 acres.
>
> 7. In computing its income for the 2010 taxation year the Appellant deducted the amount of $1.91 million (the "Deduction") in relation to the Land.

8. The Minister of National Revenue (the "Minister") initially assessed the Appellant for the 2010 taxation year by Notice dated January 17, 2011.

9. By Notice of Reassessment dated January 10, 2014, the Minister disallowed the Deduction in the 2010 taxation year in relation to the Land.

10. By Notice of Objection dated January 22, 2014, the Appellant objected to the Reassessment and by Notice of Confirmation dated March 11, 2016, the Minister confirmed the Reassessment.

2. Stellarbridge's activities

[6] Mr. Tiberini and his family control a group of more than ninety corporations (including Stellarbridge) involved in the manufacture, supply and licensing of building systems, the production and sale of auto parts worldwide, the construction of infrastructure, the building of houses and industrial buildings, land development, and the management of various properties. The said corporations are major players in their respective industries.

[7] More specifically, Stellarbridge's business includes the acquisition, development and sale of land for residential housing. For the past 5 to 10 years, Stellarbridge has been buying vacant lands and going through the planning process to bring the vacant lands to a state where the lands are serviced and home construction can begin. The land development is carried out by Stellarbridge, and then another corporation in the group builds the houses. The business of the group is vertically integrated and is carried on in southern Ontario. Mr. Tiberini has been involved in the land development business for the past 35-40 years. Through Stellarbridge and other corporations of the group, Mr. Tiberini has been personally involved in 50 to 60 land development projects.

3. The Land

[8] Mr. Tiberini testified that he took the decision to buy the Land in 2006. The purpose of the project was to develop the Land and build houses. At that time, Stellarbridge also owned a piece of land located just across from the Land, which has been bought in 2000 or thereabouts ("Bradford Capital"). Mr. Tiberini testified that the Bradford Capital project had not yet been completed at the date of the hearing, as house construction was still being carried out on that piece of land. In 2006, work on the Bradford Capital project had not yet begun.

[9] The purchase price of the Land was established in 2006. A group of Stellarbridge employees, including engineers, planners, lawyers and accountants, met to determine that purchase price. According to Mr. Tiberini, the determination of the purchase price took into account the value of the Land per developable acre, with the time it would take for development, as well as the costs involved (for example, the cost of fill), being factored in; that amount was then compared to the price at which a residential lot would be sold in 4 to 5 years and adjusted to ensure that the project would be profitable.

[10] Having considered their land inventory and on the basis of his knowledge of the industry, Mr. Tiberini estimated that, as at the Valuation Date, the Land had declined in value by at least "a quarter". In a letter dated December 4, 2012 addressed to the Canada Revenue Agency, Mr. Tiberini stated the factors supporting the decline in fair market value of the Land (which included the site-specific costs, as defined below) and justifying the claiming of the Deduction. Mr. Tiberini testified that the awareness of the factors giving rise to site-specific costs and other facts explaining the decline in value of the Land came about during the preparation of the draft plan of subdivision. In this case, a draft plan of subdivision dated October 28, 2010, prepared by KLM Planning Partners Inc., which would likely be approved by the Town, was adduced in evidence. Mr. Galluzzo testified that the preparation of a draft plan of subdivision requires extensive studies and "back and forth" with the municipality which indicates that the date of October 28, 2010 is not an appropriate indicator of when the Appellant acquired awareness of the factors giving rise to the site-specific costs. Hence, according to Mr. Galluzzo, the Appellant would have become aware of these issues before October 28, 2010 because of the length of time it takes to prepare a draft plan of subdivision.

[11] Mr. Tiberini was of the view that as at the Valuation Date the Land was worth approximately $5.4 million. However, no appraisal of the Land was conducted in June 2010.

4. Experts' evidence

[12] According to Mr. John Galluzzo from Altus Group, whom I qualified as an expert for the purpose of the valuation of the Land as at the Valuation Date, the fair market value of the Land as at that date was $5,650,000 as detailed in his report (Exhibit A-9 as updated by Exhibit A-10) (the "Galluzzo Report"). According to Ms. Terri Otway from the Canada Revenue Agency, whom I also qualified as an expert for the purpose of the valuation of the Land as at the Valuation Date, the fair

market value of the Land as at the Valuation Date was $13,833,000 as detailed in her report (Exhibit R-9) (the "Otway Report"). Each expert used a different method of valuation to arrive at his/her opinion. Mr. Galluzzo used the "subdivision development approach" (the "SDA") and confirmed the result obtained under that method by comparing it with the result obtained with the "direct comparison approach" (the "DCA"). However, Ms. Otway relied solely on the DCA. She also compared properties on a gross acreage basis rather than on a net developable acreage basis.

[13] Unlike Mr. Galluzzo, Ms. Otway did not factor into the value of the Land the following costs (together, the "Site-specific Costs"): i) $250,000 representing the cost estimate for the construction of a second secured road access from Simcoe Road along Danube Lane to facilitate approval of the Draft Plan of Subdivision; ii) $300,000 representing the cost estimate for remediation with respect to the First Nations burial ground, affecting approximately 20 acres in the southeast quadrant of the Land; iii) $2,959,000 representing the cost estimate for land fill importation; and iv) $750,000 representing the estimated increased financing carrying costs for the Land because of the delay in servicing the Land. Mr. Galluzzo presented the Site-specific Costs as hypothetical conditions in his appraisal report, and took these Site-specific Costs into account in establishing the fair market value of the Land as at the Valuation Date.

[14] I qualified Mr. Orjan Carlson of Urban Ecosystems Limited ("UEL") as an expert on the need for and the cost of importing, placing and compacting land fill on the Land. Mr. Carlson filed an expert report in which he estimated at $2,959,000 the cost of land fill importation for the Land as at the Valuation Date (the "UEL Report").

III. ISSUE

[15] The sole issue in this appeal is whether the Appellant is entitled to the Deduction. In order to answer that question, I have to determine whether the fair market value of the Land as at the Valuation Date was less than its cost (namely $7.3 million) and, if so, the amount of the difference between the fair market value of the Land and the cost of the Land.

IV. THE LAW

[16] The applicable statutory provisions read as follows:

9(1) Income — Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.	**9(1) Revenu** — Sous réserve des autres dispositions de la présente partie, le revenu qu'un contribuable tire d'une entreprise ou d'un bien pour une année d'imposition est le bénéfice qu'il en tire pour cette année.
. . .	[…]
10(1) Valuation of inventory — For the purpose of computing a taxpayer's income for a taxation year from a business that is not an adventure or concern in the nature of trade, property described in an inventory shall be valued at the end of the year at the cost at which the taxpayer acquired the property or its fair market value at the end of the year, whichever is lower, or in a prescribed manner.	**10(1) Évaluation des biens figurant à l'inventaire** — Pour le calcul du revenu d'un contribuable pour une année d'imposition tiré d'une entreprise qui n'est pas un projet comportant un risque ou une affaire de caractère commercial, les biens figurant à l'inventaire sont évalués à la fin de l'année soit à leur coût d'acquisition pour le contribuable ou, si elle est inférieure, à leur juste valeur marchande à la fin de l'année, soit selon les modalités réglementaires.

[Emphasis added.]

V. PARTIES' POSITIONS

1. The Appellant

[17] The Appellant is of the view that it has met its burden of proof in establishing the fair market value of the Land as at the Valuation Date as being $5,650,000. Since the fair market value of the Land as at the Valuation Date was lower than its cost, an amount of $1,650,000 should, in the computation of Stellarbridge's income for the 2010 taxation year, be allowed as a deduction in accordance with subsection 10(1).

[18] Mr. Galluzzo's valuation of the Land as detailed in the Galluzzo Report should be accepted by the Court as representing the fair market value of the Land as at the Valuation Date, taking into account the Site-specific Costs. The SDA is the proper valuation method. Furthermore, the UEL Report contains a reasonable and reliable estimate of the land fill importation costs as at the Valuation Date.

[19] According to the Appellant, I should disregard Ms. Otway's valuation and the Otway report since Ms. Otway made material errors in her report; in particular, she used the wrong methodology. Furthermore, Ms. Otway made the following errors: she did not walk the Land, or ask to be given access to the Land, or request information from the Appellant; she considered irrelevant factors; she based her analysis on the Land's gross acreage rather than the Land's net developable acreage; and she did not consider the Site-specific Costs in her valuation.

2. The Respondent

[20] According to the Respondent, the fair market value of the Land as at the Valuation Date was not less than $7.3 million. Since the Land's fair market value was not lower than its cost, the Deduction should be disallowed.

[21] Given the issues in respect of the admissibility of the Galluzzo Report under section 145 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules") and the reliability of the evidence adduced at the hearing, the Galluzzo Report should not be relied upon and on that basis, the Appellant did not meet its burden and the appeal should be dismissed.

[22] However, the Respondent was of the view that, if I were to conclude that the Galluzzo Report was admissible, the evidence adduced at the hearing by Mr. Galluzzo lacked independence and reliability. The methods used by Mr. Galluzzo to arrive at the valuation of the Land should not be considered by the Court as he made various adjustments without providing data: he decided to value the Land on the basis of net developable acreage and not on the basis of gross acreage; he did not ascribe any value to the environmentally protected land, which was wrong; and he took into account the Site-specific Costs without verifying whether these costs were also applicable to the comparable sales he relied upon in his analysis.

[23] Further, with respect to the Site-specific Costs, the Respondent was of the view that they should not be factored into the valuation of the Land since the Appellant did not establish that at the Valuation Date it had knowledge of these costs or of the factors giving rise to them. Mr. Tiberini's testimony was not reliable in many respects. On the other hand, on these same issues, Mr. McKnight's testimony should be accepted as he was a credible and reliable witness. The Respondent also questioned the result that Mr. Carlson arrived at in estimating the cost of land fill importation as at the Valuation Date.

[24] More importantly, according to the Respondent, the SDA, as used in the Galluzzo Report, should be disregarded by the Court since that method involved too many estimates and unsupported figures.

VI. ANALYSIS

[25] For the purpose of calculating a taxpayer's income from a business under section 9, subsection 10(1) requires property in an inventory to be valued at the end of the year at the lower of the cost at which a taxpayer acquired the property or its fair market value. Section 9 and subsection 10(1) will entitle the Appellant to a deduction if the fair market value of the Land as at the Valuation Date is lower than its cost. The Appellant must demonstrate on a balance of probabilities that the fair market value of the Land as at the Valuation Date was less than $7.3 million (undisputed cost of the Land) in order for it to be entitled to a deduction in computing its income.

[26] I will first examine the relevant valuation principles to be applied in this appeal and determine whether the Site-specific Costs should have been factored into the valuation of the Land as at the Valuation Date. Then, I will consider whether all or part of the Galluzzo Report should be excluded for failure to comply with section 145 of the Rules. Finally, I will review the experts' evidence and determine the fair market value of the Land as at the Valuation Date.

1. Applicable valuation principles and the Site-specific Costs

1.1. Valuation principles under the Act

[27] The Act does not define the expression "fair market value". It was defined by Justice Cattanach of the Federal Court in *Henderson Estate and Bank of New York v. M.N.R.*, 73 DTC 5471, [1973] CTC 636 [*Henderson Estate*], as follows (p. 5476 OTC):

> . . . That common understanding I take to mean the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question in the ordinary course of business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell. . . .

[28] That definition has since been consistently cited with approval by the Federal Court of Appeal and this Court (see *A.G. of Canada v. Nash*, 2005 FCA 386, 2005 DTC 5696; *The Queen v. Gilbert*, 2007 FCA 136,

2008 DTC 6295 [*Gilbert*]; *Kruger Wayagamack Inc. v. The Queen*, 2015 TCC 90, 2015 DTC 1112).

[29] The classic problem of the difficulties inherent in the determination of the fair market value of capital property was aptly stated in *Gold Coast Selection Trust Limited v. Humphrey (Inspector of Taxes)*, [1948] AC 459, [1948] 2 All ER 379, a leading case decided by the House of Lords. Viscount Simon stated at page 473 A.C.:

> . . . If the asset is difficult to value, but is none the less of a money value, the best valuation possible must be made. Valuation is an art, not an exact science. Mathematical certainty is not demanded, nor indeed is it possible. It is for the commissioners to express in the money value attributed by them to the asset their estimate, and this is a conclusion of fact to be drawn from the evidence before them.

[30] An inquiry into the fair market value of an asset focuses on the knowledge of willing and informed buyers at the appropriate time. This is clear from the classic definition of fair market value from *Henderson Estate*, referred to above, which was cited with approval by the Federal Court of Appeal in *Gilbert*, *supra* at paragraph 18:

> . . . the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question in the ordinary course of business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell. I would add that the foregoing understanding as I have expressed it in a general way includes what I conceive to be the essential element which is an open and unrestricted market in which the price is hammered out between willing and informed buyers and sellers on the anvil of supply and demand. . . .

[31] More recently, Justice Boyle of our Court acknowledged that the definition of fair market value in a tax case "contemplates willing and knowledgeable buyers" (*McCuaig Balkwill v. The Queen*, 2018 TCC 99, 2018 DTC 1084 (para. 14)).

[32] Also, as indicated by the Ontario Superior Court in *Trask v. Groves Memorial Community Hospital*, 2014 ONSC 26, when evaluating a property, ". . . it is not appropriate to have regard to facts and conditions which were not known or available to the public or reasonably ascertainable by the exercise of reasonable diligence as of the Reference Valuation Date" (para. 31).

[33] Finally, this Court is free to accept any expert opinion, or to make its own estimate of value on the basis of the evidence adduced at the hearing (*Petro-Canada v. The Queen*, 2004 FCA 158, 2004 DTC 6329 at para. 48).

1.2. Site-specific Costs

[34] As indicated above, unlike Mr. Galluzzo, Ms. Otway did not factor into the value of the Land the Site-specific Costs.

[35] The Respondent seems to suggest that the Appellant's knowledge of the factors giving rise to the Site-specific Costs on or around the date of acquisition of the Land means that the fair market value of the Land as at the Valuation Date was not less than the cost of the land. However, I am of the view that the Appellant's knowledge, on the date of its acquisition of the Land, of the presence or the likelihood of the presence of the factors giving rise to the Site-specific Costs does not necessarily mean that the fair market value of the Land as at the Valuation Date was not less than its cost. As indicated by the case law, the inquiry into the fair market value of the Land should properly be focused on the price that a willing and informed buyer and seller would arrive at for the Land as at the Valuation Date, determined objectively and on the basis of information known as at the Valuation Date.

[36] Evidence of the Appellant's knowledge is of assistance in determining what facts were known on the Valuation Date. Mr. Tiberini's testimony is the primary source of evidence substantiating the Appellant's awareness of the factors giving rise to the Site-specific Costs at the Valuation Date. Hence, if Mr. Tiberini was unaware of facts that would have an impact on the fair market value of the Land, it may be reasonable to infer that a willing and informed buyer would not have been aware of those facts. Conversely, if Mr. Tiberini was aware of facts that would have an impact on the fair market value of the Land, it may be reasonable to infer that a willing and informed buyer would have been aware of those facts and would have taken them into account in arriving at a price for the Land. Furthermore, other objective facts adduced in evidence at the hearing have to be considered in making the determination as to whether the factors giving rise to the Site-specific Costs were known as at the Valuation Date.

[37] For the reasons set out below, I am of the view that the costs for the remediation of the First Nations burial ground and the costs for the construction of the second access from Simcoe Road cannot be factored into the valuation of the Land as at the Valuation Date. However, for the reasons also stated below, I am of

the view that the delay in servicing the Land was known at the Valuation Date and, subject to considerations relating to the methodology used by the appraiser, had to be factored into the valuation of the Land: an amount of $750,000 is reasonable in that respect. Furthermore, I am of the view that the land fill importation requirement was also known at the Valuation Date and had to be factored into the valuation of the Land: an amount of $1,965,600 is reasonable in that respect.

a) *First Nations burial ground*

[38] Mr. Tiberini testified that in the course of the second environmental study required by the Town several-century-old human remains were discovered on the southeast quadrant of the Land, and a First Nations settlement was found. First Nations bands and experts got involved and the Land was excavated by an archeological team; the process was very difficult. According to Mr. Tiberini, the First Nations burial ground was discovered in 2009 or 2010, before the draft plan of subdivision was prepared. As at the Valuation Date, Mr. Tiberini was not sure how many more studies would be required and what the costs associated with the remediation would be. The Appellant had not signed a contract with a remediation company as at the Valuation Date, but was aware of the extent of the excavation area (approximately 20 acres of the parcel).

[39] The Galluzzo Report made reference to a remediation cost estimate of $300,000 for the First Nations burial ground as a hypothetical condition considered in the valuation of the Land. Mr. Galluzzo reduced the fair market value of the Land by an amount of $300,000 to take into account such remediation costs. In his testimony, Mr. Galluzzo indicated that his client, Stellarbridge, had provided him with the estimate for the remediation costs. Mr. Galluzzo also testified that the actual costs incurred by Stellarbridge for the remediation were approximately $380,000. Again, Stellarbridge provided that information to Mr. Galluzzo.

[40] Mr. Galluzzo's testimony as to the actual costs incurred by Stellarbridge for the remediation of the First Nations burial ground is inadmissible, as hearsay, in proof of the facts asserted (*Wilband v. The Queen*, [1967] S.C.R. 14). Furthermore, the evidence adduced at the hearing by Mr. Galluzzo on the issue of the cost estimate for the remediation as at the Valuation Date is also hearsay evidence and is not admissible for the truth of its contents. Mr. Galluzzo was however entitled to base his opinion on an assumption that the estimated remediation costs were $300,000 as at the Valuation Date, but I will not consider Mr. Galluzzo's testimony on that issue. The information came from Stellarbridge, a party to the

litigation, and no independent evidence to support these cost estimates was adduced at the hearing.

[41] As indicated by Justice Sopinka in *R. v. Lavallee*, [1990] 1 S.C.R. 852 [*Lavallee*] at page 900:

> Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. . . .

[42] However, I do accept Mr. Tiberini's testimony that the First Nations burial ground was discovered before the Valuation Date. The evidence also showed that the existence of the First Nations burial ground on the Land was public information. Accordingly, a willing and informed buyer would have known about the existence of the First Nations burial ground at the Valuation Date. The difficulty here is the lack of evidence regarding the cost estimates for the remediation of the First Nations burial ground. No documentation was adduced in evidence to support the amount of the remediation costs estimate. In his testimony, Mr. Galluzzo referred to the engineering consultant's report from UEL containing the estimated development costs relating to the existing draft plan of subdivision (Galluzzo Report, Appendix A: the UEL cost estimate report), which indicated a budget of $300,000 for "Archeological Study (Phase II)". However, at the hearing, Mr. Tiberini did not testify as to the amount of the remediation costs estimate or as to how that amount was arrived at.

[43] The Appellant did not adduce sufficient evidence to convince me, on a balance of probabilities, that an amount of $300,000 is a reasonable estimate for the remediation costs. Therefore, I am of the view that the costs associated with the First Nations burial ground cannot be taken into account in establishing the fair market value of the Land as at the Valuation Date.

b) *Simcoe Road access*

[44] Mr. Tiberini testified that the requirement to construct a second road access to the site from Simcoe Road was known during the negotiations to obtain approval of the draft plan of subdivision, which would have been before the Valuation Date. Since there was already an entrance to the site, which only needed to be enlarged to meet municipal standards, he thought that the Town would expropriate some land that belonged to a church to allow for the widening of the

entrance. If the Town had proceeded by way of expropriation, construction for the road access would have been much less expensive. Mr. Tiberini testified that, because the Town refused to proceed with expropriation, Stellarbridge was left to negotiate with the church, which asked $1.8 million for the small strip of land needed for the widening of the entrance. According to Mr. Tiberini, that price was unreasonable and another plan had to be considered. The Appellant bought an additional piece of land of one acre on the south part of the site, with a house on it, to allow for the construction of the second entrance to the site from Simcoe Road in order to meet municipal standards.

[45] According to Mr. McKnight, the Appellant would have first known about the number of required access points from Simcoe Road through the secondary plan (or Green Valley Community Plan) development process, which started in the fall of 2005, but no later than when the secondary plan was approved and adopted by the town council in May of 2008. Mr. McKnight testified that the secondary plan process is a public process: a team of consultants is hired by the Town and they make recommendations to the Town. According to Mr. McKnight, Stellarbridge would certainly have participated in that process.

[46] Mr. McKnight's testimony corroborated Mr. Tiberini's testimony in that the necessity to construct a second road access was known on or before the Valuation Date. As previously discussed, however, whether or not Mr. Tiberini knew of the issue before or on the date of acquisition of the Land is not relevant to the determination of the fair market value of the Land as at the Valuation Date.

[47] According to Mr. Galluzzo, from the information provided to him by the Appellant, the estimated cost to build that second entrance to the site from Simcoe Road was $250,000. The Galluzzo Report made reference to a cost estimate of $250,000 for the construction of a second entrance to the site from Simcoe Road as a hypothetical condition considered in the valuation of the Land. Mr. Galluzzo reduced the fair market value of the Land by an amount of $250,000 to take into account this cost.

[48] As with his testimony referred to above in the section dealing with the First Nations burial ground, Mr. Galluzzo's testimony concerning the estimated road access construction costs as at the Valuation Date is not admissible for the truth of its contents as it is hearsay evidence and cannot be considered by the Court. Again, that information came from Stellarbridge, a party to the litigation, and no independent evidence to support this construction cost estimate was adduced at the hearing. Mr. Tiberini did not testify on the costs involved in constructing that

second entrance, nor did he provide the Court with documentation evidencing such costs. Furthermore, no evidence was adduced as to the factors taken into account in arriving at the estimated construction costs of $250,000.

[49] Given the evidence adduced at the hearing, I am of the view that, at the Valuation Date, a willing and informed buyer would have known about the obligation to construct a second entrance from Simcoe Road. As with the First Nations burial ground issue, the difficulty here is the lack of evidence as to the amount involved for the construction of the road access. At the hearing, Mr. Tiberini did not testify as to how he arrived at the estimated road access construction cost. No documentation supporting that estimate was submitted to the Court.

[50] The Appellant did not adduce sufficient evidence to convince me, on a balance of probabilities, that an amount of $250,000 is a reasonable estimate for the construction costs for the second road access to the site. I am of the view that the costs associated with the second road access cannot be taken into account in establishing the fair market value of the Land as at the Valuation Date.

c) *Delay in servicing*

[51] The secondary plan includes a document called the "Master Environmental Servicing Plan" ("MESP"), which is a background document prepared while the secondary plan was being developed. The MESP process would also have started in the fall of 2005. The MESP is largely an engineering exercise for the purpose of looking at how a new neighborhood can be serviced with respect to sanitary servicing, water supply and storm water runoff management, and it would have referred to the necessity for the Green Valley pumping station and for the construction of an associated system of force mains and pipes through the municipal road system to the waste management plant.

[52] Mr. McKnight testified that Bradford relied on a lot levy or a development charge to fund the construction of the infrastructure needed to meet the servicing demands for new developments. The lot levy or development charge is a per-unit fee collected from developers when they apply for building permits. In these circumstances, Bradford would borrow money to fund the infrastructure in advance. Mr. McKnight testified that, as an alternative method to fund infrastructure without the need to borrow money in advance, the Town would enter into an early payment agreement (an "EPA") with the residential developers. The EPAs allowed Bradford to collect the development charges earlier, even before

construction of the infrastructure itself. According to Mr. McKnight, EPAs are not unique to Bradford. The Town has used that approach over the last several years to fund a lot of the major projects situated on its territory, including the Land. When a developer participates in an EPA, it receives a water allocation and a wastewater allocation for the servicing of the lots to be developed. EPA 1 was executed in January 2007. Negotiations between the parties took 8 to 12 months. According to Mr. McKnight, the Town had contacted landowners that might be interested in participating early in 2006. EPA 2 was executed in 2010 (as it was authorized by the Town on September 7, 2010, all the parties would have signed prior to that date) as an amendment to EPA 1. EPA 1 and EPA 2 provide funding to Bradford for water, wastewater infrastructure (expansion of the wastewater treatment plant), construction of a large water main to connect with a neighboring municipality and the designing and construction of the Green Valley pumping station, together with the construction of an associated system of force mains and pipes through the municipal road system to the wastewater treatment plant.

[53] Mr. McKnight testified that the Town did not anticipate in 2010 that there would be a delay in the construction of the Green Valley pumping station. The Town expected the pumping station and major sewers to be operational in 2010. The Green Valley pumping station was intended to start operating in 2010, however, construction did not begin on it until around 2014; it was substantially completed by the end of 2015 and fully commissioned in 2016. According to Mr. McKnight, that caused a one- to two-year delay in development. Municipal servicing delays applied to all developers in Bradford between 2006 and 2010, and not only to Stellarbridge.

[54] Mr. Tiberini testified that he knew that there were some water shortage issues when Stellarbridge bought the Land in 2006. With the execution of EPA 1 and EPA 2, he thought that that problem would be solved, as Stellarbridge had prepaid the development charges to Bradford, which amounted to $4.2 million. However, the allocation of water received under EPA 1 and EPA 2 was not sufficient to service all the lots. Issues were also encountered with respect to the sanitary systems. Furthermore, Bradford did not proceed with the construction of the Green Valley pumping station and the associated system of force mains and pipes which was contemplated under EPA 1 and EPA 2.

[55] According to Mr. Tiberini, it became evident in 2010 that Bradford was in financial difficulty and could not afford the cost of putting in place the infrastructure for new subdivision developments (sanitary infrastructure, water and roads). The Town had to undertake this work in order for Stellarbridge to fully

develop the Land. Mr. Tiberini testified that in 2010 he did not know when Stellarbridge would be able to service the lots on the Land since development required the construction of the Green Valley pumping station and the associated system of force mains and pipes through the municipal road system up to the waste treatment plant. Mr. Tiberini did not have a very accurate projection or timeline as to when servicing would be in place. According to Mr. Tiberini, in 2010 he thought this project could not be completed until 2015 at the earliest or as late as 2016. Furthermore, the water capacity of Bradford was insufficient to allow for the full development of the Land. In 2010, the earliest Mr. Tiberini foresaw servicing being in place was within 4 to 5 years. Mr. Tiberini stated that as recently as April 2018 the Land was still in the process of being serviced and is not fully developed yet, as the water allocation is insufficient.

[56] Bradford and the residential developers then entered into EPA 3. According to Mr. McKnight, EPA 3 was executed in March of 2014 after a two-year negotiation period. Hence, the parties must have met in the spring of 2012. EPA 3 was quite different than EPA 1 and EPA 2. Stellarbridge's contributions to be made under EPA 3 were substantial, totalling around $13 million. Mr. McKnight is of the view that, as at the Valuation Date, a developer would not have known the extent of the contributions to be made under EPA 3. However, Mr. Tiberini testified that he did not remember exactly when negotiations started in respect of EPA 3, but he did say that it was in 2009-2010 that Bradford requested the developers to enter into EPA 3. In his testimony, Mr. Tiberini stated that contributions to be made by Stellarbridge under EPA 3 should be taken into account in determining the fair market value of the Land as at the Valuation Date.

[57] On balance, I am of the view that as at the Valuation Date a willing and informed buyer would not have known about the existence of EPA 3 nor would such buyer have known the extent of the contributions to be made under EPA 3. Mr. Tiberini's testimony as to the timing with respect to EPA 3 was not clear and is not plausible given that EPA 2 was executed in 2010. I am of the view that EPA 3 contributions ($13 million) cannot be taken into account in establishing the fair market value of the Land.

[58] However, the testimony of both Mr. Tiberini and Mr. McKnight clearly established that the construction of the Green Valley pumping station and the associated system of force mains and pipes through the municipal road system up to the wastewater treatment plant was essential before development could take place on the Land. On the Valuation Date, construction had not yet begun.

[59] As at the Valuation Date, a willing and informed buyer would have known that the Green Valley pumping station and the associated force mains and pipes had not been constructed, that the water allocation was insufficient and that a certain delay in development was to be expected. I find Mr. McKnight's estimate of a one- to two-year delay in development to be an underestimation. Mr. Tiberini's testimony is more plausible and credible in that respect.

[60] The evidence also showed that construction of the Green Valley pumping station only began in 2014. While this is hindsight evidence, it demonstrates the reasonableness of the assumption made by Mr. Galluzzo that development would be delayed on account of the delay in servicing the Land. Mr. Galluzzo stated in his report and in his testimony that municipal servicing infrastructure had been delayed and was anticipated to be completed by 2015 for the Land (at mid-point between 2014 and 2018). Mr. Galluzzo estimated the cost for that delay at $750,000, which estimate was based on the assumption of a $5 million loan at 5% interest for an additional development timing of 3 years.

[61] I am of the view that it is reasonable to assume a three-year additional development delay for the servicing of the Land, as indicated in the Galluzzo Report, and subject to what is stated in the paragraph immediately following, to factor into the valuation of the Land an estimated cost of $750,000 in respect of the additional three-year development delay.

[62] I acknowledged that the evidence showed that the servicing delay would have applied to all developers in Bradford in 2010. However, that does not mean that a certain amount to account for that delay should not be factored into the valuation of the Land. I am of the view that the methodology used by the appraiser will be of relevance in the determination of that amount. Under the SDA, the cost estimates for the servicing delay will have to be taken into account. However, I am of the view that under the DCA the location and dates of the comparable sales used by the appraiser will determine whether the cost estimates for the servicing delay have to be factored into the valuation.

d) *Fill importation*

[63] Mr. McKnight testified that the secondary plan and the MESP would have indicated that importation of fill would be required on a certain part of the Land. Furthermore, the MESP noted that the lands are quite flat, that some fill and grading would be required to provide sufficient slope to allow runoff to occur efficiently.

[64] Mr. Tiberini testified that the most expensive challenge in respect of the Land was the need to import land fill. That factor is very important for developers as the expense for importing fill is very onerous; accordingly, engineers and planners make sure that sites balance when they plan the roads and the services. Since it was not otherwise possible to balance the site, a large quantity of fill had to be imported to the Land. Then, that large quantity of fill had to be moved, levelled and compacted. The required fill added an unexpected cost to the development of the Land.

[65] According to Mr. Tiberini, the quantity of fill required to be imported to the Land was known at around the Valuation Date. The planners and engineers of the Appellant, while they were working on the draft plan of subdivision, estimated the amount of fill necessary at between 200,000 and 250,000 cubic metres. However, the actual cost was not known as at the Valuation Date. Mr. Tiberini testified that 140,000 cubic metres of fill were still required to be imported in 2018, in addition to the 130,000 cubic metres imported in 2017.

[66] In 2013, the Appellant requested Mr. Carlson and his firm, UEL, to determine the cost of the fill importation requirement for the Land. Mr. Carlson testified that the need for importation of fill on the Land and Bradford Capital was extraordinary. He also stated that the need for fill importation is very uncommon for residential subdivisions because a developer can play with grades and house types. However, residential subdivisions will still require the moving and compacting of fill. It is another matter for industrial subdivisions since there is less flexibility. Mr. Carlson said that, apart from the Land and Bradford Capital, he knew of only two other residential projects where importation of fill was necessary. Mr. Carlson testified that UEL, once it started working on the preliminary design (that is, before the draft plan of subdivision), realized that the Land would be short of fill as would Bradford Capital.

[67] A preliminary opinion letter dated April 25, 2013 (Exhibit R-2) was issued by UEL. On the basis of the preliminary engineering design, which contains a preliminary grading plan, and the draft plan of subdivision, UEL estimated that the volume of fill required to be imported onto the Land was 168,000 cubic metres (on a net basis, because of the shortfall of fill) at a cost of $12.50 per cubic metre, for a total of $2,100,000 (without considering any cost for the fill itself, because in those years one would not have had to pay for fill). The estimate was a generic unit cost of $12.50 per cubic metre, which was a reasonable estimate based on experience. Mr. Carlson testified that if that estimate was applied to 2010 using the Ontario Series of the Construction Cost Index, as published by CanaData

(the "Construction Cost Index"), the cost would have been $11.70 per cubic metre, for a total fill cost of $1,965,600. Mr. Carlson also testified that in October 2009 his firm had prepared a Functional Servicing Report, which is a document in support of the draft plan of subdivision. With that document, he would have been able to estimate the amount of fill needed on the Land. The cost estimate indicated in his letter dated April 25, 2013, was based on that information.

[68] In 2017, the Appellant asked Mr. Carlson to review his 2013 fill cost estimate. Mr. Carlson's expert report dated December 18, 2017, the UEL report, was filed as Exhibit A-3. According to the UEL Report, the volume of fill required to be imported onto the Land is estimated at 254,000 cubic metres for a total cost of approximately $2,959,000, which was based on a 2010 cost of $11.65 per cubic metre. In order to determine what the cost would have been in 2010, Mr. Carlson used the Construction Cost Index. Furthermore, UEL had its own statistics which were used by Mr. Carlson. The differing results are due to the fact that in 2017 UEL had access to the final engineering design (which was finalized in 2014), detailed grading calculations and the actual costs associated with fill importation for Bradford Capital incurred in 2016. According to Mr. Carlson, Bradford Capital and the Land are of similar size and located directly opposite each other, so he was of the view that it was appropriate to use the experience from Bradford Capital to make his calculations for the Land.

[69] According to the UEL Report, the costs associated with the importation of fill in respect of Bradford Capital totalled $1,894,028.58 for 145,740 cubic metres of imported fill. In 2016, the resulting cost per cubic metre would have been approximately of $13.00. Mr. Carlson explained that, in order to adjust these costs to reflect the costs for the importation of fill in 2010, he used the Construction Cost Index. For June 2010, the composite index was 131.4 and for June 2016, 146.7, representing a change of 15.3 index points or 11.64%. Mr. Carlson explained that the cost of $13 per cubic metre in 2016 would have had to be discounted by 10.43% to $11.65 per cubic metre if the work had been performed in 2010.

[70] According to Mr. Carlson, using the Construction Cost Index is the correct way to calculate the cost of fill for 2010, as a big part of the index is the cost of construction equipment. It is the least variable of the variables. The Ontario Series of the Composite Cost Index includes a whole range of different types of construction costs, but one of the key components for fill importation is, of course, the cost of construction equipment; in estimating the cost of fill here, the only thing we are dealing with is the cost of heavy construction equipment, and those pieces of equipment have relatively standard unit rates in Ontario.

[71] For the following reasons, I am of the view that the UEL Report cannot be relied upon to estimate the cost of importation of fill onto the Land as at the Valuation Date, as it relies substantially on hindsight information. In preparing the UEL Report, Mr. Carlson had the benefit of using the final engineering design and had access to detailed grading calculations, which were not available at the Valuation Date. Furthermore, Mr. Carlson used the costs incurred for fill importation during 2016 in respect of another project of the Appellant, Bradford Capital. I am of the view that this represents unpermitted use of hindsight information. Mr. Carlson did not use hindsight information to test the reasonableness of his assumptions, which would have been an admissible use of hindsight, but he used it to make his calculations, which I find is not admissible (*Douglas Zeller and Leon Paroian, Trustees of the Estate of Marjorie Zeller v. The Queen*, 2008 TCC 426, 2008 DTC 4441, at para. 42 [*Zeller Estate*]; *Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board*, 2000 CarswellOnt 1530, [2000] O.J. No. 1480 (QL), at para. 11 [*Ford Motor*]).

[72] Furthermore, the general principle is that one must base a valuation on the knowledge available at the effective date of valuation (*Debora v. Debora*, 83 O.R. (3d) 81 at para. 50). Here, the knowledge available at the Valuation Date would have included the preliminary engineering design, the preliminary grading plan, the draft plan of subdivision as well as the Functional Servicing Report of October 2009. However, knowledge at the Valuation Date would not have included the final engineering design and the detailed grading calculations. For the same reasons, the experience with respect to fill importation on Bradford Capital in 2016 cannot be used by Mr. Carlson to estimate the cost of fill importation for the Land as at the Valuation Date.

[73] I would also point out that, while the MESP specifies that importation of fill would be required for the eastern portion of the Land, and that information had been available since 2005, this is not relevant to the determination of the fair market value of the Land as at the Valuation Date. The Respondent seemed to suggest that as Mr. Tiberini knew, or ought to have known, about the necessity for fill importation when the Land was purchased in 2006, the costs with respect thereto cannot be taken into account to assess the value of the Land in 2010. As mentioned above, it is the fair market value of the Land as at the Valuation Date that I need to determine and not whether Mr. Tiberini knew about the need for fill importation in 2006. I have to determine, on the evidence adduced at the hearing, whether, at the Valuation Date, a willing and informed buyer would have known about the necessity to import fill, and if so, the quantity of fill needed and the price per cubic metre at that time.

[74] I am of the view that, on balance, the evidence showed that a willing and informed buyer would have known about the necessity to import fill onto the Land at the Valuation Date because of the preliminary engineering design, the preliminary grading design and the draft plan of subdivision. Mr. Tiberini's testimony was credible and reliable regarding the fact that Stellarbridge's engineers and planners had realized that between 200,000 and 250,000 cubic metres of fill would need to be imported onto the Land while they were working on the draft plan of subdivision prior to the Valuation Date. Also, Mr. Carlson testified that UEL, when it started working on the preliminary design (that is, before creating the draft plan of subdivision), had realized that the Land would be short of fill (as would also be the case for Bradford Capital). Mr. Carlson also testified that if he had been asked in 2010 to estimate the quantity of fill required on the Land, he would have opined, on the basis of the information available at that time, that 168,000 cubic metres of fill was necessary.

[75] Accordingly, given Mr. Carlson's experience and expertise, I conclude that, at the Valuation Date, a willing and informed buyer would have estimated that the Land needed 168,000 cubic metres of fill. Furthermore, I would agree that, as stated by Mr. Carlson, using the Construction Cost Index to determine the cost of fill in 2010 is reasonable and I agree that a cost of $12.50 per cubic metre in April 2013 represents $11.70 per cubic metre in June 2010. I am therefore of the view that it is reasonable to estimate the cost of fill for the Land as at the Valuation Date at a total of $1,965,600 and that that cost estimate has to be factored into the valuation of the Land.

2. Admissibility of the Galluzzo Report

[76] Section 145 of the Rules sets out the procedural guidelines with respect to expert witnesses and their reports.

[77] The relevant provisions of the Rules read as follows:

145(2) An expert report shall	**145(2)** Le rapport d'expert :
(a) set out in full the evidence of the expert;	a) reproduit entièrement la déposition du témoin expert;
. . .	[…]
145(3) If an expert fails to comply with the Code of Conduct for Expert Witnesses, the Court may exclude	**145(3)** La Cour peut exclure tout ou partie du rapport d'expert si le témoin expert ne se conforme pas au Code de conduite régissant les

some or all of their expert report.	témoins experts.
. . .	[…]

SCHEDULE III	**ANNEXE III**
(Paragraph 145(2)(c) and Form 145(2) of Schedule I)	**(alinéa 145(2)c) et formule 145(2) de l'annexe I)**
Code of Conduct for Expert Witnesses	**Code de conduite régissant les témoins experts**
Expert Reports	Rapport d'expert
3 An expert report referred to in subsection 145(1) of the Rules shall include	**3** Le rapport d'expert visé au paragraphe 145(1) des présentes règles comprend :
. . .	[...]
(d) the facts and assumptions on which the opinions in the report are based;	d) les faits et les hypothèses sur lesquels les opinions figurant dans le rapport sont fondées;
. . .	[...]
(h) any literature or other materials specifically relied on in support of the opinions;	h) les ouvrages ou les documents invoqués expressément à l'appui des opinions;
. . .	[...]

[78] The Respondent argued, in her closing arguments, that the Galluzzo Report is inadmissible due to non-compliance with the Rules and with the *Code of Conduct for Expert Witnesses*. The Respondent relied on *Bekesinski v. The Queen*, 2014 TCC 35, 2014 DTC 1066 [*Bekesinski*], *Gerbro Holdings Company v. The Queen*, 2016 TCC 173, 2016 DTC 1165 [*Gerbro*] and *Grimes v. The Queen*, 2016 TCC 280, 2016 DTC 1210. The non-compliance, in the Respondent's view, stems from the failure to include environmental studies concerning the Land, market information and certain calculations. This is allegedly in contravention of paragraph 145(2)(a) of the Rules and paragraphs 3(d) and (h) of the *Code of Conduct for Expert Witnesses*.

[79] According to the Respondent, the Galluzzo Report listed the following documents as providing guidance, but these documents were not included in the report:

- Phase 1 and Phase 2 Environmental Site Assessment as well as Geotechnical Investigation report, prepared by Toronto Inspection Ltd. and dated August 2006;

- Hydrogeological Investigation Report prepared by Cole Engineering, dated August 2011;

- Functional Servicing Report prepared by UEL, dated October 16, 2009;

- Environmental Impact Study prepared by Cunningham Environmental Associates, dated April 2010;

- EPA 1, EPA 2 and EPA 3 (cost-sharing schedules).

[80] Additionally, according to the Respondent, while the Galluzzo Report included excerpts from the Bradford West Gwillimbury Official Plan, Trimart Housing Market Overview data and statistics, and MPAC market data, they should have been included in the Galluzzo Report in their entirety.

[81] The Respondent relies on the *Gerbro* description of the ruling in *Bekesinski*, *supra*, to argue that the Galluzzo Report is inadmissible on the basis of paragraph 145(2)(a) of the Rules. In *Bekesinski*, *supra*, Justice Campbell concluded that an expert report may be excluded if it fails to state the facts and reasoning relied on in reaching its conclusions, including any quantitative data relied on in formulating these conclusions (paras. 27-32). The Respondent relies as well on the former wording of paragraph 145(2)(b) of the Rules, which required that "a full statement of the proposed evidence in chief of the [expert]" be set out in the expert report.

[82] The current version of section 145 of the Rules is somewhat different in that it enumerates specific requirements in respect to the expert report's content. It accomplishes this by adding as a schedule a "Code of Conduct for Expert Witnesses", which enumerates the specific content required to be included in an expert report. The concern in both the former and the current section 145 is to maintain procedural fairness and avoid "trial by ambush".

[83] The question boils down to whether the various documents referred to above are "materials specifically relied on in support of the opinions". The word

"specifically" (in the French version "expressément") is key, as is the phrase "relied on in support of" (in the French version "invoqués [...] à l'appui des").

[84] In examining non-compliance with the rules for expert reports, the Court will weigh the gravity of the non-compliance and the prejudice to the opposing party. In *Gerbro, supra,* Lamarre A.C.J. noted that the non-compliance in *Bekesinski, supra*, which resulted in the exclusion of an expert report, was more serious than in *Gerbro, supra,* where there was only a partial omission of data (para. 144). Nonetheless, in *Gerbro, supra,* Lamarre A.C.J. excluded the expert report because she was of the view that the fairness of the trial might have been affected if the incomplete expert report was allowed (para. 147).

[85] Since the issue is one of procedural fairness, the particular instances of alleged non-compliance and their effect on the expert's opinion and the Respondent's ability to make its case are important.

[86] Here, the Respondent failed to substantiate the prejudicial effect of the deficiencies, such as the effect on the Respondent's ability to make her case. The Respondent's objection only arose after her cross-examination of Mr. Galluzzo. While it is true that the Respondent is not responsible for reviewing the contents of an expert report for compliance (*Gerbro, supra*, para. 147), the listing of the documents in the Galluzzo Report and the lateness of the Respondent's objection suggest that the deficiencies did not prejudice the Respondent. I am of the view that this situation is not tantamount to "trial by ambush", as the Respondent did not seem to have been ambushed.

[87] Mr. Galluzzo testified that he did not rely directly on the Phase 1 and Phase 2 Environmental Site Assessment reports and the Geotechnical Investigation report, prepared by Toronto Inspection Ltd. and dated August 2006. Such studies are usually done to determine whether there is contamination on a property. The Galluzzo Report simply assumed that there were no environmental issues with the Land that would affect its fair market value (Galluzzo Report, p. 23).

[88] Mr. Galluzzo also testified that the Hydrogeological Investigation Report dated August 2011 prepared by Cole Engineering, the Functional Servicing Report dated October 16, 2009 prepared by UEL, and the Environmental Impact Study dated April 2010 prepared by Cunningham Environmental Associates only provided guidance on drainage, physical features and background servicing requirements in respect of the Land.

[89] Mr. Galluzzo's survey of comparable sales and his opinion with respect to the value of the Land, before incorporation of the Site-specific Costs, does not appear to rely on these studies.

[90] Furthermore, Mr. Galluzzo testified that the EPA payments were not included in the valuation of the Land under either method. A review of the Galluzzo Report indicates very clearly that none of the EPA payments (including payments to be made under EPA 3) were included in determining the fair market value of the Land. I cannot find any indication that these payments were considered in his analysis under the DCA. Furthermore, under the SDA, the development charges taken into account are those charged by the Town as at the Valuation Date upon issuance of a building permit of $32,582 per unit or $13,065,382, which includes regional and municipal charges (p. 76). If payments under the EPAs had been taken into account, the development charges would have been $43,237 per unit or a total of $17,337,980 (p. 48). It is clear that EPAs payments were not relied upon by Mr. Galluzzo in arriving at the fair market value of the Land.

[91] Given Mr. Galluzzo's testimony and after my review of the Galluzzo Report, I am of the view that the references to the various documents indicated in that report are insufficient to bring these documents within the purview of paragraph 3(h) of the *Code of Conduct for Expert Witnesses*.

[92] With respect to the Official Plan, Trimart excerpts and MPAC excerpts, the Respondent has not clearly stated how the inclusion of the reports in their entirety would be relevant to the valuation of the Land. As the relevant excerpts were included in the Galluzzo Report, I find that that was sufficient to constitute compliance with the Rules.

[93] It cannot be said that the mere consideration of these various documents in the course of arriving at an opinion means that these documents are therefore "specifically relied on in support of" that opinion. Accordingly, I am of the view that the Galluzzo Report is in conformity with the Rules and should not be excluded by the Court on that basis.

[94] Furthermore, the Respondent claims that the evidence adduced by Mr. Galluzzo lacked independence and reliability because the Appellant informed him of the amount of the Deduction before he completed his valuation opinion. I cannot accept that argument. Mr. Galluzzo has extensive experience in real estate

valuation, having performed more than one thousand five hundred appraisals during his career. Mr. Galluzzo is a qualified professional and he agreed to be bound by the *Code of Conduct for Expert Witnesses*. Mr. Galluzzo is not a Stellarbridge employee, rather he is employed by a large, reputable, independent firm that is not subject to Stellarbridge's control. While I do not agree with all the details of Mr. Galluzzo's opinion, I find nothing to suggest that his opinion is biased or lacks independence such that it cannot be relied on.

3. Experts' evidence and fair market value of the Land as at the Valuation Date

[95] According to the Galluzzo Report, the fair market value of the Land as at the Valuation Date is $5,650,000 or $77,706 per net developable acre, taking into account, under the SDA, the Site-specific Costs. Because of the limited availability of truly comparable land sales and considering that the highest and best use of the Land was future residential development, Mr. Galluzzo was of the view that the preferable method for valuing the Land was the SDA, and he relied to a much greater extent on that approach. In his testimony, Mr. Galluzzo confirmed that he used the DCA to confirm the results he had obtained under the SDA.

[96] In addition to considering the Site-specific Costs, Mr. Galluzzo's valuation takes into account the following hypothetical conditions (Galluzzo Report, p. 4): i) the draft plan of subdivision dated October 28, 2010 and indicating a net developable land area of 72.71 acres would likely be approved and ii) 401 residential units (on 262 lots) could have been developed on the Land.

[97] Ms. Otway valued the Land as at the Valuation Date at $13,833,000 or $115,000 per gross acre. As indicated above, she used only the DCA to establish the fair market value of the Land. She testified that she inspected the Land on April 10, 2017, but she did not enter onto or walk the Land. She did not take into account the Site-specific Costs. Further, she did not request information from the Appellant.

[98] For the following reasons, I am of the view that the Otway Report cannot be relied upon and should be given no weight by the Court given its material errors and deficiencies. After reviewing the comparable sales used by both appraisers, I conclude that the DCA was not an appropriate methodology to use to value the Land as it would not be reasonable to value the Land on the basis of only one reliable comparable sale. Furthermore, I find that the valuation metric to be used under the DCA was the net developable acre and not the gross acreage of the Land

used by Ms. Otway. I also find that the SDA is an appropriate method to use to value the Land given the existing indicia regarding development of the Land as at the Valuation Date.

[99] After reviewing the DCA as used by Mr. Galluzzo and Ms. Otway, and describing some of the deficiencies and errors contained in the Otway Report, I will examine the SDA as applied by Mr. Galluzzo and determine the fair market value of the Land as at the Valuation Date.

3.1. Methodology

a) *Direct comparison approach as applied by Ms. Otway*

[100] To establish the fair market value of the Land as at the Valuation Date, Ms. Otway used six comparable sales registered between May 2008 and October 2012. She testified that, because development site sales are often negotiated a few years prior to registration and are subject to conditions, she felt it was reasonable to use transactions that occurred after the Valuation Date to arrive at a value for the Land (namely comparable sale No. 4 (October 2012) and comparable sale No. 5 (January 2012)). After analyzing the six comparable sales, Ms. Otway concluded that the fair market value of the Land as at the Valuation Date fell between comparable sale No. 4 as the upper limit, at $126,500 per acre, and comparable sale No. 3 as the lower limit, at $113,400 per acre, but that it was closer to the latter. However, according to Mr. Galluzzo, only sales that occurred not more than 6 months after the effective date of valuation could be included under the DCA.

[101] As mentioned above, the general rule is that hindsight is not admissible except to test the reasonableness of the assumptions made by the valuators (*Zeller Estate*, *supra*, *Ford Motor*, *supra*). The general principle is that one must base a valuation on the knowledge available at the effective date of valuation (*Debora v. Debora*, *supra*, para. 50). As indicated by the Supreme Court of Canada in *Tabco Timber Limited v. The Queen*, [1971] S.C.R. 361 [*Tabco*] at page 367, the rule dealing with the admissibility of sales occurring after the valuation date as stated by the same Court in *Roberts and Bagwell v. The Queen*, [1957] S.C.R. 28, is as follows: “The rule should allow the Court to admit evidence of such sales at it finds, in place, time and circumstances, to be logically probative of the fact to be found.”

[102] I am of the view that comparable sales No. 4 and No. 5 should not have been used by Ms. Otway as it was an inappropriate use of hindsight information. These sales were registered in October 2012 and January 2012 respectively, more than a year and a half after the Valuation Date. Ms. Otway testified that she was not able to confirm the actual date of sale of these two properties. Furthermore, given the market conditions, which were better in October 2012, the exception to the use of hindsight as stated by the Supreme Court in *Tabco*, *supra*, does not apply in this case. Ms. Otway mentioned in her report that residential lot prices had increased significantly, by 10.8%, in 2011, which was indicative of a robust residential market in 2010. Also, residential lot prices had risen by 6.82% in 2012. It would therefore not be appropriate to rely on a 2012 sale to establish the fair market value of the Land as at the Valuation Date.

[103] Ms. Otway used comparable sale No. 4 as the upper limit for the value of the Land; she did not use hindsight information to test the reasonableness of her assumptions, she used hindsight information to arrive at her conclusion. No evidence was adduced before the Court concerning the delay in registering sales for development sites. Furthermore, municipal services were available for comparable sale No. 4 as well as for comparable sale No. 5, which was not the case for the Land as at the Valuation Date. In addition, comparable sales No. 3 ($113,402 per gross acre) and No. 2 ($65,868 per gross acre) were zoned as agricultural, had no municipal services, and were situated outside the urban boundary of Bradford. Comparable sale No. 2 would require significant adjustments to make it comparable to the Land, given the larger size, the inferior location and the superior planning status of the Land. In her testimony, Ms. Otway acknowledged that comparable sale No. 1 could have been excluded from her report, as it represents the least comparable sale. In my view, as comparable sale No. 1 is located in another municipality and is agricultural land, it should be disregarded. In conclusion, that will leave only one comparable sale, that is, comparable sale No. 6, to use for the purpose of valuing the Land.

b) *Direct comparison approach as applied by Mr. Galluzzo*

[104] For the following reasons, I am of the view that Mr. Galluzzo's application of the DCA is reasonable, subject to my conclusion in respect of the applicability or non-applicability of each of the Site-specific Costs to the valuation. However, given that only one comparable sale is truly a comparable sale (comparable sale No. 4 (which is comparable sale No. 6 in the Otway Report), I am of the view that the DCA was not an appropriate methodology to use to value the Land, as it would not be reasonable to value the Land on the basis of only one reliable comparable

sale. Further, given that conclusion, I will not decide whether the cost estimates with respect to the delay in servicing the Land should be taken into account under the DCA.

[105] Using the DCA, Mr. Galluzzo reviewed five comparable sales, three being located outside the urban boundary (comparable sales No. 1, No. 2 and No. 3), one being of a relatively small size (5.5 acres) and without access to municipal services (comparable sale No. 5), and the last being comparable sale No. 4.

[106] Comparable sales No. 1, No. 2 and No. 3 were all located outside the urban boundaries. Accordingly, it was not possible to determine when those properties would be provided with municipal services and when they would be included within the urban boundaries. Further, the zoning of these properties was agricultural or future employment. In my view, these sales did not offer reliable comparability with the Land. Furthermore, I am of the view that comparable sale No. 5 does not offer a reliable basis for an estimate of the value of the Land given its much smaller size, a characteristic which would appeal to different kinds of developers than those who would be interested in the Land.

[107] The price per net developable acre of comparable sale No. 4 was $141,252; the sale date was in January 2009; the net developable area was 66 acres; and the gross developable area was 66.4 acres. After having proceeded with adjustments that included timing, location, size and land use (zoning, official plan and draft plan status), Mr. Galluzzo concluded that the adjusted sale price of comparable sale No. 4 as compared to the Land was $124,302 per net developable acre, without taking into account the Site-specific Costs.

[108] The adjustment made by Mr. Galluzzo was quantitative in terms of timing, which was to reflect market conditions; that adjustment was 0.5% per month. Mr. Galluzzo testified that as the average increase in home sale prices was approximately 6% per annum in 2008, 2009 and 2010, he chose to use a 0.5% average per-month adjustment to reflect market conditions. I find that approach to be reasonable given the market conditions during that period.

[109] Furthermore, the adjustments were also qualitative with respect to size, location and planning. He had no paired sales to rely on to make these adjustments. Mr. Galluzzo relied instead on his own judgment and professional experience to make the adjustments, which was both reasonable and helpful in the circumstances. Ms. Otway took issue with the manner in which Mr. Galluzzo’s adjustments to the sale price were made. She noted that it is an error to quantify qualitative

adjustments without having market data to rely on. I do not agree with Ms. Otway's comments on that issue. The role of valuators is to provide their opinion on the value of a property, using their skills, judgment and experience. It is reasonable to perform quantitative adjustments to assist the Court in determining the nature of a specific variable's impact on value. Where a quantitative adjustment is unsupported by market data, it is true that the quantitative adjustment will be imprecise. That, however, is an issue that should go to weight.

[110] After taking into account the Site-specific Costs totalling $4,259,000 (including the revised fill importation cost amount as estimated by UEL on December 18, 2017), which amounted to $58,575 per net developable acre, the sale price of comparable sale No. 4 was adjusted by $58,575 per net developable acre to $65,727, to arrive at an estimated value of $4,779,010 ($65,727 x 72.71 acres) for the Land as at the Valuation Date. As it is not possible to arrive at an exact value, Mr. Galluzzo estimated the fair market value of the Land as falling within a range of approximately $60,000 to $70,000 per net developable acre. He then opined that the fair market value of the Land using the DCA would be $4,800,000, taking into account the Site-specific Costs.

[111] While I accept Mr. Galluzzo's DCA methodology, I find that the Appellant has not proven some of the factual assumptions that Mr. Galluzzo relied on in arriving at his valuation opinion. His analysis must be adjusted to account for those assumptions which I have not found as facts: i.e., estimated costs of $250,000 and $300,000 for the second road access from Simcoe Road and for the remediation of the First Nations burial ground respectively. Furthermore, I find that the cost estimate for land fill importation should be $1,965,600 and not $2,959,000. Given these findings, the total Site-specific Costs would be less than Mr. Galluzzo assumed, resulting in a total of $2,715,600 or $37,348 per net developable acre. The price for comparable sale No. 4 must be adjusted by $37,348 per acre to $86,954 per acre ($124,302 - $37,348 = $86,954), as a result of which we arrive at an estimated value of $6,322,425 ($86,954 x 72.71 acres). The market value estimate for the Land would be approximately $82,000 to $92,000 per net developable acre for a total of $5,962,220 minimum and $6,689,320 maximum rounded to $6,000,000 minimum and $6,700,000 maximum.

[112] If I were to use the DCA to value the Land, the estimated fair market value of the Land as at the Valuation Date would be $6,350,000 or $87,333 per net developable acre. However, I find that the DCA is not a proper method to use in the present case given the limited number of comparable sales. I find that some

other method should be relied upon to properly establish the fair market value of the Land as at the Valuation Date.

c) *Subdivision development approach: another methodology for valuing the Land*

[113] The SDA is a method of valuing a property by estimating the projected revenues from the sale of the subdivision lots and subtracting from that amount the development costs in bringing the land from a raw state to a serviced lot state and the developer's profit margin.

[114] Ms. Otway neither used nor mentioned the SDA in her report. The Respondent's position is that the SDA is not appropriate in the circumstances because development of the Land was not imminent and costs and revenues were not known with sufficient precision. However, the Respondent did not refer to any case law to support this position.

[115] I am of the view that the Otway Report is deficient in that it fails to explain why the SDA was not used or even considered. Moreover, Ms. Otway conceded in her testimony that her report was deficient in failing to explain why she chose not to use the SDA.

[116] The Appraisal Institute of Canada has stated that the most appropriate method of valuating vacant sites with development schemes in place is the SDA (Exhibit A-11, p. 18). The Appraisal Institute of Canada specifies in a Professional Excellence Bulletin (Exhibit A-11, attachment) that the SDA should only be utilized when development of the site is not too distant, there is obvious demand for the product and there is at least some documentary evidence that such a development will be approved.

[117] Furthermore, as argued by the Appellant, various cases support the utilization of the SDA or a method other than the DCA. The Supreme Court of Canada stated in *Saint-Laurent (City of) v. Canadair Ltd.*, [1978] 2 S.C.R. 79 at page 94, that "[t]he valuation method based on capitalization of income entails a risk of inaccuracy, but it is not heresy to fall back on it when other methods fail or to use it along with other methods that are not fully satisfactory." In *M.N.R. v. Allarco Developments Ltd.*, [1974] S.C.R. 730 at page 740, the Supreme Court of Canada also mentioned that the "land residual approach" is a recognized method of land valuation, which is applied where it is not possible to determine value on the basis of comparable sales.

[118] Various decisions from the United Kingdom and the United States were also submitted by the Appellant in support of the use of the SDA; (*Lehigh-Northampton Airport Authority v. Fuller* (Joint Book of Authorities, Tab 5); *Bank of Ireland (UK) plc v. Patterson and others*, [2014] NIQB 140; *Xerox Corporation v. Clackamas County Assessor, and Department of Revenue, State of Oregon* (Appellant's Book of Authorities, Tab 24).

[119] The evidence has shown that as at the Valuation Date, the servicing of the Land would probably be in place in approximately 4 to 5 years. The Land was subject to a draft plan of subdivision dated October 28, 2010, which would likely be approved by the Town. As at the Valuation Date, the Appellant had a very good idea of the way the Land would be developed. I am also of the view that it was more plausible than not that the Appellant would proceed with the development of the Land. The Appellant had been involved in the development of land for residential purposes for many years. EPA 1 and EPA 2 were executed in 2007 and 2010 respectively and the Appellant was a party to these agreements. Payments have been made by the Appellant to the Town under these EPAs. Further, a Functional Servicing Report was prepared by UEL in October 2009. These are all signs of future development. Mr. Galluzzo testified that the SDA could be used when development of a subdivision is to take place within 5 years.

[120] Given the very limited number of comparable sales, as indicated above, and the above-noted signs of likely future development, I am of the view that the SDA should have been used or at least should have been considered by Ms. Otway to establish the fair market value of the Land as at the Valuation Date.

[121] With respect to the imprecision of the costs and revenues under the SDA, I am of the view that that question is not relevant at this stage and I will come back to that issue below.

d) *Other deficiencies contained in the Otway Report*

- *Extraordinary assumption*

[122] The Otway Report contains an extraordinary assumption that between the Valuation Date and the date of inspection on April 10, 2017, there were no significant changes to the Land. Furthermore, the Otway Report indicated that the Land "had access to full municipal services, including electricity, natural gas, municipal water, cable television, sanitary sewers and telephone" (p. 22).

[123] However, the evidence has shown that between the Valuation Date and the inspection date, significant changes had been made to the Land. The secured road access from Simcoe Road was constructed, the remediation in respect of the First Nations burial ground was completed and servicing infrastructure was under construction or was in place, including the Green Valley pumping station.

[124] Furthermore, the evidence has shown that municipal services were not available on the Land at the Valuation Date. The Land required improvements such as sanitary sewers and a permanent pumping station, the extension of the existing water main system into the developable area in order to supply water and provide fire protection, installation of a storm water conveyance system, construction of a storm water management facility, and construction of a road network and pedestrian sidewalks. The evidence has shown that residential development could not be proceeded with on the Land until adequate servicing capacity was in place. At the Valuation Date, there was no certainty as to when the required Green Valley pumping station and the associated force mains and pipes would be constructed.

[125] In her report, Ms. Otway also assumed that no environmental contamination problems had been noted. However, I am of the view that if she had inquired of the municipal authorities, Ms. Otway would have been made aware of the existence of the First Nations burial ground, but she did not do so.

- *Highest and best use of the Land*

[126] According to the Appellant, when valuing the Land using the DCA, the value should be adjusted to account for the amount of developable acreage rather than being based on gross acreage. Furthermore, no value should be ascribed to the undevelopable acreage.

[127] In support of its position, the Appellant referred to *Alberta (Transportation) v. Kerr*, 1981 ABCA 9 [*Kerr*], for the proposition that where different portions of a piece of land are capable of different uses, valuing the entire parcel and then attributing a pro rata value to the parcel of land expropriated is inappropriate. The Appellant also relied on *Mannix v. Alberta (Environment, Minister)*, 1984 ABCA 348 [*Mannix*], for the proposition that where a parcel of land comprising both developable land and undevelopable land (i.e., land on which no development can take place for a profit), the value to be ascribed to that latter component is nil.

[128] However, the Respondent takes the position that gross acreage is the appropriate valuation metric under the DCA. The undevelopable portions both add value to the developable portion and themselves have inherent value. The Respondent is of the view that there is in the valuation community no unanimously accepted approach in terms of using gross acreage or developable acreage.

[129] The Respondent relied on *Ordman v. Red Deer (City)*, 2005 CanLII 78457 (AB LCB), for the proposition that, in cases where there is raw land for urban development, buyers and sellers do not buy and sell only the parts that are developable and therefore the unsuitable parts are a factor to be considered when arriving at a total price for the parcel; it is the whole parcel that will be purchased and sold and for which the highest and best use is determined. The Respondent also relied on *United Management Ltd. and Genstar Corp. v. Calgary (City)*, (1986) 70 A.R. 23 (AB LCB), as authority for the proposition that undevelopable land has an impact, either positive or negative, on the value of developable land and that the market does not reflect sales of only the developable or undevelopable parts of the land.

[130] As explained by Ms. Otway, "[t]he concept of highest and best use represents the premise upon which value is based. . . . [It] must be legally permissible, physically possible, financially feasible and maximally productive" (Otway Report, p. 29). According to the Otway Report, as at the Valuation Date the highest and best use of the Land as vacant land was for residential development, with some environmental protection lands, and this would have been in conformity with the secondary plan.

[131] With respect to the Land, the undevelopable acreage is composed of open space (blocks 282 and 283 comprising 1.112 acres) and the woodlot/valley which is zoned as environmentally protected land (blocks 289 and 290 comprising 46.461 acres). The undevelopable portion or the environmentally protected land approximates 40% of the total acreage of the Land, which is very significant if we compare that with the figures for the comparable sales referred to in the Otway Report: 14% for comparable sale No. 4; 30% for comparable sale No. 5; and 1% for comparable sale No. 6. As comparable sales Nos. 1, 2 and 3 are located outside the urban boundary and are not draft plan approved, it is not possible to ascertain the net developable acreage of those properties.

[132] Mr. Galluzzo testified that the highest and best use of the developable acreage is subdivision development but that such is not the case for the undevelopable portion, which can only be used for environmental protection

purposes. According to Mr. Galluzzo, the highest and best use should have been based on the net developable area of 72.713 acres and not on the gross area of 120.286 acres since the undevelopable portion can only be used for environmental protection and no development is permitted on it. The fair market value of the undevelopable portion is nil since there is no value in it for a developer as it will have to be surrendered to the municipality for no consideration and its value is embedded in the value of the developable acreage.

[133] In addition, Mr. Galluzzo testified that in his career he had never seen a valuation based on gross acreage. However, if a property is not subject to a draft plan of subdivision and one has no idea of how many lots the property will comprise, then that property may be appraised on the basis of gross acreage. If there is a draft plan of subdivision in place, the valuation will always be made on the basis of the net developable acreage of the property. Mr. Galluzzo also recognized that a developer would pay a premium for nicely located land, but said that that value would be embedded in the value of the net developable acreage of the property.

[134] The Otway Report suggests also that the undevelopable portion adds value to the developable portion. Importantly, however, the Otway Report does not state why the undevelopable portion is an amenity and how it adds value to the developable portion as an amenity, and it fails to quantify the value of the amenity. In her testimony, Ms. Otway recognized that the highest and best use of the open space portion of the Land is maintaining it as environmentally protected open space; she recognized that each portion has to be valued separately, but she did not do that in her valuation.

[135] I agree with the Appellant that *Kerr*, *supra*, is authority for the proposition that where different portions of a piece of land are capable of different uses, valuing the entire parcel and then attributing a pro rata value to the parcel of land expropriated is inappropriate. Also, in *Mannix*, *supra*, involving the expropriation of property of some 300 acres, which included both developable and undevelopable portions, the Court accepted the approach of breaking the property down into developable and undevelopable portions to determine value. Furthermore, in *Canadian National Railway Co. v. Industrial Estates Ltd.*, (1986), 5 F.T.R. 170 (TD) at para. 8, the Federal Court concluded that, given that the entire parcel of land was not homogeneous, it would be wrong to value the entire parcel on the same basis.

[136] I am of the view that developable acreage is the appropriate metric for the DCA in this appeal. Using gross acreage when comparing the Land to comparable sales would inappropriately overvalue the Land given the presence of a sizeable area of uneconomic, environmentally protected land. Had Ms. Otway applied developable acreage as the metric, as opposed to gross acreage, her valuation would have been reduced substantially, from $13,833,000 to $8,361,995. Furthermore, the Appellant is prevented from putting the undevelopable portion of the Land to any economic use. I accept Mr. Galluzzo's testimony that the undevelopable portion of the Land had no economic value to a willing and informed buyer who would be buying the Land for development purposes. The Otway Report's material error is an important factor in my decision to place no weight on her DCA valuation opinion.

- *Other comments in respect of the Otway Report*

[137] Ms. Otway did not walk the Land and failed to contact the Appellant in order to obtain relevant information about the Land. However, she indicated in her report that a concerted effort had been made to verify the accuracy of the information contained in it (Otway Report, p. 16). In her testimony, Ms. Otway conceded that, because of her failure to contact the Appellant, that statement was not accurate. She explained that she was under the mistaken understanding that she could not contact the Appellant, but also admitted that she was wrong in that presumption.

[138] Because she did not contact the Appellant, she did not assess the factors giving rise to the Site-specific Costs. However, she conceded during the hearing that it would be reasonable to take into account the remediation costs of $300,000 for the First Nations burial ground if the Court came to the conclusion that these costs were known at the Valuation Date. Ms. Otway testified that, when she did her search for comparable sales, she tried to contact the property owner to see if there were any particularities in respect of the property. I find that she should have proceeded in the same way when she did the valuation of the Land. She should have contacted the Appellant to determine whether there were any particularities with respect to the Land.

[139] Ms. Otway also made improper factual assumptions, such as the fact that all properties in Bradford required fill. However, the evidence has shown that the importation of fill is exceptional for a residential subdivision development. Mr. Carlson's testimony, which I found credible and reliable, was clear that the importation of fill was exceptional for a residential subdivision.

[140] Finally, Ms. Otway testified that because she did not have paired sales for the purpose of making adjustments with regard to comparable sales, it was impossible for her to make adjustments to the sale prices of the comparables. I do not agree with her. The role of a valuator is to evaluate properties. She should have used her experience in arriving at appropriate adjustments.

3.2. Subdivision development approach as applied by Mr. Galluzzo and determination of fair market value of the Land as at the Valuation Date

[141] Mr. Galluzzo was confident that the SDA was the proper method to use to determine the fair market value of the Land because the draft plan of subdivision dated October 28, 2010 would likely be approved by the Town, and it indicated the number and types of lots to be developed. Also, Mr. Galluzzo had access to the UEL cost estimates (the "UEL Cost Estimate Report"). Furthermore, he had access to the MCAP survey and had a lot of experience in determining a developer's reasonable profit margin for this type of development.

[142] Mr. Galluzzo explained that he had estimated the total revenues and deducted the total costs to be incurred in order to complete a conceptual residential draft plan of subdivision, i.e., the draft plan of subdivision dated October 28, 2010. As indicated in the Galluzzo Report (p. 70): "The development revenues were based on our market research[.] The development cost estimates were based on a preliminary budget prepared by UEL as at June 2010 as well as Altus Group Ltd.'s internal database and prior valuation experience with subdivision development sites in the GTA." The developer's profit would then be included in the calculation.

[143] The Respondent appears to reject the SDA as an appropriate method generally. The Respondent's critiques are, *inter alia*, that the expenses are all estimates, a small error can result in a large variation in the final valuation, and there is no consensus as to what a reasonable profit is. While these are valid criticisms, as discussed above, I am satisfied that the SDA is a valid approach in these circumstances. I am prepared to accept the "risk of inaccuracy" because the Appraisal Institute of Canada's conditions are met and because, owing the lack of quality of the comparable sales, the DCA is "not fully satisfactory", as discussed in *Saint-Laurent (City of) v. Canadair Ltd., supra*.

[144] The Respondent also argued that, because Mr. Galluzzo relied on cost estimates provided by UEL (in the UEL Cost Estimate Report) for some of the costs included in his calculations, which were not tendered in evidence by

Mr. Carlson or supported by an independent expert report, Mr. Galluzzo's SDA analysis should be given little or no weight. Mr. Carlson was qualified as an expert on an entirely different topic. The Respondent therefore suggests that the UEL Cost Estimate Report should not be given much weight to the extent that it is relied on by Mr. Galluzzo in his SDA analysis.

[145] The cost estimates provided by UEL in the UEL Cost Estimate Report were completed by UEL in 2013, but took into account the costs as at the Valuation Date. Mr. Galluzzo testified that he, as well as a costs consultant at Altus Group, had reviewed the costs as estimated by UEL and compared them with Altus Group's internal knowledge of these costs and then concluded that the costs were reasonable. Mr. Galluzzo also provided cost estimates for financing and interest in respect of the Land.

[146] Mr. Galluzzo's opinion is not based entirely on the UEL Cost Estimate Report. Furthermore, UEL is not a party to the litigation. The Respondent has not persuaded me that UEL's information is inherently suspect such that independent proof of the information is necessary in the circumstances, as it is with some of the Site-specific Costs. I find that this is a situation where an expert "arrives at an opinion on the basis of forms of enquiry and practice that are accepted means of decision within that expertise" (*Lavallee*, *supra*, at p. 899). Mr. Galluzzo is an expert valuator with considerable experience in using cost estimates similar to those provided by UEL to arrive at an opinion on fair market value, but only after having tested the reasonableness of such costs by applying his experience and expertise. I am satisfied that Mr. Galluzzo's judgment and experience provided him with the ability to consider the reasonableness of the cost estimates, when he relied on the UEL Cost Estimate Report. The Respondent has not provided me with sufficient reason to doubt the reasonableness of the UEL cost estimates nor as she presented any contrary evidence. Therefore, subject to my comments below, I will accept Mr. Galluzzo's reliance on the cost estimates derived from the UEL Cost Estimate Report.

[147] The total revenues from lot sales, estimated by Mr. Galluzzo at an aggregate amount of $48,293,325, seem reasonable. I find the methodology used by Mr. Galluzzo to arrive at the total revenues from lot sales for the Land to be appropriate and reasonable. Mr. Galluzzo estimated the revenue from residential lot sales at $47,595,600 on the basis of the number of lots and the value per front foot for each type of lot (detached homes, semi-detached homes and townhouses). He based his estimate of the value per front foot on his review of comparable lot sales by developers to builders in the Bradford area (average $3,320 per front foot)

as well as on the MCAP lot value survey of May 2010 for Newmarket (a superior market) and Barrie (an inferior market), which included development charges. The various figures were provided in the Galluzzo Report. Mr. Galluzzo testified that the projected serviced lot revenues for the Land were based on a timeline of 3 years (5% increase per year based on Mr. Galluzzo's review of the market in Bradford for the years 2008 to 2010). As indicated by Mr. Galluzzo, the projected serviced lot revenues may seem a bit higher than the reported serviced lot transactions in the area, but he took into account the fact that a portion of the lots on the Land would be superior to the comparable transactions and that the comparable transactions were likely negotiated prior to the registered sale date.

[148] The Respondent argued that there were no detailed calculations in the methodology used by Mr. Galluzzo to arrive at the various figures he indicated in his report. However, I am prepared to accept Mr. Galluzzo's calculation of the revenues, as no calculation needed to be made to arrive at the various figures since they were simply derived from market data.

[149] In addition, revenues from a school block and from a future development block (block 295) were included. At the hearing, Mr. Galluzzo also testified that revenues from three other blocks should be included, to the extent of $81,300.

[150] As indicated above, development costs to get the property from a raw state to a fully serviced subdivision that is building permit ready have to be estimated; they will be applied in reduction of the estimated total revenues. In accordance with the UEL Cost Estimate Report, the development costs of the Land, on the basis of the draft plan of subdivision dated October 28, 2010, were estimated at a total of $34,250,000 (including a cost of $2,100,000 for fill importation, a cost of $300,000 for an archeological study (Phase II) and a cost of $1,500,000 for financing interest). Mr. Galluzzo estimated the development costs under the SDA to be $34,085,617 in the aggregate, including the Site-specific Costs.

[151] For the following reasons, I am of the view that it is reasonable to estimate the total development costs for the Land to be $31,481,362.

[152] As I have concluded above, the cost estimate of $300,000 for the First Nations burial ground remediation and of $250,000 for the second road access from Simcoe Road should not be included in the development cost estimates. The land fill importation cost estimate included in the development costs should be reduced from $3,000,000 to $1,965,600. Furthermore, for the reasons indicated below, the development contingency amount equal to 5% of all the development

costs should be reduced from $1,623,125 to $653,270 and the financing fees should be reduced from $200,000 to $150,000.

[153] I accept that the following development costs totalling $12,507,460 are reasonable and should be included in total development costs under the SDA:

i) Hard costs for servicing the Land (sanitary sewers, storm water management, water, roads and sidewalks) ($6,592,000);

ii) Hydro and street lighting services ($1,804,500 in the aggregate or $4,500 per lot);

iii) Costs for landscaping and fencing ($401,000 in the aggregate or $1,000 per unit);

iv) Engineering costs ($730,700);

v) Surveyor/geotechnical/miscellaneous consultants' costs ($200,500 in the aggregate or $500 per lot);

vi) Municipal engineering fees ($353,815);

vii) Miscellaneous fees ($50,000);

viii) Management and development fees ($802,000 in the aggregate or $2,000 per unit);

ix) Legal and marketing fees ($300,750 in the aggregate or $750 per unit);

x) Realty taxes and insurance ($357,195);

xi) Letter of credit fees ($200,000); and

xii) Costs for connecting to the external servicing infrastructure ($715,000).

[154] I also find that the cost estimates for the development charges ($13,065,382) are reasonable and should be included in the total development costs. As discussed above, these costs are payable upon issuance of a building permit. That amount was not calculated on the basis of amounts paid or payable under the EPAs, but was calculated taking into account the development charges within Bradford as at

the Valuation Date for detached/semi-detached homes and townhouses. Mr. Galluzzo's calculations are reasonable.

[155] The development costs as estimated by Mr. Galluzzo included financing fees of $200,000 which were estimated on the basis of a loan of $20,000,000 (covering 60% of the development costs for the Land) and a 1% lender's commitment fee. Mr. Galluzzo testified that lender's commitment fees are fees a bank will charge to undertake and go through the process of financing a project or the servicing costs of a project; they are one-time fees and are in addition to interest. I am of the view that a reasonable estimate for a lender's commitment fee would be an amount of $150,000, and not $200,000. The amount estimated by Mr. Galluzzo represents the maximum a developer will likely have to pay in that respect. As indicated in the Galluzzo Report, "Most developers are able to negotiate lenders fees between 50 and 100 basis points depending upon the development risk, their banking relationships and credit. At the higher end of this range, financing fees would be $200,000" (Galluzzo Report, p. 76). It would not be reasonable to estimate that the lender's commitment fee would be at the higher end of the range; that is the reason I have decided that an amount between $100,000 and $200,000, namely $150,000, would be appropriate.

[156] I find that the cost estimate of $800,000 for servicing loan interest, calculated on the basis of a servicing loan of $20,000,000 at 4% interest and a lot close-out term of 24 months per phase is reasonable and should be included in the development costs for the Land.

[157] I also find that the cost estimate of $1,500,000 for the Land financing, based on a loan of $5,000,000 to purchase the Land, a 6-year term and a rate of interest of 5%, is reasonable and should be included in the development costs for the Land. These costs take into account the fact that the Land would be serviced only between 2014 and 2018 on account of the delay in the servicing of the Land; they include cost estimates of $750,000 with respect to the additional 3-year development delay. Mr. Galluzzo testified that, if it were not for the delay specifically applicable to the Land, he would have used only a 3-year period, which is typical for development where a property is serviced. As indicated above, I am of the view that the servicing of the Land was delayed because of the delay in the construction of the Green Valley pumping station and the associated system of force mains and pipes through the municipal road system up to the wastewater treatment plant.

[158] Servicing contingency costs of $839,650 were included by Mr. Galluzzo in the cost estimates. That amount represents 10% of the aggregate hard costs for servicing the Land ($6,592,000) and hydro and street lighting costs ($1,804,500). According to Mr. Galluzzo, it is typical to take into account a servicing contingency allowance and that a rate of 10% is considered reasonable in the development industry. Furthermore, according to Mr. Galluzzo, since the hard costs and the hydro costs are estimates and not guaranteed amounts, one is justified in taking into account this servicing contingency amount, which is an allowance for any potential changes to these costs. Considering that it is typical in the industry to provide for a servicing contingency amount of 10%, I will include the servicing contingency cost in the calculation of the development costs for the Land.

[159] Furthermore, a development contingency allowance equal to 5% of the total development costs, namely an amount of $1,623,125, was included in the cost estimates. Mr. Galluzzo testified that the purpose of the development contingency allowance is to take into account the fact that the development charges of approximately $13 million could change, and in fact did increase in Bradford after the Valuation Date; it also takes into account the uncertainty in terms of timing with regard to the servicing of the Land (approximately $8.3 million) and in terms of financing for the Land. Mr. Galluzzo testified that, because all the costs are actually estimates, there is typically a dollar contingency amount that is applicable to all the costs as estimated. I am of the view that it would be reasonable for the development contingency allowance to apply to the cost estimates for the development charges and not to other costs; it should be limited to an amount of $653,270. I am also of the view that it should not apply to the hard servicing costs and hydro and street lighting services given that servicing contingency costs of 10% have already been included in the costs estimate. It is not appropriate to charge a development contingency amount on a servicing contingency amount. Furthermore, I am also of the view that the delay in the servicing of the Land has already been taken into account in the additional financing costs with respect to the Land: it would not be appropriate to take into account an additional contingency amount for that risk. Finally, I am of the view that no contingency amount should apply to the other cost estimates, as either the nature of such costs does not support applying the development contingency amounts (for example, the letter of credit fees) or it is established in the Galluzzo Report that the cost estimates are reasonable.

[160] In order to arrive at the future development value estimate for the Land ($9,567,964), the developer’s profit, estimated at 15% of total gross revenues of

$48,293,325, namely an amount of $7,243,999, has to be deducted from the result obtained by subtracting from the total revenue estimates ($48,293,325) the total development cost estimates ($31,481,362). The rate of 15% was based on what in Mr. Galluzzo's experience was the subdivision development profit margin of developers (typically ranging from 10% to 15%) as well as on the fact that Bradford was a secondary market compared to the Greater Toronto Area. I find it reasonable to conclude that a profit margin at the higher end of the range is warranted given the development risks and delay, as indicated by Mr. Galluzzo. In the Galluzzo Report, the future development value of the Land is estimated at $6,894,605. The difference stems from the various development cost estimates which, for the reasons indicated above, I have refused to consider in the calculation.

[161] On the basis of my conclusion, the future development value estimate would then be $9,567,964 or $131,591 per net developable acre and is based on a 3-year timeline. As indicated above, since the Land was not serviced as at the Valuation Date and construction of the Green Valley pumping station had been delayed, I agree with Mr. Galluzzo that it is reasonable to provide for an additional time lag of 3 years. Mr. Galluzzo estimated that the value of the Land had to be discounted by 7% per annum for 3 years to arrive at the present value for the Land. Applying the same reasoning, the application of the SDA in this particular case leads one to conclude that the market value of the Land as at the Valuation Date can be estimated at $7,810,309 or $107,417 per net developable acre.

[162] Applying the SDA methodology as described in the Galluzzo Report, I conclude that the fair market value of the Land as at the Valuation Date was $7,800,000 or $107,275 per net developable acre.

VII. CONCLUSION

[163] This appeal involved valuation opinions on land inventory that diverged considerably. If the cost at which the Appellant acquired the Land was an accurate representation of fair market value in 2006, the differences in the parties' positions were especially pronounced. The Appellant's expert suggested the fair market value of the Land decreased by approximately 23% over three and a half years. The Respondent's expert suggested that its fair market value increased by approximately 90% over those three and a half years. I largely accepted Mr. Galluzzo's analysis, subject to adjustments to account for assumptions which I did not find as facts and development cost estimates that I found should not be included under the SDA.

[164] I find that the fair market value of the Land as at the Valuation Date was $7,800,000. Therefore, the Appellant is not entitled to a deduction under subsection 10(1) since the fair market value of the Land as at the Valuation Date is not less than the cost of the Land.

[165] For the foregoing reasons, the appeal is dismissed. The parties have 30 days to agree on costs, failing which each party is to file submissions on costs, not to exceed five pages. The Respondent shall then have a further 10 days to file written submissions on costs and the Appellant shall have yet a further 10 days to file a written response thereto. If the parties do not advise the Court that they have reached an agreement and no submissions are received within the above-stated time, costs will be awarded to the Respondent as set out in the Tariff; however, given my conclusion on the Otway Report, no costs shall be awarded to the Respondent in respect of expert witness fees.

Signed at Ottawa, Canada, this 13th day of June 2019.

"Dominique Lafleur"

Lafleur J.

CITATION:	2019 TCC 134
COURT FILE NO.:	2016-1473(IT)G
STYLE OF CAUSE:	STELLARBRIDGE MANAGEMENT INC. V. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	April 10, 11, 12 and 13, 2018 and November 5, 6, 7 and 8, 2018
REASONS FOR JUDGMENT BY:	The Honourable Justice Dominique Lafleur
DATE OF JUDGMENT:	June 13, 2019

APPEARANCES:

Counsel for the Appellant:	David C. Nathanson, Q.C. Adrienne Woodyard (April 10 to 13, 2018 only) Ashley Boyes (November 5 to 8, 2018 only)
Counsel for the Respondent:	Dominique Gallant Laura Rhodes

COUNSEL OF RECORD:

For the Appellant:

Name:	David C. Nathanson, Q.C. Adrienne Woodyard Ashley Boyes
Firm:	DLA Piper (Canada) LLP Toronto, Ontario

For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada