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June 21, 2022

ENTERED
Office of Proceedings
June 21, 2022
Part of
Public Record

Via E-Filing
Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. St. SW
Washington DC 20423

Re: STB Docket No. FD 36619
City of North Chicago, Illinois
Petition for Declaratory Judgment Order

Dear Chief Brown,

Please find attached for e-filing the City of North Chicago's Petition for a Declaratory Judgment, which is done in response to a referral from the Circuit Court of Lake County, Illinois in *The City of North Chicago v 2nd & Main*, LLC, No. 19 ED 20 (April 20, 2022).

The undersigned represents the City of North Chicago, Illinois, which is a local government entity of the State of Illinois. Therefore, pursuant to 49 CFR § 1002.2(e)(1), the City requests a waiver of the $1,400.00 filing fee for filing the attached Petition for Declaratory Judgment Order. However, in order the expedite Board review of this matter, the City has paid the filing fee on pay.gov as a deposit and hereby requests a refund of the fee if and when the Board decides to grant this waiver request.

If there are any questions regarding this e-filing, please contact me at the number or email shown above. At your convenience, please email me a file-stamped copy of this Petition.

Sincerely yours,

Mary Jean Dolan

cc: Thomas DiCianni
John Quinn

Enclosure

FEE RECEIVED
June 21, 2022
SURFACE
TRANSPORTATION BOARD

FILED
June 21, 2022
SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 36619

THE CITY OF NORTH CHICAGO, ILLINOIS' PETITION FOR DECLARATORY ORDER

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Dated: June 21, 2022

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 36619

THE CITY OF NORTH CHICAGO, ILLINOIS'
PETITION FOR DECLARATORY ORDER

Pursuant to 5 U.S.C. §554(e), the City of North Chicago, Illinois (the "City") hereby petitions the Surface Transportation Board ("Board") to open a declaratory judgment proceeding, hold an evidentiary hearing, and find (A) that the City's state court condemnation action is not preempted by the Interstate Commerce Commission Termination Act because the 60-year-old water main for which it seeks an after-the-fact easement does not unreasonably interfere with railroad operations or, (B) in the alternative, that the state trial court lacks any basis to order the City to reinforce its entire water main on the Property immediately as a remedy for a highly unlikely partial preemption in the future.

This declaratory order is requested pursuant to an order from the Circuit Court of Lake County, Illinois, in the case of *City of North Chicago v. 2nd & Main, LLC* , No. 19-ED-20 (April 20, 2022), that directed the City petition the Board "to resolve the parameters of its jurisdiction and for any relief compatible with the parties' interests." C930.

I. Factual Background

This is an unusual situation which requires the special expertise of the Board to resolve. Since 1961, a portion of one of the City's twenty-four-inch transmission water mains has continuously operated underneath property located at 1930 Main Street, North Chicago (the "Property"), which is now owned by 2nd & Main, LLC ("2nd & Main"). This water main is

important because it provides water to a significant portion of the City's population. However, the City never acquired an easement to operate the water main underneath the Property, apparently because the city attorney at the time the main was installed forgot to record it. C166-68.

There is no evidence that any of the previous owners of the Property objected to the City's operation of the water main without an easement until 2nd & Main purchased the Property in 2014. C166-68. Prior to 2nd & Main's purchase of the Property the City told 2nd & Main that it did not have an easement to operate the portion of the water main running underneath its Property. C696-97. The City attempted to purchase an easement from 2nd & Main, but when that proved unsuccessful 2nd & Main filed an inverse condemnation lawsuit on July 13, 2017. The inverse condemnation action was terminated with the filing of the current condemnation action by the City seeking to forcibly acquire the water main easement.

The Property is an abandoned lumber mill, C001-C081, which is severely blighted and on which no business activity currently takes place. C250, C275. 2nd & Main is a small business owned and controlled by one man, Phil Dahl. C677-78. Since purchasing the Property in 2014, Mr. Dahl has attempted to use the Property for a variety of business ventures, none of which has proven successful. C689-95. His purported latest business venture is to attempt to use the Property for large container storage. C286, C689-91. On March 17, 2017, 2nd & Main acquired a Notice of Exemption from the Surface Transportation Board. C104-C126.

An abandoned rail spur traverses the Property, running from Union Pacific Rail Road tracks that lie to the west of the Property to an abandoned lumber-storage shed on the Property. C239, C243. This spur does not run above or near the water main within the Property. C287, C295, C941. According to one of the City's engineering experts, Devin Moose, the existing railroad spur could

operate without any need for additional improvement to the water main infrastructure. C223. Mr. Dahl would like to haul containers from rail cars on the Union Pacific tracks onto the Property, where they would be stored. C689-91.

Mr. Dahl has stated that at some point in the future, he would like to add additional rail spurs, which might be located above the existing water main. C102. The entirety of the evidence 2nd & Main provided to support its claim that additional rail spurs will be added was one sentence in one affidavit from Phil Dahl stating, "2nd & Main plans to use the Property that is the subject of the suit, including the property that North Chicago seeks to condemn, for railroad purposes specifically for storage area for shipping containers, additional spur tracks and railroad access." C102.

There is no evidence that it would be economically viable for 2nd & Main to build any additional rail spurs. The City's appraiser, Barton DeLacy, examined whether the Surface Transportation Board Notice of Exemption had any impact on the value of the Property along with the economic viability of using the Property for railroad purposes in the near term. C255. In Mr. DeLacy's opinion there was no likelihood that it would be economically viable to use the Property for container storage or anything else involving the rail spur in the near or medium term. *Id.* The Property is located in a blighted area with low levels of economic activity which makes the demand for large container storage at the Property non-existent. C253-54. As such, Mr. DeLacy opined that there is no economic justification for 2nd & Main to construct additional rail spurs that may intersect with the water main. C255.

In addition, David Johanson, the City's railroad design and construction engineering expert, establishes that there is little likelihood that the Union Pacific Railroad ("UPRR") would provide service to 2nd & Main for its current rail spur or any future rail spurs. It is unlikely that

the Property would receive service from UPRR due to the significant amount of existing rail volumes on the current UPRR North Line (including passenger rail) because it is unlikely that it would be cost effective for UPRR to disrupt this major line connecting Milwaukee and Chicago by providing service to the Property. C934-35. Moreover, Johanson opines that it is unlikely that the existing rail spur would receive service from UPRR because it is not compliant with the current UPRR standards. Specifically, the existing horizontal degree of curvature is approximately 18 degrees (319.62-foot radius) whereas the current UPRR standards require a maximum degree of curvature of 10 degrees (573.69-foot radius). C933-34.

In addition, Johanson explains that locations where 2nd & Main could possibly install a new rail spur so that reinforcement of the existing water main might be necessary based on the applicable railroad standards can only be determined using a detailed site development plan showing specific track locations. C933. 2nd & Main has provided no such plan but has only vaguely referred to possible future plans (for which the City's expert testified there is no economic justification). Johanson analyzed the possibilities for any new rail spurs and determined that the current railroad design standards (requiring a maximum degree of curvature of 10 degrees) and site constraints (e.g., size, relation to railroad line) would significantly limit the length and location of a new rail spur. Johanson calculated the possibilities and created an exhibit that shows the one practical alignment that would both meet the current UPRR horizontal alignment standards and maximize the possible track length on the Property. C941. Hypothetically, as illustrated in Exhibit 2 to Johanson's Affidavit (C941), the one rail spur that might be possible would be a maximum length of approximately 330' which would store between five and seven rail cars (because different types of rail cars have different lengths). It would cross over the water main at a single point. Under applicable railroad standards, there

would be a requirement to reinforce the water main by providing casing around the existing pipe and "the length of the casing pipe under tracks shall be a minimum distance of 30' from center of outside track (measured perpendicular to the tracks) when the end of the casing is below ground." C932-33. Applying this rule and based on applicable railroad standards, if 2nd & Main was to ever install and operate this only practicable new rail spur, only a relatively small portion of the water main running under the Property would require encasement. See C934.

This means that if 2nd & Main ever followed through on its idea of possibly adding a new rail spur, and in the unlikely event that it was able to secure service from Union Pacific, then only a small portion of the water main located on the Property would be required to be reinforced.

II. Procedural Background

A. The Trial Court

2nd & Main filed an inverse condemnation case, captioned 2017-MR-1149, in the Circuit Court of Lake County. After considerable discovery the City determined that it had no viable affirmative defenses and admitted liability. The trial court ordered the City to commence condemnation proceedings, which it did on July 19, 2019. The condemnation proceedings are captioned 2019-ED-20, and this is the underlying case from which the referral was made and the origin of this Petition. See C0001.

On May 13, 2021, 2nd & Main filed a motion for partial summary judgment ("Motion") in the condemnation case. C088. The Motion argued that the City's condemnation action was preempted by the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §§ 10101, *et seq.* (the "Act"). Under the Act, local regulations, including condemnation actions, that "unreasonably interfere with" "the movement of passengers or property, or both, by rail" are

preempted. 49 U.S.C. 10501; *Union Pac. R.R. v. Chi. Transit Auth.*, 647 F.3d 675, 681 (7th Cir. 2011). 2nd & Main argued that the City's condemnation action was preempted by the Act because the water main is not sufficiently reinforced to bear the weight of a rail spur in the event that at some unspecified time in the future a new rail spur happens to be constructed over the water main. C092-95. 2nd & Main argued that the failure of the water main to be sufficiently reinforced to handle this hypothetical scenario constituted an unreasonable interference with railroad transportation. *Id.* Therefore, the water main needed to be reinforced, now, to abate this hypothetical future interference with rail transportation. C095.

The trial court granted 2nd & Main's motion for partial summary judgment. C600-642. It held that 2nd & Main presented sufficient evidence to show that the condemnation would unreasonably interfere with railroad transportation on the Property and thus was preempted by the Act. C622-24. The court ordered the City to reinforce the entire water main on the Property so that it would be able to bear the weight of an unspecified rail spur in the event one was constructed on the Property and operated at some future time. *See* C625-34. Once this was done the water main would no longer unreasonably interfere with railroad transportation and there would be no ICCTA preemption, the court held. *Id.* This would allow the City to complete its condemnation. *Id.* The City appealed.

B. The Appellate Court's Ruling & the Referral to the Board

The appellate court's decision requires some unpacking. While it found that the trial court did not err in implicitly finding preemption, the court also determined that the Board should be the one to resolve what should happen if there was preemption. It stated:

> While there is no dispute that the trial court had jurisdiction to determine the preemption issue, which it implicitly resolved in defendant's favor, preemption suggests that the Board would be better positioned to decide relief, as opposed to the court's decision here

> to "fix" or "avoid" preemption by crafting relief that it deemed would result in noninterference (or, perhaps not-unreasonable interference), with railroad operations.

App. Ct. Op. at ¶50. C926-27.

The appellate court's opinion directs the City (through a mandated circuit court order) to solicit the Board's opinion on the entire question of what a right of preemption entails and what is the reasonable remedy. As a threshold matter, the appellate court wants the Board to advise on whether reconstruction of the entire water main, as ordered, is necessary to avoid preemption, so that if the Board found that the water main did not need to be reinforced, in part or in its entirety, to avoid railroad interference, then the trial court's ordered relief would not be appropriate.

Moreover, the appellate opinion quotes extensively from *City of Ozark, Arkansas v. Union Pacific R.R. Co.*, 843 F.3d 1167 (8th Cir. 2016), where the Eighth Circuit found that the Board should have the opportunity to revisit the trial court's finding on preemption. For example, the appellate court stated that in *Ozark*, while the trial court had found no preemption, there was some evidence that reopening the crossing at issue there would "impede railroad operations. . . (*i.e.* triggering preemption," App. Ct. Op. at ¶51, C927-28, therefore it appeared "an order reopening the cross is within the [Board's] exclusive jurisdiction." *Id.* (quoting *Ozark*, 843 F.3d at 1173). And further, the appellate court quoted the Eighth Circuit as stating: "'if presented the preemption issue the agency could determine that any order restoring this crossing is preempted, or that some accommodation of the parties' interests may be compatible with sound railroad transportation. . . . '" *Id.*

Even more so than in *Ozark*, this is a case where the Board's special expertise should be used to resolve a complex potential preemption problem. As the appellate court observed, here it would not be sufficient to simply find preemption and dismiss the condemnation action – the water main would remain.

> "However, the [trial] court did not dismiss or enjoin the action; rather it crafted relief to circumvent the preemption. As dismissing the [condemnation] complaint will not aid the controversy because plaintiff is seeking an easement for a water main that already exists on defendant's property (and we remain mindful that defendant has a counterclaim for trespass), enjoining the action and seeking input from the Board is the more appropriate approach.

App. Ct. Op. at ¶52, C928-29. The specific direction here was to "petition the Board to resolve the parameters of its jurisdiction and any relief compatible with the parties' interests." *Id.*

Here, it would be appropriate for the Board to determine the parameters of its jurisdiction include revisiting the underlying preemption decision because that is inherently intertwined with the decision of what the proper remedy should be in this unusual situation. As in *Ozark*, the Board can determine if "'any order [allowing the easement] is preempted, or that some accommodation of the parties' interests may be compatible with sound railroad transportation.'" App. Ct. Op. at ¶51 (quoting *Ozark*, 843 F.3d at 1173). The Board has the special expertise in railroads to evaluate the impact and feasibility of a possible future railroad spur crossing over the unreinforced water main. It may do so and determine that the condemnation can be effected without an unreasonable interference with (possible) railroad operations. As discussed below, the Board should also consider whether an easement for the existing water main does not unreasonably interfere with 2nd & Main's potential plan to add a railroad spur because that plan is too speculative and unlikely to succeed. At a minimum, if the Board finds some potential for limited preemption, it can evaluate and limit the remedy to what is needed

Accordingly, the City respectfully requests the Board to issue a declaratory order that the City's easement for the water main does not unreasonably interfere with railroad operations or, in the alternative, that the trial court lacked a basis to order the City to reinforce its entire water main immediately as a remedy for possible future usage of the Property for rail purposes, which

would only potentially require reinforcement of a small portion of the water main in the future. If the Board needs more evidence to make such findings, then the City requests that it order an evidentiary hearing.

III. The Case Against Preemption and the Trial Court's Remedy

The Interstate Commerce Act gives the Board broad and exclusive jurisdiction over "transportation by rail carrier." 49 U.S.C. § 10501(a)(1). The statute defines rail transportation expansively to encompass any locomotive, property, facility, structure, or equipment "related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use." 49 U.S.C. § 10102(9). Section 10501(b) states that "the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." The primary purpose of § 10501(b) is to prevent a patchwork of local regulation from interfering with interstate commerce. *See, e.g., Tubbs—Pet. for Declaratory Order*, FD 35792, slip op. at 5 (STB served Oct. 31, 2014), *aff'd* 812 F.3d 1141 (8th Cir. 2015). Local condemnation is not categorically preempted but rather an "as applied" analysis is used. *Union Pac. R.R. v. Chi. Transit Auth.*, 647 F.3d 675, 678 (7th Cir. 2011).

The test for preemption is whether the government action "would have the effect of preventing or *unreasonably* interfering with railroad transportation." *Id.* at 679 (emphasis added). "What matters is the degree to which the challenged regulation burdens rail transportation." *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 253 (3d Cir. 2007). "This is a fact-intensive inquiry." *Id.* A government "may take easements over rail lines when the facts show that doing so will not significantly interfere with the railroad's ability to conduct business." *Id.* (citing *Maumee & W. Ry. Corp.*, 2004 STB LEXIS 140 (2004)). *See also Friends of the Eel*

River v. North Coast Railroad Auth., 3 Cal. 5th 677, 717 (2017) (The as-applied type of preemption is "'based on the degree of interference the particular state action has on railroad operations'" and requires a factual assessment of whether the effect of the state action would be to prevent or unreasonably interfere with railroad operations.) A government action will not be found to unreasonably interfere with railroad transportation if it has "a more remote or incidental effect on rail transportation." *Florida E. Coast Ry. Co. v. W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001).

In this case, the potential interference with railroad operations is remote and unproven, and not shown to be unreasonable. As discussed above, the water main presents no interference at all with the existing rail spur since it does not cross under or come close to the rail spur. C941. Also, the existing rail spur is not in compliance with current UPRR standards. C933-34. And there was no evidence at all that 2nd & Main will install a new rail spur in the future. Moreover, there is evidence that it is unlikely 2nd & Main will be able to get railroad service from UPRR because of the busy schedule of rail traffic for UPRR around the Property's location. C934-35. It is not feasible to determine what part of the water main, if any, would need to be reinforced unless 2nd & Main provided a concrete, objectively reasonable plan to build and operate a spur, which it has not done. C933, C102.

This case is similar to *Reading Blue Mt. & Northern R.R. Co., v. UGI Utils., Inc.*, 2012 U.S. Dist. LEXIS 8719 (M.D. Pa.), where the court denied a preliminary injunction to stop installation of an underground gas line on railroad property because plaintiff had failed to show it was likely to succeed on the merits of showing preemption. Like here, plaintiff relied on a "lone affidavit" raising the possibility that in the future, the railroad might move its track so that there would be interference with the planned gas line. *Id.* at **2-3. The court concluded that, without

more, it “cannot find cannot find that Plaintiff's railroad operations would be burdened unreasonably by the installation of Defendant's gas line, especially when there would be no present disruptions of the railroad's operations and where the most that can be said is that future track upgrades may possibly be impeded by the presence of the gas line.” *Id.* at *11.

While it is true that in *Union Pacific*, 647 F.3d 675 (7th Cir. 2011), the court found that a condemnation action for an easement was preempted when the railroad defendant had no clear-cut plans for expanding its rail tracks, that case is distinguishable. There, the tracks used by the city transit, for which it sought an easement, were "only a few feet beside Union Pacific's current railroad tracks, [so] a taking would unreasonably interfere with Union Pacific's existing railroad traffic," which was "evident from [the] Union Pacific practice of using non-standard procedures to inspect and maintain its Right of Way" because of the closeness of the parallel tracks. *Id.* at 681. Here, unlike in *Union Pacific*, there is no current interference and no fully operational railroad at issue.

IV. Conclusion

A. The Board Should Take This Case

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to terminate a controversy or remove uncertainty. The Board should take this case because it is unique and needs the Board’s special expertise. Hours of research have uncovered no preemption cases where there was no currently operating railway at issue, the future railway plans were unformed and unproven, and the potential interference was only with a rail spur added to facilitate container storage, not an operating railroad, and the service itself was unlikely. It is not at all clear that the Board, which is charged with administering the Act, would

even find this scenario to be interference with railroad operations, let alone the unreasonable interference required to find preemption.

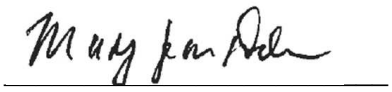
It is also unique because research has not uncovered another case where the easement sought was for a 60-year old underground utility that is already on the alleged railroad property. Here, the City's water main has been continuously operating on the Property for over sixty years. So, a finding of preemption is not a simple matter of dismissing a condemnation lawsuit. The trial court determined that the City needed to dig up and reinforce its water main, at a likely cost of millions of dollars (given the environmental contamination on the Property) and at least a temporary shut off of water service to a significant portion of the City's population. The court has asked the Board for its expertise in fashioning relief and determining the rights of the parties under these unique circumstances. The City asks this Board to find that this is a case where "some accommodation of the parties' interests [is] compatible with sound railroad transportation.'" *See* App. Ct. Op. at ¶51 (quoting *Ozark*, 843 F.3d at 1173).

B. Relief Requested

The City respectfully requests that the Board issue a declaratory order that the City's condemnation action is not preempted by the Interstate Commerce Commission Termination Act because the 60-year-old water main for which it seeks an easement does not unreasonably interfere with railroad operations. In the alternative, the City requests a declaratory order that the trial court lacks the authority to order the City to reinforce its water main immediately as a remedy for preemption that is unlikely to occur in the future, or at a minimum, lacks the authority to order the highly unreasonable remedy of reconstruction of the entire water main on the Property, when the most that could be required in the unlikely event of adding a future rail spur is the reinforcement of a portion of the water main on the Property. Alternatively, if the

Board finds that a part of the water main easement may be preempted in the future, an appropriate remedy may be to allow the easement but with the restriction that if in the future 2nd & Main ever has a specific plan for a new rail spur for which it had a contract for railroad service, then at that time the City would be required to reinforce as much of the water main as was demonstrably required to accommodate the new rail spur. If helpful, the City further petitions the Board to open an evidentiary hearing so that additional facts can developed.

Respectfully submitted,



Mary Jean Dolan

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Attorneys for the City of North Chicago

Certificate of Service

I, Mary Jean Dolan, certify that I served the foregoing **City of North Chicago, Illinois' Petition for a Declaratory Order** and a copy of the **Appendix** by emailing a copy of same on the 21st day of June 2022 to:

John W. Quinn
Churchill Quinn Richtman & Hamilton, Ltd.
2 S Whitney St.
Grayslake, IL 60030
JQuinn@grayslakelaw.com

Mary Jean Dolan

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 36619

THE CITY OF NORTH CHICAGO, ILLINOIS'
PETITION FOR DECLARATORY JUDGMENT

APPENDIX TO PETITION FOR DECLARATORY JUDGMENT

Complaint.....C0001
Defendant 2nd & Main's Answer and Counterclaim.....C0066
Plaintiff's Reply to Defendant's Affirmative Matter and Answer and Affirmative Defense to Defendant's Counterclaim C0082
Defendant 2nd & Main's Motion for Partial Summary Judgment.....C0088
Defendant 2nd & Main's Statement of Material Facts.....C0097
Plaintiff City of North Chicago's Response to Defendant 2nd & Main's Motion for Partial Summary Judgment C0330
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Defendant 2nd & Main's Reply in Support of Its Motion for Partial Summary Judgment C0458
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Supplemental Reply Brief of Plaintiff/Appellant City of North Chicago… ..C0888-C0898
Order and Opinion Appellate Court …… C0899-C0929
Order Circuit Court (April 20, 2022)…….. C0930
Affidavit of David C. Johanson……...C0931-C0941

FILED
6/13/2019 1:07 PM
ERIN CARTWRIGHT WEINSTEIN
Clerk of the Circuit Court
Lake County, Illinois

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

The City of North Chicago	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 19ED00000020
	)	
2nd & Main, LLC; Unknown Owners and Non-Record Claimants	)	Jury Demanded
	)	
	)	
Defendants.	)	

Complaint for Condemnation

Plaintiff, the City of North Chicago, through its attorneys Ancel Glink, P.C., brings the following Complaint for Condemnation and in support thereof avers as follows:

1. Plaintiff City of North Chicago ("the City") is a municipal corporation and home rule unit of government with its principal office located at 1850 Lewis Avenue, North Chicago, Lake County.
2. The City, by virtue of its home rule authority, 65 ILCS 5/11-61-1, 65 ILCS 5/11-139-12, and the Eminent Domain Act (735 ILCS 30/1-1-1, *et seq.*) (collectively, the "City Authority"), is authorized to exercise the right of eminent domain to acquire property located within its corporate limits deemed useful, advantageous or desirable for municipal purposes or public welfare and for the purpose of acquiring, constructing, extending, or improving any combined waterworks and sewerage system, or any property necessary or appropriate therefor.
3. The City is authorized to enact an eminent domain ordinance with regard to taking property for a public purpose.
4. Pursuant to the City Authority, on May 20, 2019, the City adopted Ordinance No. 2019-12, a copy of which is attached as Exhibit 2 and which authorizes the City to acquire by eminent

C0001

domain a water main easement on the property commonly known as 1940 Marquette St., North Chicago, IL 60064 and legally described in Exhibit 1 and referred to hereafter as "the Property." The water main easement the City seeks to acquire is legally described in paragraph 8 and hereafter referred to as "the Easement." The City seeks to acquire the Easement for the public purpose of operating a water main, part of which runs underneath the Property, that provides water to many City residents.

5. Because this water main has been in existence for greater than fifty (50) years and is an integral part of the City's water system, providing water to dozens of residents and businesses, and would be difficult, expensive, and potentially dangerous to remove, it is necessary for the City to obtain an easement to continue to operate the water main in its current location underneath the Property.

6. The City has authorized and directed its counsel to negotiate for and on behalf of the City with the owner of the Property for the purchase of the Easement. In the event that its counsel should be unable to agree with the owner of the Property as to the price to be paid for its purchase, Ordinance No. 2019-12 further authorizes, instructs, and directs its counsel to exercise the right of eminent domain on behalf of the City for the acquisition of the Easement.

7. The City has negotiated in good faith with the owner of Property for the purpose of attempting to agree on the amount of just compensation to be paid for the Easement. These negotiations included offering to purchase the Easement for more than its fair market value as determined by an appraiser hired by the City, as seen in the offer letter provided to Defendant attached as Exhibit 3. However, Defendant rejected this offer, demanding a sum of money greater than twenty-five (25) times the Easement's appraised value and demanding that the City remove

the water main and replace it. Because the parties have such significantly differing opinions on the value of the Easement they have been unable to agree upon just compensation.

8. The City has ascertained the names of all persons known to possess an interest in the Property by obtaining and reviewing recent title commitments.

9. The legal description of the easement the City seeks to acquire is set forth below:

A 20 FOOT EASEMENT FOR THE CONSTRUCTION AND MAINTENANCE OF A WATER MAIN OVER THAT PART OF THE FOLLOWING PARCEL:

A PART OF THE NORTH HALF OF THE NORTHWEST QUARTER OF SECTION 4, TOWNSHIP 44 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, DESCRIBED AS FOLLOWS: BEGINNING AT A POINT ON THE EASTERLY RIGHT OF WAY LINE OF THE CHICAGO AND NORTH WESTERN RAILROAD COMPANY, WHICH POINT IS 772.10 FEET MEASURED ALONG SAID RIGHT OF WAY LINE SOUTHERLY OF THE INTERSECTION OF SAID RIGHT OF WAY LINE WITH THE SOUTHERLY RIGHT OF WAY LINE OF THE ELGIN, JOLIET AND EASTERN RAILWAY COMPANY; RUNNING THENCE EAST ON A LINE PARALLEL WITH THE SOUTH LINE OF SAID NORTHWEST QUARTER OF THE SAID SECTION 4, A DISTANCE OF 515.8 FEET TO THE WEST LINE OF MARQUETTE STREET; THENCE NORTHERLY ALONG THE WEST LINE OF MARQUETTE STREET, APPROXIMATLY 220 FEET TO THE SOUTHEAST CORNER OF THE FORMER J.W. AULSON AND SONS CORPORATION PROPERTY, MORE PARTICULARLY DESCRIBED BY WARRANTY DEED DATED APRIL 20, 1921 AND RECORDED APRIL 26, 1921, AS DOCUMENT 201389; THENCE WEST 435 FEET ON THE SOUTH LINE OF SAID FORMER J.W. AULSON AND SONS CORPORATION PROPERTY TO SAID EASTERLY RIGHT OF WAY OF SAID CHICAGO AND NORTH WESTERN RAILROAD COMPANY; RUNNING THENCE IN A SOUTHERLY DIRECTION ALONG SAID EASTERLY RIGHT OF WAY LINE TO THE POINT OF BEGINNING, IN NORTH CHICAGO, LAKE COUNTY, ILLINOIS.

SAID 20 FOOT EASEMENT FOR THE CONSTRUCTION AND MAINTENANCE OF A WATER MAIN BEING 10 FEET ON EACH SIDE OF THE FOLLOWING DESCRIBED LINE;

BEGINNING AT A POINT ON THE WEST LINE OF MARQUETTE STREET, SAID POINT BEING 185.3 FEET NORTH OF THE SOUTH LINE OF SAID PARCEL, BEING DESCRIBED AS A LINE PARALLEL WITH THE SOUTH LINE OF THE NORTHWEST QUARTER OF SECTION 4, TOWNSHIP 44 NORTH, RANGE 12 EAST OF THE THIRD PRINCIPAL MERIDIAN; THENCE ON AN ASSUMED BEARING OF NORTH 86 DEGREES, 40 MINUTES WEST, A DISTANCE OF 438 FEET TO A POINT ON THE EASTERLY RIGHT OF WAY LINE OF THE CHICAGO AND NORTH WESTERN RAILROAD COMPANY (ALSO KNOWN AS THE UNION PACIFIC RAILROAD

COMPANY), SAID POINT BEING 212.05 FEET NORTHERLY OF THE SOUTH LINE OF SAID PARCEL, BEING DESCRIBED AS A LINE PARALLEL WITH THE SOUTH LINE OF SAID NORTHWEST QUARTER OF SECTION 4, AS MEASURED ALONG THE EASTERLY LINE OF SAID CHICAGO AND NORTH WESTERN RAILROAD COMPANY, SAID POINT BEING THE END OF THIS DESCRIPTION, IN NORTH CHICAGO, LAKE COUNTY, ILLINOIS.

P.I.N. #: 12-04-100-005

Address: 1940 Marquette St., North Chicago, IL 60063

10. The owners of record of the Property are 2nd & Main, LLC, and according to the title commitments reviewed by the City's attorneys are the only interest holders in the Property. The owners acquired the Property on June 25, 2014, for $62,000.

11. In addition to the Defendants named in this Complaint there may be other parties with an interest in this action, and these parties shall be made Defendants under the description of Unknown Owners and Non-Record Claimants.

12. The City demands a trial by jury.

WHEREFORE, Plaintiff respectfully requests that:

1. Summons be issued against Defendant commanding it to appear before this Court;
2. This Court ascertain and cause just compensation to be paid to the interest holders of the Property described in this Complaint;
3. This Court enter judgment vesting the Easement described in this Complaint to Plaintiff City of North Chicago.
4. This Court grants any other relief that it finds to be appropriate.

Respectfully submitted,



By: _____
One of Plaintiff's attorneys

Adam B. Simon (ARDC # 6243892)
Matthew T. DiCianni (ARDC #6312661)
ANCEL GLINK, P.C.
175 E. Hawthorn Parkway, Suite 145
Vernon Hills, IL 60061
Ph: 847.247.7400
Fax: 847.247.7405
mdicianni@ancelglink.com
asimon@ancelglink.com

EXHIBIT 1
Legal Description of 1940 Marquette St., North Chicago, IL

A PART OF THE NORTH 1/2 OF THE NORTHWEST 1/4 OF SECTION 4, TOWNSHIP 44 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT ON THE EASTERLY RIGHT OF WAY LINE OF THE CHICAGO AND NORTH WESTERN RAILWAY COMPANY, WHICH POINT IS 772.10 FEET MEASURED ALONG SAID RIGHT OF WAY LINE SOUTHERLY OF THE INTERSECTION OF SAID RIGHT OF WAY LINE WITH THE SOUTHERLY RIGHT OF WAY LINE OF THE ELGIN, JOLIET AND EASTERN RAILWAY COMPANY; RUNNING THENCE EAST ON A LINE PARALLEL WITH THE SOUTH LINE OF SAID NORTHWEST 1/4 OF THE SAID SECTION 4, A DISTANCE OF 515.8 FEET TO THE WEST LINE OF MARQUETTE STREET; THENCE NORTHERLY ALONG THE WEST LINE OF MARQUETTE STREET, APPROXIMATELY 220 FEET TO THE SOUTHEAST CORNER OF THE FORMER J. W. AULSON AND SONS CORPORATION PROPERTY, MORE PARTICULARLY DESCRIBED BY WARRANTY DEED DATETD APRIL 20, 1921 AND RECORDED APRIL 26, 1921, AS DOCUMENT 201389; THENCE WEST 435 FEET ON THE SOUTH LINE OF SAID FORMER J. W. AULSON AND SONS CORPORATION PROPERTY TO SAID EASTERLY RIGHT OF WAY LINE OF SAID CHICAGO AND NORTH WESTERN RAILWAY COMPANY; RUNNING THENCE IN A SOUTHERLY DIRECTION ALONG SAID EASTERLY RIGHT OF WAY LINE TO THE PLACE OF BEGINNING, IN LAKE COUNTY, ILLINOIS.

P.I.N. #: 12-04-100-005

Address: 1940 Marquette St., North Chicago, IL 60063

EXHIBIT 2

Ordinance No. 2019-12

C0007

THE CITY OF NORTH CHICAGO
LAKE COUNTY, ILLINOIS

ORDINANCE NO. 2019 - 12

AN ORDINANCE AUTHORIZING THE USE OF EMINENT DOMAIN FOR THE ACQUISITION OF AN EASEMENT ON THE PROPERTY LOCATED AT 1940 MARQUETTE ST., NORTH CHICAGO, IL

Passed by the City Council, May 20, 2019 Printed and Published, May 20, 2019, 2019

Printed and Published in Pamphlet Form by Authority of the City Council

CITY OF NORTH CHICAGO
LAKE COUNTY, ILLINOIS

I hereby certify that this document was properly published on the date stated above.

Lori L. Collins
City Clerk

C0008

BE IT ORDAINED by the Mayor and City Council of the City of North Chicago, Lake County, Illinois, THAT:

AN ORDINANCE AUTHORIZING THE USE OF EMINENT DOMAIN FOR THE ACQUISITION OF AN EASEMENT ON THE PROPERTY LOCATED AT 1940 MARQUETTE ST., NORTH CHICAGO, IL

2019 – 12

shall be, and is hereby, adopted as follows:

Section 1. BACKGROUND.

In the early 1960s, the City of North Chicago ("City") installed a 24 inch water main that forms a part of the City's water system. Part of this water main runs underneath the property located at 1940 Marquette St., North Chicago, IL ("Property"). The City never recorded easement rights to operate the water main underneath the Property. The City needs the legal right to operate the main underneath the Property.

The City has made a good faith effort to purchase easement rights from the current owner of the Property, 2nd & Main, LLC. It conducted an appraisal of the Property, attached as Exhibit C, which valued a 25-foot wide easement to operate the water main on the Property at $42,725. The legal description of the easement rights that the City had appraised and seeks to purchase are attached as Exhibit A, and these rights will be referred to hereafter as "the Easement."

The City offered to purchase the Easement for 20% more than its appraised value (*see* Exhibit B), but 2nd & Main, LLC refused this offer. While 2nd& Main made counteroffers, these counteroffers asked the City to pay the owner's costs to redevelop the Property and to purchase the Easement for many times more than the City's appraiser valued the easement, offers which the City did not believe were reasonable. As a result, the parties have reached an impasse in their negotiations over the purchase of the Easement.

The City has determined that it is necessary and proper and in the public interest to acquire the Easement under the provisions set forth in the Eminent Domain Act, 735 ILCS 30/1-1-1, *et seq*. The City has the authority to acquire the Easement pursuant to its home rule authority, the Eminent Domain Act, and sections 11-61-1 and 11-139-12 of the Municipal Code.

Section 2. FINDINGS.

The Corporate Authorities hereby find that the following facts will be or have been established by the preponderance of the evidence:

a. The acquisition of the Easement is necessary for the public purpose of providing water to City residents. The City has negotiated in good faith with the owner of the Property, who has been unwilling to sell the Easement to the City even for an amount considerably above its appraised value;

b. The City has the authority to acquire the Easement through eminent domain, and the exercise of this power has become necessary due to the City's inability to purchase the easement through good faith negotiations with the Property owner.

c. The City shall have the authority to continue negotiating with the owners of the Property to purchase the Easement, but if those negotiations prove unsuccessful, the City shall initiate an eminent domain action to acquire the Easement forthwith.

Section 3. EFFECTIVE DATE.

This Ordinance shall be in full force and effect upon its passage, approval and publication in the manner required by law.

PASSED AND APPROVED THIS 20TH DAY OF MAY, 2019

AYES: FISHER, MAYFIELD, MARKHAM, RUNNELS

NAYS: JANUARY

ABSENT: EVANS, ALLEN

LEON ROCKINGHAM, JR., Mayor

ATTEST:

LORI L. COLLINS, City Clerk

C0010

EXHIBIT A

Easement Legal Description

PERMANENT PUBLIC WATER MAIN EASEMENT LEGAL DESCRIPTION:

A 20 FOOT EASEMENT FOR THE CONSTRUCTION AND MAINTENANCE OF A WATER MAIN OVER THAT PART OF THE FOLLOWING PARCEL:

A PART OF THE NORTH HALF OF THE NORTHWEST QUARTER OF SECTION 4, TOWNSHIP 44 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, DESCRIBED AS FOLLOWS: BEGINNING AT A POINT ON THE EASTERLY RIGHT OF WAY LINE OF THE CHICAGO AND NORTH WESTERN RAILROAD COMPANY, WHICH POINT IS 772.10 FEET MEASURED ALONG SAID RIGHT OF WAY LINE SOUTHERLY OF THE INTERSECTION OF SAID RIGHT OF WAY LINE WITH THE SOUTHERLY RIGHT OF WAY LINE OF THE ELGIN, JOLIET AND EASTERN RAILWAY COMPANY; RUNNING THENCE EAST ON A LINE PARALLEL WITH THE SOUTH LINE OF SAID NORTHWEST QUARTER OF THE SAID SECTION 4, A DISTANCE OF 515.8 FEET TO THE WEST LINE OF MARQUETTE STREET; THENCE NORTHERLY ALONG THE WEST LINE OF MARQUETTE STREET, APPROXIMATLY 220 FEET TO THE SOUTHEAST CORNER OF THE FORMER J.W. AULSON AND SONS CORPORATION PROPERTY, MORE PARTICULARLY DESCRIBED BY WARRANTY DEED DATED APRIL 20, 1921 AND RECORDED APRIL 26, 1921, AS DOCUMENT 201389; THENCE WEST 435 FEET ON THE SOUTH LINE OF SAID FORMER J.W. AULSON AND SONS CORPORATION PROPERTY TO SAID EASTERLY RIGHT OF WAY OF SAID CHICAGO AND NORTH WESTERN RAILROAD COMPANY; RUNNING THENCE IN A SOUTHERLY DIRECTION ALONG SAID EASTERLY RIGHT OF WAY LINE TO THE POINT OF BEGINNING, IN NORTH CHICAGO, LAKE COUNTY, ILLINOIS.

SAID 20 FOOT EASEMENT FOR THE CONSTRUCTION AND MAINTENANCE OF A WATER MAIN BEING 10 FEET ON EACH SIDE OF THE FOLLOWING DESCRIBED LINE;

BEGINNING AT A POINT ON THE WEST LINE OF MARQUETTE STREET, SAID POINT BEING 185.3 FEET NORTH OF THE SOUTH LINE OF SAID PARCEL, BEING DESCRIBED AS A LINE PARALLEL WITH THE SOUTH LINE OF THE NORTHWEST QUARTER OF SECTION 4, TOWNSHIP 44 NORTH, RANGE 12 EAST OF THE THIRD PRINCIPAL MERIDIAN; THENCE ON AN ASSUMED BEARING OF NORTH 86 DEGREES, 40 MINUTES WEST, A DISTANCE OF 438 FEET TO A POINT ON THE EASTERLY RIGHT OF WAY LINE OF THE CHICAGO AND NORTH WESTERN RAILROAD COMPANY (ALSO KNOWN AS THE UNION PACIFIC RAILROAD COMPANY), SAID POINT BEING
212.05 FEET NORTHERLY OF THE SOUTH LINE OF SAID PARCEL, BEING DESCRIBED AS A LINE PARALLEL WITH THE SOUTH LINE OF SAID NORTHWEST QUARTER OF SECTION 4, AS MEASURED ALONG THE EASTERLY LINE OF SAID CHICAGO AND NORTH WESTERN RAILROAD COMPANY, SAID POINT BEING THE END OF THIS DESCRIPTION, IN NORTH CHICAGO, LAKE COUNTY, ILLINOIS.

P.I.N. #: 12-04-100-005

C0011

EXHIBIT B

Offer Letter to the Owner of the Property for the Purchase of the Easement

Ancel Glink

A Professional Corporation
140 South Dearborn Street, Suite 600
Chicago, IL 60603
www.ancelglink.com

Adam B. Simon
asimon@ancelglink.com
(P) 847.856.5440
(F) 847.247.7405

April 29, 2019

VIA EMAIL (JQuinn@grayslakelaw.com) John W. Quinn
Churchill, Quinn, Richtman & Hamilton, Ltd. 2 S. Whitney Street
Grayslake, IL 60030

Re: Offer to Purchase an Easement for the 2nd & Main Property

Dear John:

As you know, the City of North Chicago would like to purchase an easement to operate its water main underneath the property of your client, 2nd & Main, LLC, located at 1940 Marquette St., North Chicago, IL 60064. As you also know, the City has conducted an appraisal as to the value of such an easement, and the City's appraiser has valued it at $42,725. A copy of this appraisal is attached as Exhibit A. The City is willing to offer your client 20% more than the appraised value of the easement to purchase it, or $52,000.

The easement would be for a 20-foot-wide tract of land that would include the land under which the water main runs along with approximately 10-feet of the land adjacent to the water main on each side, and would provide the City with the right to enter onto your client's property and use this land to repair and construct a water main. The City would agree to repair any damage caused to your client's property by the exercise of its easement rights. The City would also agree to dispose of any soil uncovered by the exercise of its easement rights in the manner required by law. A diagram showing the approximate location of the easement is attached as Exhibit B, with the easement highlighted in yellow, and a legal description of the easement is attached as Exhibit C.

This offer will remain open for ten (10) days, until 5:00PM on May 9, 2019. If we do not receive a response to the offer by then we will assume that you have rejected it. If this offer is unacceptable to you then the City may initiate condemnation proceedings to take the easement.

Please share this offer with your client, Phil Dahl, and contact me after you have discussed it with him. We would like to negotiate with you in good faith to purchase this easement.

Sincerely,

Adam Simon

Adam B. Simon

EXHIBIT C

City's Appraisal of the Easement

ACCURITY United



Water Main Easement Before and After Valuation
2nd and Main, LLC v. City of North Chicago

Lake County PINs
12-04-100-005, 12-04-100-029, and 12-04-100-030

DeLCon File 18-030

Valuation Counsel for:
City of North Chicago

Market Value Appraisal
As of
August 31, 2018

C0015

ACCURITY United

DeLacy Consulting, LLC
Commercial Real Estate Advisory

October 12, 2018

Matthew T. DiCianni, Esq.
Ancel Glink
140 South Dearborn Street, 6th Floor
Chicago, IL 60603

312.604.9125
mdicianni@ancelglink.com

Re: Water Main Easement; 2nd and Main, LLC v. City of North Chicago

Dear Mr. DiCianni
Accurity United and DeLacy Consulting are delighted to present this draft before and after appraisal of proposed easement that your client, the City of North Chicago, allegedly failed to secure through the former Norland Lumber Co. site, adjacent to the Great Lakes Naval Training Station for its water main. The owner of the site is suing the City and alleging damages. The City is weighing its options, ranging from condemnation of the entire site to merely taking a utility easement.
Please see the accompanying report for a description of the property, our scope of work and valuation findings.
Do not hesitate to call us if you have further questions.
Very truly yours,

P. Barton DeLacy, M.U.P, MAI, ASA, CRE, FRICS

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C0017

SUMMARY OF SALIENT FACTS

Property Name		North Chicago Lumber	
Location	Address	1940 Marquette St. Terminus of Main Street	
	City, State, Zip	North Chicago, IL 60064	
	County/Township	Lake County/ Shields Township	
Property Summary		Former lumber yard Potential rail terminal; planned container and sand storage site	
DeLCon-AU File No.		18-030	
Assessor PINs	Lake County	12-04-100-005	
		12-04-100-029	
		12-04-100-030	
Interest Appraised		Fee Simple	
Owner of Record		2nd & Main, LLC	
Property Type/Use		Former lumber yard	
Zoning	City of North Chicago	M-3 Intensive Industrial	
Land: Building Ratio		NA	
Neighborhood Character		Industrial, rail-oriented	
Total Site Area (sf)	12-04-100-005		108,900
	12-04-100-029		4,356
	12-04-100-030		4,792
Larger Parcel Total Site Area	A		118,048
Total Site Area (ac)			2.71
Parcel Configuration		Irregular	
Water Main Easement (sf)	B		11,030.00
Remainder north of easement	C		12,984.75
Unencumbered site after taking	D=A-(B+C)		94,033.25

C0018

Improvement Summary	Wooden lumber warehouse, steel framed and sided sheds; small office. Three contiguous lots flank extension of Main St.
Gross Building Area	Not available
Year Built	1940-1980
Remaining Economic Life	0-years
Major Tenants	Hussey Terminal, LLC
Date of Inspection	August 31, 2018
Highest and Best Use	Terminal storage
As If Vacant	Terminal storage
As Improved	NA
Property Rights Appraised	Fee simple
Estimated Exposure/Marketing Time	12 Months

VALUATION FINDINGS: Partial Acquisition

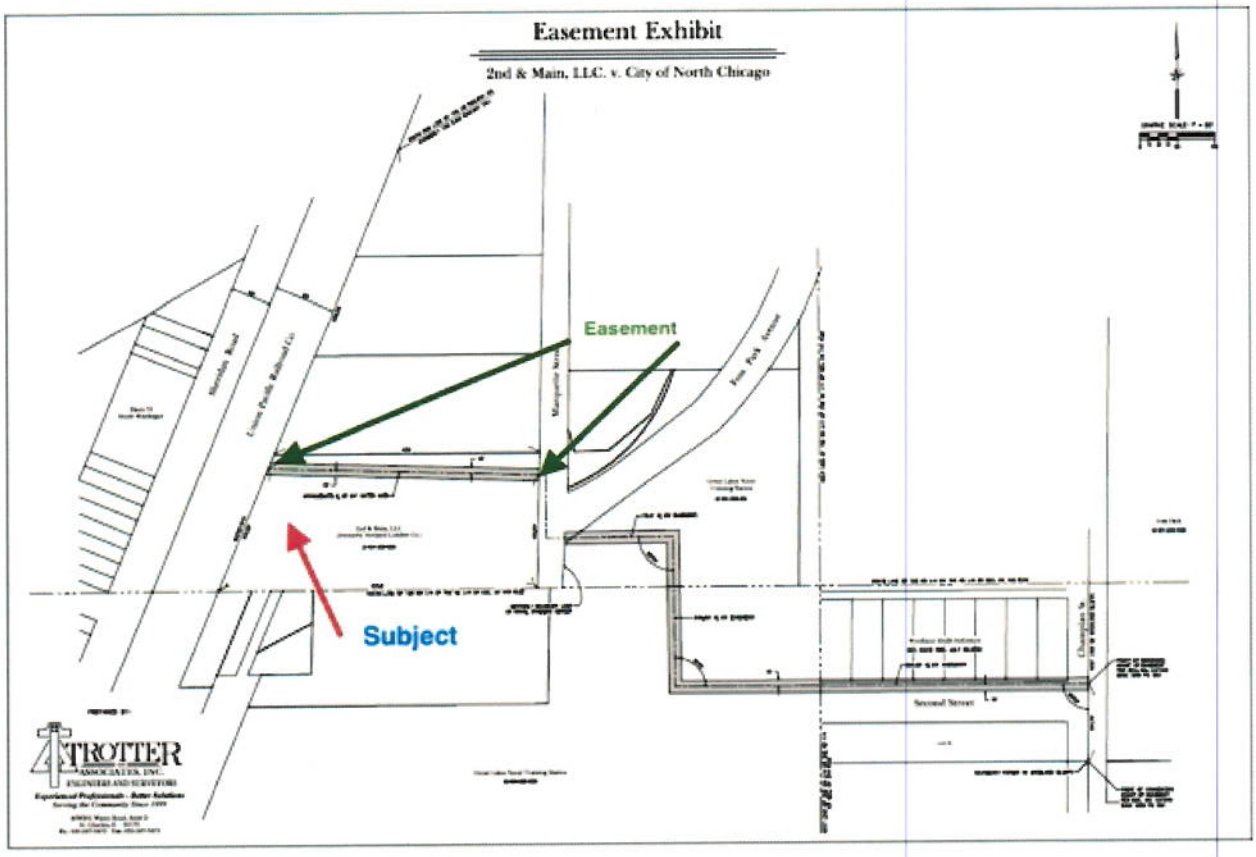
MV before the take	**Site Area (sf)**	**MV per sq. ft.**	**Utility**	**Total**
MV Whole Property	118,048	$2.00	100%	$236,096
			Rounded	**$236,000**
Acquisition affected parcels:		**MV per sq. ft.**	**Utility**	**Total**
Easement Acquired	11,030	$2.00	50%	$11,030
Damages: Severed Remainder	12,985	$2.00	50%	$12,985
Property Remainder	94,033	$2.00	90%	$169,260
MV after partial acquisition:	118,048	$1.64		**$193,275**
Just Compensation (MV before less MV after taking)				**$42,725**

C0019

SUBJECT PHOTOGRAPHS AND MAPS

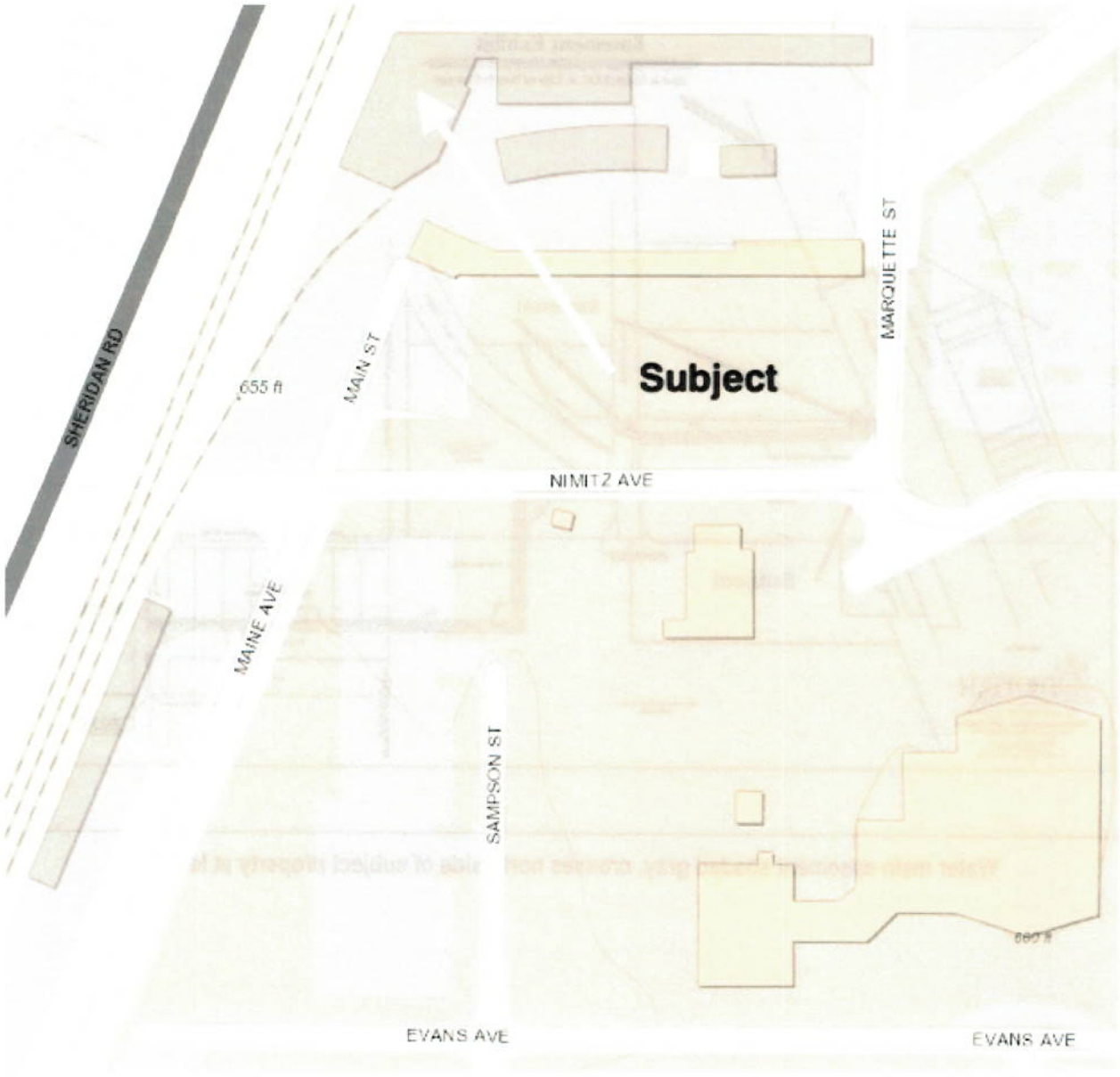


North Chicago Lumber property facing north



Water main easement shaded gray, crosses north side of subject property at left

C0021



Building footprints from Lake County

C0022

SUBJECT PHOTOGRAPHS



North Chicago Lumber property from Sheridan Road, facing east



Access to the subject from Main St., facing north

C0023

SUBJECT PHOTOGRAPHS



Rail spur to old shed, facing north (photo from 2016)



Subject site facing northeast toward Sheridan Road

SUBJECT PHOTOGRAPHS



Water main easement route, facing east; shed wall marks proximate north property line



Easement route facing west, passes through steel shed toward Sheridan Road

SUBJECT PHOTOGRAPHS



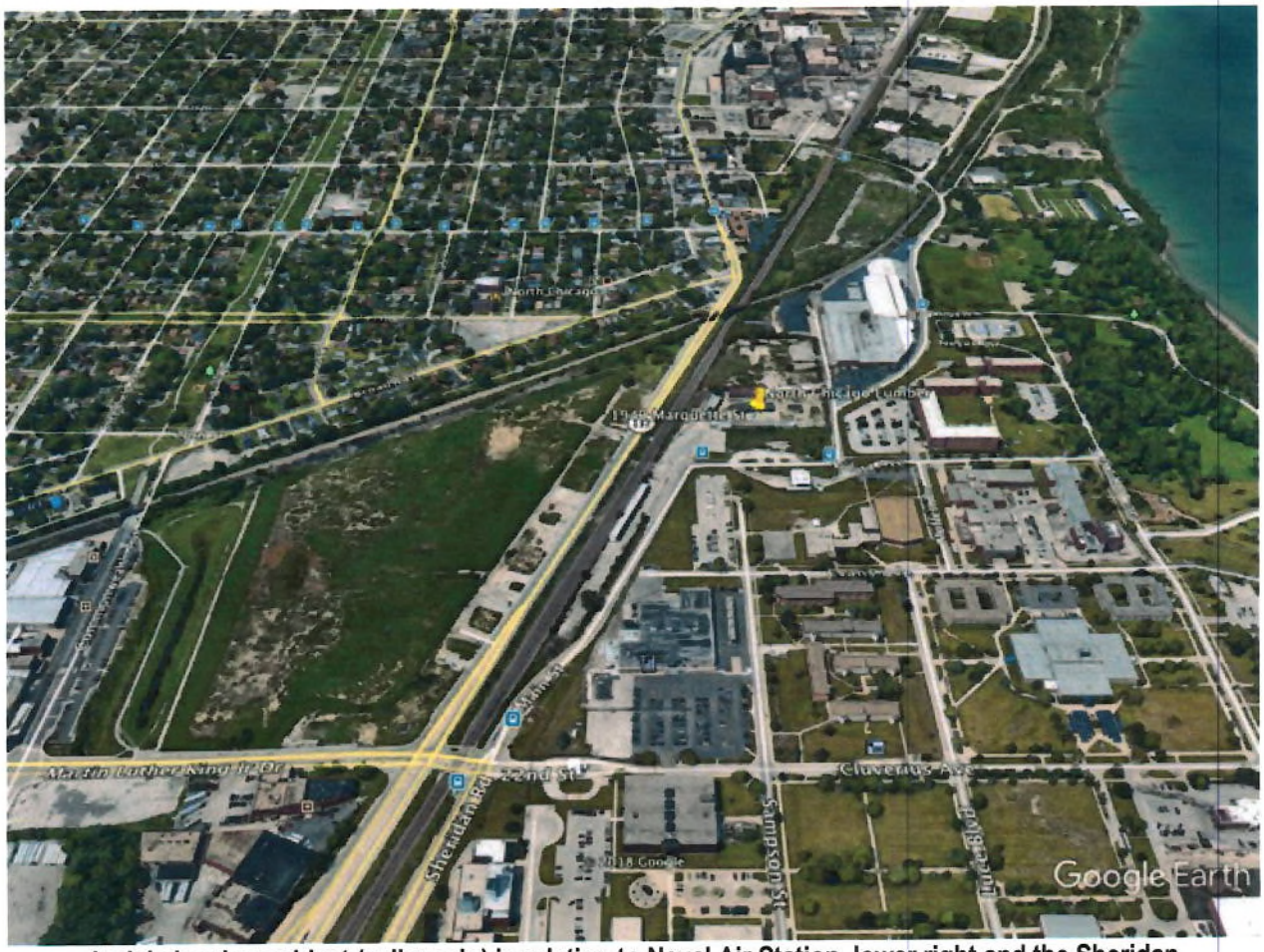
Interior of shed; easement runs to right, view facing west



Main Street extension, facing south from southern edge of property

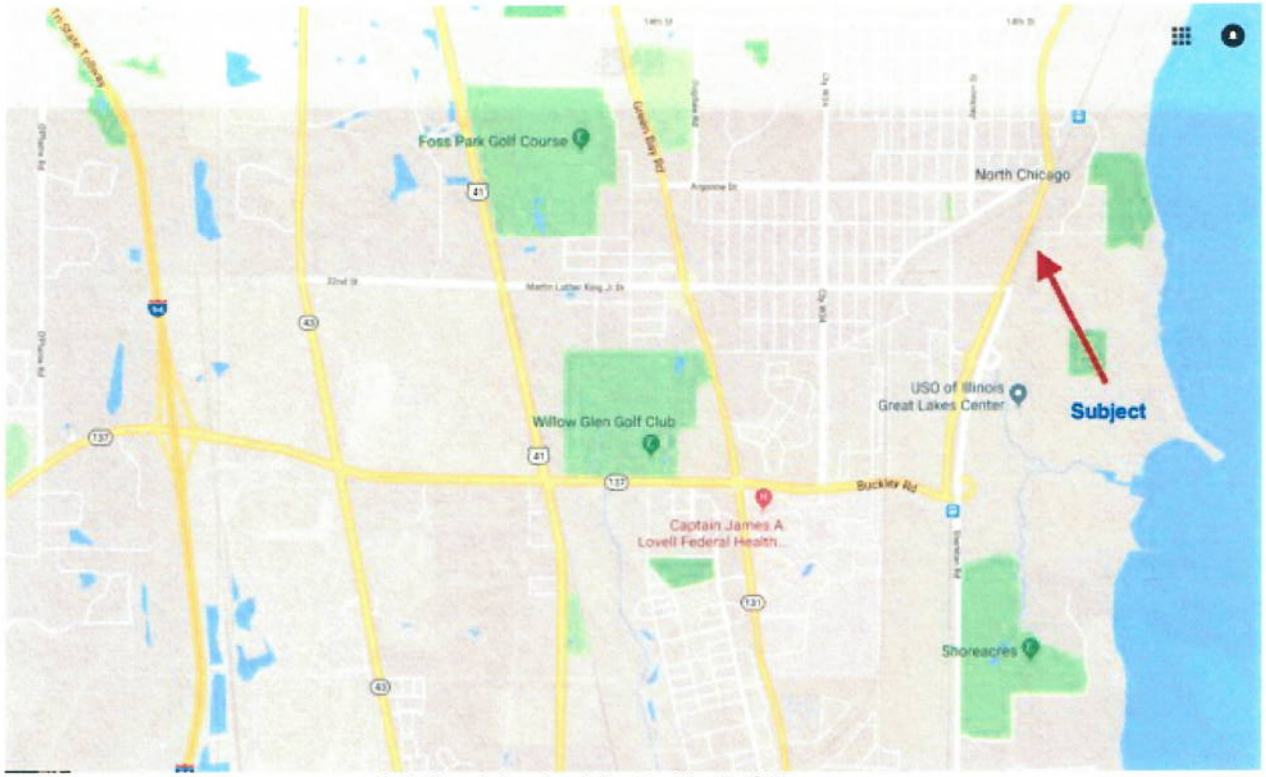
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MAPS



Aerial showing subject (yellow pin) in relation to Naval Air Station, lower right and the Sheridan Crossing redevelopment site to left.

C0027



Relationship of subject to North Chicago

CERTIFICATION OF REAL PROPERTY VALUATION CONSULTING REPORT

We certify to the best of our knowledge and belief:

1. The statements of fact contained in this report are true and correct.
2. The reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions and are our personal, impartial and unbiased professional analyses, opinions, and conclusions.
3. We have no present or prospective interest in or bias with respect to the property that is the subject of this report and have no personal interest in or bias with respect to the parties involved with this assignment.
4. We performed a prior appraisal of the property under alternate assumptions but with the same valuation date.
5. Our engagement in this assignment was not contingent upon developing or reporting predetermined results.
6. Our compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.
7. This real property appraisal consulting assignment was not based upon a requested minimum valuation, a specific valuation, or the approval of a loan.
8. Our analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the Uniform Standards of Professional Appraisal Practice.
9. The reported analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the requirements of the Code of Professional Ethics and Standards of Professional Appraisal Practice of the Appraisal Institute.
10. The use of this report is subject to the requirements of the Appraisal Institute relating to review by its duly authorized representatives.
11. As of the date of this report, P. Barton DeLacy, MAI, CRE, FRICS has completed the continuing education program of the Appraisal Institute.
12. Properties that are the subject of this report were inspected as part of this engagement.

P. Barton DeLacy, MUP,
MAI, CRE, ASA, FRICS
Illinois Certified General Appraiser 553.001797
Expires 9/30/2019

C0029

INTRODUCTION

This section presents appraisal-reporting information to comply with the Uniform Standards of Professional Appraisal Practice (USPAP).

CONTEXT

The City of North Chicago (the City) allegedly failed to secure an easement through the former North Chicago Lumber Co. site, adjacent to the Great Lakes Naval Training Station, for its water main. The owner of the site is suing the City and seeking damages. The City is weighing its options, ranging from condemnation of the entire site to merely taking a utility easement.

INTENDED USE OF REPORT

This appraisal will be relied upon by City of North Chicago administration and their advisors in negotiations to acquire this site.

INTENDED USER OF REPORT

This appraisal is to be used by the City of North Chicago, and no other user may rely on our report without authorization of the undersigned valuers.

PROPERTY IDENTIFICATION

The subject property is a now-closed lumber yard best identified by its Lake County Assessor Property Identification Numbers (PINs): 12-04-100-005, 12-04-100-029, and 12-04-100-030. The site is otherwise located at the terminus of Main Street between The Union Pacific RR adjacent to west and the US Naval Air Station grounds to the east.

REAL PROPERTY INTEREST

The fee simple interest of the property is being valued.

MARKET VALUE DEFINITION

Market value is described, not defined, in the Uniform Standards of Professional Appraisal Practice (USPAP) as follows: A type of value, stated as an opinion, that presumes the transfer of a property (i.e., a right of ownership or a bundle of such rights), as of a certain date, under specific conditions set forth in the definition of the term identified by the appraiser as applicable in an appraisal.

Here, Market Value is defined as: The most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.[1]

[1] Appraisal Institute, The Dictionary of Real Estate Appraisal, 6th ed. (Chicago: Appraisal Institute, 2015), pp 142-3

EFFECTIVE DATE OF VALUE

The subject property was last inspected by the undersigned valuer on August 31, 2018, the date of value. The date of the report is the date of the transmittal letter. This report has been prepared as an "as is" market value, based on the special assumptions, below.

SCOPE OF WORK

Our scope of work included the following tasks:

- Site inspection and interviews with the property owner regarding current and proposed plans for use.
- Analyze community demographics and economic development within the City of North Chicago.
- Develop a before and after analysis premised on the hypothetical condition that the City's water main did not pass through the property.
- Develop Sales Comparison Approach to value site, as zoned in the hypothetical "before" scenario.
- Develop analysis of proposed easement on site utility and its impact on value in "after" scenario

REPORT SPECIAL ASSUMPTIONS AND LIMITATIONS

The before and after rule is required by most courts when partial acquisitions, such as utility easements, are acquired. This procedure allows acquiring agencies and the courts to calculate a reasonable measure of compensation by deducting the remainder or after value from the larger parcel's before value. The result is a figure that includes the value of the property acquired as well as any compensable damages. This report seeks to value the subject property under two scenarios:

- Here, the "before" scenario requires a hypothetical condition that values the property as if unencumbered by the water main.
- The "after" value makes an extraordinary assumption that the property is encumbered by an ordinary utility easement.

In addition, the suit by the property owner against the city is being brought under the Illinois Eminent Domain Act (735 ILCS 30/1, et seq.) whereby special benefits to the property must be considered. In this case, no special benefit is found.

HISTORY OF THE PROPERTY

We have no reliable ownership history for the subject property. The owner of record is 2nd and Main, LLC.

To the best of our knowledge, the property was last acquired out of foreclosure by the current owners in June 2014 for $62,000. North Chicago Lumber operated on the property until 2008. The facility has been vacant since then. However, the current owners claim to qualify as a rail road because this property has an operable rail spur, adjacency to an active line and capacity to serve as a materials storage terminal. Signage on the property indicates it is leased to Hussey Terminals, understood to be a related entity to the property owners.

GENERAL ASSUMPTIONS AND LIMITING CONDITIONS

This valuation/consulting report makes the following assumptions and the analysis is subject to these general limiting conditions:

1. Regardless of any template tool or format employed here, the content, analyses, conclusions, and opinions are those of the valuer. The client has not stipulated values or rents, direction in values or rents, or the results of analyses.
2. The valuer assumes the title is marketable and free and clear of all liens, encumbrances, encroachments, easements, and restrictions, except those specifically discussed in this report. In this analysis, the valuer assumes conditions in which the property would be available for lease or sale under prevailing market conditions.
3. The valuer assumes the property is under responsible ownership and competent management.
4. The valuer assumes there are no hidden or undisclosed conditions of the land or of the improvements which would affect the determination of market value or rent.
5. The valuer assumes that the subject property is not affected by any adverse environmental conditions that would have an impact on the analysis. Such conditions unknown to the valuer could impact the findings.
6. The valuer assumes the property is in compliance with all applicable building, environmental, zoning, and other Federal, state and local laws, regulations, and codes, unless otherwise noted in the appraisal.
7. The conclusions stated in the report apply only as of the date of valuation and no representation is made as to the effect of subsequent events. Any projections are based on existing and past data and cannot be guaranteed.
8. Unless contractual arrangements have been made in advance, the valuer is not required to give testimony, or be in attendance in court or other hearings regarding this appraisal or the property that is the subject of the appraisal.
9. The valuer has not made a survey of the property and assumes no responsibility in connection with such matters. The majority of the spatial data has been supplied by client and is assumed to be correct. Sketches or surveys included in this report are for illustrative purposes only.
10. The valuer is not responsible for considerations requiring expertise in other fields, including but not limited to, legal descriptions and other legal matters, geologic considerations such as soils and seismic stability, engineering, or environmental and toxic contaminants.
11. The appraisal process inherently requires information from a wide variety of sources. The valuer has relied on information provided by other individuals and in good faith believes that information to be reliable. The valuer does not accept responsibility for erroneous information provided by others.

C0032

12. The valuation report is subject to the requirements of professional organizations of which the valuer is a member, with regard to peer review and various disciplinary actions. The valuer will not disclose confidential information or assignment results to anyone other than: the client and persons specifically authorized by the client; state enforcement agencies and such third parties as may be authorized by due process of law; and a duly authorized professional peer review committee except when such disclosure to a committee would violate applicable law or regulation.

C0033

AREA ANALYSIS

The subject property is located in the City of North Chicago. North Chicago is located on the shores of Lake Michigan in east-central Lake County, 33 miles north of Chicago's Loop along the North Shore. Population in the 2010 census was approximately 32,500. Population continues to decline from a peak of 47,000 in 1970. Projections for 2017 indicate city population has dropped to below 29,500.

The City of North Chicago has sought to alleviate urban blight along some of its arterials by repurposing derelict vacant sites through acquisition and assemblage. This policy has enjoyed modest success in places. The subject



property, a former lumber yard, lies just east of the Sheridan Crossing site, running along the west side of Sheridan Road, north of its juncture with Martin Luther King Blvd and the North Gate of the Great Lakes Naval Air Training Center.

Sheridan Crossing is a 30-acre former mill site at the juncture of Martin Luther King Blvd. and N. Sheridan Rd. (Illinois 137) across from the north gate to the Naval Air Training Center. The site's extensive frontage along the west side of Sheridan Road was once "the strip' and home to saloons and other entertainment venues catering to the transient naval personnel population resident at the training center. As the strip declined, the City eventually razed derelict buildings and created a tax increment financing (TIF) district to incentivize redevelopment.

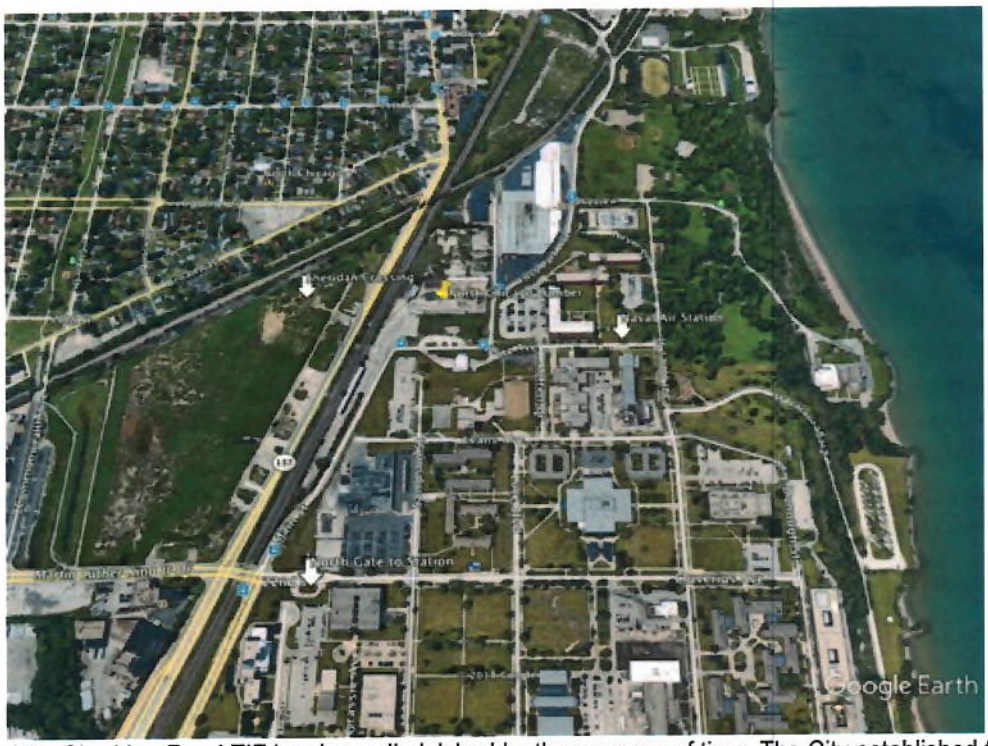
The City of North Chicago's economy is dominated by two major employers: Abbott Labs- Abbvie and the U. S. Navy. Because both employers operate from large secured campuses, employees seldom seem to venture out, except for the daily commute. Many of the Navy personnel are both transient and confined to base housing and services. Hence, neither employer seems to generate much local retail demand. The City has long hoped that the regular stream of visitors to the Naval Training Center, particularly families from

C0034

outside the area, could generate sufficient hospitality demand to trigger at least more motel and restaurant development.

Another conundrum is posed by the geographic proximity of some of the most affluent communities in region; Lake Forest and Lake Bluff, adjacent to the south. Rather than seek to service and thereby integrate an affluent demographic, a combination of institutional campuses, parkland, golf courses and north-south rail lines and highways effectively insulate the communities from each other.

Yellow Pin highlights the subject; arrows indicate significant points of influence



The impact of the Sheridan Road TIF has been diminished by the passage of time. The City established the District in 1998 for 23 years. Expiring in 2021, the District now only has three more years to run. Sheridan Crossing has languished as an unrealized plan for over 10 years. According to the current Structured Development site plan, the northern portion of the 30+ acre site will be improved with a "National Gallery" of Naval Art, beyond which would lie green space and a sculpture garden. Retail outpads would otherwise line the west side of Sheridan Rd, behind which would lie parking with retail anchors along the northwest property line.

Neighborhood Comments

The subject property, a relic from the area's mill era now sits as an isolated industrial tract hemmed in by the railroad and the Naval Air Base. Notwithstanding its exposure to traffic on Sheridan Road, access is shunted south to the controlled intersection with MLK Drive. Land use along the Sheridan Road corridor is mixed, though much of the land is vacant.

Adjacent uses include an abandoned former paint manufacturing site to the north. The subject property owners claim it is contaminated. This is significant since the owner's fear disturbing soil along the water main could cause seepage onto their property. Transportation corridors, including the Union Pacific RR and Sheridan Road bound the site on the west. Beyond which lies the sprawling and as yet undeveloped Sheridan Crossing acreage. The Naval Air Base effectively flanks the subject on its eastern and southern boundaries. Across the extension of Marquette Street is the parking lot for a large Navy dormitory. The site adjacent on the south is a vacant tract with a PACE bus stop.

A significant rail road embankment and overpass across Sheridan Road separates the Navy Base-dominated area from the old North Chicago CBD and Foss Park, one quarter mile to the north. The Sheridan Crossing assemblage is bounded on its west side by a major trunk rail line. One quarter mile north, beyond the rail overpass is the compact North Chicago Central Business District, traversed by Sheridan Road and anchored by the Metra North Chicago Depot. Modest redevelopment has occurred here with commercial space occupied by neighborhood services. The nearby lakefront is accessible to the east at Foss Park. Housing stock west of the tracks and just beyond the Sheridan Crossing project area is predominantly older single family where owner-occupancy rates may be less than 50%.

The Naval Air Base makes for a peculiar neighbor; dominant but not impactful. It is the largest military installation in Illinois and represents the largest training station for the Navy. The base functions as its own city within a city, sealed off from North Chicago by manned gates and perimeter fencing. The 193-acre campus lines the western shore of Lake Michigan and dates to 1904. Even under base closings and realignments, the facility still accommodates over 7,000 recruits at any one time, processing over 40,000 a year. However, because such military facilities are designed to be self-sufficient, the base no longer interacts with local retailers.

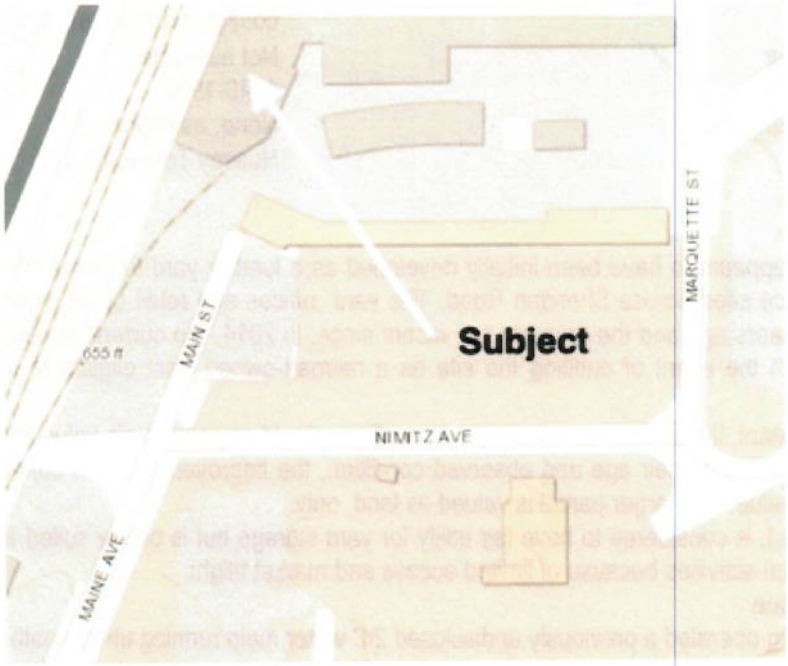
This perceived pattern of stagnancy surrounding the subject site supports a long-term interim use for rail terminal oriented outside storage.

PROPERTY ANALYSIS

The Larger Parcel

The subject property is a one-time lumber yard dating to the 1940s, but closed and vacant since 2008. The site was purchased over four-years ago for conversion to terminal yard storage. The three-parcel assemblage enjoys critical linkage to the adjacent Union Pacific RR right-of-way which, according to the owner, makes it ideally suited for terminal rail storage.

The salient Property characteristics are described below:



Property Name		North Chicago Lumber
Location	Address	1940 Marquette St. Terminus of Main Street
	City, State, Zip	North Chicago, IL 60064
	County/Township	Lake County/ Shields Township
Property Summary		Former lumber yard Potential rail terminal; planned container and sand storage site
Assessor PINs	Lake County	12-04-100-005 12-04-100-029 12-04-100-030
Interest Appraised		Fee Simple

C0037

Owner of Record		2nd & Main, LLC
Property Type/Use		Former lumber yard
Zoning	City of North Chicago	M-3 Intensive Industrial
Land: Building Ratio		NA
Neighborhood Character		Industrial, rail-oriented
Improvement Summary		Wooden lumber warehouse, steel framed and sided sheds; small office. Three contiguous lots flank extension of Main St.
Gross Building Area		Not available
Year Built		1940-1980
Remaining Economic Life		None, as improved
Major Tenants		Hussey Terminal, LLC

Property Utility

The subject property appears to have been initially developed as a lumber yard to market finished goods produced by the lumber mill once sited across Sheridan Road. The yard, offices and retail outlet closed at the onset of the Great Recession 10 years ago and the property sat vacant since. In 2014, the current owners acquired the property out of foreclosure with the intent of entitling the site as a railroad-owned tract eligible to serve for terminal yard storage.

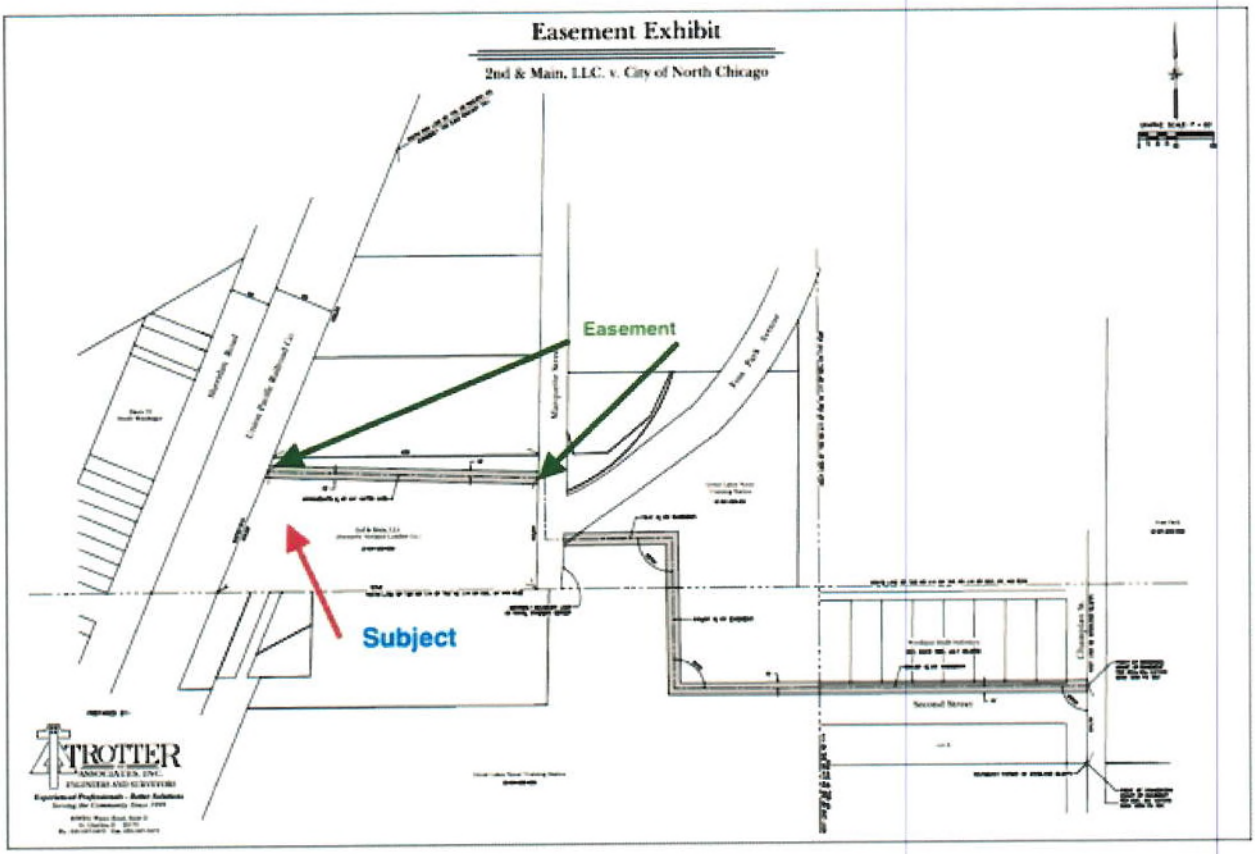
It is unclear to what extent, if any, the improvements as configured add any economic value to the property under this proposed use scheme. Given their age and observed condition, the improvements are considered obsolete and to have no contributory value. The larger parcel is valued as land, only.

The site, as assembled, is considered to have fair utility for yard storage but is poorly suited for many other types of commercial or industrial activities because of limited access and market blight.

Water Main Description

North Chicago has long operated a previously undisclosed 24" water main running underneath the northern portion of the subject property, described above as the "Larger Parcel." The water main is depicted as a shaded area in the illustration, below.

C0038



The green arrows show the approximate path of the water main through the northern portion of the subject property

The exhibit shows an easement that the City owns to run the water main underneath the Naval Air Station (which is legally described and recorded). The necessary easement through the subject property was never recorded.

It is unclear how far below the surface the 24" water main runs. An attempt by the city to find the main proved unsuccessful, according to the owner as of the date of inspection. A permanent utility easement is required by the City in order to access the water main for repairs or replacement throughout its effective economic life. Although the 10 ft wide easement has been described, the apparent depth of the water line might necessitate as much as 25 feet in width to accommodate trenching. Further, the land lying between such an easement and the property line is effectively severed from the rest of the property

Larger Parcel After the Taking

The dimensions of the proposed easement area and the severed remainder adjacent to the north are shown below, subject to refinement with a survey:

- Utility Easement Area: 11,030 sq. ft. = 25 ft. wide by 441.2 ft. in length of parcel
- Severed Remainder Area: 12, 985 sq. ft.= irregular width varying from 25 to 35 ft. across parcel length

C0039

The table below sets out the site areas for the underlying larger parcel, followed by the site areas for the proposed water main easement and the severed remainder adjacent to the north. The unencumbered site after the taking, plus the encumbered easement area and the severed remainder constitute the property subject to the after valuation.

Total Site Area (sf)	12-04-100-005	108,900
	12-04-100-029	4,356
	12-04-100-030	4,792
Larger Parcel Total Site Area	A	**118,048**
Total Site Area (ac)		2.71
Water Main Easement (sf)	B	11,030.00
Remainder north of easement	C	12,984.75
Unencumbered site after take	D=A-(B+C)	94,033.25

C0040

HIGHEST AND BEST USE ANALYSIS

Introduction

A before and after valuation requires that highest and best use be determined under both scenarios.

The lynchpin for market value is the Highest and Best Use (HBU) analysis, whereby the valuer considers the maximally profitable use for the property among physical, legal and financially viable alternatives. Key considerations include the pattern of surrounding land use, the vector for growth and community needs.

We find that the proposed acquisition of a utility easement will not affect the highest and best use under either scenario.

Definition of Highest and Best Use

According to The Dictionary of Real Estate Appraisal, Sixth Edition (2015), a publication of the Appraisal Institute, the highest and best use is defined as:

> The reasonably probable use of property that results in the highest value. The four criteria that the highest and best use must meet are legal permissibility, physical possibility, financial feasibility, and maximum productivity.

The International Valuation Standards define highest and best use as:

> The use of an asset that maximizes its potential and that is possible, legally permissible, and financially feasible. The highest and best use may be for continuation of an asset's existing use or for some alternative use. This is determined by the use that a market participant would have in mind for the asset when formulating the price that it would be willing to bid.[2]

Highest and Best Use Criteria

We have evaluated the site's highest and best use as if vacant. As such, the property's highest and best use must meet four criteria. That use must be:

(1) legally permissible,
(2) physically possible,
(3) financially feasible, and
(4) maximally productive.

Our conclusions include the following findings:

(1) What is the physical highest and best use?
(2) What is the timing of that use?

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[2] Ibid.

C0041

(3) Who are the most likely market participants?
   a. Who is the most likely buyer type?
   b. Who is the most likely user type?

Legally Permissible

The first test concerns permitted uses. The subject is zoned industrial and may benefit from additional entitlements through its current ownership, which claims to be a railroad. It is unclear and beyond scope to determine whether any such further rights are transferable. For valuation purposes the subject larger parcel will be treated as zoned. Importantly, it is our understanding that the existing zoning allows open storage of materials such as sand and gravel for road and rail repair. Alternatively, enclosed storage and fabrication would be allowed, contingent, of course on effective market demand.

Physically Possible

The second test is what is physically possible. The larger parcel is level, at street grade and fully serviced by municipal utilities. Its configuration and overall size of 2.71 acres is ample to accommodate most conforming industrial activities. Although the subject has good exposure to Sheridan Road traffic, access is somewhat circuitous; limited to an MLK Drive overpass accessing Main Street nearly one-half mile to the south. Only a destination storage use could survive such limited access.

The owner claims that the now unused spur crossing the property from the Union Pacific trunk line is active and that this is the last available storage site for terminal road materials in the area.

The effect of the proposed utility easement will be to reduce the site area that might be improved or within a building footprint. The existing buildings, through which the easement will pass, are considered at the end of their useful economic lives. They can continue in use as covered storage but, if rebuilt would likely be moved south of the proposed easement. Open surface container or materials storage should be unaffected by the easement, assuming such materials could be moved in the event that entry to the easement is required.

For valuation purposes we find that the easement and severed remainder effectively lose at least half of their utility. The owner retains rights to use except that building to the property line is precluded.

Financial Feasibility and Maximal Productivity

The third and fourth tests of highest and best use examine financially feasible alternatives and attempt to project what will produce the highest net return. After analyzing the physically possible and legally permissible uses of the property, the highest and best use must be considered in light of financial feasibility and maximum productivity. For a potential use to be seriously considered, it must have the potential to provide a sufficient return to attract investment capital over alternative forms of investment. A positive net income or acceptable rate of return would indicate that a use is financially feasible.

Although comparably zoned land in the greater submarket has sold recently, many of these sites had sat vacant and available for years.

The Sheridan Crossing project, across Sheridan Road, has also languished for nearly a decade waiting for the local economy to improve, or for anchor-users to commit financially to this location. On balance, this section of the Sheridan Road corridor remains blighted. However, there may be some demand for outside storage in this location because of the adjacency of rail and the absence of suitable sites with similar linkage and zoning.

Highest and Best Use of the Larger Parcel as Though Vacant

Based on this analysis, we have concluded that the highest and best use of the larger parcel, if vacant, and in the hypothetical scenario of before a taking, would be for material storage. The likely purchaser would be a user such as a transportation or material-handling firm.

The highest and best use after the taking would remain the same, only with a reduced yard area.

The improvements to the site are considered to be at the end of their economic life and no longer add value.

C0043

VALUATION ANALYSIS

Methodology

There are three generally accepted approaches available in developing an opinion of value: The Cost, Sales Comparison and Income Capitalization approaches. In appraisal practice, an approach to value is included or eliminated based on its applicability to the property type being valued and the quality of information available. The reliability of each approach is dependent upon the availability and comparability of the market data uncovered as well as the motivation and thinking of purchasers in the market for a property such as the subject. In this analysis, only the Sales Comparison Approach has been applied to the valuation of vacant land in both the before and after scenarios.

Sales Comparison Approach

The Sales Comparison Approach will be used to value the larger parcel in the before the taking scenario. Thus, the subject is being valued as a 2.71 acre industrially-zoned tract, as described above. In the sales comparison approach properties that sold or are listed for sale are analyzed based on common units of comparison. Here, the subject is being valued as a vacant industrial site, hence price per square foot of land area will be the unit of comparison.

The North Lake County Industrial Market Overview

The subject property competes within the greater North Lake County industrial sub-market. Each of the national brokerages maintain occupancy and sale data for each of the major property type categories and typically publish quarterly reports. Boundaries will vary but the findings are often consistent. Here we have used CoStar Analytics. As noted below, their quarterly surveys include over 40 million sq. ft. of investment grade product. The key take-aways, are that vacancy continues to decline but is expected to stabilize between 5% and 6% with modest rent growth. These trends indirectly impact land values positively.

KEY INDICATORS

Current Quarter	RBA	Vacancy Rate	Asking Rent	Availability Rate	Net Absorption SF	Deliveries SF	Under Construction
Logistics	22,948,756	5.4%	$6.38	12.7%	(14,582)	0	1,675,827
Specialized Industrial	15,951,329	4.4%	$6.71	6.9%	7,757	0	0
Flex	1,848,130	0.8%	$9.45	4.6%	0	0	0
Submarket	**40,748,215**	**4.8%**	**$6.64**	**10.2%**	**(6,825)**	**0**	**1,675,827**

Annual Trends	12 Month	Historical Average	Forecast Average	Peak	When	Trough	When
Vacancy Change (YOY)	-1.7%	7.2%	5.8%	12.3%	2010 Q3	2.3%	1996 Q2
Net Absorption SF	1 M	328,711	552,800	1,372,705	2017 Q4	(792,325)	2010 Q3
Deliveries SF	341 K	464,061	756,843	1,095,976	2005 Q3	0	2017 Q2
Rent Growth	3.4%	1.9%	1.7%	7.9%	1997 Q2	-3.1%	2010 Q1
Sales Volume	$63 M	$54.6 M	N/A	$186.9 M	2007 Q4	$6.3 M	2010 Q1

Investment grade industrial product in the North Lake County submarket lies east of I-90 in the suburbs of Abbott Park, North Chicago, and Waukegan. Most of the building stock consists of 1970s-era warehouses

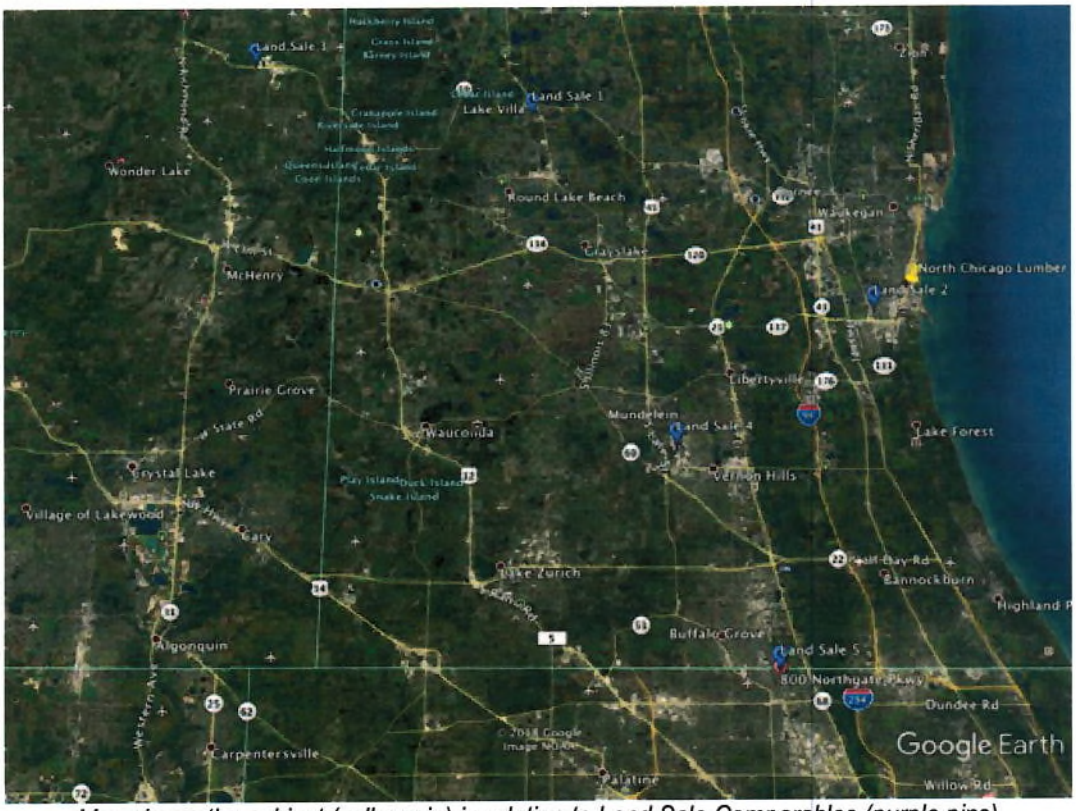
C0044

characterized by small bay spaces with ceiling heights less than 20 feet. This inventory is interspersed with a few newer institutional-grade assets. The high-bay investment type properties are located around the Amhurst Industrial Center in Waukegan or in Gurnee at the CenterPoint Business Center and the Tri-State Distribution Center. Key occupiers and users include chemicals and pharmaceuticals, durable- and nondurable-good wholesalers, and medical and surgical equipment supplies. There is also a significant concentration of housing-related tenants who service the local Lake County home-building community.

According to CoStar, vacancies rose in 2016 when Bridge Development's 600,000-plus sq. ft. facility opened in Waukegan. However, Amazon absorbed most of that space in early 2017. As vacancy rates dropped near the single-digits, rent growth posted over 4% gains in 2017. Rent growth through the first half of 2018 was posted gains of 1.50% in the six-month period.

Long-term, the North Lake County sub-market promises to be stable to improving. Expectations of growth are reflected in the selling of some vacant tracts of land for speculation. Many of these parcels have been on the market for over five years.

Discussion of Comparable Land Sales



Map shows the subject (yellow pin) in relation to Land Sale Comparables (purple pins)

The map above plots the Land Sales selected for comparison with the subject in the before the take scenario.

C0045

We have arrayed five recent commercial and industrial land sales within the greater North Lake County market and mapped them in relation to the subject. Of the five selected transactions, three closed in 2018 and the other two since 2015. We included the 2014 sale of the subject. It sets the low end and was reported bought out of foreclosure.

Property Type No	Industrial Subject	Industrial 1	Commercial 2	Industrial 3	Industrial 4	Industrial 5	Comparable Averages
Address	1940 Marquette St.	254 Park Ave.	Green Bay at Sherman	2909 B Route 12	921 Tower Rd	800 Northgate Pkwy	
City	North Chicago	Lake Villa	North Chicago	Spring Grove	Mundelein	Wheeling, IL	
County	Lake	Lake	Lake	Lake	Lake	Cook	
PIN	12-04-100-005 12-04-100-029 12-04-100-030			04-25-300-024	11-31-202-015	03-03-200-026-0000	
Site Area (sf)	118,048	43,560	161,172	123,710	144,184	607,444	199,686
Zoning	M-3 Intensive Industrial	LI-2	B -2	I-1	M-1	I-3	
Improvements	Former lumber yard; Misc. sheds	shovel-ready site w/ storm detention	Spec development site	Spec development site	Spec development site	Spec development site	
Year Built	NA						
Sale Price	$62,000	$104,000	$250,000	$59,000	$363,950	$2,150,000	
Municipal Utilities	All	All	All	All	All	All	
Configuration	Rectangle	Rectangle	Rectangle	Rectangle	Rectangle	Irreguar	
Access	Street	Street	Street	Panhandle	Street	Parkway	
MV/ sf site area	$0.53	$2.39	$1.55	$0.48	$2.52	$3.54	$1.83
Sale Date	Jun-14	Sep-18	Jul-18	May-18	Aug-15	Jun-16	
Comments	Facility closed 2008, bought out of foreclosure	on market 8 mo	on market nearly 7 years; day care center intended	encumbered with 50' easement; vacant site, adj. to light industrial development	Former RR Property; on market 9 years	Excess land sold by Frito-Lay to speculative developer; 7 yrs. On mkt.	
Confirmation	Inspection	Robert E. Frank	Dan Grasso, JLL	Premier Commercial	Transwestern	CBRE	
Grantor		NA	Great Lakes CU	NA	Illinois Central RR	Frito-Lay	
Grantee		NA	Northstar Commercial	NA	NA	Hamilton Partners	

The sale properties bracket the subject in terms of size and have comparable zoning. All the sales are in the same greater Lake County market, however, only one comparable is from North Chicago; the balance are located in superior industrial corridors to the west. Before adjustment these land sales average $1.83 per sq. ft. including the subject. Excluding the subject, the unadjusted average value is $2.10 per sq. ft.
Adjustment factors are discussed below.

Adjustment Factor	*Explanation*	Applicability
TRANSACTION ADJUSTMENTS		
Property Rights *leased*	*What property interest traded; fee,* *fee, partial interest, etc.*	No adjustments, all transactions in fee
Terms of Finance	*Whether sale was for cash or its equivalent, or were there incentives including seller finance*	All sales understood to be cash out

C0046

Conditions of Sale	*Closed sale or listing, presence of distress or unusual motivation of parties*	Listed properties discounted to reflect typical play of negotiations in sale process. Here, Land Sale 3 was encumbered with a significant 50 ft. easement that has comprised its utility.
Extraordinary Sale Costs *expenditures to*	*Accounts for unusual* *achieve sale price; such as demolition, remediation, impact fees etc.*	No such unusual costs either reported or observed
Market Trends	*Changes in market conditions between transaction date and date of value*	Insufficient time and data to support any projection of passive appreciation or value declines

Comparable sales are first adjusted for transaction anomalies before applying qualitative property and location differences with the subject. Superior characteristics required downward adjustments. Inferior attributes were adjusted upward. Note that these adjustments are qualitative.

PROPERTY ADJUSTMENTS

Adjustment Factor	Explanation	Applicability
Location *appeal or*	*intangible effects of linkages,* *rental rate differentials*	Only Sale 2, shares the same North Chicago location. Land Sales 1 and 5 are judged to have marginally superior location evidenced by more active industrial markets. Land Sale 3 is more remote and considered inferior.
Configuration/size	*Presence of surplus or excess land area; inverse relationship between size and unit values*	Parcel site areas bracket the subject site, and none sold with excess land.
Quality/utility	*Acknowledges significant variance in age, condition, construction quality, functionality and appeal to market*	Sale 3 was judged inferior because of the easement and was adjusted upward.
Zoning/Entitlements *special*	*Conformance of improvements;* *incentives or unusual land use constraints*	No adjustments required; all transactions located in comparable zones.
Other Considerations *transaction*	*Special circumstances of* *affecting comparability*	None observed.

C0047

After adjustment the sale properties ranged in value from $1.01 to $3.19 per sq. ft., averaging $2.04 per sq. ft. Sale 2, on Green Bay Rd. a mile west of the subject in North Chicago languished on the market for over seven years before finally selling at $1.55 per sq. ft. In spite of its commercial zoning its utility in the before scenario is considered comparable.

Property Type No	Industrial Subject	Industrial 1	Commercial 2	Industrial 3	Industrial 4	Industrial 5
Address	1940 Marquette St.	254 Park Ave.	Green Bay at Sherman	2909 B Route 12	921 Tower Rd	800 Northgate Pkwy
City	North Chicago	Lake Villa	North Chicago	Spring Grove	Mundelein	Wheeling, IL
County	Lake	Lake	Lake	Lake	Lake	Cook
Site Area (sf)	118,048	43,560	161,172	123,710	144,184	607,444
Zoning	M-3 Intensive Industrial	LI-2	B -2	I-1	M-1	I-3
Improvements	Former lumber yard; Misc. sheds	shovel-ready site w/ storm detention	Spec development site	Spec development site	Spec development site	Spec development site
Year Built	NA					
Sale Price	$62,000	$104,000	$250,000	$59,000	$363,950	$2,150,000
Municipal Utilities	All	All	All	All	All	All
Configuration	Rectangle	Rectangle	Rectangle	Rectangle	Rectangle	Irreguar
Access	Street	Street	Street	Panhandle	Street	Parkway
MV/ sf site area	**$0.53**	**$2.39**	**$1.55**	**$0.48**	**$2.52**	**$3.54**
Sale Date	Jun-14	Sep-18	Jul-18	May-18	Aug-15	Jun-16
TRANSACTION ADJUSTMENTS		1	2	3		4
Property Rights	*Fee*	Fee	*Fee*	*Fee*	*Fee*	*Fee*
Adjustment		0%	0%	*0%*	*0%*	*0%*
Terms of Finance	*Cash*	Cash	Cash	*Cash*	*Cash*	*Cash*
Adjustment		0%	0%	*0%*	*0%*	*0%*
Conditions of Sale	*Distressed REO*	Market Value	Market Value	inferior	Market Value	Market Value
Adjustment		0%	0%	*25%*	*0%*	*0%*
Market Trends	*3rd Q 2018*	Not observed	Not observed	*Not observed*	*Not observed*	*Not observed*
Adjustment		0%	0%	*0%*	*0%*	*0%*
Net Adjustments (as % of unit value)		0%	0%	*25%*	*0%*	*0%*
ADJUSTED VALUE/SF GBA		$2.39	$1.55	$0.60	$2.52	$3.54
PROPERTY ADJUSTMENTS		1	4	2		3
Location	*Average*	superior	comparable	inferior	comparable	superior
Adjustment		-20%	0%	*20%*	0%	*-10%*
configuration/size	*Rectangular*	comparable	comparable	*inferior access*	comparable	*comparable*
Adjustment		0%	0%	*50%*	0%	*0%*
Quality/utility	*Average*	comparable	comparable	*comparable*	comparable	*comparable*
Adjustment		0%	0%	*0%*	0%	*0%*
Zoning/Entitlements	*Fair*	comparable	comparable	*comparable*	comparable	*comparable*
Adjustment		0%	0%	*0%*	0%	*0%*
Other	*Vacant*	comparable	comparable	*comparable*	comparable	*comparable*
Adjustment		0%	0%	*0%*	0%	*0%*
Net Adjustments (as % of unit value)		-20%	0%	*70%*	*0%*	*-10%*
ADJUSTED VALUE/SF GBA		**$1.91**	**$1.55**	**$1.01**	**$2.52**	**$3.19**

Valuation Findings

When compared to the subject site, Sales 1, and 5 are found marginally superior in location and utility. Sale 3 is more remote and similarly encumbered with an easement, so more resembles the subject in the "after" scenario. The adjusted average of the four sales more comparable to the subject in the "before" scenario is
$2.29 per sq. ft.

C0048

Our value calculations are summarized on the table following. Based on this analysis we find that the market value of the subject site in the hypothetical "before" scenario, would be based on $2.00 per sq. ft., applicable to the entire site.
The valuation of the property in the "after taking" scenario may be adjusted by the loss of utility. A permanent easement transfers a portion of the bundle of rights to the dominant estate, in this case, the City of North Chicago. As understood, the easement would effectively prohibit construction on or over the area taken, though the subservient interest, the property owner could use the are for open storage; material that could be moved in the event the City required entry for whatever reason to service or repair the water main.
The placement of the proposed easement would also restrict the use of what is effectively a severed remainder; the narrow strip of land lying between the easement and the north property line, described above.
Ideally, sales of similarly impaired tracts of land might be compared with the subject. However, we found only very limited industrial land sale activity in North Chicago and only one sale encumbered by what appears to be an even more restrictive 50 foot easement.
We have found that the lost utility of the part taken plus the damage to the remainder is equal to 50% of the unencumbered market value. The remainder property may suffer diminished utility as well, of say 10%. The resulting market value of the remainder in the "after taking" scenario is calculated as follows:

VALUATION FINDINGS: Partial Acquisition

MV before the take	**Site Area (sf)**	**MV per sq. ft.**	**Utility**	**Total**
MV Whole Property	118,048	$2.00	100%	$236,096
			Rounded	**$236,000**
Acquisition affected parcels:		**MV per sq. ft.**	**Utility**	**Total**
Easement Acquired	11,030	$2.00	50%	$11,030
Damages: Severed Remainder	12,985	$2.00	50%	$12,985
Property Remainder	94,033	$2.00	90%	$169,260
MV after partial acquisition:	118,048	$1.64		**$193,275**
Just Compensation (MV before less MV after taking)				**$42,725**

C0049

ADDENDA

- Appraiser Qualifications

P. BARTON DELACY, M. U. P., MAI, ASA, CRE, FRICS
Accurity United -DeLacy Consulting, LLC
Professional Qualifications

Career Experience

DeLacy Consulting, LLC is a Chicago-based boutique real estate consulting firm specializing in valuation counsel, property tax consulting, appraisal services, litigation support and Green Energy Valuation. Green Energy Valuation focuses on the real estate implications of electric power generated when using renewable fuels; i.e. wind, solar, biomass or other non- fossil fuels.

P. Barton DeLacy brought 35 years of advisory experience to the firm, founded in 2013. His seasoned perspective spans all North American geographies and touches virtually all property types. In his corporate career, including practice leadership positions at Cushman & Wakefield, CBRE and Arthur Andersen, DeLacy concentrated on working with corporate clients and public institutions.

Mr. DeLacy was a Senior Managing Director and spent eight years at Cushman & Wakefield in Chicago and Portland, Oregon. Prior to joining C&W, DeLacy logged over 20 years as a partner or principal of fee appraisal and consulting firms. From 1998-2002 he led the real estate consulting practice in the Pacific Northwest for Arthur Andersen LLP. DeLacy began his career in 1977 as a residential appraiser for the Oregon-based Benj. Franklin Savings and Loan.

In addition to conventional appraisal assignments, Mr. DeLacy's counseling practice centers on problem solving engagements where valuation is incidental to the solution. Specialties include trust and estates, property tax consulting, litigation support, integrated business, personal and real property appraisals, land use impact studies, and counseling for non-profit businesses and institutions with real estate assets.

Academic Education

- **Master of Urban Planning** (M.U.P.), Portland State University -1988
- **Bachelor of Arts** (B.A.), Willamette University, Salem, Oregon -1975
- University of Oregon School of Law, Eugene, Oregon 1976-7
- School of Irish Studies, Dublin, Ireland 1974

Professional Credentials

- AI-GRS Member, Appraisal Institute, general appraisal review specialist -2014
- Member, Lambda Alpha International, land economics honorary- 2013
- Fellow, the Royal Institution of Royal Chartered Surveyors (FRICS) - 2005
- CRE Member, Counselors of Real Estate (No.2128) - 2003
- ASA Member, Urban Properties, American Society of Appraisers- 2002
- MAI Member, Appraisal Institute (No. 6680) – 1983
- SRA Member, Appraisal Institute- 1980

Institutional Campus Consulting

For many years, DeLacy has advised academic, religious and healthcare institutions, as well as non-profit agencies, and occasionally private parties regarding the highest and best use and valuation of purpose-built campus real estate holdings. Some of the more significant engagements include:

- Advised Wells Fargo Wealth Management regarding land lease and disposition options of 200+ acre Grant's Farm, a private zoo and residential estate near St. Louis, Missouri; 2013, 2015
- Performed right of way analysis and land use impact study for Trinity University in Deerfield, Illinois when local village considered street extension; 2013

- Valued Maryville University campus in Creve Coeur, St. Louis County Missouri. The 120-acre campus was expanding its residential footprint by acquiring an adjacent hotel for dormitory conversion. 2009,2013
- Divisional Headquarters of the Salvation Army retained us to value its Des Plaines, IL office campus headquarters and advise on option to remodel or move; also valued its Training Center in the Lakeview neighborhood of Chicago, Illinois. 2013-2014
- Modeled the highest and best use of a 66-acre site adjacent to Qualcomm stadium for San Diego State University. We considered land residual values for proposed transit oriented mixed use development in the parking lot should the NFL team, the San Diego Chargers relocate. 2012
- Valued the campus of Lambuth College in Jackson, Tennessee for potential sale as extension campus to Memphis State University. The former Methodist College had been closed and put on market. 2011
- Valued Birmingham Southern College in Birmingham, Alabama to help refinance debt. 2011
- Valued Trinity College in Washington, D.C., to help refinance debt. 2011
- Advised Thiel College, a Lutheran institution in Greenville, Pennsylvania regarding campus consolidation and highest and best use to assist with debt financing. 2010
- Valued Perlman B'Nai Brith Camp in Lake Como, Pennsylvania also addressed impact of mineral and gas leases, 2010
- Valued Missouri Baptist University campus, St. Louis County, Missouri. 2010
- Valued Marymount EF Campus in Tarrytown, New York. A one-time Catholic women's college, it had been converted to a graduate school for Fordham school before sale to EF for an international high school baccalaureate program. 2009
- Valued North Bay Camp in North East, Maryland, a 97 acre leasehold school and retreat center on Chesapeake Bay for financing when owner was in bankruptcy. 2009, 2011
- Appraised Sienna Heights University in Adrian, Michigan. The Co-ed Catholic College was sited on 55 acres next to the convent of the founding religious order. 2009

Subject Matter Expert-Litigation Support

Mr. DeLacy has appeared as an expert witness or prepared expert testimony in eminent domain proceedings, property damages cases, bankruptcy hearings, land use hearings and property tax appeals. He has analyzed rural land use impacts and performed valuations for siting energy facilities including wind turbine farms, cell towers and power generating plants.

Specifically, Mr. DeLacy has qualified as an expert witness in real property valuation cases for United States Circuit Courts in New Jersey, Oregon, Illinois and Northern California. Mr. DeLacy has presented expert testimony in property tax appeals at various levels in Oregon, Washington, Missouri, Illinois, Georgia and Montana.

He has also been retained by the US Departments of Justice and Interior, Bureau of Indian Affairs, the Department of Defense (US Navy), US Forest Service, General Services Administration (GSA) and Internal Revenue Service as a valuation expert.

Dispute Resolution and Public Testimony

- Expert testimony regarding property value impacts of proposed cell tower siting on church-owned site in Village of Olympia Fields, Illinois before planning board, June 2016
- Hunt Building Corp. as appellant v. Mead County, South Dakota in matter of consolidated tax appeals regarding Ellsworth Air Force Base housing project, aka, Antelope Ridge near Rapid City, SD; deposition as tax payer's expert witness; January 2015; Trial June 2016 Civ. No. 12-335
- Expert testimony before 45th Judicial Circuit of Lincoln County, Missouri; Foremost Insurance Company v. Peters Heating & Air Conditioning; regarding diminution in value on rural residential property; June 2014

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- Expert testimony before 21st Judicial Circuit Court of St. Louis County, Missouri; City of St. Louis and Factory Mutual Insurance v. Guarantee Electrical, et. al.; regarding diminution in value at central utility plant at Lambert Field; November 2013
- Expert testimony at settlement conference before Federal Circuit Court of New Jersey on pipeline condemnation of railroad right of way; Texas Eastern Transmission, LLP v. Consolidated Rail Corporation, September 2013
- Served as lessor representative on three-member arbitration panel in lease dispute regarding Philadelphia area data center, King of Prussia, Pennsylvania, 2012
- Expert testimony in the 43rd judicial Circuit Court, DeKalb County, Missouri; property tax appeal, Lost creek Wind, LLC v. Assessor, DeKalb County, Missouri, 2012
- Expert testimony before Lowndes County Board of Equalization re: property tax appeal regarding Magnolia Grove, base housing project, Moody AFB, Valdosta, Georgia, 2011
- Expert testimony before Illinois Property Tax Appeal Board, re: Lincolns Landing, St. Clair County, December 2010
- Served on three-member American Arbitration Association Panel: Shannon v. Mackay, AAA Case No 74 180 Y 0067208 DEAR, May 2009
- Prepared written and oral testimony for EFSEC, the Energy Facility Site Evaluation Council of Washington State for wind power projects, as expert for applicants, in Kittitas County, 2005-7
- Oregon Tax Court, mediation at Magistrate Level on property tax appeal made by Siltronic Corporation, 2005
- US v. Malcolm McGregor et al. 02-03425-rid (USBC Ore.) deposition only, as expert witness for US Department of Justice, Tax Division; regarding residential subdivision land values; July 2003
- Expert testimony, Cooper v. City of Ashland, USDC Case No. C-00-1146-PJH, witness for the City Of Ashland, US District Ct. for Northern California, December 2002

Green Energy Valuation

Mr. DeLacy's energy experience spans the spectrum of energy generating facilities; from renewables to fossil fuel-based thermal power plants. He has built valuation models and studied property value impacts made by wind and solar farms as well as fossil fuel fired generating plants. He has also developed adaptive re-use studies for obsolete thermal plants.

- Retained by statewide contract assessor to develop methodology for ad valorem valuation of 24 MW utility-scale wind farm in Sullivan County, New Hampshire. 2017
- Valued private municipal power plant and municipal heating system serving the City of Fairbanks, Alaska. 2011 and 2017.
- Valued municipal landfills in Puerto Rico and Alabama for financial reporting. 2016
- Valued entire 17.3 sq. miles of city-owned right of way for Spokane, Washington to establish collateral for annual maintenance payments between Streets and Utilities Divisions. 2015
- Valuation of small utility scale wind farm in Teton County, Montana. Follow-on advisory work included counsel for property tax appeal. 2015
- Appraised 3.24 MW solar farm in Macon, Missouri for conventional financing. 2015
- Valued proposed waste-to-energy anaerobic biodigester to be installed on former Air Force base in Brunswick, Maine. 2015
- Wind farm land lease market study for US Forest Service advising them on best practices for first wind farm on National Forest lands in Vermont. 2014

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- Valued portfolio of single and double turbine distributive small wind projects funded by California Self Generation Incentive Program. 2013-15
- Valued portfolio of installed distributive solar installations on several high schools in Douglas County, Colorado in bankruptcy case for FITI Consulting. 2014
- Valued proposed 3.0 MW utility scale solar power plant on leased airport land in Rockford, Illinois for Cole Taylor Bank. 2012
- Retained by Booze Allen Hamilton to identify development opportunities, including solar energy sites, at 55 CONUS Air Force bases where Enhanced Use Leases were present. 2012
- Counseled the Arizona Department of State Lands regarding land lease rates for wind and solar development near the Grand Canyon National Park. 2011
- Valued Skypower's portfolio of eight 10 MW solar farms in Ontario Canada for CalPERS. 2010
- Valued proposed solar power plants at Onyx Ranch, Kern County, CA. 2009-11
- Retained as valuation consultant by Indiana County in assessment negotiations with major independent system operator (ISO) on 2,000 MW coal-gas thermal power plant.
- Developed adaptive reuse study for wholesale power supplier on a gas power plant that may be converted to a peaker station on the California Coast. 2011
- Developed collateral valuation of 120 MW coal-burning power plant for conversion to plasma gasification near Fall River, Massachusetts. 2009
- Valued proposed 400 MW utility scale wind power project on Island of Lanai in Hawaii. 2008

Infrastructure Advisory

Mr. DeLacy's infrastructure valuation experience includes railroad corridors, municipal rights of way and airports.

- Developed impact study regarding a proposed 20 MW solar farm in Dorchester County, Maryland. 2017
- Valued small portfolio of cell tower ground leases on the Pine Ridge Indian Reservation in South Dakota for the Bureau of Indian Affairs. 2017
- Authored white paper and provided city council testimony in support of a value capture ordinance for the Department of Publics in the City of Portland. 2016
- Valued municipal landfills in Puerto Rico and Alabama for financial reporting. 2016
- Valued entire 17.3 sq. miles of city-owned right of way for Spokane, Washington to establish collateral for annual maintenance payments between Streets and Utilities Divisions. 2015
- Right of Way valuation included impact study of Texas Eastern pipeline leases along the Conrail National Dock Branch Rail Corridor in New Jersey. 2012-13
- Completed due diligence on the district energy system (including power plants and associated infrastructure) for major Midwestern city. 2013
- Valued geo-thermal heat exchange system for the Missouri University of Science & Technology campus for the Missouri University System in Rolla, Missouri. 2013
- Advisory opinion on whether fire-damaged central utility plant at St. Louis International Airport had market value. 2013
- Produced a market study and consolidated cash flow analysis for Aeroterm Air Cargo facilities covering entire 26 airport portfolio across continental U.S. 2012

- Advised Midwestern energy company on highest and best use for obsolete tank farm on Chesapeake Bay near St. Mary, Maryland. 2011
- Valued private municipal power plant and municipal heating system serving the City of Fairbanks, Alaska. 2011
- Advised Macquarie team in their bid(s) to acquire Midway Airport in Chicago. 2008, 2011
- Valued 200-mile Front Range Class I railroad right of way for BNSF from Ft. Collins to Pueblo, Colorado, including the Denver Globe Yards. 2001

Farm, Forestry and Wood Products Consulting

As an urban appraiser, DeLacy first became involved with timberland valuations when testing for highest and best use of large forested tracts proposed for resort or residential development on the Pacific Coast. Later, his work gravitated to financing, bankruptcy proceedings and financial reporting. DeLacy has worked in virtually every silviculture in North America; from the Douglas-fir of the western Cascades and Rockies in Montana, to the birch and poplar forest of Maine, to the pine plantations of the Southeastern US. In 2015, DeLacy began appraising inholdings on Ranch and farm land in trust to the Bureau of Indian Affairs across the Great Plains.

Some of the more significant engagements include the following:

- Client: U.S. Department of Agriculture; venue: State of Missouri; Areawide market study to determine cropland market values for wetland and conservation easements. 2017
- Client: Cheyenne River Indian Reservation and BIA; venue: Dewey and Ziebach Counties, South Dakota; Market Study to determine range unit rents. Market valuations for ranch land inholdings. 2015
- Client: Winnebago Indian Reservation and BIA: venue: Thurston County, Nebraska; Market valuations for homesites and cropland. 2015
- Client: Indiana Lumbermens Mutual Insurance Co (represented by Paine Hamblen of Spokane); venue: Idaho Federal District Court; at issue appraisal review and valuation counsel regarding damages and replacement cost after fire razed a sawmill in the Idaho panhandle in 2008. (2013)
- Client: Kolschowsky Trust (Chicago); valuation, highest and best use analysis of 1,800 acres of managed timberland in Clark County, Wisconsin (2010, 2012).
- Client: Timberland Investment Resources, LLC (Georgia); evaluation of 13,900-acre lease of managed Cumberland Ridge (Tennessee) timberland for wind farm development (2011).
- Client: Willamette Management (Portland); valuation of Noble Tree Farm operations, 3,521 acres in multiple Oregon counties; modeled their financial operations, established land values and highest and best use; assumed a wind down of operations. Noble Farms was one of the largest Christmas tree operation in the PNW (2009).
- Client: PALCO (Pacific Lumber Co.), Scotia CA; Valuation of entire property portfolio including mills and mill sites in Scotia, Fortuna and Carlotta, all in Humboldt County, CA for bankruptcy proceedings (2006-2008).
- Client: Wells Fargo (California); Valuation of Harwood Products land and mill in Branscomb, Mendocino Co., CA for bankruptcy proceeding (2008).
- Client: Brookfield Asset Management; Longview Timber Corp. Tree Farm Portfolio: Select valuation of highest and best use sites within 586,000-acre portfolio of managed timberland in Oregon and Washington (2007).
- Client: Bank of the West (Omaha); valuation of 3 sawmills owned by Neiman Enterprises in South Dakota and Wyoming (2007).
- Client: Great American Group (California); valuation of paper mill portfolio in purchase price allocation when Neenah Paper bought Fox River Paper. Mill sites in California, Wisconsin, Ohio and Massachusetts. (2007)
- Client: Washington State Dept. of Natural Resources; 38 parcel portfolio of surplus lands totaling 1,000 acres in 16 counties (2006).

C0055

- Client: Yellowstone Club; property tax appeal in Madison Co., Montana on timbered recreation areas surrounding homesites within 8,000 acre holding (2005-6).
- Client: US Bank; valuation of Three Rivers saw mill and 1,000 acre timber holdings in and around Kamiah, Idaho. (2003)
- Client: Plum Creek Timber Co (REIT) (Seattle); appraised over 3 million acres of managed timberland in Oregon, Washington, Montana, Maine and pine plantations in the Southeastern U.S. for a purchase price allocation with Georgia Pacific; emphasis on identification of highest and best use recreational tracts (2001-2).
- Client: Consolidated Paper (Stevens Point, WI); purchase price allocation involving merger with Mead paper, appraised 670,000 acres of managed timberland in Wisconsin, Minnesota and Ontario, Canada(2000).
- Client: Weyerhaeuser (Tacoma, WA); valuation of 700,00 acre managed timber portfolio on Vancouver Island (British Columbia) and Alabama in purchase price allocation following acquisition of McMillan-Bloedel (1999).

Select Publications

- "Renewables, Tax Credits and Ad Valorem Taxes: Are Policies Aligned?" *Real Estate Issues*, The Counselors of Real Estate, Volume 39, No. 1, 2014
- "Wind Power and The Tax Base: Reliable as the Resource?" *The Journal of the International Machinery and Technical Specialties Committee of the American Society of Real Estate Appraisers*; Volume 30, Issue 1, First Quarter, 2014
- "Wind Farms Harvest More Than Just Energy," *Terra Firma*, Realtors Land Institute, Winter2014
- "Earth, Wind and LULUs – Wind Farms: Harvesting Energy and Controversy," *Journal of the Center for Real Estate Studies*, Realtor University, Vol. 1, No. 2, September 2013
- "Renewable Energy: Headwinds Ahead?" *Real Estate Issues*, The Counselors of Real Estate, Vol. 36, No. 3, 2011
- Panel presenter, Illinois Wind Working Group Annual Conference, Illinois Institute of Technology, Chicago, IL (July 21-22, 2011)
- "Wind Farms- A Valuation Primer," *Appraisal Journal*, Appraisal Institute, Winter 2011
- Presentation Faculty at Law Seminars International Symposium on Land Use Impacts of Wind Energy, Vancouver Hilton, February 11-12, 2007

Teaching and Course Development

As a recognized national subject matter expert, Mr. DeLacy was asked to develop and teach an eight-hour wind farm valuation class for the Society of Farm Managers and Rural Appraisers in 2014. In 2015 he was asked by the Appraisal Institute to teach a two-hour seminar, "A Valuation Primer for Renewables" at the national meetings in Dallas, Texas.

Previously he prepared two 2-hour seminars on green energy valuation for continuing education for both the Illinois and Indiana Chapters of the Appraisal Institute. DeLacy also presented at the ICAP seminar in Lisle, IL in August 2014 for Illinois Continuing Education credit.

Mr. DeLacy served as Adjunct Professor in the School of Business Administration at Portland State University, 2004-6. He also developed a graduate level online class for Marylhurst University combining land use planning and valuation perspectives to study city growth. The class was taught 2002-4. In the 1980s Mr. DeLacy was adjunct faculty teaching introductory appraisal classes at both Lane and Clackamas Community Colleges in Eugene and Oregon City, Oregon, respectively.

C0056

Professional and Civic Leadership

Mr. DeLacy serves in the following leadership roles professionally and within the community.

- President, Illinois Coalition of Appraisal Professionals (ICAP) 2017
- Board of Directors, University Club of Chicago, 2018
- Board of Directors, Chicago Chapter of the Appraisal Institute (2016-2019)
- Board of Directors, 18th & Wabash Corp., a non-profit SRO housing project (2012-16)
- Past Associate Editor of *Real Estate Issues*, the peer reviewed journal of the Counselors of Real Estate ®
- Chapter Chair (2015) and National Board Member, Counselors of Real Estate ®, since 2013
- Region III Director, Appraisal Institute (2014-2015)
- Emeritus, Abbey Foundation of Oregon
- Board of Advisors, Catholic Charities of Chicago
- Willamette University Trustee (1991-1994)
- Planning Commissioner, City of Lake Oswego, Oregon (1989-93)
- Emergency Siting Authority, Juvenile Prison Project, State of Oregon (1995, 1998)
- Regional Advisory Board Member, Resolution Trust Corp (RTC) 1989-1991

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Active State Certifications

Mr. DeLacy received his initial license as a Certified General Real Estate Appraiser in Oregon, but maintains active certified general credentials in the following states:

- California, license no. AG034219
- Colorado, license no. 1000006312
- Illinois, license no. 553.001797
- Indiana, license no. CG41001248
- Iowa, license no. CG02930
- Massachusetts, license no. 103170
- Michigan, license no. 1201073739
- Missouri, license no. 2005035957
- New York, license no. 46000047021
- Oregon, license no. C000089
- Pennsylvania, license no. GA003949
- Washington, license no. 1100107
- Wisconsin, license no. 1678-01

Consulting Corps for the Counselors of Real Estate ® (CRE)

The following projects were undertaken pro-bono upon selection by the Counselors of Real Estate ®:

- Chaired panel advising New Jersey Futures and Oxford Township, New Jersey on how best to stimulate its downtown and promote economic development. (2016)
- Advised the Chancery Office for the Archdiocese of Philadelphia on best practices for real estate disposition. (2015)
- Developed comprehensive real estate strategy for California's State Center Community College District in Fresno. (2013)
- Led team to advise the soon-to-be closed Trinity Hospital on adaptive re-use options in Birmingham, Alabama. (2011)
- Chaired panel assisting University of Arkansas at Little Rock on University District development strategy. (2008)
- Chaired panel advising City of Orlando, Florida regarding placement of homeless shelter. (2005)
- Advised Tougaloo College in Jackson, Mississippi on disposition of excess land (2004).

C0058

EXHIBIT 3

OFFER LETTER

Ancel Glink

A Professional Corporation
140 South Dearborn Street, Suite 600
Chicago, IL 60603
www.ancelglink.com

Adam B. Simon
asimon@ancelglink.com
(P) 847.856.5440
(F) 847.247.7405

May 1, 2019

VIA EMAIL (JQuinn@grayslakelaw.com)
John W. Quinn
Churchill, Quinn, Richtman & Hamilton, Ltd.
2 S. Whitney Street
Grayslake, IL 60030

Re: Offer to Purchase an Easement for the 2nd & Main Property

Dear John:

As you know, the City of North Chicago would like to purchase an easement to operate its water main underneath the property of your client, 2nd & Main, LLC, located at 1940 Marquette St., North Chicago, IL 60064. As you also know, the City has conducted an appraisal as to the value of such an easement, and the City's appraiser has valued it at $42,725. A copy of this appraisal is attached as Exhibit A. The City is willing to offer your client 20% more than the appraised value of the easement to purchase it, or $52,000. This offer is contingent upon the parties reaching a voluntary agreement.

The easement would be for a 20-foot-wide tract of land that would include the land under which the water main runs along with approximately 10 feet of the land adjacent to the water main on each side, and would provide the City with the right to enter onto your client's property and use this land to repair and construct a water main. The City would agree to repair any damage caused to your client's property by the exercise of its easement rights. The City would also agree to dispose of any soil uncovered by the exercise of its easement rights in the manner required by law. A diagram showing the approximate location of the easement is attached as Exhibit B, and a legal description of the easement is attached as Exhibit C.

This offer will remain open for twelve (12) days, until 5:00PM on May 13, 2019. If we do not receive a response to the offer by then we will assume that you have rejected it. If this offer is unacceptable to you then the City may initiate condemnation proceedings to take the easement.

Please share this offer with your client, Phil Dahl, and contact me after you have discussed it with him. We would like to negotiate with you in good faith to purchase this easement.

Sincerely,

Adam B. Simon

C,Q R+H Churchill, Quinn, Richtman & Hamilton LTD.
Attorneys at Law – Founded In 1903

TWO SOUTH WHITNEY, GRAYSLAKE, IL 60030
(847) 223-1500, FAX (847) 223-1700
WWW.GRAYSLAKELAW.COM

R.W. CHURCHILL (1875-1963)
GEORGE O. CHURCHILL (1914-1985)

ROBERT W. CHURCHILL
WILLIAM A. CHURCHILL
JOHN W. QUINN
JOHN (JACK) RICHTMAN
MARK T. HAMILTON
MARK VAN DONSELAAR
LEO J. DELANEY
JOHN L. QUINN
JENCIE A. RICHTMAN
LISA D. WISOWATY

May 8, 2019

Adam Simon
Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C.
140 S. Dearborn St., Suite 600
Chicago, IL 60603

Re: 2nd & Main, LLC v. City of North Chicago

Dear Adam;

I write this letter in response to your letter to me of May 1, 2019.

My client would be willing to settle the pending litigation on the following terms:

1. A payment to 2nd & Main, LLC in the amount of $1,101,000.00 for a new easement plus his fees, court and expert costs.

2. The new easement would be over the north 20 feet of my client's property. It would be limited to one 24 inch water main and that main would be located in the north 10 feet of the easement.

3. At its own cost, the City will be required to remove the existing 24 inch water main and restore the property to its present condition and obtain an NFR letter from the EPA. In order to do so a temporary 20 foot easement centered on the existing water main would be granted for the City to remove the existing 24 inch water main.

4. The easement would provide a hold harmless for actions and events by the City to my clients and its owners, affiliates, etc.

If the existing main is not removed and the NFR letter not obtained by December 31, 2019, the City will pay a $300 per day penalty, payable monthly.

I look forward to hearing from you.

Very truly yours,

John W. Quinn
JWQ/sl

C0061

Ancel Glink

A Professional Corporation
175 E. Hawthorn Parkway, Suite 145
Vernon Hills, IL 60061
www.ancelglink.com

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asimon@ancelglink.com
(P) 847.856.5440
(F) 847.247.7405

May 10, 2019

VIA EMAIL (JQuinn@grayslakelaw.com)
John W. Quinn
Churchill, Quinn, Richtman & Hamilton, Ltd.
2 S. Whitney Street
Grayslake, IL 60030

Re: Offer to Purchase an Easement for the 2nd & Main Property

Dear John:

Thank you for your response to the City's offer to purchase an easement across the 2nd & Main property. The City cannot accept your counteroffer, as it asks for more than twenty times what it offered to purchase the easement for, which was already higher than the City's appraised value of the easement. Moreover, it is not practical or necessary for the City to relocate the existing twenty-four-inch water main. If the City were to condemn the easement it would neither be required to relocate the water main, file a RCRA action, nor seek a no further remediation letter from the IEPA, or any of the other redevelopment expenses which properly belong to the owner of the property.

Unless your client is willing to reduce his demand to an amount that is within the ballpark of the City's appraised value of the easement and limit his demand to only monetary compensation, then it does not seem fruitful to continue to negotiate. If your client is willing to do that, please let me know.

Sincerely,

Adam B. Simon

Churchill, Quinn,
Richtman & Hamilton LTD.
Attorneys at Law – Founded in 1903

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MARK VAN DONSELAAR
LEO J. DELANEY
JOHN L. QUINN
JENCIE A. RICHTMAN
LISA D. WISOWATY

May 20, 2019

Adam Simon
Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C.
140 S. Dearborn St., Suite 600
Chicago, IL 60603

Re: 2nd & Main, LLC v. City of North Chicago

Dear Adam;

I write this letter in response to your letter to me of May 10, 2019. I am not sure your client understands its risk.

Your letter would be well taken if the City of North Chicago had the legal ability to condemn the property. They do not. My client is a railroad because, as you are aware, on March 6, 2017, 2nd & Main filed a Notice of Exemption under 49 C.F.R. § 1150.31 with the Surface Transportation Board. After that, on March 22, 2017, the Surface Transportation Board issued its decision regarding the Notice of Exemption. As a result, any attempt by the City to condemn my client's property would be preempted by the Interstate Commerce Commission Termination Act 49 U.S.C. § 10501(b). In that regard I would direct your attention to *Union Pacific Railroad Company v. Chicago Transit Authority* 647 F.3d 675 (2011). Even though the *Union Pacific* case is a federal case, for all practical purposes, it is binding on the state court because, in *Union Pacific*, the railroad was able to obtain an injunction in federal court against the condemning body's action in state court.

Plaintiff's complaint contains a count for ejectment. Since the City cannot condemn an easement it will be forced to remove the existing main. The cost to do so will exceed the demand made by client in my letter of May 8, 2019. We estimate that the cost to remove and relocate the existing water main will exceed $1,500,000 and that does not include the cost to remediate any pollution that has migrated from the north on to my client's property.

That being said, my client does wish to resolve this litigation. In that regard, my client is willing to provide a 20 foot easement for the maintenance and repair of the existing 24 inch water main for $438,000.00 pursuant to the Duff & Phelps appraisal (see page 33). This offer would not include the right to replace the existing main nor to install any additional mains.

I look forward to hearing from you.

Very truly yours,

John W. Quinn
JWQ/sl

C0063

Ancel Glink

A Professional Corporation
175 E. Hawthorn Parkway, Suite 145
Vernon Hills, IL 60061
www.ancelglink.com

Adam B. Simon
asimon@ancelglink.com
(P) 847.856.5440
(F) 847.247.7405

May 29, 2019

VIA EMAIL (JQuinn@grayslakelaw.com)
John W. Quinn
Churchill, Quinn, Richtman & Hamilton, Ltd.
2 S. Whitney Street
Grayslake, IL 60030

Re: Offer to Purchase an Easement for the 2nd & Main Property

Dear John:

Thank you for your May 20, 2019 letter. Your arguments about the City's risk rely on the presumption that the operation of the City's water main will conflict with the "railroad" your client seeks to operate. Respectfully, I disagree.

Nothing in *Union Pacific R. Co. v. Chicago Transit Authority*, 647 F.3d 675 (7th Cir. 2011) suggests that the City would be categorically prohibited from condemning an easement across railroad property. Just the opposite, the Court holds that condemnation is not categorically preempted by the Interstate Commerce Commission Termination Act (ICCTA). The exercise of eminent domain, "is not a rule of general applicability because each instance necessarily varies with the facts of the case and the specific property subject to the condemnation." *Union Pacific R. Co., supra* at 679-680. *Union Pacific* is also distinguishable from the facts at bar because the CTA sought to permanently exclude the railroad from using its property for railroad purposes. The City has not and does not seek to exclude the owners from using the subject property for railroad purposes due to the operation of the water main.

In fact, *Union Pacific* supports the City's position, as it held that the ICCTA only preempts local regulations over railroads when the regulation "would have the effect of preventing or unreasonably interfering with railroad transportation." *Id.* at 679. Similarly, the Surface Transportation Board has consistently held that the ICCTA does not preempt condemnation actions that do not interfere with a railroad's operations or pose safety risks. For example, in *Lincoln Lumber Co.—Petition for Declaratory Order*, 2007 WL 2299735 (S.T.B. Aug.10, 2007), a case involving condemnation of a storm sewer easement, the Board held that, "acquisition by eminent domain of a temporary easement over part of LLC's railroad right-of-way (for construction) and a permanent easement under that part of LLC's right-of-way (for operation) would not implicate the section 10501(b) preemption unless it would prevent or unreasonably interfere with railroad operations." Moreover, in summarizing prior rulings, the Board stated "routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire

crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations or pose undue safety risks." *Id.* The Board even went so far to explain that determinations as to whether proposed eminent domain actions would interfere with railroad operations can be made by local State courts without requiring Board intervention. *Id.*

It is instructive to point out that the easement in the *Lincoln Lumber Co.* decision ran longitudinally to the railroad right-of-way, whereas the proposed easement sought by the City is perpendicular to the rail spur on your client's property. The easement that the City seeks would have an insignificant impact on the railroad's operations and you have presented the City with no evidence to counter that conclusion. Based on the City's experience, for nearly 60 years the coexistence of the water main and railroad lines has never caused a conflict, resulted in interference with railroad operations or posed safety risks. If you have actual evidence to the contrary, rather than speculation, please share it with me so we can engage in meaningful dialogue instead of casting shadows and innuendo.

Furthermore, I am somewhat confused as to why you would include an inverse condemnation count in your complaint if you do not believe the City has authority to condemn the easement. The inverse condemnation count asks for a writ of mandamus ordering the City to condemn the easement. Based on the legal arguments set forth in your letter, there would be no legal basis supporting Count I of your complaint. Accordingly, I invite you to voluntarily dismiss the inverse condemnation count and rely solely on the ejectment and trespass claims.

With that said, the City is still hopeful that we can settle this matter and remains committed to bargaining in good faith with your client. Therefore, the City is willing to increase its offer to purchase the easement to $125,000, nearly three times the City's appraised value. As stated in our previous letter, the City would also agree to repair any physical damage caused to your client's property and dispose of any soil uncovered by the exercise of its easement rights. This is the City's final and best offer.

We look forward to your response.

Sincerely,

Adam B. Simon

IN THE CIRCUIT COURT OF THE NINETEENTH JUDIIAL CIRCUIT
LAKE COUNTY, ILLINOIS

THE CITY OF NORTH CHICAGO Plaintiff, v. 2ND & MAIN LLC, UNKNOWN OWNERS and NON-RECORD CLAIMANTS Defendants.	)))))))))	19 ED 20

ANSWER

NOW COMES the Plaintiff, 2nd & MAIN, LLC ("Defendant"), by and through its attorneys, CHURCHILL, QUINN, RICHTMAN & HAMILTON, LTD., for its answer to Plaintiff's complaint states as follows:

1. Defendant admits this allegation.

2. Paragraph 2 calls for a legal opinion and therefor Defendant makes no answer to this allegation.

3. Defendant admits this allegation.

4. Defendant admits the ordinance referenced in this paragraph was adopted but has insufficient information regarding the remaining allegations and therefore denies the same.

5. Defendant has insufficient information regarding the allegations in this paragraph and therefor denies the same.

6. Defendant states that the ordinance speaks for itself but has insufficient information regarding the remaining allegations and therefore denies the same.

7. Defendant denies this allegation.

8. Defendant has insufficient information regarding the allegations in this paragraph and therefor denies the same.

C0066

9. Defendant admits this allegation.

10. Defendant admits this allegation.

11. Defendant has insufficient information regarding the allegations in this paragraph and therefor denies the same.

12. Defendant admits this allegation.

AFFIRMATIVE MATTER---North Chicago's right to eminent domain is Limited by Federal Law

1. On March 6, 2017, 2nd and Main, LLC filed a Notice of Exemption under 49 C.F.R. § 1150.31 with the Surface Transportation Board. A copy of that filing is attached as Exhibit A.

2. On March 22, 2017, the Surface Transportation Board issued its decision regarding the Notice of Exemption. As a result of the decision, the exemption became effective April 5, 2017. A copy of that decision is attached as Exhibit B.

3. The Interstate Commerce Commission Termination Act of 1995 ("ICCTA") (49 U.S.C.A. §10101 *et. seq.*) abolished the Interstate Commerce Commission and gave the Surface Transportation Board exclusive jurisdiction over: (1) transportation by rail carriers and the remedies provided with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, tear switching, or side tracks, or facilities, even if the tracks are located, entirely in on state. 49 U.S.C. § 10501(b).

4. "The Termination Act expressly preempts "remedies provided under Federal or State law" and vests with the Surface Transportation Board (the "Transportation Board"), a federal agency, exclusive jurisdiction over "transportation by rail carriers" and "the construction…of…facilities…" Green *Mountain Railroad v. Vermont* 404 F.3d 638, 639 (2005).

C0067

5. As a result, North Chicago's right to eminent domain is limited because North Chicago is not permitted to interfere with the Defendant's operations as a railroad.

WHEREFORE the Plaintiff, 2nd & Main, LLC hereby prays that any relief provided be limited to the extent that it does not interfere with 2nd & Mains railroad operations.

COUNTER-CLAIM—TRESPASS

NOW COMES the Plaintiff, 2nd & MAIN, LLC ("Defendant"), by and through its attorneys, CHURCHILL, QUINN, RICHTMAN & HAMILTON, LTD., for its Counter-Claim against the City of North Chicago states as follows:

1. The Counter-Plaintiff, 2nd & MAIN, LLC, owns and possesses the following real estate (hereafter the "Property") located in North Chicago and described as follows:

> A Part of the North Half of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, described as follows: Beginning at a point on the Easterly Right of Way Line of the Chicago and North Western Railway Company, which point is 772.10 feet measured along said Right of Way Line Southerly of the intersection of said Right of Way Line with the Southerly Right of Way Line of the Elgin, Joliet and Eastern Railway Company; running thence East on a Line parallel with the South Line of said Northwest Quarter of the said Section 4, a distance of 515.8 feet the West Line of Marquette Street; thence Northerly along the West Line of Marquette Street, approximately 220 feet to the Southeast Corner of the former J.W. Aulson and Sons Corporation Property, more particularly described by Warranty Deed dated April 20, 1921 and Recorded April 26, 1921, as Document 201389; thence West 435 feet on the South Line of said Former J. W. Aulson and Sons Corporation Property to said Easterly Right of Way of said Chicago and North Western Railway Company; running thence in a Southerly direction along said Easterly Right of Way Line to the point of beginning, in Lake County, Illinois.

2. The Counter-Defendant, City of North Chicago was incorporated as a city in 1901.

3. After 1901, North Chicago or its agents, without obtaining an easement or other right to the property, installed a 24" water main pipe on the Property. That pipe is highlighted in yellow and shown on the attached Exhibit A.
4. North Chicago has at all times relevant owned, controlled and maintained this pipe on 2nd & Main's property and if a trespass is continuing any person in possession of the land at any time during its continuance may maintain and action for trespass. [See *Rosenthal v. City of Crystal Lake*, 171 Ill.App. 3d 428, 525 N.E. 2d 1176, 1181 (2nd Dist. 1988)]
5. By reason of the above actions North Chicago has wrongfully interfered with 2nd & Main's actual possessory rights in the Property and, as a result, 2nd & Main has and continues to suffer damages.

WHEREFORE the Plaintiff, 2nd & Main, LLC prays that a judgment be entered against North Chicago for damages in excess of $50,000, attorney's fees and costs of suit.

Respectfully submitted:

Attorney for 2nd & Main, LLC

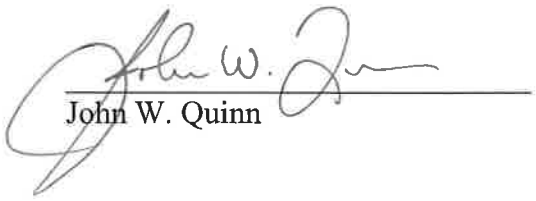
John W. Quinn
Churchill, Quinn, Richtman & Hamilton Ltd.
2 South Whitney St.
Grayslake, IL 60030
Phone: 847-223-1500
2270706
jquinn@grayslakelaw.com
G:\Litigation Files\2nd & Main, LLC\19 ED 20\Answer.docx

STATE OF ILLINOIS)
) ss.
COUNTY OF LAKE)

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, John W. Quinn, on oath deposes and says:

1. This answer contains certain statements of insufficient knowledge upon which to base a belief as to the truth or falsity of the allegations contained in the Complaint.

2. That said allegations of insufficient knowledge are true and correct.



John W. Quinn



BEFORE THE
SURFACE TRANSPORTATION BOARD

2ND & MAIN, LLC -- ACQUISITION AND OPERATION EXEMPTION -- NORLAND NORTH CHICAGO, IL	)	FINANCE DOCKET NO. 36106

NOTICE OF EXEMPTION
UNDER 49 C.F.R. § 1150.31

2ND & MAIN, LLC
1900 Marquette Street
North Chicago, IL 60062

Applicant

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1666
Chicago, IL 60604-1228
(312) 236-0204 (ph)
mcfarland@aol.com

Attorney for Applicant

Date Filed: March 6, 2017



C0071

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1666
CHICAGO, ILLINOIS 60604-1228
TELEPHONE (312) 236-0204
mcfarland@aol.com

THOMAS F. MCFARLAND

RECEIVED
MAR 06 2017

March 3, 2017

242739
ENTERED
Office of Proceedings
March 6, 2017
Part of
Public Record

By UPS overnight mail

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: Finance Docket No. 36106, *2nd & Main, LLC -- Acquisition and Operation Exemption -- Norland North Chicago, LLC*

Dear Ms. Brown:

Hereby transmitted is the original and 10 copies of Notice Of Exemption Under 49 C.F.R. § 1150.31 for filing with the Board in the above referenced matter.

This Notice is related to Finance Docket No. 36103, *Hussey Terminal Railroad Company and 2nd & Main, LLC -- Acquisition and Operation Exemption -- at North Chicago, Lake County, IL*. It is respectfully requested that the Notice of Exemption in F.D. 36103 be noticed to the public on the same date on which this Notice of Exemption is noticed to the public.

Also enclosed is a check in the amount of $1,900 for the filing fee.

Very truly yours,

/s/ Thomas F. McFarland

Thomas F. McFarland
Attorney for Applicant

TMcF:kl:enc:\1754-A\ltrSTB1

FEE RECEIVED
March 6, 2017
SURFACE
TRANSPORTATION BOARD

FILED
March 6, 2017
SURFACE
TRANSPORTATION BOARD

C0072

BEFORE THE
SURFACE TRANSPORTATION BOARD

2ND & MAIN, LLC -- ACQUISITION AND OPERATION EXEMPTION -- NORLAND NORTH CHICAGO, IL	))))	FINANCE DOCKET NO. 36106

NOTICE OF EXEMPTION
UNDER 49 C.F.R. § 1150.31

Pursuant to 49 U.S.C. § 10502 and 49 C.F.R. § 1150.31, *et seq.*, 2nd & Main, LLC (2&M) hereby provides notice of its class exemption for its acquisition from Norland North Chicago, LLC (Norland) and operation of approximately 540 feet of rail line at North Chicago, IL shown on a plat that is attached to this Notice as Appendix 1.

INFORMATION ABOUT 2&M REQUIRED BY 49 C.F.R. § 1150.33

The following is furnished pursuant to 49 C.F.R. § 1150.33:

(a) *The full name and address of the applicant;*

Applicant is 2nd & Main, LLC, (2&M), 1900 Marquette Street, North Chicago, IL 60062.

(b) *The name, address, and telephone number of the representative of the applicant who should receive correspondence;*

2&M's representative is Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, #1666, Chicago, IL 60604-1228, 312-236-0204.

(c) *A statement that an agreement has been reached or details about when an agreement will be reached;*

An agreement has been reached between 2&M and Norland for 2&M's acquisition and operation of the Rail Line.

C0073

(d) The operator of the property;

The operator of the property will be 2&M.

(e) A brief summary of the proposed transaction, including:

(1) The name and address of the railroad transferring the subject property;

The transferor of the property is Norland North Chicago, LLC, 1601 North Lewis Avenue, Waukegan, IL 60085-1761. Norland is believed to have acquired the Rail Line in bankruptcy prior to 2014 as a secured creditor of a prior owner of the Line, Edward Hines Lumber Co., which was later involuntarily dissolved.

(2) The proposed time schedule for consummation of the transaction;

The transaction will be consummated shortly after the exemption for the transaction becomes effective.

(3) The mileposts of the subject property, including any branch lines; and

The Rail Line does not have milepost numbers.

(4) The total route miles being acquired;

Approximately 540 feet of rail line is proposed to be acquired and operated.

(f) A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States; and

A plat showing the Rail Line is attached to this Notice as Appendix 1.

(g) A certificate that applicant's projected revenues do not exceed those that would qualify it as a Class III rail carrier.

2&M's projected revenues would not exceed those that would qualify it as a Class III rail carrier. *See* the Verification of Philip N. Dahl, President of 2&M, attached to this Notice as Appendix 2.

C0074

(h) Interchange Commitments.

There are no interchange commitments.

ADDITIONAL INFORMATION

Annual Revenues

In compliance with 49 C.F.R. § 1150.32(e), Applicant states that the projected annual revenue of 2&M created by the prior transaction did not exceed $5 million. *See* Appendix 2.

CAPTION SUMMARY

The Caption Summary required by 49 C.F.R. § 1150.34 is attached as Appendix 3.

LABOR PROTECTION

By virtue of 49 U.S.C. § 10901(c), labor protective conditions are not to be imposed in regard to the proposed exemption.

ENVIRONMENTAL AND HISTORIC CONSIDERATIONS

By virtue of 49 C.F.R. § 1106(c) and 49 C.F.R. § 1105.8(b)(1), no environmental or historic reporting is required in regard to the proposed exemption.

VERIFICATION

The verification of Philip N. Dahl, President of 2&M, is attached to this Notice as Appendix 2.

C0075

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, the Board should publish notice of the filing of this Notice of Exemption in the Federal Register no more than 16 days after filing of the Notice. *See* 49 C.F.R. § 1150.32(b).

Respectfully submitted,

2ND & MAIN, LLC
1900 Marquette Street
North Chicago, IL 60062

Applicant

/s/ Thomas F. McFarland

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1666
Chicago, IL 60604-1228
(312) 236-0204 (ph)
mcfarland@aol.com

Attorney for Applicant

Date Filed: March 6, 2017

C0076

Appendix 1

"Plat" as referred to in instrument recorded as Doc 164344 on April 7, 1916 in Book 2215 of Mortgages page 343.

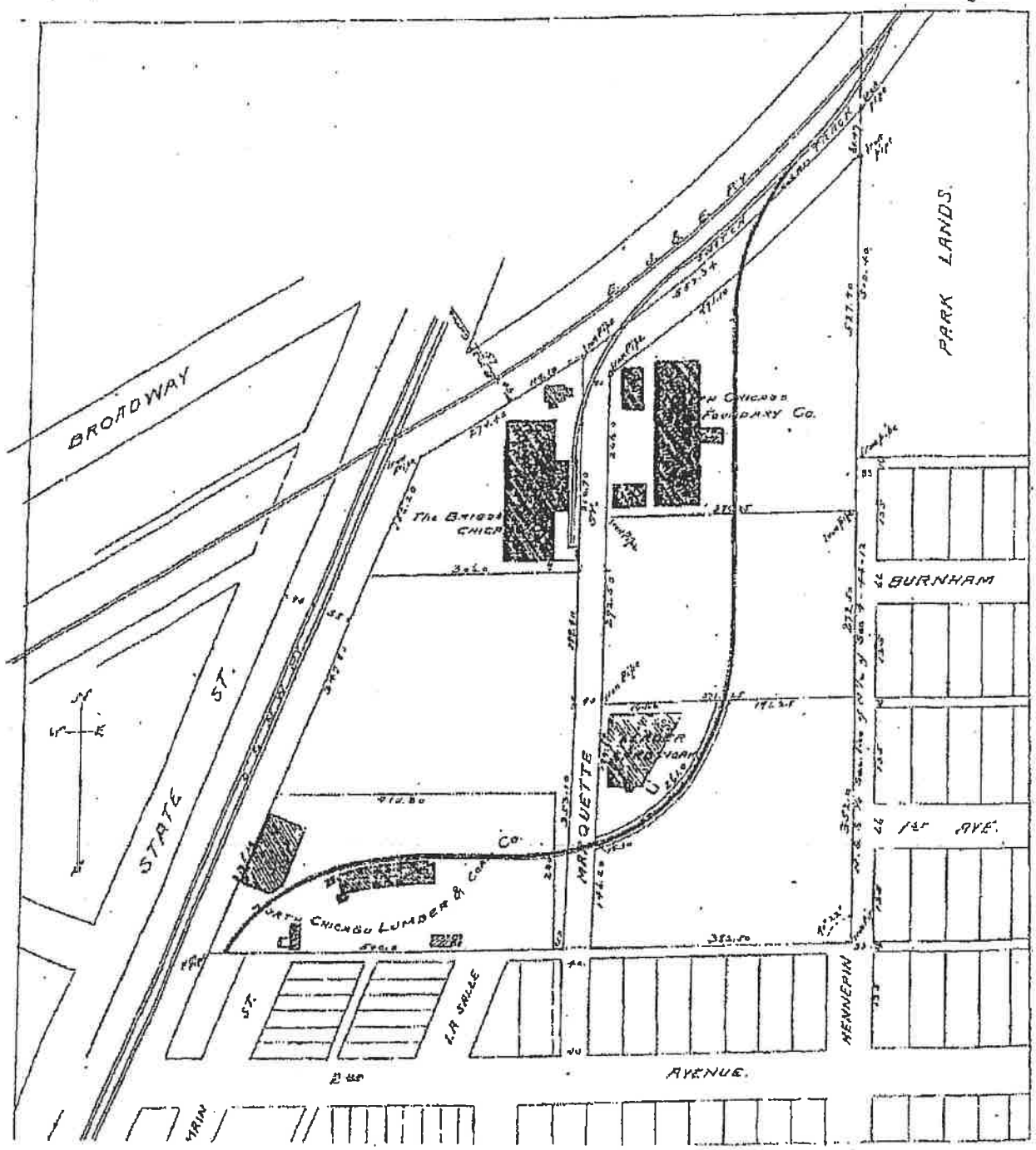
EXHIBIT "A"

PLAT

Of that part of the N½ of the N.W.¼ of Sec. 4 T. 44 N R. 12 E of 3rd P.M. Lying South of the C. M. & St. P. & C. R. R. Co's East of the C. & N.W. Ry.

NORTH CHICAGO, ILL.

Scale 100 feet per inch Oct 1915 R. J. Smith, C.E.



C0077

Finance Docket No. 36106

Appendix 2

VERIFICATION

STATE OF ILLINOIS)
) SS:
COUNTY OF LAKE)

PHILIP N. DAHL, being duly sworn, states that he is President of 2nd & Main, LLC (2&M); that he has read the foregoing Notice of Exemption under 49 C.F.R. § 1150.31; that the projected revenues of 2&M would not exceed those that would qualify it as a Class III rail carrier; that the projected annual revenue of 2&M to be created by the proposed acquisition and operation would not exceed $5 million; and that all other facts set forth in the Notice of Exemption are true and correct.

PHILIP N. DAHL

SUBSCRIBED and SWORN to before me this 3rd day of March, 2017.

Notary Public

My Commission Expires: 1/19/21

"OFFICIAL SEAL"
LINDA GALLU
Notary Public, State of Illinois
My Commission Expires 1/19/2021

C0078

Finance Docket No. 36106

Appendix 3

CAPTION SUMMARY

SURFACE TRANSPORTATION BOARD

Notice of Exemption

STB Finance Docket No. 36106

2nd & Main, LLC -- Acquisition and Operation Exemption -- Norland North Chicago, LLC

2nd & Main, LLC (2&M) has filed a Notice of Exemption to acquire from Norland North Chicago, LLC and operate approximately 540 feet of rail line at North Chicago, Lake County, Illinois (the Rail Line). The Rail Line does not have milepost numbers. Comments must be filed with the Board and served on 2&M's representative, Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, Suite 1666, Chicago, IL 60604-1228, ph 312-236-0204.

The Notice is filed under 49 C.F.R. § 1150.31 *et seq.* If the Notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

By the Board

C0079

45729 SERVICE DATE – MARCH 22, 2017

DO

FR-4915-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36106]

2nd & Main, LLC—Acquisition and Operation Exemption—Norland North Chicago, LLC

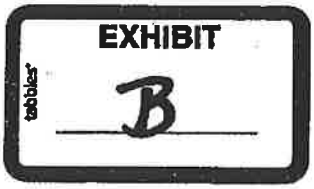
2nd & Main, LLC (2ML), a noncarrier, has filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from Norland North Chicago, LLC (Norland) and operate approximately 540 feet of rail line between a point of connection on its north end to a main track of the Elgin, Joliet & Eastern Railway Company (now Canadian National Railway Company) and a point of connection on its southwest end to a main track of the Chicago & North Western Railway Company (now Union Pacific Railroad Company), in North Chicago, in Lake County, Ill. (the Line). According to 2ML, there are no milepost designations on the Line.

The verified notice indicates that the transaction will be consummated shortly after April 5, 2017, the effective date of the exemption (30 days after the notice of exemption was filed).[1]

2ML certifies that its projected annual revenues as a result of this transaction will not result in its becoming a Class II or Class I rail carrier and will not exceed $5 million.

---

[1] 2ML's notice is related to a notice of exemption filed in Hussey Terminal Railroad Company—Acquisition & Operation Exemption—2nd & Main, LLC, Docket No. FD 36103, in which Hussey Terminal Railroad Company seeks Board authority to acquire the Line from 2ML. That notice is contingent upon this notice becoming effective.



C0080

2ML states that there are no interchange commitments.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions to stay must be filed no later than March 29, 2017 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 36106, must be filed with the Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, a copy of each pleading must be served on Thomas F. McFarland, 208 South LaSalle St., Suite 1666, Chicago, IL 60604-1228.

Board decisions and notices are available on our website at "WWW.STB.GOV."

Decided: March 17, 2017.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

C0081

FILED
9/5/2019 12:54 PM
ERIN CARTWRIGHT WEINSTEIN
Clerk of the Circuit Court
Lake County, Illinois

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

The City of North Chicago Plaintiff, v. 2nd & Main, LLC; Unknown Owners and Non-Record Claimants Defendants.	)	Case No. 19-ED-20

Plaintiff's Reply to Defendant's Affirmative Matter and Answer and Affirmative Defense to Defendant's Counterclaim

Plaintiff/Counter-Defendant, the City of North Chicago ("City"), through its attorneys Ancel Glink, P.C., replies to Defendant/Counter-Plaintiff 2nd & Main, LLC's affirmative matter and answers 2nd & Main's counterclaim as follows:

Reply to Defendant's Affirmative Matter

1. On March 6, 2017, 2nd and Main, LLC filed a Notice of Exemption under 49 C.F.R. § 1150.31 with the Surface Transportation Board. A copy of that filing is attached as Exhibit A.

ANSWER: The City lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 1 and demands strict proof thereof.

2. On March 22, 2017, the Surface Transportation Board issued its decision regarding the Notice of Exemption. As a result of the decision, the exemption became effective April 5, 2017. A copy of that decision is attached as Exhibit B.

ANSWER: The City asserts that the STB order speaks for itself. As to the remainder of the allegations, the City lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2 and demands strict proof thereof.

C0082

3. The Interstate Commerce Commission Termination Act of 1995 ("ICCTA") (49 U.S.C.A. §10101 *et. seq.)* abolished the Interstate Commerce Commission and gave the Surface Transportation Board exclusive jurisdiction over: (1) transportation by rail carriers and the remedies provided with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, tear switching, or side tracks, or facilities, even if the tracks are located, entirely in on state. 49 U.S.C. § 10501(b).

ANSWER: The City asserts that the ICCTA speaks for itself. As to the remainder of the allegations the City asserts that the allegations contain a legal conclusion for which no response is necessary.

4. "The Termination Act expressly preempts "remedies provided under Federal or State law" and vests with the Surface Transportation Board (the "Transportation Board"), a federal agency, exclusive jurisdiction over "transportation by rail carriers" and "the construction...of...facilities..." *Green Mountain Railroad v. Vermont* 404 F.3d 638, 639 (2005).

ANSWER: The City asserts that the ICCTA speaks for itself. As to the remainder of the allegations the City asserts that the allegations contain a legal conclusion for which no response is necessary.

5. As a result, North Chicago's right to eminent domain is limited because North Chicago is not permitted to interfere with the Defendant's operations as a railroad.

ANSWER: The City denies the allegations in paragraph 5.

C0083

WHEREFORE, the City of North Chicago respectfully requests that this Court deny entering any affirmative matter on behalf of 2nd & Main, LLC and that it enter any relief it finds to be just.

Answer to Defendant's Counter-Claim for Trespass

1. The Counter-Plaintiff, 2nd & MAIN, LLC, owns and possesses the following real estate (hereafter the "Property") located in North Chicago and described as follows:

> A Part of the North Half of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, described as follows: Beginning at a point on the Easterly Right of Way Line of the Chicago and North Western Railway Company, which point is 772.10 feet measured along said Right of Way Line Southerly of the intersection of said Right of Way Line with the Southerly Right of Way Line of the Elgin, Joliet and Eastern Railway Company; running thence East on a Line parallel with the South Line of said Northwest Quarter of the said Section 4, a distance of 515.8 feet the West Line of Marquette Street; thence Northerly along the West Line of Marquette Street, approximately 220 feet to the Southeast Corner of the former J.W. Aulson and Sons Corporation Property, more particularly described by Warranty Deed dated April 20, 1921 and Recorded April 26, 1921, as Document 201389; thence West 435 feet on the South Line of said Former J. W. Aulson and Sons Corporation Property to said Easterly Right of Way of said Chicago and North Western Railway Company; running thence in a Southerly direction along said Easterly Right of Way Line to the point of beginning, in Lake County, Illinois.

ANSWER: The City admits the allegations in paragraph 1.

2. The Counter-Defendant, City of North Chicago was incorporated as a city in 1901.

ANSWER: The City admits the allegations in paragraph 2.

3. After 1901, North Chicago or its agents, without obtaining an easement or other right to the property, installed a 24" water main pipe on the Property. That pipe is highlighted in yellow and shown on the attached Exhibit A.

ANSWER: The City admits the allegations that it installed a 24" water main on 2nd & Main's property sometime after 1901 without obtaining an easement. It lacks knowledge

or information sufficient to form a belief as to whether this water main is located within the highlighted portion of the map in Exhibit A, and demands strict proof thereof.

4. North Chicago has at all times relevant owned, controlled and maintained this pipe on 2nd & Main's property and if a trespass is continuing any person in possession of the land at any time during its continuance may maintain and action for trespass. [See *Rosenthal v. City of Crystal Lake,* 171 I11.App. 3d 428, 525 N.E. 2d 1176, 1181 (2nd Dist. 1988)]

ANSWER: The City admits that it owns, controls and maintains a water main that crosses 2nd and Main's property. As to the remainder of the allegations the City asserts that the allegations contain a legal conclusion for which no response is necessary.

5. By reason of the above actions North Chicago has wrongfully interfered with 2nd & Main's actual possessory rights in the Property and, as a result, 2nd & Main has and continues to suffer damages.

ANSWER: The City denies the allegations in paragraph 5.

WHEREFORE, the City of North Chicago denies that 2nd & Main, LLC is entitled to any judgment against it and respectfully requests that this Court enter judgment in the City's favor and award it the costs of defending against this claim and any other remedy this Court deems just.

Affirmative Defense

1. 735 ILCS 5/13-205 imposes a five-year statute of limitations on continuing trespasses, only permitting a plaintiff to collect damages for the preceding five years when bringing a claim for a continuing trespass. *See, e.g., Rosenthal v. City of Crystal Lake*, 171 Ill. App. 3d 428, 440 (2d Dist. 1988). Therefore, if the Court finds the City is liable for a trespass, it should be characterized as a continuing trespass and 2nd & Main is only permitted to recover damages as a result of the City's trespass for the five years preceding the time of trial.

Respectfully submitted,



By: _____
One of Plaintiff's attorneys

Adam B. Simon (ARDC # 6243892)
Matthew T. DiCianni (ARDC #6312661)
ANCEL GLINK, P.C.
175 E. Hawthorn Parkway, Suite 145
Vernon Hills, IL 60061
Phone: 847.247.7400
Facsimile: 847.247.7405
asimon@ancelglink.com
mdicianni@ancelglink.com

C0086

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

The City of North Chicago	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 19-ED-20
	)	
2nd & Main, LLC; Unknown Owners and Non-Record Claimants	)	
	)	
	)	
Defendants.	)	

Affidavit of Insufficient Knowledge

I, Matthew DiCianni, on oath depose and say:

1. That I am the attorney representing the party on whose behalf this answer was prepared.

2. That this answer contains certain statements of insufficient knowledge on which to base a belief as to the truth or falsity of the allegations contained in the complaint.

3. That those allegations of insufficient knowledge are true and correct.

Matthew DiCianni

Matthew DiCianni

SUBSCRIBED AND SWORN to before me

this 5th day of September, 2019.

Petra C. Neugebauer
Notary Public

4825-6162-4226, v. 4

OFFICIAL SEAL
PETRA C NEUGEBAUER
NOTARY PUBLIC, STATE OF ILLINOIS
My Commission Expires 02/09/2020

C0087

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT COURT OF LAKE COUNTY, ILLINOIS

THE CITY OF NORTH CHICAGO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	19 ED 20
	)	
2nd & MAIN, LLC, UNKNOWN OWNERS, and NON-RECORD CLAIMAINTS,	)	
	)	
	)	
Defendants.	)	

Motion for Partial Summary Judgment

NOW COMES Defendant/Counter-Plaintiff 2nd & Main, LLC, by and through its attorneys, Churchill, Quinn, Richtman & Hamilton, Ltd., and moves the Court for Partial Summary Judgment pursuant to 735 ILCS 5/2-1005 and in support thereof states as follows:

INTRODUCTION

There is no dispute that, long before the Defendant, 2nd & Main, LLC purchased the property that is the subject of the complaint ("the property"), sometime during the early 1960's, North Chicago ("the City") constructed a water main that runs from east to west across the northerly part of the Defendant's property. They did so without ever obtaining an easement. (Rule 2-1.04 Statement paragraph 4). That is why the City brought this action for condemnation in order to obtain such an easement. What makes this case unique

C0088

is that the property is legally a railroad, and as such, the City's right to condemn is limited. The purpose of this motion is to obtain a ruling regarding the limitation of the City's eminent domain powers.

DESIGNATION AS A RAILROAD

On March 6, 2017, 2nd and Main, LLC filed a Notice of Exemption under 49 C.F.R. § 1150.31 with the Surface Transportation Board. (Rule 2-1.04 Statement paragraph 5). On March 22, 2017, the Surface Transportation Board issued its decision regarding the Notice of Exemption. As a result of the decision, by operation of law pursuant to 49 U.S.C. 10501 and 9 CFR § 1150.32, the exemption became effective April 5, 2017. (Rule 2-1.04 Statement paragraph 6). Because of this, 2nd & Main plans to use the property as a storage area for shipping containers, railroad access and to place additional spur tracks on the property. (Rule 2-1.04 Statement paragraph 7). The property has been leased to Hussey Terminal Railroad Company for those purposes. (Rule 2-1.04 Statement paragraph 8)

PREEMPTION

"The Supremacy Clause of the United States Constitution provides that the Constitution and laws of the United States are "the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Thus, under the Supremacy Clause,

federal law "preempts state laws that interfere with, or are contrary to, federal law." *Union Pac. R.R. Co. v. Chicago Transit Auth.*, 647 F.3d 675, 678 (7th Cir. 2011)

The importance of this is that the Federal Government now has regulatory jurisdiction over the Defendant's property. In the *Union Pacific* case the Court summarized that stating:

In 1995, Congress enacted the Interstate Commerce Commission Termination Act and created the Surface Transportation Board to administer the Act. 49 U.S.C. §§ 10101, 10102(1). In the Act, Congress expressly conferred on the Board "exclusive" jurisdiction over the regulation of railroad transportation:

The jurisdiction of the Board over –

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b). Congress also defined "transportation" to include railroad property, facilities, and equipment "related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use." 49 U.S.C. § 10102(9). Congress's intent in the Act to preempt state and local regulation of railroad transportation has been recognized as broad and sweeping.

"Courts have treated preemption under the Act in a variety of ways. In 2005, the Board surveyed the different approaches in case law and suggested that

there were two manners in which state or local actions or regulations could be preempted: (1) categorical, or per se, preemption, and (2) "as applied" preemption. *CSX Transp., Inc. – Petition for Declaratory Order, STB Finance* Docket No. 34662, 2005 WL 1024490, at *2-3 (S.T.B. May 3, 2005); see also *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332 (5th Cir.2008) (describing the Board's framework). Categorical preemption occurs when a state or local action is preempted on its face despite its context or rationale. *Id* at *2. If an action is not categorically preempted, it may be preempted "as applied" based on the degree of interference that the particular action has on railroad transportation—this occurs when the facts show that the action "would have the effect of preventing or unreasonably interfering with railroad transportation." *Id* at 479.

So the question becomes, given this designation, can North Chicago condemn a portion of the Defendant's property for its water main? The answer is yes, provided they do not interfere with any of the Defendant's proposed or actual railroad uses. Any such interference is preempted by the "Termination Act". In *Green Mountain Railroad v. Vermont* 404 F.3d 638, 639 (2005) the Green Mountain Railroad Corporation proposed to build facilities on its property in Vermont and sought a declaration that Vermont's environmental land use statute was preempted by the Interstate Commerce Commission Termination Act. The Court found: "**The Termination Act expressly preempts "remedies provided**

under Federal or State law" and vests with the Surface Transportation Board (the "Transportation Board"), a federal agency, exclusive jurisdiction over "transportation by rail carriers" and "the construction ... of ... facilities...." 49 U.S.C. § 10501(b). The term "transportation" includes a "warehouse... yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail." 49 U.S.C. § 10102."

(Emphasis added)

THE WATER MAIN AS CURRENTLY CONSTRUCTED INTERFERES WITH THE PROPERTY'S RAILRAOD USE

Frank Furlan was the City's engineer when the water main was constructed in the 1960's. At his deposition he produced drawings of the water main located on the 2nd & Main property and adjoining properties that was prepared by Alvord, Burdick & Howson in 1961 on North Chicago's behalf. (Rule 2-1.04 Statement paragraph 9). That map showed property that was both railroad and non-railroad. The water lines are different depending on whether or not a railroad is involved. At his deposition Furlan testified that when constructing a water main under railroad property a carrier pipe is first installed, then the concrete water main is placed within the carrier pipe and it is filled with sand to carry the load. (Rule 2-1.04 Statement paragraph 10). This is done to avoid

putting the load of the railroad tracks on the water pipes. Instead, it is put on the outside casing. (Rule 2-1.04 Statement paragraph 11).

However, the water main across the 2nd & Main property was installed without a carrier pipe and is not to railroad standards. (Rule 2-1.04 Statement paragraph 12). Moreover, the existing 24-inch diameter pre-stressed concrete cylinder pipe water main on the 2nd & Main property is not sufficiently constructed for the purpose of supporting railroad loadings and does not meet railroad criteria for utility crossings. Thus, the existing water main renders the 2nd & Main property unusable for railroad purposes in the area over and north of the existing water main. (Rule 2-1.04 Statement paragraphs 12-14)

IT DOES NOT MATTER WHETHER OR NOT THE PROPERTY IS CURRENTLY BEING USED AS A RAILROAD

The Defendant anticipates that the City will argue that significant railroad operations are not now taking place on the property. That does not matter. The 8th Circuit stated in *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858, 862 (8th Cir. 2005) : " Finally, the Board can consider the railway's future plans as well as its current uses and make its own evaluation of how likely it is that the plans will come to fruition. Condemnation is a permanent action, and it can never be stated with certainty at what time any particular part of a right of way may become

C0093

necessary for railroad uses." *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858, 862 (8th Cir. 2005).

CONCLUSION AND RELIEF SOUGHT

In the present case, North Chicago has brought condemnation proceedings, seeking to take an easement through the Property for the use of its water main. Using an as applied preemption analysis, if the condemnation interferes with 2nd and Main's use of the railroad property, then the condemnation will be preempted by Federal Law. On the other hand, if the condemnation does not interfere with the use of the Property as a railroad, then it will not be preempted. It follows then, that North Chicago may only take 2nd & Main's property to the extent that they can show that the taking would not interfere with its use as a rail road.

The reason that the Defendant seeks only partial summary judgment is that: "[f]ederal preemption does not apply to all situations where the use of property prevents or unreasonably interferes with railroad transportation; it applies to those situations where a regulation prevents or unreasonably interferes with railroad transportation. If a state or local government secures the use of property in a way that affects railroad transportation by contract or other agreement, there is no issue of federal preemption; but if it attempts to secure

such use by regulation (in this case, by condemnation), then the possibility of federal preemption may arise." *Union Pac. R.R. Co. v. Chicago Transit Auth.*, 647 F.3d 675, 682 (7th Cir. 2011)

The Court need not bar this condemnation action, it need only fashion a remedy so that the taking will not interfere with the Defendant's use of the property as a railroad. That is not particularly difficult. The Court need only require that, if a judgment for condemnation is entered, that the existing water main be replaced by one that meets railroad standards at least as stringent as those set forth in the City's drawings by Alvord, Burdick & Howson. In addition, once the pipe is replaced, the property should be put back in the condition that existed before the replacement.

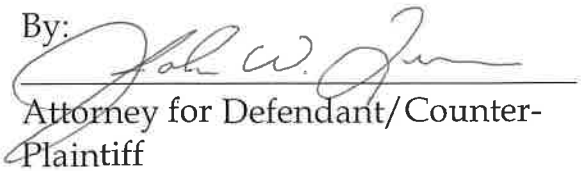
Wherefore, 2nd & Main, LLC prays that this Court order that:

A) In the event the City of North Chicago condemns an easement over the property set forth in its complaint that the existing water main be replaced and maintained by one that meets railroad standards at least as stringent as those set forth in the City's drawings by Alvord, Burdick & Howson and;

B) After the water main is replaced, the property should be put back in the condition that existed prior to the replacement, and;

C) For such other relief as this Court deems just and proper.

Respectfully submitted,

By: 

Attorney for Defendant/Counter-Plaintiff

John W. Quinn
CHURCHILL, QUINN, RICHTMAN & HAMILTON, LTD.
2 S. Whitney St., Grayslake, IL 60030
(847)223-1500
Attorney No. 2270706
jquinn@grayslakelaw.com

IN THE CIRCUIT COURT OF THE NINETEENTH JUDIIAL CIRCUIT
LAKE COUNTY, ILLINOIS

THE CITY OF NORTH CHICAGO Plaintiff, v. 2ND & MAIN LLC, UNKNOWN OWNERS and NON-RECORD CLAIMANTS Defendants.	)	19 ED 20

RULE 2-1.04 Statement

NOW COMES 2nd & Main, LLC, by and through his attorneys, Churchill, Quinn, Richtman & Hamilton, Ltd., and for its Rule 2-1.04 Statement, states as follows:

PARTIES

1. 2nd & MAIN, LLC, is the owner of the following real estate (hereafter the "Property") located in North Chicago and described as follows:

> A Part of the North Half of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, described as follows: Beginning at a point on the Easterly Right of Way Line of the Chicago and North Western Railway Company, which point is 772.10 feet measured along said Right of Way Line Southerly of the intersection of said Right of Way Line with the Southerly Right of Way Line of the Elgin, Joliet and Eastern Railway Company; running thence East on a Line parallel with the South Line of said Northwest Quarter of the said Section 4, a distance of 515.8 feet the West Line of Marquette Street; thence Northerly along the West Line of Marquette Street, approximately 220 feet to the Southeast Corner of the former J.W. Aulson and Sons Corporation Property, more particularly described by Warranty Deed dated April 20, 1921 and Recorded April 26, 1921, as Document 201389; thence West 435 feet on the South Line of said Former J. W. Aulson and Sons Corporation Property to said Easterly Right of Way of said Chicago and North Western Railway Company; running thence in a

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Southerly direction along said Easterly Right of Way Line to the point of beginning, in Lake County, Illinois.

2. The City of North Chicago is a municipal corporation.

FACTS SUPPORTING VENUE AND JURISDICTION

3. The property involved in this action is located in Lake County, Illinois.

UNCONTESTED FACTS

4. Sometime after 1901, North Chicago installed a 24 inch water main across the 2nd & Main's property without obtaining an easement. (Counter Complaint paragraph 3 and answer).

5. On March 6, 2017, 2nd and Main, LLC filed a Notice of Exemption under 49 C.F.R. § 1150.31 with the Surface Transportation Board. A copy of that filing is attached as Exhibit A to the Phil Dahl Affidavit. (Exhibit 1--Affidavit of Phil Dahl paragraph 4)

6. On March 22, 2017, the Surface Transportation Board issued its decision regarding the Notice of Exemption. As a result of the decision, the exemption became effective April 5, 2017. A copy of that decision is attached as Exhibit B to the Phil dahl Affidavit. (Exhibit 1--Affidavit of Phil Dahl paragraph 5)

7. 2nd & Main plans to use the property that is the subject of the suit and a storage area for shipping containers and railroad access. (Exhibit 1--Affidavit of Phil Dahl paragraph 6)

8. The property in question has been leased by 2nd & Main LLC to Hussey Terminal Railroad Company. (Exhibit 1--Affidavit of Phil Dahl paragraph 7)

C0098

9. Attached as Exhibit 2, are drawings of the water main located on the 2nd & Main property and adjoining properties prepared by North Chicago's engineers Alvord, Burdick & Howson in 1961 and provided by Frank Furlan a former North Chicago city engineer.

10. When constructing a water main under railroad property a carrier pipe is first installed, then the concrete water main is placed within the carrier pipe and it is filled with sand to carry the load. (Deposition of Frank Furlan Exhibit 3 page 21 and Affidavit of Peter Kolb Exhibit 4 paragraph 7)

11. This is done to avoid putting the load of the railroad tracks on the water pipes. Instead, it is put on the outside casing. (Deposition of Frank Furlan page 21 and Affidavit of Peter Kolb Exhibit 4 paragraph 8))

12. The water main across the 2nd & Main property was installed without a carrier pipe and is not to railroad standards. (Affidavit of Peter Kolb Exhibit 4 paragraph 9)

13. The Existing 24-inch diameter pre-stressed concrete cylinder pipe water main on the 2nd & Main property is not sufficiently constructed for the purpose of supporting railroad loadings and does not meet railroad criteria for utility crossings. (Affidavit of Peter Kolb Exhibit 4 paragraph 10)

14. The existing water main renders the 2nd & Main property unusable for railroad purposes in the area over and north of the existing water main. (Affidavit of Peter Kolb Exhibit 4 paragraph 11).

Respectfully submitted,

By: _____
Attorney for 2nd & Main

John W. Quinn
CHURCHILL, QUINN, RICHTMAN & HAMILTON, LTD.
2 S. Whitney St., Grayslake, IL 60030
(847)223-1500
Attorney No. 2270706
jquinn@grayslakelaw.com
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IN THE CIRCUIT COURT OF THE NINETEENTH JUDIIAL CIRCUIT
LAKE COUNTY, ILLINOIS

THE CITY OF NORTH CHICAGO Plaintiff, v. 2ND & MAIN LLC, UNKNOWN OWNERS and NON-RECORD CLAIMANTS Defendants.	))))))))	19 ED 20

AFFIDAVIT OF PHIL DAHL

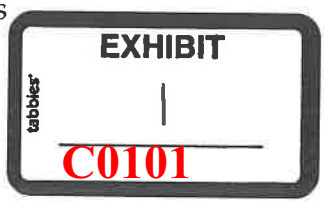
Under penalty of perjury pursuant to 735 ILCS 5/1-109, the affiant states as follows:

1. The affiant is above the age of 18 and if called as a witness to this cause of action will testify to the matters set forth in this Affidavit on his personal knowledge.

2. I am one of the Managers of 2nd & Main, LLC.

3. 2nd & MAIN, LLC, is the owner of the following real estate (hereafter the "Property") located in North Chicago and described as follows:

> A Part of the North Half of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, described as follows: Beginning at a point on the Easterly Right of Way Line of the Chicago and North Western Railway Company, which point is 772.10 feet measured along said Right of Way Line Southerly of the intersection of said Right of Way Line with the Southerly Right of Way Line of the Elgin, Joliet and Eastern Railway Company; running thence East on a Line parallel with the South Line of said Northwest Quarter of the said Section 4, a distance of 515.8 feet the West Line of Marquette Street; thence Northerly along the West Line of Marquette Street, approximately 220 feet to the Southeast Corner of the former J.W. Aulson and Sons



Corporation Property, more particularly described by Warranty Deed dated April 20, 1921 and Recorded April 26, 1921, as Document 201389; thence West 435 feet on the South Line of said Former J. W. Aulson and Sons Corporation Property to said Easterly Right of Way of said Chicago and North Western Railway Company; running thence in a Southerly direction along said Easterly Right of Way Line to the point of beginning, in Lake County, Illinois.

4. On March 6, 2017, 2nd and Main, LLC filed a Notice of Exemption under 49 C.F.R. § 1150.31 with the Surface Transportation Board. A copy of that filing is attached as Exhibit A.

5. On March 22, 2017, the Surface Transportation Board issued its decision regarding the Notice of Exemption. As a result of the decision, the exemption became effective April 5, 2017. A copy of that decision is attached as Exhibit B.

6. 2nd & Main plans to use the Property that is the subject of the suit, including the property that North Chicago seeks to condemn, for railroad purposes specifically for storage area for shipping containers, additional spur tracks and railroad access.

7. The property in question has been leased by 2nd & Main LLC to Hussey Terminal Railroad Company. A copy of the lease is attached as Exhibit C.

8. North Chicago's use of the easement will interfere with railroad operations if the water main is not constructed to at least the standards set forth on the drawings prepared by North Chicago's engineers Alvord, Burdick & Howson in 1961.

9. Further Affiant sayeth not.

Phil Dahl

C0102

John W. Quinn
Attorney number 22709706
Churchill, Quinn, Richtman & Hamilton Ltd.
2 South Whitney St.
Grayslake, IL 60030
Phone: 847-223-1500
jquinn@grayslakelaw.com



BEFORE THE
SURFACE TRANSPORTATION BOARD

2ND & MAIN, LLC – ACQUISITION AND OPERATION EXEMPTION – NORLAND NORTH CHICAGO, IL	))))	FINANCE DOCKET NO. 36106

NOTICE OF EXEMPTION
UNDER 49 C.F.R. § 1150.31

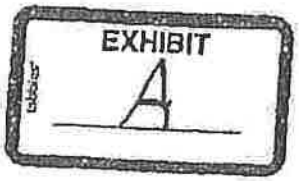
2ND & MAIN, LLC
1900 Marquette Street
North Chicago, IL 60062

Applicant

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1666
Chicago, IL 60604-1228
(312) 236-0204 (ph)
mcfarland@aol.com

Attorney for Applicant

Date Filed: March 6, 2017



C0104

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1666
CHICAGO, ILLINOIS 60604-1228
TELEPHONE (312) 236-0204
mcfarland@aol.com

THOMAS F. MCFARLAND

RECEIVED
MAR 06 2017

March 3, 2017

242739
ENTERED
Office of Proceedings
March 6, 2017
Part of
Public Record

By UPS overnight mail

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: Finance Docket No. 36106, *2nd & Main, LLC -- Acquisition and Operation Exemption -- Norland North Chicago, LLC*

Dear Ms. Brown:

Hereby transmitted is the original and 10 copies of Notice Of Exemption Under 49 C.F.R. § 1150.31 for filing with the Board in the above referenced matter.

This Notice is related to Finance Docket No. 36103, *Hussey Terminal Railroad Company and 2nd & Main, LLC -- Acquisition and Operation Exemption -- at North Chicago, Lake County, IL*. It is respectfully requested that the Notice of Exemption in F.D. 36103 be noticed to the public on the same date on which this Notice of Exemption is noticed to the public.

Also enclosed is a check in the amount of $1,900 for the filing fee.

Very truly yours,

/s/ Thomas F. McFarland

Thomas F. McFarland
Attorney for Applicant

TMcF:kl;enc:\1754-A\ltrSTB1

FEE RECEIVED
March 6, 2017
SURFACE
TRANSPORTATION BOARD

FILED
March 6, 2017
SURFACE
TRANSPORTATION BOARD

C0105

BEFORE THE
SURFACE TRANSPORTATION BOARD

2ND & MAIN, LLC -- ACQUISITION AND OPERATION EXEMPTION -- NORLAND NORTH CHICAGO, IL	))))	FINANCE DOCKET NO. 36106

NOTICE OF EXEMPTION
UNDER 49 C.F.R. § 1150.31

Pursuant to 49 U.S.C. § 10502 and 49 C.F.R. § 1150.31, *et seq.*, 2nd & Main, LLC (2&M) hereby provides notice of its class exemption for its acquisition from Norland North Chicago, LLC (Norland) and operation of approximately 540 feet of rail line at North Chicago, IL shown on a plat that is attached to this Notice as Appendix 1.

INFORMATION ABOUT 2&M REQUIRED BY 49 C.F.R. § 1150.33

The following is furnished pursuant to 49 C.F.R. § 1150.33:

(a) The full name and address of the applicant;

Applicant is 2nd & Main, LLC, (2&M), 1900 Marquette Street, North Chicago, IL 60062.

(b) The name, address, and telephone number of the representative of the applicant who should receive correspondence;

2&M's representative is Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, #1666, Chicago, IL 60604-1228, 312-236-0204.

(c) A statement that an agreement has been reached or details about when an agreement will be reached;

An agreement has been reached between 2&M and Norland for 2&M's acquisition and operation of the Rail Line.

C0106

(d) The operator of the property;

The operator of the property will be 2&M.

(e) A brief summary of the proposed transaction, including:

(1) The name and address of the railroad transferring the subject property;

The transferor of the property is Norland North Chicago, LLC, 1601 North Lewis Avenue, Waukegan, IL 60085-1761. Norland is believed to have acquired the Rail Line in bankruptcy prior to 2014 as a secured creditor of a prior owner of the Line, Edward Hines Lumber Co., which was later involuntarily dissolved.

(2) The proposed time schedule for consummation of the transaction;

The transaction will be consummated shortly after the exemption for the transaction becomes effective.

(3) The mileposts of the subject property, including any branch lines; and

The Rail Line does not have milepost numbers.

(4) The total route miles being acquired;

Approximately 540 feet of rail line is proposed to be acquired and operated.

(f) A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States; and

A plat showing the Rail Line is attached to this Notice as Appendix 1.

(g) A certificate that applicant's projected revenues do not exceed those that would qualify it as a Class III rail carrier.

2&M's projected revenues would not exceed those that would qualify it as a Class III rail carrier. *See* the Verification of Philip N. Dahl, President of 2&M, attached to this Notice as Appendix 2.

C0107

(h) Interchange Commitments.

There are no interchange commitments.

ADDITIONAL INFORMATION

Annual Revenues

In compliance with 49 C.F.R. § 1150.32(e), Applicant states that the projected annual revenue of 2&M created by the prior transaction did not exceed $5 million. *See* Appendix 2.

CAPTION SUMMARY

The Caption Summary required by 49 C.F.R. § 1150.34 is attached as Appendix 3.

LABOR PROTECTION

By virtue of 49 U.S.C. § 10901(c), labor protective conditions are not to be imposed in regard to the proposed exemption.

ENVIRONMENTAL AND HISTORIC CONSIDERATIONS

By virtue of 49 C.F.R. § 1106(c) and 49 C.F.R. § 1105.8(b)(1), no environmental or historic reporting is required in regard to the proposed exemption.

VERIFICATION

The verification of Philip N. Dahl, President of 2&M, is attached to this Notice as Appendix 2.

C0108

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, the Board should publish notice of the filing of this Notice of Exemption in the Federal Register no more than 16 days after filing of the Notice. *See* 49 C.F.R. § 1150.32(b).

Respectfully submitted,

2ND & MAIN, LLC
1900 Marquette Street
North Chicago, IL 60062

Applicant

/s/ Thomas F. McFarland

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1666
Chicago, IL 60604-1228
(312) 236-0204 (ph)
mcfarland@aol.com

Attorney for Applicant

Date Filed: March 6, 2017

C0109

Appendix 1

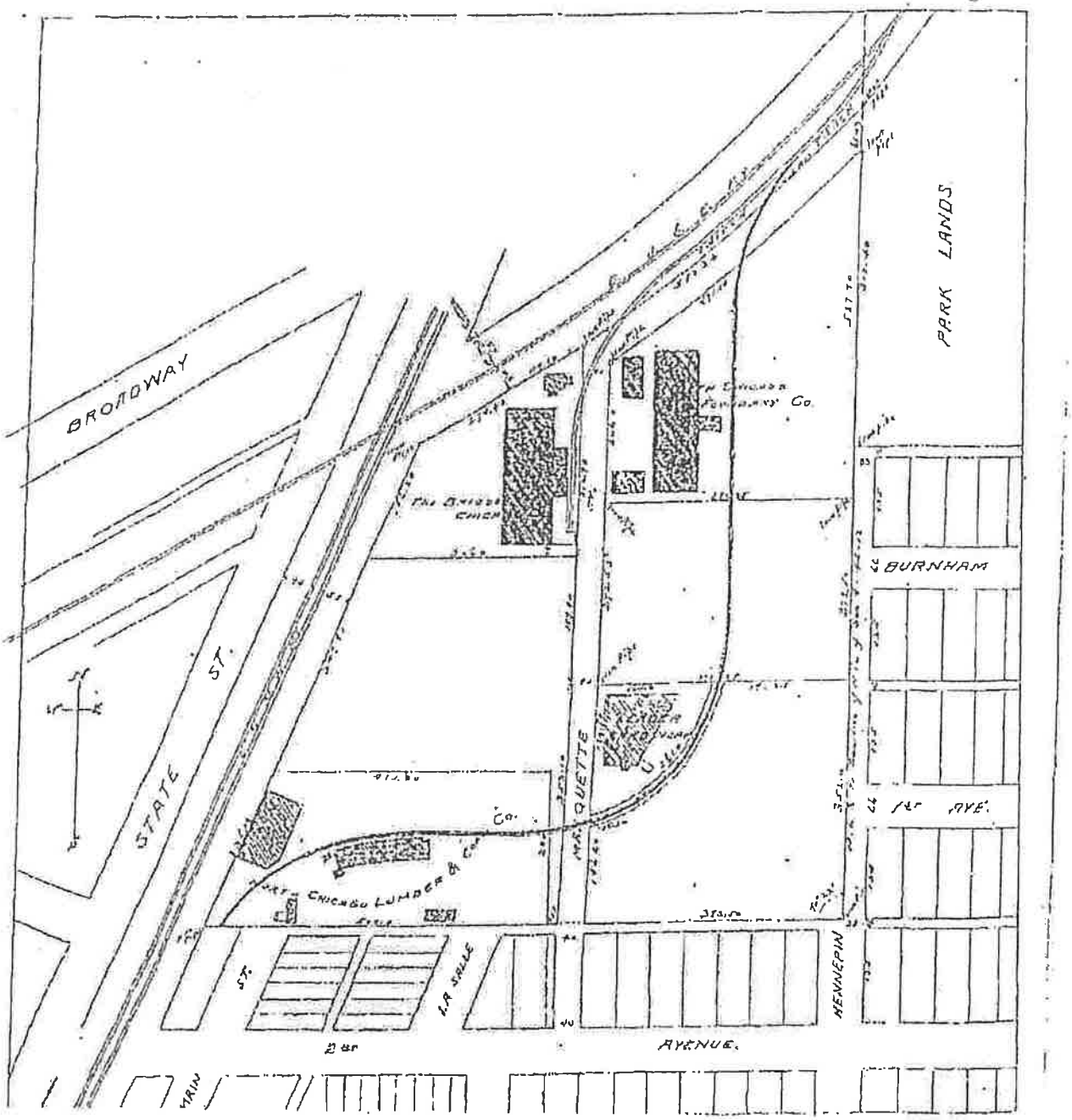
EXHIBIT "A"

PLAT

Of that part of the N½ of the NW¼ of Sec. 7 T 29 N R 12 E of 3rd P.M. Lying South of the E. J. & E. Ry. & East of the C. & N.W. Ry.

NORTH CHICAGO, ILL.

Scale 100 feet per inch Oct 1913 A. J. Smith, C.E.



C0110

Finance Docket No. 36106

Appendix 2

VERIFICATION

STATE OF ILLINOIS)
) SS:
COUNTY OF LAKE)

PHILIP N. DAHL, being duly sworn, states that he is President of 2nd & Main, LLC (2&M); that he has read the foregoing Notice of Exemption under 49 C.F.R. § 1150.31; that the projected revenues of 2&M would not exceed those that would qualify it as a Class III rail carrier; that the projected annual revenue of 2&M to be created by the proposed acquisition and operation would not exceed $5 million; and that all other facts set forth in the Notice of Exemption are true and correct.

PHILIP N. DAHL

SUBSCRIBED and SWORN to before me this 31st day of March, 2017.

Notary Public

My Commission Expires: 1/19/21

"OFFICIAL SEAL"
LINDA GALLU
Notary Public, State of Illinois
My Commission Expires 1/19/2021

C0111

Finance Docket No. 36106

Appendix 3

CAPTION SUMMARY

SURFACE TRANSPORTATION BOARD

Notice of Exemption

STB Finance Docket No. 36106

2nd & Main, LLC -- Acquisition and Operation Exemption -- Norland North Chicago, LLC

2nd & Main, LLC (2&M) has filed a Notice of Exemption to acquire from Norland North Chicago, LLC and operate approximately 540 feet of rail line at North Chicago, Lake County, Illinois (the Rail Line). The Rail Line does not have milepost numbers. Comments must be filed with the Board and served on 2&M's representative, Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, Suite 1666, Chicago, IL 60604-1228, ph 312-236-0204.

The Notice is filed under 49 C.F.R. § 1150.31 *et seq.* If the Notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

By the Board

C0112

45729 SERVICE DATE – MARCH 22, 2017

DO

FR-4915-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36106]

2nd & Main, LLC—Acquisition and Operation Exemption—Norland North Chicago, LLC

2nd & Main, LLC (2ML), a noncarrier, has filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from Norland North Chicago, LLC (Norland) and operate approximately 540 feet of rail line between a point of connection on its north end to a main track of the Elgin, Joliet & Eastern Railway Company (now Canadian National Railway Company) and a point of connection on its southwest end to a main track of the Chicago & North Western Railway Company (now Union Pacific Railroad Company), in North Chicago, in Lake County, Ill. (the Line). According to 2ML, there are no milepost designations on the Line.

The verified notice indicates that the transaction will be consummated shortly after April 5, 2017, the effective date of the exemption (30 days after the notice of exemption was filed).[1]

2ML certifies that its projected annual revenues as a result of this transaction will not result in its becoming a Class II or Class I rail carrier and will not exceed $5 million.

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[1] 2ML's notice is related to a notice of exemption filed in Hussey Terminal Railroad Company—Acquisition & Operation Exemption—2nd & Main, LLC, Docket No. FD 36103, in which Hussey Terminal Railroad Company seeks Board authority to acquire the Line from 2ML. That notice is contingent upon this notice becoming effective.

EXHIBIT
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C0113

2ML states that there are no interchange commitments.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions to stay must be filed no later than March 29, 2017 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 36106, must be filed with the Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, a copy of each pleading must be served on Thomas F. McFarland, 208 South LaSalle St., Suite 1666, Chicago, IL 60604-1228.

Board decisions and notices are available on our website at "WWW.STB.GOV."

Decided: March 17, 2017.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

C0114

THIS AGREEMENT CONTAINS AN AUTOMATIC RENEWAL PROVISION

OPERATING AGREEMENT

THIS AGREEMENT, made and entered into as of the 10 day of August, 2017, between 2nd & Main, LLC and Lumberyard Storage, LLC (collectively referred to as "OWNERS") on the one hand and Hussey Terminal Railroad Company ("HTRC") on the other hand.

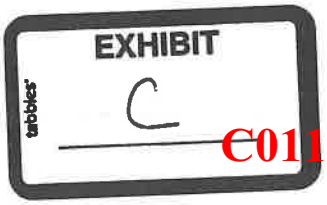
WITNESSETH

WHEREAS, 2nd & Main, LLC has acquired right-of-way and trackage located on and adjoining 2nd & Main's property in North Chicago, Illinois, that right-of-way and trackage is more particularly depicted on Exhibit A attached hereto ("the Owners trackage"); and

WHEREAS HTRC desires to operate and maintain 2nd & Main's Trackage and OWNERS property for the provision of rail service in the name of, and in behalf of, HRTC; and

WHEREAS, Lumberyard Storage, LLC owns the following property to wit:

PARCEL 1: That part of Government Lot 1 of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, bounded as follows: On the North by the South Line of Second Avenue as shown on the Plat of Bord Du Lac Bluffs ("C" of Plats, Page 37), extended West, on the Southeast by the northwesterly line of Main Street ("C" of Plats, Page 37), on the South by the North Line of 22nd Street extended East, and on the Northwest by a line drawn parallel with and distant 30 feet Southeasterly, measured at right angle from the Center Line of the most Southeasterly or East bound main track of the Chicago and North Western Transportation Company, as said main track is now located, in Lake County, Illinois, except that part conveyed as follows; that part of Government Lot 1 of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, more particularly described as follows: Beginning at the intersection of the existing north line of 22nd Street extended East and the northwesterly line of Main Street, shown in Bord Du Lac Bluffs Subdivision, thence on an assumed bearing of South 88 degrees 00 minutes 58 seconds West along said North Line extended East, 71.47 feet to the existing Easterly right of way line of the Union Pacific Railroad, formerly known as the Chicago and North Western Transportation Company; thence North 23 degrees 56 minutes 39 seconds East along said easterly right of way line, 424.88 feet; thence



south 64 degrees 55 minutes 06 seconds east, 64.56 feet to said northwesterly line of Main Street; thence South 23 degrees 45 minutes 40 seconds West along said northwesterly line of Main Street, 395.72 feet to the point of beginning, in Lake County, Illinois recorded September 13, 2005 as Document 5857311.

PARCEL 2: That part of the Southeast Quarter of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, lying Northwesterly of the Northwesterly line of Main Street, Lying Northerly of the North Line of Second Avenue and lying southeasterly of a line parallel with and distant 55 feet Southeasterly, measured at right angles from the center line of the most northwesterly or west bound main track of the Chicago and Northwestern Transportation Company as said main track is now located, in Lake County, Illinois.

PARCEL 3: That part of the South Half of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, described as follows: Beginning at the Northwest corner of that part of Navy property lying East of the Chicago and Northwestern Railroad, said corner being described as the point of intersection of the South Line of the North Half of the North Half of Section 4 and the easterly right of way line of the Chicago and Northwestern Railroad; thence East along the North Line of Navy property, 99.0 feet to a point thence South, at right angles to the last described course, 54.0 feet to the point of beginning of the tract of land being described; continuing thence South along the last described course extended, a distance of 84.70 feet to a point; thence West, parallel with the North Line of Navy property, 102.83 feet to a point; thence northeasterly, along a line, if extended would pass through a point on the North Line of Navy property 50.0 feet East of the Northwest corner thereof, a distance of 40.42 feet to a point; thence northeasterly 100.0 feet, more or less, to the point of beginning, in Lake County, Illinois.

PARCEL 4: That part of the South Half of the Northwest Quarter of Section 4, Township 44 North, Range 12 described as follows: Beginning at the Northwest corner of Navy property, which lies East of the Chicago and Northwestern Railroad right of way, said point being the intersection of the South Line of the North Half of the North Half of said Section 4 and the easterly right of way line of the Chicago and Northwestern Railroad, thence East along the Navy North property line 50 feet to the point of beginning of the parcel to be described, thence continuing along the last described course for a distance of 49 feet to a point; thence southerly at

a right angle to the last described line for a distance of 54 feet; thence deflecting 62 degrees to the right from a prolongation of the previous line for a distance of 100 feet to a point; thence northeasterly for a distance of 110 feet to the point of beginning, in Lake County, Illinois.

PARCEL 5: Portion of Navy property situated in the South Half of the Northwest Quarter of Section 4, Township 44 North, Range 12 East of the Third Principal Meridian, described as follows: Beginning at the Northwest corner of Navy property, which lies East of the Chicago and North Western Railroad right of way, said point being the intersection of the South Line of the North Half of the North Half of Section 4 and the easterly right of way line of the Chicago and North Western Railroad; thence East along the Navy property line approximately 28.25 feet to a point on the West Line of Main Street; thence along the West Line of Main Street on an approximate bearing of south 22 degrees 13 minutes West for a distance of a approximately 150 feet to a point; thence westerly parallel to the Navy North property line for a distance of approximately 28.25 feet to a point on the West Line of Navy property, also being the easterly right of way line of the Chicago and North Western Railroad; thence northeasterly on an approximate bearing of North 22 degrees 13 minutes East along the aforesaid common boundary line for a distance of approximately 150 feet to the point of beginning, in Lake County, Illinois.

PARCEL 6: That part of Nimitz Avenue, also known as Second Avenue, legally described as follows: "That part of Government Lot 1 of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, bounded as follows: On the North by the North Line of Second Avenue as shown on the plat of Bord Du Lac Bluffs ("C " of Plats, page 37) extended West, on the Southeast by the Northwesterly Line of Main Street ("C" of Plats, Page 37), on the South by the South Line of Second Avenue as shown on the plat of Bord Du Lac Bluffs ("C" of Plats, Page 37) extended West, and on the Northwest by a line drawn from the point of intersection of the South Line of Second Avenue extended West with a line lying 30 feet Southeasterly of as measured at right angles to and parallel with the center line of the most Southeasterly or Eastbound track of the Chicago and Northwestern Railway to a point of intersection with the North Line of Second Avenue extended West with a line lying 55 feet Southeasterly of as measured at right angles to and parallel with the Northwesterly or Westbound main track of the Chicago and Northwestern Railway, all in Lake County, Illinois.

WHEREAS, 2nd & Main, LLC, owns the following property to wit:

A Part of the North Half of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, described as follows: Beginning at a point on the Easterly Right of Way Line of the Chicago and North Western Railway Company, which point is 772.10 feet measured along said Right of Way Line Southerly of the intersection of said Right of Way Line with the Southerly Right of Way Line of the Elgin, Joliet and Eastern Railway Company; running thence East on a Line parallel with the South Line of said Northwest Quarter of the said Section 4, a distance of 515.8 feet the West Line of Marquette Street; thence Northerly along the West Line of Marquette Street, approximately 220 feet to the Southeast Corner of the former J.W. Aulson and Sons Corporation Property, more particularly described by Warranty Deed dated April 20, 1921 and Recorded April 26, 1921, as Document 201389; thence West 435 feet on the South Line of said Former J. W. Aulson and Sons Corporation Property to said Easterly Right of Way of said Chicago and North Western Railway Company; running thence in a Southerly direction along said Easterly Right of Way Line to the point of beginning, in Lake County, Illinois.

All of the above property being referred to as the "OWNERS property".

WHEREAS HTRC is agreeable to such operation and maintenance upon the terms and conditions herein contained.

NOW, THEREFORE, in consideration of the covenants and conditions contained herein the parties hereto agree as follows:

ARTICLE ONE

GRANT OF RIGHT TO OPERATE

AND MAINTAIN THE OWNERS TRACKAGE

OWNERS hereby grant HTRC the right to operate its trains, locomotives, cars, and equipment with its crews over the OWNERS trackage for the purpose of providing rail service to shippers and receivers located on such lines and to transport shipments by rail over such lines, and to maintain the OWNERS trackage, and (ii) HTRC agrees to operate and maintain the OWNERS trackage. HTRC

C0118

reserves the right to operate trains, locomotives, cars and equipment on an as-needed basis, using a leased locomotive or a substitute, using its own personnel. HTRC will perform all necessary freight car switching at the OWNWERS property and will operate all freight car loading and unloading facilities on those properties. HTRC is also granted the right to coordinate the conduct of railcar switching and movement of freight cars on the subject site.

ARTICLE TWO

TERM; TERMINATION

Section 2.01 Term. Subject to earlier termination as provided herein, the term of this Agreement shall be one year from the date of this Agreement shown above; provided, however, that this Agreement will be renewed automatically for additional one year periods unless, no later than 60 days before its expiration, either of the OWNERS or HTRC provides written notice to the other party of its intent not to renew this agreement.

OWNERS may terminate this Agreement upon ten (10) calendar days written notice if by any reason most of the circulating shares in HTRC with right to a vote are no longer property of OWNERS or its parent or affiliated companies, or if any shares in HTRC are owned, directly or indirectly, by a competitor of OWNERS.

Section 2.02 Termination for Default. Either party may terminate this Agreement by written notice if the other party fails to perform any obligation required of it hereunder and fails to remedy such default within thirty (30) days after receipt of written notice of such default.

Section 2.03 Termination for Bankruptcy, Etc. Either party may immediately terminate this Agreement by written notice if the other party enters into or is placed in bankruptcy or receivership or is nationalized, become insolvent, or makes an assignment for the benefit of its creditors.

C0119

ARTICLE THREE

SCOPE OF OPERATIONS AND MAINTENANCE AND COMPENSATION THEREFORE

The scope of operations and maintenance and the agreed compensation therefore are contained in Exhibit B hereto. The parties may amend Exhibit B from time to time by executing an amended scope of operations and maintenance and compensation.

ARTICLE FOUR

GOVERNMENT APPROVAL, ETC.

HTRC at its own expense shall obtain any and all governmental approvals, authorizations, permits, licenses, and exemptions that may be required for its operation and maintenance of the OWNERS property and trackage, and for the direct operation of locomotives and switching operations thereon.

ARTICLE FIVE

INSURANCE

HTRC shall be required to obtain and keep in force a commercial general liability insurance policy covering HTRC operation and maintenance of the OWNERS property and trackage, including public liability, personal injury, property damage, and contractual liability with per occurrence and aggregate limits of not less than $2 million. OWNERS shall be named as an additional insured in such policy. Upon reasonable request, HTRC shall make such policy available for inspection and review by OWNERS.

ARTICLE SIX

MANAGEMENT AND OPERATIONS

HTRC shall comply with the provisions of the Federal Safety Appliance Act, as amended, and all other federal, state, and local laws, regulations and rules respecting (i) the operations and maintenance of the OWNERS property and trackage, (ii) the operation, condition, inspection and safety

C0120

of HTRC's trains, locomotives, cars, and equipment where such trains, locomotives, cars and equipment are being operated over the OWNERS property and trackage. HTRC shall indemnify, protect, defend, and save harmless OWNERS and its officers, agents and employees from and against all fines, penalties and liabilities imposed upon HTRC or its officers, agents and employees under such laws, rules and regulations by any public authority or court having jurisdiction in the premises, when attributable in any manner to the failure of HTRC to comply with its obligations under this article.

ARTICLE SEVEN

LIABILTIY AND INDEMNITY

Whenever any loss of, damage to, or destruction of any property whatsoever, or injury or death of any person or persons whomsoever occurs with the trains, locomotives, cars, or equipment of, or on account of HTRC, HTRC shall assume all liability therefore, and shall forever protect, defend, indemnify and save harmless OWNERS and its officers, agents and employees from and against any such liability, cost and expense, except if such loss, damage, injury or death was caused by HTRC.

ARTICLE EIGHT

ENVIRONMENTAL CONDITIONS

OWNERS shall indemnify HTRC for any and all Losses resulting from environmental conditions existing on the OWNERS property and trackage as of the commencement of operations by HTRC. HTRC shall indemnify OWNERS for any and all losses resulting from environmental conditions occurring or arising on the OWNERS property and trackage during the term of this Agreement except to the extent caused by the act or omission of OWNERS.

ARTICLE NINE

THIRD PARTY CLAIMS RELATING TO OWNERSHIP OPERATION

HTRC shall not cause any lien, claim, or encumbrance to be placed against the OWNERS property or trackage. If any such lien, claim or encumbrance shall be filed or placed against the

C0121

OWNERS property or trackage or any part thereof, HTRC agrees to discharge the same within 30 days after HTRC has notice thereof. If HTRC fails to do so, OWNERS shall have the right (but not the obligation) to pay or discharge any such liens, claims or encumbrances without inquiry as to their validity and any amount so paid, including interest, fees, charges, and expenses, shall be paid by HTRC to OWNERS, as applicable.

ARTICLE TEN

FINANCIAL STATEMENTS

If OWNERS shall so request, HTRC shall be required on a quarterly basis to provide statements reflecting its financial condition, such as a balance sheet and profit-loss statement.

ARTICLE ELEVEN

CONFIDENTIALITY

HTRC will keep secret and confidential at all times and will not disclose, divulge, or communicate any confidential or proprietary information provided by OWNERS hereunder, in any manner, directly or indirectly, to any third party, except as permitted by this Agreement, and except where that information:

(a) Is or later become publicly known under circumstances involving no breach of this Agreement by HTRC;

(b) Was already known to HTRC at the time it was received from OWNERS, not under an obligation of confidentiality, as evidenced by written documents in the possession of HTRC; or .

(c) Is made available to HTRC by a third party without secrecy obligations and without breach of an obligation to OWNERS.

C0122

HTRC may disclose confidential information only to those of its directors, officers, and employees who legitimately require it for the purposes permitted by this Agreement, and will use its best efforts to prevent any unauthorized disclosure by them.

Notwithstanding the termination of this Agreement, the obligations of HTRC under this Section 11 shall continue in force for ten (10) years after termination.

ARTICLE TWELVE

REAL PROPERTY TAXATION

HTRC agrees to file Illinois Department of Revenue Railroad Property Tax Forms (including but not limited to Illinois Department of Revenue forms, PTAX500 through 513 and 520A through 523, and 537) listing the OWNERS property as "railroad operating property" as defined in the applicable Illinois statues. HTRC shall pay the resulting property taxes or immediately fully reimburse OWNERS if OWNERS pay such taxes.

ARTICLE THIRTEEN

AMENDMENTS

This Agreement represents the entire understanding between the parties and supersedes and replaces any and all prior agreements between the parties relating to the subject matter hereof. This Agreement may not be amended except by a written instrument signed on behalf of each party by its authorized representatives.

ARTICLE FOURTEEN

ASSIGNMENT

Neither party may assign this Agreement without the prior written consent of the other, except that OWNERS may assign this Agreement to any entity which succeeds, by sale, merger, acquisition, transfer, or otherwise, to all or substantially all of its assets or business at OWNERS Facility.

ARTICLE FIFTEEN

MISCELLANEOUS

Section 15.01 Any notices, requests, or other communications hereunder shall be in writing and shall be deemed to have been duly given when made upon a party by personal service at any place where they may be found or by mailing such notices, requests, or communications by certified mail, postage prepaid and return receipt requested, or by nationally recognized courier, or by transmitting such notice by facsimile , in each case to the following addresses or facsimile numbers as the case may be:

(a) If to OWNERS: John W. Quinn
Churchill, Quinn, Richtman and Hamilton, Ltd.
2 South Whitney Street
Grayslake, Illinois 60030

(b) If to HTRC: John P. Dahl
360 Lake Street
Antioch, Illinois 60002

Either party may provide changes in the above addresses to the other party by a notice given to the other party in this Section 15.01.

Section 15.02 Governing Law. This Agreement shall be construed and enforced in accordance with the laws of the State of Illinois.

Section 15.03 Severability. If any provision in this Agreement shall for any reason be determined to be invalid or unenforceable, the balance of such provision and the remaining provisions of this Agreement shall nevertheless continue to be valid and enforceable as though the invalid or unenforceable provision had not been a part hereof.

Section 15.04 Titles. The title of the sections and subsections of this Agreement are for convenience of reference only and are not to be considered in construing this Agreement.

IN WITNESS WHEREOF, this Agreement has been executed by the parties hereon on the day and year first above written.

C0124

2nd & Main, LLC

By: _____
Authorized Representative

Lumberyard Storage, LLC

By: _____
Authorized Representative

Hussey Terminal Railroad Company

By: _____
Authorized Representative

C0125

Plat attached to instrument recorded as Doc No 1304 on April 7, 1916 in Book 221 of Mortgages, page 449.

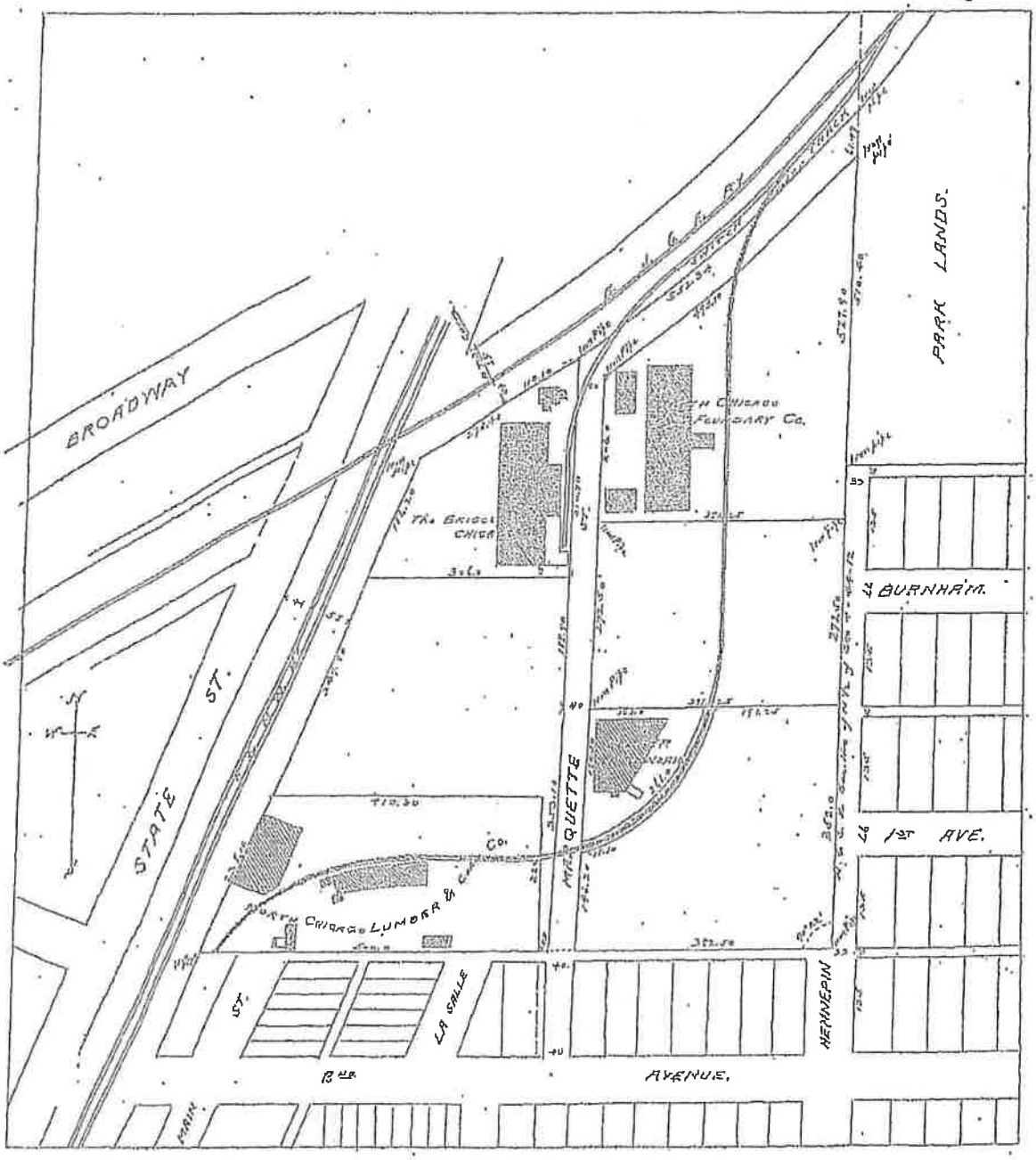
EXHIBIT "A"

PLAT

Of that part of the N½ of the NW¼ of Sec. 4 T 44 N. R 12 E of 3rd P.M. lying South of the E. J. & E. Ry. and East of the C. & N.W. Ry.

NORTH CHICAGO, ILL.

Scale 100 feet per inch Oct 1915 R. H. Smith, C.E.



C0126

Re: Westrocks Illinois Law firm and the agreement.

phil dahl

Tue 8/8/2017 9:58 AM

To:John W. Quinn <JQuinn@grayslakelaw.com>; Theresa Dahl <jpdahl1@yahoo.com>;

Ist year base rent of $2,800 per month to each owner

+ 25% of any incidental revenue parcel specific to each owner

Note we are all ready paying the real estate taxes and insuring the property.

Sent from Outlook

C0127

NORTH CHICAGO TERMINAL LEASE ADJUSTMENT

phil dahl

Sat 9/8/2018 11:19 AM

To:phil dahl <philipndahl@msn.com>; John W. Quinn <jquinn@grayslakelaw.com>; Theresa Dahl <jpdahl1@yahoo.com>;

Base lease to be $1000 per month to each owner

+ 7.5% of all transportation revenues received by HTRC to each owner

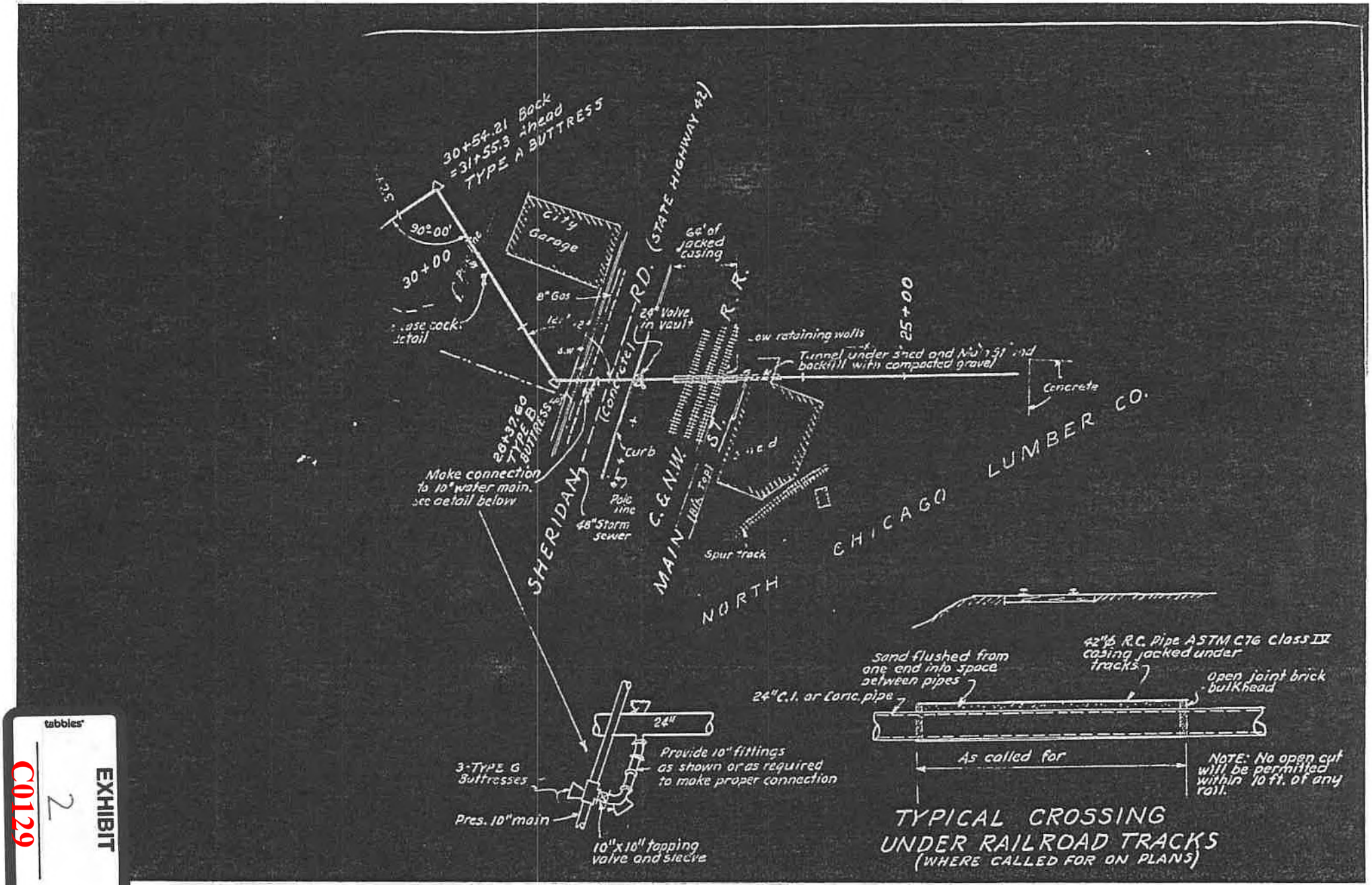
+ 25 % of any incidental revenue parcel specific to each owner

Starting 8-10-18

AGREED TO BY 2ND & MAIN LLC, LUMBERYARD STORAGE LLC AND HUSSEY TERMINAL RAILROAD COMPANY

Sent from Outlook

C0128



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EXHIBIT

2

C0129

STATE OF ILLINOIS)
) SS:
COUNTY OF L A K E)

IN THE CIRCUIT COURT FOR THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

2nd & MAIN, LLC, Plaintiff,	)	
vs.	)	No. 17 MR 1149
THE CITY OF NORTH CHICAGO, Defendant.	)	

The deposition of FRANK FURLAN, called by the Plaintiff, for examination, pursuant to notice, and pursuant to the provisions of the Illinois Code of Civil Procedure and the Rules of the Supreme Court pertaining to the taking of depositions for the purpose of **discovery**, taken before JENNIFER E. GARCIA, CSR, at 2 South Whitney Street, Grayslake, IL, on the 14th day of February, 2019, at the hour of 2:00 p.m.

EXHIBIT
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C0130

A P P E A R A N C E S:

CHURCHILL, QUINN, RICHTMAN & HAMILTON, LTD.
2 South Whitney Street
Grayslake, IL 60030
847-223-1500
Jquinn@grayslakelaw.com
BY: MR. JOHN W. QUINN

Appeared on behalf of the Plaintiff.

ANCEL GLINK
140 S. Dearborn Street
Chicago, IL 60603
312-782-7606
Mdicianni@ancelglink.com
BY: MR. MATTHEW T. DICIANNI

Appeared on behalf of the Defendant.

ALSO PRESENT: Mr. Phil Dahl

* * * * *

I N D E X

THE WITNESS	PAGE
FRANK FURLAN	
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Examination by Mr. Dicianni	31-52

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(Witness sworn.)

MR. QUINN: Let the record reflect that this is the discovery deposition of Frank Furlan, taken pursuant to notice and subject to the rules of the Nineteenth Judicial Circuit, the Illinois Code of Civil Procedure, and the Rules of the Illinois Supreme Court.

Frank, I am John Quinn, and I am representing 2nd & Main in this case. So you have had your deposition taken before, I assume?

THE WITNESS: Yes, I have.

MR. QUINN: So you know you have to answer out loud. And if you don't understand one of my questions, let me know and I will rephrase it so it's clearer.

THE WITNESS: I understand.

F R A N K F U R L A N,

called as a witness herein, having been first duly sworn, was examined and testified as follows, to-wit:

E X A M I N A T I O N

by Mr. Quinn:

Q. Okay. Would you state your name for the record?

A. Frank J. Furlan.

Q. And, Frank, what's your occupation?

A. Civil engineer and land surveyor.

Q. And can you tell me where you went to school and got your engineering degree?

A. Yes, I went to the University of Illinois, and then I went to the Chicago Technical College.

Q. Okay. What's the Chicago Technical College now?

A. It's a building down there on 20th and Michigan. I don't know what it is. It's not in existence anymore.

Q. Oh, it's not in existence anymore. I wondered if turned into IIT or something like that.

A. No, actually aside of that, it was they were both nonaccredited colleges when we went there, when I went there from '47 on, and then finally IIT became accredited, and because the Chicago Technical College didn't have a library onsite, they accredited IIT but not Chicago Technical. They were both using the John Carrara Library downtown.

Q. So I'm going to show you what we're going to mark as Deposition Exhibit No. 1, which is the notice of -- you know what, it's already marked here. Guess what, my secretary marked it, so we're just going to

use that one.

(Exhibit No. 1 marked for I.D., 02/14/2019.)

BY MR. QUINN:

Q. And that was the Notice of Deposition that went with the subpoena, and it asked you to bring some documents, and I see you brought some stuff with you today.

A. Yes, I did.

Q. Can you tell me what you brought?

A. Yes, I brought the original file folder from 1960 where we did the easements for the sanitary sewer and water main for the City of North Chicago. They were putting in a 24-inch water main, and they were putting in an also 24-inch sanitary sewer.

Q. Okay. Can I just take a look at that for a minute?

A. Certainly.

Q. Gee, where did you keep this stuff, Frank?

A. I kept them in my file cabinets. We had a fire, and that's why if you look at the outside of the cover, it's kind of singed around the corners.

Q. Old onionskin paper here.

A. We had to go up to the courthouse and trace

off different subdivisions and that on onionskin because there was no way of reproducing it.

Q. Those were the good old days.

A. Right.

Q. Okay. Well, let me, and you have got --

A. I brought a roll that was prepared originally by Alvord, Burdick & Howson who were the engineers for the City of North Chicago for this particular project for the sanitary sewer and water. This is a copy of their drawings that show the alignment of the water main.

MR. DAHL: Okay, we're up here.

THE WITNESS: Uh-huh, that is correct, and then that goes across the street.

MR. DAHL: Is that the depth?

THE WITNESS: Yes.

MR. QUINN: The depth is shown, what page is this?

THE WITNESS: That's on all the pages. The profile is shown on all the pages.

(Discussion had off the record.)

MR. QUINN: Why don't we, we're going come back to these surveys here, but there is a couple

things I want to find out first.

THE WITNESS: Sure.

MR. QUINN: So we're going to actually renumber these. We're going to make this No. 2.

(Exhibit No. 2 marked for I.D., 02/14/2019.)

BY MR. QUINN:

Q. What I am going to show you is a few surveys here, Frank, in pictures because what I am going to try to do as we start out here is figure out what lines are out on the property and what they are made of.

So I have marked this as Exhibit No. 2, this plat of survey. That's a survey you did in 1961, correct?

A. Correct.

Q. Now, does that show the water main that runs across the we'll call it the North Chicago Lumber property?

A. Yes, it does. It shows the route of the water main.

Q. At the time you did this in 1961, were you the City Engineer for North Chicago?

A. I was.

Q. And was there a line already there, or was

this brand new line?

A. This was brand new line.

Q. Okay. The whole way across the property?

A. Yes.

Q. Was there an existing line there before it?

A. No.

MR. QUINN: Okay, all right, okay. Now let's mark this as, okay, let's mark this as Exhibit No. 3.

(Exhibit No. 3 marked for I.D., 02/14/2019.)

MR. QUINN: Bear with me for one second because I am going to go get a marking pen.

(Brief recess.)

BY MR. QUINN:

Q. It's a little hard to see maybe, Frank, but what I have marked as Exhibit No. 3 here is one of the maps that we've come across in the course of the discovery and everything on this case. Have you seen this before?

A. Yes.

Q. Can you tell me what it is?

A. Yes, this was a second route that that water main was going to follow. When the Navy didn't allow

us to go straight down 2nd Avenue, this is the second location of where the water main was going to go. Goes up Marquette and goes on about the same alignment along the north property line of the lumber company. Then it comes south-southwesterly along the barns that were in there. Then it was going to cross at right angles to the railroad tracks to go up across the Chicago Northwestern and the Chicago Northern Milwaukee and across the City Yard.

Q. Okay. I am going to take that back from you and mark it with an orange to see if I have gotten the route.

I have just marked that in orange. Is that the route it was going to take?

A. That was one of the routes they were talking about, yes.

Q. Okay. Did that actually get installed there?

A. No.

Q. Okay. And let me show you one other thing that we also got in discovery.

MR. QUINN: And let's mark this as, what are we up to now, 4.

(Exhibit No. 4 marked for I.D., 02/14/2019.)

BY MR. QUINN:

Q. Now, the City of North Chicago is, I think they have been having an assessment or mapping done of their water lines, and so this is one of the documents, it's from one of the documents that was turned over to me regarding Dearborn & Companies, and when I looked at this, it appears to show the water line running in the area that is marked in orange on Exhibit 3 here.

A. That's about what it shows here, yes.

Q. Is that wrong?

A. Yes.

Q. Okay. Do you know why they might have put that in their assessment?

A. Yes, because they probably copied this off of the maps that were shown on those set of drawings previously, you know, that one you showed me there.

Q. This one?

A. Yeah. This was, this was the second route that we were -- the water main was going to come in. The first route was going to come from along the Navy all the way down 2nd Avenue until they got to the Northwestern tracks. Then it was going to cross the

Northwestern tracks and go down -- if I may?

Q. Oh yeah, no, we want to find out what's actually happened here, Frank, so whatever you need to refer to.

A. Showing you a Township map showing you 2nd Avenue is right here, isn't it?

Q. Is 2nd Avenue used to be Nimitz or is? 2nd Avenue, yeah, right there.

A. Right.

The water main comes up to Foss Park and comes into what is Hennepin Avenue here. Then it was going to come straight down 2nd Avenue all the way to the Northwestern tracks. Then it was going to cross -- yeah, Northwestern tracks. Then it was going to cross and come down this alley here between these two, down this city street.

The Navy at the time had control of all of this property all the way down through here and down through here. They said, no, we don't want you coming into our 2nd Avenue at the Navy gate, and we don't want you coming down Nimitz Avenue. Find yourself another route. We'll give you access to this building that was here was a warehouse building. They had us come north along the east side of the warehouse building, then

come west along the north side of the warehouse building to Marquette Avenue, then go north on Marquette Avenue and then along the northerly line of the lumber company, and then from the lumber company they came down parallel to the buildings that were there and back to basically 2nd Avenue, then across the street they had before, like basically like that's showing there. See here's the -- if I may?

Q. Sure.

A. On this drawing here, here's 2nd Avenue.

Q. We're looking at Exhibit 4 here.

A. Here's where the warehouse building was for the Navy. There was a gate here, and this property, this property here was all under the control of the Navy.

Q. Even the 2nd & Main property -- I'm sorry. Even the North Chicago Lumber Company?

A. No, not, that was the dividing line. The south line of North Chicago Lumber was the north line of the Navy property.

Q. Okay.

A. And the Navy said, no, we don't want you disturbing our gate here, our gatehouse, and we don't want you disturbing 2nd Avenue, so they said we'll give

you an easement to go north along this building and then out westerly to about where the lumber company was, and the lumber company was at the north end here, and they came down along the north line. Then they dropped down to the south, and then across the tracks at the south end of theirs buildings. That was the second route that they proposed.

Q. Okay. That was a route that they proposed, not the route that got put in?

A. Right.

Q. Okay.

A. Then, if I may?

Q. Sure.

A. The reason this route was changed Ollie Savel, who was manager of the lumber company, called me up and said, Frank, he said, can we do something different than putting this in? This is going to screw up our operation of the lumberyard because we had tracks in there, and they said, is there some other way we can go? I said, well, we can talk to the engineers Alvord, Burdick & Howson about coming straight across the railroad tracks and into the public works yard of the City and then going on from there. And that's how we arrived at that other location.

The biggest problem we had is that usually crossing the railroad you have to cross at 90 degrees, so Alvord, Burdick & Howson went back to the railroad and said, can we come straight across at a little bit of a skewed angle to your tracks? The railroad said, yeah, that's all right, we'll go along with that, so that eliminated all these bends in here and brought it straight across.

Now, that's a 24-inch concrete cylinder pipe. The individual joints on a concrete cylinder pipe had very little deflection, less than one degree of deflection. Any time you made a change in direction you had to buy a fitting to whatever your directional change was. By doing it straight across, we eliminated one, two, three, about four fittings in there and made it actually a nicer operation for that water main.

Q. So this was constructed in like 1960?

A. 1961, yeah.

Q. Do you have any idea why there wasn't actually an easement obtained from North Chicago Lumber?

A. No, I don't, because we prepared the drawing, and then I turned it over to Michael Pusen (phonetic) who was the City Attorney, and he was

supposed to get the easement from the lumber company --

Q. Okay.

A. -- under that new alignment going straight through and across, and that was going to put it underneath their sheds. Ollie said he had no problem with that as long as it went underneath the shed.

Q. Now, is this water line, does this come from the water treatment plant?

A. Yes, it came all the way from the treatment plant, it came across Foss Park, and then entered the Navy property at Hennepin Avenue.

Q. Where did they get the water from before this line was constructed?

A. There was a 12-inch line. There is a water tower that was in this area here. There is a 12-inch line that came right straight across someplace, I think, yeah, it's right down where this street is here.

Q. And was that 3rd Avenue?

A. Yeah. And that tower is right in this location here on an easement that was granted from the Navy back in 1918 or someplace back along in there. Anyhow, that's where the water tower was for the City. The 12-inch comes right across and goes to the back end of the alley here and runs down the alley.

Q. So this 24-inch, this new one was to replace or augment?

A. Augment it, yes.

Q. Got you. Okay.

Hang on for a minute now because I am completely out of my order what I was going to do.

A. Sure. I'm sorry.

Q. No, no, no. Actually, we're trying to figure out where everything is and what happened, so.

A. I am really surprised at that. I hadn't seen that one before. This is something new.

Q. That surprised us too, so it's caused a little bit of confusion here.

MR. QUINN: Now, so let me just see what I have already, what we've already used. We're up to 4, right? We have 4. Let's mark this as No. 5.

(Exhibit No. 5 marked for I.D., 02/14/2019.)

BY MR. QUINN:

Q. Now, Frank, this is another document that was given to my client by Josh Wheeler from North Chicago. Did you know Josh?

A. Yes, I know who he is.

Q. Okay. And on this drawing, it shows I think

the line that we've been talking about, and the word transite is written on it with an exclamation point; do you see that?

A. Uh-huh.

Q. Do you know what transite is?

A. Yes.

Q. What is it?

A. Cement asbestos. It's made by Johns Manville.

Q. Okay.

A. And that's not the pipe that was put in.

Q. Okay. What pipe was put in?

A. Concrete cylinder pipe.

Q. Okay. And what is concrete cylinder pipe?

A. Is a reinforced concrete pipe that has a steel cylinder built right into the wall, and that's manufactured by American Concrete Association or whatever it is. It's a different type of water main than transite.

Q. Okay. Do you have any idea why somebody would have written transite on this map?

A. Yeah, because it looks like from the outside, it looks like it could be transite.

Now, I don't know how Josh got this

information, but it was never a transite pipe.

Q. And were you there when it was installed?

A. I saw it, yes, sir. In fact, I also had to make an tap for the refiners and smelters later on for a water tap, and in order to tap it, they had to tap the pipe, and it was a concrete cylinder pipe.

Q. Who did you say did the tap?

A. The tap was done by William Sprig (phonetic), JR Meyers & Company. And that was maybe at least 15 years after the pipe was installed, or maybe later than that. That's why I am saying I knew what pipe was put in.

Q. Okay. And do you have -- is anything in the documents that you have there that are all spread out, the surveys or anything, that have the specifications or show, any documents that show what the pipe is made out of?

A. Let me take look at that.

It wouldn't show on our easements. This section here, does it say something here about --

Q. We're looking at the Alvord, Burdick --

A. Howson drawing.

Q. Yeah, I think the very first page.

A. Right. And on this section here, I think it

says something here about either concrete or cast iron, doesn't it?

Q. Why don't we turn it over so you are not reading upside down, and I will come around to you.

A. That's all right. I can find it real quick here.

Right here's the note: Cast iron or concrete pipe.

MR. QUINN: Okay. Matt, I am going to ask you, both of you this. Is there a way that you could give these to the North Chicago City Attorney and have them copied so we have a set?

MR. DICIANNI: Yeah, sure, I am sure we can do that.

MR. QUINN: Just send us a copy at my expense, but I want to get a copy I think that's full size so I can see it.

MR. DICIANNI: Yeah.

BY MR. QUINN:

Q. And what I am looking at here says, typical crossing under railroad tracks where called for on the plans. Do you use the same pipe everywhere, or is there a difference what you do under the railroad tracks?

A. No, the pipe is the same, but you put a carrier pipe in. In other words, you put the outside diameter is a carrier pipe, and then you slide the concrete pipe in this case through the carrier pipe. The railroad has a specification that any crossing has to be put in a steel shell pipe of certain thickness, I think 3/8 inch or something like that, and then you put your water main inside that pipe, and then you fill it full of sand to carry the load.

Q. Okay. So you have the pipe that is going everywhere else; then you get to the railroad track and you have this?

A. You have the casing.

Q. And you have the casing, and then you put sand in the casing?

A. You put the pipe in, the concrete water pipe that you use, you put it in, you have to on rollers, and then you fill it full of sand.

Q. Oh, okay. And why did they do that, the railroad?

A. Well, the railroad, it doesn't put the load of the railroad tracks on the water pipe. It puts it on the outside casing that supports the railroad tracks above it.

Q. There were some as-builts that were in this report I just showed you which are difficult to read, and I am just looking to see if they look like they are the same.

A. Let me take a quick --

Q. Sure.

MR. QUINN: That's from the booklet, but I blew them up a little bit bigger so you could see them kind of.

MR. DICIANNI: Okay.

BY THE WITNESS:

A. Yeah, this is Sheet 2. Yep.

BY MR. QUINN:

Q. Oh, okay. Well, you know what's odd about this to me, Frank, is they have got this sheet attached to their reports, but they end up with the drawing that shows it going south.

A. The other way. That's what I am saying that I remember saying the augering pit at this location when they were augering underneath the tracks for their casing pipe, that's where they put the water main.

Q. So there is no, in your opinion, there is no chance that there is two mains or two water lines?

A. No, no, no.

Q. If I can go back to Exhibit No. 1, the very -- or 2, No. 2 which is your survey.

A. Yes.

Q. That survey doesn't show any buildings on it.

A. No, it does not.

Q. Can you tell me why not?

A. No, just rather than confuse the issue, they asked us for a location of survey.

MR. QUINN: Okay. Well, let me show you -- what are we up to to now, 6?

(Exhibit No. 6 marked for I.D., 02/14/2019.)

BY MR. QUINN:

Q. This is a portion of a survey that was done for my client before he or as part of his purchase of the property. And it shows the 24-inch water main. You see that there, Frank?

A. Uh-huh.

Q. You know what I was wondering about is, were these buildings there before they put the water main in?

A. No.

Q. Okay.

A. The only building that was there before the water main was put in was --

Q. Here, why don't you just mark it for me.

A. This shed didn't come all the way up here, this way here. This was open. There was a shed here about like this, and then there was a little shed in this corner down here. And I think that does show someplace on --

Q. I will pull it back out.

A. Hang on here. I think it shows on that set there, please.

Yeah.

Q. Oh.

A. Here's the shed, and here's the tracks here, and there were two sets of tracks here, and that's why instead of coming down or following the shed, Ollie said take it straight across.

Q. And Ollie is?

A. It was Ollie Savel. He was the manager of the North Chicago Lumberyard at that time.

Q. And that shed is shown on the Page 1 of the Alvord, Burdick & Howson document here.

So then for whatever reason, North Chicago Lumber later built buildings on top of the

water main?

A. Yeah, yes.

MR. QUINN: Let's take a break for a couple minutes. I want to talk to Phil, if we can.

MR. DICIANNI: Okay.

MR. QUINN: The deposition has gone a little bit different than I thought it was, lot more information.

THE WITNESS: Okay.

(Brief recess.)

BY MR. QUINN:

Q. Okay. There is just a couple of more things I want to go over. Let me see if I can find the map that we started with here. Maybe it's Exhibit 2 -- Exhibit 3. That's the one with --

A. This one here.

Q. Yeah, with the line.

I will tell you what I didn't understand about this is down in the lower corner of this, there are dates in boxes. There is an April 3, 1944, looks like a January something, 1948?

A. I see them, yeah.

Q. In this line that's shown on here, this would have been for a route that was much later than

those dates.

A. Yes.

Q. So --

A. What are these dates?

Q. I don't know what those dates are.

A. Those are copies of tax plats. This was taken off a tax plat. This was a part of the tax plat.

Q. I see. We used to call them sidwells.

A. No, sidwells were the box -- these are actually, these are the tax plats that were at the Recorder's Office. We got these from the map department. When we were doing our survey work, we'd get copies of tax plats. And that was the piece of tax plat that somebody had applied that alignment on there.

Q. So this is a -- this would be a track map then?

A. Yeah, yes, sir.

Q. Okay. And that's why there would be this notation in the upper right that says taxing County Town Road and bridge and stuff like that?

A. Yes, sir.

Q. Okay. All right. Then can we look at these? These are as-builts that you brought?

A. Those are the drawings that we had of the

alignment.

Q. You know what I want to try to find out is how deep that 24-inch water main is on my client's property.

A. The best I can tell you, it looks like your client's property is here. Looks like it's about 650 -- about 655.

Q. 655 is the?

A. Is the elevation of the ground. And then, see, here's a shed, there is a shed, and the water main is down at about, that looks like the top is about 645.

Q. So where was the ground?

A. 655.

Q. So it's ten feet down?

A. About ten feet down, yes.

Q. Is that all the way across?

A. Yes, it's all the way across from where they started their auger pit which was underneath where the shed was and then underneath the railroad tracks, and then it went all the way across to the west side of Sheridan Road because they had to get underneath this storm sewer that was right in here, so they stayed down all the way across until they got to the west side of Sheridan Road, and then they came back up again to

about a five-foot depth.

Q. Okay. And that's shown on Page 1 here?

A. Page 1, yes.

Q. So a water main, is that like -- it's not like a sewer line where --

A. We don't have to follow a grade line because it's under pressure.

MR. QUINN: Let's go off the record for a second.

(Discussion had off the record.)

MR. QUINN: Let's go back on the record.

BY MR. QUINN:

Q. East of the shed, you go east of the shed.

A. Right.

Q. How deep is it, can you tell from these drawings?

A. It's supposed to be down about five feet.

Q. Five feet because --

A. If I may?

Q. Yeah, go ahead.

A. I know they were asking me how deep it was when they were digging for it out there, and they said they couldn't find it, and they said, well, they couldn't find it, and they couldn't dig any deeper than

their backhoe had, and it didn't go down 14 feet. Whatever they did, I couldn't tell you because I wasn't out there, but I do know they asked me about that.

Q. And by "they", who is that?

A. The City.

Q. The City, okay.

A. Yeah.

THE WITNESS: I think it was in relationship to I think last time, I believe, didn't you ask the City Water Department of how deep the water main was?

MR. QUINN: And for the record, Phil Dahl from 2nd and Main is here, and Frank just asked him a question.

Go ahead, Phil.

MR. DAHL: I asked, and they said it was deeper than they could reach.

THE WITNESS: But they couldn't reach 14 feet with the equipment they had. It's a backhoe on the back of their tractor, and they could reach just about nine or ten feet at the most.

MR. DAHL: Is that where --

MR. QUINN: Let's go off the record for a second here.

(Discussion had off the record.)

MR. QUINN: Let's go back on the record, and just let the record reflect that Phil Dahl may interject some things here, and then we'll be able to -- it will be easier to get everything out that we need to get out.

THE WITNESS: Sure. The question was how deep was the water main at the time it was put in. And my answer was that at the time, it was about five- to five-and-a-half foot of cover over the water main along the north line of the lumberyard.

Mr. Dahl said that they had dug out there, and if they would have been in the right location, they should have hit the water main at that five- to five-and-a-half-foot cover. They dug down about maybe nine or ten feet, and they couldn't find it, and the reason I say nine or ten is because that was the information that Josh Wheeler gave me. He said we can only dig down nine feet with the backhoe that we had.

MR. DAHL: Based on the elevation of the tracks that are currently on the property, would the property have been fairly level to the north, or did it drop off?

THE WITNESS: It was fairly level to the

north.

MR. DAHL: Okay, but -- All right.

THE WITNESS: Basically, there was no drop-off along the north property line.

MR. DAHL: Okay. And it would have been similar with the east Marquette Street; there was no drop-off where that pipe was put in?

THE WITNESS: That's correct.

MR. DAHL: Okay. So I would suggest that the elevation didn't change significantly.

THE WITNESS: That's very possible.

MR. DAHL: Okay. So the City must have looked in the wrong spot.

THE WITNESS: I think they did.

MR. QUINN: Okay. Well, I don't have any more. I can't add to anything that Phil said.

How about you, Matt?

MR. DICIANNI: Sure.

E X A M I N A T I O N

by Mr. Dicianni:

Q. Frank, I know you said that at the time the water main was put in there weren't the buildings on the property that are there now; is that correct?

A. That's correct.

C0160

Q. Do you know what buildings were on the property then?

A. Here, this shed, and there was nothing along the north line.

Q. And just for the record, the shed he's referring to is on --

A. Is on Page 1, yeah, on Page 1 of the drawing, it says shed and it shows the alignment going on the north end of the shed, and then if you look carefully, you can see that there is a little like extension of that shed which was a secondary shed, and that was the one that Ollie said was not worth very much.

Q. And those two sheds that were on the property at the time have been torn down?

A. I believe so, and I believe the surveys that we did subsequent to that, there was a surveyor that was Ed Peklay, he did a survey in 1999, and then we did another survey in 2010 that showed the buildings as they were at that particular time.

Here on Sheet 1, yeah, on Sheet 2 on the north end, there is no buildings shown along that north line. Coming off of Marquette Avenue here, there is no buildings shown on that north line. There wasn't

C0161

a building there.

Q. And you said that Ollie?

A. S-A-V-E-L.

Q. He decided to build the buildings over the water main?

A. Yes, afterwards, yes.

Q. And did he know that he was building buildings over the water main?

A. Certainly.

Q. Okay. Did Ollie Savel know that the water main was in existence?

A. Yes.

Q. Okay. And do you know how he would have known that?

A. He was the guy I talked to to change the route. He was out there when they were building it because he was there all the time.

Q. Do you have any idea how long Ollie Savel owned the property for?

A. No, I don't have an idea. I know it was for more than ten years.

Q. Okay. Do you know who owned the property after Ollie Savel?

A. As far as I knew, it was North Chicago

Lumber until such time as they sold it to you. The bank I know had a -- owned it. I think the bank foreclosed on the property, and we did the survey for the bank at the time in 19 -- in 2010.

Q. And do you know whether -- do you have any idea whether North Chicago Lumber was aware of the existence of that water main?

A. Yes, they were.

Q. How do you know that?

A. Because they seen it was put in at the time. Ollie was the owner or the manager, manager/owner I am not sure, and he was there for at least 25 years afterward.

Q. So Ollie Savel owned the property for 25 years?

A. At least, yeah.

Q. And he was aware of the water line the whole time?

A. Yes, he was.

Q. Do you know if he ever did anything to try to have the water line moved?

A. I don't know that information. It was never -- it never occurred at the time during the time I was the City Engineer for North Chicago, and that was from

1960 to 1989.

Q. Did you ever talk with anyone from Edward Hines Lumber Company?

A. No.

Q. Do you know if Edward Hines Lumber Company owned -- do you know anything about their ownership?

A. Yeah, I do. The reason I know about that is because I was on the bank board as a -- it was the NorStates Bank. It was Bank of Waukegan first, and then it was NorStates Bank.

Q. And you were on the bank board?

A. I was on the bank board for 42 years.

Q. Oh wow. What years were those?

A. 1974 through last year.

Q. Okay.

A. '76 to last year.

Q. Did you ever know a Mack Hines by chance?

A. No.

Q. Forgive me if I asked you this.

A. Sure.

Q. Do you have any idea whether Edward Hines Lumber Company knew about the water main?

A. I can't give you an answer. I don't know.

Q. Okay.

A. Wait a minute. If I may?

Q. Sure.

A. Let's see who we did the survey for.

They did because here's a survey that was done in 1999 by Peklay Surveying Company, and it was done for the Chicago Title Company and the Edward Hines Lumber Company, and it has that same note for the City of Waukegan -- or City of North Chicago water main.

Q. I see. Have we marked this as an exhibit?

MR. QUINN: I don't think so. You know what, though? That's attached to and we don't have to mark that. I will show you why here. Just a second.

That was attached to Frank's affidavit that he filed in this case. I think this is the same survey if you wanted to mark that.

MR. DICIANNI: Okay.

MR. QUINN: That would be what No. 7.

MR. DICIANNI: Okay, so let's mark this as Exhibit 7.

(Exhibit No. 7 marked for I.D., 02/14/2019.)

BY MR. DICIANNI:

Q. Frank, were you the one who prepared this

survey which we've marked as Exhibit 7?

A. No, that was prepared by Peklay Surveying.

Q. Okay. And Peklay Surveying prepared this for Edward Hines Lumber Company?

A. Yes, here's the notation of who they prepared it for.

Q. So I want to just briefly go back to why there was never an easement recorded for this property. So to your knowledge, no easement was ever recorded for the water main that ran underneath the 2nd & Main property?

A. That's correct.

Q. And you said that you gave or you asked the City Attorney to do it?

A. I was instructed to prepare a survey for the easement. I prepared it, and then I turned it over to the City Attorney. He was the one that was to get all the easements for the entire line.

Q. Okay. So he must have just forgotten to get the easement or --

A. I can't tell you.

Q. Who knows.

A. Yeah, who knows.

Q. Or it never got recorded; that's the

important part there.

A. It may have gotten lost in the shuffle because he did get easements for other parcels of property.

Q. So you said that you prepared a survey for that water main in 1961?

A. The easement.

Q. Yeah, for the easement.

A. Yes.

Q. In 1961 and then 2013 also?

A. 2010.

Q. 2010. And was there another year in between where they were prepared?

A. No, not me. The other one you are thinking about is Peklay survey in 1999.

Q. Okay. So just the survey in 1961 and the survey in 2010 were the only two you prepared?

A. Yes.

Q. And do you remember if there were any major changes between the surveys in 1961 and 2010?

A. Yes, there were because in 1961 all we did was prepare an easement drawing that had just a portion of the property. In 2010 we did a survey of the entire property including the strip that went down along the

railroad tracks.

Q. And there were new buildings on the property in 2010?

A. Yes.

Q. Do you happen to remember at all what buildings had been built in that interim period?

A. No, I can't tell you.

Q. Yeah, I am asking a lot there.

A. All I can say is that there were more buildings in 2010 than over there in '61.

Q. Do you know if the City ever dug up the water main over the years?

A. Not until they were looking for it. They never -- there was never any question about where that water main was for the 29 or 30 years that I was the City Engineer.

Q. Did you ever get the express permission of any of the property owners to operate the water main underneath their property?

A. Yes, we did from Ollie Savel.

Q. He gave you the express permission?

A. Yes. That's what I said. I did have a meeting with Ollie at the time we staked the second alignment that I was saying. The second alignment

being the one with the drop-down and around the buildings. When he saw that, when he saw a survey crew out there locating how it was going to go, that's when he called and said can we change this alignment, and that's when we had to go back to the railroad. I didn't have to go down, but the Zion Engineers Alvord, Burdick & Howson contacted the railroad to see if they would let us cross at, instead of at exactly a right angle, at a skewed angle so that the line was straight coming all the way across from the lumberyard all the way across the Northwestern Railroad Tracks and across the Sheridan Road.

Q. And throughout that whole time from 1961 to today, the water line has always had water; is that --

A. Yes.

Q. Have you ever been on the 2nd & Main property since you conducted the survey in 1961?

A. Oh, yes.

Q. Why did you go on the property?

A. I bought lumber there.

Q. Okay.

A. It was a lumberyard in North Chicago.

Q. Frank, I'd just like to go through some of these documents that you've brought here and just maybe

get you to comment on some of them. I'd like to look through them and just see if I have any questions here.

This is just a copy of what you brought before, right? This is the one that's titled Plat of Survey.

A. Yeah, but this is not the water main. There is easements here for the sanitary sewer here also because we had both. And if you look at the heading, it says an easement for and it's the maintenance of sanitary sewer. The other one says water main.

Q. Okay. So this one, I see, this one that says plat of survey of, and then a 25-foot easement for the construction and maintenance of a sanitary sewer?

A. Right.

Q. This shows the sanitary sewer and not the water main?

A. Right.

Q. Okay. And then this one too, it says plat of survey, a 22.5-foot easement for the construction and maintenance?

A. Sanitary and the water main. This was at the far west end. This was out by Dugdale Road and 20th Street. That's the farther west end before it goes across Green Bay Road.

Q. Okay.

A. And they were both in one easement there.

Q. Okay. Do you have any idea what this handwritten note is here?

A. Yeah, this is the quitclaim from the railroad to North Chicago. It describes a piece of property of Lots 1, 2, 3, and 4, and it probably could be the -- I assume that it's just a piece of property from one piece of property to the other, but I copied this probably from something at the Recorder's Office.

Q. Okay. Do you have any idea what these documents are?

A. Yeah, these are the handwritten legal descriptions for the sanitary sewer. These are handwritten legal descriptions for the sanitary sewer on this particular sheet.

Q. Okay. And these are the yellow pieces of paper and it's like graph paper?

A. Yes, and if you look, it also says, this one here says, a water main 12-and-a-half feet on either side at 25-foot easement, so they were handwritten products of the surveyors, probably myself. I didn't write these because this isn't my handwriting, but it was probably somebody in my office, one of the fellows

that was working on it for me.

Q. Are you still operating your office?

A. No, I closed up in June of 2014.

Q. Okay.

A. They tore the bank building down, tore my office out. At that point I decided that was enough.

Q. Do you know what this is on the onionskin paper?

A. Sure. This is a copy of the record plat showing Lots 1 through 4, and it would be part of Section 44412. It's part of a copy of a record plat of subdivision.

Q. Okay. Any idea what this table of numbers is here?

A. Yeah, this is staking -- showing the different cuts in Phil's wherever this was at. This was at the corner of 16 and Jackson, which is not on this site, but it's actually out there in the field showing elevations and telling how far down to put their whatever it was, sanitary or water main. In other words, when a survey crew goes out, they set wood hubs, and then they mark on the hubs what the depth has to be below the surface of the ground.

Q. Is this a title commitment for the property

there?

A. Uh-huh, could be. Let's see what it was. Here, see, it was Michael Pusen, the attorney. Anderson & White. Yeah, let's see what we have.

This is way out west. It's the north 33 feet of Lot D in South Waukegan. And it's a Ken Glick was the manager at the time of this document.

MR. QUINN: See, that's a name that doesn't mean anything to you, but it means everything to me. See, when I started, attorneys when they went into private practice usually came from either the State's Attorney's Office or the title company. And so I came from the title company, and Ken Glick came from Chicago Title too, so that's. Now that's not true anymore, but that was almost universally true, came from one place or the other.

MR. DICIANNI: Wow.

BY MR. DICIANNI:

Q. Oh, Michael Pusen, is he still alive?

A. No.

Q. No.

MR. QUINN: Ken Glick is. Ken Glick is still practicing, kind of, I don't know. I think he shows up at the office; I don't know how much he does.

I have seen him there.

THE WITNESS: I did a couple surveys for him just before I finished up in 2014. I seen Ken.

BY MR. DICIANNI:

Q. So this is the letter titled Elgin, Joliet, and Eastern Railway Company.

A. Right.

Q. And you were in talks with them about where to lay the water main?

A. Let me take a look at this real quick.

Yeah, this was a letter back from the railroad to Dean Snarsky who was the Assistant City Attorney saying that the alignment was all right. They had some comments about the angle and so forth and that, but that was the location for this water main.

Q. And then this here, this is another letter from the City Attorney to the railroad?

A. Yes.

Q. Go ahead.

A. This was letting them know where they wanted easements from the EJ & E.

Q. Were you ever in contact with the railroad company at all about where to lay the water pipe?

A. No. We were given the route based on what

the design engineers laid out.

Q. Before, we mentioned Ollie Savel. Were you -- have you ever met any of Ollie's kids before, like Fred Savel?

A. Yeah, yeah. What's Ollie's son's name? Ollie's son took over the operation of the lumber company after his father -- I wasn't sure after he passed or not, but he was there for a number of years before they sold it to Edward Hines.

Q. Okay. Fred, does that name ring a bell, Fred Savel?

A. No.

Q. Okay. He might have had a few different sons. I think one is Fred, but no.

Do you remember who the North Chicago Mayor was at the time you laid this water main?

A. Anton Macrowski.

Q. And then is this a picture of where the water main would run?

A. No, that whole series of pictures there are for the sanitary sewer.

Q. Okay.

A. And they were we shot and we had those shot because there was a lawsuit that was filed between the

contractors who was putting in the sanitary sewer and the City of North Chicago. The City went ahead and had the sanitary sewer laid out on the old Northshore and Milwaukee Railroad Tracks, the shoreline, and they had never contacted the railroad that they were going to get the easement from them. And low and behold, they started putting in this sanitary sewer and they got to the railroad and the railroad said, hey, where do you think you are going, you don't have any easements, and of course there was much discussion back and forth about that, but anyhow, the upshot of it was that the sanitary sewer, instead of going down the railroad tracks at that time, there was a unilateral change in direction to go straight down 16th Street, and that didn't happen because the contractor said, hey, that's not what I gave you a price on; we're not going to go that way, so.

Q. So the City has had some trouble for digging on properties without any easement before?

A. Well, they never got started digging because it got to the point where they were going to go in there, and then they decided. Then when they got the discussion with the contractor who was doing the sanitary sewer, the sanitary sewer that was being built

was started in a couple locations, and the sewer wasn't very good. In fact, I had taken -- at that point we had the equipment to televise the inside of the sanitary sewer, but all we could get from them at that point was Polaroid shots taken off of the TV screen.

I set up a motion picture camera in the trailer, and actually as the television camera was going through the sanitary sewer that was built, I was taking a motion picture film of the sewer. And that was part of the discussion we had when we were in court for the sanitary.

Q. And did you testify in that case?

A. Absolutely.

MR. QUINN: Some of the most fascinating film ever is the inside of the sewer line, if you have ever looked at it. I didn't have any idea that they filmed them until we had a big dispute with Conway Farms out there.

BY THE WITNESS:

A. At that point when I was doing this, all they would give you was a Polaroid. They didn't have the equipment to televise like they do now.

MR. QUINN: Oh yeah, yeah.

BY THE WITNESS:

A. Yeah, so that's why I set up my camera and used black-and-white 400-speed film to pick the information off the television screen.

MR. QUINN: There's nothing that a jury likes to see more than three or four hours of sewer film.

MR. DICIANNI: Sure, that's riveting stuff.

THE WITNESS: Yeah, it's so interesting.

BY MR. DICIANNI:

Q. And these papers, it looks like they are all about the sewer. So was the sewer line laid then at the same time as the water line?

A. Part of it.

Q. Okay.

A. But the part that was laid at the same time was torn out of the ground and redone, it was so bad.

Q. Any idea why it was torn out?

A. Sure. It was leaking. Instead of the line carrying sewage, it was carrying rain water. If you looked at the film, you could see that there was -- the way they built the sewer, at that point there was a different number of different joints that they had, and the joint that Alvord, Burdick & Howson had was a Jude

joint with a cement lining around the way cut. As the cameras was going through the sewer, you had joints that were offset at places where we couldn't get the camera through a 12-inch sewer, and there were places where the alignment for the sanitary was completely under water. They had broken grade so that the camera went completely under water on a 12-inch sewer. And at that point when we finally got done, there was a different contractor that was finally hired to put the E-sewer in after the lawsuit was settled, so the sanitary sewer, part of it was done at the same time the water main was put in, but the majority of it was finally done by a different contractor.

Q. During all your years in working with the property and in North Chicago, was the property always used as a lumberyard?

A. Yes.

Q. Do you know if that railroad next to it had ever -- or the rail spur that was on the property, do you know if that had ever been used?

A. Sure, yes, it was. There were two, there were two spurs on there. They went between the buildings that existed at the time. What they would do is they'd bring the rail cars in that had the lumber

in, then they'd shift the lumber to either side of the rail cars into the proper bins, and from the rail cars to the storage sheds for sale.

Q. You know, I just want to circle back to, I know you said earlier that Ollie Savel gave the City permission to use the water line. Did he ever -- did he tell you expressly that the City could put that water line in there, or do you know if he told anyone?

A. Yes, he did because they put the water line in.

Q. And the City wouldn't have done that had he not given them permission?

A. That's correct. We would have had no access to it if he hadn't given us permission.

Q. And you don't know if any of the other property owners gave the City permission to use the property -- I'm sorry -- to operate the water main, do you?

A. To operate it, no, they wouldn't operate it. They can install it on their property.

Q. Okay. But the subsequent property owners, they never objected?

A. Oh, you mean at the lumberyard?

Q. Yeah.

A. Not that I know of, no.

Q. Okay.

MR. DICIANNI: All right. Frank, I think that's all I have.

John, do you have anything else?

MR. QUINN: I have no more.

MR. DICIANNI: Okay.

MR. QUINN: Signature? Do you want to reserve or -- I am going to have it written up. I don't know if you want to read it or not.

THE WITNESS: No.

MR. QUINN: Okay, he waives signature.

COURT REPORTER: All right, why don't I do this on the record. Do you want to order?

MR. QUINN: Order, yes.

COURT REPORTER: Copy?

MR. DICIANNI: Sure.

(AND FURTHER DEPONENT SAITH NOT)

(WITNESS EXCUSED.)

C0181

STATE OF ILLINOIS)
) SS:
COUNTY OF L A K E)

I, JENNIFER E. GARCIA, CSR, a Notary Public within and for the County of Lake, State of Illinois, do hereby certify that I am a Certified Shorthand Reporter doing business in the County of Lake and State of Illinois; that the foregoing deposition is duly taken and sworn to before me at the time and place and for the purpose in the caption mentioned; that I reported by means of machine shorthand the testimony given at the foregoing proceedings and that the foregoing is a true and correct transcript to the best of my ability of the testimony given by the witness pursuant to my shorthand notes so taken as aforesaid.

I further certify that the taking of this deposition was pursuant to notice and that there were present at the taking of this deposition counsel on behalf of the plaintiff and counsel on behalf of the defendant.

I further certify that the reading and signing of said deposition was waived by the witness.

I further certify that I am not counsel

for nor in any way related to any of the parties to this suit, nor am I in any way interested in the outcome thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on this 23rd day of February, 2019.

Jennifer E. Garcia

JENNIFER E. GARCIA, CSR,
CSR License No. 084-003687

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IN THE CIRCUIT COURT OF THE NINETEENTH JUDIIAL CIRCUIT
LAKE COUNTY, ILLINOIS

THE CITY OF NORTH CHICAGO Plaintiff, v. 2ND & MAIN LLC, UNKNOWN OWNERS and NON-RECORD CLAIMANTS Defendants.	))))))))	19 ED 20

AFFIDAVIT OF PETER E. KOLB

Under penalty of perjury pursuant to 735 ILCS 5/1-109, the affiant states as follows:

1. The affiant is above the age of 18 and if called as a witness to this cause of action will testify to the matters set forth in this Affidavit on his personal knowledge and to a reasonable degree of engineering and scientific certainty.
2. I received a B.S. in Civil Engineering from the University of Illinois in 1977. I am a licensed engineer in Illinois.
3. I functioned as the Chief Engineer for planning, design, and coordination of all capital improvement projects for Lake County, Illinois Public Works Department from 1992 to 2004.
4. I was the Director of Public Works for Lake County, Illinois from 2004 to 2016. A copy of my resume is attached as Exhibit A.
5. A copy of the report that I prepared in this matter is attached as Exhibit B.

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6. Attached as Exhibit C, are drawings of the water main located on the 2nd & Main property and adjoining properties prepared by North Chicago's engineers Alvord, Burdick & Howson in 1961.
7. When constructing a water main under railroad property a carrier pipe is first installed, then the concrete water main is placed within the carrier pipe and it is filled with sand to carry the load.
8. This is done to avoid putting the load of the railroad tracks on the water pipes. Instead, it is put on the outside casing.
9 The water main across the 2nd & Main property was installed without a carrier pipe and is not to railroad standards.
10. The Existing 24-inch diameter pre-stressed concrete cylinder pipe water main on the 2nd & Main property is not sufficiently constructed for the purpose of supporting railroad loadings and does not meet railroad criteria for utility crossings.
11. The existing water main renders the 2nd & Main property unusable for railroad purposes in the area over and north of the existing water main.
12. Further Affiant sayeth not.

Peter E. Kolb

Peter E. Kolb, P.E.

John W. Quinn

Peter E. Kolb, P.E.

Mr. Kolb is a vice president at ATI with over 35 years of progressive, combined experience in public sector management and supervision in engineering, water supply, wastewater processes, and infrastructure refurbishment. He served as Director of the Lake County Public Works Department (LCPWD) in Illinois for 12 years, where he supervised 96 full-time employees. He also managed all department facilities necessary to provide water and wastewater services to over 300,000 retail and wholesale customers, including management of a $110 million Capital Improvement Program.

Education

- B.S., Civil Engineering, University of Illinois, 1977

Professional Registration

- Professional Engineer: California, Illinois

Professional Associations

- American Water Works Association, Illinois Section
- Fox Valley Operator's Association

Project Highlights

Peter has been managing the following projects since joining ATI in December 2016.

Central Lake County Joint Action Water Agency, Illinois
Lake Michigan Water Conversion

Project manager for design and construction coordination to extend the CLCJAWA water distribution system to provide Lake Michigan water to the Villages of Lake Villa and Lindenhurst and Lake County's Grandwood Park and Fox Lake Hills water systems.

Lake County, Illinois

Vernon Hills Water System Electrical Evaluation

Project manager for preparation of an electrical system evaluation for the Vernon Hills Water System.

Teal Lane Lift Station Sewer Rerouting

Project manager for the study of alternatives to reroute sanitary sewer flows from the Teal Lane Lift Station through the Village of Buffalo Grove sanitary sewer system.

Water Main and Sanitary Sewer Infrastructure Assessment

Project manager for the Assessment Study and resulting Five Year Capital Improvements Plan for the County's 305 miles of water and 388 miles of sewer assets.

Wells Abandonment Study

Project manger for preparation of a study to evaluate and recommend abandonment of well facilities in the Fox Lake Hills and Grandwood Park water systems after connection to the Central Lake County Joint Action Water Agency (CLCJAWA) water distribution systems.

Lake in the Hills Sanitary District, Illinois
District Engineer

District engineer working closely with the District Manager and Board to manage projects, maintain quality, oversee project timelines, and engage with stakeholders. Recent projects include a 1,700 foot roadway replacement, Beach Lift Station rehabilitation, electrical system evaluation, washwater pump replacement, and a sewer bypass.

Lakes Region Sanitary District (LRSD), Illinois
Interim District Manager

Peter has been working closely with both the LRSD and Lake County Boards on the process of dissolving the LRSD. More specifically, he is managing the day-to-day functions of the District, including coordination of legislative changes/ provisions that will allow the District to dissolve itself and enter into an agreement for transfer of all funds, assets, staff and service commitments to Lake County.

Village of Lake Villa, Illinois
Monaville Road Lift Station Improvements

Project manager for the design and construction of improvements to the aging lift station. The new station has a capacity of 2,445 gpm to handle 20-year peak hour design flows.

pekolb@ati-ae.com • (847) 265-7325

Applied Technologies
Engineers - Architects

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PETER E. KOLB, P.E.

Villages of Morton Grove and Niles, Illinois
Water Supply Conversion

Project manager for the Village's water supply conversions from the City of Chicago to the City of Evanston. Project involves 33,000 feet of 20-inch and 30-inch water transmission main, two pumping stations, a 7 million gallon reservoir, a crossing of the North Branch of the Chicago River, and a crossing of Interstate I-94.

Wheaton Sanitary District, Illinois
Preliminary Treatment Building Air Handling

Project manager for the study, design, and construction of air handling improvements.

LCPWD Director of Public Works, 2004-2016

Regional Biosolids Facility

Client manager for planning and design of the $30 million expansion of the Des Plaines River WRF. Project included a new biosolids dryer facility, modification of the existing activated sludge facilities for enhanced BPR, and conversion of aerobic digesters into fermentation basins.

General

- Directed operations, administration, and management of all County water supply facilities and sanitary sewage facilities.
- Managed 96 full-time personnel working in six operational areas that provide water and sewer services to 25,000 retail accounts and wholesale sewer service to 18 municipalities.
- Oversaw the operation and maintenance of 12 separate water supply and distribution systems, 3 water reclamation facilities, and 5 regional wastewater interceptor systems.
- Responsible for preparation and management of the Department's $40 million annual operating budget, long-range capital improvement program, and rates and fees. Also prepared all Public Works Committee agenda items, resolutions and ordinances.
- Acted as the County liaison for all water supply and sanitary sewer issues with municipalities and sanitary districts and negotiated agreements on behalf of the County for contractual services.
- Implemented an Automated Meter Reading Program that installed 21,000 water meters in all retail accounts to provide wireless automated readings, usage tracking, and leak detection capability for customers.
- Completed a $7.5 million upgrade of the Excess Flow Facilities in Round Lake Beach to mitigate unauthorized discharges during wet weather events.
- Spearheaded the creation of SSA #16 to fund the construction of a $46 million expansion of the Central Lake County Joint Action Water Agency system to bring Lake Michigan water to 4 communities.
- Managed the design and construction of $32 million in improvements to the Des Plaines River Water Reclamation Facility incorporating enhanced biological nutrient removal and biosolids drying facilities.
- Led the creation of the Des Plaines River Watershed Workgroup, a coalition of Lake County agencies created to collect and analyze data and develop strategies to improve water quality in the Des Plaines River.

Chief Engineer, 1992-2004

- Functioned as Chief Engineer for planning, design, and coordination of all capital improvement projects for the County's Public Works Department.
- Responsible for supervision of engineering personnel within the Engineering Division, review and approval of subdivision submittals, survey parties and contract administration.
- Developed and implemented Department goals, acted as County representative on water and wastewater related issues, and provided professional decisions on engineering and administrative problems.
- Managed several major projects.
  - Water System Improvements Pekara Drive Reservoir ($1.1 million)
  - Mill Creek Wastewater Treatment Plant Construction ($11.5 million)
  - Northeast Lake Interceptor Sewer Construction ($13.5 million)

Applied Technologies
Engineers - Architects

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Clear Thinking

February 28, 2020

Mr. John W. Quinn, Esquire
Churchill, Quinn, Richtman & Hamilton LTD.
Two South Whitney
Grayslake, Illinois 60030

Subject: Phil Dahl Property – 2nd & Main LLC

Dear Mr. Quinn

The following report provides the findings and recommendations provided by Applied Technologies, Inc. (ATI) relative to the subject property in conformance with ATI's Proposal for Engineering Services dated January 21, 2020.

Background:

The subject property is identified as 2nd & Main Street, North Chicago, Lake County, Illinois, and is located approximately 35 miles north of the downtown area of Chicago, Illinois. The property consists of an irregular shaped parcel of land and is approximately 4.17 acres in size. The PINs for the subject property are 12-04-100-005, -015, -017, -029, -030, and -034. The subject property and adjoining properties are located in a commercial/industrial area. The property is zoned M3 by the City of North Chicago Zoning Department and is divided by Nimitz Avenue. The main facility is located to the north of Nimitz Avenue and there is a single overhang storage structure located on the southern portion of the subject property. The northern portion of the site is developed with a small office, several overhang storage structures and three (3) warehouse buildings. The two (2) large warehouse buildings were used for lumber storage and the smaller building housed power saws and planners. The site buildings are either wood-frame construction or metal panel buildings and are no longer in use for lumber sales operation. The northern and southern properties are enclosed with gated chain link fences.

The current property owner Mr. Phil Dahl is investigating options for potential use of the site as a storage area for shipping containers and railroad car access. Possible uses would entail constructing additional railroad spurs to provide access to the entire site. One of the challenges is in identifying underground utilities that are currently crossing the site and restricting potential future use of the property. There does not appear to be any easement

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documentation recorded for the 24-inch diameter water main or for the sanitary sewer main crossing the property. The water main is owned and operated by the City of North Chicago and the sewer line is owned and operated by the Great Lakes Naval Training Center (GLNTC). Other challenges include elimination of the migration of offsite contaminants from entering the property through groundwater infiltration along underground pipeline bedding and backfill trenches.

Impacts to soil and groundwater in excess of Illinois Environmental Protection Agency (IEPA) soil remediation objectives (SROs) were documented in a Phase II ESA completed in 2010 (EPI, 2010). The source of the impacts appeared to be the northern adjoining former Chemical Packaging property.

Scope of Work:

Mr. Dahl enlisted engineering services from ATI to provide for review of existing underground water and sanitary sewer utilities and to prepare recommendations on improvements necessary to maintain existing underground utilities in order to accommodate additional development proposed for the site or to possibly relocate these utilities. It is desired that the site be reconfigured with additional railroad spurs which would require either relocating underground utilities or protecting them in place. There is currently disagreement with the City of North Chicago, who owns and operates the water main on the property, regarding the future use of the property and the potential migration of contaminates from offsite. Mr. Dahl is the Defendant in a current lawsuit with North Chicago regarding the property. Engineering services include review of existing conditions, plans, soils reports, investigation of easement documentation, development of options for underground infrastructure improvements, and to make recommendations and presentations for discussion with affected parties with respect to long term use of the property.

Engineering services will also be provided to function as an expert witness to the client in deliberations with outside parties.

Findings:

Several documents were reviewed with respect to the property and underground utilities including the following:

- Water Mains Construction Drawings, Section 2 Sheets 1 and 2, for North Chicago prepared by Alvord, Burdick & Howson; July 1961.
- Phase II Subsurface Investigation prepared by Environmental Protection Industries (EPI); March 2010.
- ALTA/ACSM Land Title Survey prepared by Northern Illinois Survey Inc.; May 2010.
- Phase II Environmental Site Assessment (EAS) performed by Deigan & Associates, LLC; August 2013.

- Phase II Subsurface Soil Investigation prepared by Stateline Environmental Consulting Services, Inc; August 2013.
- Opinion Letter by JAS Environmental, Inc.; October 2014.
- Deposition of Mr. Frank Furlan, Northern Illinois Survey Inc, and former City of North Chicago City Engineer; February 2019.

Based on review of the listed documents it was determined that there exists a 24-inch diameter prestressed concrete cylinder pipe owned and operated by the City of North Chicago that runs through and beneath the property. This main runs from Marquette Street, westward to Sheridan Road, near the property line with the former Chemical Packaging site directly to the north. The watermain is the main transmission line conveying treated water from the City's water treatment plant on the shore of Lake Michigan to the City's water distribution system. The pipe was installed with conventional open trench methods, bedded with sand at pipe crossings, and backfilled with compacted gravel or tamped earth. The pipe was originally installed in 1961 at a depth of 4.5 feet of cover.

Water main that was installed under railroad tracks was encased in a 48-inch diameter steel casing that was bored and jacked under the tracks. The water transmission carrier pipe was installed inside the steel casing and then the remaining void space was filled with sand. Each end of the casing pipe was sealed with an open joint brick bulkhead. Construction of the water main used gravel or native material for backfilling the original trench. This material is more permeable than the undisturbed soils and offers a pathway for the migration of contaminants within the soil water or within the groundwater. Being more permeable the rate of migration within this preferential pathway can be up-gradient or cross-gradient to the point of release.

Also running through the property is a sanitary sewer line of unknown diameter, owned and operated by the GLNTC. The sanitary sewer line runs from the north property line to the south property line in essentially the midpoint of the property. This line may be a combined sewer as there are catch basins and manholes depicted on the drawings. Construction methods of this line are not known for certain, however it was most likely also constructed using open trench methods and used bedding and backfill materials as well. This material is more permeable than the undisturbed soils and offers a pathway for the migration of contaminants within the soil water or within the groundwater. Again, the rate of migration within this preferential pathway can be up-gradient or cross-gradient to the point of release.

A site visit was conducted on February 21, 2020. In attendance were the property owner, Mr. Phil Dahl, and Mr. Peter Kolb, P.E. of ATI. The goal was to confirm the location and orientation of the water main and sanitary sewer facilities on the site. Mr. Dahl indicated that the City of North Chicago had attempted to locate their water main on a previous date and had excavated in the area of the expected pipe location. The City had excavated to a depth of 10-feet below the surface but was not able to locate their water main. Evidence of this excavation remains. There are two sanitary sewer structures identified on the Title

Survey. One structure is a catch basin in the center of the property and was found to have an open grate cover. There is standing water at the bottom of the structure at about 9 feet deep and there is no apparent water flow as observed from the surface. Further north at the approximate location of the water main is a second catch basin structure depicted on the Title Survey. This structure was unearthed and found to have a solid manhole cover with a pick hole. Upon removing the manhole cover standing water was observed in the structure at about 9-feet deep. The bottom of the structure was found to be at about 9.75 feet deep. There was no apparent water flow in this structure. This may indicate that the two structures and the underground line are a combined sanitary sewer/storm sewer. Further investigation with the GLNTC is necessary to determine the use of this line and connected properties. If this line is no longer providing service to this property or others there may be the possibility of abandoning it and sealing off the preferential pathway blocking the migration of contaminants. If this line needs to remain in place there could possibly be a grout cutoff-wall constructed around the pipe at the northern most point of the property that would then seal off this preferential pathway.

The current owner of the railroad running along the west property line is the Union Pacific Railroad Company. Upon reviewing their criteria for encased non-flammable pipeline crossings, it was determined that each crossing of an underground utility would require installation of a steel casing pipe a minimum distance of 30-feet from the centerline of track to the near face of boring and jacking pits. This would require a minimum of at least 60 feet of steel casing for each railroad crossing.

With respect to the water main along the north property line a minimum distance of 15 feet from the edge of a railroad embankment to the centerline of the existing watermain would need to be provided the entire length of the watermain to allow for future excavation and repair of the line. Given the location of the existing water main this would render approximately 50 feet of area unusable for the entire east-west length of the north property line.

Several environmental studies have been performed at the site and conclusions reached corroborate findings that off-site migration of chemical contaminants present on the former Chemical Packaging site has affected the subject property. Chemical contamination has been documented on the former Chemical Packaging site specifically the presence of benzene, toluene, ethyl benzene, xylenes, naphthalene, and certain heavy metals have been found in soil samples in excess of applicable soil remediation objectives (SROs). Soil samples collected from the northern portion of the subject property have revealed the presence of ethyl benzene and xylenes in excess of SROs. Groundwater samples from borings have revealed the presence of benzene, ethyl benzene and xylenes in excess of groundwater remediation objectives (GROs). The presence of the water main and the sanitary sewer line have provided preferential pathways for the migration of these contaminates and will continue to do so until remediation is provided.

Conclusions and Recommendations:

a) An existing 24-inch diameter prestressed concrete cylinder pipe water main, owned and operated by the Plaintiff, crossing the Defendant's property is not sufficiently constructed for the purpose of supporting railroad loadings and does not meet railroad criteria for utility crossings.

b) The existing water main renders the Defendant's property unusable for railroad purposes in the area over and north of the existing water main. Conventional setbacks would be required of approximately 15 feet from the edge of a railroad embankment to the centerline of the watermain. Given the existing location of the water main this renders approximately 50 feet of area unusable for the entire east-west length of the property.

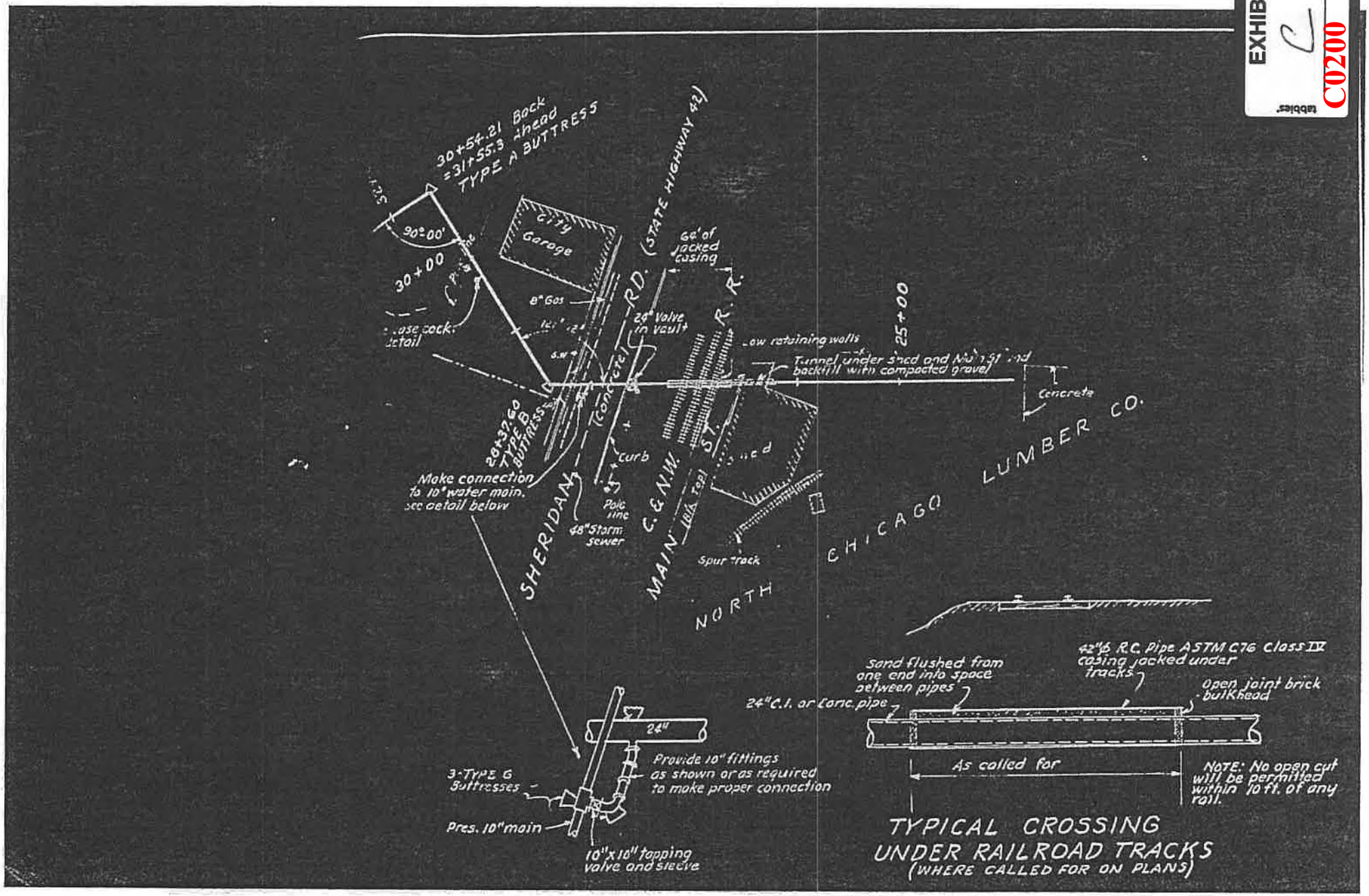
c) An existing sanitary sewer line, owned and operated by the Great Lakes Naval Training Center, runs from the property to the north down and across the Defendant's property to the south of the Defendant's property. The existing sewer line is not sufficiently constructed to meet railroad criteria for utility crossings. Each crossing would require a minimum of 30 feet of pipe casing on either side of the centerline of the track.

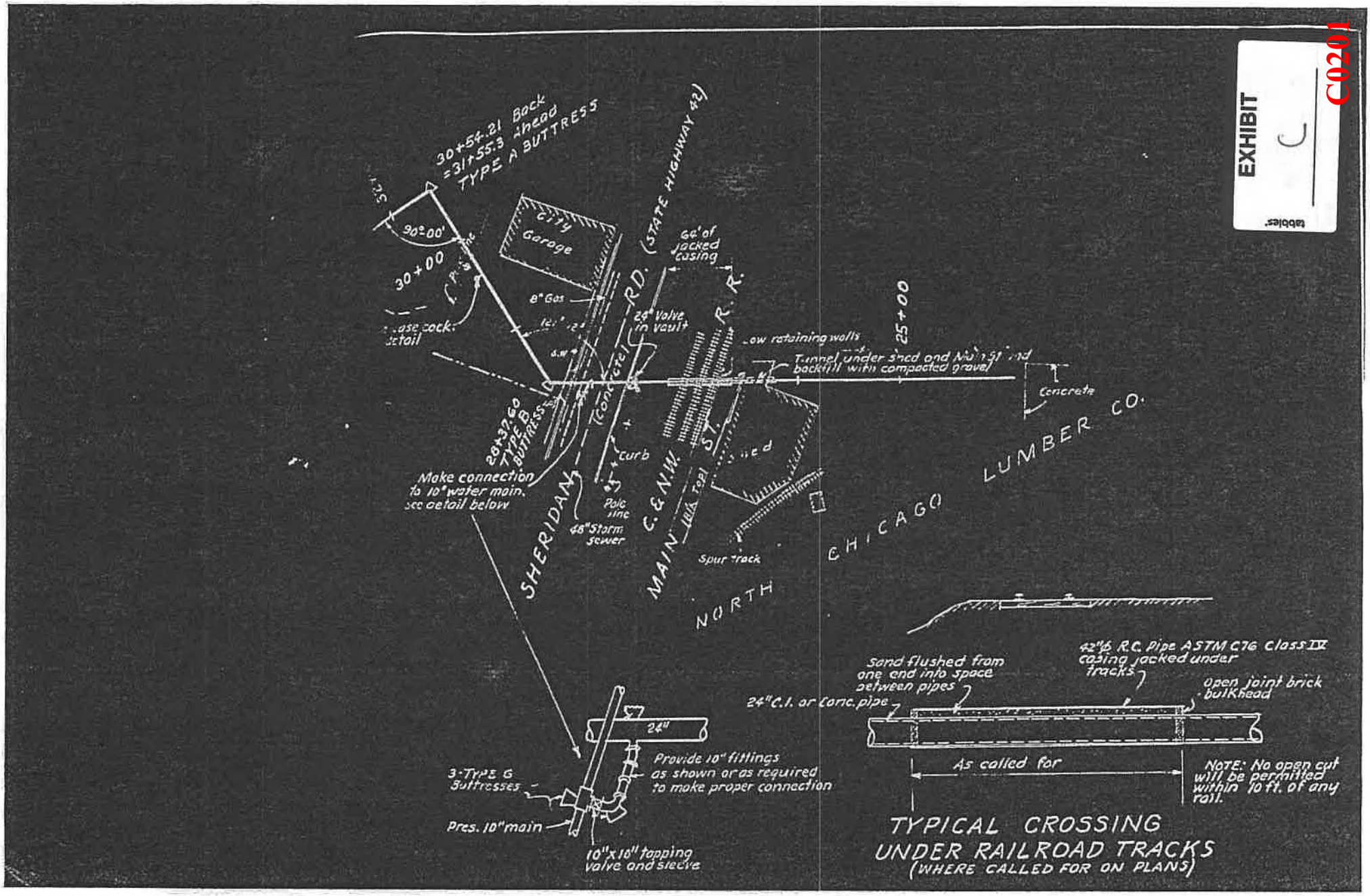
d) The property to the north of the Defendant's property contains environmental contamination and several environmental investigations have revealed the presence of contaminates migrating to the Defendants property. The Plaintiff's water main and the GLNTC sanitary sewer line act as preferential migration pathways for contamination to travel. Bedding material and backfill surrounding the pipes used in the construction of the water main and the sewer line provide a pathway for the migration of environmental contamination across the Defendants property and will continue to do so until remediation is provided.

Best regards,
Applied Technologies, Inc.

Peter E. Kolb

Peter E. Kolb, P.E.
Vice President


EXHIBIT
C0200
30+54.21 Back
=31+55.3 Ahead
TYPE A BUTTRESS
90°00'
30+00
City Garage
6" of jacked casing
8" Gas
24" Valve in vault
R. R.
25+00
Low retaining walls
Tunnel under shed and backfill with compacted gravel
Concrete
26+37.60
TYPE B BUTTRESS
Make connection to 10" water main, see detail below
Curb
Pole line
48" Storm sewer
SHERIDAN RD. (STATE HIGHWAY 42)
C. & N.W.
MAIN
ST.
Spur track
CHICAGO LUMBER CO.
NORTH
Sand flushed from one end into space between pipes
42"ϕ R.C. Pipe ASTM C76 Class IV casing jacked under tracks
Open joint brick bulkhead
24" C.I. or Conc. pipe
As called for
NOTE: No open cut will be permitted within 10 ft. of any rail.
24"
Provide 10" fittings as shown or as required to make proper connection
3-TYPE G Buttresses
Pres. 10" main
10"x10" tapping valve and sleeve
TYPICAL CROSSING UNDER RAILROAD TRACKS
(WHERE CALLED FOR ON PLANS)


EXHIBIT
C
C0201
30+54.21 Back
=31+55.3 Ahead
TYPE A BUTTRESS
90°00'
30+00
City Garage
64' of jacked casing
(STATE HIGHWAY 42)
RD.
8" Gas
24" Valve in vault
C. & N.W. R.R.
25+00
Low retaining walls
Tunnel under shed and N. 1st and backfill with compacted gravel
Concrete
CHICAGO LUMBER CO.
28+37.60
TYPE B
BUTTRESS
Make connection to 10" water main, see detail below
Curb
Pole line
48" Storm sewer
SHERIDAN
MAIN
ST.
Spur track
NORTH
24"
3-TYPE G Buttresses
Pres. 10" main
Provide 10" fittings as shown or as required to make proper connection
10"x10" tapping valve and sleeve
Sand flushed from one end into space between pipes
42" R.C. Pipe ASTM C76 Class IV casing jacked under tracks
24" C.I. or Conc. pipe
Open joint brick bulkhead
As called for
NOTE: No open cut will be permitted within 10 ft. of any rail.
TYPICAL CROSSING
UNDER RAILROAD TRACKS
(WHERE CALLED FOR ON PLANS)

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6/9/2021 3:28 PM
ERIN CARTWRIGHT WEINSTEIN
Clerk of the Circuit Court
Lake County, Illinois

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

The City of North Chicago,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2019 ED 20
	)	
2nd & Main, LLC; Unknown Owners and Non-Record Claimants,	)	
	)	
Defendants.	)	

City of North Chicago's Response to 2nd & Main's Motion for Partial Summary Judgment

Now Comes Plaintiff, the City of North Chicago, through its attorneys, and responds to Defendant 2nd & Main's Motion for Partial Summary Judgment ("Motion"), stating as follows:

Argument

I. Whether the Water Main Interferes with the Property's Use as a Railroad Is a Disputed Issue of Material Fact.

A. The City Has Expert Testimony Disputing 2nd & Main's Claim that the Water Main Will Interfere with the Use of the Property as a Railroad.

2nd & Main predicates its Motion on one fundamental assumption: that the water main interferes with its ability to construct railroad spurs on 2nd & Main's Property (the "Property"). This interference, 2nd & Main argues, requires this Court to "fashion a remedy so that the taking will not interfere with the Defendant's use of the property as a railroad." Mtn. p. 8.

Thus, for this Court to grant this Motion, there must be no dispute that the water main interferes with the use of the Property as a railroad. *See, e.g., People ex rel. First Nat'l Bank v. N. Chi.*, 158 Ill. App. 3d 85, 103 (2d Dist. 1987) ("Summary judgment is properly granted only where there is no genuine issue of material fact"). After all, if the water main does not interfere with the

C0202

construction and operation of railroad spurs on the Property, then there is no need for this Court to order the City to replace the water main or award any of the other relief the Motion seeks.

There is a dispute as to whether the water main interferes with the use of the Property as a railroad. The City has disclosed expert testimony opining that the water main will not interfere with the operation of the Property as a railroad. *See* Rsp. to Rule 2-1.04 Statement, Exhibit A. Thus, this is a disputed issue of material fact, and there is no basis for this Court to grant summary judgment.

2nd & Main claims that the water main is not sufficiently reinforced to bear the weight of a railroad spur operating on the Property above it. Mtn. p. 5-6. The City's expert, Devin Moose, a professional engineer, disputes this claim. *See* Rsp. to Rule 2-1.04 Statement, Exhibit A. In Mr. Moose's opinion, the presence of the water main does not limit 2nd & Main's ability to use the Property for railroad purposes. *Id.* at ¶¶ 3-5. The existing rail spur could operate without additional improvement to the water main infrastructure. *Id.* The northern portion of the Property could be utilized without modification to the rail spur or water main. *Id.* at ¶ 4. The water main does not even run underneath the railroad spur. *Id.* at ¶ 1.

In Mr. Moose's opinion there is no need for this Court to award 2nd & Main the relief sought in the Motion, because the harm the Motion seeks to alleviate, the interference with railroad operations caused by the water main, does not exist. *Id.* at ¶ 5.

Ultimately, this Court cannot grant this Motion because doing so would require it to resolve a disputed issue of material fact—whether the water main will interfere with the use of the Property as a railroad. This is a question for the jury to decide.

C0203

B. Whether the Water Main Will Interfere with the Use of the Property as a Railroad in the Future Is Also a Disputed Issue of Material Fact.

2nd & Main argues that "it does not matter whether or not the Property is currently being used as a railroad" because the City is preempted from using the Property in a way that will interfere with 2nd & Main's plans for the Property's future use. Mtn. p. 6. There will be significant future development of the Property as a railroad, 2nd & Main argues, and thus the water main must be constructed to a standard that will support this future development.

Again, this argument requires this Court to resolve a disputed issue of material fact—whether the Property is capable of being used in a manner that will sustain significant future railroad operations. And 2nd & Main has provided no evidence to show that it will be. The Motion contains no evidence that 2nd & Main's plan to use the Property as a railroad hub is at all viable.

In contrast the City has provided evidence disputing this contention. The City's appraiser, Barton DeLacy, examined whether the Surface Transportation Board exemption had any impact on the value of the Property along with the likelihood that the Property could be used as a railroad hub in the future. *See* Rsp. to Rule 2-1.04 Statement, Exhibit B. In Mr. DeLacy's opinion there is no likelihood that the Property could be used as a railroad hub or for the storage of shipping containers and railroad access. *Id.* at ¶ 8. The Property is located in a blighted area with low levels of economic activity which makes the demand for a railroad hub non-existent. *Id.*

2nd & Main can claim that the Property will be the next major railroad hub in Lake County. That does not mean such a use is likely or warrants a finding that the City's condemnation should be limited because of these plans. There is simply not enough evidence to support its claim that the Property will be used as a railroad hub to warrant the entry of summary judgment.

II. There Is No Basis for this Court to Award 2nd & Main the Relief It Seeks.

There is no basis for this Court to award, in summary fashion, the relief that 2nd & Main seeks. 2nd & Main has provided nothing to support its contention that "if judgment for condemnation is entered, [this Court should order] that the existing water main be replaced by one that meets railroad standards at least as stringent as those set forth in the City's drawings by Alvord, Burdick, and Howson." Mtn. p. 8.

First, 2nd & Main does not explain why this order should be entered if this Court awards condemnation. *See id.* Earlier in the Motion 2nd & Main argues that this relief should only be granted if the Court finds that the water main will interfere with the use of the Property as a railroad, not if an order of condemnation is entered. *See id.* at pp. 5-6.

Second, "[o]n a motion for summary judgment, it is the movant's burden to present matters demonstrating that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law." *Guese v. Farmers Inter-Insurance Exch.*, 238 Ill. App. 3d 196, 200 1st Dist. 1992). 2nd & Main does not meet this burden. It fails to explain why, if this Court enters condemnation in its favor, the City should replace the existing water main with one that is allegedly sufficient to bear the weight of the railroad spurs on the Property. It fails to explain why the standard set forth in the Alvord, Burdick, & Howson drawings is the appropriate standard as opposed to some other standard. There is simply no basis for this Court to enter an order, in summary fashion, requiring the City to replace the water main. The same applies to 2nd & Main's request that "[a]fter the water main is replaced, the property should be put back in the condition that existed prior to the replacement." Mtn. p. 8.

C0205

Conclusion

This Court cannot grant this Motion unless it finds that there is no disputed issue of material fact that the water main will interfere with 2nd & Main's ability to construct and operate railroad spurs on the Property. Such a finding is unwarranted. The City has provided expert testimony disputing this claim. In the opinion of the City's expert the water main will not prevent the construction and operation of railroad spurs on the Property. The City's appraiser finds that there is no likelihood that the Property will be used as a railroad hub in the future, and thus the condemnation action will not affect the ability of the Property to be used for railroad operations. Because of these disputed issues of material fact this Court must deny this Motion. //.

WHEREFORE, Plaintiff City of North Chicago respectfully requests that this Court deny 2nd & Main's Motion for Partial Summary Judgment and grant any other relief it finds to be just.

Respectfully submitted,



By: _____
Matthew DiCianni, Attorney for the City of North Chicago

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6/9/2021 3:41 PM
ERIN CARTWRIGHT WEINSTEIN
Clerk of the Circuit Court
Lake County, Illinois

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

The City of North Chicago	)	
Plaintiff,	)	
v.	)	Case No. 2019-ED-20
2nd & Main, LLC; Unknown Owners and Non-Record Claimants	)	
Defendants.	)	

The City of North Chicago's Response to 2nd & Main's 2-1.04 Statement

NOW COMES the City of North Chicago, through its attorneys Ancel Glink, P.C., and for its Response to 2nd & Main's Rule 2-1.04 Statement, states as follows:

PARTIES

1. 2nd & MAIN, LLC, is the owner of the following real estate (hereafter the "Property") located in North Chicago and described as follows:

> A Part of the North Half of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, described as follows: Beginning at a point on the Easterly Right of Way Line of the Chicago and North Western Railway Company, which point is 772.10 feet measured along said Right of Way Line Southerly of the intersection of said Right of Way Line with the Southerly Right of Way Line of the Elgin, Joliet and Eastern Railway Company; running thence East on a Line parallel with the South Line of said Northwest Quarter of the said Section 4, a distance of 515.8 feet the West Line of Marquette Street; thence Northerly along the West Line of Marquette Street, approximately 220 feet to the Southeast Corner of the former J.W. Aulson and Sons Corporation Property, more particularly described by Warranty Deed dated April 20, 1921 and Recorded April 26, 1921, as Document 201389; thence West 435 feet on the South Line of said Former J. W. Aulson and Sons Corporation Property to said Easterly Right of Way of said Chicago and North Western Railway Company; running thence in a Southerly direction along said Easterly Right of Way Line to the point of beginning, in Lake County, Illinois.

RESPONSE: Undisputed.

2. The City of North Chicago is a municipal corporation.

C0207

RESPONSE: Undisputed.

FACTS SUPPORTING VENUE AND JURISDICTION

3. The property involved in this action is located in Lake County, Illinois.

RESPONSE: Undisputed.

UNCONTESTED FACTS

4. Sometime after 1901, North Chicago installed a 24 inch water main across the 2nd & Main's property without obtaining an easement. (Counter Complaint paragraph 3 and answer).

RESPONSE: Undisputed.

5. On March 6, 2017, 2nd and Main, LLC filed a Notice of Exemption under 49 C.F.R. § 1150.31 with the Surface Transportation Board. A copy of that filing is attached as Exhibit A to the Phil Dahl Affidavit. (Exhibit 1--Affidavit of Phil Dahl paragraph 4)

RESPONSE: Undisputed.

6. On March 22, 2017, the Surface Transportation Board issued its decision regarding the Notice of Exemption. As a result of the decision, the exemption became effective April 5, 2017. A copy of that decision is attached as Exhibit B to the Phil dahl Affidavit. (Exhibit 1--Affidavit of Phil Dahl paragraph 5).

RESPONSE: Undisputed.

7. 2nd & Main plans to use the property that is the subject of the suit and a storage area for shipping containers and railroad access. (Exhibit 1--Affidavit of Phil Dahl paragraph 6)

RESPONSE: Disputed. Contrary evidence is provided by P. Barton DeLacy, the City's appraiser, in his affidavit attached as Exhibit B. Mr. DeLacy opines that the Notice of Exemption adds no value to the Property because there is little opportunity for the Property to be used as a location where significant railroad operations take place. *Id.* at ¶ 5.

8. The property in question has been leased by 2nd & Main LLC to Hussey Terminal Railroad Company. (Exhibit 1--Affidavit of Phil Dahl paragraph 7).

RESPONSE: Undisputed.

9. Attached as Exhibit 2, are drawings of the water main located on the 2nd & Main property and adjoining properties prepared by North Chicago's engineers Alvord, Burdick & Howson in 1961 and provided by Frank Furlan a former North Chicago city engineer.

RESPONSE: Undisputed.

10. When constructing a water main under railroad property a carrier pipe is first installed, then the concrete water main is placed within the carrier pipe and it is filled with sand to carry the load. (Deposition of Frank Furlan Exhibit 3 page 21 and Affidavit of Peter Kolb Exhibit 4 paragraph 7)

RESPONSE: Disputed. This is not always necessary to support the load of the railroad spur on the water main. *See* Exhibit A, Affidavit of Devin Moose, Ex. 1.

11. This is done to avoid putting the load of the railroad tracks on the water pipes. Instead, it is put on the outside casing. (Deposition of Frank Furlan page 21 and Affidavit of Peter Kolb Exhibit 4 paragraph 8))

RESPONSE: Disputed. This is not always necessary to support the load of the railroad spur on the water main. *See* Exhibit A, Exhibit 1.

12. The water main across the 2nd & Main property was installed without a carrier pipe and is not to railroad standards. (Affidavit of Peter Kolb Exhibit 4 paragraph 9)

RESPONSE: Disputed. The City's expert witness, Devin Moose, opines that the water main can bear the weight of a railroad spur if it were to be constructed over the main. *See* Exhibit A, Exhibit

1. Currently, the water main does not run below the railroad spur. Exhibit C, "Deposition Transcript of Peter Kolb," p. 77, ln. 13-16.

13. The Existing 24-inch diameter pre-stressed concrete cylinder pipe water main on the 2nd & Main property is not sufficiently constructed for the purpose of supporting railroad loadings and does not meet railroad criteria for utility crossings. (Affidavit of Peter Kolb Exhibit 4 paragraph 10)

RESPONSE: Disputed. The City's expert witness, Devin Moose, opines that the water main can bear the weight of a railroad spur if it were to be constructed over the main. *See* Exhibit A, Exhibit 1. Currently, the water main does not run below the railroad spur. Exhibit C, "Deposition Transcript of Peter Kolb," p. 77, ln. 13-16.

14. The existing water main renders the 2nd & Main property unusable for railroad purposes in the area over and north of the existing water main. (Affidavit of Peter Kolb Exhibit 4 paragraph 11).

RESPONSE: Disputed. The City's expert witness, Devin Moose, opines that the water main can bear the weight of a railroad spur if it were to be constructed over the main. *See* Exhibit A, Exhibit 1. Currently, the water main does not run below the railroad spur. Exhibit C, "Deposition Transcript of Peter Kolb," p. 77, ln. 13-16.

THE CITY'S STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL FACTS

The following material facts are undisputed or genuinely indisputable:

1. The water main does not intersect the railroad spur on the 2nd & Main Property ("Property"). *See* Exhibit C, "Deposition Transcript of Peter Kolb," p. 77, ln. 13-16. At no point does the water main travel underneath the railroad spur on the Property. *See id.*

2. Devin Moose, a professional engineer with Aptim, Inc. with more than 35 years of experience, has reviewed the documents 2nd & Main and its experts relied upon to conclude that the water main is not sufficiently reinforced to bear the weight of railroad spurs operating on the Property.
3. After reviewing these documents, Mr. Moose concludes that the water main will not interfere with the operation of the railroad spur on the Property. Mr. Moose describes his opinions, and provides his expert report, in an affidavit attached as Exhibit A.
4. According to Mr. Moose, the water main as currently constructed does not interfere with the Property's railroad use and will not interfere with any of 2nd & Main's proposed or future railroad uses of the Property. Exhibit A, ¶ 4.
5. It is Mr. Moose's opinion that the presence of the water main does not limit 2nd & Main's ability to use the Property for railroad purposes or for a storage area for shipping containers and railroad access. *Id.* The existing rail spur could operate without additional improvement to the water main infrastructure. *Id.* The northern portion of the Property could be utilized without modification to the rail spur or water main. *Id.*
6. In Mr. Moose's opinion there is no need for this Court to award 2nd & Main the relief sought in the Motion, because the harm the Motion seeks to alleviate, the interference with railroad operations caused by the water main, does not exist. Exhibit A, Exhibit 1.
7. Barton DeLacy is a licensed appraiser with more than 40 years of experience. Mr. DeLacy performed an appraisal of the Property, which is included with his affidavit attached as Exhibit B.
8. Among the issues that Mr. DeLacy examined was whether the Surface Transportation Board designation that 2nd & Main received would have any impact on the value of the Property or

the way the Property could be used in the future. Mr. DeLacy found that it did not. Exhibit B, ¶ 5.

9. Mr. DeLacy came to this conclusion because there is no demand for the use of the Property as a railroad hub or for the storage of shipping containers and railroad access. *Id.* Mr. DeLacy found that because the Property is located in an area of significant blight with low levels of economic activity and economic opportunity 2nd & Main's plans for the future use of the Property are not viable. *Id.*

Respectfully submitted,

Attorney for the City of North Chicago

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EXHIBIT A

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

The City of North Chicago Plaintiff, v. 2nd & Main, LLC; Unknown Owners and Non-Record Claimants Defendants.	)	Case No. 2019-ED-20

Affidavit of Devin Moose

I, Devin Moose, after being duly sworn, state under oath as follows:

1. I am over 18 years of age, and the statements made in this Affidavit are based on my personal knowledge. If called to testify, I could competently testify to the facts stated herein.
2. I am a Licensed Professional Engineer in Illinois. I have over 35 years of experience in the field of environmental engineering.
3. I reviewed a number of documents discussing the construction standards of the water main located on 2nd & Main's property ("Property"). I also reviewed documents related to the construction of the railroad spur on the 2nd & Main property along with the survey of the Property.
4. Based on my experience and review of the documents it is my opinion that the presence of the water main does not substantially limit the future use of the Property. The existing rail spur could resume without additional improvement to the water main infrastructure. The northern portion of the Property, between the existing rail spur and northern property boundary, could be used for a variety of purposes, including but not limited to housing shipping containers or

C0214

other material storage. The rail spur, therefore, could be utilized without modification to the rail line or the water main.

5. Attached as Exhibit 1 is the expert report that I drafted that contains my findings and opinion regarding the ability of the railroad spurs to be constructed on the Property.

FURTHER AFFIANT SAYETH NAUGHT.

Under penalties as provided by law pursuant to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), the undersigned certifies that the statements set forth in this affidavit are true and correct.

Executed on June 7th, 2021

Devin Moose

SUBSCRIBED and SWORN to

before me this 7th day of June, 2021.

KATHRYN DITORE
Official Seal
Notary Public - State of Illinois
My Commission Expires Jul 22, 2022

Kathryn Ditore
Notary Public

C0215

EXHIBIT 1

C0216

Expert Opinions of Devin A. Moose, P.E., DEE and John P. Low, P.G.

Submitted To:

Mr. Matthew T. DiCianni
Ancel Glink, P.C.
140 South Dearborn, Suite 600
Chicago, IL 60603

Regarding:

The City of North Chicago v. 2nd & Main, LLC
Circuit Court of Lake County, Illinois
Case No. 19 ED 00000020

Submitted by:

Devin A. Moose, P.E., DEE and
John P. Low, P.G.
Aptim Environmental & Infrastructure, LLC

June 2, 2021

Expert Opinions of
Devin A. Moose, P.E., DEE and
John P. Low, P.G.

Submitted to:

Mr. Matthew T. DiCianni
Ancel Glink, P.C.
140 South Dearborn, Suite 600
Chicago, IL 60603

Regarding:

The City of North Chicago v. 2nd & Main, LLC
Circuit Court of Lake County, Illinois
Case No. 19 ED 00000020

Submitted by:

Devin A. Moose, P.E., DEE and
John P. Low, P.G.
Aptim Environmental & Infrastructure, LLC

June 2, 2021

C0218

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Figure 2 Historical Site Investigation Layout Map
Figure 3 Soil Impacts Map – All Constituents North Adjacent Property
Figure 4 Soil Impacts Map – Ethylbenzene
Figure 5 Soil Impacts Map – Xylenes
Figure 6 Soil Impacts map – Benzene
Figure 7 Reported Slag and Foundry Sand Fill Location Map

LIST OF ATTACHMENTS

Attachment A Complaint for Condemnation
Attachment B Curricula Vitae of Devin A. Moose and John P. Low
Attachment C Applied Technologies, Inc. report, dated February 28, 2020
Attachment D1 ALTA/ACSM Land Title Survey
Attachment D2 Copy of ALTA/ACSM Land Title Survey – Zoomed In
Attachment E Phase II Subsurface Soil Investigation (Stateline Environmental, August 16, 2013)
Attachment F Phase II Subsurface Investigation (Environmental Protection Industries, March 2010)
Attachment G Findings of Phase II Environmental Assessment (Deigan & Associates, LLC, August 8, 2013)
Attachment H Water Main Construction Drawings, Section 2 Sheet 1 and 2, for North Chicago (Alvord, Burdick & Howson, July 1961)
Attachment I Selected Soil Boring Logs (Deigan & Associates, LLC, August 8, 2013)

June 2, 2021

Mr. Matthew T. DiCianni
Ancel Glink, P.C.
140 South Dearborn, Suite 600
Chicago, IL 60603

Re: The City of North Chicago v. 2nd & Main, LLC; Unknown Owner and Non-Record Claimants
Circuit Court of Lake County, Illinois
Case No. 19 ED 00000020

Dear Mr. DiCianni,

Aptim Environmental & Infrastructure, LLC (APTIM) has been retained by Ancel Glink, P.C. to provide expert opinions with regard to certain conditions of the acquisition of a water main easement (Easement) by the City of North Chicago (City) from 2nd & Main, LLC on the property commonly known as 1940 Marquette St, North Chicago, Illinois 60064 (Property) in the case listed above (refer to **Attachment A** for the Complaint for Condemnation). 2nd & Main, LLC opines that subsurface utilities, including an east-west oriented water main located beneath the Property owned by the City and a north-south oriented Great Lakes Naval Training Center sanitary sewer line, restrict potential future use of the Property and act as a preferential pathway for environmental impacts to migrate to the Property from off-site sources.

The City installed the water main in 1961. Its approximate location, the Property boundaries, and surrounding properties are illustrated on **Figure 1**.

2nd & Main, LLC is demanding over twenty-five (25) times the Easement's appraised value and further demanding that the City remove the water main and replace it to provide structural support for a rail spur that it may construct for future use on the Property. However, as detailed within this expert opinion, such demands are not justified.

The expert opinions contained herein are as follows:

1. The presence of the water main does not substantially limit the future use of the Property. The existing rail spur could resume without additional improvement to the water main infrastructure. The northern portion of the Property, between the existing rail spur and northern property boundary, could be used for a variety of

purposes, including but not limited to housing shipping containers or other material storage.

2. The environmental impacts to soil reported on the north adjacent property have contributed in only a minor fashion to environmental degradation on the Property, and those on Property impacts appear to be attenuating through natural processes.

3. The importation and placement of foundry sand and fill from smelters on the western edge of the Property, remote from the water main, has contributed substantially more to the environmental degradation of the Property than the historical operations on the north adjacent property.

4. The bedding and backfill within the water main trench have not acted as a preferential pathway for impacts to migrate from off-site sources onto the Property.

Opinion 1 is provided by Devin A. Moose, while opinions 2, 3, and 4 are provided by John P. Low.

I. Expert Qualifications

Devin A. Moose is a Licensed Professional Engineer in Illinois. Mr. Moose has over 35 years of experience in the field of environmental engineering. Mr. Moose's experience and qualifications can be viewed in greater detail on his Curriculum Vitae included in **Attachment B**.

John P. Low is a Licensed Professional Geologist in Illinois with more than 15 years of consulting experience related to environmental site assessments and remedial implementation. Mr. Low earned his B.S. in Geology and Environmental Geosciences and B.A. in Economics from Northern Illinois University and is responsible for conducting environmental site assessments and performing remedial actions for municipalities, private industrial companies, and other clients across the United States. Mr. Low's experience and qualifications can be viewed in greater detail on his Curriculum Vitae included in **Attachment B**.

II. Basis of Opinions

Opinions provided within this document have been formulated based on the following:

1. Education
2. Experience
3. Training and Continuing Education
4. Document Review

III. Document Review

The following documents were provided for review in preparation of this document:

1. Various Documents Produced by Plaintiff
2. Various Documents Produced by Defendant
3. Interrogatories and Admissions of Fact
4. Discovery Depositions
5. Materials Included with, or Cited within, this Document

IV. Compensation

Compensation for these opinions is on a time and materials basis. The hourly billing rates of Devin Moose and John Low are $250 and $140, respectively.

V. Background

According to the Complaint for Condemnation, the City seeks to acquire by eminent domain a water main Easement on the property commonly known as 1940 Marquette St, North Chicago, Illinois 60064. The water main has been in existence for more than fifty (50) years and is an integral part of the City's water system. The City has directed Ancel Glink, P.C. to negotiate with the 2nd & Main, LLC for the purchase of the Easement, which has been undertaken in good faith. 2nd & Main, LLC has rejected the City's offer, which included compensation of 20% greater than the appraised value of the Easement. 2nd & Main, LLC has demanded twenty-five (25) times the Easement's appraised value and is demanding that the City remove the water main and replace it.

2nd & Main, LLC contracted Mr. Peter Kolb, P.E. of Applied Technologies, Inc. to provide opinions and recommendations germane to this Complaint for Condemnation, which include the following:

- An existing 24-inch diameter prestressed concrete cylinder pipe water main, owned and operated by the City, crossing the Property is not sufficiently

constructed for the purpose of supporting railroad loadings and does not meet railroad criteria for utility crossings.

- The existing water main renders the Property unusable for railroad purposes in the area over and north of the existing water main. Conventional setbacks would be required of approximately 15 feet from the edge of the railroad embankment to the centerline of the water main. Given the existing location of the water main this renders approximately 50 feet of area unusable for the entire east-west length of the Property.
- The adjacent property to the north contains environmental contamination and several environmental investigations have revealed the presence of contaminants migrating to the Property. The City's water main and the Great Lakes Navel Training Center sanitary sewer line act as preferential migration pathways for contamination to travel. Bedding materials and backfill surrounding the pipes used in the construction of the water main and sewer line provide a pathway for the migration of environmental contamination across the Property and will continue to do so until remediation is provided.

The text of the report, dated February 28, 2020, is included as **Attachment C**.

2nd & Main, LLC is utilizing these opinions to seek additional compensation for the Easement and demand that the City undertake additional actions to replace the water main and mitigate the migration of environmental constituents from off-site sources onto the Property. However, as detailed within this expert opinion, such demands are not justified.

VI. Opinions

The presence of the water main does not substantially limit the future use of the Property. The existing rail spur could resume without additional improvement to the water main infrastructure. The northern portion of the Property, between the existing rail spur and northern property boundary, could be used for a variety of purposes, including but not limited to housing shipping containers or other material storage.

The Alta/ACSM Land Title Survey (Survey) is included as **Attachments D1 and D2**. The Survey is dated June 18, 1999 and depicts the location of the 24-inch water main, the sanitary sewer line, multiple sanitary sewer manholes, and other key features such as the rail spur. The presence and location of each feature are clearly identified on the Survey, which would have been readily available for review by 2nd & Main, LLC at the time it acquired the Property on June 25, 2014.

As stated in the Applied Technologies opinion, a minimum distance of 15 feet from the edge of a railroad embankment to the centerline of the existing water main would need to be provided to allow for future excavation and repair of the line. The entire existing rail spur is greater than 15 feet from the centerline of the water main. The rail spur, therefore, could be utilized without modification to the rail line or the water main. The area between the north Property line and rail spur, although not suitable to house additional rail lines, could be utilized for other purposes, including but not limited to unloaded rail car storage and other general material storage

The environmental impacts to soil reported on the north adjacent property have contributed in only a minor fashion to the environmental degradation of the Property, and those on Property impacts appear to be attenuating through natural processes.

Environmental impacts on the north adjacent property were reported in the *Phase II Subsurface Soil Investigation* (Stateline Environmental, August 16, 2013 – **Attachment E**). The investigation was limited to the assessment of soil, including the collection of five (5) discrete soil samples from five (5) soil borings (B-1 through B-5) for laboratory analysis of the following constituents:

- volatile organic compounds (VOCs)
- semi-volatile organic compounds (SVOCs)
- polychlorinated biphenyls (PCBs)
- Priority Pollutant List (PPL) metals

The location of each soil boring is depicted on **Figure 2**. The soil boring locations were selected to assess the environmental condition of the southeast portion of the property in proximity to a known underground storage tank (UST) farm, and if present, whether those impacts were likely to have migrated onto the south adjoining property where the water main resides. No groundwater samples were collected, and groundwater conditions were not included in the report.

Soil impacts in excess of Tier 1 soil remediation objectives (SROs) published in 35 IAC Part 742, *Tiered Approach to Corrective Action Objectives (TACO)* were reported in four (4) of the five (5) samples collected. The following constituents of concern exceed their respective SROs, with maximum concentrations indicated:

- ethylbenzene – 310 milligrams per kilogram (mg/kg) in B-2
- toluene – 13,000 mg/kg in B-2
- xylenes (total) – 1,800 mg/kg in B-2
- benzo(a)pyrene – 1.2 mg/kg in B-2
- naphthalene – 2.9 mg/kg in B-1

- mercury – 0.029 mg/kg in B-3

The reported impacts were present in soil samples collected between 4 and 9.5 feet below ground surface (bgs). The soil impacts were reported in excess of multiple exposure routes, as defined in *TACO*, including Soil Component to Groundwater Ingestion for Class I and II resources; Inhalation for residential, industrial/commercial, and construction worker populations; and Ingestion for residential populations. The soil impacts on the north adjacent property are shown on **Figure 3**.

Environmental Protection Industries (EPI) and Deigan & Associates, LLC (Deigan & Associates) performed environmental site assessments on the Property in March 2010 and August 2013, respectively. The EPI investigation consisted of the advancement of four (4) soil borings (B1 through B4) and the collection of one (1) soil sample from each soil boring in between 4 and 8 feet bgs for laboratory analysis of VOCs, SVOCs, and Resource Conservation and Recovery Act (RCRA) 8 metals. One (1) groundwater sample was collected from B2 for laboratory analysis of VOCs and SVOCs. Although a formal report of the sampling was not provided, APTIM reviewed figures, tables, and the analytical laboratory report that were compiled by EPI and their subcontractors (**Attachment F**).

Soil impacts in excess of Tier 1 SROs were reported in two (2) of the four (4) samples collected. The Tier 1 exceedances were limited to the following constituents, with maximum concentrations indicated:

- ethylbenzene – 34 mg/kg in B2 and B3
- xylenes (total) – 220 mg/kg in B2

The reported impacts were present in soil samples collected between 4 and 8 bgs. The exposure routes exceeded were reduced to only the Soil Component to Groundwater Ingestion for Class I and II resources and Inhalation for the construction worker population. The soil samples were collected south of the Stateline Environmental sampling locations, between the north Property line and the water main.

EPI converted B2 into a temporary groundwater monitoring well to facilitate the collection of one (1) groundwater sample for laboratory analysis of VOCs and SVOCs. The laboratory results revealed a limited number of constituents to be present in excess of the Tier 1 groundwater remedial objectives (GROs), including:

- benzene
- ethylbenzene

- xylenes (total)
- dibenzo(a,h)anthracene
- indeno(1,2,3-c,d)pyrene

Ethylbenzene and xylenes exceeded the GROs for Class I and II resources, while benzene, dibenzo(a,h)anthracene, and indeno(1,2,3-c,d)pyrene exceeded only the GRO for Class I resources.

Deigan & Associates performed a Phase II Environmental Site Assessment (ESA) of the Property approximately 3.5 years after the EPI investigation, and concurrently with the Stateline Environmental investigation of the north adjacent property. The Deigan & Associates investigation included the advancement of twenty-six (26) soil borings, of which eight (8) were located between the north property boundary and the water main (SB-4, SB-9, SB-19, SB-20, SB-21, SB-22, SB-23, and SB-26). One (1) soil sample was collected from each of the eight (8) soil borings from depth intervals ranging from 4 to 9 feet bgs, with the exception of SB-22, where four (4) discreet samples were collected ranging in depth from 2 to 10 feet bgs. Soil samples were generally analyzed for VOCs, with the addition of PNAs in SB-20, and metals and PNAs in select intervals in SB-22. The results of the investigation were provided in Findings of Phase II Environmental Assessment (Deigan & Associates, August 8, 2013 – **Attachment G**).

Soil impacts in excess of Tier 1 SROs were reported in only two (2) of the eight (8) soil boring locations. The Tier 1 exceedances were limited to the following constituents, with maximum concentrations indicated:

- benzene – 0.16 mg/kg in SB-20 (8-9')
- lead – 780 mg/kg in SB-22 (2-3')

The one (1) lead impact was reportedly collected from an isolated area of this portion of the Property that contained foundry sand and slag fill and is not attributable to the historic operations on the north adjacent property.

The one (1) benzene impact exceeds only the Soil Component to Groundwater Ingestion for Class I resources.

The soil samples were collected south of the Stateline Environmental sampling locations, between the north Property line and the water main proximal to the EPI sampling locations.

Deigan & Associates converted three (3) soil borings into temporary groundwater monitoring points to facilitate the collection of three (3) groundwater samples for laboratory analysis of VOCs.

None of the three (3) samples reported VOCs in excess of the most stringent Tier 1 groundwater remedial objectives (GROs).

Six (6) constituents, including toluene, ethylbenzene, xylenes, benzo(a,h)anthracene, naphthalene, and mercury, were reported at concentrations exceeding at least one SRO on the north adjacent property, compared to two (2) constituents (ethylbenzene and xylenes) on the Property during the 2010 EPI investigation. The 2013 Deigan & Associates investigation yielded only one (1) constituent potentially attributable to the north adjacent property, benzene, in excess of Tier 1 SROs.

The maximum concentration of ethylbenzene on the Property in 2010 was 34 mg/kg compared to 310 mg/kg on the north adjacent property. The maximum concentration of xylenes on the Property in 2010 was 220 mg/kg compared to 1,800 mg/kg on the north adjacent property. Benzene, which was reported in only one (1) soil sample in either 2010 and 2013, was not reported above the laboratory report limit on the north adjacent property. The distribution of ethylbenzene, xylenes, and benzene on the Property and north adjacent property are depicted on **Figure 4**, **Figure 5**, and **Figure 6**, respectively.

The reduction in the number and concentration of constituents reported between the north adjacent property and the Property indicate that southern migration of these constituents is very limited. The limited constituents reported to exceed any Tier 1 SROs or GROs on the Property by Deigan and Associates indicates that attenuation of these constituents has likely occurred through natural processes between 2010 and 2013, and that significant impacts were not reported in 2013.

<u>The importation and placement of foundry sand and fill from smelters on the western edge of the Property, remote from the water main, has contributed substantially more to the environmental degradation of the Property than the historical operations on the north adjacent property.</u>

The Deigan & Associates Phase II Environmental Assessment report indicates that an approximate 2-foot-thick layer of foundry sand and slag fill was observed during soil boring and classification activities on eastern bank of the Union Pacific Railroad Co. line. The fill was encountered in each of the eight (8) borings advanced on the “south property” and in soil borings SB-7 and SB-22 on the “north property”, as depicted on **Figure 7**.

Of the twenty-six (26) soil borings advanced by Deigan & Associates, ten (10) were located in areas that contained slag. Analytical laboratory results revealed that seven (7) of the ten (10) locations contained soil in excess of Tier 1 SROs. The following fill related constituents were reported to exceed their respective SROs:

- arsenic
- mercury

- lead
- benzo(a,h)anthracene
- benzo(a)pyrene
- benzo(b)fluoranthene
- carbazole
- dibenzo(a,h)anthracene
- indeno(1,2,3-cd)pyrene

Deigan and Associates submitted thirty-three (33) soil samples for laboratory analysis. Eight (8) of the thirty-three (3) soil samples contained Tier 1 SRO exceedances, of which seven (7) are attributable to the impacted fill located on and adjacent to the Property. Six (6) of the seven (7) exceedances were collected from sampling locations that are between 300 and 1,200 feet south of the water main, and do not pose a threat of environmental impact to it.

<u>The bedding and backfill within the water main trench have not acted as a preferential pathway for impacts to migrate from off-site sources onto the Property.</u>

Construction drawings prepared by Alvord, Burdick & Howson, dated 1961 (included as **Attachment H**), contain trench and backfill details for the water main. The details indicate that 2" sand bedding was specified to underlie the 24-inch pipe, and that sand bedding was to be located at a depth between 6.5 and 7 feet bgs. Earth fill in compacted 6" layers was specified for backfilling the full depth of the trench. APTIM assumes the actual construction of the pipe and backfilling was performing in accordance with these specifications.

The boring logs accompanying the Deigan & Associates Phase II ESA report indicate that the Property contains layers of silty clay or clay, slag fill and silty sand from the ground surface to boring terminuses, which ranged from 15 to 20 feet bgs in borings located in proximity to the water main. The silty clay and clay layers begin immediately under the surficial concrete to depths of 5-12 feet bgs, most commonly terminating between 5 and 8 feet bgs. A medium-grained silty sand layer underlies the silty clay/clay layer. The thickness of the sand layer is 1 to 7 feet, most commonly 1-3 feet. The depth to top of sand ranges from 5 – 12 feet bgs, most commonly between 5 and 8 feet bgs. A second medium-grained sand layer was observed in at least eight (8) of the Deigan & Associates soil boring locations, ranging in thickness of 1 to over 11 feet. Refer to the boring logs provided in **Attachment I**.

It is APTIM's understanding that site soils were not evaluated in field or laboratory settings for analysis of hydraulic conductivity. However, typical hydraulic conductivity values (Cherry, 1979) for the geologic units identified by Deigan & Associates are as follows:

- silt and clay: $1x10^{-7}$ – $1x10^{-5}$ centimeters per second (cm/sec)
- silty sand: $1x10^{-4}$ – $1x10^{-3}$ cm/sec

To the limited extent that environmental impacts are mobilizing from off-site sources onto the Property, they are reportedly doing so through the natural, continuous, and relatively conductive sand layers present beneath the Property. The lone petroleum-related Tier 1 SRO exceedance reported during the Deigan & Associates investigation was collected from the upper sand unit in SB-20, located 8-9' bgs. Noticeable petroleum odors and elevated photoionization detector (PID) readings were noted in the upper sand unit on the boring log, and benzene slightly exceeded the Tier 1 SRO in the sample collected for laboratory analysis. Neither the 2" sand bedding layer or the compacted backfill materials are likely to be mobilizing constituents more readily than the natural continuous silty sand layers.

VII. Conclusion

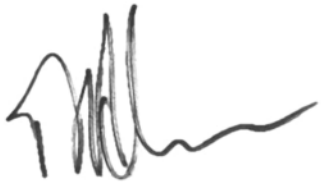
Historic site conditions, including the identification of environmentally impacted soil and groundwater and presence of a 24-inch water main, were documented prior to the June 25, 2014 acquisition of the Property by 2nd & Main, LLC.

The rail spur can be utilized without modification to the rail line or the water main. The area between the north Property line and rail spur, although not suitable to house additional rail lines, could be utilized for other purposes, including but not limited to unloaded rail car storage and other general material storage

Environmental impacts reported on the Property have been reported to originate from the importation and placement of impacted fill material and from historic industrial operations conducted on the north adjacent property. Based on the results of multiple historical environmental site investigations, the impacted fill material has impacted the site with multiple metal and SVOC constituents, largely remote from the City's water main. Limited petroleum related impacts have migrated from the north adjacent property to the Property through a natural, continuous, and relatively conductive sand unit. Neither the 2" sand bedding layer or the compacted backfill materials are likely to be mobilizing constituents more readily than the natural continuous silty sand layers.

Sincerely,

Aptim Environmental & Infrastructure, LLC





Devin A. Moose, P.E., DEE

John P. Low, P.G.

EXHIBIT B

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

The City of North Chicago Plaintiff, v. 2nd & Main, LLC; Unknown Owners and Non-Record Claimants Defendants.	)	Case No. 2019-ED-20

Affidavit of P. Barton DeLacy

I, P. Barton DeLacy, after being duly sworn, state under oath as follows:

1. I am over 18 years of age, and the statements made in this Affidavit are based on my personal knowledge. If called to testify, I could competently testify to the facts stated herein.
2. I am a licensed and certified general real estate appraiser, with licenses in six states, including Illinois. I have more than 40 years of experience as a real estate appraiser.
3. I conducted an appraisal of the 2nd & Main property ("Property"), which is attached as Exhibit 1. In preparing my appraisal I conducted a site inspection of the Property, reviewed the Surface Transportation Board Designation issued for the Property ("STB Designation"), analyzed community demographics and economic development within the City of North Chicago, and reviewed the appraisal performed by the appraiser retained by 2nd & Main, Michael Kendzior, among other things.
4. I am aware that 2nd & Main asserts that the STB Designation significantly increases the value of the Property. I disagree with this assertion.
5. I do not believe that the STB Designation adds any value to the Property. I have found no evidence that this designation is in demand at this location. The area is severely blighted, no

similar uses in the area exist, and economic activity in the area is limited. I cannot project any market premium this designation will create. Simply stated, just because the Property can be used as a railroad does not mean that it will. The highest and best use of the Property is not for use as a railroad hub.

FURTHER AFFIANT SAYETH NAUGHT.

Under penalties as provided by law pursuant to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), the undersigned certifies that the statements set forth in this affidavit are true and correct.

Executed on June 8, 2021

P. Barton DeLacy

SUBSCRIBED and SWORN to

before me this 09 day of June, 2021.

Notary Public

PAMELA ZAMORA NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 08-21-22 205043

C0232

EXHIBIT 1

DeLacy Consulting, LLC
Commercial Real Estate Advisory



Water Main Easement
Before and After Valuation
2nd and Main, LLC v. City of North Chicago

Lake County PINs
12-04-100-005, 12-04-100-029, and 12-04-100-030

DeLCon File 20-015

Valuation Counsel for:
City of North Chicago

Market Value Appraisal
As of
May 16, 2020

C0234

DeLacy Consulting, LLC
Commercial Real Estate Advisory

June 12, 2020

Matthew T. DiCianni, Esq.
Ancel Glink
140 South Dearborn Street, 6th Floor
Chicago, IL 60603

mdicianni@ancelglink.com

Re: Water Main Easement; 2nd and Main, LLC v. City of North Chicago

Dear Mr. DiCianni

At your request we have prepared an updated before and after appraisal of a proposed easement that your client, the City of North Chicago, allegedly failed to secure through the former Norland Lumber Co. site, adjacent to the Great Lakes Naval Training Station for its water main. The owner of the site is suing the City and alleging damages.

Since our original report, dated October 12, 2018, we updated market sales and specifically addressed whether a Surface Transportation Board designation allowing railroad use to override local zoning impacted market value of the underlying property. We also reviewed additional comparable land sales offered by the landowner's appraiser. In the end, there was insufficient new data to change our value conclusions.

Please see the accompanying report for a description of the property, our scope of work and valuation findings.

Do not hesitate to call us if you have further questions.

Very truly yours,

P. Barton DeLacy, M.U.P, MAI, ASA, CRE

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SUMMARY OF SALIENT FACTS

Property Name		North Chicago Lumber	
Location	Address	1940 Marquette St. Terminus of Main Street	
	City, State, Zip	North Chicago, IL 60064	
	County/Township	Lake County/ Shields Township	
Property Summary		Former lumber yard Potential rail terminal; planned container and sand storage site	
DeLCon-AU File No.		20-015	
Assessor PINs	Lake County	12-04-100-005 12-04-100-029 12-04-100-030	
Interest Appraised		Fee Simple	
Owner of Record		2nd & Main, LLC	
Property Type/Use		Former lumber yard	
Zoning	City of North Chicago	M-3 Intensive Industrial	
Land: Building Ratio		NA	
Neighborhood Character		Industrial, rail-oriented	
Total Site Area (sf)	12-04-100-005		108,900
	12-04-100-029		4,356
	12-04-100-030		4,792
Larger Parcel Total Site Area	A		118,048
Total Site Area (ac)			2.71
Parcel Configuration		Irregular	
Water Main Easement (sf)	B		11,030.00
Remainder north of easement	C		12,984.75
Unencumbered site after taking	D=A-(B+C)		94,033.25

C0237

Improvement Summary	Wooden lumber warehouse, steel framed and sided sheds; small office. Three contiguous lots flank extension of Main St.
Gross Building Area	Not available
Year Built	1940-1980
Remaining Economic Life	0-years
Major Tenants	Hussey Terminal, LLC
Dates of Inspection	August 31, 2018 May 16, 2020
Highest and Best Use	Terminal storage
As If Vacant	Terminal storage
As Improved	NA
Property Rights Appraised	Fee simple
Estimated Exposure/Marketing Time	12 Months

VALUATION FINDINGS: Partial Acquisition

MV before the take	**Site Area (sf)**	**MV per sq. ft.**	**Utility**	**Total**
MV Whole Property	118,048	$2.00	100%	$236,096
			Rounded	**$236,000**
Acquisition affected parcels:		**MV per sq. ft.**	**Utility**	**Total**
Easement Acquired	11,030	$2.00	50%	$11,030
Damages: Severed Remainder	12,985	$2.00	50%	$12,985
Property Remainder	94,033	$2.00	90%	$169,260
MV after partial acquisition:	118,048	$1.64		**$193,275**
Just Compensation (MV before less MV after taking)				**$42,725**

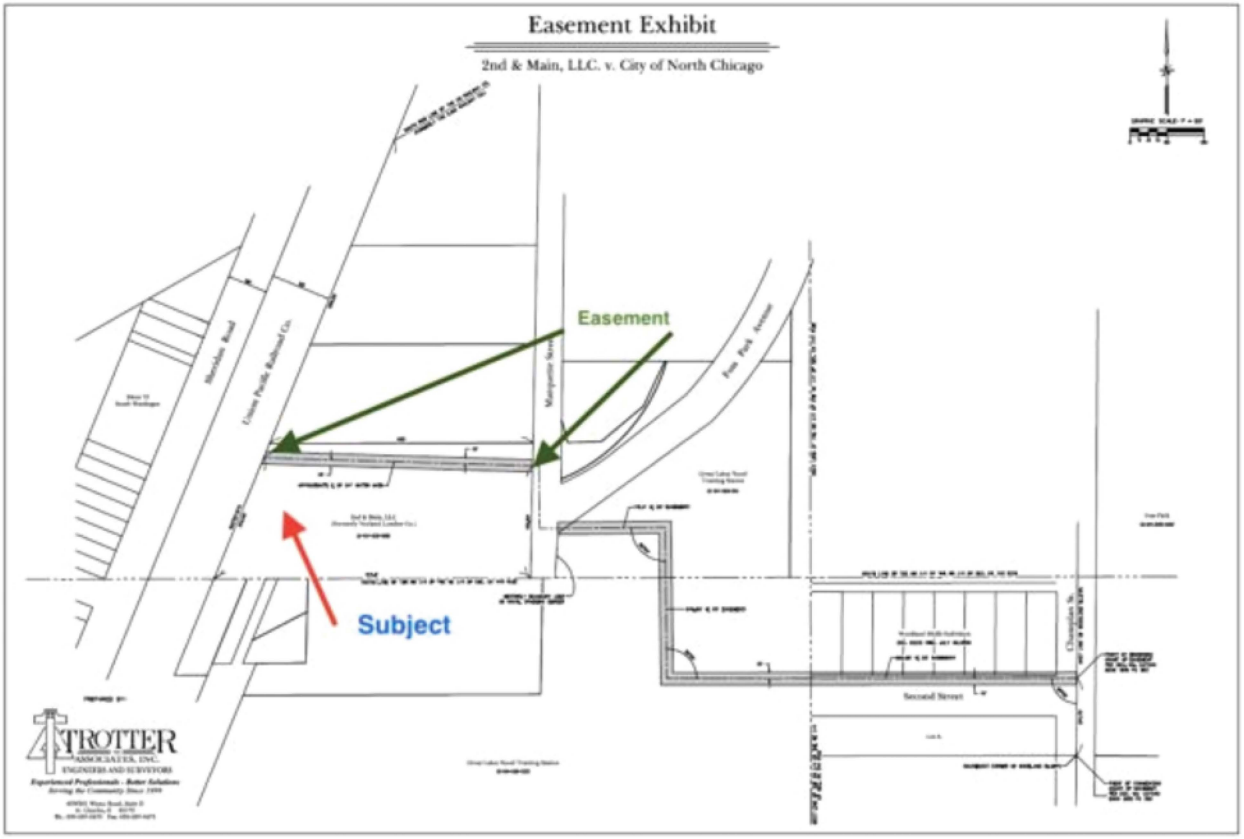
C0238

SUBJECT PHOTOGRAPHS AND MAPS



North Chicago Lumber property facing north

C0239



Water main easement shaded gray, crosses north side of subject property at left



Building footprints from Lake County

SUBJECT PHOTOGRAPHS



North Chicago Lumber property from Sheridan Road, facing east



Access to the subject from Main St., facing north

SUBJECT PHOTOGRAPHS



Rail spur to old shed, facing north (photo from 2016)



Subject site facing northeast toward Sheridan Road

SUBJECT PHOTOGRAPHS



Water main easement route, facing east; shed wall marks proximate north property line



Easement route facing west, passes through steel shed. toward Sheridan Road

SUBJECT PHOTOGRAPHS



Interior of shed; easement runs to right, view facing west



Main Street extension, facing south from southern edge of property

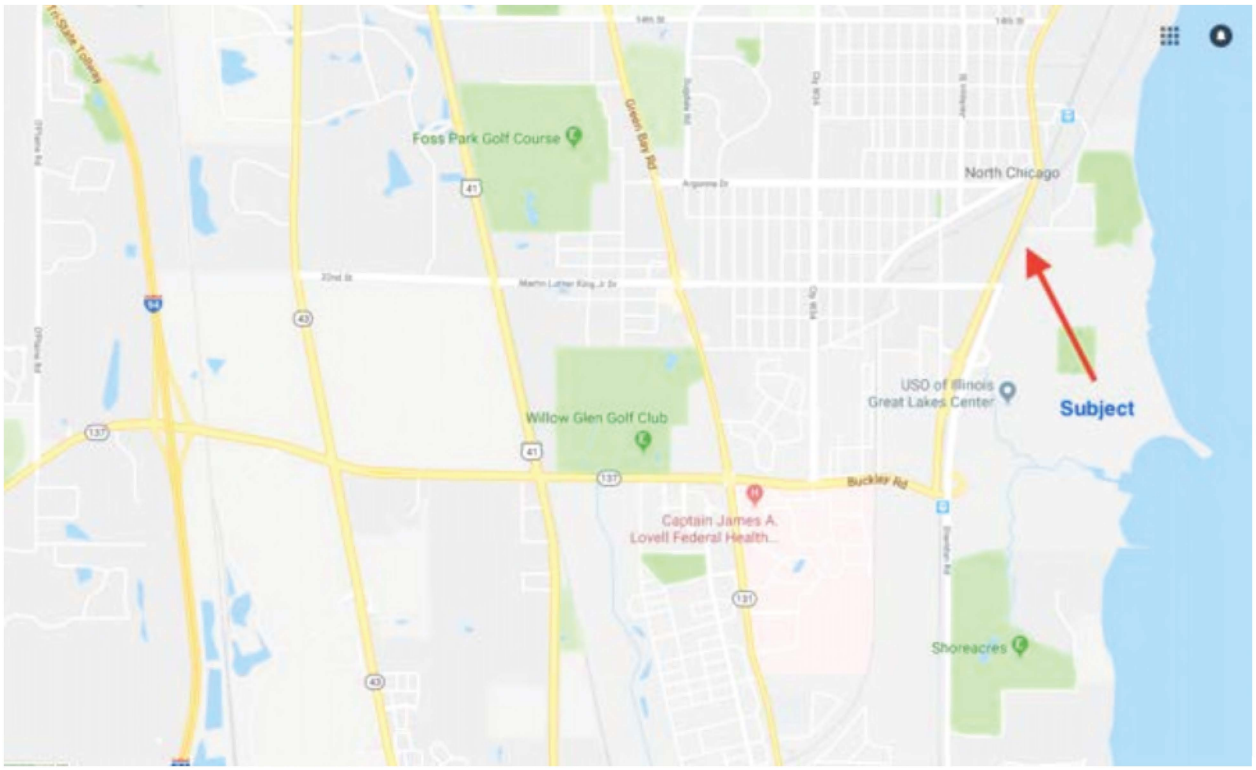
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MAPS



Aerial showing subject (yellow pin) in relation to Naval Air Station, lower right and the Sheridan Crossing redevelopment site to left.

C0246



Relationship of subject to North Chicago

C0247

CERTIFICATION OF REAL PROPERTY VALUATION CONSULTING REPORT

We certify to the best of our knowledge and belief:

1. The statements of fact contained in this report are true and correct.
2. The reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions and are our personal, impartial and unbiased professional analyses, opinions, and conclusions.
3. We have no present or prospective interest in or bias with respect to the property that is the subject of this report and have no personal interest in or bias with respect to the parties involved with this assignment.
4. We performed a prior appraisal of the property under alternate assumptions but with the same valuation date.
5. Our engagement in this assignment was not contingent upon developing or reporting predetermined results.
6. Our compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.
7. This real property appraisal consulting assignment was not based upon a requested minimum valuation, a specific valuation, or the approval of a loan.
8. Our analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the Uniform Standards of Professional Appraisal Practice.
9. The reported analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the requirements of the Code of Professional Ethics and Standards of Professional Appraisal Practice of the Appraisal Institute.
10. The use of this report is subject to the requirements of the Appraisal Institute relating to review by its duly authorized representatives.
11. As of the date of this report, P. Barton DeLacy, MAI, CRE has completed the continuing education program of the Appraisal Institute.
12. Properties that are the subject of this report were inspected as part of this engagement.

P. Barton DeLacy, M.U.P.,
MAI, CRE, ASA
Illinois Certified General Appraiser 553.001797
Expires 9/30/2021

INTRODUCTION

This section presents appraisal-reporting information to comply with the Uniform Standards of Professional Appraisal Practice (USPAP).

CONTEXT

The City of North Chicago (the City) allegedly failed to secure an easement through the former North Chicago Lumber Co. site, adjacent to the Great Lakes Naval Training Station, for its water main. The owner of the site is suing the City and seeking damages. The landowner further asserts that a Surface Transportation Board designation allowing potential railroad use to override local zoning adds a significant increment of value to the larger parcel.

INTENDED USE OF REPORT

This appraisal has been prepared to support expert testimony in a potential eminent domain proceeding.

INTENDED USER OF REPORT

This appraisal is to be used by the City of North Chicago, and no other user may rely on our report without authorization of the undersigned valuers.

PROPERTY IDENTIFICATION

The subject property is a now-closed lumber yard best identified by its Lake County Assessor Property Identification Numbers (PINs): 12-04-100-005, 12-04-100-029, and 12-04-100-030. The site is otherwise located at the terminus of Main Street between The Union Pacific RR adjacent to west and the US Naval Air Station grounds to the east.

REAL PROPERTY INTEREST

The fee simple interest of the property is being valued.

MARKET VALUE DEFINITION

Market value is described, not defined, in the Uniform Standards of Professional Appraisal Practice (USPAP) as follows: A type of value, stated as an opinion, that presumes the transfer of a property (i.e., a right of ownership or a bundle of such rights), as of a certain date, under specific conditions set forth in the definition of the term identified by the appraiser as applicable in an appraisal.

Here, Market Value is defined as: The most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.[1]

[1] Appraisal Institute, The Dictionary of Real Estate Appraisal, 6th ed. (Chicago: Appraisal Institute, 2015), pp 142-3

EFFECTIVE DATE OF VALUE

The subject property was last inspected by the undersigned valuer on May 16, 2020, the date of value. The date of the report is the date of the transmittal letter. This report has been prepared as an "as is" market value, based on the special assumptions, below.

SCOPE OF WORK

Our scope of work included the following tasks:

- Site inspection and interviews with the property owner regarding current and proposed plans for use.
- Consideration of what impact, if any, that a Surface Transportation Board designation allowing railroad use of the underlying larger parcel would have on market value.
- Analyze community demographics and economic development within the City of North Chicago.
- Develop a before and after analysis premised on the hypothetical condition that the City's water main did not pass through the property.
- Develop Sales Comparison Approach to value site, as zoned in the hypothetical "before" scenario.
- Develop analysis of proposed easement on site utility and its impact on value in "after" scenario

REPORT SPECIAL ASSUMPTIONS AND LIMITATIONS

The before and after rule is required by most courts when partial acquisitions, such as utility easements, are acquired. This procedure allows acquiring agencies and the courts to calculate a reasonable measure of compensation by deducting the remainder or after value from the larger parcel's before value. The result is a figure that includes the value of the property acquired as well as any compensable damages. This report seeks to value the subject property under two scenarios:

- Here, the "before" scenario requires a hypothetical condition that values the property as if unencumbered by the water main.
- The "after" value makes an extraordinary assumption that the property is encumbered by an ordinary utility easement.

In addition, the suit by the property owner against the city is being brought under the Illinois Eminent Domain Act (735 ILCS 30/1, et seq.) whereby special benefits to the property must be considered. In this case, no special benefit is found.

HISTORY OF THE PROPERTY

We have no reliable ownership history for the subject property. The owner of record is 2nd and Main, LLC.

To the best of our knowledge, the property was last acquired out of foreclosure by the current owners in June 2014 for $62,000. North Chicago Lumber operated on the property until 2008. The facility has been vacant since then. However, the current owners claim to qualify as a rail road because this property has an operable

rail spur, adjacency to an active line and capacity to serve as a materials storage terminal. Signage on the property indicates it is leased to Hussey Terminals, understood to be a related entity to the property owners.

GENERAL ASSUMPTIONS AND LIMITING CONDITIONS

This valuation/consulting report makes the following assumptions and the analysis is subject to these general limiting conditions:

1. Regardless of any template tool or format employed here, the content, analyses, conclusions, and opinions are those of the valuer. The client has not stipulated values or rents, direction in values or rents, or the results of analyses.
2. The valuer assumes the title is marketable and free and clear of all liens, encumbrances, encroachments, easements, and restrictions, except those specifically discussed in this report. In this analysis, the valuer assumes conditions in which the property would be available for lease or sale under prevailing market conditions.
3. The valuer assumes the property is under responsible ownership and competent management.
4. The valuer assumes there are no hidden or undisclosed conditions of the land or of the improvements which would affect the determination of market value or rent.
5. The valuer assumes that the subject property is not affected by any adverse environmental conditions that would have an impact on the analysis. Such conditions unknown to the valuer could impact the findings.
6. The valuer assumes the property is in compliance with all applicable building, environmental, zoning, and other Federal, state and local laws, regulations, and codes, unless otherwise noted in the appraisal.
7. The conclusions stated in the report apply only as of the date of valuation and no representation is made as to the effect of subsequent events. Any projections are based on existing and past data and cannot be guaranteed.
8. Unless contractual arrangements have been made in advance, the valuer is not required to give testimony, or be in attendance in court or other hearings regarding this appraisal or the property that is the subject of the appraisal.
9. The valuer has not made a survey of the property and assumes no responsibility in connection with such matters. The majority of the spatial data has been supplied by client and is assumed to be correct. Sketches or surveys included in this report are for illustrative purposes only.
10. The valuer is not responsible for considerations requiring expertise in other fields, including but not limited to, legal descriptions and other legal matters, geologic considerations such as soils and seismic stability, engineering, or environmental and toxic contaminants.

11. The appraisal process inherently requires information from a wide variety of sources. The valuer has relied on information provided by other individuals and in good faith believes that information to be reliable. The valuer does not accept responsibility for erroneous information provided by others.

12. The valuation report is subject to the requirements of professional organizations of which the valuer is a member, with regard to peer review and various disciplinary actions. The valuer will not disclose confidential information or assignment results to anyone other than: the client and persons specifically authorized by the client; state enforcement agencies and such third parties as may be authorized by due process of law; and a duly authorized professional peer review committee except when such disclosure to a committee would violate applicable law or regulation.

AREA ANALYSIS

The subject property is located in the City of North Chicago. North Chicago is located on the shores of Lake Michigan in east-central Lake County, 33 miles north of Chicago's Loop along the North Shore. Population in the 2010 census was approximately 32,500. Population continues to decline from a peak of 47,000 in 1970. Projections for 2019 indicate city population has dropped to below 29,500.



The City of North Chicago has sought to alleviate urban blight along some of its arterials by repurposing derelict vacant sites through acquisition and assemblage. This policy has enjoyed modest success in places. The subject property, a former lumber yard, lies just east of the Sheridan Crossing site, running along the west side of Sheridan Road, north of its juncture with Martin Luther King Blvd and the North Gate of the Great Lakes Naval Air Training Center.

Sheridan Crossing is a 30-acre former mill site at the juncture of Martin Luther King Blvd. and N. Sheridan Rd. (Illinois 137) across from the north gate to the Naval Air Training Center. The site's extensive frontage along the west side of Sheridan Road was once "the strip' and home to saloons and other entertainment venues catering to the transient naval personnel population resident at the training center. As the strip declined, the City eventually razed derelict buildings and created a tax increment financing (TIF) district to incentivize redevelopment.

The City of North Chicago's economy is dominated by two major employers: Abbott Labs- Abbvie and the U. S. Navy. Because both employers operate from large secured campuses, employees seldom seem to venture out, except for the daily commute. Many of the Navy personnel are both transient and confined to base housing and services. Hence, neither employer seems to generate much local retail demand. The City has long hoped that the regular stream of visitors to the Naval Training Center, particularly families from

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outside the area, could generate sufficient hospitality demand to trigger at least more motel and restaurant development.

Another conundrum is posed by the geographic proximity of some of the most affluent communities in region; Lake Forest and Lake Bluff, adjacent to the south. Rather than seek to service and thereby integrate an affluent demographic, a combination of institutional campuses, parkland, golf courses and north-south rail lines and highways effectively insulate the communities from each other.



Yellow Pin highlights the subject; arrows indicate significant points of influence

The impact of the Sheridan Road TIF has been diminished by the passage of time. The City established the District in 1998 for 23 years. Expiring in 2021, the District now only has three more years to run. Sheridan Crossing has languished as an unrealized plan for over 10 years. According to a Structured Development site plan, the northern portion of the 30+ acre site will be improved with a "National Gallery" of Naval Art, beyond which would lie green space and a sculpture garden. Retail outpads would otherwise line the west side of Sheridan Rd, behind which would lie parking with retail anchors along the northwest property line.

Neighborhood Comments

The subject property, a relic from the area's mill era now sits as an isolated industrial tract hemmed in by the railroad and the Naval Air Base. Notwithstanding its exposure to traffic on Sheridan Road, access is shunted south to the controlled intersection with MLK Drive. Land use along the Sheridan Road corridor is mixed, though much of the land is vacant.

Adjacent uses include an abandoned former paint manufacturing site to the north. The subject property owners claim it is contaminated. This is significant since the owners fear disturbing soil along the water main could cause seepage onto their property. Transportation corridors, including the Union Pacific RR and Sheridan Road bound the site on the west. Beyond which lies the sprawling and as yet undeveloped Sheridan Crossing acreage. The Naval Air Base effectively flanks the subject on its eastern and southern boundaries. Across the extension of Marquette Street is the parking lot for a large Navy dormitory. The site adjacent on the south is a vacant tract with a PACE bus stop.

The owners claim the property enjoys a Surface Transportation Board designation allowing the site to serve as a railroad terminal where rail cars might be stored. Capacity and economic concerns regarding conversion to such a facility will be discussed further in the highest and best use section infra.

A significant railroad embankment and overpass across Sheridan Road separates the Navy Base-dominated subject area from the old North Chicago downtown and Foss Park, one quarter mile to the north. The Sheridan Crossing assemblage is bounded on its west side by a major trunk rail line. Modest redevelopment has occurred here with commercial space occupied by neighborhood services. The nearby lakefront is accessible to the east at Foss Park. Housing stock west of the tracks and just beyond the Sheridan Crossing project area is predominantly older single family where owner-occupancy rates may be less than 50%.

The Naval Air Base makes for a peculiar neighbor; dominant but not impactful. It is the largest military installation in Illinois and represents the largest training station for the Navy. The base functions as its own city within a city, sealed off from North Chicago by manned gates and perimeter fencing. The 193-acre campus lines the western shore of Lake Michigan and dates to 1904. Even under base closings and realignments, the facility still accommodates over 7,000 recruits at any one time, processing over 40,000 a year. However, because such military facilities are designed to be self-sufficient, the base no longer interacts with local retailers.

This perceived pattern of stagnancy surrounding the subject site supports a long-term interim use for outside storage, perhaps with a rail orientation.

C0255

PROPERTY ANALYSIS

The Larger Parcel

The subject property is a one-time lumber yard dating to the 1940s, but closed and vacant since 2008. The site was purchased over six-years ago for conversion to terminal yard storage. The owners claim to have a Surface Transportation Board designation that overrides any local zoning constraints to all storage of rail cars. The three-parcel assemblage has a single spur to the adjacent Union Pacific RR right-of-way which, according to the owner, makes it ideally suited for terminal rail storage.



The salient Property characteristics are described below:

Property Name		North Chicago Lumber
Location	Address	1940 Marquette St. Terminus of Main Street
	City, State, Zip	North Chicago, IL 60064
	County/Township	Lake County/ Shields Township
Property Summary		Former lumber yard Potential rail terminal; planned container and sand storage site
Assessor PINs	Lake County	12-04-100-005 12-04-100-029 12-04-100-030

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Interest Appraised		Fee Simple
Owner of Record		2nd & Main, LLC
Property Type/Use		Former lumber yard
Zoning	City of North Chicago	M-3 Intensive Industrial
Land: Building Ratio		NA
Neighborhood Character		Industrial, rail-oriented
Improvement Summary		Wooden lumber warehouse, steel framed and sided sheds; small office. Three contiguous lots flank extension of Main St.
Gross Building Area		Not available
Year Built		1940-1980
Remaining Economic Life		None, as improved
Major Tenants		Hussey Terminal, LLC

Zoning

The subject site is zoned M-3, an intensive industrial use zone. According to the City's zoning code, this industrial district is established to encourage the continued growth and expansion of older, existing industrial, transportation and heavy commercial uses. This district is created in recognition of the fact that standards for new development may cause such uses undue hardship[2]. Given the flexibility and intent of this zone, it is difficult to ascribe any further utility to a Surface Transportation Board designation allowing rail car storage.

Property Utility

The subject property appears to have been initially developed as a lumber yard to market finished goods produced by the lumber mill once sited across Sheridan Road. One of the buildings was designed to accommodate a railside served by a spur. The yard, offices and retail outlet closed at the onset of the Great Recession 12 years ago and the property has sat vacant since. In 2014, the current owners acquired the property out of foreclosure with the intent of entitling the site as a railroad-owned tract eligible to serve for terminal yard storage. Although the owners claim a Surface Transportation Board designation allowing rail car storage and have designated the site as "Hussey Terminal," it is questionable whether the site is of sufficient size or suitable configuration for such a use to be viable.

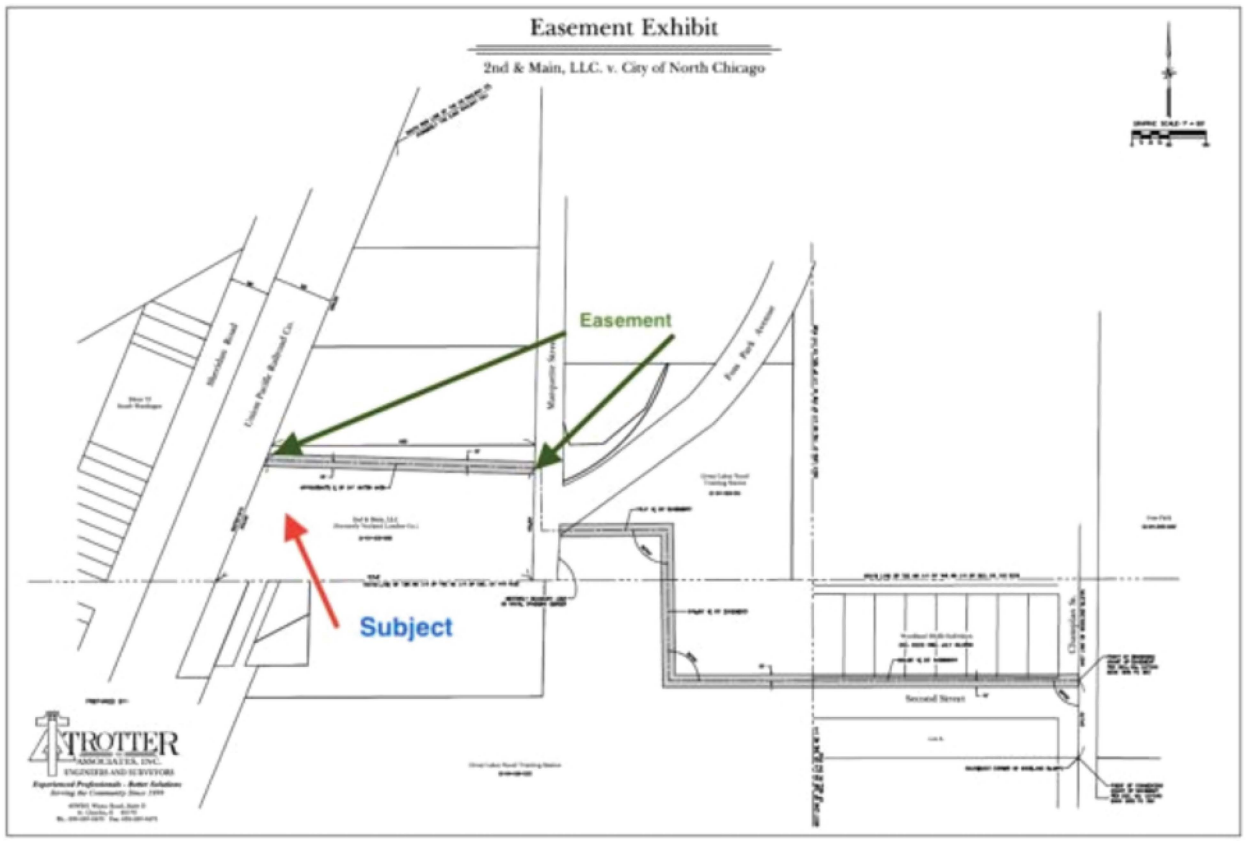
It is unclear to what extent, if any, the improvements as configured add any economic value to the property under this proposed use scheme. Given their age and observed condition, the improvements are considered obsolete and to have no contributory value. The larger parcel is valued as land, only.

The site, as assembled, is considered to have fair utility for yard storage but is poorly suited for many other types of commercial or industrial activities because of limited access and market blight.

[2] See Section 3.1.4.3 M3 - Intensive Industrial District, North Chicago Zoning Ordinance, January 6, 2020

Water Main Description- Proposed Easement

North Chicago has long operated a previously undisclosed 24 inch water main running underneath the northern portion of the subject property, described above as the "Larger Parcel." The water main is depicted as a shaded area in the illustration below. A permanent easement would be taken of at least 25 feet in width to allow trenching and pipeline repair or replacement, over time.



The green arrows show the approximate path of the water main through the northern portion of the subject property

The exhibit shows an easement that the City owns to run the water main underneath the Naval Air Station (which is legally described and recorded). The necessary easement through the subject property was never recorded.

It is unclear how far below the surface the 24" water main runs. An attempt by the city to find the main proved unsuccessful, according to the owner. A permanent utility easement is required by the City in order to access the water main for repairs or replacement throughout its effective economic life. Although the 10 ft wide easement has been described, the apparent depth of the water line might necessitate as much as 25 feet in width to accommodate trenching. Further, the land lying between such an easement and the property line is effectively severed from the rest of the property.

The remainder site, or Larger Parcel after the take, is the remaining square footage lying south or just beyond the proposed easement area.

Larger Parcel After the Taking

The dimensions of the proposed easement area and the severed remainder adjacent to the north are shown below, subject to refinement with a survey:

- Utility Easement Area: 11,030 sq. ft. = 25 ft. wide by 441.2 ft in length of parcel
- Severed Remainder Area: 12, 985 sq. ft.= irregular width varying from 25 to 35 ft across parcel length

The table below sets out the site areas for the underlying larger parcel, followed by the site areas for the proposed water main easement and the severed remainder adjacent to the north. The unencumbered site after the taking, plus the encumbered easement area and the severed remainder constitute the property subject to the after valuation.

Total Site Area (sf)	12-04-100-005	108,900
	12-04-100-029	4,356
	12-04-100-030	4,792
Larger Parcel Total Site Area	A	**118,048**
Total Site Area (ac)		2.71
Water Main Easement (sf)	B	11,030.00
Remainder north of easement	C	12,984.75
Unencumbered site after take	D=A-(B+C)	94,033.25

As was noted above, the current improvements to the site, including a shed over the proposed easement area are at least 50 years old, have not been used in over a decade and were observed to be in only fair condition. They no longer contribute any value to the property.

HIGHEST AND BEST USE ANALYSIS

Introduction

A before and after valuation requires that highest and best use be determined under both scenarios.

The lynchpin for market value is the Highest and Best Use (HBU) analysis, whereby the valuer considers the maximally profitable use for the property among physical, legal and financially viable alternatives. Key considerations include the pattern of surrounding land use, the vector for growth and community needs.

We find that the proposed acquisition of a utility easement will not affect the highest and best use under either scenario.

Definition of Highest and Best Use

According to The Dictionary of Real Estate Appraisal, Sixth Edition (2015), a publication of the Appraisal Institute, the highest and best use is defined as:

> The reasonably probable use of property that results in the highest value. The four criteria that the highest and best use must meet are legal permissibility, physical possibility, financial feasibility, and maximum productivity.

The International Valuation Standards define highest and best use as:

> The use of an asset that maximizes its potential and that is possible, legally permissible, and financially feasible. The highest and best use may be for continuation of an asset's existing use or for some alternative use. This is determined by the use that a market participant would have in mind for the asset when formulating the price that it would be willing to bid.[3]

Highest and Best Use Criteria

We have evaluated the site's highest and best use as if vacant. As such, the property's highest and best use must meet four criteria. That use must be:

(1) legally permissible,

(2) physically possible,

(3) financially feasible, and

(4) maximally productive.

Our conclusions include the following findings:

(1) What is the physical highest and best use?

(2) What is the timing of that use?

[3] Ibid.

(3) Who are the most likely market participants?

a. Who is the most likely buyer type?

b. Who is the most likely user type?

Legally Permissible

The first test concerns permitted uses. The subject is zoned industrial and may benefit from additional entitlements through its current ownership, which claims to be a railroad. A Surface Transportation Board designation is claimed by ownership. While this designation may override local zoning, we find the local North Chicago M-3 zoning fairly permissive regarding open storage or more intensive manufacturing activities.

For valuation purposes the subject larger parcel will be treated as zoned. Importantly, it is our understanding that the existing zoning allows open storage of materials such as sand and gravel for road and rail repair. Alternatively, enclosed storage and fabrication would be allowed, contingent, of course on effective market demand.

Physically Possible

The second test is what is physically possible. The larger parcel is level, at street grade and fully serviced by municipal utilities. Its configuration and overall size of 2.71 acres is ample to accommodate most conforming industrial activities. Although the subject has good exposure to Sheridan Road traffic, access is somewhat circuitous; limited to an MLK Drive overpass accessing Main Street nearly one-half mile to the south. Only a destination storage use could survive such limited access.

The owner claims that the now unused spur crossing the property from the Union Pacific trunk line is active and that this is the last available storage site for terminal road materials in the area.

The effect of the proposed utility easement will be to reduce the site area that might be improved or within a building footprint. The existing buildings, through which the easement will pass, are considered at the end of their useful economic lives. They can continue in use as covered storage but, if rebuilt would likely be moved south of the proposed easement. Open surface container or materials storage should be unaffected by the easement, assuming such materials could be moved in the event that entry to the easement is required.

For valuation purposes we find that the easement and severed remainder effectively lose at least half of their utility. The owner retains rights to use except that building to the property line is precluded.

Financial Feasibility and Maximal Productivity

The third and fourth tests of highest and best use examine financially feasible alternatives and attempt to project what will produce the highest net return. After analyzing the physically possible and legally permissible uses of the property, the highest and best use must be considered in light of financial feasibility and maximum productivity. For a potential use to be seriously considered, it must have the potential to provide a sufficient

return to attract investment capital over alternative forms of investment. A positive net income or acceptable rate of return would indicate that a use is financially feasible.

Although comparably zoned land in the greater submarket has sold recently, many of these sites had sat vacant and available for years. The Service Transportation Board granted an acquisition and operation exemption to the owners, effectively exempting the property from any zoning constraints that might limit railroad activity here. However, we find no evidence in the market to support the premise that the STB designation is in demand in this location. No market premium can be projected.

The Sheridan Crossing project, across Sheridan Road, has also languished for nearly a decade waiting for the local economy to improve, or for anchor-users to commit financially to this location. On balance, this section of the Sheridan Road corridor remains blighted. However, there may be some demand for outside storage in this location because of the adjacency of rail and the absence of suitable sites with similar linkage and zoning.

Highest and Best Use of the Larger Parcel as Though Vacant

Based on this analysis, we have concluded that the highest and best use of the larger parcel, if vacant, and in the hypothetical scenario of a before taking, would be for material storage. The likely purchaser would be a user such as a transportation or material-handling firm.

The highest and best use after the taking would remain the same, only with a reduced yard area.

The improvements to the site are considered to be at the end of their economic life and no longer add value to the property.

C0262

VALUATION ANALYSIS

Methodology

There are three generally accepted approaches available in developing an opinion of value: The Cost, Sales Comparison and Income Capitalization approaches. In appraisal practice, an approach to value is included or eliminated based on its applicability to the property type being valued and the quality of information available. The reliability of each approach is dependent upon the availability and comparability of the market data uncovered as well as the motivation and thinking of purchasers in the market for a property such as the subject. In this analysis, only the Sales Comparison Approach has been applied to the valuation of vacant land in both the before and after scenarios.

Sales Comparison Approach

The Sales Comparison Approach will be used to value the larger parcel in the before the taking scenario. Thus, the subject is being valued as a 2.71 acre industrially-zoned tract, as described above. In the sales comparison approach properties that sold or are listed for sale are analyzed based on common units of comparison. Here, the subject is being valued as a vacant industrial site, hence price per square foot of land area will be the unit of comparison.

The North Lake County Industrial Market Overview

The subject property competes within the greater North Lake County industrial sub-market. Each of the national brokerages maintain occupancy and sale data for each of the major property type categories and typically publish quarterly reports. Boundaries will vary but the findings are often consistent. Here we have used CoStar Analytics. As noted below, their quarterly surveys include over 40 million sq. ft. of investment grade industrial product. The key take-aways are that the vacancy declines and rental increases through first quarter 2020 abruptly halted with the Covid-19 pandemic. The duration on the consequent economic disruption is unknown as of the date of value.

KEY INDICATORS

Current Quarter	RBA	Vacancy Rate	Market Rent	Availability Rate	Net Absorption SF	Deliveries SF	Under Construction
Logistics	25,271,602	3.8%	$6.64	10.1%	(28,701)	0	1,818,172
Specialized Industrial	16,137,082	0.7%	$7.20	3.4%	23,352	0	0
Flex	1,888,864	0.3%	$9.91	2.7%	(1,575)	0	0
Submarket	**43,297,548**	**2.5%**	**$6.98**	**7.4%**	**(6,924)**	**0**	**1,818,172**

Annual Trends	12 Month	Historical Average	Forecast Average	Peak	When	Trough	When
Vacancy Change (YOY)	-2.1%	7.0%	5.1%	12.4%	2010 Q3	2.3%	1996 Q2
Net Absorption SF	1.6 M	432,533	598,827	2,244,075	2019 Q3	(818,555)	2010 Q3
Deliveries SF	721 K	527,934	1,116,344	1,973,827	2019 Q3	0	2015 Q2
Rent Growth	4.5%	2.1%	3.1%	8.4%	1997 Q2	-3.3%	2010 Q1
Sales Volume	$117 M	$60.4M	N/A	$186.9M	2007 Q4	$6.3M	2010 Q1

Investment grade industrial product in the North Lake County submarket lies east of I-90 in the suburbs of Abbott Park, North Chicago, and Waukegan. Most of the building stock consists of 1970s-era warehouses

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characterized by small bay spaces with ceiling heights less than 20 feet. This inventory is interspersed with a few newer institutional-grade assets. The high-bay investment type properties are located around the Amhurst Industrial Center in Waukegan or in Gurnee at the CenterPoint Business Center and the Tri-State Distribution Center. Key occupiers and users include chemicals and pharmaceuticals, durable- and nondurable-goods wholesalers, and medical and surgical equipment supplies. There is also a significant concentration of housing-related tenants who service the local Lake County home-building community.

Long-term, the North Lake County sub-market promises to be stable to improving. Expectations of growth are reflected in the selling of some vacant tracts of land for speculation. Many of these parcels have been on the market for over five years.

Discussion of Comparable Land Sales

We have arrayed eight recent commercial and industrial land sales within the greater North Lake County market and mapped them in relation to the subject. Of the eight selected transactions, five closed in 2018, one in 2019 and the other two since 2015. We included the 2014 sale of the subject. It sets the low end and was reported bought out of foreclosure.

Property Type No	Industrial Subject	Industrial 1	Commercial 2	Industrial 3	Industrial 4	Industrial 5	Industrial 6	Industrial 7	Industrial 8
Address	1940 Marquette St.	254 Park Ave.	Green Bay at Sherman	2909 B Route 12	921 Tower Rd	Oak Grove Bus. Pk 3145 N. Oak Grove Av	Big Door Storage 1401 Wilhelm Rd.	Adj. JQL Tech 1255 Armour Blvd.	800 Northgate Pkwy
City	North Chicago	Lake Villa	North Chicago	Spring Grove	Mundelein	Waukegan, IL	Mundelein, IL	Mundelein, IL	Wheeling, IL
County	Lake	Lake	Lake	McHenry	Lake	Lake	Lake	Lake	Cook
PIN	12-04-100-005 12-04-100-029 12-04-100-030	06-04-109-006	12-05-315-020	04-25-300-024	11-31-202-015	07-01-102-005	15-05-103-016 15-05-103-017 15-05-103-018	45-08-10-483-027	03-03-200-026-0000
Site Area (sf)	118,048	43,560	161,172	123,710	144,184	138,956	87,120	60,984	607,444
Site Area (ac)	2.71	1.00	3.70	2.84	3.31	3.19	2.00	1.40	13.94
Zoning	M-3 Intensive Industrial	LI-2	B -2	I-1	M-1	I-1	M-1	M-2	I-3
Improvements	Former lumber yard; Misc. sheds	shovel-ready site w/ storm detention	Spec development site	Spec development site	Spec development site	Spec development site	Spec development site	Spec development site	Spec development site
Year Built	NA					2019	2020		
Sale Price	$62,000	$104,000	$250,000	$59,000	$363,950	$775,000	$400,000	$300,000	$2,150,000
Municipal Utilities	All	All	All	All	All	All	All	All	All
Configuration	Rectangle	Rectangle	Rectangle	Rectangle	Rectangle	irregular	irregular	irregular	Irreguar
Access	Street	Street	Street	Panhandle	Street	Parkway	Parkway	Parkway	Parkway
MV/ sf site area	**$0.53**	**$2.39**	**$1.55**	**$0.48**	**$2.52**	**$5.58**	**$4.59**	**$4.92**	**$3.54**
Sale Date	Jun-14	Sep-18	Jul-18	May-18	Aug-15	Jul-18	Feb-19	Aug-18	Jun-16
Comments	Facility closed 2008, bought out of foreclosure	on market 8 mo	on market nearly 7 years; day care center intended	easement access; adj. to light industrial development; 50 ft utility easement	Former RR Property; on market 9 years	Off Delany Rd; improved with 70,000 sf whse	multiple building community garage	Sold w/ adjacent building	Excess land sold by Frito-Lay to speculative developer; 7 yrs. On mkt.
Confirmation	Inspection	Robert E. Frank	Dan Grasso, JLL	Premier Commercial	Transwestern	Lake Co, 7503854	Re Max	First Western	CBRE
Grantor		NA	Great Lakes CU	NA	Illinois Central RR	5111 S 9th St LLC	Mary Nash	NA	Frito-Lay
Grantee		NA	Northstar Commercial	NA	NA	Kinter	Big Door Sorage LLC	NA	Hamilton Partners

The sale properties bracket the subject in terms of size and have comparable zoning. All the sales are in the same greater Lake County market, however, only one comparable is from North Chicago; the balance are located in superior industrial corridors to the west or north.

Two changes were made since the earlier 2018 report: we updated the search for more recent land sales and also considered transactions submitted by the owner. This included industrial land sales in superior industrial parks where there is evident market demand for development. We also looked for any evidence that premiums might be paid for rail or container storage in Lake County. The only place where container storage is at a premium in the greater Chicago market is near intermodal facilities along the I-55 corridor in southwest

Cook County and in Will County along the I-80 corridor south of Joliet. No such logistic synergies are in play in Lake County, save for the Kenosha-Pleasant Prairie market area in southeast Wisconsin.

Before adjustment these land sales average $2.90 per sq. ft. including the subject. The land sales range from $0.48 per sq. ft. up to $5.58. Excluding the subject, the unadjusted average value is $3.20 per sq. ft.

Some comments on the sales included for analysis here:

- Sale 1 is a small one acre site in a mature Lake Villa industrial park, the Park Place Business Center. It sold in September 2018 for $2.39 psf for investment and remains undeveloped. This is a superior west Lake County suburb.
- Sale 2 is the only commercial or industrial land sale in North Chicago in five years. This is a 3.70 acre tract that is located in a residential neighborhood in west North Chicago off Green Bay Road. This site sold in July 2018 for $1.55 per sq. ft.
- Sale 3 is located in Spring Grove, a little west of Antioch in McHenry County but shares an easement encumbrance with the subject and has easement access within a small industrial park. This 2.84 acre tract sold for $0.48 per sq. ft. after being on the market for years.
- Sale 4 at 921 Tower Road in Mundelein is actually on Illinois Central Railroad land in an industrial park with access to a main trunk line. This 3.31 acre site sold back in 2015 for $2.52 psf and remains undeveloped after five years.
- Sale 5 is the sale of a 3.19 acre site at the premier Waukegan area Oak Grove Business Park off Delany Road. Before adjustment for location, this July 2018 sale sets the high end of the range at $5.58 psf.
- Sales 6 and 7 are located in the same business park in Mundelein, an affluent Lake County suburb about 10 miles southwest of North Chicago. These two sub-two acre sites sold for $4.59 and $4.52 psf respectively.
- Sale 8 is about twenty miles southwest of the subject in Wheeling where Kraft food sold a larger parcel of excess land for $3.54 per sq. ft. to an investor in June 2016. The site remains vacant.

Adjustment factors are discussed below.

Adjustment Factor	*Explanation*	Applicability
TRANSACTION ADJUSTMENTS		
Property Rights	*What property interest traded; fee, leased fee, partial interest, etc.*	No adjustments, all transactions in fee
Terms of Finance	*Whether sale was for cash or its equivalent, or were there incentives including seller finance*	All sales understood to be cash out

Conditions of Sale	*Closed sale or listing, presence of distress or unusual motivation of parties*	One of the sales was bank-owned; positive adjustment made
Extraordinary Sale Costs	*Accounts for unusual expenditures to achieve sale price; such as demolition, remediation, impact fees etc.*	No such unusual costs either reported or observed
Market Trends	*Changes in market conditions between transaction date and date of value*	Insufficient time and data to support any projection of passive appreciation or value declines

Comparable sales are first adjusted for transaction anomalies before applying qualitative property and location differences with the subject. Superior characteristics required downward adjustments. Inferior attributes were adjusted upward. Note that these adjustments are qualitative.

Adjustment Factor	Explanation	Applicability
PROPERTY ADJUSTMENTS		
Location	*intangible effects of linkages, appeal or rental rate differentials*	The North Chicago location is considered blighted compared to many of the superior suburban industrial and business parks.
Access/exposure	*Linkage to transportation facilities; ease of site access; visibility; traffic counts.*	Access to the site considered circuitous notwithstanding exposure to Sheridan Rd.
configuration/size	*Presence of surplus or excess land area; inverse relationship between size and unit values*	All but one of the sales of comparable size and configuration.
Quality/utility	*Acknowledges significant variance in age, condition, construction quality, functionality and appeal to market*	Downward adjustments were where sale site had superior utility.
Zoning/Entitlements	*Conformance of improvements; special incentives or unusual land use constraints*	No adjustments required; all transactions located incomparable industrial zones. No support for any premium for STB exemption.
Other Considerations	*Special circumstances of transaction affecting comparability*	None observed.

Valuation Findings

Our value calculations are summarized on the table below. After adjustment the sale properties ranged in value from $0.83 to $2.65 per sq. ft., averaging $1.82 per sq. ft. Placing most weight on Sale 2 and the sales requiring least adjustment, we find that the market value of the subject site in the hypothetical "before" scenario, would be based on $2.00 per sq. ft., applicable to the entire site.

The table below summarizes adjustments to each sale, as discussed above.

Property Type	Industrial	Industrial	Commercial	Industrial	Industrial	Industrial	Industrial	Industrial	Industrial
No	Subject	1	2	3	4	5	6	7	8
Address	1940 Marquette St.	254 Park Ave.	Green Bay at Sherman	2909 B Route 12	921 Tower Rd	Oak Grove Bus. Pk 3145 N. Oak Grove Av	Big Door Storage 1401 Wilhelm Rd.	Adj. JQL Tech 1255 Armour Blvd.	800 Northgate Pkwy
City	North Chicago	Lake Villa	North Chicago	Spring Grove	Mundelein	Waukegan, IL	Mundelein, IL	Mundelein, IL	Wheeling, IL
County	Lake	Lake	Lake	McHenry	Lake	Lake	Lake	Lake	Cook
Site Area (sf)	118,048	43,560	161,172	123,710	144,184	138,956	87,120	60,984	607,444
Site Area (ac)	2.71	1.00	3.70	2.84	3.31	3.19	2.00	1.40	13.94
Zoning	M-3 Intensive Industrial	LI-2	B -2	I-1	M-1	I-1	M-1	M-2	I-3
Improvements	Former lumber yard; Misc. sheds	shovel-ready site w/ storm detention	Spec development site	Spec development site	Spec development site	Spec development site	Spec development site	Spec development site	Spec development site
Year Built	NA					2019	2020		
Sale Price	$62,000	$104,000	$250,000	$59,000	$363,950	$775,000	$400,000	$300,000	$2,150,000
Municipal Utilities	All	All	All	All	All	All	All	All	All
Configuration	Rectangle	Rectangle	Rectangle	Rectangle	Rectangle	irregular	irregular	irregular	Irreguar
Access	Street	Street	Street	Panhandle	Street	Parkway	Parkway	Parkway	Parkway
MV/ sf site area	**$0.53**	**$2.39**	**$1.55**	**$0.48**	**$2.52**	**$5.58**	**$4.59**	**$4.92**	**$3.54**
Sale Date	Jun-14	Sep-18	Jul-18	May-18	Aug-15	Jul-18	Feb-19	Aug-18	Jun-16
Comments	Facility closed 2008, bought out of foreclosure	on market 8 mo	on market nearly 7 years; day care center intended	easement access; adj. to light industrial development; 50 ft utility easement	Former RR Property; on market 9 years	Off Delany Rd; improved with 70,000 sf whse	multiple building community garage	Sold w/ adjacent building	Excess land sold by Frito-Lay to speculative developer; 7 yrs. On mkt.
TRANSACTION ADJUSTMENTS		1	2	3	4	5	6	7	8
Property Rights	Fee	Fee	Fee	Fee	Fee	Fee	Fee	Fee	Fee
Adjustment		0%	0%	0%	0%	0%	0%	0%	0%
Terms of Finance	Cash	Cash	Cash	Cash	Cash	Cash	Cash	Cash	Cash
Adjustment		0%	0%	0%	0%	0%	0%	0%	0%
Conditions of Sale	Distressed REO	Market Value	Market Value	Bank-owned	Market Value	Market Value	Market Value	Market Value	Market Value
Adjustment		0%	0%	25%	0%	0%	0%	0%	0%
Market Trends	3rd Q 2018	Not observed	Not observed	Not observed	Not observed	Not observed	Not observed	Not observed	Not observed
Adjustment		0%	0%	0%	0%	0%	0%	0%	0%
Net Adjustments (as % of unit value)		0%	0%	25%	0%	0%	0%	0%	0%
ADJUSTED VALUE/SF GBA		$2.39	$1.55	$0.60	$2.52	$5.58	$4.59	$4.92	$3.54
PROPERTY ADJUSTMENTS		1	2	3	4	5	6	7	8
Location	Average	superior	comparable	inferior	superior	superior	superior	superior	superior
Adjustment		-20%	0%	20%	-20%	-20%	-25%	-25%	-25%
configuration/size	Rectangular	comparable	comparable	inferior access	comparable	Superior	Superior	Superior	comparable
Adjustment		0%	0%	20%	0%	-20%	-20%	-20%	0%
Quality/utility	Average	comparable	comparable	comparable	comparable	superior	superior	superior	comparable
Adjustment		0%	0%	0%	0%	-20%	-20%	-20%	0%
Zoning/Entitlements	Fair	comparable	comparable	comparable	comparable	comparable	comparable	comparable	comparable
Adjustment		0%	0%	0%	0%	0%	0%	0%	0%
Other	Vacant	comparable	comparable	comparable	comparable	comparable	comparable	comparable	comparable
Adjustment		0%	0%	0%	0%	0%	0%	0%	0%
Net Adjustments (as % of unit value)		-20%	0%	40%	-20%	-60%	-65%	-65%	-25%
ADJUSTED VALUE/SF GBA		**$1.91**	**$1.55**	**$0.83**	**$2.02**	**$2.23**	**$1.61**	**$1.72**	**$2.65**

The valuation of the property in the "after taking" scenario may be adjusted by the loss of utility. A permanent easement transfers a portion of the bundle of rights to the dominant estate, in this case, the City of North Chicago. As understood, the easement would effectively prohibit construction on or over the area taken, though the subservient interest, the property owner could use the encumbered parcel for open storage. The assumption being that such material placed there could be moved in the event the City required entry for whatever reason to service or repair the water main.

The placement of the proposed easement would also restrict the use of what is effectively a severed remainder; the narrow strip of land lying between the easement and the north property line, described above.

Ideally, sales of similarly impaired tracts of land might be compared with the subject. However, we found only very limited industrial land sale activity in North Chicago and only one sale encumbered by what appears to be an even more restrictive 50 foot easement.

We have found that the lost utility of the part taken plus the damage to the remainder is equal to 50% of the unencumbered market value. The remainder property may suffer diminished utility as well, of say 10%. The resulting market value of the remainder in the "after taking" scenario is calculated as follows:

VALUATION FINDINGS: Partial Acquisition				
MV before the take	**Site Area (sf)**	**MV per sq. ft.**	**Utility**	**Total**
MV Whole Property	118,048	$2.00	100%	$236,096
			Rounded	**$236,000**
Acquisition affected parcels:		**MV per sq. ft.**	**Utility**	**Total**
Easement Acquired	11,030	$2.00	50%	$11,030
Damages: Severed Remainder	12,985	$2.00	50%	$12,985
Property Remainder	94,033	$2.00	90%	$169,260
MV after partial acquisition:	118,048	$1.64		**$193,275**
Just Compensation				**$42,725**
(MV before less MV after taking)				

C0268

ADDENDA

- Appraiser Qualifications

C0269

P. BARTON DELACY, M. U. P., MAI, ASA, CRE
DeLacy Consulting, LLC
Professional Qualifications

Career Experience

DeLacy Consulting, LLC is a Chicago-based boutique real estate consulting firm specializing in valuation counsel, property tax consulting, appraisal services, litigation support and Renewable Energy Valuation. Renewable Energy Valuation focuses on the real estate implications of electric power generated when using renewable fuels; i.e. wind, solar, biomass or other non-fossil fuels.

P. Barton DeLacy brought 35 years of advisory experience to the firm, founded in 2013. His seasoned perspective spans all North American geographies and touches virtually all property types. In his corporate career, including practice leadership positions at Cushman & Wakefield, CBRE and Arthur Andersen, DeLacy concentrated on working with corporate clients and public institutions.

Mr. DeLacy was a Senior Managing Director and spent eight years at Cushman & Wakefield in Chicago and Portland, Oregon. Prior to joining C&W, DeLacy logged over 20 years as a partner or principal of fee appraisal and consulting firms. From 1998-2002 he led the real estate consulting practice in the Pacific Northwest for Arthur Andersen LLP. DeLacy began his career in 1977 as a residential appraiser for the Oregon-based Benj. Franklin Savings and Loan.

In addition to conventional appraisal assignments, Mr. DeLacy's counseling practice centers on problem solving engagements where valuation is incidental to the solution. Specialties include trust and estates, property tax consulting, litigation support, integrated business, personal and real property appraisals, land use impact studies, and counseling for non-profit businesses and institutions with real estate assets.

Academic Education

- **Master of Urban Planning** (M.U.P.), Portland State University -1988
- **Bachelor of Arts** (B.A.), Willamette University, Salem, Oregon -1975
- University of Oregon School of Law, Eugene, Oregon 1976-7
- School of Irish Studies, Dublin, Ireland 1974

Professional Credentials

- CRE Member, Counselors of Real Estate (No.2128) - 2003
- ASA Member, Urban Properties, American Society of Appraisers- 2002
- MAI Member, Appraisal Institute (No. 6680) – 1983
- SRA Member, Appraisal Institute- 1980
- AI-GRS Member, Appraisal Institute, general appraisal review specialist -2014
- Member, Lambda Alpha International, land economics honorary- 2013

Renewable Energy Valuation

Mr. DeLacy's energy experience spans the spectrum of energy generating facilities; from renewables to fossil fuel-based thermal power plants. He has built valuation models and studied property value impacts made by wind and solar farms as well as fossil fuel fired generating plants. He has also developed adaptive re-use studies for obsolete thermal plants.

- Retained to perform wind farm impact study in Fillmore and Saline Counties, Nebraska for edp Renewables. 2019
- Retained to advise on property tax appeal for a 5.0MW windfarm in Colebrook Township, Connecticut, 2019

- Undertook regional study across three-county "thumb" of Michigan for DTE Energy to test whether over 758 wind turbines accounting for 1,324 MW of nameplate capacity had impacted property values in area. 2018
- Retained by statewide contract assessor to develop methodology for ad valorem valuation of 24 MW utility-scale wind farm in Sullivan County, New Hampshire. 2017
- Developed impact study regarding a proposed 20 MW solar farm in Dorchester County, Maryland. 2017
- Valued private municipal power plant and municipal heating system serving the City of Fairbanks, Alaska. 2011 and 2017.
- Valued municipal landfills in Puerto Rico and Alabama for financial reporting. 2016
- Valued entire 17.3 sq. miles of city-owned right of way for Spokane, Washington to establish collateral for annual maintenance payments between Streets and Utilities Divisions. 2015
- Valuation of small utility scale wind farm in Teton County, Montana. Follow-on advisory work included counsel for property tax appeal. 2015
- Appraised 3.24 MW solar farm in Macon, Missouri for conventional financing. 2015
- Valued proposed waste-to-energy anaerobic biodigester to be installed on former Air Force base in Brunswick, Maine. 2015, 2018
- Wind farm land lease market study for US Forest Service advising them on best practices for first wind farm on National Forest lands in Vermont. 2014
- Valued portfolio of single and double turbine distributive small wind projects funded by California Self Generation Incentive Program. 2013-15
- Valued portfolio of installed distributive solar installations on several high schools in Douglas County, Colorado in bankruptcy case for FITI Consulting. 2014
- Valued proposed 3.0 MW utility scale solar power plant on leased airport land in Rockford, Illinois for Cole Taylor Bank. 2012
- Retained by Booze Allen Hamilton to identify development opportunities, including solar energy sites, at 55 CONUS Air Force bases where Enhanced Use Leases were present. 2012
- Counseled the Arizona Department of State Lands regarding land lease rates for wind and solar development near the Grand Canyon National Park. 2011
- Valued Skypower's portfolio of eight 10 MW solar farms in Ontario Canada for CalPERS. 2010
- Valued proposed solar power plants at Onyx Ranch, Kern County, CA. 2009-11
- Retained as valuation consultant by Indiana County in assessment negotiations with major independent system operator (ISO) on 2,000 MW coal-gas thermal power plant.
- Developed adaptive reuse study for wholesale power supplier on a gas power plant that may be converted to a peaker station on the California Coast. 2011
- Developed collateral valuation of 120 MW coal-burning power plant for conversion to plasma gasification near Fall River, Massachusetts. 2009
- Valued proposed 400 MW utility scale wind power project on Island of Lanai in Hawaii. 2008

Subject Matter Expert-Litigation Support

Mr. DeLacy has appeared as an expert witness or prepared expert testimony in eminent domain proceedings, property damages cases, bankruptcy hearings, land use hearings and property tax appeals. He has analyzed rural land use impacts and performed valuations for siting energy facilities including wind turbine farms, cell towers and power generating plants.

Specifically, Mr. DeLacy has qualified as an expert witness in real property valuation cases for United States Circuit Courts in Connecticut, New Jersey, Oregon, Illinois and Northern California. Mr. DeLacy has presented expert testimony in property tax appeals at various levels in Oregon, Washington, Missouri, Illinois, Georgia and Montana.

He has also been retained by the US Departments of Justice and Interior, Bureau of Indian Affairs, the Department of Defense (US Navy), US Forest Service, General Services Administration (GSA) and Internal Revenue Service as a valuation expert.

Dispute Resolution and Public Testimony

- Deposition and Trial Testimony in Superior Court of Connecticut. Wind Colebrook South, LLC v Town of Colebrook: at issue the classification and ad valorem assessment of 5.0 MW windfarm in Colebrook, Connecticut, 2019.
- Clifford et al v. Village of GlenEllyn and True North Energy, in the Circuit Court of the Eighth Judicial Circuit, DuPage Co., Illinois. Expert testimony regarding property value impacts of proposed gas station-convenience store siting on commercial site in Village of Glen Ellyn, Illinois, 2019
- Deposition in 2nd & Main LLC v. City of North Chicago. Expert testimony regarding before and after valuation of proposed easement taking on industrial site in North Chicago, IL, 2019. Trial pending
- Deposition in Multiple Plaintiffs v. Advanced Disposal Services Zion Landfill, Inc. Expert testimony regarding diminution in property values caused by land fill expansion near Winthrop Harbor, IL. 2018
- Expert testimony regarding property value impacts of proposed cell tower siting on church-owned site in Village of Olympia Fields, Illinois before planning board, June 2016
- Hunt Building Corp. as appellant v. Mead County, South Dakota in matter of consolidated tax appeals regarding Ellsworth Air Force Base housing project, aka, Antelope Ridge near Rapid City, SD; deposition as tax payer's expert witness; January 2015; Trial June 2016 Civ. No. 12-335
- Expert testimony before 45th Judicial Circuit of Lincoln County, Missouri; Foremost Insurance Company v. Peters Heating & Air Conditioning; regarding diminution in value on rural residential property; June 2014
- Expert testimony before 21st Judicial Circuit Court of St. Louis County, Missouri; City of St. Louis and Factory Mutual Insurance v. Guarantee Electrical, et. al.; regarding diminution in value at central utility plant at Lambert Field; November 2013
- Expert testimony at settlement conference before Federal Circuit Court of New Jersey on pipeline condemnation of railroad right of way; Texas Eastern Transmission, LLP v. Consolidated Rail Corporation, September 2013
- Served as lessor representative on three-member arbitration panel in lease dispute regarding Philadelphia area data center, King of Prussia, Pennsylvania, 2012
- Expert testimony in the 43rd judicial Circuit Court, DeKalb County, Missouri; property tax appeal, Lost creek Wind, LLC v. Assessor, DeKalb County, Missouri, 2012
- Expert testimony before Lowndes County Board of Equalization re: property tax appeal regarding Magnolia Grove, base housing project, Moody AFB, Valdosta, Georgia, 2011
- Expert testimony before Illinois Property Tax Appeal Board, re: Lincolns Landing, St. Clair County, December 2010
- Served on three-member American Arbitration Association Panel: Shannon v. Mackay, AAA Case No 74 180 Y 0067208 DEAR, May 2009
- Prepared written and oral testimony for EFSEC, the Energy Facility Site Evaluation Council of Washington State for wind power projects, as expert for applicants, in Kittitas County, 2005-7

Select Publications

- Contributor to "Chapter 6 - Valuation of Real Estate." Valuation Strategies in Divorce. 5th Edition, 2019-1 Supplement. New York: Wolters Kluwer, 2019.
- Author of "Chapter 12 - Introduction to Real Property." Valuing Specific Assets in Divorce. 2019-1 Supplement. New York: Wolters Kluwer, 2019.
- "Living on the Grid," Book Review of Access, Property and American Urban Space by M. Gordon Brown, *The Appraisal Journal,* Appraisal Institute, Spring 2018
- "Renewables, Tax Credits and Ad Valorem Taxes: Are Policies Aligned?" *Real Estate Issues*, The Counselors of Real Estate, Volume 39, No. 1, 2014
- "Wind Power and The Tax Base: Reliable as the Resource?" *The Journal of the International Machinery and Technical Specialties Committee of the American Society of Real Estate Appraisers*; Volume 30, Issue 1, First Quarter, 2014
- "Wind Farms Harvest More Than Just Energy," *Terra Firma*, Realtors Land Institute, Winter 2014
- "Earth, Wind and LULUs – Wind Farms: Harvesting Energy and Controversy," *Journal of the Center for Real Estate Studies*, Realtor University, Vol. 1, No. 2, September 2013
- "Renewable Energy: Headwinds Ahead?" *Real Estate Issues*, The Counselors of Real Estate, Vol. 36, No. 3, 2011
- Panel presenter, Illinois Wind Working Group Annual Conference, Illinois Institute of Technology, Chicago, IL (July 21-22, 2011)
- "Wind Farms- A Valuation Primer," *Appraisal Journal*, Appraisal Institute, Winter 2011
- Presentation Faculty at Law Seminars International Symposium on Land Use Impacts of Wind Energy, Vancouver Hilton, February 11-12, 2007

Active State Certifications

Mr. DeLacy received his initial license as a Certified General Real Estate Appraiser in Oregon, but maintains active certified general credentials in the following states:

- California, license no. AG034219
- Illinois, license no. 553.001797
- Indiana, license no. CG41001248
- Iowa, license no. CG02930
- Michigan, license no. 1201073739
- Missouri, license no. 2005035957
- New York, license no. 46000047021
- Oregon, license no. C000089
- Washington, license no. 1100107
- Wisconsin, license no. 1678-01

EXHIBIT C



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Transcript of Peter Kolb

Date: April 20, 2021
Case: The City of North Chicago -v- 2nd & Main, LLC, et al.

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IN THE CIRCUIT COURT OF THE 19th JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

THE CITY OF NORTH CHICAGO,)
)
Plaintiff,)
)
vs.) No. 2019 ED 20
)
2ND & MAIN, LLC, UNKNOWN)
OWNERS and NON-RECORD)
CLAIMANTS,)
)
Defendants.)

The deposition of PETER KOLB, taken for the purpose of discovery before SUSAN R. PILAR, CSR, within and for the State of Illinois, at Ancel Glink, P.C., 175 East Hawthorn Parkway, Suite 145, Vernon Hills, Illinois, commencing on April 20, 2021, at the hour of 1:00 p.m., pursuant to notice and in accordance with Illinois Supreme Court Rules.

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APPEARANCES:

ANCEL GLINK, P.C.
BY: MR. MATTHEW T. DiCIANNI
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tdicianni@ancelglik.com

On behalf of the Plaintiff;

CHURCHILL, QUINN, RICHTMAN
& HAMILTON, LTD.
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Grayslake, Illinois 60030
(847) 223-1500
Email: jquinn@grayslakelaw.com

On behalf of the Defendants.

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(Witness sworn.)
MR. MATTHEW DiCIANNI: Okay. Mr. Kolb, could you please state and spell your name for the record.
THE WITNESS: Peter E. Kolb, K-O-L-B.
MR. MATTHEW DiCIANNI: Mr. Kolb, have you -- or let the record show that this is the discovery deposition of Plaintiff's Controlled Expert Witness Peter Kolb taken pursuant to notice to all parties and in accordance with the Illinois Code of Civil Procedure, the Rules of the Supreme Court and the local Circuit Court Rules.
Mr. Kolb, have you taken a deposition before?
THE WITNESS: Yes.
MR. MATTHEW DiCIANNI: Okay. You probably know all this. I'm just going to go over the ground rules real quick here. When I ask you a question, you just need to answer out loud and in words so the court reporter can take down what you say. She can't take down uh-huhs, uh-uhs or nodding the head.
Let's just try to speak one at a time so wait for me to finishing -- finish giving my question before you answer. That way the court reporter doesn't take down both of us talking over

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each other.
If you need to take a break at any time, that's fine. Just let me know. I just ask that you answer any pending question before we take a break.
Again, if you don't know the answer to a question, just say so. We don't want you to guess. You're under oath right now, which means you're required to tell the truth the same way you would be in the courtroom.
Do you have any questions about that?
THE WITNESS: No. I understand.
PETER E. KOLB,
called as a witness herein, having been first duly sworn, was examined and testified as follows, to-wit:
EXAMINATION
BY MR. MATTHEW DiCIANNI:
Q. Okay. Mr. Kolb, did you do anything to prepare for this deposition?
A. Yes.
Q. Could you describe what you did.
A. Yes. I've reviewed a number of documents that were provided with -- by other consultants for Mr. Dahl on this property.

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Q. Okay. Were those documents included in your report?
A. I referred to them.
Q. Okay. So --
A. They were not attachments.
Q. Okay. So all of the documents you reviewed were exhibits to your expert report?
A. I referred to them. I did not include them in the report.
Q. Okay. So there were some documents that you referred to that aren't included in your expert report as exhibits?
A. I listed the documents that I reviewed in my report.
Q. Okay. Did you talk to any of the attorneys -- did you talk to Mr. Quinn?
A. Yes.
Q. Okay. What did you guys talk about?
A. We talked about the -- the property, the issue with -- relative to a water main going through the property and -- and any other utilities that might be on the property.
Q. Okay. Could you just describe what you -- you said you talked about the water main on the

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property, correct?
A. That's correct.
Q. Can you describe -- do you remember what you talked to him about in regards to the water main on the property?
A. There's a water main that's going east/west across the property.
Q. Okay. That's all you guys talked about?
A. Well, it's owned and operated by the -- the City and -- and it is on -- on Mr. Dahl's property and, apparently, there is no easement for that currently.
Q. You said you talked about a sanitary sewer line?
A. Yes. In my review of the drawings I noticed that there was a sanitary sewer line that runs north/south through the property.
Q. And you talked to Mr. Quinn about that?
A. Yes.
Q. What did you guys talk about?
A. Well, that there's another line there that should be discussed. That should be -- should keep that in mind that there's another underground line through the property.

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Q. Okay. Mr. Kolb, I'd like to just go through your CV here. Do you have a copy of that in front of you? I --
A. Of my --
Q. Of your CV. It was an attachment. It was an exhibit to your --
A. I don't know that I have that.
MR. QUINN: You know what, I've got one that I can -- if I can get my stuff out of the book --
MR. MATTHEW DiCIANNI: Yeah.
MR. QUINN: -- I can give you.
MR. MATTHEW DiCIANNI: I think I have another one, too.
MR. QUINN: Here we go. Got it.
MR. MATTHEW DiCIANNI: Thanks.
BY MR. MATTHEW DiCIANNI:
Q. Okay. So you got your BS in civil engineering from the University of Illinois?
A. Correct.
Q. And then what did you do after you left U of I?
A. I worked for Harza Engineering in Chicago.
Q. How long did you work for them?
A. Eight years.

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Q. What did you do after that?
A. Then I went -- moved to California for eight years and I worked in a municipality there. Thousand Oaks, California.
Q. What were you doing for the municipality?
A. Wastewater treatment.
Q. And then what did you do after? After that.
A. Then I moved back to Illinois and I started working at Lake County Public Works Department in 1992.
Q. Okay. So -- and what did you do in the Lake County Public Works Department?
A. I started off as the chief engineer in '90 -- 1992. I was chief engineer for 12 years. Upon the retirement of Al Galantha I became the director of public works at the County for the last 12 years of my employment there.
Q. So how long were you at -- I thought you said you were at Lake County from 1992 to 2004.
A. No. To '14. I should say actually '16. '92 to 2016.
Q. Okay. And so what did you do for -- so for the first 12 years you were the chief engineer?

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A. Right.
Q. And then what did you do for the last 12 years?
A. Director of public works.
Q. Can you describe what your responsibilities were in that position?
A. The operation and management of the County's water and wastewater systems.
Q. Okay. So what -- what does that mean? What were your day-to-day responsibilities?
A. Keeping the water system -- the water distribution system, some 300 miles of pipe reservoirs and -- and towers, functioning and delivering water. This building was one of the customers -- is still one of the customers of Lake County Public Works. And also for sanitary sewer. We operate the wastewater treatment. The Vernon Hills treatment plant here in town.
Q. And --
A. And there's two other wastewater treatment plants that the County also operates. So three in total.
Q. It says on here you were responsible for preparation and management of the department's

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$40 million annual operating budget, long-range capital improvement program and rates and fees. Also prepared all public works committee agenda items, resolutions and ordinances.
So were you involved in the administration then of --
A. Oh, yes. I was a department head.
Q. Okay.
A. And I reported to the County administrator and also the County Board members.
Q. So it seems to me that most of your job as the director of public works was dealing with the water treatment plant. Is that fair to say?
A. Water supply and wastewater treatment. Yes.
Q. Okay. Were you dealing with -- did you ever encounter environmental issues that you would work with in that position?
A. Yes. Yes.
Q. Can you describe that?
A. Wetlands issues. Dealing with the IEPA for discharge permits. During my tenure we had increasingly more stringent discharge requirements requiring us to spend more money on facilities to meet

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those requirements.
Q. So in December 2016 then you joined ATI?
A. Applied Technologies, Inc. Correct.
Q. And are you still at Applied Technologies, Inc.?
A. I am.
Q. What -- first of all, what is Applied Technologies, Inc.?
A. We're a municipal firm. We -- when I say "municipal," water and wastewater design, and we do -- we service municipalities, sanitary districts, private citizens that have need for water and supply distribution.
Q. So you -- you work a lot with local governments it looks like here?
A. That's correct.
Q. The Central Lake County Joint Action Water Agency, that's one of the local governments you work with?
A. Yes.
Q. Can you describe what you do with them?
A. We were one of the consultants that provided an extension of the Central Lake County Joint Action Water Agency pipeline. There were a number of

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municipalities that had not gotten -- that did not have Lake Michigan water and there was an expansion -- a rather large expansion project to provide water to Lake Villa, portions of -- of Lake County that didn't have Lake Michigan water yet. And Lindenhurst. And we were one of the consultants that designed that project and saw it through construction.

Q. The Central Lake County Joint Action Water Agency is a client of our law firm, Ancel Glink. Have you worked -- are you familiar with our law firm?

A. Oh, yes.

Q. Okay. Can you describe how you're familiar with Ancel Glink?

A. Scott Puma. Scott was the -- was the -- I would say counsel to the Lakes Region Sanitary District the last three years I was the interim Lakes Region Sanitary District manager. So Scott is still there, but the -- as you know, they -- the district has now been dissolved and gone into the County. So he was there. Adam Simon. I know Adam. We had encounters in the past on other projects and so I'm -- I'm quite familiar with you guys.

Q. Have you ever consulted with our firm? For our firm.

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A. Other than with Scott at the Lakes Region Sanitary District, no.

Q. You've -- no one has ever hired you as like an expert witness or anything like that?

A. No.

Q. Are you doing any work right now that involves Ancel Glink besides this case?

A. No.

Q. I don't think I asked you. What is your position with ATI?

A. Vice president.

Q. And what does -- what do you do as vice president?

A. I run the Illinois branch of Applied Technologies. We have a main office in Brookfield and I have the Illinois office in Lake Villa is where I am, and I primarily handle Illinois projects.

Q. Okay. So is ATI a national firm then?

A. No. No. We have the two offices and that's -- that's all.

Q. Okay. One in Illinois and then one --

A. In Wisconsin. Brookfield, Wisconsin.

Q. Okay. Are you a member of any professional societies?

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A. Yes. The Illinois Association of Wastewater Agencies, the AWWA -- Association of -- AWWA. I think that's it, yeah. Association of Water -- Wastewater Agency, I guess. I'm sorry. I --

Q. Yeah. Okay.

A. -- I forgot the acronym. It'll come to me.

Q. Have you published anything in the past?

A. No.

Q. How many times have you served as an expert witness?

A. This will be the first time.

Q. Okay. Did you -- had you met Phil Dahl before this litigation?

A. No.

Q. I --

A. By the way, AWWA is the American Water Works Association.

Q. Thank you.

In your deposition notice the rider asks for a bunch of documents. Did you -- you bring those documents?

A. I believe I did.

Q. Okay. All right. I'd like to take a look

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at those. So it looks like the first document you provided here is the deposition of Frank Furlan. The transcript of that.

A. Yes.

Q. Did you rely on the deposition transcript of Frank Furlan to prepare your report?

A. Yes.

Q. Can you explain how?

A. Frank provided a very detailed history and knew the documentation of the original pipe since he was the village engineer and he has a -- he had very detailed information on where the pipe went during -- during its construction back in 1961, which I found astounding.

Q. Isn't that amazing? He -- he remembers what happened in 1961 when the pipe was laid?

A. Yes. Yes. That's -- I was -- I was impressed.

Q. Yeah. Yeah. He was a great witness. He's still going strong at, you know, 90 years old?

A. Yeah.

MR. QUINN: He's over 90.

MR. MATTHEW DiCIANNI: Is he?

MR. QUINN: Yeah.

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MR. MATTHEW DiCIANNI: I remember we took his deposition in here and he was -- he was sharp.
MR. QUINN: Yeah. He was an expert for me in a case and he really saved the day one time.
MR. MATTHEW DiCIANNI: Oh, yeah.
MR. QUINN: I had two experts. Two engineers. This is off the record.
(Off the record at 1:15 p.m.)
(Resumed at 1:16 p.m.)
MR. MATTHEW DiCIANNI: Okay. We can go back on the record.
BY MR. MATTHEW DiCIANNI:
Q. It looks like the second document here is -- well, I'll let you describe it. What is that document?
A. This is the report from JAS Environmental and actually it was their letter and then he attached -- -- let's see -- other information that they had provided as part of that.
They talked about chemical contamination on the former packing plant, soil samples. They had made a representation of backfill used around utility lines, talked about backfill being permeable, rates of migration through the surrounding

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soils and the direction of this migration as pathways.
Q. Okay. So I'd like to just go through this report a little bit. First of all, you talk -- this report talks about the migration of chemical contaminants; is that correct?
A. That's right.
Q. Do you -- do you have -- so you're an engineer, correct?
A. Yes.
Q. Do you have an expertise in the migration of chemical contaminants?
A. No.
Q. Have you dealt with issues involving the migration of chemical contaminants in the past?
A. Yes. As they relate to pathways, trench -- trench backfill and pathways. If you have a -- a fluid and you have a pathway for that fluid to migrate, we've had that issue in the past. Brown water. Those types of things.
Q. So you said "we've had that issue in the past." When was that?
A. When I was working at Lake County Public Works, I encountered those types of issues.
Q. Was there a specific time that you can

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recall?
A. If we were near wetlands, we would have to be careful in terms of if our trench backfills were -- were -- allowed either a -- a pathway for the water to get out or for any other type of water to get in. So you -- I was cognizant of that -- those issues.
Q. Okay. Now, did you rely on this report here in the preparation of your expert report?
A. I did.
Q. Can you explain how?
A. Yes. I think that JSA [sic] provided some findings that described the ability of contaminants north of the Dahl property entering the Dahl property as a preferential pathway.
Q. What does that mean, "a preferential pathway?"
A. It allows a fluid or a material from -- getting from one location to another. Can act as a drain. A French drain.
Q. What's -- I'm sorry. You're going to have to just -- I'm going to have a bunch of follow-up questions here. What's a French drain?
A. It's a -- it's a stone or -- and usually with a pipe or stone that surrounds it that allows

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water to flow through a -- through the ground.
Q. So how was that preferential pathway created?
A. There was an excavation of native material. The native material was replaced with stone and that has voids in it or materials that is not the same and those voids then allow the transfer of water along with anything else that's along with the water. And as JSA indicated, contaminants.
Q. So native material. What's native material?
A. If you're digging out in a clay area, you would -- clay would come out and then backfill would go in. Something that's -- that's -- surrounds the pipe easier. It's looser. It's usually sand or -- or -- or pebbles or gravel.
Q. So the water pipe was excavated I believe you said; is that correct?
A. (No verbal response.)
Q. And then it was backfilled with stone?
A. It was backfilled with a -- a granular material.
Q. What was the granular material?
A. Either sand or gravel, but they usually

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have to have something that's -- that flows easy and that bags the pipe to protect the pipe and allows the pipe to be bedded.

Q. What does that mean to be bedded?

A. Supported.

Q. Okay. So you can't backfill the pipe with clay or other native materials?

A. No. You could. That's not the preferred method because you want something to surround the pipe to actually give the pipe support.

Q. Okay. And you said that this excavation created a preferential pathway to allow the migration of chemical contaminants?

A. It -- yes.

Q. Okay. And -- so can you explain to me -- first of all, let's -- let's just -- I'd like to give you a map of the property here and we can label this -- let's label his CV as Exhibit 1. Thank you.

MR. THOMAS DiCIANNI: This was the CV?

MR. MATTHEW DiCIANNI: Yes.

MR. THOMAS DiCIANNI: Okay. That's Exhibit 1.

(Kolb Deposition Exhibit No. 1 was marked for i.d.)

MR. MATTHEW DiCIANNI: And then let's label

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this Exhibit 2.

MR. THOMAS DiCIANNI: You want to label his report Exhibit 2. Be sure --

MR. MATTHEW DiCIANNI: Oh, yeah.

MR. THOMAS DiCIANNI: So this would be Exhibit 2, right?

MR. MATTHEW DiCIANNI: Well, I'm going through the documents that he gave me here.

MR. THOMAS DiCIANNI: Okay. All right. I'll stay out of it.

MR. MATTHEW DiCIANNI: Yeah. You know what, let's -- that's a good point, though. Let's label as Exhibit 2 this right here.

(Kolb Deposition Exhibit No. 2 was marked for i.d.)

MR. MATTHEW DiCIANNI: And for the record that is the report created by Jeep & Blazer. Oh, I'm sorry. The JAS -- there's a JAS.

THE WITNESS: Yeah. That was the one.

MR. MATTHEW DiCIANNI: That's right. Thank you. This is the report created by JAS Environmental to Jeep & Blazer.

And then let's do as Exhibit 3 this picture of the property here.

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(Kolb Deposition Exhibit No. 3 was marked for i.d.)

MR. QUINN: The JAS Environmental has the October 3rd in the right-hand corner?

MR. MATTHEW DiCIANNI: That's correct. That's --

MR. QUINN: That was No. 2?

MR. DiCIANNI: No. 2. And then this is No. 3. This is a -- what I will represent is a picture of the 2nd & Main property. These are aerial photographs. One is taken from the Lake County tax parcel website and then the second one is taken from Google Maps and these are aerial. Aerial photos of the property.

BY MR. MATTHEW DiCIANNI:

Q. So, Mr. Kolb, you're stating that the contaminants migrate onto the 2nd & Main property. Where do the contaminants come from?

A. There's a sanitary sewer line as mentioned before that runs north/south through the line, and that's shown on one of the maps that I have here. I didn't pull those out. Sorry. I have other -- I have maps, too.

Q. Okay. Sure. Yeah. That'll help us.

A. Let me give you -- let's see. I did

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bring -- I did bring a copy of a pre-stressed concrete cylinder pipe just as an example of what that looks like. That's the material that the water main's made out of.

I also have aerial photos of the -- of -- you have the same one here. And what else do I have. The Great Lakes Naval Base. It has the real estate summary map.

MR. THOMAS DiCIANNI: Want me to make copies of all that and we'll make it a group exhibit?

MR. MATTHEW DiCIANNI: Sure.

MR. THOMAS DiCIANNI: Okay.

THE WITNESS: Thanks.

MR. THOMAS DiCIANNI: Are these double-sided? Oh, there's -- there's a drawing. Okay.

THE WITNESS: I brought copies of the invoices. I don't know if you --

MR. QUINN: I've got them. You can keep them.

THE WITNESS: Keep them.

(Mr. Thomas DiCianni exited.)

BY THE WITNESS:

A. There we are. This is the one I'm looking for. This is the Alta Title Survey. It has on it --

C0281

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BY MR. MATTHEW DiCIANNI:
Q. Yeah.
A. -- the -- the city water main that runs east/west and also a -- a sewer line. It could be a combined sewer line. No one knows exactly for sure what exactly that is, but that runs north/south and that is -- runs directly to the property to the north.
That was also constructed most likely with an open cut system. You dig out the hole, you put in a bedding material, you place the pipe in the bedding. You surround the pipe with additional bedding material and then -- and then you backfill to the -- to the top.
So this would be a direct connection to the property to the north and anything that passes the water main, which is also gravel bedded, would migrate into the bedding of the -- of the water main, also.
Q. Okay.
A. That's what I was referring to.
Q. So how do you know that the sanitary sewer main that runs north and south was constructed in the manner you just described?
A. It's a -- an assumption. At that time

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they did not have -- if you wanted to go underneath a railroad track or something of that nature, you do usually have to have a carrier pipe, a steel carrier pipe. They would most likely not have had steel carrier pipe for this entire section.
I'm not absolutely certain, but this water main was put in in '61. This was probably put in at about the same time. Open cut was the preferred method of construction.
Q. What makes you say that that sanitary sewer main was probably put in at about the same time?
A. It's lower than the water main and I do believe that it was there prior to '61. I'm not sure, though.
Q. Okay. And you may have explained this and if you have, my apologies. How do you know that the water main was constructed in the manner you described previously?
A. Let's see. The -- it refers to trenching in the parkway property. Trenching would be trenching for the water main itself. It says note all trenches shown for new pipe on this sheet shall be tamped earth backfill except where trenches are in concrete paved areas which shall have sand backfilled concrete.

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And then the only other difference would be if they crossed a railroad crossing, you would have to have that in casing pipe.
Q. And for the record let's just make it clear that Mr. Kolb is reading from the title survey --
MR. QUINN: No, no.
BY THE WITNESS:
A. This is actually the 1961 construction drawings.
BY MR. MATTHEW DiCIANNI:
Q. Oh, okay.
MR. QUINN: It's the one that Frank brought in to his deposition and I think actually you made copies of this for me.
MR. MATTHEW DiCIANNI: That's right. I did do that. Okay. Thank you.
THE WITNESS: I should have shown this to you before but --
MR. MATTHEW DiCIANNI: No.
BY MR. MATTHEW DiCIANNI:
Q. Okay. So back to my original question before we kind of got off on this. Can you indicate -- let's just use this map right here and,

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again, this is Exhibit 3. It says subject property on it. Can you draw on there where the preferential pathway goes?
THE COURT REPORTER: Do you want him to draw on the exhibit or on that one?
MR. MATTHEW DiCIANNI: Yeah. Why don't -- why don't we have Mr. Kolb draw on the exhibit just so we can . . .
BY THE WITNESS:
A. All right. Let's see. The line north/south is the -- either a sewer line or a combined sewer line and the water main the question is east/west.
BY MR. MATTHEW DiCIANNI:
Q. So you said that the contamination comes from the north and migrates onto the property?
A. (No verbal response.)
Q. So does this migrate then through the sanitary sewer line?
A. Yes. Around the bedding of the sanitary sewer line.
Q. And is that the only preferential pathway for the migration of contaminants onto the property?
A. The only one that I can readily identify.

C0282

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Q. Okay. Okay. So now I am moving on to the next document that Mr. Kolb provided. This document -- let's -- let's call this the Deigan report. I think we all know what that means because we've all reviewed this document, but I just want to --

MR. QUINN: That's 4, Matt?

MR. MATTHEW DiCIANNI: Yeah. We'll label the Deigan report 4.

(Kolb Deposition Exhibit No. 4 was marked for i.d.)

MR. QUINN: Do we have another Deigan report that we can mark? I'm assuming you don't want him to take your exhibit.

THE WITNESS: Well, I was -- yeah. I was hoping that mine were just to refer to.

MR. QUINN: Right. Not to take.

THE WITNESS: I would have been happy to make copies but --

MR. MATTHEW DiCIANNI: Right. I'll give all these back to you.

THE WITNESS: Okay.

BY MR. MATTHEW DiCIANNI:

Q. Mr. Kolb --

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MR. QUINN: We -- I did -- you know, we got it in discovery. It was one of the documents I sent to you so --

MR. MATTHEW DiCIANNI: Right. I have that, too. So let's just --

MR. QUINN: We'll just agree later on that we'll submit --

MR. MATTHEW DiCIANNI: Yeah.

MR. QUINN: -- the Deigan report.

MR. MATTHEW DiCIANNI: Right.

BY MR. MATTHEW DiCIANNI:

Q. So, Mr. Kolb, can you please describe what the Deigan report concludes.

A. Yes. This provided an assessment. It's a Phase II Environmental Site Assessment of the -- Mr. Dahl's property, and I refer to it as the former Hines Lumber yard. Talked about the constituents that they found in there, lead, mercury, benzene, those types of -- and it has a -- all the background information, soil reports and their findings, and this was dated August 8th of 2013.

Q. Do you know how they determined that those contaminants were on the property?

A. In my reading they had labs doing an analysis. Soil and -- analytical analysis of -- of the soils that they took samples.

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Q. And did you use the Deigan report in preparing your report?

A. Yes.

Q. Could you explain how?

A. It identified the contaminants that they were -- that they found.

Q. Okay. So you used the Deigan report to identify the contaminants on the property?

A. Correct.

Q. Okay. It looks like the next document you have here is the Phase II Subsurface Soil Investigation from Stateline Environmental. Let's mark this as Exhibit 5.

(Kolb Deposition Exhibit No. 5 was marked for i.d.)

MR. MATTHEW DiCIANNI: And then we'll also submit that.

MR. QUINN: That's the Stateline one?

MR. MATTHEW DiCIANNI: Yes.

MR. QUINN: And I'm fairly sure I have these in the PDF format I can send you.

MR. MATTHEW DiCIANNI: Okay.

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MR. QUINN: And I'll copy you, Matt, so you have them if you do the transcript.

MR. MATTHEW DiCIANNI: Thanks, John.

BY MR. MATTHEW DiCIANNI:

Q. Mr. Kolb, can you describe what this document discusses?

A. Yes. This is also a -- a subsurface soil investigation and it was performed for the City of North Chicago August 16th. So, again, this is a -- is that report that was provided to the City and it also has soils samples and constituents that they identified. Soil borings and that sort of thing.

Q. And did you use that in the preparation of your report?

A. I used mainly the Deigan report, but I referred to this. I looked at it and it was similar in nature.

Q. Okay. And then Exhibit 6 -- we will also submit this to you, Madam Court Reporter -- this is a Phase II Subsurface Investigation from Environmental Protection Industries.

(Kolb Deposition Exhibit No. 6 was marked for i.d.)

BY MR. MATTHEW DiCIANNI:
Q. Mr. Kolb, what does that report discuss?
A. This is a report that goes to NorStates Bank from Environmental Protection Industries providing a Phase II Subsurface Investigation of the 2nd & Main property. Also a soils report.
Q. Okay. Another soil -- soil report.
Okay. So let's -- I'll give all these documents back to you, Mr. Kolb.
So, Mr. Kolb, in addition to reviewing those documents did you talk to anyone to help you compile your expert report?
A. I did contact the Navy base.
Q. Okay.
A. I was trying to ascertain the north/south sewer line if it was still active, if there was anyone connected to it. I -- when I spoke with Mr. Dahl, we -- I did the site visit and we actually were looking for the manholes that were indicated on the construction documents, but you couldn't see them and we found one that was buried, but -- and we opened it up and I identified -- I think in my report talked a little bit about at nine and a half feet you could see that there's surface water -- or groundwater I should

say and it doesn't appear to be going anywhere. So it -- there was no apparent flow in that particular line.
(Mr. Thomas DiCianni entered.)
BY THE WITNESS:
A. The Navy themselves they don't even know if there's any properties to the north connected to it, but in the event that -- that this property gets developed you would want to use that line as a sanitary sewer line in the future.
BY MR. MATTHEW DiCIANNI:
Q. So the Navy didn't know then whether the sanitary sewer line is even working?
A. That's correct.
Q. Okay. Mr. Kolb, I'd like to turn now to your report.
MR. MATTHEW DiCIANNI: I have copies of his report for whoever doesn't have it.
BY THE WITNESS:
A. February 28th?
BY MR. MATTHEW DiCIANNI:
Q. Yes. The February 28th of 2020 report.
A. Mm-hmm.
MR. QUINN: I've got one so don't worry.

MR. MATTHEW DiCIANNI: Okay. You've got one?
MR. QUINN: Yes.
MR. MATTHEW DiCIANNI: Okay.
MR. THOMAS DiCIANNI: Here.
MR. MATTHEW DiCIANNI: Oh, thanks. Yeah.
And then could we mark this as Exhibit 7 then.
(Kolb Deposition Exhibit No. 7 and Kolb Deposition Group Exhibit No. 8 were marked for i.d.)
BY MR. MATTHEW DiCIANNI:
Q. Let's just -- let's talk about Group Exhibit 8 before we dive into your report, Mr. Kolb. So I'm looking at the first document in Group Exhibit 8.
A. Mm-hmm.
Q. Can you explain what this is, please?
A. This is a cross-section of the pre-stressed concrete cylinder pipe. This is the type of pipe that was used in the construction of the water transmission main that runs across the property.
Q. Okay. How do you know that this was used in the water pipe that runs across the property?

A. The Frank Furlan deposition.
Q. Okay. I'll probably refer to that later on. Let's -- let's go into your report now, Mr. Kolb, and that's marked --
A. Mm-hmm.
Q. -- Exhibit 7 for the record. And I'd like to just take this report kind of sentence by sentence here. It's not too long of a report so . . .
All right. So it says "The subject property is identified as 2nd & Main, North Chicago, Lake County, Illinois, and is located approximately 35 miles north of the downtown area of Chicago, Illinois. The property consists of an irregular shaped parcel land and is approximately 4.17 acres in size."
So how did you determine how big the property was?
A. I believe that came off of one of the parcel maps. All right. Hmm. I have the area -- the actual area of 202,827 square feet and I know that I converted that, but -- there was one parcel that actually had the -- the map that showed the actual acreage, but I'm at a loss to find exactly where I pulled that from. Hmm.
(Mr. Thomas DiCianni exited.)

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BY THE WITNESS:

A. That's the same one.

(Mr. Thomas DiCianni entered.)

BY THE WITNESS:

A. Okay.

BY MR. MATTHEW DiCIANNI:

Q. Okay. If you can't find it, that's -- that's fine.

A. Not at the moment.

Q. Okay. Okay. So then I'm going to continue reading from the report. You say "The PINS for the subject property." You list the pins. "The subject property and adjoining properties are located in a commercial/industrial area. The property is zoned M3 by the City of North Chicago's Zoning Department and is divided by Nimitz Avenue."

So let's --

A. And I just found one of the reports where the 4.17 acres came from. This was on the -- yeah -- EPI, Environmental Protection Industries. Their background information on the site actually listed it as -- and that's on page -- just a moment -- 5. Legal location and legal description.

Q. Great. Thank you, Mr. Kolb.

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All right. So just returning to the previous question it says "The property is zoned M3 by the City of North Chicago Zoning Department and is divided by Nimitz Avenue." Let's turn to Exhibit 3 here. So where is Nimitz Avenue?

A. Yes. It's now called 2nd.

Q. Oh.

A. I believe that it was called Nimitz--

Q. Got it.

A. -- previously.

MR. MATTHEW DiCIANNI: So just for the record he is referring to the Alta ACSM Land Title Survey, and for the record Nimitz Avenue, which is now called 2nd Street, is located to the south of the 2nd & Main property.

BY MR. MATTHEW DiCIANNI:

Q. Now, you said that the property is divided by Nimitz Avenue?

A. Well, I was using some verbiage that came out of the site description, the vicinity characteristics, again, out of the report from Environmental Protection Industries, and it refers to the fact that it's an irregular shape. A portion of the property is south of 2nd and a portion of the property is north of 2nd. Or Nimitz. Sorry.

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Q. Do you know whether the property extends to the south of 2nd Street/Nimitz Avenue?

A. Yes. It's shown on the Alta survey. This is the entire parcel.

Q. Okay. Oh, I see.

So this strip of land here -- and this is the -- for the record to the northwest of the property and it runs along the railroad tracks -- that's part of the parcel as well?

A. Correct.

Q. Okay. You say here then "The main facility is located to the north of Nimitz Avenue and there is a single overhang storage structure located on the southern portion of the subject property."

So what's the main facility?

A. This office building here. It says office storage.

Q. Okay.

MR. MATTHEW DiCIANNI: And for the record Mr. Kolb is indicating -- is pointing to that Alta Land Title Survey.

MR. QUINN: And you do have a small copy here.

MR. DiCIANNI: Okay. Yeah. Great.

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BY THE WITNESS:

A. Which would be this structure.

BY MR. MATTHEW DiCIANNI:

Q. Okay. It says "The northern portion of the site is developed with a small office, several overhang structures and three warehouse buildings. The two large warehouse buildings were used for lumber storage and the smaller building housed power saws and planners."

So how do you know that the large warehouse buildings were used for lumber storage?

A. Mr. Dahl indicated that. He had -- he had knowledge of what -- that that was the old lumber yard. He showed -- actually when we opened the building, there was some equipment there that looked like planners and -- and it was referred to as such also in the same EPI report.

Q. And then the report says after that "The two large warehouse buildings were used for lumber storage and the smaller" -- oh, I'm sorry -- "building housed power saws and planners. The site buildings are either wood-frame construction or metal panel buildings and are no longer in use for lumber sales operation."

Did Mr. Dahl tell you that as well?
A. Yes. The site is not being used for that purpose.
Q. Okay. Let's turn to the next paragraph here. It says "The current property owner Mr. Phil Dahl is investigating options for potential use of the site as a storage area for shipping containers and railroad car access."
So can you describe what Mr. Dahl is doing to investigate the property for the potential use of the site as a storage area?
A. When I met with him at the site and talked about he'd like to be able to use this -- this property for storage and shipping containers with a possible railroad access.
Q. Did he give you any specifics of what he's -- of how he's investigating options?
A. No.
Q. Okay. "Possible uses would entail constructing additional railroad spurs to provide access to the entire site."
So you say "additional railroad spurs." Is there already a railroad spur there?
A. There was one. And you can see it on the

site. This would be the spur right through here.
Q. Okay. So let's go back to -- this is Exhibit 3. Could you just indicate on there where the railroad spur is.
A. Yes. And, again, I don't know how far -- let me do this. I will . . .
Q. Thank you.
So Mr. Dahl wants to construct additional railroad spurs. Did he say how many additional railroad spurs?
A. He wasn't specific.
Q. Okay. Did he tell you where those railroad spurs would run?
A. No.
Q. Let's talk about the railroad spur that's actually on the property that you indicated on Exhibit No. 3. Now, when you conducted your site inspection on February 21st, 2020, did you observe that railroad spur?
A. I was not paying attention to the railroad spur at the time, no.
Q. Is that railroad spur currently in use?
A. I don't believe so. And it does show up on the Alta Land Survey also. And it shows up as a

spur track.
Q. Do you know what that railroad spur was used for in the past?
A. This is the site of a former lumber yard. Most likely for delivery of lumber.
Q. Do you know that for sure or are you just speculating?
A. I'm speculating, yeah.
Q. Do you have any idea when that railroad spur was operating?
A. I can't say, no. I don't know.
Q. Let's continue. Your report then says one of the challenges is in identifying underground utilities that are not -- that are currently crossing the site and restricting potential future use of the property.
So let's take the first part of that sentence there. Why is it a challenge to identify underground utilities that are currently crossing the site?
A. Limited records. Not exactly sure where the existing lines are at. There's not good information on their actual locations. The water line is shown on drawings, but you don't know if it's there

or not.
As a matter of fact, when I did my site visit, Mr. Dahl indicated excavation that was performed by the City of North Chicago. They were looking for the water main. They were not able to find the water main where they were looking for it. So I'm not sure that they know exactly where the water main is at themselves.
Q. So is it fair to say that nobody knows exactly where the water main runs?
A. That's fair, yes.
Q. So you say one of the challenges is in identifying underground utilities that are currently crossing the site and restricting potential future use of the property.
So the underground utilities that are currently crossing the site may restrict potential future use of the property?
A. That's correct.
Q. How would those underground utilities restrict potential future use of the property?
A. If, in fact, you put railroad spurs through the property, you would have to protect or -- or supplement the construction of whatever utility

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it's crossing.

The railroad has certain standards for any pipe that crosses their tracks. When this pipe went in, it had a steel casing going underneath any railroad tracks. So if you use that same standard for any utilities here, you would have to encase existing utilities with a steel casing pipe if you added additional tracks.

Q. So the water main is -- has a steel casing surrounding it? Is that what you're saying?

A. Not currently. The water main it doesn't need a steel casing because it's not crossing under a track except where it crosses the railroad tracks to the west. That has a steel casing and it's shown on the record drawings, but in -- through the rest of the property there is not a steel casing. The pipe itself has steel surrounding it, yes, but it's not in a carrier pipe.

Q. So I'm a little bit confused. You said that you haven't observed the water main, correct? You haven't actually seen it?

A. I have not seen it.

Q. So how do you know that it's surrounded in a steel casing?

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A. Okay. This is 1961 record drawings. Let's see here. It is a Section 2 water main typical crossing under railroad tracks were called for and plans and -- and it shows that there is a 42- or a 48-inch -- yeah -- it's a 48-inch diameter steel pipe that was first drilled underneath the tracks.

And then the new at that time water main was -- was pulled through that steel casing and it was a 24-inch concrete pipe and then they back -- they sand filled the space between the -- the carrier pipe and the -- and the water delivery pipe and then had a joint brick bulkhead. So they have a detail of what they did.

This is -- this is shown. Right here where it goes under the tracks this is the detail of the pipe, but there was no need to do that through the property because there was no tracks. It does actually show a spur here, but it's not over the tracks. Or under the tracks.

Q. So is the water -- is the casing on the water main different in the portion that goes under the tracks than it is for the rest of the property?

A. The entire water main is made of that material.

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Q. Okay.

MR. MATTHEW DiCIANNI: And for the record Mr. Kolb is pointing to the first page of Kolb -- of Kolb Exhibit 8.

BY MR. MATTHEW DiCIANNI:

Q. Okay.

A. When it goes underneath the tracks, there's an additional pipe larger diameter that's drilled underneath the tracks. This pipe is then pulled through that carrier pipe. So when I see a -- a steel casing pipe, I'm talking about a 48-inch diameter, not the 24-inch carrier pipe.

Q. All right. Okay. So I think I'm understanding here. So there's an outer shell that's 48 inches in diameter that goes over the portion that travels underneath the railroad tracks?

A. That's correct.

Q. Now, how do you -- how do you know that there's a larger shell that goes around?

A. I'm relying on the -- the construction drawings for that. The design drawings.

Q. Okay. And that's indicated on the design drawings here?

A. Yes.

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Q. Okay. For my and for the record's sake can you point out where on the design drawings it says that?

A. Yeah. Typically crossing under railroad tracks here. It shows 64 feet of jacked casing. This is the casing they're talking about. And it goes from this end to -- well, right now it shows it at about that point there. So underneath all of the tracks.

Q. Okay.

MR. MATTHEW DiCIANNI: And for the record Mr. Kolb is referring to the Alta survey --

THE WITNESS: Well, actually this is the -- this is the design drawings from Alvord, Burdick & Howson back in 1961.

MR. MATTHEW DiCIANNI: Thank you.

BY MR. MATTHEW DiCIANNI:

Q. And that's -- there's a number one on the bottom right-hand corner of that?

A. Yeah. There's two sheets.

Q. Okay.

Okay. Mr. Kolb, let's turn back to your report here. The next sentence says "There does not appear to be any easement documentation recorded for the 24-inch diameter water main or for the

sanitary sewer main crossing the property."
So I'll agree with you that there's no easement for the 24-inch water main as much as we would like for that one to be there, but how do you know that there's no easement for the sanitary sewer main?
A. Well, I reached out and contacted the Great Lakes Naval Training Center asking them about that line and they had limited records also. I asked specifically if they had any easement documents and they were not able to indicate that they had any easement documents.
I don't know if the line was there before this property got -- changed hands or whatever, but -- so they have -- and, again, they don't know if there's any properties that are using that. It does not appear that it's being used at this time.
Q. The next sentence says "The water main is owned and operated by the City of North Chicago and the sewer line is owned and operated by the Great Lakes Naval Training Center. Other challenges include elimination of the migration of off-site contaminants from entering the property through groundwater infiltration along underground pipeline bedding and

backfilled trenches."
Okay. So, first of all, what are these off-site contaminants?
A. They were listed in detail in the environmental reports that I referred to that I -- that I read.
Q. Okay. And where did these off-site contaminants come from?
A. They indicated north -- north of the site. The property north of the site.
Q. And how do you know that these contaminants are migrating onto the property?
A. That was the findings of the -- the reports. The Phase II ESA report.
Q. So these contaminants are entering through groundwater infiltration. First of all, can you explain how they're entering through groundwater infiltration?
A. The -- there's voids that are in the trenches. Those voids allow either water or any contaminants to be migrating through that to a -- to another area. It acts as a conduit.
Q. And what's -- what's a void again?
A. Air. Space between solids. Bedding.

Q. And does the groundwater infiltrate the 2nd & Main property in a particular way? So does it flow from north to south or east to west or south to north?
A. I believe it flows from -- from the north to the south based on the reports. The soils reports.
Q. Okay. So the soil report says that groundwater flows from north to south?
A. That was the conclusion of those reports.
Q. Okay. Which -- which soils report said that?
A. The Deigan report.
Q. Okay. Is there -- any other report or just the Deigan report?
A. Let's see. The other report would be the Environmental Protection Industries report and the -- yes. There was the Environmental Protection Industries report talks about "It is the opinion of EPI that due to strong field observations and analytical testing of soil and groundwater that the historical uses of the adjacent property north of the subject property have negatively impacted the subject property."
It also listed a number of results.

Benzene, ethyl benzene, total xylenes, a number of other -- I'm going to leave -- other of these constituents that exceed -- there's the IEPA groundwater limits.
Q. Okay. So the groundwater infiltration goes along underground pipeline bedding and backfill trenches. What's a backfill trench?
A. Material that you would surround the pipe with to help support the pipe and, again, it can be sand, gravel. Some -- some granular material that allows itself to be put around the pipe so it supports the pipe and that is -- has voids in it and those voids allow migration of water or -- and/or contaminants.
Q. Got it.
So -- so I'm understanding. So the groundwater flows along the pipe and the backfill trench?
A. Yes.
Q. Okay. And you said before I believe that the groundwater is moving from north to south. So there's one pipe that flows north to south, correct? There's one sewer line?
A. Yes.

Q. So is it -- are the contaminants entering the property through the sewer line that flows from north to south?

A. Yes. Most likely.

Q. Okay. Is that the only way that they're entering the property?

A. Once that water gets into the -- onto the property it is going past another trench, which is the water main trench. So these are two trenches essentially that give the ability of this material to travel north/south and east/west.

Q. So the water -- so the contamination then flows from the north to the south and it intersects the water main trench, and then what happens when it intersects the water main trench?

A. It acts as another conduit. Another way of getting contaminants to -- to off site. Through the property off site.

Q. Okay. And -- how do you know that the -- the trench that goes east/west acts as a conduit?

A. Open cut method. Meaning you're opening it up from the surface all the way down to the pipe, right? And the -- the north/south pipe is probably ten feet deep. The east/west pipe is probably eight

feet deep. So those two trenches are intersecting and they allow then this -- any water to have the opportunity to migrate.

Q. Now, if I remember correctly, we said that we don't know -- no one knows where the water main or the sanitary sewer pipe are. So without knowing where the water main and sanitary sewer pipes run, how -- how do you know that the water infiltrates along those pipes?

A. In general you know where the water main is. The water main is on the property based on the drawings that we have. The City was not able to locate exactly on the property where that water main is, but it's going from east to west because that's how the City is getting water from Lake Michigan. So you know it's getting across here.

I don't know that anyone knows -- can tell you exactly the water main is here. That might be one thing to do is locate the water main. That might be one very important thing to do.

Q. I guess I'm just confused and maybe it's just a simple thing that I'm -- I'm not grasping, but how -- how do we know -- I mean how do you know that the water -- the groundwater is actually flowing along

the -- the pipe? I mean I'm not -- to my knowledge it doesn't say that in any of the --

A. Oh, yes.

Q. -- reports.

A. Oh, yes, it does.

Q. Oh, it says that the groundwater is flowing across the --

A. It says that the bedding material provided preferential pathway for the migration of water and contaminants.

MR. QUINN: Matt, with your permission if I could interject or I can wait until you're done, but I think -- I think we could look at the Deigan report and that might cut through a lot of this.

MR. MATTHEW DiCIANNI: Yeah. That's what my next question was going to be.

BY MR. MATTHEW DiCIANNI:

Q. Can you look at the -- tell me on the Deigan report where it's -- where it says that?

A. Complete recent recommendations I had from the Deigan report. There's also the soil sampling conducted at the site confirmed that environmental concerns exist at the site.

The concerns appear to be associated

with fill, slag layer and contamination migrating on site from the north adjacent property. Soil samples collected from fill slag layer contained lead, arsenic, commercial mercury and select volatile organ compounds at concentrations greater than both residential and commercial IEPA regulatory limits. Their soil samples indicated that there were slag layers on fill on the property.

I believe he -- the soil samples also indicated besides just the trench that there were layers. That material can migrate. Elevated petroleum-related BOC concentrations were found at samples collected along the north property boundary. Given the site history and documented contamination on the north it is likely that contamination migration has occurred.

Now, I also read something else that was a little bit more --

MR. QUINN: If I could interrupt you just there's -- on the Deigan report there's soil borings in the map right at the beginning, right? That specifically there's a site map 2A.

THE WITNESS: All right. Yes. 2A site base map. Yes.

MR. QUINN: I just want to make sure you're looking at the same picture here.

Off the record for a second.

(Off the record at 2:23 p.m.)

(Resumed at 2:24 p.m.)

BY MR. MATTHEW DiCIANNI:

Q. Mr. Kolb, that's fine. I -- if you could say -- so can you just explain here how the groundwater is migrating onto the property?

A. In the Deigan report drilled a number of holes along the north property line.

Q. Okay.

MR. MATTHEW DiCIANNI: And this is just for the record Figure 2a site-based map north parcel is what Mr. Kolb is referring to.

BY THE WITNESS:

A. Okay. And from those -- from those samples they encountered -- he named them slag or fill that might have been some other type of -- of fill besides native material that was placed in that area. Can't tell exactly when, but that -- that fill or whatever has certain voids in it also which allows any -- if there's off-site contaminants to enter the site also. So that's -- that's a possibility, also.

Q. And --

A. So I didn't say -- sorry. It's just one conduit. If you have fill along that area, that's another potential avenue for contaminants to come on to the site.

Q. And just for the record, Mr. Kolb, where does the Deigan report talk about the preferential pathways?

A. Let's see. Maybe it's in another report. Allow me to refer to -- all right. This is the JAS Environmental, Inc. report October 3rd findings. "The water plain on the former Hines parcel borderlines on the former chemical packaging site and the sewer line and water main beneath Marquette Street all may act as preferential migration pathways.

Backfill placed around utility lines is typically more permeable on the surrounding soils. This relatively more permeable backfill offers a pathway for the migration of free phase contaminants, vapors or contaminants occurring within soil, water in the vadose zone and/or within the groundwater aquifer. Being more permeable the rate of migration is typically greater than that occurring in the surrounding soils. Also the direction of migration within these preferential pathways can be upgradient or cross gradient to the point of release."

That is finding No. 5 in their report.

Q. Thank you.

Okay. In looking at the scope of the work section of your report I think we've gone over everything in there. Jumping down to the findings we've talked about those documents. You provided all of those documents today.

A. Okay.

Q. So let's go down to the next paragraph there and, again, this is page 3 of the report. So it says "Based on review of the listed documents it was determined that there exists a 24-inch diameter pre-stressed concrete cylinder pipe owned and operated by the City of North Chicago that runs through and beneath the property. This water main runs from Marquette Street westward to Sheridan Road near the property line with the former chemical packaging site directly to the north."

So, Mr. Kolb, I would like you to indicate on the map that I provided, which I believe is Exhibit 2, the one that you've been drawing on,

where exactly the water main runs. So here's -- I'm sorry. That's Exhibit 3. So yeah. If you could just --

A. This dashed line here 24-inch -- is a 24-inch diameter water main. And, again, it's based on the drawings that -- the original construction drawing.

Q. Got it. Thank you.

Okay. The water main is the main transmission line conveying treated water from the City's water treatment plant from the shore of Lake Michigan to the City's water distribution system.

The pipe was installed with conventional open trench methods, bedded with sand at pipe crossings and backfilled with compacted gravel or tamped earth. We have discussed that.

The pipe was originally installed in 1961 at a depth of 4.5 feet cover. What does that mean a depth of 4.5 feet cover?

A. Top of the pipe is 4.5 feet below the surface.

Q. Got it.

A. Generally.

Q. I thought you said before that it was ten

feet underneath the surface?
A. The sewer line.
Q. Sewer line. Okay.
A. And, again, the pipe is four and a half feet down and then -- then you have the diameter pipe, which is another two feet, and then you'd usually excavation underneath to put a little bit of material in there. So, you know, we're talking about six and a half, seven feet.
Q. So -- and how do you know that it's at a depth of 4.5 feet of cover?
A. Drawings.
Q. Okay. So water main that was installed under railroad tracks was encased in a 48-inch diameter steel casing that was bored and jacked under the tracks.
My apologies if you've answered this before, but how -- how -- how do you know that the 48-inch diameter steel casing went around the portion that goes underneath the tracks?
A. Also indicated on the drawings.
Q. Okay. "The water transmission carrier pipe was installed inside the steel casing and then the remaining void space was filled with sand. Each

end of the casing pipe was sealed with an open joint brick bulkhead.
Construction of the water main used gravel or native material for backfilling the original trench. This material is more permeable than the undescript soils and offers a pathway for the migration of contaminants within the soil, water or within the groundwater." We discussed that.
"Being more permeable the rate of migration within this preferential pathway can be upgradient or cross gradient to the point of release."
So what does upgradient or cross gradient to the point of release mean?
A. It -- again, that verbiage was pulled directly from the soils report. If you have -- if you have vapors or other contaminants, it can go in either direction. It can -- the water usually goes downstream, downhill, but vapors -- volatile granite compounds can have vapors and those can travel up the pipe also. So that's what that refers to. But, again that verbiage was pulled from the environmental -- the soils report.
Q. And soils report, that's the JAS report?
A. Yes. That's specifically the -- that's that Section 5 I read before.
Q. All right. So you just said that vapors are running along the preferential pathway?
A. I will refer again to the JAS. "The relatively more permeable backfill offers a pathway for the migration of free phase contaminants, vapors or contaminants occurring within the soil water in the vadose zone or within a groundwater aquifer."
Q. I'm going to turn to the next paragraph there. It says "Also running through the property is a sanitary sewer line of unknown diameter owned and operated by the Great Lakes Naval Training Center." We discussed that and you indicated on the map where that runs.
"The sanitary sewer line runs from the north property line to the south property line. Essentially the midpoint of the property."
And, again, where did you figure out -- and so you figured out where the sanitary sewer line runs from the survey?
A. Yeah.
Q. Okay. "This line may be a combined sewer as there are catch basins and manholes depicted on the drawings." What's a combined sewer?

A. Sanitary sewer and storm sewer.
Q. "Construction methods of this line are not known for certain. However, it was most likely also constructed using open trench methods and using bedding and backfill materials as well."
Now, are you sure that it was -- or do you know for certain that it was constructed using open trench methods and --
A. No.
Q. Are you just speculating as to that?
A. I am.
Q. And are you speculating that it used bedding and backfill materials as well?
A. For what?
Q. Oh, the sanitary sewer pipe.
A. I'm speculating on the sanitary sewer pipe.
Q. Right.
A. I know from Frank Furlan's and from the construction drawings that there's bedding in the water main.
Q. Okay. "This material is more permeable than the undisturbed soils and offers a pathway for the migration of contaminants within the soil water or

within the groundwater. Again, the rate of migration within this preferential pathway can be upgradient or cross gradient to the point of release." We discussed that.

"So a site visit was conducted on February 21st, 2020 and in attendance were the property owner, Mr. Phil Dahl, and Mr. Peter Kolb," PI -- "PE of ATI."

Approximately how long did that site visit take place?

A. About an hour and a half. Maybe two.

Q. And when you did the site visit, did you -- can you describe exactly what you did?

A. Yes. In general I looked at what's the location of the site, the condition of the site. We were trying to ascertain -- I wanted to know where this sewer line was and there are structures.

So you can actually see here's one and, again, it's -- I think that the reason I think it's a combined sewer is because the storm sewer collects surface water to get it off site and we -- we found one of the catch basins, and then the other one we estimated where it was and dug around and, sure enough, we found the manhole cover.

We pulled the cover and we took a look in there and that's how I got certain depths in there. The water surface was about nine and a half feet from the ground. There did not appear to be any running water. There was no flow. I looked down in there but, again, it doesn't look like anything was moving.

Q. So from the site inspection you got the depth of the sanitary sewer line?

A. Yes.

Q. And how did you measure -- how do you know it was nine feet down? Did you measure?

A. I did. I had a tape measure.

Q. Okay. And so did you actually go down --

A. Oh, no.

Q. No?

A. No, no. That would be a confined space entry.

Q. The next sentence "Mr. Dahl indicated that the City of North Chicago had attempted to locate the water main on a previous date and had excavated in the area of the expected pipe location."

Did Mr. Dahl provide any more detail about what the City did in its efforts to find the expected pipe location?

A. He indicated that they had gone down as far as they could go with the equipment that they had. Essentially it was a backhoe. They got down to ten feet and couldn't locate the pipe so either they missed it or the pipe is a little deeper, but they couldn't find it.

And all the drawings indicate that it should be about five, six feet below the surface. So they probably didn't know exactly where it was. So that's one of the reasons no one knows exactly the location of that pipe. I mean it's here somewhere, but we don't know where.

Q. "Evidence of this excavation remains." What evidence remains?

A. Oh, broken up concrete and it was just backfilled and -- so they dug it up, couldn't find it, put the material back in the hole.

Q. Did Mr. Dahl let them do that?

A. Yes, he did.

Q. Okay. "There are two sanitary sewer structures identified on the title survey." I believe you showed me those.

A. Yeah. It does say catch basin. Catch basin.

Q. Okay. "One structure is a catch basin in the center of the property and was found to have an open grate cover, standing water at the bottom of the structure at about nine feet deep and there's no apparent water flow. It's observed from the surface.

Further north at the approximate location of the water main is a second catch basin structure depicted on the title survey. This structure was unearthed and found to have a solid manhole cover with a pick hole. Upon removing the manhole cover standing water was observed in the structure at about nine feet deep.

The bottom of the structure was found to be at about 9.75 feet deep. There was no apparent water flow in the structure. This may indicate that the two structures in the underground line are combined sanitary sewer storm line.

Further investigation with the GLNTC is necessary to determine the use of this line and connect to property. This line is no longer providing service to this property or others. There may be the possibility of abandoning it and sealing off the preferential pathway blocking the migration of

contaminants.

So I want to just linger on that sentence for a minute. So -- if the line's no longer providing service to this property or others, there may be the possibility of abandoning it and sealing off the preferential pathway blocking the migration of contaminants.

So, first of all, how do you know that that possibility exists?

A. We've used something of that nature on -- on -- you can -- they did -- you can replace the -- the gravel material with a fine clay and that acts as a -- a water barrier. So you could potentially seal off that preferential pathway.

Q. Okay.

A. But that -- that's only the pipe. If there are other -- as these soil borings indicate, any other -- if they go along there and there was fill in that area -- fill meaning F-I-L-L -- and it has voids in it, that's also a -- a way of migration and not just the sewer line.

Q. Is there any other way of sealing off the preferential pathway besides putting clay down there? I mean --

A. Well, that's the -- that's the most readily available.

Q. Okay.

A. I suppose you could inject grout. I mean that's another way.

Q. "If this line needs to remain in place, there could possibly be a grout cutoff wall constructed around the pipe at the northernmost point of the property that would then seal off this preferential pathway."

So if I may ask, what was the purpose of including the description of the sanitary sewer pipe in the expert report? What --

A. I think it was very important. If we're talking about migration of material from the north to the south, the sanitary sewer line is an absolute -- that's it. That's -- that's a direct connection --

Q. All right.

A. -- as opposed to fill material or anything else. That's also another, but this is a direct -- this is direct connection.

Q. Would it be possible for contaminants to migrate onto the site if that sanitary sewer line weren't there?

A. Well, I think you have to go to the other environmental reports. They talk -- it talked in there about slag, other fill material. Those materials ultimately have voids. It's not just the bedding, but if it has -- if it's slag or if it -- so there was always the possibility of those other -- if you didn't have the pipe -- if you didn't have the sewer pipe, I guess there would still be a possibility of -- of contaminants entering the site because of fill material that they identified in the soil borings.

Q. So who placed that fill material there that would allow the preferential pathway?

A. I have no idea.

Q. Wait. So -- so you say that there's two ways that there could be migration of contaminants onto the property. One, through the sanitary sewer line and, two, through the fill material. Where -- could you describe what fill material you're referring to?

A. I can only describe what I read --

Q. Okay.

A. -- in the reports.

(Mr. Thomas DiCianni exited.)

BY THE WITNESS:

A. I'm sorry. I'm not locating exactly where they were talking about the -- what the fill material was that they found.

BY MR. MATTHEW DiCIANNI:

Q. Okay. That's -- that's fine. We can move on.

A. Okay.

Q. I -- yeah.

Let's move to the next paragraph there. It says the -- this is the second paragraph on page 4. It says "The current owner of the railroad running along the west property line is the Union Pacific Railroad Company.

Upon reviewing their criteria for encased non-flammable pipeline crossings it was determined that each crossing of an underground utility would require installation of a steel casing pipe a minimum distance of 30 feet from the centerline of track to the near face of boring and jacking pits."

(Mr. Thomas DiCianni entered.)

BY MR. MATTHEW DiCIANNI:

Q. Okay. So let's take a look at that -- the first clause of that sentence, upon reviewing their

So can you describe the Union Pacific criteria for encased non-flammable pipeline crossings?

A. Yes. If you wanted to install a water main under the Union Pacific Railroad, they had certain standards for pipelines. One of them was you have to cross on a parallel and -- I mean perpendicular -- sorry -- and another is that any pipe crossing has to be in a steel casing. A carrier pipe. And the carrier pipe needs to be a minimum of 15 feet each side of the centerline of the -- of the railroad. So each track requires a carrier pipe of at least 30 feet.

Q. Okay. And where did you get that Union Pacific criteria from?

A. I had pulled that from their -- there was a -- a standard site for -- for utility crossings.

Q. Is that criteria included in any of the exhibits of your -- to your report?

A. I'm not sure. I'm not sure. I -- I can try to look through here. Oh, yes. Here. I'm sorry. I do think I have it. That's what I was looking for. Sorry. Here's the permit and here's a sample of a railroad crossing. I'm sorry I did not have that

included.

Q. Okay. So these aren't included in your report?

A. No. I'm sorry.

Q. But -- that's okay. Let's mark this as -- boy, what exhibit are we up to now? 9?

MR. QUINN: 9.

MR. MATTHEW DiCIANNI: Okay. Let's just mark this as Exhibit 9.

(Kolb Deposition Exhibit No. 9 was marked for i.d.)

BY MR. MATTHEW DiCIANNI

Q. And where did you say you got this from? The -- Exhibit 9 here.

A. Yeah. I believe I got that off their website. This is a permit for application of a railroad crossing. It has the application in front of it and as an attachment it talks about encased non-flammable pipe crossing and it identifies minimum distances for the steel casing.

Q. Okay.

THE WITNESS: John, I don't think I ever gave you a copy of this. Sorry.

MR. QUINN: I don't think so, but we'll mark it

BY MR. MATTHEW DiCIANNI:

Q. Now, is this the standard everywhere in the United States?

A. I can't say it is, but it's fairly typical.

Q. How do you know it's fairly typical?

A. We've had other railroad crossings that also required steel casings for water.

Q. You say "we've had." Who --

A. My previous jobs have required crossings.

Q. Which -- can you --

A. Central Lake County Joint Action Water Agency we had the water main extension for that. We had to go down Monaville Road. Made a crossing there. You also needed a steel casing and a -- it's typical.

Q. Was the steel casing on that -- when you worked on before was there -- did you use 60 feet of steel casing for each railroad crossing on that?

A. I believe the distances were -- were similar. I can't tell you exactly, but the idea is to get out from underneath the influence of the tracks so that if you had a problem with the pipe, you could pull the pipe out and put another pipe in without

disturbing the railroad.

Q. Do you know does Union Pacific -- is this the standard for the crossing just to the west of the 2nd & Main property? Is it -- is the crossing there in conformity with these Union Pacific standards?

A. It shows here 64 feet of jacked casing. So it's close.

Q. And you're reading from?

A. This is --

Q. Just the records. Right here.

A. 64 feet of jacked casing. This is drawing 1 on the design drawing from Alvord, Burdick & Howson.

Q. So what's the relevance then of including the Union Pacific railroad crossing criteria in your expert report?

A. Was trying to -- there's an impact to the utilities. If you have utilities on the property and you wish to have additional railroad lines installed on it, you would need to do something with those existing utilities. You can either dig them up and relocate them or you can provide protection casings under those.

Q. Okay. So -- and how was that relevant to

C0294

A. If you have to stay away from a pipe that you cannot protect with a steel casing, you would lose the use of that property. The use of that piece of land over the -- let's say water main or the sanitary sewer line. So there's no longer -- you couldn't put a railroad spur on it.

Q. Okay. So do any railroad spurs on the 2nd & Main property currently go over a -- the City's water main?

A. No. I don't believe the spur does. That's an old one.

Q. Okay. So just -- just to make this clear the spur does not cross the City's water main currently?

A. Correct.

Q. But if the -- so if you were to put additional spurs on the property, he would need to reinforce them to the Union Pacific's standard?

A. You would either have to stay away from the water main a certain distance or you reinforce the water main, yes. Those are options.

Q. Well, how -- how could he put in a spur that crosses the water main?

A. I'm sorry. I can't answer that. I don't know.

Q. I mean doesn't the water main -- and I'm just referring to your drawing here, Mr. Kolb. Doesn't the water main cross underneath all these buildings here?

A. Yes. That's -- that's where it's indicated. Yes. Yeah. Now where is that. Here we go.

Q. So I guess I -- I mean I am just -- I'm just a little confused here. My apologies. Maybe there's something I'm not getting, but I guess I just don't understand what the relevance of including the Union Pacific Railroad crossing standards for water mains is when there's no crossing on the -- on the property now and there probably -- and you're not sure if there even could be one.

A. I'm not sure there could be one or would be one, but I was referring to that you have to stay away from the water main a distance with any railroad spurs that you would use in the future if you put one in. If that was Mr. Dahl's desire.

Q. Okay. And how far away would the railroad spur have to be from the water main?

approximately 15 feet from the edge of the railroad embankment to the centerline of the water main.

Q. And where did you come up with the 15 feet number?

A. Well, it requires 15 feet from the centerline of the pipe to where the end of the casing would be, right? And you would want to stay away from the centerline of -- the edge of the water main because if you ever have to get to the water main, you have to dig it out.

So you have to give yourself sufficient room to excavate if you ever had a break in that pipe. You have to stay a reasonable distance from a -- a spur or a track or encase the pipe.

Q. Why 15 feet and not 10 feet or 20 feet?

A. Well, I'm using 15 feet from the centerline of the pipe because you need to have at least a certain distance on either side of the pipe for excavation if you ever had to get in, and then I'm leaving 10 feet to the -- to the railroad tracks so that you're not on top of where -- you're not on top of each other.

So 15 feet from the center of the pipe to the tracks is a reasonable distance that I would suggest you keep away from the different tracks so that you can excavate the pipe should there be a break.

Q. And how did you determine that 15 feet was the proper distance?

A. We've -- it's a -- it's a 24-inch diameter pipe and you need to have some way to get in and out and make excavation. It's based on my past experience.

Q. And what past experience specifically?

A. Construction of underground utilities.

Q. Can you describe what that construction was?

A. Sure. We -- we just installed a -- an 18-inch and a 30-inch diameter water main to install that you need to have equipment to be able to get in, dig a trench, lay the pipe, fill it back in. You have to stay away from existing utilities or existing railroad tracks a certain distance. My 15 feet is a reasonable estimation on how far you got to stay away from a spur to do that.

Q. Oh, one -- one other thing here. You say 60 -- this would require a minimum of at least 60 feet

a particular type of steel that should be used.

A. Steel casing. Again, it can be three-eighths inch, something of that nature. Something that will support the weight of railroad cars going over it.

Q. Just turning back to -- you know, I know we talked about how the Union Pacific standards -- you know, we discussed the relevance, but just one follow-up question I had on that.

Why did you choose the Union Pacific Railroad standards and not say the Burlington Northern Santa Fe Railroad standards?

A. Because I thought that that was -- they are now Union Pacific, aren't they? Isn't that -- I thought that that's where -- oh, I made notes for myself. It was the Chicago Northwestern from 1959 to 1972. It was the Chicago and North Western Transportation from 1972 to 1995. Turned into the Union Pacific Railroad in 1995.

Q. Okay.

A. That's a good question.

MR. QUINN: You said land trust. I'm trying to figure out what land trust.

MR. THOMAS DiCIANNI: You want to take a break?

MR. QUINN: Sure.

THE WITNESS: That would be a good idea.

(Off the record at 3:10 p.m.)

(Resumed at 3:27 p.m.)

MR. MATTHEW DiCIANNI: Okay. We can go back on the record here.

Mr. Kolb, I just have a few questions left for you.

THE WITNESS: I did find -- you had asked me before about the geological conditions and I did find that section, and that was on the EPI, Environmental Protection Institute. Was one of their field investigations, the findings, and it talked about cinders and clay deposition and it talked about also large grain sand and gravel to determine the boring. So they're referring to fill in the area of those borings. So I thought I would mention it.

MR. MATTHEW DiCIANNI: Thank you.

THE WITNESS: Okay.

BY MR. MATTHEW DiCIANNI:

Q. Mr. Kolb, there's just a couple things I wanted to follow up on here. Let's turn to Exhibit -- what's this one? Exhibit 7?

MR. MATTHEW DiCIANNI: Exhibit 8.

MR. QUINN: That's the group exhibit, I think.

BY MR. MATTHEW DiCIANNI.

Q. Now, Mr. Kolb, did you say that the -- the water main is made out of this material here?

A. Yes.

Q. And how -- how do you know that?

A. Frank Furlan in his deposition was very deliberate, knows that this is concrete cylinder pipe because he had to make a connection to this and it's very difficult to make a connection.

It's not like a steel pipe where you just drill a hole. You have to go through layers of concrete, pre-stressed wires and interior steel cylinder and then again an interior piece of concrete. A very difficult and expensive connection.

Q. Are there other methods to encase water main pipes?

A. Yes.

Q. Okay. And what -- can you just briefly describe what some of those are?

A. You can have a reinforced concrete pipe without a steel line. You can have composite

materials, fiberglass. You have different types of pipe, but in 1961 this was probably the standard water distribution pipe. It would last 60, 80 years. It was designed to last that long.

Q. So you said before that the water main is between four and a half feet and eight feet below the surface. How do you know that the groundwater infiltration that's bringing the chemicals from the property to the north onto the 2nd & Main property -- how do you know that that's not migrating over the surface? How do you know -- how do you know that that's migrating through the water main and not the -- over the surface or in the four and a half feet of material above the water main?

A. I don't. The pipe trench is one path. One potential path. Can there be others? Yes.

Q. So do you know for sure that -- so -- you know what, strike that. Let's just move on here.

I believe you referenced underground storage tanks in your report. Do you -- are you aware of that reference?

A. I'm afraid I don't recall. I don't think so. I don't believe so.

Q. Do you know if there's underground storage

Q. So I want to just talk about the spurs. So my understanding of the way spurs work -- correct me if I'm wrong -- is that the -- there's a -- a railroad station and the spur connects to the railroad station and there's like a switching area at the railroad station.

Do you know where the spur on the 2nd & Main property runs to? Does it run to a railroad yard?

A. Based on the drawing it shows a spur track and it shows a connection to the -- the main line in about this area right here.

Q. Okay.

MR. MATTHEW DiCIANNI: And just for the record Mr. Kolb is indicating to the Alta Land Title Survey.

BY MR. MATTHEW DiCIANNI:

Q. Do you know how much the load would -- the railroad load would weigh on the spur on the 2nd & Main property?

A. No. I would anticipate that you would design it with the same standards that the regular railroad is designed.

Q. Wouldn't the weight of the load on the spur be less than the weight of the load on the main railroad line?

A. I don't know.

Q. Okay. I guess what I'm -- my question is why would the pipe need to be reinforced to the same standard when it crosses underneath the spur as it would when it crosses underneath the actual railroad track?

A. I'm using that as a basis. That's -- that's the basis of -- of -- and I don't know if it's any less -- requirement of less or not, but I used the standard specifications for pipe under -- under railroad lines.

Q. Now, I believe you said before that no railroad spur could be built within 15 feet of the water main. Is that correct?

A. Yes.

Q. Okay. Now -- so it's your position then that all of the land south from 15 feet away from the water main could be used to -- for railroad spurs?

A. Yes.

Q. Okay. So it's only the -- the only portion of the property then where railroad spurs

Q. Okay. And is that a yes?

A. Yes.

Q. What about the Navy's sewer main? Would that prevent the construction of new railroad spurs?

A. You would have to do something similar with the Navy line, yes.

Q. Are new spurs the only development for the property that would be prohibited due to the existing water line on the property?

A. You would not want to construct permanent structures over it. That's usually one of the restrictions of an easement that you don't allow permanent construction because if you ever have to get to the pipe to dig it up to make a repair, you wouldn't want to have to deal with a structure.

Q. Aren't there permanent structures already over the --

A. There are. There certainly are.

Q. Okay. Do you know what Phil Dahl has done to explore the creation of more railroad spurs?

A. I don't know.

Q. Okay. So just going back to something you said before. You said you don't want to construct permanent structures over the water main, correct?

A. Correct.

Q. Is that also true with respect to the sewer line?

A. Yes. However, if it's not a publicly owned sewer or if the sewer line just services this property, you can have just a service line comes in out of there.

I mean right now one of the things that still needs to be ascertained if there's any additional users on that line. The short time that I was involved with this we can't tell yet. The Navy doesn't know. So that's still a bit of a mystery.

Q. I believe your report says that the water line may create a preferential pathway. You don't know for sure that it will create a preferential pathway?

A. That's right. It was identified in the soils reports that that is a potential --

Q. Okay.

A. -- route.

Q. So just to -- your opinions regarding the environmental contamination of the property are just

A. Correct.

Q. Now, Mr. Kolb, you said that there were two manholes on the property, correct?

A. Correct.

Q. Wouldn't the manholes be a more efficient way for contaminants to permeate the property than infiltration from the surface?

A. The manholes are a way for surface water to get into the sewer. However, if the contaminants are below grade, the trench is the way that it would allow migration of material.

So surface -- surface water can get inside the pipe, but around the pipe and the bedding that's -- that's a pathway for underground water or contaminants to move.

Q. Now, before you said that the contamination flows from the sewer line to the water main, correct?

A. It has the ability to go that route, yes.

Q. Okay. Do you know whether the sewer line and the water main are at the same height?

A. They're not at the same heighth. Based on

the drawings the water main is above the sanitary sewer line, but they are both constructed with trenches that go all the way to the surface. So those two trenches intersect.

Q. Do you know that for sure that the trenches intersect?

A. If they were constructed with open cut, I would say yes. Yeah. And they were not constructed with directional boring. That wasn't happening at that time.

Q. So I -- I guess do you know for sure, though? I mean how do you know that the trench for the sanitary sewer line and the water main intersect?

A. I'm looking at the drawings. The two lines are crossing each other. To construct the sanitary sewer line you have to go all the way down to the end -- to the bottom of the sewer line to lay the pipe and when the water main crosses that trench, you would be crossing whatever materials they filled the trench with. So they would then be interconnected.

Q. Is there any report that says that they're interconnected?

A. No.

Q. You haven't actually observed them being

MR. MATTHEW DiCIANNI: Are there any other -- okay. Those are all the questions I have.

John, do you have --

MR. QUINN: I just want to go over a couple of things to make sure they're covered.

EXAMINATION

BY MR. QUINN:

Q. Peter, I want you to take a look at the Deigan report, which is Exhibit No. 4.

MR. QUINN: And remind me to get you emails so I can send you these exhibits so you can attach them.

BY MR. QUINN:

Q. There is -- in the Deigan report just a few pages -- four or five pages in it refers to Figure 2a, which is site-based mass north parcel.

A. I have it here.

Q. Okay. So I'm looking along the -- the north part of that. You see a -- a B4 and an SB21 and an SB20 and all of those?

A. Yes.

Q. Those are soil borings that were done along the water main; is that correct?

A. Yes. Or adjacent to, obviously.

Q. Okay. In some of those they show -- like SB-22 shows lead and SB-20 shows benzene; is that right?

A. That's correct.

Q. And it talks about the technical BTEX concentrations. That's -- that's benzene and xylene?

A. Yeah. I'm not exactly sure of the name.

Q. Okay.

A. I would have to refer to the -- yes. But you're right. It lists some on there.

Q. I've been involved in environmental cases before. The BTEX comes up all the time.

A. Oh, I see.

Q. Okay. Also -- we'll just stay on this Deigan report. There is an Exhibit D to this, which is environmental cleanup costs.

A. Yes.

Q. It's the very -- so let me ask you just a couple of things. Assuming for a moment that the City's water line runs through contaminated soil, runs through a contaminated fill -- and you've been the director of public works from a municipal point of view -- what is the effect if a water line that's in

(f)(3).
BY MR. QUINN:
Q. You can answer.
A. If the water main would rupture and you would lose pressure on the pipe, you would worry about any -- if there's any localized contaminants getting into the pipe.
Q. And that would have an effect on the downstream water supply?
A. Yes. I mean this is the -- this is the water supply to the city of North Chicago.
Can I mention something? I just saw on the -- on the -- on the Figure 2 site base map it does indicate -- we talked briefly about slag and foundry sand average two feet thick.
That would be -- it's indicated on here where those areas are and it -- and it does look like the water main would run right through that. So slag is -- you know, is very porous and foundry sand in those two areas would be a perfect path for migration of materials.
Q. So you were mentioning before the two --

the two trenches, the two lines intersecting. The trench lines. So, for example, if you dig a -- a sanitary sewer down 12 feet, everything above that is going to be fill when you fill the hole back in, right?
A. Loose -- looser material than the native soils, yes.
Q. Right.
So then when you run another trench parallel to it even if it's four or five feet deep, those two trenches -- the looser soil is -- is going to intersect?
A. Yes.
Q. Okay. All right. Now, you did a supplemental disclosure report about the cost of remediating the contamination within the water line, correct?
MR. MATTHEW DiCIANNI: Objection. That's -- I never got that.
MR. QUINN: Oh, sure you did. This.
MR. THOMAS DiCIANNI: Let me see. Object.
MR. MATTHEW DiCIANNI: What's that?
MR. THOMAS DiCIANNI: Object. Based on (f)(3).
MR. MATTHEW DiCIANNI: Okay.
THE COURT REPORTER: I think it's 10.
MR. QUINN: Okay.
(Kolb Deposition Exhibit No. 10 marked for i.d.)
BY MR. QUINN:
Q. I'm showing you what I've marked as Exhibit 10.
A. Right.
Q. And you used the Deigan report as a basis for that, correct?
MR. MATTHEW DiCIANNI: Okay. Ob --
MR. THOMAS DiCIANNI: Go ahead. Object.
MR. MATTHEW DiCIANNI: Objection. I'm just going to object to all these line of questions.
MR. QUINN: That's fine.
MR. THOMAS DiCIANNI: On (f)(3).
MR. MATTHEW DiCIANNI: On (f)(3).
MR. QUINN: So you're saying you never got this?
MR. MATTHEW DiCIANNI: No. I don't think so.
MR. QUINN: I don't know. We should clear that up.

MR. MATTHEW DiCIANNI: John, do you mind if we take a break?
MR. QUINN: Sure.
(Off the record at 3:51 p.m.)
(Resumed at 3:52 p.m.)
MR. QUINN: I'll have to go back and look and make sure, but I'm fairly certain that that went out. And I've got the date on there that it was emailed. I just don't know if I sent it or if my secretary did.
MR. MATTHEW DiCIANNI: Okay. Yeah. I'll look for it, too.
BY MR. QUINN:
Q. So, in any event, I just wanted to make sure that those are your opinions, Mr. Kolb?
A. Yes.
MR. MATTHEW DiCIANNI: Objection based on (f)(3).
BY MR. QUINN:
Q. And you based those opinions on your experience as an engineer and the Deigan report, correct?
MR. MATTHEW DiCIANNI: Just a continuing objection to -- TO all of these questions based on (f)(3).

and then I brought those costs up to 2020 as I noted in here.

MR. QUINN: Okay. That's all I've got.

MR. MATTHEW DiCIANNI: Okay. Thanks, John.

MR. QUINN: All right.

MR. THOMAS DiCIANNI: Thanks, Mr. Kolb.

THE COURT REPORTER: Signature?

MR. QUINN: We'll waive signature.

MR. THOMAS DiCIANNI: Have you been ordering the deps?

MR. MATTHEW DiCIANNI: Yeah. Yeah. We'll take --

MR. THOMAS DiCIANNI: Order a copy.

MR. MATTHEW DiCIANNI: Yeah. We'll take --

MR. QUINN: I'll take a copy.

MR. MATTHEW DiCIANNI: Yeah. We'll take a copy, too. We'll order it.

THE COURT REPORTER: What format?

MR. MATTHEW DiCIANNI: Just PDF. We don't need the paper copy.

THE COURT REPORTER: Mr. Quinn, what format?

MR. QUINN: Oh, PDF.

MR. THOMAS DiCIANNI: Can we get a mini? Mini, right? Yeah.

(Witness excused.)

AND FURTHER DEPONENT SAITH NOT.

(Deposition concluded at 3:54 p.m.)

taken before SUSAN R. PILAR, CSR No. 84-003432, at Ancel Glink, P.C., 175 East Hawthorn Parkway, Suite 145, Vernon Hills, Illinois, commencing at 1:00 p.m. on April 20, 2021. Said witness was first duly sworn by me and then examined upon oral interrogatories. The questions and answers were taken via machine shorthand by the undersigned and reduced to computerized transcription. The foregoing is an accurate and complete record of said deposition.

The certificate annexed hereto applies only to the original transcript and copies signed and certified by me. I assume no responsibility for copies which have been reproduced beyond my direction or control.

The signature of the witness was waived by agreement of the parties herein.

The undersigned is not interested in this case, nor is of kin or counsel to any of the parties herein.

IN WITNESS WHEREOF, I hereunto affix my hand as Certified Shorthand Reporter in and for the State of Illinois, on April 28, 2021.

_____

SUSAN R. PILAR, CSR
CSR No. 084-003432



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ERIN CARTWRIGHT WEINSTEIN
Clerk of the Circuit Court
Lake County, Illinois

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

The City of North Chicago, Plaintiff, v. 2nd & Main, LLC; Unknown Owners and Non-Record Claimants, Defendants.	))))))))))	Case No. 2019 ED 20

City of North Chicago's Response to 2nd & Main's Motion for Partial Summary Judgment

Now Comes Plaintiff, the City of North Chicago, through its attorneys, and responds to Defendant 2nd & Main's Motion for Partial Summary Judgment ("Motion"), stating as follows:

Argument

I. Whether the Water Main Interferes with the Property's Use as a Railroad Is a Disputed Issue of Material Fact.

A. The City Has Expert Testimony Disputing 2nd & Main's Claim that the Water Main Will Interfere with the Use of the Property as a Railroad.

2nd & Main predicates its Motion on one fundamental assumption: that the water main interferes with its ability to construct railroad spurs on 2nd & Main's Property (the "Property"). This interference, 2nd & Main argues, requires this Court to "fashion a remedy so that the taking will not interfere with the Defendant's use of the property as a railroad." Mtn. p. 8.

Thus, for this Court to grant this Motion, there must be no dispute that the water main interferes with the use of the Property as a railroad. *See, e.g., People ex rel. First Nat'l Bank v. N. Chi.*, 158 Ill. App. 3d 85, 103 (2d Dist. 1987) ("Summary judgment is properly granted only where there is no genuine issue of material fact"). After all, if the water main does not interfere with the

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construction and operation of railroad spurs on the Property, then there is no need for this Court to order the City to replace the water main or award any of the other relief the Motion seeks.

There is a dispute as to whether the water main interferes with the use of the Property as a railroad. The City has disclosed expert testimony opining that the water main will not interfere with the operation of the Property as a railroad. *See* Rsp. to Rule 2-1.04 Statement, Exhibit A. Thus, this is a disputed issue of material fact, and there is no basis for this Court to grant summary judgment.

2nd & Main claims that the water main is not sufficiently reinforced to bear the weight of a railroad spur operating on the Property above it. Mtn. p. 5-6. The City's expert, Devin Moose, a professional engineer, disputes this claim. *See* Rsp. to Rule 2-1.04 Statement, Exhibit A. In Mr. Moose's opinion, the presence of the water main does not limit 2nd & Main's ability to use the Property for railroad purposes. *Id.* at ¶¶ 3-5. The existing rail spur could operate without additional improvement to the water main infrastructure. *Id.* The northern portion of the Property could be utilized without modification to the rail spur or water main. *Id.* at ¶ 4. The water main does not even run underneath the railroad spur. *Id.* at ¶ 1.

In Mr. Moose's opinion there is no need for this Court to award 2nd & Main the relief sought in the Motion, because the harm the Motion seeks to alleviate, the interference with railroad operations caused by the water main, does not exist. *Id.* at ¶ 5.

Ultimately, this Court cannot grant this Motion because doing so would require it to resolve a disputed issue of material fact—whether the water main will interfere with the use of the Property as a railroad. This is a question for the jury to decide.

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B. Whether the Water Main Will Interfere with the Use of the Property as a Railroad in the Future Is Also a Disputed Issue of Material Fact.

2nd & Main argues that "it does not matter whether or not the Property is currently being used as a railroad" because the City is preempted from using the Property in a way that will interfere with 2nd & Main's plans for the Property's future use. Mtn. p. 6. There will be significant future development of the Property as a railroad, 2nd & Main argues, and thus the water main must be constructed to a standard that will support this future development.

Again, this argument requires this Court to resolve a disputed issue of material fact—whether the Property is capable of being used in a manner that will sustain significant future railroad operations. And 2nd & Main has provided no evidence to show that it will be. The Motion contains no evidence that 2nd & Main's plan to use the Property as a railroad hub is at all viable.

In contrast the City has provided evidence disputing this contention. The City's appraiser, Barton DeLacy, examined whether the Surface Transportation Board exemption had any impact on the value of the Property along with the likelihood that the Property could be used as a railroad hub in the future. *See* Rsp. to Rule 2-1.04 Statement, Exhibit B. In Mr. DeLacy's opinion there is no likelihood that the Property could be used as a railroad hub or for the storage of shipping containers and railroad access. *Id.* at ¶ 8. The Property is located in a blighted area with low levels of economic activity which makes the demand for a railroad hub non-existent. *Id.*

2nd & Main can claim that the Property will be the next major railroad hub in Lake County. That does not mean such a use is likely or warrants a finding that the City's condemnation should be limited because of these plans. There is simply not enough evidence to support its claim that the Property will be used as a railroad hub to warrant the entry of summary judgment.

II. There Is No Basis for this Court to Award 2nd & Main the Relief It Seeks.

There is no basis for this Court to award, in summary fashion, the relief that 2nd & Main seeks. 2nd & Main has provided nothing to support its contention that "if judgment for condemnation is entered, [this Court should order] that the existing water main be replaced by one that meets railroad standards at least as stringent as those set forth in the City's drawings by Alvord, Burdick, and Howson." Mtn. p. 8.

First, 2nd & Main does not explain why this order should be entered if this Court awards condemnation. *See id.* Earlier in the Motion 2nd & Main argues that this relief should only be granted if the Court finds that the water main will interfere with the use of the Property as a railroad, not if an order of condemnation is entered. *See id.* at pp. 5-6.

Second, "[o]n a motion for summary judgment, it is the movant's burden to present matters demonstrating that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law." *Guese v. Farmers Inter-Insurance Exch.*, 238 Ill. App. 3d 196, 200 1st Dist. 1992). 2nd & Main does not meet this burden. It fails to explain why, if this Court enters condemnation in its favor, the City should replace the existing water main with one that is allegedly sufficient to bear the weight of the railroad spurs on the Property. It fails to explain why the standard set forth in the Alvord, Burdick, & Howson drawings is the appropriate standard as opposed to some other standard. There is simply no basis for this Court to enter an order, in summary fashion, requiring the City to replace the water main. The same applies to 2nd & Main's request that "[a]fter the water main is replaced, the property should be put back in the condition that existed prior to the replacement." Mtn. p. 8.

Conclusion

This Court cannot grant this Motion unless it finds that there is no disputed issue of material fact that the water main will interfere with 2nd & Main's ability to construct and operate railroad spurs on the Property. Such a finding is unwarranted. The City has provided expert testimony disputing this claim. In the opinion of the City's expert the water main will not prevent the construction and operation of railroad spurs on the Property. The City's appraiser finds that there is no likelihood that the Property will be used as a railroad hub in the future, and thus the condemnation action will not affect the ability of the Property to be used for railroad operations. Because of these disputed issues of material fact this Court must deny this Motion. //.

WHEREFORE, Plaintiff City of North Chicago respectfully requests that this Court deny 2nd & Main's Motion for Partial Summary Judgment and grant any other relief it finds to be just.

Respectfully submitted,



By: _____
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ERIN CARTWRIGHT WEINSTEIN
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Lake County, Illinois

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

The City of North Chicago	)	
Plaintiff,	)	
v.	)	Case No. 2019-ED-20
2nd & Main, LLC; Unknown Owners and Non-Record Claimants	)	
Defendants.	)	

The City of North Chicago's Response to 2nd & Main's 2-1.04 Statement

NOW COMES the City of North Chicago, through its attorneys Ancel Glink, P.C., and for its Response to 2nd & Main's Rule 2-1.04 Statement, states as follows:

PARTIES

1. 2nd & MAIN, LLC, is the owner of the following real estate (hereafter the "Property") located in North Chicago and described as follows:

> A Part of the North Half of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, described as follows: Beginning at a point on the Easterly Right of Way Line of the Chicago and North Western Railway Company, which point is 772.10 feet measured along said Right of Way Line Southerly of the intersection of said Right of Way Line with the Southerly Right of Way Line of the Elgin, Joliet and Eastern Railway Company; running thence East on a Line parallel with the South Line of said Northwest Quarter of the said Section 4, a distance of 515.8 feet the West Line of Marquette Street; thence Northerly along the West Line of Marquette Street, approximately 220 feet to the Southeast Corner of the former J.W. Aulson and Sons Corporation Property, more particularly described by Warranty Deed dated April 20, 1921 and Recorded April 26, 1921, as Document 201389; thence West 435 feet on the South Line of said Former J. W. Aulson and Sons Corporation Property to said Easterly Right of Way of said Chicago and North Western Railway Company; running thence in a Southerly direction along said Easterly Right of Way Line to the point of beginning, in Lake County, Illinois.

RESPONSE: Undisputed.

2. The City of North Chicago is a municipal corporation.

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RESPONSE: Undisputed.

FACTS SUPPORTING VENUE AND JURISDICTION

3. The property involved in this action is located in Lake County, Illinois.

RESPONSE: Undisputed.

UNCONTESTED FACTS

4. Sometime after 1901, North Chicago installed a 24 inch water main across the 2nd & Main's property without obtaining an easement. (Counter Complaint paragraph 3 and answer).

RESPONSE: Undisputed.

5. On March 6, 2017, 2nd and Main, LLC filed a Notice of Exemption under 49 C.F.R. § 1150.31 with the Surface Transportation Board. A copy of that filing is attached as Exhibit A to the Phil Dahl Affidavit. (Exhibit 1--Affidavit of Phil Dahl paragraph 4)

RESPONSE: Undisputed.

6. On March 22, 2017, the Surface Transportation Board issued its decision regarding the Notice of Exemption. As a result of the decision, the exemption became effective April 5, 2017. A copy of that decision is attached as Exhibit B to the Phil dahl Affidavit. (Exhibit 1--Affidavit of Phil Dahl paragraph 5).

RESPONSE: Undisputed.

7. 2nd & Main plans to use the property that is the subject of the suit and a storage area for shipping containers and railroad access. (Exhibit 1--Affidavit of Phil Dahl paragraph 6)

RESPONSE: Disputed. Contrary evidence is provided by P. Barton DeLacy, the City's appraiser, in his affidavit attached as Exhibit B. Mr. DeLacy opines that the Notice of Exemption adds no value to the Property because there is little opportunity for the Property to be used as a location where significant railroad operations take place. *Id.* at ¶ 5.

8. The property in question has been leased by 2nd & Main LLC to Hussey Terminal Railroad Company. (Exhibit 1--Affidavit of Phil Dahl paragraph 7).

RESPONSE: Undisputed.

9. Attached as Exhibit 2, are drawings of the water main located on the 2nd & Main property and adjoining properties prepared by North Chicago's engineers Alvord, Burdick & Howson in 1961 and provided by Frank Furlan a former North Chicago city engineer.

RESPONSE: Undisputed.

10. When constructing a water main under railroad property a carrier pipe is first installed, then the concrete water main is placed within the carrier pipe and it is filled with sand to carry the load. (Deposition of Frank Furlan Exhibit 3 page 21 and Affidavit of Peter Kolb Exhibit 4 paragraph 7)

RESPONSE: Disputed. This is not always necessary to support the load of the railroad spur on the water main. *See* Exhibit A, Affidavit of Devin Moose, Ex. 1.

11. This is done to avoid putting the load of the railroad tracks on the water pipes. Instead, it is put on the outside casing. (Deposition of Frank Furlan page 21 and Affidavit of Peter Kolb Exhibit 4 paragraph 8))

RESPONSE: Disputed. This is not always necessary to support the load of the railroad spur on the water main. *See* Exhibit A, Exhibit 1.

12. The water main across the 2nd & Main property was installed without a carrier pipe and is not to railroad standards. (Affidavit of Peter Kolb Exhibit 4 paragraph 9)

RESPONSE: Disputed. The City's expert witness, Devin Moose, opines that the water main can bear the weight of a railroad spur if it were to be constructed over the main. *See* Exhibit A, Exhibit

1. Currently, the water main does not run below the railroad spur. Exhibit C, "Deposition Transcript of Peter Kolb," p. 77, ln. 13-16.

13. The Existing 24-inch diameter pre-stressed concrete cylinder pipe water main on the 2nd & Main property is not sufficiently constructed for the purpose of supporting railroad loadings and does not meet railroad criteria for utility crossings. (Affidavit of Peter Kolb Exhibit 4 paragraph 10)

RESPONSE: Disputed. The City's expert witness, Devin Moose, opines that the water main can bear the weight of a railroad spur if it were to be constructed over the main. *See* Exhibit A, Exhibit 1. Currently, the water main does not run below the railroad spur. Exhibit C, "Deposition Transcript of Peter Kolb," p. 77, ln. 13-16.

14. The existing water main renders the 2nd & Main property unusable for railroad purposes in the area over and north of the existing water main. (Affidavit of Peter Kolb Exhibit 4 paragraph 11).

RESPONSE: Disputed. The City's expert witness, Devin Moose, opines that the water main can bear the weight of a railroad spur if it were to be constructed over the main. *See* Exhibit A, Exhibit 1. Currently, the water main does not run below the railroad spur. Exhibit C, "Deposition Transcript of Peter Kolb," p. 77, ln. 13-16.

THE CITY'S STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL FACTS

The following material facts are undisputed or genuinely indisputable:

1. The water main does not intersect the railroad spur on the 2nd & Main Property ("Property"). *See* Exhibit C, "Deposition Transcript of Peter Kolb," p. 77, ln. 13-16. At no point does the water main travel underneath the railroad spur on the Property. *See id.*

2. Devin Moose, a professional engineer with Aptim, Inc. with more than 35 years of experience, has reviewed the documents 2nd & Main and its experts relied upon to conclude that the water main is not sufficiently reinforced to bear the weight of railroad spurs operating on the Property.
3. After reviewing these documents, Mr. Moose concludes that the water main will not interfere with the operation of the railroad spur on the Property. Mr. Moose describes his opinions, and provides his expert report, in an affidavit attached as Exhibit A.
4. According to Mr. Moose, the water main as currently constructed does not interfere with the Property's railroad use and will not interfere with any of 2nd & Main's proposed or future railroad uses of the Property. Exhibit A, ¶ 4.
5. It is Mr. Moose's opinion that the presence of the water main does not limit 2nd & Main's ability to use the Property for railroad purposes or for a storage area for shipping containers and railroad access. *Id.* The existing rail spur could operate without additional improvement to the water main infrastructure. *Id.* The northern portion of the Property could be utilized without modification to the rail spur or water main. *Id.*
6. In Mr. Moose's opinion there is no need for this Court to award 2nd & Main the relief sought in the Motion, because the harm the Motion seeks to alleviate, the interference with railroad operations caused by the water main, does not exist. Exhibit A, Exhibit 1.
7. Barton DeLacy is a licensed appraiser with more than 40 years of experience. Mr. DeLacy performed an appraisal of the Property, which is included with his affidavit attached as Exhibit B.
8. Among the issues that Mr. DeLacy examined was whether the Surface Transportation Board designation that 2nd & Main received would have any impact on the value of the Property or

the way the Property could be used in the future. Mr. DeLacy found that it did not. Exhibit B, ¶ 5.

9. Mr. DeLacy came to this conclusion because there is no demand for the use of the Property as a railroad hub or for the storage of shipping containers and railroad access. *Id.* Mr. DeLacy found that because the Property is located in an area of significant blight with low levels of economic activity and economic opportunity 2nd & Main's plans for the future use of the Property are not viable. *Id.*

Respectfully submitted,



Attorney for the City of North Chicago

Matthew T. DiCianni (ARDC #6312661)
ANCEL GLINK, P.C.
140 South Dearborn Street, 6th Floor
Chicago, Illinois 60603
P: 312-604-9125
F: 312-782-0943
mdicianni@ancelglink.com

EXHIBIT A

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

The City of North Chicago Plaintiff, v. 2nd & Main, LLC; Unknown Owners and Non-Record Claimants Defendants.	)	Case No. 2019-ED-20

Affidavit of Devin Moose

I, Devin Moose, after being duly sworn, state under oath as follows:

1. I am over 18 years of age, and the statements made in this Affidavit are based on my personal knowledge. If called to testify, I could competently testify to the facts stated herein.
2. I am a Licensed Professional Engineer in Illinois. I have over 35 years of experience in the field of environmental engineering.
3. I reviewed a number of documents discussing the construction standards of the water main located on 2nd & Main's property ("Property"). I also reviewed documents related to the construction of the railroad spur on the 2nd & Main property along with the survey of the Property.
4. Based on my experience and review of the documents it is my opinion that the presence of the water main does not substantially limit the future use of the Property. The existing rail spur could resume without additional improvement to the water main infrastructure. The northern portion of the Property, between the existing rail spur and northern property boundary, could be used for a variety of purposes, including but not limited to housing shipping containers or

other material storage. The rail spur, therefore, could be utilized without modification to the rail line or the water main.

5. Attached as Exhibit 1 is the expert report that I drafted that contains my findings and opinion regarding the ability of the railroad spurs to be constructed on the Property.

FURTHER AFFIANT SAYETH NAUGHT.

Under penalties as provided by law pursuant to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), the undersigned certifies that the statements set forth in this affidavit are true and correct.

Executed on June 7th, 2021

Devin Moose

SUBSCRIBED and SWORN to

before me this 7th day of June, 2021.

KATHRYN DITORE
Official Seal
Notary Public - State of Illinois
My Commission Expires Jul 22, 2022

Kathryn Ditore
Notary Public

C0343

EXHIBIT 1

Expert Opinions of Devin A. Moose, P.E., DEE and John P. Low, P.G.

Submitted To:

Mr. Matthew T. DiCianni
Ancel Glink, P.C.
140 South Dearborn, Suite 600
Chicago, IL 60603

Regarding:

The City of North Chicago v. 2nd & Main, LLC
Circuit Court of Lake County, Illinois
Case No. 19 ED 00000020

Submitted by:

Devin A. Moose, P.E., DEE and
John P. Low, P.G.
Aptim Environmental & Infrastructure, LLC

June 2, 2021

Expert Opinions of
Devin A. Moose, P.E., DEE and
John P. Low, P.G.

Submitted to:

Mr. Matthew T. DiCianni
Ancel Glink, P.C.
140 South Dearborn, Suite 600
Chicago, IL 60603

Regarding:

The City of North Chicago v. 2nd & Main, LLC
Circuit Court of Lake County, Illinois
Case No. 19 ED 00000020

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Devin A. Moose, P.E., DEE and
John P. Low, P.G.
Aptim Environmental & Infrastructure, LLC

June 2, 2021

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Figure 2 Historical Site Investigation Layout Map
Figure 3 Soil Impacts Map – All Constituents North Adjacent Property
Figure 4 Soil Impacts Map – Ethylbenzene
Figure 5 Soil Impacts Map – Xylenes
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Figure 7 Reported Slag and Foundry Sand Fill Location Map

LIST OF ATTACHMENTS

Attachment A Complaint for Condemnation
Attachment B Curricula Vitae of Devin A. Moose and John P. Low
Attachment C Applied Technologies, Inc. report, dated February 28, 2020
Attachment D1 ALTA/ACSM Land Title Survey
Attachment D2 Copy of ALTA/ACSM Land Title Survey – Zoomed In
Attachment E Phase II Subsurface Soil Investigation (Stateline Environmental, August 16, 2013)
Attachment F Phase II Subsurface Investigation (Environmental Protection Industries, March 2010)
Attachment G Findings of Phase II Environmental Assessment (Deigan & Associates, LLC, August 8, 2013)
Attachment H Water Main Construction Drawings, Section 2 Sheet 1 and 2, for North Chicago (Alvord, Burdick & Howson, July 1961)
Attachment I Selected Soil Boring Logs (Deigan & Associates, LLC, August 8, 2013)

June 2, 2021

Mr. Matthew T. DiCianni
Ancel Glink, P.C.
140 South Dearborn, Suite 600
Chicago, IL 60603

Re: The City of North Chicago v. 2nd & Main, LLC; Unknown Owner and Non-Record Claimants
Circuit Court of Lake County, Illinois
Case No. 19 ED 00000020

Dear Mr. DiCianni,

Aptim Environmental & Infrastructure, LLC (APTIM) has been retained by Ancel Glink, P.C. to provide expert opinions with regard to certain conditions of the acquisition of a water main easement (Easement) by the City of North Chicago (City) from 2nd & Main, LLC on the property commonly known as 1940 Marquette St, North Chicago, Illinois 60064 (Property) in the case listed above (refer to **Attachment A** for the Complaint for Condemnation). 2nd & Main, LLC opines that subsurface utilities, including an east-west oriented water main located beneath the Property owned by the City and a north-south oriented Great Lakes Naval Training Center sanitary sewer line, restrict potential future use of the Property and act as a preferential pathway for environmental impacts to migrate to the Property from off-site sources.

The City installed the water main in 1961. Its approximate location, the Property boundaries, and surrounding properties are illustrated on **Figure 1**.

2nd & Main, LLC is demanding over twenty-five (25) times the Easement's appraised value and further demanding that the City remove the water main and replace it to provide structural support for a rail spur that it may construct for future use on the Property. However, as detailed within this expert opinion, such demands are not justified.

The expert opinions contained herein are as follows:

1. The presence of the water main does not substantially limit the future use of the Property. The existing rail spur could resume without additional improvement to the water main infrastructure. The northern portion of the Property, between the existing rail spur and northern property boundary, could be used for a variety of

purposes, including but not limited to housing shipping containers or other material storage.

2. The environmental impacts to soil reported on the north adjacent property have contributed in only a minor fashion to environmental degradation on the Property, and those on Property impacts appear to be attenuating through natural processes.

3. The importation and placement of foundry sand and fill from smelters on the western edge of the Property, remote from the water main, has contributed substantially more to the environmental degradation of the Property than the historical operations on the north adjacent property.

4. The bedding and backfill within the water main trench have not acted as a preferential pathway for impacts to migrate from off-site sources onto the Property.

Opinion 1 is provided by Devin A. Moose, while opinions 2, 3, and 4 are provided by John P. Low.

I. Expert Qualifications

Devin A. Moose is a Licensed Professional Engineer in Illinois. Mr. Moose has over 35 years of experience in the field of environmental engineering. Mr. Moose's experience and qualifications can be viewed in greater detail on his Curriculum Vitae included in **Attachment B**.

John P. Low is a Licensed Professional Geologist in Illinois with more than 15 years of consulting experience related to environmental site assessments and remedial implementation. Mr. Low earned his B.S. in Geology and Environmental Geosciences and B.A. in Economics from Northern Illinois University and is responsible for conducting environmental site assessments and performing remedial actions for municipalities, private industrial companies, and other clients across the United States. Mr. Low's experience and qualifications can be viewed in greater detail on his Curriculum Vitae included in **Attachment B**.

II. Basis of Opinions

Opinions provided within this document have been formulated based on the following:

1. Education
2. Experience
3. Training and Continuing Education
4. Document Review

III. Document Review

The following documents were provided for review in preparation of this document:

1. Various Documents Produced by Plaintiff
2. Various Documents Produced by Defendant
3. Interrogatories and Admissions of Fact
4. Discovery Depositions
5. Materials Included with, or Cited within, this Document

IV. Compensation

Compensation for these opinions is on a time and materials basis. The hourly billing rates of Devin Moose and John Low are $250 and $140, respectively.

V. Background

According to the Complaint for Condemnation, the City seeks to acquire by eminent domain a water main Easement on the property commonly known as 1940 Marquette St, North Chicago, Illinois 60064. The water main has been in existence for more than fifty (50) years and is an integral part of the City's water system. The City has directed Ancel Glink, P.C. to negotiate with the 2nd & Main, LLC for the purchase of the Easement, which has been undertaken in good faith. 2nd & Main, LLC has rejected the City's offer, which included compensation of 20% greater than the appraised value of the Easement. 2nd & Main, LLC has demanded twenty-five (25) times the Easement's appraised value and is demanding that the City remove the water main and replace it.

2nd & Main, LLC contracted Mr. Peter Kolb, P.E. of Applied Technologies, Inc. to provide opinions and recommendations germane to this Complaint for Condemnation, which include the following:

- An existing 24-inch diameter prestressed concrete cylinder pipe water main, owned and operated by the City, crossing the Property is not sufficiently

constructed for the purpose of supporting railroad loadings and does not meet railroad criteria for utility crossings.

- The existing water main renders the Property unusable for railroad purposes in the area over and north of the existing water main. Conventional setbacks would be required of approximately 15 feet from the edge of the railroad embankment to the centerline of the water main. Given the existing location of the water main this renders approximately 50 feet of area unusable for the entire east-west length of the Property.
- The adjacent property to the north contains environmental contamination and several environmental investigations have revealed the presence of contaminants migrating to the Property. The City's water main and the Great Lakes Navel Training Center sanitary sewer line act as preferential migration pathways for contamination to travel. Bedding materials and backfill surrounding the pipes used in the construction of the water main and sewer line provide a pathway for the migration of environmental contamination across the Property and will continue to do so until remediation is provided.

The text of the report, dated February 28, 2020, is included as **Attachment C**.

2nd & Main, LLC is utilizing these opinions to seek additional compensation for the Easement and demand that the City undertake additional actions to replace the water main and mitigate the migration of environmental constituents from off-site sources onto the Property. However, as detailed within this expert opinion, such demands are not justified.

VI. Opinions

<u>The presence of the water main does not substantially limit the future use of the Property. The existing rail spur could resume without additional improvement to the water main infrastructure. The northern portion of the Property, between the existing rail spur and northern property boundary, could be used for a variety of purposes, including but not limited to housing shipping containers or other material storage.</u>

The Alta/ACSM Land Title Survey (Survey) is included as **Attachments D1 and D2**. The Survey is dated June 18, 1999 and depicts the location of the 24-inch water main, the sanitary sewer line, multiple sanitary sewer manholes, and other key features such as the rail spur. The presence and location of each feature are clearly identified on the Survey, which would have been readily available for review by 2nd & Main, LLC at the time it acquired the Property on June 25, 2014.

As stated in the Applied Technologies opinion, a minimum distance of 15 feet from the edge of a railroad embankment to the centerline of the existing water main would need to be provided to allow for future excavation and repair of the line. The entire existing rail spur is greater than 15 feet from the centerline of the water main. The rail spur, therefore, could be utilized without modification to the rail line or the water main. The area between the north Property line and rail spur, although not suitable to house additional rail lines, could be utilized for other purposes, including but not limited to unloaded rail car storage and other general material storage

The environmental impacts to soil reported on the north adjacent property have contributed in only a minor fashion to the environmental degradation of the Property, and those on Property impacts appear to be attenuating through natural processes.

Environmental impacts on the north adjacent property were reported in the *Phase II Subsurface Soil Investigation* (Stateline Environmental, August 16, 2013 – **Attachment E**). The investigation was limited to the assessment of soil, including the collection of five (5) discrete soil samples from five (5) soil borings (B-1 through B-5) for laboratory analysis of the following constituents:

- volatile organic compounds (VOCs)
- semi-volatile organic compounds (SVOCs)
- polychlorinated biphenyls (PCBs)
- Priority Pollutant List (PPL) metals

The location of each soil boring is depicted on **Figure 2**. The soil boring locations were selected to assess the environmental condition of the southeast portion of the property in proximity to a known underground storage tank (UST) farm, and if present, whether those impacts were likely to have migrated onto the south adjoining property where the water main resides. No groundwater samples were collected, and groundwater conditions were not included in the report.

Soil impacts in excess of Tier 1 soil remediation objectives (SROs) published in 35 IAC Part 742, *Tiered Approach to Corrective Action Objectives (TACO)* were reported in four (4) of the five (5) samples collected. The following constituents of concern exceed their respective SROs, with maximum concentrations indicated:

- ethylbenzene – 310 milligrams per kilogram (mg/kg) in B-2
- toluene – 13,000 mg/kg in B-2
- xylenes (total) – 1,800 mg/kg in B-2
- benzo(a)pyrene – 1.2 mg/kg in B-2
- naphthalene – 2.9 mg/kg in B-1

- mercury – 0.029 mg/kg in B-3

The reported impacts were present in soil samples collected between 4 and 9.5 feet below ground surface (bgs). The soil impacts were reported in excess of multiple exposure routes, as defined in *TACO*, including Soil Component to Groundwater Ingestion for Class I and II resources; Inhalation for residential, industrial/commercial, and construction worker populations; and Ingestion for residential populations. The soil impacts on the north adjacent property are shown on **Figure 3**.

Environmental Protection Industries (EPI) and Deigan & Associates, LLC (Deigan & Associates) performed environmental site assessments on the Property in March 2010 and August 2013, respectively. The EPI investigation consisted of the advancement of four (4) soil borings (B1 through B4) and the collection of one (1) soil sample from each soil boring in between 4 and 8 feet bgs for laboratory analysis of VOCs, SVOCs, and Resource Conservation and Recovery Act (RCRA) 8 metals. One (1) groundwater sample was collected from B2 for laboratory analysis of VOCs and SVOCs. Although a formal report of the sampling was not provided, APTIM reviewed figures, tables, and the analytical laboratory report that were compiled by EPI and their subcontractors (**Attachment F**).

Soil impacts in excess of Tier 1 SROs were reported in two (2) of the four (4) samples collected. The Tier 1 exceedances were limited to the following constituents, with maximum concentrations indicated:

- ethylbenzene – 34 mg/kg in B2 and B3
- xylenes (total) – 220 mg/kg in B2

The reported impacts were present in soil samples collected between 4 and 8 bgs. The exposure routes exceeded were reduced to only the Soil Component to Groundwater Ingestion for Class I and II resources and Inhalation for the construction worker population. The soil samples were collected south of the Stateline Environmental sampling locations, between the north Property line and the water main.

EPI converted B2 into a temporary groundwater monitoring well to facilitate the collection of one (1) groundwater sample for laboratory analysis of VOCs and SVOCs. The laboratory results revealed a limited number of constituents to be present in excess of the Tier 1 groundwater remedial objectives (GROs), including:

- benzene
- ethylbenzene

- xylenes (total)
- dibenzo(a,h)anthracene
- indeno(1,2,3-c,d)pyrene

Ethylbenzene and xylenes exceeded the GROs for Class I and II resources, while benzene, dibenzo(a,h)anthracene, and indeno(1,2,3-c,d)pyrene exceeded only the GRO for Class I resources.

Deigan & Associates performed a Phase II Environmental Site Assessment (ESA) of the Property approximately 3.5 years after the EPI investigation, and concurrently with the Stateline Environmental investigation of the north adjacent property. The Deigan & Associates investigation included the advancement of twenty-six (26) soil borings, of which eight (8) were located between the north property boundary and the water main (SB-4, SB-9, SB-19, SB-20, SB-21, SB-22, SB-23, and SB-26). One (1) soil sample was collected from each of the eight (8) soil borings from depth intervals ranging from 4 to 9 feet bgs, with the exception of SB-22, where four (4) discreet samples were collected ranging in depth from 2 to 10 feet bgs. Soil samples were generally analyzed for VOCs, with the addition of PNAs in SB-20, and metals and PNAs in select intervals in SB-22. The results of the investigation were provided in Findings of Phase II Environmental Assessment (Deigan & Associates, August 8, 2013 – **Attachment G**).

Soil impacts in excess of Tier 1 SROs were reported in only two (2) of the eight (8) soil boring locations. The Tier 1 exceedances were limited to the following constituents, with maximum concentrations indicated:

- benzene – 0.16 mg/kg in SB-20 (8-9')
- lead – 780 mg/kg in SB-22 (2-3')

The one (1) lead impact was reportedly collected from an isolated area of this portion of the Property that contained foundry sand and slag fill and is not attributable to the historic operations on the north adjacent property.

The one (1) benzene impact exceeds only the Soil Component to Groundwater Ingestion for Class I resources.

The soil samples were collected south of the Stateline Environmental sampling locations, between the north Property line and the water main proximal to the EPI sampling locations.

Deigan & Associates converted three (3) soil borings into temporary groundwater monitoring points to facilitate the collection of three (3) groundwater samples for laboratory analysis of VOCs.

None of the three (3) samples reported VOCs in excess of the most stringent Tier 1 groundwater remedial objectives (GROs).

Six (6) constituents, including toluene, ethylbenzene, xylenes, benzo(a,h)anthracene, naphthalene, and mercury, were reported at concentrations exceeding at least one SRO on the north adjacent property, compared to two (2) constituents (ethylbenzene and xylenes) on the Property during the 2010 EPI investigation. The 2013 Deigan & Associates investigation yielded only one (1) constituent potentially attributable to the north adjacent property, benzene, in excess of Tier 1 SROs.

The maximum concentration of ethylbenzene on the Property in 2010 was 34 mg/kg compared to 310 mg/kg on the north adjacent property. The maximum concentration of xylenes on the Property in 2010 was 220 mg/kg compared to 1,800 mg/kg on the north adjacent property. Benzene, which was reported in only one (1) soil sample in either 2010 and 2013, was not reported above the laboratory report limit on the north adjacent property. The distribution of ethylbenzene, xylenes, and benzene on the Property and north adjacent property are depicted on **Figure 4**, **Figure 5**, and **Figure 6**, respectively.

The reduction in the number and concentration of constituents reported between the north adjacent property and the Property indicate that southern migration of these constituents is very limited. The limited constituents reported to exceed any Tier 1 SROs or GROs on the Property by Deigan and Associates indicates that attenuation of these constituents has likely occurred through natural processes between 2010 and 2013, and that significant impacts were not reported in 2013.

<u>The importation and placement of foundry sand and fill from smelters on the western edge of the Property, remote from the water main, has contributed substantially more to the environmental degradation of the Property than the historical operations on the north adjacent property.</u>

The Deigan & Associates Phase II Environmental Assessment report indicates that an approximate 2-foot-thick layer of foundry sand and slag fill was observed during soil boring and classification activities on eastern bank of the Union Pacific Railroad Co. line. The fill was encountered in each of the eight (8) borings advanced on the “south property” and in soil borings SB-7 and SB-22 on the “north property”, as depicted on **Figure 7**.

Of the twenty-six (26) soil borings advanced by Deigan & Associates, ten (10) were located in areas that contained slag. Analytical laboratory results revealed that seven (7) of the ten (10) locations contained soil in excess of Tier 1 SROs. The following fill related constituents were reported to exceed their respective SROs:

- arsenic
- mercury

- lead
- benzo(a,h)anthracene
- benzo(a)pyrene
- benzo(b)fluoranthene
- carbazole
- dibenzo(a,h)anthracene
- indeno(1,2,3-cd)pyrene

Deigan and Associates submitted thirty-three (33) soil samples for laboratory analysis. Eight (8) of the thirty-three (3) soil samples contained Tier 1 SRO exceedances, of which seven (7) are attributable to the impacted fill located on and adjacent to the Property. Six (6) of the seven (7) exceedances were collected from sampling locations that are between 300 and 1,200 feet south of the water main, and do not pose a threat of environmental impact to it.

<u>The bedding and backfill within the water main trench have not acted as a preferential pathway for impacts to migrate from off-site sources onto the Property.</u>

Construction drawings prepared by Alvord, Burdick & Howson, dated 1961 (included as **Attachment H**), contain trench and backfill details for the water main. The details indicate that 2" sand bedding was specified to underlie the 24-inch pipe, and that sand bedding was to be located at a depth between 6.5 and 7 feet bgs. Earth fill in compacted 6" layers was specified for backfilling the full depth of the trench. APTIM assumes the actual construction of the pipe and backfilling was performing in accordance with these specifications.

The boring logs accompanying the Deigan & Associates Phase II ESA report indicate that the Property contains layers of silty clay or clay, slag fill and silty sand from the ground surface to boring terminuses, which ranged from 15 to 20 feet bgs in borings located in proximity to the water main. The silty clay and clay layers begin immediately under the surficial concrete to depths of 5-12 feet bgs, most commonly terminating between 5 and 8 feet bgs. A medium-grained silty sand layer underlies the silty clay/clay layer. The thickness of the sand layer is 1 to 7 feet, most commonly 1-3 feet. The depth to top of sand ranges from 5 – 12 feet bgs, most commonly between 5 and 8 feet bgs. A second medium-grained sand layer was observed in at least eight (8) of the Deigan & Associates soil boring locations, ranging in thickness of 1 to over 11 feet. Refer to the boring logs provided in **Attachment I**.

It is APTIM's understanding that site soils were not evaluated in field or laboratory settings for analysis of hydraulic conductivity. However, typical hydraulic conductivity values (Cherry, 1979) for the geologic units identified by Deigan & Associates are as follows:

- silt and clay: $1x10^{-7}$ – $1x10^{-5}$ centimeters per second (cm/sec)
- silty sand: $1x10^{-4}$ – $1x10^{-3}$ cm/sec

To the limited extent that environmental impacts are mobilizing from off-site sources onto the Property, they are reportedly doing so through the natural, continuous, and relatively conductive sand layers present beneath the Property. The lone petroleum-related Tier 1 SRO exceedance reported during the Deigan & Associates investigation was collected from the upper sand unit in SB-20, located 8-9' bgs. Noticeable petroleum odors and elevated photoionization detector (PID) readings were noted in the upper sand unit on the boring log, and benzene slightly exceeded the Tier 1 SRO in the sample collected for laboratory analysis. Neither the 2" sand bedding layer or the compacted backfill materials are likely to be mobilizing constituents more readily than the natural continuous silty sand layers.

VII. Conclusion

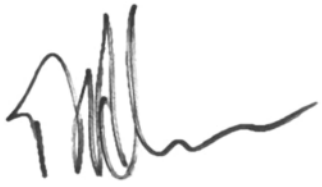
Historic site conditions, including the identification of environmentally impacted soil and groundwater and presence of a 24-inch water main, were documented prior to the June 25, 2014 acquisition of the Property by 2nd & Main, LLC.

The rail spur can be utilized without modification to the rail line or the water main. The area between the north Property line and rail spur, although not suitable to house additional rail lines, could be utilized for other purposes, including but not limited to unloaded rail car storage and other general material storage

Environmental impacts reported on the Property have been reported to originate from the importation and placement of impacted fill material and from historic industrial operations conducted on the north adjacent property. Based on the results of multiple historical environmental site investigations, the impacted fill material has impacted the site with multiple metal and SVOC constituents, largely remote from the City's water main. Limited petroleum related impacts have migrated from the north adjacent property to the Property through a natural, continuous, and relatively conductive sand unit. Neither the 2" sand bedding layer or the compacted backfill materials are likely to be mobilizing constituents more readily than the natural continuous silty sand layers.

Sincerely,

Aptim Environmental & Infrastructure, LLC





Devin A. Moose, P.E., DEE

John P. Low, P.G.

EXHIBIT B

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

The City of North Chicago Plaintiff, v. 2nd & Main, LLC; Unknown Owners and Non-Record Claimants Defendants.	)	Case No. 2019-ED-20

Affidavit of P. Barton DeLacy

I, P. Barton DeLacy, after being duly sworn, state under oath as follows:

1. I am over 18 years of age, and the statements made in this Affidavit are based on my personal knowledge. If called to testify, I could competently testify to the facts stated herein.
2. I am a licensed and certified general real estate appraiser, with licenses in six states, including Illinois. I have more than 40 years of experience as a real estate appraiser.
3. I conducted an appraisal of the 2nd & Main property ("Property"), which is attached as Exhibit 1. In preparing my appraisal I conducted a site inspection of the Property, reviewed the Surface Transportation Board Designation issued for the Property ("STB Designation"), analyzed community demographics and economic development within the City of North Chicago, and reviewed the appraisal performed by the appraiser retained by 2nd & Main, Michael Kendzior, among other things.
4. I am aware that 2nd & Main asserts that the STB Designation significantly increases the value of the Property. I disagree with this assertion.
5. I do not believe that the STB Designation adds any value to the Property. I have found no evidence that this designation is in demand at this location. The area is severely blighted, no

C0359

similar uses in the area exist, and economic activity in the area is limited. I cannot project any market premium this designation will create. Simply stated, just because the Property can be used as a railroad does not mean that it will. The highest and best use of the Property is not for use as a railroad hub.

FURTHER AFFIANT SAYETH NAUGHT.

Under penalties as provided by law pursuant to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), the undersigned certifies that the statements set forth in this affidavit are true and correct.

Executed on June 8, 2021

P. Barton DeLacy

SUBSCRIBED and SWORN to

before me this 09 day of June, 2021.

Notary Public

PAMELA ZAMORA NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 08-21-22 205043

C0360

EXHIBIT 1

DeLacy Consulting, LLC
Commercial Real Estate Advisory



Water Main Easement
Before and After Valuation
2nd and Main, LLC v. City of North Chicago

Lake County PINs
12-04-100-005, 12-04-100-029, and 12-04-100-030

DeLCon File 20-015

Valuation Counsel for:
City of North Chicago

Market Value Appraisal
As of
May 16, 2020

C0362

DeLacy Consulting, LLC
Commercial Real Estate Advisory

June 12, 2020

Matthew T. DiCianni, Esq.
Ancel Glink
140 South Dearborn Street, 6th Floor
Chicago, IL 60603

mdicianni@ancelglink.com

Re: Water Main Easement; 2nd and Main, LLC v. City of North Chicago

Dear Mr. DiCianni

At your request we have prepared an updated before and after appraisal of a proposed easement that your client, the City of North Chicago, allegedly failed to secure through the former Norland Lumber Co. site, adjacent to the Great Lakes Naval Training Station for its water main. The owner of the site is suing the City and alleging damages.

Since our original report, dated October 12, 2018, we updated market sales and specifically addressed whether a Surface Transportation Board designation allowing railroad use to override local zoning impacted market value of the underlying property. We also reviewed additional comparable land sales offered by the landowner's appraiser. In the end, there was insufficient new data to change our value conclusions.

Please see the accompanying report for a description of the property, our scope of work and valuation findings.

Do not hesitate to call us if you have further questions.

Very truly yours,

P. Barton DeLacy, M.U.P, MAI, ASA, CRE

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SUMMARY OF SALIENT FACTS

Property Name		North Chicago Lumber	
Location	Address	1940 Marquette St. Terminus of Main Street	
	City, State, Zip	North Chicago, IL 60064	
	County/Township	Lake County/ Shields Township	
Property Summary		Former lumber yard Potential rail terminal; planned container and sand storage site	
DeLCon-AU File No.		20-015	
Assessor PINs	Lake County	12-04-100-005 12-04-100-029 12-04-100-030	
Interest Appraised		Fee Simple	
Owner of Record		2nd & Main, LLC	
Property Type/Use		Former lumber yard	
Zoning	City of North Chicago	M-3 Intensive Industrial	
Land: Building Ratio		NA	
Neighborhood Character		Industrial, rail-oriented	
Total Site Area (sf)	12-04-100-005		108,900
	12-04-100-029		4,356
	12-04-100-030		4,792
Larger Parcel Total Site Area	A		118,048
Total Site Area (ac)			2.71
Parcel Configuration		Irregular	
Water Main Easement (sf)	B		11,030.00
Remainder north of easement	C		12,984.75
Unencumbered site after taking	D=A-(B+C)		94,033.25

C0365

Improvement Summary	Wooden lumber warehouse, steel framed and sided sheds; small office. Three contiguous lots flank extension of Main St.
Gross Building Area	Not available
Year Built	1940-1980
Remaining Economic Life	0-years
Major Tenants	Hussey Terminal, LLC
Dates of Inspection	August 31, 2018 May 16, 2020
Highest and Best Use	Terminal storage
As If Vacant	Terminal storage
As Improved	NA
Property Rights Appraised	Fee simple
Estimated Exposure/Marketing Time	12 Months

VALUATION FINDINGS: Partial Acquisition

MV before the take	**Site Area (sf)**	**MV per sq. ft.**	**Utility**	**Total**
MV Whole Property	118,048	$2.00	100%	$236,096
			Rounded	**$236,000**
Acquisition affected parcels:		**MV per sq. ft.**	**Utility**	**Total**
Easement Acquired	11,030	$2.00	50%	$11,030
Damages: Severed Remainder	12,985	$2.00	50%	$12,985
Property Remainder	94,033	$2.00	90%	$169,260
MV after partial acquisition:	118,048	$1.64		**$193,275**
Just Compensation (MV before less MV after taking)				**$42,725**

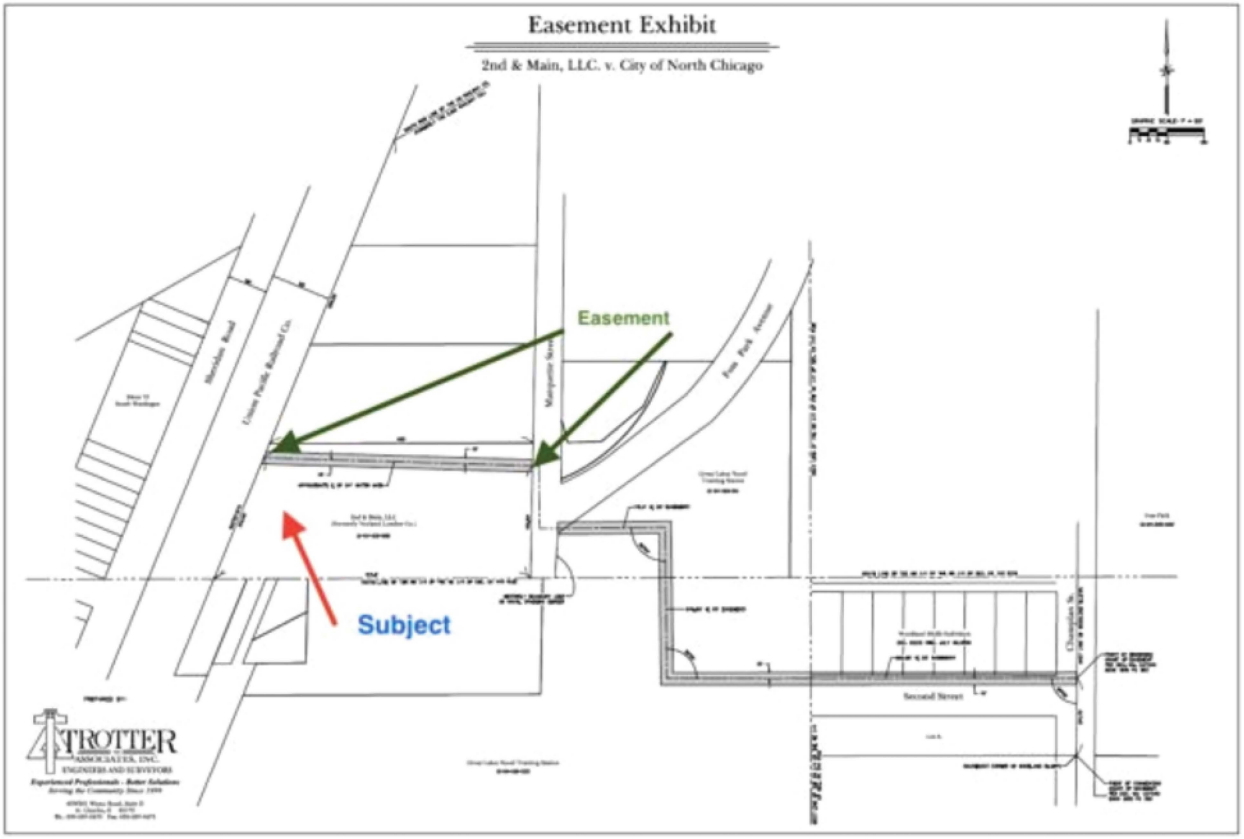
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SUBJECT PHOTOGRAPHS AND MAPS



North Chicago Lumber property facing north

C0367



Water main easement shaded gray, crosses north side of subject property at left



Building footprints from Lake County

SUBJECT PHOTOGRAPHS



North Chicago Lumber property from Sheridan Road, facing east



Access to the subject from Main St., facing north

SUBJECT PHOTOGRAPHS



Rail spur to old shed, facing north (photo from 2016)



Subject site facing northeast toward Sheridan Road

C0371

SUBJECT PHOTOGRAPHS



Water main easement route, facing east; shed wall marks proximate north property line



Easement route facing west, passes through steel shed. toward Sheridan Road

SUBJECT PHOTOGRAPHS



Interior of shed; easement runs to right, view facing west



Main Street extension, facing south from southern edge of property

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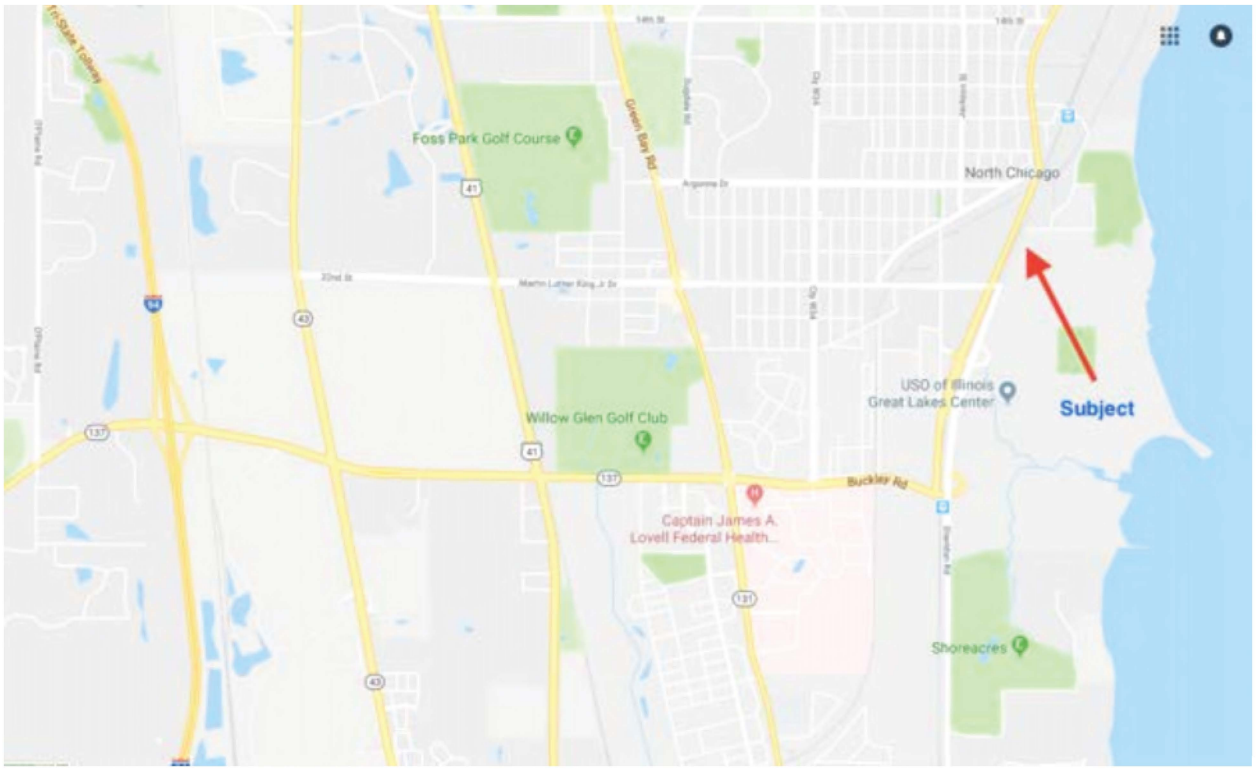
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MAPS



Aerial showing subject (yellow pin) in relation to Naval Air Station, lower right and the Sheridan Crossing redevelopment site to left.

C0374



Relationship of subject to North Chicago

CERTIFICATION OF REAL PROPERTY VALUATION CONSULTING REPORT

We certify to the best of our knowledge and belief:

1. The statements of fact contained in this report are true and correct.
2. The reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions and are our personal, impartial and unbiased professional analyses, opinions, and conclusions.
3. We have no present or prospective interest in or bias with respect to the property that is the subject of this report and have no personal interest in or bias with respect to the parties involved with this assignment.
4. We performed a prior appraisal of the property under alternate assumptions but with the same valuation date.
5. Our engagement in this assignment was not contingent upon developing or reporting predetermined results.
6. Our compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.
7. This real property appraisal consulting assignment was not based upon a requested minimum valuation, a specific valuation, or the approval of a loan.
8. Our analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the Uniform Standards of Professional Appraisal Practice.
9. The reported analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the requirements of the Code of Professional Ethics and Standards of Professional Appraisal Practice of the Appraisal Institute.
10. The use of this report is subject to the requirements of the Appraisal Institute relating to review by its duly authorized representatives.
11. As of the date of this report, P. Barton DeLacy, MAI, CRE has completed the continuing education program of the Appraisal Institute.
12. Properties that are the subject of this report were inspected as part of this engagement.

P. Barton DeLacy, M.U.P.,
MAI, CRE, ASA
Illinois Certified General Appraiser 553.001797
Expires 9/30/2021

INTRODUCTION

This section presents appraisal-reporting information to comply with the Uniform Standards of Professional Appraisal Practice (USPAP).

CONTEXT

The City of North Chicago (the City) allegedly failed to secure an easement through the former North Chicago Lumber Co. site, adjacent to the Great Lakes Naval Training Station, for its water main. The owner of the site is suing the City and seeking damages. The landowner further asserts that a Surface Transportation Board designation allowing potential railroad use to override local zoning adds a significant increment of value to the larger parcel.

INTENDED USE OF REPORT

This appraisal has been prepared to support expert testimony in a potential eminent domain proceeding.

INTENDED USER OF REPORT

This appraisal is to be used by the City of North Chicago, and no other user may rely on our report without authorization of the undersigned valuers.

PROPERTY IDENTIFICATION

The subject property is a now-closed lumber yard best identified by its Lake County Assessor Property Identification Numbers (PINs): 12-04-100-005, 12-04-100-029, and 12-04-100-030. The site is otherwise located at the terminus of Main Street between The Union Pacific RR adjacent to west and the US Naval Air Station grounds to the east.

REAL PROPERTY INTEREST

The fee simple interest of the property is being valued.

MARKET VALUE DEFINITION

Market value is described, not defined, in the Uniform Standards of Professional Appraisal Practice (USPAP) as follows: A type of value, stated as an opinion, that presumes the transfer of a property (i.e., a right of ownership or a bundle of such rights), as of a certain date, under specific conditions set forth in the definition of the term identified by the appraiser as applicable in an appraisal.

Here, Market Value is defined as: The most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.[1]

[1] Appraisal Institute, The Dictionary of Real Estate Appraisal, 6th ed. (Chicago: Appraisal Institute, 2015), pp 142-3

EFFECTIVE DATE OF VALUE

The subject property was last inspected by the undersigned valuer on May 16, 2020, the date of value. The date of the report is the date of the transmittal letter. This report has been prepared as an "as is" market value, based on the special assumptions, below.

SCOPE OF WORK

Our scope of work included the following tasks:

- Site inspection and interviews with the property owner regarding current and proposed plans for use.
- Consideration of what impact, if any, that a Surface Transportation Board designation allowing railroad use of the underlying larger parcel would have on market value.
- Analyze community demographics and economic development within the City of North Chicago.
- Develop a before and after analysis premised on the hypothetical condition that the City's water main did not pass through the property.
- Develop Sales Comparison Approach to value site, as zoned in the hypothetical "before" scenario.
- Develop analysis of proposed easement on site utility and its impact on value in "after" scenario

REPORT SPECIAL ASSUMPTIONS AND LIMITATIONS

The before and after rule is required by most courts when partial acquisitions, such as utility easements, are acquired. This procedure allows acquiring agencies and the courts to calculate a reasonable measure of compensation by deducting the remainder or after value from the larger parcel's before value. The result is a figure that includes the value of the property acquired as well as any compensable damages. This report seeks to value the subject property under two scenarios:

- Here, the "before" scenario requires a hypothetical condition that values the property as if unencumbered by the water main.
- The "after" value makes an extraordinary assumption that the property is encumbered by an ordinary utility easement.

In addition, the suit by the property owner against the city is being brought under the Illinois Eminent Domain Act (735 ILCS 30/1, et seq.) whereby special benefits to the property must be considered. In this case, no special benefit is found.

HISTORY OF THE PROPERTY

We have no reliable ownership history for the subject property. The owner of record is 2nd and Main, LLC.

To the best of our knowledge, the property was last acquired out of foreclosure by the current owners in June 2014 for $62,000. North Chicago Lumber operated on the property until 2008. The facility has been vacant since then. However, the current owners claim to qualify as a rail road because this property has an operable

rail spur, adjacency to an active line and capacity to serve as a materials storage terminal. Signage on the property indicates it is leased to Hussey Terminals, understood to be a related entity to the property owners.

GENERAL ASSUMPTIONS AND LIMITING CONDITIONS

This valuation/consulting report makes the following assumptions and the analysis is subject to these general limiting conditions:

1. Regardless of any template tool or format employed here, the content, analyses, conclusions, and opinions are those of the valuer. The client has not stipulated values or rents, direction in values or rents, or the results of analyses.
2. The valuer assumes the title is marketable and free and clear of all liens, encumbrances, encroachments, easements, and restrictions, except those specifically discussed in this report. In this analysis, the valuer assumes conditions in which the property would be available for lease or sale under prevailing market conditions.
3. The valuer assumes the property is under responsible ownership and competent management.
4. The valuer assumes there are no hidden or undisclosed conditions of the land or of the improvements which would affect the determination of market value or rent.
5. The valuer assumes that the subject property is not affected by any adverse environmental conditions that would have an impact on the analysis. Such conditions unknown to the valuer could impact the findings.
6. The valuer assumes the property is in compliance with all applicable building, environmental, zoning, and other Federal, state and local laws, regulations, and codes, unless otherwise noted in the appraisal.
7. The conclusions stated in the report apply only as of the date of valuation and no representation is made as to the effect of subsequent events. Any projections are based on existing and past data and cannot be guaranteed.
8. Unless contractual arrangements have been made in advance, the valuer is not required to give testimony, or be in attendance in court or other hearings regarding this appraisal or the property that is the subject of the appraisal.
9. The valuer has not made a survey of the property and assumes no responsibility in connection with such matters. The majority of the spatial data has been supplied by client and is assumed to be correct. Sketches or surveys included in this report are for illustrative purposes only.
10. The valuer is not responsible for considerations requiring expertise in other fields, including but not limited to, legal descriptions and other legal matters, geologic considerations such as soils and seismic stability, engineering, or environmental and toxic contaminants.

11. The appraisal process inherently requires information from a wide variety of sources. The valuer has relied on information provided by other individuals and in good faith believes that information to be reliable. The valuer does not accept responsibility for erroneous information provided by others.

12. The valuation report is subject to the requirements of professional organizations of which the valuer is a member, with regard to peer review and various disciplinary actions. The valuer will not disclose confidential information or assignment results to anyone other than: the client and persons specifically authorized by the client; state enforcement agencies and such third parties as may be authorized by due process of law; and a duly authorized professional peer review committee except when such disclosure to a committee would violate applicable law or regulation.

C0380

AREA ANALYSIS

The subject property is located in the City of North Chicago. North Chicago is located on the shores of Lake Michigan in east-central Lake County, 33 miles north of Chicago's Loop along the North Shore. Population in the 2010 census was approximately 32,500. Population continues to decline from a peak of 47,000 in 1970. Projections for 2019 indicate city population has dropped to below 29,500.



The City of North Chicago has sought to alleviate urban blight along some of its arterials by repurposing derelict vacant sites through acquisition and assemblage. This policy has enjoyed modest success in places. The subject property, a former lumber yard, lies just east of the Sheridan Crossing site, running along the west side of Sheridan Road, north of its juncture with Martin Luther King Blvd and the North Gate of the Great Lakes Naval Air Training Center.

Sheridan Crossing is a 30-acre former mill site at the juncture of Martin Luther King Blvd. and N. Sheridan Rd. (Illinois 137) across from the north gate to the Naval Air Training Center. The site's extensive frontage along the west side of Sheridan Road was once "the strip' and home to saloons and other entertainment venues catering to the transient naval personnel population resident at the training center. As the strip declined, the City eventually razed derelict buildings and created a tax increment financing (TIF) district to incentivize redevelopment.

The City of North Chicago's economy is dominated by two major employers: Abbott Labs- Abbvie and the U. S. Navy. Because both employers operate from large secured campuses, employees seldom seem to venture out, except for the daily commute. Many of the Navy personnel are both transient and confined to base housing and services. Hence, neither employer seems to generate much local retail demand. The City has long hoped that the regular stream of visitors to the Naval Training Center, particularly families from

C0381

outside the area, could generate sufficient hospitality demand to trigger at least more motel and restaurant development.

Another conundrum is posed by the geographic proximity of some of the most affluent communities in region; Lake Forest and Lake Bluff, adjacent to the south. Rather than seek to service and thereby integrate an affluent demographic, a combination of institutional campuses, parkland, golf courses and north-south rail lines and highways effectively insulate the communities from each other.



Yellow Pin highlights the subject; arrows indicate significant points of influence

The impact of the Sheridan Road TIF has been diminished by the passage of time. The City established the District in 1998 for 23 years. Expiring in 2021, the District now only has three more years to run. Sheridan Crossing has languished as an unrealized plan for over 10 years. According to a Structured Development site plan, the northern portion of the 30+ acre site will be improved with a "National Gallery" of Naval Art, beyond which would lie green space and a sculpture garden. Retail outpads would otherwise line the west side of Sheridan Rd, behind which would lie parking with retail anchors along the northwest property line.

Neighborhood Comments

The subject property, a relic from the area's mill era now sits as an isolated industrial tract hemmed in by the railroad and the Naval Air Base. Notwithstanding its exposure to traffic on Sheridan Road, access is shunted south to the controlled intersection with MLK Drive. Land use along the Sheridan Road corridor is mixed, though much of the land is vacant.

Adjacent uses include an abandoned former paint manufacturing site to the north. The subject property owners claim it is contaminated. This is significant since the owners fear disturbing soil along the water main could cause seepage onto their property. Transportation corridors, including the Union Pacific RR and Sheridan Road bound the site on the west. Beyond which lies the sprawling and as yet undeveloped Sheridan Crossing acreage. The Naval Air Base effectively flanks the subject on its eastern and southern boundaries. Across the extension of Marquette Street is the parking lot for a large Navy dormitory. The site adjacent on the south is a vacant tract with a PACE bus stop.

The owners claim the property enjoys a Surface Transportation Board designation allowing the site to serve as a railroad terminal where rail cars might be stored. Capacity and economic concerns regarding conversion to such a facility will be discussed further in the highest and best use section infra.

A significant railroad embankment and overpass across Sheridan Road separates the Navy Base-dominated subject area from the old North Chicago downtown and Foss Park, one quarter mile to the north. The Sheridan Crossing assemblage is bounded on its west side by a major trunk rail line. Modest redevelopment has occurred here with commercial space occupied by neighborhood services. The nearby lakefront is accessible to the east at Foss Park. Housing stock west of the tracks and just beyond the Sheridan Crossing project area is predominantly older single family where owner-occupancy rates may be less than 50%.

The Naval Air Base makes for a peculiar neighbor; dominant but not impactful. It is the largest military installation in Illinois and represents the largest training station for the Navy. The base functions as its own city within a city, sealed off from North Chicago by manned gates and perimeter fencing. The 193-acre campus lines the western shore of Lake Michigan and dates to 1904. Even under base closings and realignments, the facility still accommodates over 7,000 recruits at any one time, processing over 40,000 a year. However, because such military facilities are designed to be self-sufficient, the base no longer interacts with local retailers.

This perceived pattern of stagnancy surrounding the subject site supports a long-term interim use for outside storage, perhaps with a rail orientation.

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PROPERTY ANALYSIS

The Larger Parcel

The subject property is a one-time lumber yard dating to the 1940s, but closed and vacant since 2008. The site was purchased over six-years ago for conversion to terminal yard storage. The owners claim to have a Surface Transportation Board designation that overrides any local zoning constraints to all storage of rail cars. The three-parcel assemblage has a single spur to the adjacent Union Pacific RR right-of-way which, according to the owner, makes it ideally suited for terminal rail storage.



The salient Property characteristics are described below:

Property Name		North Chicago Lumber
Location	Address	1940 Marquette St. Terminus of Main Street
	City, State, Zip	North Chicago, IL 60064
	County/Township	Lake County/ Shields Township
Property Summary		Former lumber yard Potential rail terminal; planned container and sand storage site
Assessor PINs	Lake County	12-04-100-005 12-04-100-029 12-04-100-030

C0384

Interest Appraised		Fee Simple
Owner of Record		2nd & Main, LLC
Property Type/Use		Former lumber yard
Zoning	City of North Chicago	M-3 Intensive Industrial
Land: Building Ratio		NA
Neighborhood Character		Industrial, rail-oriented
Improvement Summary		Wooden lumber warehouse, steel framed and sided sheds; small office. Three contiguous lots flank extension of Main St.
Gross Building Area		Not available
Year Built		1940-1980
Remaining Economic Life		None, as improved
Major Tenants		Hussey Terminal, LLC

Zoning

The subject site is zoned M-3, an intensive industrial use zone. According to the City's zoning code, this industrial district is established to encourage the continued growth and expansion of older, existing industrial, transportation and heavy commercial uses. This district is created in recognition of the fact that standards for new development may cause such uses undue hardship[2]. Given the flexibility and intent of this zone, it is difficult to ascribe any further utility to a Surface Transportation Board designation allowing rail car storage.

Property Utility

The subject property appears to have been initially developed as a lumber yard to market finished goods produced by the lumber mill once sited across Sheridan Road. One of the buildings was designed to accommodate a railside served by a spur. The yard, offices and retail outlet closed at the onset of the Great Recession 12 years ago and the property has sat vacant since. In 2014, the current owners acquired the property out of foreclosure with the intent of entitling the site as a railroad-owned tract eligible to serve for terminal yard storage. Although the owners claim a Surface Transportation Board designation allowing rail car storage and have designated the site as "Hussey Terminal," it is questionable whether the site is of sufficient size or suitable configuration for such a use to be viable.

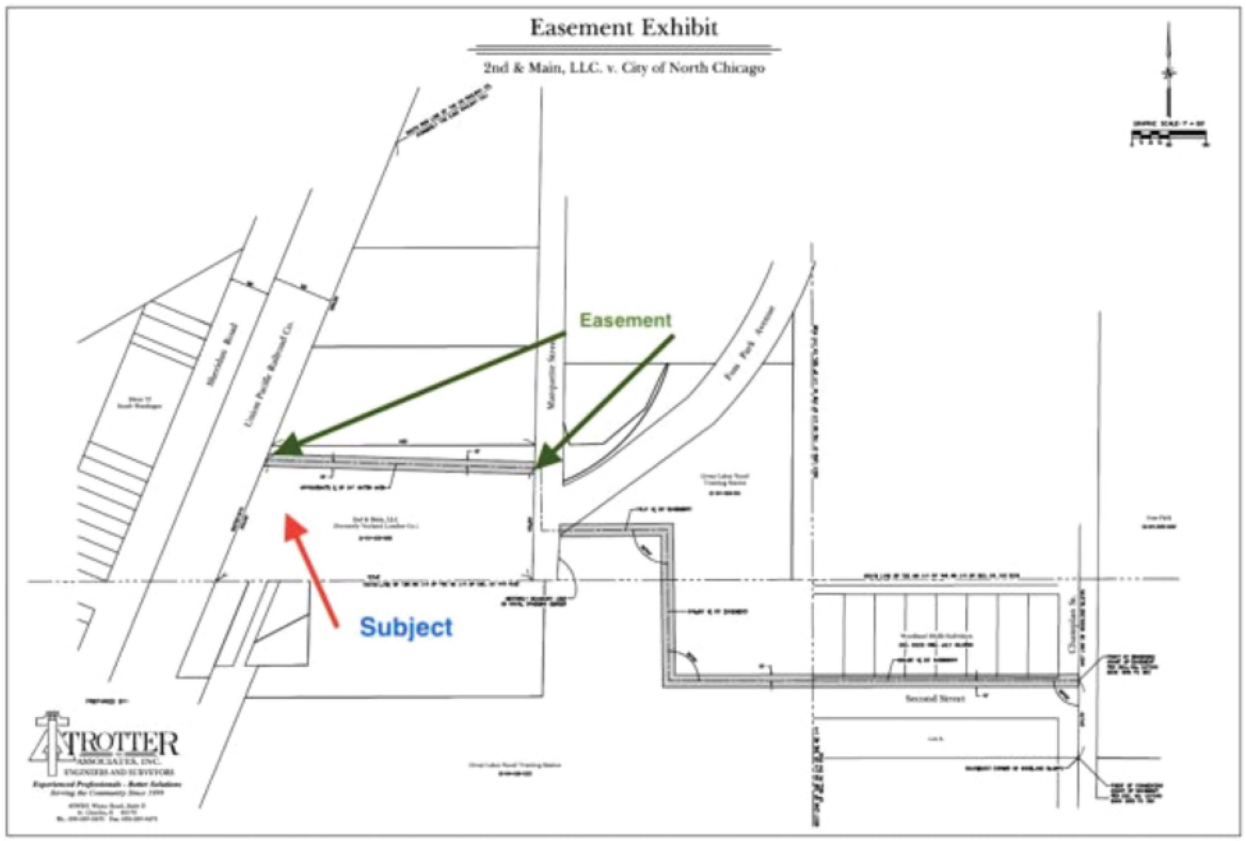
It is unclear to what extent, if any, the improvements as configured add any economic value to the property under this proposed use scheme. Given their age and observed condition, the improvements are considered obsolete and to have no contributory value. The larger parcel is valued as land, only.

The site, as assembled, is considered to have fair utility for yard storage but is poorly suited for many other types of commercial or industrial activities because of limited access and market blight.

[2] See Section 3.1.4.3 M3 - Intensive Industrial District, North Chicago Zoning Ordinance, January 6, 2020

Water Main Description- Proposed Easement

North Chicago has long operated a previously undisclosed 24 inch water main running underneath the northern portion of the subject property, described above as the "Larger Parcel." The water main is depicted as a shaded area in the illustration below. A permanent easement would be taken of at least 25 feet in width to allow trenching and pipeline repair or replacement, over time.



The green arrows show the approximate path of the water main through the northern portion of the subject property

The exhibit shows an easement that the City owns to run the water main underneath the Naval Air Station (which is legally described and recorded). The necessary easement through the subject property was never recorded.

It is unclear how far below the surface the 24" water main runs. An attempt by the city to find the main proved unsuccessful, according to the owner. A permanent utility easement is required by the City in order to access the water main for repairs or replacement throughout its effective economic life. Although the 10 ft wide easement has been described, the apparent depth of the water line might necessitate as much as 25 feet in width to accommodate trenching. Further, the land lying between such an easement and the property line is effectively severed from the rest of the property.

The remainder site, or Larger Parcel after the take, is the remaining square footage lying south or just beyond the proposed easement area.

Larger Parcel After the Taking

The dimensions of the proposed easement area and the severed remainder adjacent to the north are shown below, subject to refinement with a survey:

- Utility Easement Area: 11,030 sq. ft. = 25 ft. wide by 441.2 ft in length of parcel
- Severed Remainder Area: 12, 985 sq. ft.= irregular width varying from 25 to 35 ft across parcel length

The table below sets out the site areas for the underlying larger parcel, followed by the site areas for the proposed water main easement and the severed remainder adjacent to the north. The unencumbered site after the taking, plus the encumbered easement area and the severed remainder constitute the property subject to the after valuation.

Total Site Area (sf)	12-04-100-005	108,900
	12-04-100-029	4,356
	12-04-100-030	4,792
Larger Parcel Total Site Area	A	**118,048**
Total Site Area (ac)		2.71
Water Main Easement (sf)	B	11,030.00
Remainder north of easement	C	12,984.75
Unencumbered site after take	D=A-(B+C)	94,033.25

As was noted above, the current improvements to the site, including a shed over the proposed easement area are at least 50 years old, have not been used in over a decade and were observed to be in only fair condition. They no longer contribute any value to the property.

C0387

HIGHEST AND BEST USE ANALYSIS

Introduction

A before and after valuation requires that highest and best use be determined under both scenarios.

The lynchpin for market value is the Highest and Best Use (HBU) analysis, whereby the valuer considers the maximally profitable use for the property among physical, legal and financially viable alternatives. Key considerations include the pattern of surrounding land use, the vector for growth and community needs.

We find that the proposed acquisition of a utility easement will not affect the highest and best use under either scenario.

Definition of Highest and Best Use

According to The Dictionary of Real Estate Appraisal, Sixth Edition (2015), a publication of the Appraisal Institute, the highest and best use is defined as:

> The reasonably probable use of property that results in the highest value. The four criteria that the highest and best use must meet are legal permissibility, physical possibility, financial feasibility, and maximum productivity.

The International Valuation Standards define highest and best use as:

> The use of an asset that maximizes its potential and that is possible, legally permissible, and financially feasible. The highest and best use may be for continuation of an asset's existing use or for some alternative use. This is determined by the use that a market participant would have in mind for the asset when formulating the price that it would be willing to bid.[3]

Highest and Best Use Criteria

We have evaluated the site's highest and best use as if vacant. As such, the property's highest and best use must meet four criteria. That use must be:

(1) legally permissible,

(2) physically possible,

(3) financially feasible, and

(4) maximally productive.

Our conclusions include the following findings:

(1) What is the physical highest and best use?

(2) What is the timing of that use?

[3] Ibid.

(3) Who are the most likely market participants?

a. Who is the most likely buyer type?

b. Who is the most likely user type?

Legally Permissible

The first test concerns permitted uses. The subject is zoned industrial and may benefit from additional entitlements through its current ownership, which claims to be a railroad. A Surface Transportation Board designation is claimed by ownership. While this designation may override local zoning, we find the local North Chicago M-3 zoning fairly permissive regarding open storage or more intensive manufacturing activities.

For valuation purposes the subject larger parcel will be treated as zoned. Importantly, it is our understanding that the existing zoning allows open storage of materials such as sand and gravel for road and rail repair. Alternatively, enclosed storage and fabrication would be allowed, contingent, of course on effective market demand.

Physically Possible

The second test is what is physically possible. The larger parcel is level, at street grade and fully serviced by municipal utilities. Its configuration and overall size of 2.71 acres is ample to accommodate most conforming industrial activities. Although the subject has good exposure to Sheridan Road traffic, access is somewhat circuitous; limited to an MLK Drive overpass accessing Main Street nearly one-half mile to the south. Only a destination storage use could survive such limited access.

The owner claims that the now unused spur crossing the property from the Union Pacific trunk line is active and that this is the last available storage site for terminal road materials in the area.

The effect of the proposed utility easement will be to reduce the site area that might be improved or within a building footprint. The existing buildings, through which the easement will pass, are considered at the end of their useful economic lives. They can continue in use as covered storage but, if rebuilt would likely be moved south of the proposed easement. Open surface container or materials storage should be unaffected by the easement, assuming such materials could be moved in the event that entry to the easement is required.

For valuation purposes we find that the easement and severed remainder effectively lose at least half of their utility. The owner retains rights to use except that building to the property line is precluded.

Financial Feasibility and Maximal Productivity

The third and fourth tests of highest and best use examine financially feasible alternatives and attempt to project what will produce the highest net return. After analyzing the physically possible and legally permissible uses of the property, the highest and best use must be considered in light of financial feasibility and maximum productivity. For a potential use to be seriously considered, it must have the potential to provide a sufficient

return to attract investment capital over alternative forms of investment. A positive net income or acceptable rate of return would indicate that a use is financially feasible.

Although comparably zoned land in the greater submarket has sold recently, many of these sites had sat vacant and available for years. The Service Transportation Board granted an acquisition and operation exemption to the owners, effectively exempting the property from any zoning constraints that might limit railroad activity here. However, we find no evidence in the market to support the premise that the STB designation is in demand in this location. No market premium can be projected.

The Sheridan Crossing project, across Sheridan Road, has also languished for nearly a decade waiting for the local economy to improve, or for anchor-users to commit financially to this location. On balance, this section of the Sheridan Road corridor remains blighted. However, there may be some demand for outside storage in this location because of the adjacency of rail and the absence of suitable sites with similar linkage and zoning.

Highest and Best Use of the Larger Parcel as Though Vacant

Based on this analysis, we have concluded that the highest and best use of the larger parcel, if vacant, and in the hypothetical scenario of a before taking, would be for material storage. The likely purchaser would be a user such as a transportation or material-handling firm.

The highest and best use after the taking would remain the same, only with a reduced yard area.

The improvements to the site are considered to be at the end of their economic life and no longer add value to the property.

C0390

VALUATION ANALYSIS

Methodology

There are three generally accepted approaches available in developing an opinion of value: The Cost, Sales Comparison and Income Capitalization approaches. In appraisal practice, an approach to value is included or eliminated based on its applicability to the property type being valued and the quality of information available. The reliability of each approach is dependent upon the availability and comparability of the market data uncovered as well as the motivation and thinking of purchasers in the market for a property such as the subject. In this analysis, only the Sales Comparison Approach has been applied to the valuation of vacant land in both the before and after scenarios.

Sales Comparison Approach

The Sales Comparison Approach will be used to value the larger parcel in the before the taking scenario. Thus, the subject is being valued as a 2.71 acre industrially-zoned tract, as described above. In the sales comparison approach properties that sold or are listed for sale are analyzed based on common units of comparison. Here, the subject is being valued as a vacant industrial site, hence price per square foot of land area will be the unit of comparison.

The North Lake County Industrial Market Overview

The subject property competes within the greater North Lake County industrial sub-market. Each of the national brokerages maintain occupancy and sale data for each of the major property type categories and typically publish quarterly reports. Boundaries will vary but the findings are often consistent. Here we have used CoStar Analytics. As noted below, their quarterly surveys include over 40 million sq. ft. of investment grade industrial product. The key take-aways are that the vacancy declines and rental increases through first quarter 2020 abruptly halted with the Covid-19 pandemic. The duration on the consequent economic disruption is unknown as of the date of value.

KEY INDICATORS

Current Quarter	RBA	Vacancy Rate	Market Rent	Availability Rate	Net Absorption SF	Deliveries SF	Under Construction
Logistics	25,271,602	3.8%	$6.64	10.1%	(28,701)	0	1,818,172
Specialized Industrial	16,137,082	0.7%	$7.20	3.4%	23,352	0	0
Flex	1,888,864	0.3%	$9.91	2.7%	(1,575)	0	0
Submarket	**43,297,548**	**2.5%**	**$6.98**	**7.4%**	**(6,924)**	**0**	**1,818,172**

Annual Trends	12 Month	Historical Average	Forecast Average	Peak	When	Trough	When
Vacancy Change (YOY)	-2.1%	7.0%	5.1%	12.4%	2010 Q3	2.3%	1996 Q2
Net Absorption SF	1.6 M	432,533	598,827	2,244,075	2019 Q3	(818,555)	2010 Q3
Deliveries SF	721 K	527,934	1,116,344	1,973,827	2019 Q3	0	2015 Q2
Rent Growth	4.5%	2.1%	3.1%	8.4%	1997 Q2	-3.3%	2010 Q1
Sales Volume	$117 M	$60.4M	N/A	$186.9M	2007 Q4	$6.3M	2010 Q1

Investment grade industrial product in the North Lake County submarket lies east of I-90 in the suburbs of Abbott Park, North Chicago, and Waukegan. Most of the building stock consists of 1970s-era warehouses

characterized by small bay spaces with ceiling heights less than 20 feet. This inventory is interspersed with a few newer institutional-grade assets. The high-bay investment type properties are located around the Amhurst Industrial Center in Waukegan or in Gurnee at the CenterPoint Business Center and the Tri-State Distribution Center. Key occupiers and users include chemicals and pharmaceuticals, durable- and nondurable-goods wholesalers, and medical and surgical equipment supplies. There is also a significant concentration of housing-related tenants who service the local Lake County home-building community.

Long-term, the North Lake County sub-market promises to be stable to improving. Expectations of growth are reflected in the selling of some vacant tracts of land for speculation. Many of these parcels have been on the market for over five years.

Discussion of Comparable Land Sales

We have arrayed eight recent commercial and industrial land sales within the greater North Lake County market and mapped them in relation to the subject. Of the eight selected transactions, five closed in 2018, one in 2019 and the other two since 2015. We included the 2014 sale of the subject. It sets the low end and was reported bought out of foreclosure.

Property Type No	Industrial Subject	Industrial 1	Commercial 2	Industrial 3	Industrial 4	Industrial 5	Industrial 6	Industrial 7	Industrial 8
Address	1940 Marquette St.	254 Park Ave.	Green Bay at Sherman	2909 B Route 12	921 Tower Rd	Oak Grove Bus. Pk 3145 N. Oak Grove Av	Big Door Storage 1401 Wilhelm Rd.	Adj. JQL Tech 1255 Armour Blvd.	800 Northgate Pkwy
City	North Chicago	Lake Villa	North Chicago	Spring Grove	Mundelein	Waukegan, IL	Mundelein, IL	Mundelein, IL	Wheeling, IL
County	Lake	Lake	Lake	McHenry	Lake	Lake	Lake	Lake	Cook
PIN	12-04-100-005 12-04-100-029 12-04-100-030	06-04-109-006	12-05-315-020	04-25-300-024	11-31-202-015	07-01-102-005	15-05-103-016 15-05-103-017 15-05-103-018	45-08-10-483-027	03-03-200-026-0000
Site Area (sf)	118,048	43,560	161,172	123,710	144,184	138,956	87,120	60,984	607,444
Site Area (ac)	2.71	1.00	3.70	2.84	3.31	3.19	2.00	1.40	13.94
Zoning	M-3 Intensive Industrial	LI-2	B -2	I-1	M-1	I-1	M-1	M-2	I-3
Improvements	Former lumber yard; Misc. sheds	shovel-ready site w/ storm detention	Spec development site	Spec development site	Spec development site	Spec development site	Spec development site	Spec development site	Spec development site
Year Built	NA					2019	2020		
Sale Price	$62,000	$104,000	$250,000	$59,000	$363,950	$775,000	$400,000	$300,000	$2,150,000
Municipal Utilities	All	All	All	All	All	All	All	All	All
Configuration	Rectangle	Rectangle	Rectangle	Rectangle	Rectangle	irregular	irregular	irregular	Irreguar
Access	Street	Street	Street	Panhandle	Street	Parkway	Parkway	Parkway	Parkway
MV/ sf site area	**$0.53**	**$2.39**	**$1.55**	**$0.48**	**$2.52**	**$5.58**	**$4.59**	**$4.92**	**$3.54**
Sale Date	Jun-14	Sep-18	Jul-18	May-18	Aug-15	Jul-18	Feb-19	Aug-18	Jun-16
Comments	Facility closed 2008, bought out of foreclosure	on market 8 mo	on market nearly 7 years; day care center intended	easement access; adj. to light industrial development; 50 ft utility easement	Former RR Property; on market 9 years	Off Delany Rd; improved with 70,000 sf whse	multiple building community garage	Sold w/ adjacent building	Excess land sold by Frito-Lay to speculative developer; 7 yrs. On mkt.
Confirmation	Inspection	Robert E. Frank	Dan Grasso, JLL	Premier Commercial	Transwestern	Lake Co, 7503854	Re Max	First Western	CBRE
Grantor		NA	Great Lakes CU	NA	Illinois Central RR	5111 S 9th St LLC	Mary Nash	NA	Frito-Lay
Grantee		NA	Northstar Commercial	NA	NA	Kinter	Big Door Sorage LLC	NA	Hamilton Partners

The sale properties bracket the subject in terms of size and have comparable zoning. All the sales are in the same greater Lake County market, however, only one comparable is from North Chicago; the balance are located in superior industrial corridors to the west or north.

Two changes were made since the earlier 2018 report: we updated the search for more recent land sales and also considered transactions submitted by the owner. This included industrial land sales in superior industrial parks where there is evident market demand for development. We also looked for any evidence that premiums might be paid for rail or container storage in Lake County. The only place where container storage is at a premium in the greater Chicago market is near intermodal facilities along the I-55 corridor in southwest

Cook County and in Will County along the I-80 corridor south of Joliet. No such logistic synergies are in play in Lake County, save for the Kenosha-Pleasant Prairie market area in southeast Wisconsin.

Before adjustment these land sales average $2.90 per sq. ft. including the subject. The land sales range from $0.48 per sq. ft. up to $5.58. Excluding the subject, the unadjusted average value is $3.20 per sq. ft.

Some comments on the sales included for analysis here:

- Sale 1 is a small one acre site in a mature Lake Villa industrial park, the Park Place Business Center. It sold in September 2018 for $2.39 psf for investment and remains undeveloped. This is a superior west Lake County suburb.
- Sale 2 is the only commercial or industrial land sale in North Chicago in five years. This is a 3.70 acre tract that is located in a residential neighborhood in west North Chicago off Green Bay Road. This site sold in July 2018 for $1.55 per sq. ft.
- Sale 3 is located in Spring Grove, a little west of Antioch in McHenry County but shares an easement encumbrance with the subject and has easement access within a small industrial park. This 2.84 acre tract sold for $0.48 per sq. ft. after being on the market for years.
- Sale 4 at 921 Tower Road in Mundelein is actually on Illinois Central Railroad land in an industrial park with access to a main trunk line. This 3.31 acre site sold back in 2015 for $2.52 psf and remains undeveloped after five years.
- Sale 5 is the sale of a 3.19 acre site at the premier Waukegan area Oak Grove Business Park off Delany Road. Before adjustment for location, this July 2018 sale sets the high end of the range at $5.58 psf.
- Sales 6 and 7 are located in the same business park in Mundelein, an affluent Lake County suburb about 10 miles southwest of North Chicago. These two sub-two acre sites sold for $4.59 and $4.52 psf respectively.
- Sale 8 is about twenty miles southwest of the subject in Wheeling where Kraft food sold a larger parcel of excess land for $3.54 per sq. ft. to an investor in June 2016. The site remains vacant.

Adjustment factors are discussed below.

Adjustment Factor	*Explanation*	Applicability
TRANSACTION ADJUSTMENTS		
Property Rights	*What property interest traded; fee, leased fee, partial interest, etc.*	No adjustments, all transactions in fee
Terms of Finance	*Whether sale was for cash or its equivalent, or were there incentives including seller finance*	All sales understood to be cash out

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Conditions of Sale	*Closed sale or listing, presence of distress or unusual motivation of parties*	One of the sales was bank-owned; positive adjustment made
Extraordinary Sale Costs	*Accounts for unusual expenditures to achieve sale price; such as demolition, remediation, impact fees etc.*	No such unusual costs either reported or observed
Market Trends	*Changes in market conditions between transaction date and date of value*	Insufficient time and data to support any projection of passive appreciation or value declines

Comparable sales are first adjusted for transaction anomalies before applying qualitative property and location differences with the subject. Superior characteristics required downward adjustments. Inferior attributes were adjusted upward. Note that these adjustments are qualitative.

Adjustment Factor	Explanation	Applicability
PROPERTY ADJUSTMENTS		
Location	*intangible effects of linkages, appeal or rental rate differentials*	The North Chicago location is considered blighted compared to many of the superior suburban industrial and business parks.
Access/exposure	*Linkage to transportation facilities; ease of site access; visibility; traffic counts.*	Access to the site considered circuitous notwithstanding exposure to Sheridan Rd.
configuration/size	*Presence of surplus or excess land area; inverse relationship between size and unit values*	All but one of the sales of comparable size and configuration.
Quality/utility	*Acknowledges significant variance in age, condition, construction quality, functionality and appeal to market*	Downward adjustments were where sale site had superior utility.
Zoning/Entitlements	*Conformance of improvements; special incentives or unusual land use constraints*	No adjustments required; all transactions located incomparable industrial zones. No support for any premium for STB exemption.
Other Considerations	*Special circumstances of transaction affecting comparability*	None observed.

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Valuation Findings

Our value calculations are summarized on the table below. After adjustment the sale properties ranged in value from $0.83 to $2.65 per sq. ft., averaging $1.82 per sq. ft. Placing most weight on Sale 2 and the sales requiring least adjustment, we find that the market value of the subject site in the hypothetical "before" scenario, would be based on $2.00 per sq. ft., applicable to the entire site.

The table below summarizes adjustments to each sale, as discussed above.

Property Type	Industrial	Industrial	Commercial	Industrial	Industrial	Industrial	Industrial	Industrial	Industrial
No	Subject	1	2	3	4	5	6	7	8
Address	1940 Marquette St.	254 Park Ave.	Green Bay at Sherman	2909 B Route 12	921 Tower Rd	Oak Grove Bus. Pk 3145 N. Oak Grove Av	Big Door Storage 1401 Wilhelm Rd.	Adj. JQL Tech 1255 Armour Blvd.	800 Northgate Pkwy
City	North Chicago	Lake Villa	North Chicago	Spring Grove	Mundelein	Waukegan, IL	Mundelein, IL	Mundelein, IL	Wheeling, IL
County	Lake	Lake	Lake	McHenry	Lake	Lake	Lake	Lake	Cook
Site Area (sf)	118,048	43,560	161,172	123,710	144,184	138,956	87,120	60,984	607,444
Site Area (ac)	2.71	1.00	3.70	2.84	3.31	3.19	2.00	1.40	13.94
Zoning	M-3 Intensive Industrial	LI-2	B -2	I-1	M-1	I-1	M-1	M-2	I-3
Improvements	Former lumber yard; Misc. sheds	shovel-ready site w/ storm detention	Spec development site	Spec development site	Spec development site	Spec development site	Spec development site	Spec development site	Spec development site
Year Built	NA					2019	2020		
Sale Price	$62,000	$104,000	$250,000	$59,000	$363,950	$775,000	$400,000	$300,000	$2,150,000
Municipal Utilities	All	All	All	All	All	All	All	All	All
Configuration	Rectangle	Rectangle	Rectangle	Rectangle	Rectangle	irregular	irregular	irregular	Irreguar
Access	Street	Street	Street	Panhandle	Street	Parkway	Parkway	Parkway	Parkway
MV/ sf site area	**$0.53**	**$2.39**	**$1.55**	**$0.48**	**$2.52**	**$5.58**	**$4.59**	**$4.92**	**$3.54**
Sale Date	Jun-14	Sep-18	Jul-18	May-18	Aug-15	Jul-18	Feb-19	Aug-18	Jun-16
Comments	Facility closed 2008, bought out of foreclosure	on market 8 mo	on market nearly 7 years; day care center intended	easement access; adj. to light industrial development; 50 ft utility easement	Former RR Property; on market 9 years	Off Delany Rd; improved with 70,000 sf whse	multiple building community garage	Sold w/ adjacent building	Excess land sold by Frito-Lay to speculative developer; 7 yrs. On mkt.
TRANSACTION ADJUSTMENTS		1	2	3	4	5	6	7	8
Property Rights	Fee	Fee	Fee	Fee	Fee	Fee	Fee	Fee	Fee
Adjustment		0%	0%	0%	0%	0%	0%	0%	0%
Terms of Finance	Cash	Cash	Cash	Cash	Cash	Cash	Cash	Cash	Cash
Adjustment		0%	0%	0%	0%	0%	0%	0%	0%
Conditions of Sale	Distressed REO	Market Value	Market Value	Bank-owned	Market Value	Market Value	Market Value	Market Value	Market Value
Adjustment		0%	0%	25%	0%	0%	0%	0%	0%
Market Trends	3rd Q 2018	Not observed	Not observed	Not observed	Not observed	Not observed	Not observed	Not observed	Not observed
Adjustment		0%	0%	0%	0%	0%	0%	0%	0%
Net Adjustments (as % of unit value)		0%	0%	25%	0%	0%	0%	0%	0%
ADJUSTED VALUE/SF GBA		$2.39	$1.55	$0.60	$2.52	$5.58	$4.59	$4.92	$3.54
PROPERTY ADJUSTMENTS		1	2	3	4	5	6	7	8
Location	Average	superior	comparable	inferior	superior	superior	superior	superior	superior
Adjustment		-20%	0%	20%	-20%	-20%	-25%	-25%	-25%
configuration/size	Rectangular	comparable	comparable	inferior access	comparable	Superior	Superior	Superior	comparable
Adjustment		0%	0%	20%	0%	-20%	-20%	-20%	0%
Quality/utility	Average	comparable	comparable	comparable	comparable	superior	superior	superior	comparable
Adjustment		0%	0%	0%	0%	-20%	-20%	-20%	0%
Zoning/Entitlements	Fair	comparable	comparable	comparable	comparable	comparable	comparable	comparable	comparable
Adjustment		0%	0%	0%	0%	0%	0%	0%	0%
Other	Vacant	comparable	comparable	comparable	comparable	comparable	comparable	comparable	comparable
Adjustment		0%	0%	0%	0%	0%	0%	0%	0%
Net Adjustments (as % of unit value)		-20%	0%	40%	-20%	-60%	-65%	-65%	-25%
ADJUSTED VALUE/SF GBA		**$1.91**	**$1.55**	**$0.83**	**$2.02**	**$2.23**	**$1.61**	**$1.72**	**$2.65**

The valuation of the property in the "after taking" scenario may be adjusted by the loss of utility. A permanent easement transfers a portion of the bundle of rights to the dominant estate, in this case, the City of North Chicago. As understood, the easement would effectively prohibit construction on or over the area taken, though the subservient interest, the property owner could use the encumbered parcel for open storage. The assumption being that such material placed there could be moved in the event the City required entry for whatever reason to service or repair the water main.

The placement of the proposed easement would also restrict the use of what is effectively a severed remainder; the narrow strip of land lying between the easement and the north property line, described above.

Ideally, sales of similarly impaired tracts of land might be compared with the subject. However, we found only very limited industrial land sale activity in North Chicago and only one sale encumbered by what appears to be an even more restrictive 50 foot easement.

We have found that the lost utility of the part taken plus the damage to the remainder is equal to 50% of the unencumbered market value. The remainder property may suffer diminished utility as well, of say 10%. The resulting market value of the remainder in the "after taking" scenario is calculated as follows:

VALUATION FINDINGS: Partial Acquisition				
MV before the take	**Site Area (sf)**	**MV per sq. ft.**	**Utility**	**Total**
MV Whole Property	118,048	$2.00	100%	$236,096
			Rounded	**$236,000**
Acquisition affected parcels:		**MV per sq. ft.**	**Utility**	**Total**
Easement Acquired	11,030	$2.00	50%	$11,030
Damages: Severed Remainder	12,985	$2.00	50%	$12,985
Property Remainder	94,033	$2.00	90%	$169,260
MV after partial acquisition:	118,048	$1.64		**$193,275**
Just Compensation				**$42,725**
(MV before less MV after taking)				

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ADDENDA

- Appraiser Qualifications

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P. BARTON DELACY, M. U. P., MAI, ASA, CRE
DeLacy Consulting, LLC
Professional Qualifications

Career Experience

DeLacy Consulting, LLC is a Chicago-based boutique real estate consulting firm specializing in valuation counsel, property tax consulting, appraisal services, litigation support and Renewable Energy Valuation. Renewable Energy Valuation focuses on the real estate implications of electric power generated when using renewable fuels; i.e. wind, solar, biomass or other non-fossil fuels.

P. Barton DeLacy brought 35 years of advisory experience to the firm, founded in 2013. His seasoned perspective spans all North American geographies and touches virtually all property types. In his corporate career, including practice leadership positions at Cushman & Wakefield, CBRE and Arthur Andersen, DeLacy concentrated on working with corporate clients and public institutions.

Mr. DeLacy was a Senior Managing Director and spent eight years at Cushman & Wakefield in Chicago and Portland, Oregon. Prior to joining C&W, DeLacy logged over 20 years as a partner or principal of fee appraisal and consulting firms. From 1998-2002 he led the real estate consulting practice in the Pacific Northwest for Arthur Andersen LLP. DeLacy began his career in 1977 as a residential appraiser for the Oregon-based Benj. Franklin Savings and Loan.

In addition to conventional appraisal assignments, Mr. DeLacy's counseling practice centers on problem solving engagements where valuation is incidental to the solution. Specialties include trust and estates, property tax consulting, litigation support, integrated business, personal and real property appraisals, land use impact studies, and counseling for non-profit businesses and institutions with real estate assets.

Academic Education

- **Master of Urban Planning** (M.U.P.), Portland State University -1988
- **Bachelor of Arts** (B.A.), Willamette University, Salem, Oregon -1975
- University of Oregon School of Law, Eugene, Oregon 1976-7
- School of Irish Studies, Dublin, Ireland 1974

Professional Credentials

- CRE Member, Counselors of Real Estate (No.2128) - 2003
- ASA Member, Urban Properties, American Society of Appraisers- 2002
- MAI Member, Appraisal Institute (No. 6680) – 1983
- SRA Member, Appraisal Institute- 1980
- AI-GRS Member, Appraisal Institute, general appraisal review specialist -2014
- Member, Lambda Alpha International, land economics honorary- 2013

Renewable Energy Valuation

Mr. DeLacy's energy experience spans the spectrum of energy generating facilities; from renewables to fossil fuel-based thermal power plants. He has built valuation models and studied property value impacts made by wind and solar farms as well as fossil fuel fired generating plants. He has also developed adaptive re-use studies for obsolete thermal plants.

- Retained to perform wind farm impact study in Fillmore and Saline Counties, Nebraska for edp Renewables. 2019
- Retained to advise on property tax appeal for a 5.0MW windfarm in Colebrook Township, Connecticut, 2019

- Undertook regional study across three-county "thumb" of Michigan for DTE Energy to test whether over 758 wind turbines accounting for 1,324 MW of nameplate capacity had impacted property values in area. 2018
- Retained by statewide contract assessor to develop methodology for ad valorem valuation of 24 MW utility-scale wind farm in Sullivan County, New Hampshire. 2017
- Developed impact study regarding a proposed 20 MW solar farm in Dorchester County, Maryland. 2017
- Valued private municipal power plant and municipal heating system serving the City of Fairbanks, Alaska. 2011 and 2017.
- Valued municipal landfills in Puerto Rico and Alabama for financial reporting. 2016
- Valued entire 17.3 sq. miles of city-owned right of way for Spokane, Washington to establish collateral for annual maintenance payments between Streets and Utilities Divisions. 2015
- Valuation of small utility scale wind farm in Teton County, Montana. Follow-on advisory work included counsel for property tax appeal. 2015
- Appraised 3.24 MW solar farm in Macon, Missouri for conventional financing. 2015
- Valued proposed waste-to-energy anaerobic biodigester to be installed on former Air Force base in Brunswick, Maine. 2015, 2018
- Wind farm land lease market study for US Forest Service advising them on best practices for first wind farm on National Forest lands in Vermont. 2014
- Valued portfolio of single and double turbine distributive small wind projects funded by California Self Generation Incentive Program. 2013-15
- Valued portfolio of installed distributive solar installations on several high schools in Douglas County, Colorado in bankruptcy case for FITI Consulting. 2014
- Valued proposed 3.0 MW utility scale solar power plant on leased airport land in Rockford, Illinois for Cole Taylor Bank. 2012
- Retained by Booze Allen Hamilton to identify development opportunities, including solar energy sites, at 55 CONUS Air Force bases where Enhanced Use Leases were present. 2012
- Counseled the Arizona Department of State Lands regarding land lease rates for wind and solar development near the Grand Canyon National Park. 2011
- Valued Skypower's portfolio of eight 10 MW solar farms in Ontario Canada for CalPERS. 2010
- Valued proposed solar power plants at Onyx Ranch, Kern County, CA. 2009-11
- Retained as valuation consultant by Indiana County in assessment negotiations with major independent system operator (ISO) on 2,000 MW coal-gas thermal power plant.
- Developed adaptive reuse study for wholesale power supplier on a gas power plant that may be converted to a peaker station on the California Coast. 2011
- Developed collateral valuation of 120 MW coal-burning power plant for conversion to plasma gasification near Fall River, Massachusetts. 2009
- Valued proposed 400 MW utility scale wind power project on Island of Lanai in Hawaii. 2008

Subject Matter Expert-Litigation Support

Mr. DeLacy has appeared as an expert witness or prepared expert testimony in eminent domain proceedings, property damages cases, bankruptcy hearings, land use hearings and property tax appeals. He has analyzed rural land use impacts and performed valuations for siting energy facilities including wind turbine farms, cell towers and power generating plants.

Specifically, Mr. DeLacy has qualified as an expert witness in real property valuation cases for United States Circuit Courts in Connecticut, New Jersey, Oregon, Illinois and Northern California. Mr. DeLacy has presented expert testimony in property tax appeals at various levels in Oregon, Washington, Missouri, Illinois, Georgia and Montana.

He has also been retained by the US Departments of Justice and Interior, Bureau of Indian Affairs, the Department of Defense (US Navy), US Forest Service, General Services Administration (GSA) and Internal Revenue Service as a valuation expert.

Dispute Resolution and Public Testimony

- Deposition and Trial Testimony in Superior Court of Connecticut. Wind Colebrook South, LLC v Town of Colebrook: at issue the classification and ad valorem assessment of 5.0 MW windfarm in Colebrook, Connecticut, 2019.
- Clifford et al v. Village of GlenEllyn and True North Energy, in the Circuit Court of the Eighth Judicial Circuit, DuPage Co., Illinois. Expert testimony regarding property value impacts of proposed gas station-convenience store siting on commercial site in Village of Glen Ellyn, Illinois, 2019
- Deposition in 2nd & Main LLC v. City of North Chicago. Expert testimony regarding before and after valuation of proposed easement taking on industrial site in North Chicago, IL, 2019. Trial pending
- Deposition in Multiple Plaintiffs v. Advanced Disposal Services Zion Landfill, Inc. Expert testimony regarding diminution in property values caused by land fill expansion near Winthrop Harbor, IL. 2018
- Expert testimony regarding property value impacts of proposed cell tower siting on church-owned site in Village of Olympia Fields, Illinois before planning board, June 2016
- Hunt Building Corp. as appellant v. Mead County, South Dakota in matter of consolidated tax appeals regarding Ellsworth Air Force Base housing project, aka, Antelope Ridge near Rapid City, SD; deposition as tax payer's expert witness; January 2015; Trial June 2016 Civ. No. 12-335
- Expert testimony before 45th Judicial Circuit of Lincoln County, Missouri; Foremost Insurance Company v. Peters Heating & Air Conditioning; regarding diminution in value on rural residential property; June 2014
- Expert testimony before 21st Judicial Circuit Court of St. Louis County, Missouri; City of St. Louis and Factory Mutual Insurance v. Guarantee Electrical, et. al.; regarding diminution in value at central utility plant at Lambert Field; November 2013
- Expert testimony at settlement conference before Federal Circuit Court of New Jersey on pipeline condemnation of railroad right of way; Texas Eastern Transmission, LLP v. Consolidated Rail Corporation, September 2013
- Served as lessor representative on three-member arbitration panel in lease dispute regarding Philadelphia area data center, King of Prussia, Pennsylvania, 2012
- Expert testimony in the 43rd judicial Circuit Court, DeKalb County, Missouri; property tax appeal, Lost creek Wind, LLC v. Assessor, DeKalb County, Missouri, 2012
- Expert testimony before Lowndes County Board of Equalization re: property tax appeal regarding Magnolia Grove, base housing project, Moody AFB, Valdosta, Georgia, 2011
- Expert testimony before Illinois Property Tax Appeal Board, re: Lincolns Landing, St. Clair County, December 2010
- Served on three-member American Arbitration Association Panel: Shannon v. Mackay, AAA Case No 74 180 Y 0067208 DEAR, May 2009
- Prepared written and oral testimony for EFSEC, the Energy Facility Site Evaluation Council of Washington State for wind power projects, as expert for applicants, in Kittitas County, 2005-7

Select Publications

- Contributor to "Chapter 6 - Valuation of Real Estate." Valuation Strategies in Divorce. 5th Edition, 2019-1 Supplement. New York: Wolters Kluwer, 2019.
- Author of "Chapter 12 - Introduction to Real Property." Valuing Specific Assets in Divorce. 2019-1 Supplement. New York: Wolters Kluwer, 2019.
- "Living on the Grid," Book Review of Access, Property and American Urban Space by M. Gordon Brown, *The Appraisal Journal,* Appraisal Institute, Spring 2018
- "Renewables, Tax Credits and Ad Valorem Taxes: Are Policies Aligned?" *Real Estate Issues*, The Counselors of Real Estate, Volume 39, No. 1, 2014
- "Wind Power and The Tax Base: Reliable as the Resource?" *The Journal of the International Machinery and Technical Specialties Committee of the American Society of Real Estate Appraisers*; Volume 30, Issue 1, First Quarter, 2014
- "Wind Farms Harvest More Than Just Energy," *Terra Firma*, Realtors Land Institute, Winter 2014
- "Earth, Wind and LULUs – Wind Farms: Harvesting Energy and Controversy," *Journal of the Center for Real Estate Studies*, Realtor University, Vol. 1, No. 2, September 2013
- "Renewable Energy: Headwinds Ahead?" *Real Estate Issues*, The Counselors of Real Estate, Vol. 36, No. 3, 2011
- Panel presenter, Illinois Wind Working Group Annual Conference, Illinois Institute of Technology, Chicago, IL (July 21-22, 2011)
- "Wind Farms- A Valuation Primer," *Appraisal Journal*, Appraisal Institute, Winter 2011
- Presentation Faculty at Law Seminars International Symposium on Land Use Impacts of Wind Energy, Vancouver Hilton, February 11-12, 2007

Active State Certifications

Mr. DeLacy received his initial license as a Certified General Real Estate Appraiser in Oregon, but maintains active certified general credentials in the following states:

- California, license no. AG034219
- Illinois, license no. 553.001797
- Indiana, license no. CG41001248
- Iowa, license no. CG02930
- Michigan, license no. 1201073739
- Missouri, license no. 2005035957
- New York, license no. 46000047021
- Oregon, license no. C000089
- Washington, license no. 1100107
- Wisconsin, license no. 1678-01

EXHIBIT C



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Transcript of Peter Kolb

Date: April 20, 2021
Case: The City of North Chicago -v- 2nd & Main, LLC, et al.

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IN THE CIRCUIT COURT OF THE 19th JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

THE CITY OF NORTH CHICAGO,)
)
Plaintiff,)
)
vs.) No. 2019 ED 20
)
2ND & MAIN, LLC, UNKNOWN)
OWNERS and NON-RECORD)
CLAIMANTS,)
)
Defendants.)

The deposition of PETER KOLB, taken for the purpose of discovery before SUSAN R. PILAR, CSR, within and for the State of Illinois, at Ancel Glink, P.C., 175 East Hawthorn Parkway, Suite 145, Vernon Hills, Illinois, commencing on April 20, 2021, at the hour of 1:00 p.m., pursuant to notice and in accordance with Illinois Supreme Court Rules.

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APPEARANCES:

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(Witness sworn.)
MR. MATTHEW DiCIANNI: Okay. Mr. Kolb, could you please state and spell your name for the record.
THE WITNESS: Peter E. Kolb, K-O-L-B.
MR. MATTHEW DiCIANNI: Mr. Kolb, have you -- or let the record show that this is the discovery deposition of Plaintiff's Controlled Expert Witness Peter Kolb taken pursuant to notice to all parties and in accordance with the Illinois Code of Civil Procedure, the Rules of the Supreme Court and the local Circuit Court Rules.
Mr. Kolb, have you taken a deposition before?
THE WITNESS: Yes.
MR. MATTHEW DiCIANNI: Okay. You probably know all this. I'm just going to go over the ground rules real quick here. When I ask you a question, you just need to answer out loud and in words so the court reporter can take down what you say. She can't take down uh-huhs, uh-uhs or nodding the head.
Let's just try to speak one at a time so wait for me to finishing -- finish giving my question before you answer. That way the court reporter doesn't take down both of us talking over

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each other.
If you need to take a break at any time, that's fine. Just let me know. I just ask that you answer any pending question before we take a break.
Again, if you don't know the answer to a question, just say so. We don't want you to guess. You're under oath right now, which means you're required to tell the truth the same way you would be in the courtroom.
Do you have any questions about that?
THE WITNESS: No. I understand.
PETER E. KOLB,
called as a witness herein, having been first duly sworn, was examined and testified as follows, to-wit:
EXAMINATION
BY MR. MATTHEW DiCIANNI:
Q. Okay. Mr. Kolb, did you do anything to prepare for this deposition?
A. Yes.
Q. Could you describe what you did.
A. Yes. I've reviewed a number of documents that were provided with -- by other consultants for Mr. Dahl on this property.

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Q. Okay. Were those documents included in your report?
A. I referred to them.
Q. Okay. So --
A. They were not attachments.
Q. Okay. So all of the documents you reviewed were exhibits to your expert report?
A. I referred to them. I did not include them in the report.
Q. Okay. So there were some documents that you referred to that aren't included in your expert report as exhibits?
A. I listed the documents that I reviewed in my report.
Q. Okay. Did you talk to any of the attorneys -- did you talk to Mr. Quinn?
A. Yes.
Q. Okay. What did you guys talk about?
A. We talked about the -- the property, the issue with -- relative to a water main going through the property and -- and any other utilities that might be on the property.
Q. Okay. Could you just describe what you -- you said you talked about the water main on the

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property, correct?
A. That's correct.
Q. Can you describe -- do you remember what you talked to him about in regards to the water main on the property?
A. There's a water main that's going east/west across the property.
Q. Okay. That's all you guys talked about?
A. Well, it's owned and operated by the -- the City and -- and it is on -- on Mr. Dahl's property and, apparently, there is no easement for that currently.
Q. You said you talked about a sanitary sewer line?
A. Yes. In my review of the drawings I noticed that there was a sanitary sewer line that runs north/south through the property.
Q. And you talked to Mr. Quinn about that?
A. Yes.
Q. What did you guys talk about?
A. Well, that there's another line there that should be discussed. That should be -- should keep that in mind that there's another underground line through the property.

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Q. Okay. Mr. Kolb, I'd like to just go through your CV here. Do you have a copy of that in front of you? I --
A. Of my --
Q. Of your CV. It was an attachment. It was an exhibit to your --
A. I don't know that I have that.
MR. QUINN: You know what, I've got one that I can -- if I can get my stuff out of the book --
MR. MATTHEW DiCIANNI: Yeah.
MR. QUINN: -- I can give you.
MR. MATTHEW DiCIANNI: I think I have another one, too.
MR. QUINN: Here we go. Got it.
MR. MATTHEW DiCIANNI: Thanks.
BY MR. MATTHEW DiCIANNI:
Q. Okay. So you got your BS in civil engineering from the University of Illinois?
A. Correct.
Q. And then what did you do after you left U of I?
A. I worked for Harza Engineering in Chicago.
Q. How long did you work for them?
A. Eight years.

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Q. What did you do after that?
A. Then I went -- moved to California for eight years and I worked in a municipality there. Thousand Oaks, California.
Q. What were you doing for the municipality?
A. Wastewater treatment.
Q. And then what did you do after? After that.
A. Then I moved back to Illinois and I started working at Lake County Public Works Department in 1992.
Q. Okay. So -- and what did you do in the Lake County Public Works Department?
A. I started off as the chief engineer in '90 -- 1992. I was chief engineer for 12 years. Upon the retirement of Al Galantha I became the director of public works at the County for the last 12 years of my employment there.
Q. So how long were you at -- I thought you said you were at Lake County from 1992 to 2004.
A. No. To '14. I should say actually '16. '92 to 2016.
Q. Okay. And so what did you do for -- so for the first 12 years you were the chief engineer?

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A. Right.
Q. And then what did you do for the last 12 years?
A. Director of public works.
Q. Can you describe what your responsibilities were in that position?
A. The operation and management of the County's water and wastewater systems.
Q. Okay. So what -- what does that mean? What were your day-to-day responsibilities?
A. Keeping the water system -- the water distribution system, some 300 miles of pipe reservoirs and -- and towers, functioning and delivering water. This building was one of the customers -- is still one of the customers of Lake County Public Works. And also for sanitary sewer. We operate the wastewater treatment. The Vernon Hills treatment plant here in town.
Q. And --
A. And there's two other wastewater treatment plants that the County also operates. So three in total.
Q. It says on here you were responsible for preparation and management of the department's

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$40 million annual operating budget, long-range capital improvement program and rates and fees. Also prepared all public works committee agenda items, resolutions and ordinances.
So were you involved in the administration then of --
A. Oh, yes. I was a department head.
Q. Okay.
A. And I reported to the County administrator and also the County Board members.
Q. So it seems to me that most of your job as the director of public works was dealing with the water treatment plant. Is that fair to say?
A. Water supply and wastewater treatment. Yes.
Q. Okay. Were you dealing with -- did you ever encounter environmental issues that you would work with in that position?
A. Yes. Yes.
Q. Can you describe that?
A. Wetlands issues. Dealing with the IEPA for discharge permits. During my tenure we had increasingly more stringent discharge requirements requiring us to spend more money on facilities to meet

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those requirements.
Q. So in December 2016 then you joined ATI?
A. Applied Technologies, Inc. Correct.
Q. And are you still at Applied Technologies, Inc.?
A. I am.
Q. What -- first of all, what is Applied Technologies, Inc.?
A. We're a municipal firm. We -- when I say "municipal," water and wastewater design, and we do -- we service municipalities, sanitary districts, private citizens that have need for water and supply distribution.
Q. So you -- you work a lot with local governments it looks like here?
A. That's correct.
Q. The Central Lake County Joint Action Water Agency, that's one of the local governments you work with?
A. Yes.
Q. Can you describe what you do with them?
A. We were one of the consultants that provided an extension of the Central Lake County Joint Action Water Agency pipeline. There were a number of

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municipalities that had not gotten -- that did not have Lake Michigan water and there was an expansion -- a rather large expansion project to provide water to Lake Villa, portions of -- of Lake County that didn't have Lake Michigan water yet. And Lindenhurst. And we were one of the consultants that designed that project and saw it through construction.

Q. The Central Lake County Joint Action Water Agency is a client of our law firm, Ancel Glink. Have you worked -- are you familiar with our law firm?

A. Oh, yes.

Q. Okay. Can you describe how you're familiar with Ancel Glink?

A. Scott Puma. Scott was the -- was the -- I would say counsel to the Lakes Region Sanitary District the last three years I was the interim Lakes Region Sanitary District manager. So Scott is still there, but the -- as you know, they -- the district has now been dissolved and gone into the County. So he was there. Adam Simon. I know Adam. We had encounters in the past on other projects and so I'm -- I'm quite familiar with you guys.

Q. Have you ever consulted with our firm? For our firm.

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A. Other than with Scott at the Lakes Region Sanitary District, no.

Q. You've -- no one has ever hired you as like an expert witness or anything like that?

A. No.

Q. Are you doing any work right now that involves Ancel Glink besides this case?

A. No.

Q. I don't think I asked you. What is your position with ATI?

A. Vice president.

Q. And what does -- what do you do as vice president?

A. I run the Illinois branch of Applied Technologies. We have a main office in Brookfield and I have the Illinois office in Lake Villa is where I am, and I primarily handle Illinois projects.

Q. Okay. So is ATI a national firm then?

A. No. No. We have the two offices and that's -- that's all.

Q. Okay. One in Illinois and then one --

A. In Wisconsin. Brookfield, Wisconsin.

Q. Okay. Are you a member of any professional societies?

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A. Yes. The Illinois Association of Wastewater Agencies, the AWWA -- Association of -- AWWA. I think that's it, yeah. Association of Water -- Wastewater Agency, I guess. I'm sorry. I --

Q. Yeah. Okay.

A. -- I forgot the acronym. It'll come to me.

Q. Have you published anything in the past?

A. No.

Q. How many times have you served as an expert witness?

A. This will be the first time.

Q. Okay. Did you -- had you met Phil Dahl before this litigation?

A. No.

Q. I --

A. By the way, AWWA is the American Water Works Association.

Q. Thank you.

In your deposition notice the rider asks for a bunch of documents. Did you -- you bring those documents?

A. I believe I did.

Q. Okay. All right. I'd like to take a look

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at those. So it looks like the first document you provided here is the deposition of Frank Furlan. The transcript of that.

A. Yes.

Q. Did you rely on the deposition transcript of Frank Furlan to prepare your report?

A. Yes.

Q. Can you explain how?

A. Frank provided a very detailed history and knew the documentation of the original pipe since he was the village engineer and he has a -- he had very detailed information on where the pipe went during -- during its construction back in 1961, which I found astounding.

Q. Isn't that amazing? He -- he remembers what happened in 1961 when the pipe was laid?

A. Yes. Yes. That's -- I was -- I was impressed.

Q. Yeah. Yeah. He was a great witness. He's still going strong at, you know, 90 years old?

A. Yeah.

MR. QUINN: He's over 90.

MR. MATTHEW DiCIANNI: Is he?

MR. QUINN: Yeah.

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MR. MATTHEW DiCIANNI: I remember we took his deposition in here and he was -- he was sharp.
MR. QUINN: Yeah. He was an expert for me in a case and he really saved the day one time.
MR. MATTHEW DiCIANNI: Oh, yeah.
MR. QUINN: I had two experts. Two engineers. This is off the record.
(Off the record at 1:15 p.m.)
(Resumed at 1:16 p.m.)
MR. MATTHEW DiCIANNI: Okay. We can go back on the record.
BY MR. MATTHEW DiCIANNI:
Q. It looks like the second document here is -- well, I'll let you describe it. What is that document?
A. This is the report from JAS Environmental and actually it was their letter and then he attached -- -- let's see -- other information that they had provided as part of that.
They talked about chemical contamination on the former packing plant, soil samples. They had made a representation of backfill used around utility lines, talked about backfill being permeable, rates of migration through the surrounding

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soils and the direction of this migration as pathways.
Q. Okay. So I'd like to just go through this report a little bit. First of all, you talk -- this report talks about the migration of chemical contaminants; is that correct?
A. That's right.
Q. Do you -- do you have -- so you're an engineer, correct?
A. Yes.
Q. Do you have an expertise in the migration of chemical contaminants?
A. No.
Q. Have you dealt with issues involving the migration of chemical contaminants in the past?
A. Yes. As they relate to pathways, trench -- trench backfill and pathways. If you have a -- a fluid and you have a pathway for that fluid to migrate, we've had that issue in the past. Brown water. Those types of things.
Q. So you said "we've had that issue in the past." When was that?
A. When I was working at Lake County Public Works, I encountered those types of issues.
Q. Was there a specific time that you can

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recall?
A. If we were near wetlands, we would have to be careful in terms of if our trench backfills were -- were -- allowed either a -- a pathway for the water to get out or for any other type of water to get in. So you -- I was cognizant of that -- those issues.
Q. Okay. Now, did you rely on this report here in the preparation of your expert report?
A. I did.
Q. Can you explain how?
A. Yes. I think that JSA [sic] provided some findings that described the ability of contaminants north of the Dahl property entering the Dahl property as a preferential pathway.
Q. What does that mean, "a preferential pathway?"
A. It allows a fluid or a material from -- getting from one location to another. Can act as a drain. A French drain.
Q. What's -- I'm sorry. You're going to have to just -- I'm going to have a bunch of follow-up questions here. What's a French drain?
A. It's a -- it's a stone or -- and usually with a pipe or stone that surrounds it that allows

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water to flow through a -- through the ground.
Q. So how was that preferential pathway created?
A. There was an excavation of native material. The native material was replaced with stone and that has voids in it or materials that is not the same and those voids then allow the transfer of water along with anything else that's along with the water. And as JSA indicated, contaminants.
Q. So native material. What's native material?
A. If you're digging out in a clay area, you would -- clay would come out and then backfill would go in. Something that's -- that's -- surrounds the pipe easier. It's looser. It's usually sand or -- or -- or pebbles or gravel.
Q. So the water pipe was excavated I believe you said; is that correct?
A. (No verbal response.)
Q. And then it was backfilled with stone?
A. It was backfilled with a -- a granular material.
Q. What was the granular material?
A. Either sand or gravel, but they usually

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have to have something that's -- that flows easy and that bags the pipe to protect the pipe and allows the pipe to be bedded.

Q. What does that mean to be bedded?

A. Supported.

Q. Okay. So you can't backfill the pipe with clay or other native materials?

A. No. You could. That's not the preferred method because you want something to surround the pipe to actually give the pipe support.

Q. Okay. And you said that this excavation created a preferential pathway to allow the migration of chemical contaminants?

A. It -- yes.

Q. Okay. And -- so can you explain to me -- first of all, let's -- let's just -- I'd like to give you a map of the property here and we can label this -- let's label his CV as Exhibit 1. Thank you.

MR. THOMAS DiCIANNI: This was the CV?

MR. MATTHEW DiCIANNI: Yes.

MR. THOMAS DiCIANNI: Okay. That's Exhibit 1.

(Kolb Deposition Exhibit No. 1 was marked for i.d.)

MR. MATTHEW DiCIANNI: And then let's label

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this Exhibit 2.

MR. THOMAS DiCIANNI: You want to label his report Exhibit 2. Be sure --

MR. MATTHEW DiCIANNI: Oh, yeah.

MR. THOMAS DiCIANNI: So this would be Exhibit 2, right?

MR. MATTHEW DiCIANNI: Well, I'm going through the documents that he gave me here.

MR. THOMAS DiCIANNI: Okay. All right. I'll stay out of it.

MR. MATTHEW DiCIANNI: Yeah. You know what, let's -- that's a good point, though. Let's label as Exhibit 2 this right here.

(Kolb Deposition Exhibit No. 2 was marked for i.d.)

MR. MATTHEW DiCIANNI: And for the record that is the report created by Jeep & Blazer. Oh, I'm sorry. The JAS -- there's a JAS.

THE WITNESS: Yeah. That was the one.

MR. MATTHEW DiCIANNI: That's right. Thank you. This is the report created by JAS Environmental to Jeep & Blazer.

And then let's do as Exhibit 3 this picture of the property here.

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(Kolb Deposition Exhibit No. 3 was marked for i.d.)

MR. QUINN: The JAS Environmental has the October 3rd in the right-hand corner?

MR. MATTHEW DiCIANNI: That's correct. That's --

MR. QUINN: That was No. 2?

MR. DiCIANNI: No. 2. And then this is No. 3. This is a -- what I will represent is a picture of the 2nd & Main property. These are aerial photographs. One is taken from the Lake County tax parcel website and then the second one is taken from Google Maps and these are aerial. Aerial photos of the property.

BY MR. MATTHEW DiCIANNI:

Q. So, Mr. Kolb, you're stating that the contaminants migrate onto the 2nd & Main property. Where do the contaminants come from?

A. There's a sanitary sewer line as mentioned before that runs north/south through the line, and that's shown on one of the maps that I have here. I didn't pull those out. Sorry. I have other -- I have maps, too.

Q. Okay. Sure. Yeah. That'll help us.

A. Let me give you -- let's see. I did

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bring -- I did bring a copy of a pre-stressed concrete cylinder pipe just as an example of what that looks like. That's the material that the water main's made out of.

I also have aerial photos of the -- of -- you have the same one here. And what else do I have. The Great Lakes Naval Base. It has the real estate summary map.

MR. THOMAS DiCIANNI: Want me to make copies of all that and we'll make it a group exhibit?

MR. MATTHEW DiCIANNI: Sure.

MR. THOMAS DiCIANNI: Okay.

THE WITNESS: Thanks.

MR. THOMAS DiCIANNI: Are these double-sided? Oh, there's -- there's a drawing. Okay.

THE WITNESS: I brought copies of the invoices. I don't know if you --

MR. QUINN: I've got them. You can keep them.

THE WITNESS: Keep them.

(Mr. Thomas DiCianni exited.)

BY THE WITNESS:

A. There we are. This is the one I'm looking for. This is the Alta Title Survey. It has on it --

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BY MR. MATTHEW DiCIANNI:
Q. Yeah.
A. -- the -- the city water main that runs east/west and also a -- a sewer line. It could be a combined sewer line. No one knows exactly for sure what exactly that is, but that runs north/south and that is -- runs directly to the property to the north.
That was also constructed most likely with an open cut system. You dig out the hole, you put in a bedding material, you place the pipe in the bedding. You surround the pipe with additional bedding material and then -- and then you backfill to the -- to the top.
So this would be a direct connection to the property to the north and anything that passes the water main, which is also gravel bedded, would migrate into the bedding of the -- of the water main, also.
Q. Okay.
A. That's what I was referring to.
Q. So how do you know that the sanitary sewer main that runs north and south was constructed in the manner you just described?
A. It's a -- an assumption. At that time

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they did not have -- if you wanted to go underneath a railroad track or something of that nature, you do usually have to have a carrier pipe, a steel carrier pipe. They would most likely not have had steel carrier pipe for this entire section.
I'm not absolutely certain, but this water main was put in in '61. This was probably put in at about the same time. Open cut was the preferred method of construction.
Q. What makes you say that that sanitary sewer main was probably put in at about the same time?
A. It's lower than the water main and I do believe that it was there prior to '61. I'm not sure, though.
Q. Okay. And you may have explained this and if you have, my apologies. How do you know that the water main was constructed in the manner you described previously?
A. Let's see. The -- it refers to trenching in the parkway property. Trenching would be trenching for the water main itself. It says note all trenches shown for new pipe on this sheet shall be tamped earth backfill except where trenches are in concrete paved areas which shall have sand backfilled concrete.

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And then the only other difference would be if they crossed a railroad crossing, you would have to have that in casing pipe.
Q. And for the record let's just make it clear that Mr. Kolb is reading from the title survey --
MR. QUINN: No, no.
BY THE WITNESS:
A. This is actually the 1961 construction drawings.
BY MR. MATTHEW DiCIANNI:
Q. Oh, okay.
MR. QUINN: It's the one that Frank brought in to his deposition and I think actually you made copies of this for me.
MR. MATTHEW DiCIANNI: That's right. I did do that. Okay. Thank you.
THE WITNESS: I should have shown this to you before but --
MR. MATTHEW DiCIANNI: No.
BY MR. MATTHEW DiCIANNI:
Q. Okay. So back to my original question before we kind of got off on this. Can you indicate -- let's just use this map right here and,

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again, this is Exhibit 3. It says subject property on it. Can you draw on there where the preferential pathway goes?
THE COURT REPORTER: Do you want him to draw on the exhibit or on that one?
MR. MATTHEW DiCIANNI: Yeah. Why don't -- why don't we have Mr. Kolb draw on the exhibit just so we can . . .
BY THE WITNESS:
A. All right. Let's see. The line north/south is the -- either a sewer line or a combined sewer line and the water main the question is east/west.
BY MR. MATTHEW DiCIANNI:
Q. So you said that the contamination comes from the north and migrates onto the property?
A. (No verbal response.)
Q. So does this migrate then through the sanitary sewer line?
A. Yes. Around the bedding of the sanitary sewer line.
Q. And is that the only preferential pathway for the migration of contaminants onto the property?
A. The only one that I can readily identify.

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Q. Okay. Okay. So now I am moving on to the next document that Mr. Kolb provided. This document -- let's -- let's call this the Deigan report. I think we all know what that means because we've all reviewed this document, but I just want to --

MR. QUINN: That's 4, Matt?

MR. MATTHEW DiCIANNI: Yeah. We'll label the Deigan report 4.

(Kolb Deposition Exhibit No. 4 was marked for i.d.)

MR. QUINN: Do we have another Deigan report that we can mark? I'm assuming you don't want him to take your exhibit.

THE WITNESS: Well, I was -- yeah. I was hoping that mine were just to refer to.

MR. QUINN: Right. Not to take.

THE WITNESS: I would have been happy to make copies but --

MR. MATTHEW DiCIANNI: Right. I'll give all these back to you.

THE WITNESS: Okay.

BY MR. MATTHEW DiCIANNI:

Q. Mr. Kolb --

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MR. QUINN: We -- I did -- you know, we got it in discovery. It was one of the documents I sent to you so --

MR. MATTHEW DiCIANNI: Right. I have that, too. So let's just --

MR. QUINN: We'll just agree later on that we'll submit --

MR. MATTHEW DiCIANNI: Yeah.

MR. QUINN: -- the Deigan report.

MR. MATTHEW DiCIANNI: Right.

BY MR. MATTHEW DiCIANNI:

Q. So, Mr. Kolb, can you please describe what the Deigan report concludes.

A. Yes. This provided an assessment. It's a Phase II Environmental Site Assessment of the -- Mr. Dahl's property, and I refer to it as the former Hines Lumber yard. Talked about the constituents that they found in there, lead, mercury, benzene, those types of -- and it has a -- all the background information, soil reports and their findings, and this was dated August 8th of 2013.

Q. Do you know how they determined that those contaminants were on the property?

A. In my reading they had labs doing an analysis. Soil and -- analytical analysis of -- of the soils that they took samples.

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Q. And did you use the Deigan report in preparing your report?

A. Yes.

Q. Could you explain how?

A. It identified the contaminants that they were -- that they found.

Q. Okay. So you used the Deigan report to identify the contaminants on the property?

A. Correct.

Q. Okay. It looks like the next document you have here is the Phase II Subsurface Soil Investigation from Stateline Environmental. Let's mark this as Exhibit 5.

(Kolb Deposition Exhibit No. 5 was marked for i.d.)

MR. MATTHEW DiCIANNI: And then we'll also submit that.

MR. QUINN: That's the Stateline one?

MR. MATTHEW DiCIANNI: Yes.

MR. QUINN: And I'm fairly sure I have these in the PDF format I can send you.

MR. MATTHEW DiCIANNI: Okay.

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MR. QUINN: And I'll copy you, Matt, so you have them if you do the transcript.

MR. MATTHEW DiCIANNI: Thanks, John.

BY MR. MATTHEW DiCIANNI:

Q. Mr. Kolb, can you describe what this document discusses?

A. Yes. This is also a -- a subsurface soil investigation and it was performed for the City of North Chicago August 16th. So, again, this is a -- is that report that was provided to the City and it also has soils samples and constituents that they identified. Soil borings and that sort of thing.

Q. And did you use that in the preparation of your report?

A. I used mainly the Deigan report, but I referred to this. I looked at it and it was similar in nature.

Q. Okay. And then Exhibit 6 -- we will also submit this to you, Madam Court Reporter -- this is a Phase II Subsurface Investigation from Environmental Protection Industries.

(Kolb Deposition Exhibit No. 6 was marked for i.d.)

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BY MR. MATTHEW DiCIANNI:
Q. Mr. Kolb, what does that report discuss?
A. This is a report that goes to NorStates Bank from Environmental Protection Industries providing a Phase II Subsurface Investigation of the 2nd & Main property. Also a soils report.
Q. Okay. Another soil -- soil report.
Okay. So let's -- I'll give all these documents back to you, Mr. Kolb.
So, Mr. Kolb, in addition to reviewing those documents did you talk to anyone to help you compile your expert report?
A. I did contact the Navy base.
Q. Okay.
A. I was trying to ascertain the north/south sewer line if it was still active, if there was anyone connected to it. I -- when I spoke with Mr. Dahl, we -- I did the site visit and we actually were looking for the manholes that were indicated on the construction documents, but you couldn't see them and we found one that was buried, but -- and we opened it up and I identified -- I think in my report talked a little bit about at nine and a half feet you could see that there's surface water -- or groundwater I should

say and it doesn't appear to be going anywhere. So it -- there was no apparent flow in that particular line.
(Mr. Thomas DiCianni entered.)
BY THE WITNESS:
A. The Navy themselves they don't even know if there's any properties to the north connected to it, but in the event that -- that this property gets developed you would want to use that line as a sanitary sewer line in the future.
BY MR. MATTHEW DiCIANNI:
Q. So the Navy didn't know then whether the sanitary sewer line is even working?
A. That's correct.
Q. Okay. Mr. Kolb, I'd like to turn now to your report.
MR. MATTHEW DiCIANNI: I have copies of his report for whoever doesn't have it.
BY THE WITNESS:
A. February 28th?
BY MR. MATTHEW DiCIANNI:
Q. Yes. The February 28th of 2020 report.
A. Mm-hmm.
MR. QUINN: I've got one so don't worry.

MR. MATTHEW DiCIANNI: Okay. You've got one?
MR. QUINN: Yes.
MR. MATTHEW DiCIANNI: Okay.
MR. THOMAS DiCIANNI: Here.
MR. MATTHEW DiCIANNI: Oh, thanks. Yeah.
And then could we mark this as Exhibit 7 then.
(Kolb Deposition Exhibit No. 7 and Kolb Deposition Group Exhibit No. 8 were marked for i.d.)
BY MR. MATTHEW DiCIANNI:
Q. Let's just -- let's talk about Group Exhibit 8 before we dive into your report, Mr. Kolb. So I'm looking at the first document in Group Exhibit 8.
A. Mm-hmm.
Q. Can you explain what this is, please?
A. This is a cross-section of the pre-stressed concrete cylinder pipe. This is the type of pipe that was used in the construction of the water transmission main that runs across the property.
Q. Okay. How do you know that this was used in the water pipe that runs across the property?

A. The Frank Furlan deposition.
Q. Okay. I'll probably refer to that later on. Let's -- let's go into your report now, Mr. Kolb, and that's marked --
A. Mm-hmm.
Q. -- Exhibit 7 for the record. And I'd like to just take this report kind of sentence by sentence here. It's not too long of a report so . . .
All right. So it says "The subject property is identified as 2nd & Main, North Chicago, Lake County, Illinois, and is located approximately 35 miles north of the downtown area of Chicago, Illinois. The property consists of an irregular shaped parcel land and is approximately 4.17 acres in size."
So how did you determine how big the property was?
A. I believe that came off of one of the parcel maps. All right. Hmm. I have the area -- the actual area of 202,827 square feet and I know that I converted that, but -- there was one parcel that actually had the -- the map that showed the actual acreage, but I'm at a loss to find exactly where I pulled that from. Hmm.
(Mr. Thomas DiCianni exited.)

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BY THE WITNESS:

A. That's the same one.

(Mr. Thomas DiCianni entered.)

BY THE WITNESS:

A. Okay.

BY MR. MATTHEW DiCIANNI:

Q. Okay. If you can't find it, that's -- that's fine.

A. Not at the moment.

Q. Okay. Okay. So then I'm going to continue reading from the report. You say "The PINS for the subject property." You list the pins. "The subject property and adjoining properties are located in a commercial/industrial area. The property is zoned M3 by the City of North Chicago's Zoning Department and is divided by Nimitz Avenue."

So let's --

A. And I just found one of the reports where the 4.17 acres came from. This was on the -- yeah -- EPI, Environmental Protection Industries. Their background information on the site actually listed it as -- and that's on page -- just a moment -- 5. Legal location and legal description.

Q. Great. Thank you, Mr. Kolb.

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All right. So just returning to the previous question it says "The property is zoned M3 by the City of North Chicago Zoning Department and is divided by Nimitz Avenue." Let's turn to Exhibit 3 here. So where is Nimitz Avenue?

A. Yes. It's now called 2nd.

Q. Oh.

A. I believe that it was called Nimitz --

Q. Got it.

A. -- previously.

MR. MATTHEW DiCIANNI: So just for the record he is referring to the Alta ACSM Land Title Survey, and for the record Nimitz Avenue, which is now called 2nd Street, is located to the south of the 2nd & Main property.

BY MR. MATTHEW DiCIANNI:

Q. Now, you said that the property is divided by Nimitz Avenue?

A. Well, I was using some verbiage that came out of the site description, the vicinity characteristics, again, out of the report from Environmental Protection Industries, and it refers to the fact that it's an irregular shape. A portion of the property is south of 2nd and a portion of the property is north of 2nd. Or Nimitz. Sorry.

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Q. Do you know whether the property extends to the south of 2nd Street/Nimitz Avenue?

A. Yes. It's shown on the Alta survey. This is the entire parcel.

Q. Okay. Oh, I see.

So this strip of land here -- and this is the -- for the record to the northwest of the property and it runs along the railroad tracks -- that's part of the parcel as well?

A. Correct.

Q. Okay. You say here then "The main facility is located to the north of Nimitz Avenue and there is a single overhang storage structure located on the southern portion of the subject property."

So what's the main facility?

A. This office building here. It says office storage.

Q. Okay.

MR. MATTHEW DiCIANNI: And for the record Mr. Kolb is indicating -- is pointing to that Alta Land Title Survey.

MR. QUINN: And you do have a small copy here.

MR. DiCIANNI: Okay. Yeah. Great.

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BY THE WITNESS:

A. Which would be this structure.

BY MR. MATTHEW DiCIANNI:

Q. Okay. It says "The northern portion of the site is developed with a small office, several overhang structures and three warehouse buildings. The two large warehouse buildings were used for lumber storage and the smaller building housed power saws and planners."

So how do you know that the large warehouse buildings were used for lumber storage?

A. Mr. Dahl indicated that. He had -- he had knowledge of what -- that that was the old lumber yard. He showed -- actually when we opened the building, there was some equipment there that looked like planners and -- and it was referred to as such also in the same EPI report.

Q. And then the report says after that "The two large warehouse buildings were used for lumber storage and the smaller" -- oh, I'm sorry -- "building housed power saws and planners. The site buildings are either wood-frame construction or metal panel buildings and are no longer in use for lumber sales operation."

Did Mr. Dahl tell you that as well?
A. Yes. The site is not being used for that purpose.
Q. Okay. Let's turn to the next paragraph here. It says "The current property owner Mr. Phil Dahl is investigating options for potential use of the site as a storage area for shipping containers and railroad car access."
So can you describe what Mr. Dahl is doing to investigate the property for the potential use of the site as a storage area?
A. When I met with him at the site and talked about he'd like to be able to use this -- this property for storage and shipping containers with a possible railroad access.
Q. Did he give you any specifics of what he's -- of how he's investigating options?
A. No.
Q. Okay. "Possible uses would entail constructing additional railroad spurs to provide access to the entire site."
So you say "additional railroad spurs." Is there already a railroad spur there?
A. There was one. And you can see it on the

site. This would be the spur right through here.
Q. Okay. So let's go back to -- this is Exhibit 3. Could you just indicate on there where the railroad spur is.
A. Yes. And, again, I don't know how far -- let me do this. I will . . .
Q. Thank you.
So Mr. Dahl wants to construct additional railroad spurs. Did he say how many additional railroad spurs?
A. He wasn't specific.
Q. Okay. Did he tell you where those railroad spurs would run?
A. No.
Q. Let's talk about the railroad spur that's actually on the property that you indicated on Exhibit No. 3. Now, when you conducted your site inspection on February 21st, 2020, did you observe that railroad spur?
A. I was not paying attention to the railroad spur at the time, no.
Q. Is that railroad spur currently in use?
A. I don't believe so. And it does show up on the Alta Land Survey also. And it shows up as a

spur track.
Q. Do you know what that railroad spur was used for in the past?
A. This is the site of a former lumber yard. Most likely for delivery of lumber.
Q. Do you know that for sure or are you just speculating?
A. I'm speculating, yeah.
Q. Do you have any idea when that railroad spur was operating?
A. I can't say, no. I don't know.
Q. Let's continue. Your report then says one of the challenges is in identifying underground utilities that are not -- that are currently crossing the site and restricting potential future use of the property.
So let's take the first part of that sentence there. Why is it a challenge to identify underground utilities that are currently crossing the site?
A. Limited records. Not exactly sure where the existing lines are at. There's not good information on their actual locations. The water line is shown on drawings, but you don't know if it's there

or not.
As a matter of fact, when I did my site visit, Mr. Dahl indicated excavation that was performed by the City of North Chicago. They were looking for the water main. They were not able to find the water main where they were looking for it. So I'm not sure that they know exactly where the water main is at themselves.
Q. So is it fair to say that nobody knows exactly where the water main runs?
A. That's fair, yes.
Q. So you say one of the challenges is in identifying underground utilities that are currently crossing the site and restricting potential future use of the property.
So the underground utilities that are currently crossing the site may restrict potential future use of the property?
A. That's correct.
Q. How would those underground utilities restrict potential future use of the property?
A. If, in fact, you put railroad spurs through the property, you would have to protect or -- or supplement the construction of whatever utility

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it's crossing.

The railroad has certain standards for any pipe that crosses their tracks. When this pipe went in, it had a steel casing going underneath any railroad tracks. So if you use that same standard for any utilities here, you would have to encase existing utilities with a steel casing pipe if you added additional tracks.

Q. So the water main is -- has a steel casing surrounding it? Is that what you're saying?

A. Not currently. The water main it doesn't need a steel casing because it's not crossing under a track except where it crosses the railroad tracks to the west. That has a steel casing and it's shown on the record drawings, but in -- through the rest of the property there is not a steel casing. The pipe itself has steel surrounding it, yes, but it's not in a carrier pipe.

Q. So I'm a little bit confused. You said that you haven't observed the water main, correct? You haven't actually seen it?

A. I have not seen it.

Q. So how do you know that it's surrounded in a steel casing?

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A. Okay. This is 1961 record drawings. Let's see here. It is a Section 2 water main typical crossing under railroad tracks were called for and plans and -- and it shows that there is a 42- or a 48-inch -- yeah -- it's a 48-inch diameter steel pipe that was first drilled underneath the tracks.

And then the new at that time water main was -- was pulled through that steel casing and it was a 24-inch concrete pipe and then they back -- they sand filled the space between the -- the carrier pipe and the -- and the water delivery pipe and then had a joint brick bulkhead. So they have a detail of what they did.

This is -- this is shown. Right here where it goes under the tracks this is the detail of the pipe, but there was no need to do that through the property because there was no tracks. It does actually show a spur here, but it's not over the tracks. Or under the tracks.

Q. So is the water -- is the casing on the water main different in the portion that goes under the tracks than it is for the rest of the property?

A. The entire water main is made of that material.

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Q. Okay.

MR. MATTHEW DiCIANNI: And for the record Mr. Kolb is pointing to the first page of Kolb -- of Kolb Exhibit 8.

BY MR. MATTHEW DiCIANNI:

Q. Okay.

A. When it goes underneath the tracks, there's an additional pipe larger diameter that's drilled underneath the tracks. This pipe is then pulled through that carrier pipe. So when I see a -- a steel casing pipe, I'm talking about a 48-inch diameter, not the 24-inch carrier pipe.

Q. All right. Okay. So I think I'm understanding here. So there's an outer shell that's 48 inches in diameter that goes over the portion that travels underneath the railroad tracks?

A. That's correct.

Q. Now, how do you -- how do you know that there's a larger shell that goes around?

A. I'm relying on the -- the construction drawings for that. The design drawings.

Q. Okay. And that's indicated on the design drawings here?

A. Yes.

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Q. Okay. For my and for the record's sake can you point out where on the design drawings it says that?

A. Yeah. Typically crossing under railroad tracks here. It shows 64 feet of jacked casing. This is the casing they're talking about. And it goes from this end to -- well, right now it shows it at about that point there. So underneath all of the tracks.

Q. Okay.

MR. MATTHEW DiCIANNI: And for the record Mr. Kolb is referring to the Alta survey --

THE WITNESS: Well, actually this is the -- this is the design drawings from Alvord, Burdick & Howson back in 1961.

MR. MATTHEW DiCIANNI: Thank you.

BY MR. MATTHEW DiCIANNI:

Q. And that's -- there's a number one on the bottom right-hand corner of that?

A. Yeah. There's two sheets.

Q. Okay.

Okay. Mr. Kolb, let's turn back to your report here. The next sentence says "There does not appear to be any easement documentation recorded for the 24-inch diameter water main or for the

sanitary sewer main crossing the property."

So I'll agree with you that there's no easement for the 24-inch water main as much as we would like for that one to be there, but how do you know that there's no easement for the sanitary sewer main?

A. Well, I reached out and contacted the Great Lakes Naval Training Center asking them about that line and they had limited records also. I asked specifically if they had any easement documents and they were not able to indicate that they had any easement documents.

I don't know if the line was there before this property got -- changed hands or whatever, but -- so they have -- and, again, they don't know if there's any properties that are using that. It does not appear that it's being used at this time.

Q. The next sentence says "The water main is owned and operated by the City of North Chicago and the sewer line is owned and operated by the Great Lakes Naval Training Center. Other challenges include elimination of the migration of off-site contaminants from entering the property through groundwater infiltration along underground pipeline bedding and

backfilled trenches."

Okay. So, first of all, what are these off-site contaminants?

A. They were listed in detail in the environmental reports that I referred to that I -- that I read.

Q. Okay. And where did these off-site contaminants come from?

A. They indicated north -- north of the site. The property north of the site.

Q. And how do you know that these contaminants are migrating onto the property?

A. That was the findings of the -- the reports. The Phase II ESA report.

Q. So these contaminants are entering through groundwater infiltration. First of all, can you explain how they're entering through groundwater infiltration?

A. The -- there's voids that are in the trenches. Those voids allow either water or any contaminants to be migrating through that to a -- to another area. It acts as a conduit.

Q. And what's -- what's a void again?

A. Air. Space between solids. Bedding.

Q. And does the groundwater infiltrate the 2nd & Main property in a particular way? So does it flow from north to south or east to west or south to north?

A. I believe it flows from -- from the north to the south based on the reports. The soils reports.

Q. Okay. So the soil report says that groundwater flows from north to south?

A. That was the conclusion of those reports.

Q. Okay. Which -- which soils report said that?

A. The Deigan report.

Q. Okay. Is there -- any other report or just the Deigan report?

A. Let's see. The other report would be the Environmental Protection Industries report and the -- yes. There was the Environmental Protection Industries report talks about "It is the opinion of EPI that due to strong field observations and analytical testing of soil and groundwater that the historical uses of the adjacent property north of the subject property have negatively impacted the subject property."

It also listed a number of results.

Benzene, ethyl benzene, total xylenes, a number of other -- I'm going to leave -- other of these constituents that exceed -- there's the IEPA groundwater limits.

Q. Okay. So the groundwater infiltration goes along underground pipeline bedding and backfill trenches. What's a backfill trench?

A. Material that you would surround the pipe with to help support the pipe and, again, it can be sand, gravel. Some -- some granular material that allows itself to be put around the pipe so it supports the pipe and that is -- has voids in it and those voids allow migration of water or -- and/or contaminants.

Q. Got it.

So -- so I'm understanding. So the groundwater flows along the pipe and the backfill trench?

A. Yes.

Q. Okay. And you said before I believe that the groundwater is moving from north to south. So there's one pipe that flows north to south, correct? There's one sewer line?

A. Yes.

Q. So is it -- are the contaminants entering the property through the sewer line that flows from north to south?

A. Yes. Most likely.

Q. Okay. Is that the only way that they're entering the property?

A. Once that water gets into the -- onto the property it is going past another trench, which is the water main trench. So these are two trenches essentially that give the ability of this material to travel north/south and east/west.

Q. So the water -- so the contamination then flows from the north to the south and it intersects the water main trench, and then what happens when it intersects the water main trench?

A. It acts as another conduit. Another way of getting contaminants to -- to off site. Through the property off site.

Q. Okay. And -- how do you know that the -- the trench that goes east/west acts as a conduit?

A. Open cut method. Meaning you're opening it up from the surface all the way down to the pipe, right? And the -- the north/south pipe is probably ten feet deep. The east/west pipe is probably eight

feet deep. So those two trenches are intersecting and they allow then this -- any water to have the opportunity to migrate.

Q. Now, if I remember correctly, we said that we don't know -- no one knows where the water main or the sanitary sewer pipe are. So without knowing where the water main and sanitary sewer pipes run, how -- how do you know that the water infiltrates along those pipes?

A. In general you know where the water main is. The water main is on the property based on the drawings that we have. The City was not able to locate exactly on the property where that water main is, but it's going from east to west because that's how the City is getting water from Lake Michigan. So you know it's getting across here.

I don't know that anyone knows -- can tell you exactly the water main is here. That might be one thing to do is locate the water main. That might be one very important thing to do.

Q. I guess I'm just confused and maybe it's just a simple thing that I'm -- I'm not grasping, but how -- how do we know -- I mean how do you know that the water -- the groundwater is actually flowing along

the -- the pipe? I mean I'm not -- to my knowledge it doesn't say that in any of the --

A. Oh, yes.

Q. -- reports.

A. Oh, yes, it does.

Q. Oh, it says that the groundwater is flowing across the --

A. It says that the bedding material provided preferential pathway for the migration of water and contaminants.

MR. QUINN: Matt, with your permission if I could interject or I can wait until you're done, but I think -- I think we could look at the Deigan report and that might cut through a lot of this.

MR. MATTHEW DiCIANNI: Yeah. That's what my next question was going to be.

BY MR. MATTHEW DiCIANNI:

Q. Can you look at the -- tell me on the Deigan report where it's -- where it says that?

A. Complete recent recommendations I had from the Deigan report. There's also the soil sampling conducted at the site confirmed that environmental concerns exist at the site.

The concerns appear to be associated

with fill, slag layer and contamination migrating on site from the north adjacent property. Soil samples collected from fill slag layer contained lead, arsenic, commercial mercury and select volatile organ compounds at concentrations greater than both residential and commercial IEPA regulatory limits. Their soil samples indicated that there were slag layers on fill on the property.

I believe he -- the soil samples also indicated besides just the trench that there were layers. That material can migrate. Elevated petroleum-related BOC concentrations were found at samples collected along the north property boundary. Given the site history and documented contamination on the north it is likely that contamination migration has occurred.

Now, I also read something else that was a little bit more --

MR. QUINN: If I could interrupt you just there's -- on the Deigan report there's soil borings in the map right at the beginning, right? That specifically there's a site map 2A.

THE WITNESS: All right. Yes. 2A site base map. Yes.

MR. QUINN: I just want to make sure you're looking at the same picture here.

Off the record for a second.

(Off the record at 2:23 p.m.)

(Resumed at 2:24 p.m.)

BY MR. MATTHEW DiCIANNI:

Q. Mr. Kolb, that's fine. I -- if you could say -- so can you just explain here how the groundwater is migrating onto the property?

A. In the Deigan report drilled a number of holes along the north property line.

Q. Okay.

MR. MATTHEW DiCIANNI: And this is just for the record Figure 2a site-based map north parcel is what Mr. Kolb is referring to.

BY THE WITNESS:

A. Okay. And from those -- from those samples they encountered -- he named them slag or fill that might have been some other type of -- of fill besides native material that was placed in that area. Can't tell exactly when, but that -- that fill or whatever has certain voids in it also which allows any -- if there's off-site contaminants to enter the site also. So that's -- that's a possibility, also.

Q. And --

A. So I didn't say -- sorry. It's just one conduit. If you have fill along that area, that's another potential avenue for contaminants to come on to the site.

Q. And just for the record, Mr. Kolb, where does the Deigan report talk about the preferential pathways?

A. Let's see. Maybe it's in another report. Allow me to refer to -- all right. This is the JAS Environmental, Inc. report October 3rd findings. "The water plain on the former Hines parcel borderlines on the former chemical packaging site and the sewer line and water main beneath Marquette Street all may act as preferential migration pathways.

Backfill placed around utility lines is typically more permeable on the surrounding soils. This relatively more permeable backfill offers a pathway for the migration of free phase contaminants, vapors or contaminants occurring within soil, water in the vadose zone and/or within the groundwater aquifer. Being more permeable the rate of migration is typically greater than that occurring in the surrounding soils. Also the direction of migration within these preferential pathways can be upgradient or cross gradient to the point of release."

That is finding No. 5 in their report.

Q. Thank you.

Okay. In looking at the scope of the work section of your report I think we've gone over everything in there. Jumping down to the findings we've talked about those documents. You provided all of those documents today.

A. Okay.

Q. So let's go down to the next paragraph there and, again, this is page 3 of the report. So it says "Based on review of the listed documents it was determined that there exists a 24-inch diameter pre-stressed concrete cylinder pipe owned and operated by the City of North Chicago that runs through and beneath the property. This water main runs from Marquette Street westward to Sheridan Road near the property line with the former chemical packaging site directly to the north."

So, Mr. Kolb, I would like you to indicate on the map that I provided, which I believe is Exhibit 2, the one that you've been drawing on,

where exactly the water main runs. So here's -- I'm sorry. That's Exhibit 3. So yeah. If you could just --

A. This dashed line here 24-inch -- is a 24-inch diameter water main. And, again, it's based on the drawings that -- the original construction drawing.

Q. Got it. Thank you.

Okay. The water main is the main transmission line conveying treated water from the City's water treatment plant from the shore of Lake Michigan to the City's water distribution system.

The pipe was installed with conventional open trench methods, bedded with sand at pipe crossings and backfilled with compacted gravel or tamped earth. We have discussed that.

The pipe was originally installed in 1961 at a depth of 4.5 feet cover. What does that mean a depth of 4.5 feet cover?

A. Top of the pipe is 4.5 feet below the surface.

Q. Got it.

A. Generally.

Q. I thought you said before that it was ten

feet underneath the surface?
A. The sewer line.
Q. Sewer line. Okay.
A. And, again, the pipe is four and a half feet down and then -- then you have the diameter pipe, which is another two feet, and then you'd usually excavation underneath to put a little bit of material in there. So, you know, we're talking about six and a half, seven feet.
Q. So -- and how do you know that it's at a depth of 4.5 feet of cover?
A. Drawings.
Q. Okay. So water main that was installed under railroad tracks was encased in a 48-inch diameter steel casing that was bored and jacked under the tracks.
My apologies if you've answered this before, but how -- how -- how do you know that the 48-inch diameter steel casing went around the portion that goes underneath the tracks?
A. Also indicated on the drawings.
Q. Okay. "The water transmission carrier pipe was installed inside the steel casing and then the remaining void space was filled with sand. Each

end of the casing pipe was sealed with an open joint brick bulkhead.
Construction of the water main used gravel or native material for backfilling the original trench. This material is more permeable than the undescript soils and offers a pathway for the migration of contaminants within the soil, water or within the groundwater." We discussed that.
"Being more permeable the rate of migration within this preferential pathway can be upgradient or cross gradient to the point of release."
So what does upgradient or cross gradient to the point of release mean?
A. It -- again, that verbiage was pulled directly from the soils report. If you have -- if you have vapors or other contaminants, it can go in either direction. It can -- the water usually goes downstream, downhill, but vapors -- volatile granite compounds can have vapors and those can travel up the pipe also. So that's what that refers to. But, again that verbiage was pulled from the environmental -- the soils report.
Q. And soils report, that's the JAS report?
A. Yes. That's specifically the -- that's that Section 5 I read before.
Q. All right. So you just said that vapors are running along the preferential pathway?
A. I will refer again to the JAS. "The relatively more permeable backfill offers a pathway for the migration of free phase contaminants, vapors or contaminants occurring within the soil water in the vadose zone or within a groundwater aquifer."
Q. I'm going to turn to the next paragraph there. It says "Also running through the property is a sanitary sewer line of unknown diameter owned and operated by the Great Lakes Naval Training Center." We discussed that and you indicated on the map where that runs.
"The sanitary sewer line runs from the north property line to the south property line. Essentially the midpoint of the property."
And, again, where did you figure out -- and so you figured out where the sanitary sewer line runs from the survey?
A. Yeah.
Q. Okay. "This line may be a combined sewer as there are catch basins and manholes depicted on the drawings." What's a combined sewer?

A. Sanitary sewer and storm sewer.
Q. "Construction methods of this line are not known for certain. However, it was most likely also constructed using open trench methods and using bedding and backfill materials as well."
Now, are you sure that it was -- or do you know for certain that it was constructed using open trench methods and --
A. No.
Q. Are you just speculating as to that?
A. I am.
Q. And are you speculating that it used bedding and backfill materials as well?
A. For what?
Q. Oh, the sanitary sewer pipe.
A. I'm speculating on the sanitary sewer pipe.
Q. Right.
A. I know from Frank Furlan's and from the construction drawings that there's bedding in the water main.
Q. Okay. "This material is more permeable than the undisturbed soils and offers a pathway for the migration of contaminants within the soil water or

within the groundwater. Again, the rate of migration within this preferential pathway can be upgradient or cross gradient to the point of release." We discussed that.

"So a site visit was conducted on February 21st, 2020 and in attendance were the property owner, Mr. Phil Dahl, and Mr. Peter Kolb," PI -- "PE of ATI."

Approximately how long did that site visit take place?

A. About an hour and a half. Maybe two.

Q. And when you did the site visit, did you -- can you describe exactly what you did?

A. Yes. In general I looked at what's the location of the site, the condition of the site. We were trying to ascertain -- I wanted to know where this sewer line was and there are structures.

So you can actually see here's one and, again, it's -- I think that the reason I think it's a combined sewer is because the storm sewer collects surface water to get it off site and we -- we found one of the catch basins, and then the other one we estimated where it was and dug around and, sure enough, we found the manhole cover.

We pulled the cover and we took a look in there and that's how I got certain depths in there. The water surface was about nine and a half feet from the ground. There did not appear to be any running water. There was no flow. I looked down in there but, again, it doesn't look like anything was moving.

Q. So from the site inspection you got the depth of the sanitary sewer line?

A. Yes.

Q. And how did you measure -- how do you know it was nine feet down? Did you measure?

A. I did. I had a tape measure.

Q. Okay. And so did you actually go down --

A. Oh, no.

Q. No?

A. No, no. That would be a confined space entry.

Q. The next sentence "Mr. Dahl indicated that the City of North Chicago had attempted to locate the water main on a previous date and had excavated in the area of the expected pipe location."

Did Mr. Dahl provide any more detail about what the City did in its efforts to find the expected pipe location?

A. He indicated that they had gone down as far as they could go with the equipment that they had. Essentially it was a backhoe. They got down to ten feet and couldn't locate the pipe so either they missed it or the pipe is a little deeper, but they couldn't find it.

And all the drawings indicate that it should be about five, six feet below the surface. So they probably didn't know exactly where it was. So that's one of the reasons no one knows exactly the location of that pipe. I mean it's here somewhere, but we don't know where.

Q. "Evidence of this excavation remains." What evidence remains?

A. Oh, broken up concrete and it was just backfilled and -- so they dug it up, couldn't find it, put the material back in the hole.

Q. Did Mr. Dahl let them do that?

A. Yes, he did.

Q. Okay. "There are two sanitary sewer structures identified on the title survey." I believe you showed me those.

A. Yeah. It does say catch basin. Catch basin.

Q. Okay. "One structure is a catch basin in the center of the property and was found to have an open grate cover, standing water at the bottom of the structure at about nine feet deep and there's no apparent water flow. It's observed from the surface.

Further north at the approximate location of the water main is a second catch basin structure depicted on the title survey. This structure was unearthed and found to have a solid manhole cover with a pick hole. Upon removing the manhole cover standing water was observed in the structure at about nine feet deep.

The bottom of the structure was found to be at about 9.75 feet deep. There was no apparent water flow in the structure. This may indicate that the two structures in the underground line are combined sanitary sewer storm line.

Further investigation with the GLNTC is necessary to determine the use of this line and connect to property. This line is no longer providing service to this property or others. There may be the possibility of abandoning it and sealing off the preferential pathway blocking the migration of

contaminants.

So I want to just linger on that sentence for a minute. So -- if the line's no longer providing service to this property or others, there may be the possibility of abandoning it and sealing off the preferential pathway blocking the migration of contaminants.

So, first of all, how do you know that that possibility exists?

A. We've used something of that nature on -- on -- you can -- they did -- you can replace the -- the gravel material with a fine clay and that acts as a -- a water barrier. So you could potentially seal off that preferential pathway.

Q. Okay.

A. But that -- that's only the pipe. If there are other -- as these soil borings indicate, any other -- if they go along there and there was fill in that area -- fill meaning F-I-L-L -- and it has voids in it, that's also a -- a way of migration and not just the sewer line.

Q. Is there any other way of sealing off the preferential pathway besides putting clay down there? I mean --

A. Well, that's the -- that's the most readily available.

Q. Okay.

A. I suppose you could inject grout. I mean that's another way.

Q. "If this line needs to remain in place, there could possibly be a grout cutoff wall constructed around the pipe at the northernmost point of the property that would then seal off this preferential pathway."

So if I may ask, what was the purpose of including the description of the sanitary sewer pipe in the expert report? What --

A. I think it was very important. If we're talking about migration of material from the north to the south, the sanitary sewer line is an absolute -- that's it. That's -- that's a direct connection --

Q. All right.

A. -- as opposed to fill material or anything else. That's also another, but this is a direct -- this is direct connection.

Q. Would it be possible for contaminants to migrate onto the site if that sanitary sewer line weren't there?

A. Well, I think you have to go to the other environmental reports. They talk -- it talked in there about slag, other fill material. Those materials ultimately have voids. It's not just the bedding, but if it has -- if it's slag or if it -- so there was always the possibility of those other -- if you didn't have the pipe -- if you didn't have the sewer pipe, I guess there would still be a possibility of -- of contaminants entering the site because of fill material that they identified in the soil borings.

Q. So who placed that fill material there that would allow the preferential pathway?

A. I have no idea.

Q. Wait. So -- so you say that there's two ways that there could be migration of contaminants onto the property. One, through the sanitary sewer line and, two, through the fill material. Where -- could you describe what fill material you're referring to?

A. I can only describe what I read --

Q. Okay.

A. -- in the reports.

(Mr. Thomas DiCianni exited.)

BY THE WITNESS:

A. I'm sorry. I'm not locating exactly where they were talking about the -- what the fill material was that they found.

BY MR. MATTHEW DiCIANNI:

Q. Okay. That's -- that's fine. We can move on.

A. Okay.

Q. I -- yeah.

Let's move to the next paragraph there. It says the -- this is the second paragraph on page 4. It says "The current owner of the railroad running along the west property line is the Union Pacific Railroad Company.

Upon reviewing their criteria for encased non-flammable pipeline crossings it was determined that each crossing of an underground utility would require installation of a steel casing pipe a minimum distance of 30 feet from the centerline of track to the near face of boring and jacking pits."

(Mr. Thomas DiCianni entered.)

BY MR. MATTHEW DiCIANNI:

Q. Okay. So let's take a look at that -- the first clause of that sentence, upon reviewing their

So can you describe the Union Pacific criteria for encased non-flammable pipeline crossings?

A. Yes. If you wanted to install a water main under the Union Pacific Railroad, they had certain standards for pipelines. One of them was you have to cross on a parallel and -- I mean perpendicular -- sorry -- and another is that any pipe crossing has to be in a steel casing. A carrier pipe.

And the carrier pipe needs to be a minimum of 15 feet each side of the centerline of the -- of the railroad. So each track requires a carrier pipe of at least 30 feet.

Q. Okay. And where did you get that Union Pacific criteria from?

A. I had pulled that from their -- there was a -- a standard site for -- for utility crossings.

Q. Is that criteria included in any of the exhibits of your -- to your report?

A. I'm not sure. I'm not sure. I -- I can try to look through here. Oh, yes. Here. I'm sorry. I do think I have it. That's what I was looking for. Sorry. Here's the permit and here's a sample of a railroad crossing. I'm sorry I did not have that

included.

Q. Okay. So these aren't included in your report?

A. No. I'm sorry.

Q. But -- that's okay. Let's mark this as -- boy, what exhibit are we up to now? 9?

MR. QUINN: 9.

MR. MATTHEW DiCIANNI: Okay. Let's just mark this as Exhibit 9.

(Kolb Deposition Exhibit No. 9 was marked for i.d.)

BY MR. MATTHEW DiCIANNI

Q. And where did you say you got this from? The -- Exhibit 9 here.

A. Yeah. I believe I got that off their website. This is a permit for application of a railroad crossing. It has the application in front of it and as an attachment it talks about encased non-flammable pipe crossing and it identifies minimum distances for the steel casing.

Q. Okay.

THE WITNESS: John, I don't think I ever gave you a copy of this. Sorry.

MR. QUINN: I don't think so, but we'll mark it

BY MR. MATTHEW DiCIANNI:

Q. Now, is this the standard everywhere in the United States?

A. I can't say it is, but it's fairly typical.

Q. How do you know it's fairly typical?

A. We've had other railroad crossings that also required steel casings for water.

Q. You say "we've had." Who --

A. My previous jobs have required crossings.

Q. Which -- can you --

A. Central Lake County Joint Action Water Agency we had the water main extension for that. We had to go down Monaville Road. Made a crossing there. You also needed a steel casing and a -- it's typical.

Q. Was the steel casing on that -- when you worked on before was there -- did you use 60 feet of steel casing for each railroad crossing on that?

A. I believe the distances were -- were similar. I can't tell you exactly, but the idea is to get out from underneath the influence of the tracks so that if you had a problem with the pipe, you could pull the pipe out and put another pipe in without

disturbing the railroad.

Q. Do you know does Union Pacific -- is this the standard for the crossing just to the west of the 2nd & Main property? Is it -- is the crossing there in conformity with these Union Pacific standards?

A. It shows here 64 feet of jacked casing. So it's close.

Q. And you're reading from?

A. This is --

Q. Just the records. Right here.

A. 64 feet of jacked casing. This is drawing 1 on the design drawing from Alvord, Burdick & Howson.

Q. So what's the relevance then of including the Union Pacific railroad crossing criteria in your expert report?

A. Was trying to -- there's an impact to the utilities. If you have utilities on the property and you wish to have additional railroad lines installed on it, you would need to do something with those existing utilities. You can either dig them up and relocate them or you can provide protection casings under those.

Q. Okay. So -- and how was that relevant to

A. If you have to stay away from a pipe that you cannot protect with a steel casing, you would lose the use of that property. The use of that piece of land over the -- let's say water main or the sanitary sewer line. So there's no longer -- you couldn't put a railroad spur on it.

Q. Okay. So do any railroad spurs on the 2nd & Main property currently go over a -- the City's water main?

A. No. I don't believe the spur does. That's an old one.

Q. Okay. So just -- just to make this clear the spur does not cross the City's water main currently?

A. Correct.

Q. But if the -- so if you were to put additional spurs on the property, he would need to reinforce them to the Union Pacific's standard?

A. You would either have to stay away from the water main a certain distance or you reinforce the water main, yes. Those are options.

Q. Well, how -- how could he put in a spur that crosses the water main?

A. I'm sorry. I can't answer that. I don't know.

Q. I mean doesn't the water main -- and I'm just referring to your drawing here, Mr. Kolb. Doesn't the water main cross underneath all these buildings here?

A. Yes. That's -- that's where it's indicated. Yes. Yeah. Now where is that. Here we go.

Q. So I guess I -- I mean I am just -- I'm just a little confused here. My apologies. Maybe there's something I'm not getting, but I guess I just don't understand what the relevance of including the Union Pacific Railroad crossing standards for water mains is when there's no crossing on the -- on the property now and there probably -- and you're not sure if there even could be one.

A. I'm not sure there could be one or would be one, but I was referring to that you have to stay away from the water main a distance with any railroad spurs that you would use in the future if you put one in. If that was Mr. Dahl's desire.

Q. Okay. And how far away would the railroad spur have to be from the water main?

approximately 15 feet from the edge of the railroad embankment to the centerline of the water main.

Q. And where did you come up with the 15 feet number?

A. Well, it requires 15 feet from the centerline of the pipe to where the end of the casing would be, right? And you would want to stay away from the centerline of -- the edge of the water main because if you ever have to get to the water main, you have to dig it out.

So you have to give yourself sufficient room to excavate if you ever had a break in that pipe. You have to stay a reasonable distance from a -- a spur or a track or encase the pipe.

Q. Why 15 feet and not 10 feet or 20 feet?

A. Well, I'm using 15 feet from the centerline of the pipe because you need to have at least a certain distance on either side of the pipe for excavation if you ever had to get in, and then I'm leaving 10 feet to the -- to the railroad tracks so that you're not on top of where -- you're not on top of each other.

So 15 feet from the center of the pipe to the tracks is a reasonable distance that I would suggest you keep away from the different tracks so that you can excavate the pipe should there be a break.

Q. And how did you determine that 15 feet was the proper distance?

A. We've -- it's a -- it's a 24-inch diameter pipe and you need to have some way to get in and out and make excavation. It's based on my past experience.

Q. And what past experience specifically?

A. Construction of underground utilities.

Q. Can you describe what that construction was?

A. Sure. We -- we just installed a -- an 18-inch and a 30-inch diameter water main to install that you need to have equipment to be able to get in, dig a trench, lay the pipe, fill it back in. You have to stay away from existing utilities or existing railroad tracks a certain distance. My 15 feet is a reasonable estimation on how far you got to stay away from a spur to do that.

Q. Oh, one -- one other thing here. You say 60 -- this would require a minimum of at least 60 feet

a particular type of steel that should be used.

A. Steel casing. Again, it can be three-eighths inch, something of that nature. Something that will support the weight of railroad cars going over it.

Q. Just turning back to -- you know, I know we talked about how the Union Pacific standards -- you know, we discussed the relevance, but just one follow-up question I had on that.

Why did you choose the Union Pacific Railroad standards and not say the Burlington Northern Santa Fe Railroad standards?

A. Because I thought that that was -- they are now Union Pacific, aren't they? Isn't that -- I thought that that's where -- oh, I made notes for myself. It was the Chicago Northwestern from 1959 to 1972. It was the Chicago and North Western Transportation from 1972 to 1995. Turned into the Union Pacific Railroad in 1995.

Q. Okay.

A. That's a good question.

MR. QUINN: You said land trust. I'm trying to figure out what land trust.

MR. THOMAS DiCIANNI: You want to take a break?

MR. QUINN: Sure.

THE WITNESS: That would be a good idea.

(Off the record at 3:10 p.m.)

(Resumed at 3:27 p.m.)

MR. MATTHEW DiCIANNI: Okay. We can go back on the record here.

Mr. Kolb, I just have a few questions left for you.

THE WITNESS: I did find -- you had asked me before about the geological conditions and I did find that section, and that was on the EPI, Environmental Protection Institute. Was one of their field investigations, the findings, and it talked about cinders and clay deposition and it talked about also large grain sand and gravel to determine the boring. So they're referring to fill in the area of those borings. So I thought I would mention it.

MR. MATTHEW DiCIANNI: Thank you.

THE WITNESS: Okay.

BY MR. MATTHEW DiCIANNI:

Q. Mr. Kolb, there's just a couple things I wanted to follow up on here. Let's turn to Exhibit -- what's this one? Exhibit 7?

MR. MATTHEW DiCIANNI: Exhibit 8.

MR. QUINN: That's the group exhibit, I think.

BY MR. MATTHEW DiCIANNI.

Q. Now, Mr. Kolb, did you say that the -- the water main is made out of this material here?

A. Yes.

Q. And how -- how do you know that?

A. Frank Furlan in his deposition was very deliberate, knows that this is concrete cylinder pipe because he had to make a connection to this and it's very difficult to make a connection.

It's not like a steel pipe where you just drill a hole. You have to go through layers of concrete, pre-stressed wires and interior steel cylinder and then again an interior piece of concrete. A very difficult and expensive connection.

Q. Are there other methods to encase water main pipes?

A. Yes.

Q. Okay. And what -- can you just briefly describe what some of those are?

A. You can have a reinforced concrete pipe without a steel line. You can have composite materials, fiberglass. You have different types of pipe, but in 1961 this was probably the standard water distribution pipe. It would last 60, 80 years. It was designed to last that long.

Q. So you said before that the water main is between four and a half feet and eight feet below the surface. How do you know that the groundwater infiltration that's bringing the chemicals from the property to the north onto the 2nd & Main property -- how do you know that that's not migrating over the surface? How do you know -- how do you know that that's migrating through the water main and not the -- over the surface or in the four and a half feet of material above the water main?

A. I don't. The pipe trench is one path. One potential path. Can there be others? Yes.

Q. So do you know for sure that -- so -- you know what, strike that. Let's just move on here.

I believe you referenced underground storage tanks in your report. Do you -- are you aware of that reference?

A. I'm afraid I don't recall. I don't think so. I don't believe so.

Q. Do you know if there's underground storage

Q. So I want to just talk about the spurs. So my understanding of the way spurs work -- correct me if I'm wrong -- is that the -- there's a -- a railroad station and the spur connects to the railroad station and there's like a switching area at the railroad station.

Do you know where the spur on the 2nd & Main property runs to? Does it run to a railroad yard?

A. Based on the drawing it shows a spur track and it shows a connection to the -- the main line in about this area right here.

Q. Okay.

MR. MATTHEW DiCIANNI: And just for the record Mr. Kolb is indicating to the Alta Land Title Survey.

BY MR. MATTHEW DiCIANNI:

Q. Do you know how much the load would -- the railroad load would weigh on the spur on the 2nd & Main property?

A. No. I would anticipate that you would design it with the same standards that the regular railroad is designed.

Q. Wouldn't the weight of the load on the spur be less than the weight of the load on the main railroad line?

A. I don't know.

Q. Okay. I guess what I'm -- my question is why would the pipe need to be reinforced to the same standard when it crosses underneath the spur as it would when it crosses underneath the actual railroad track?

A. I'm using that as a basis. That's -- that's the basis of -- of -- and I don't know if it's any less -- requirement of less or not, but I used the standard specifications for pipe under -- under railroad lines.

Q. Now, I believe you said before that no railroad spur could be built within 15 feet of the water main. Is that correct?

A. Yes.

Q. Okay. Now -- so it's your position then that all of the land south from 15 feet away from the water main could be used to -- for railroad spurs?

A. Yes.

Q. Okay. So it's only the -- the only portion of the property then where railroad spurs

Q. Okay. And is that a yes?

A. Yes.

Q. What about the Navy's sewer main? Would that prevent the construction of new railroad spurs?

A. You would have to do something similar with the Navy line, yes.

Q. Are new spurs the only development for the property that would be prohibited due to the existing water line on the property?

A. You would not want to construct permanent structures over it. That's usually one of the restrictions of an easement that you don't allow permanent construction because if you ever have to get to the pipe to dig it up to make a repair, you wouldn't want to have to deal with a structure.

Q. Aren't there permanent structures already over the --

A. There are. There certainly are.

Q. Okay. Do you know what Phil Dahl has done to explore the creation of more railroad spurs?

A. I don't know.

Q. Okay. So just going back to something you said before. You said you don't want to construct permanent structures over the water main, correct?

A. Correct.

Q. Is that also true with respect to the sewer line?

A. Yes. However, if it's not a publicly owned sewer or if the sewer line just services this property, you can have just a service line comes in out of there.

I mean right now one of the things that still needs to be ascertained if there's any additional users on that line. The short time that I was involved with this we can't tell yet. The Navy doesn't know. So that's still a bit of a mystery.

Q. I believe your report says that the water line may create a preferential pathway. You don't know for sure that it will create a preferential pathway?

A. That's right. It was identified in the soils reports that that is a potential --

Q. Okay.

A. -- route.

Q. So just to -- your opinions regarding the environmental contamination of the property are just

A. Correct.

Q. Now, Mr. Kolb, you said that there were two manholes on the property, correct?

A. Correct.

Q. Wouldn't the manholes be a more efficient way for contaminants to permeate the property than infiltration from the surface?

A. The manholes are a way for surface water to get into the sewer. However, if the contaminants are below grade, the trench is the way that it would allow migration of material.

So surface -- surface water can get inside the pipe, but around the pipe and the bedding that's -- that's a pathway for underground water or contaminants to move.

Q. Now, before you said that the contamination flows from the sewer line to the water main, correct?

A. It has the ability to go that route, yes.

Q. Okay. Do you know whether the sewer line and the water main are at the same height?

A. They're not at the same heighth. Based on

the drawings the water main is above the sanitary sewer line, but they are both constructed with trenches that go all the way to the surface. So those two trenches intersect.

Q. Do you know that for sure that the trenches intersect?

A. If they were constructed with open cut, I would say yes. Yeah. And they were not constructed with directional boring. That wasn't happening at that time.

Q. So I -- I guess do you know for sure, though? I mean how do you know that the trench for the sanitary sewer line and the water main intersect?

A. I'm looking at the drawings. The two lines are crossing each other. To construct the sanitary sewer line you have to go all the way down to the end -- to the bottom of the sewer line to lay the pipe and when the water main crosses that trench, you would be crossing whatever materials they filled the trench with. So they would then be interconnected.

Q. Is there any report that says that they're interconnected?

A. No.

Q. You haven't actually observed them being

MR. MATTHEW DiCIANNI: Are there any other -- okay. Those are all the questions I have.

John, do you have --

MR. QUINN: I just want to go over a couple of things to make sure they're covered.

EXAMINATION

BY MR. QUINN:

Q. Peter, I want you to take a look at the Deigan report, which is Exhibit No. 4.

MR. QUINN: And remind me to get you emails so I can send you these exhibits so you can attach them.

BY MR. QUINN:

Q. There is -- in the Deigan report just a few pages -- four or five pages in it refers to Figure 2a, which is site-based mass north parcel.

A. I have it here.

Q. Okay. So I'm looking along the -- the north part of that. You see a -- a B4 and an SB21 and an SB20 and all of those?

A. Yes.

Q. Those are soil borings that were done along the water main; is that correct?

A. Yes. Or adjacent to, obviously.

Q. Okay. In some of those they show -- like SB-22 shows lead and SB-20 shows benzene; is that right?

A. That's correct.

Q. And it talks about the technical BTEX concentrations. That's -- that's benzene and xylene?

A. Yeah. I'm not exactly sure of the name.

Q. Okay.

A. I would have to refer to the -- yes. But you're right. It lists some on there.

Q. I've been involved in environmental cases before. The BTEX comes up all the time.

A. Oh, I see.

Q. Okay. Also -- we'll just stay on this Deigan report. There is an Exhibit D to this, which is environmental cleanup costs.

A. Yes.

Q. It's the very -- so let me ask you just a couple of things. Assuming for a moment that the City's water line runs through contaminated soil, runs through a contaminated fill -- and you've been the director of public works from a municipal point of view -- what is the effect if a water line that's in

(f)(3).
BY MR. QUINN:
Q. You can answer.
A. If the water main would rupture and you would lose pressure on the pipe, you would worry about any -- if there's any localized contaminants getting into the pipe.
Q. And that would have an effect on the downstream water supply?
A. Yes. I mean this is the -- this is the water supply to the city of North Chicago.
Can I mention something? I just saw on the -- on the -- on the Figure 2 site base map it does indicate -- we talked briefly about slag and foundry sand average two feet thick.
That would be -- it's indicated on here where those areas are and it -- and it does look like the water main would run right through that. So slag is -- you know, is very porous and foundry sand in those two areas would be a perfect path for migration of materials.
Q. So you were mentioning before the two --

the two trenches, the two lines intersecting. The trench lines. So, for example, if you dig a -- a sanitary sewer down 12 feet, everything above that is going to be fill when you fill the hole back in, right?
A. Loose -- looser material than the native soils, yes.
Q. Right.
So then when you run another trench parallel to it even if it's four or five feet deep, those two trenches -- the looser soil is -- is going to intersect?
A. Yes.
Q. Okay. All right. Now, you did a supplemental disclosure report about the cost of remediating the contamination within the water line, correct?
MR. MATTHEW DiCIANNI: Objection. That's -- I never got that.
MR. QUINN: Oh, sure you did. This.
MR. THOMAS DiCIANNI: Let me see. Object.
MR. MATTHEW DiCIANNI: What's that?
MR. THOMAS DiCIANNI: Object. Based on (f)(3).
MR. MATTHEW DiCIANNI: Okay.
THE COURT REPORTER: I think it's 10.
MR. QUINN: Okay.
(Kolb Deposition Exhibit No. 10 marked for i.d.)
BY MR. QUINN:
Q. I'm showing you what I've marked as Exhibit 10.
A. Right.
Q. And you used the Deigan report as a basis for that, correct?
MR. MATTHEW DiCIANNI: Okay. Ob --
MR. THOMAS DiCIANNI: Go ahead. Object.
MR. MATTHEW DiCIANNI: Objection. I'm just going to object to all these line of questions.
MR. QUINN: That's fine.
MR. THOMAS DiCIANNI: On (f)(3).
MR. MATTHEW DiCIANNI: On (f)(3).
MR. QUINN: So you're saying you never got this?
MR. MATTHEW DiCIANNI: No. I don't think so.
MR. QUINN: I don't know. We should clear that up.

MR. MATTHEW DiCIANNI: John, do you mind if we take a break?
MR. QUINN: Sure.
(Off the record at 3:51 p.m.)
(Resumed at 3:52 p.m.)
MR. QUINN: I'll have to go back and look and make sure, but I'm fairly certain that that went out. And I've got the date on there that it was emailed. I just don't know if I sent it or if my secretary did.
MR. MATTHEW DiCIANNI: Okay. Yeah. I'll look for it, too.
BY MR. QUINN:
Q. So, in any event, I just wanted to make sure that those are your opinions, Mr. Kolb?
A. Yes.
MR. MATTHEW DiCIANNI: Objection based on (f)(3).
BY MR. QUINN:
Q. And you based those opinions on your experience as an engineer and the Deigan report, correct?
MR. MATTHEW DiCIANNI: Just a continuing objection to -- TO all of these questions based on (f)(3).

and then I brought those costs up to 2020 as I noted in here.

MR. QUINN: Okay. That's all I've got.

MR. MATTHEW DiCIANNI: Okay. Thanks, John.

MR. QUINN: All right.

MR. THOMAS DiCIANNI: Thanks, Mr. Kolb.

THE COURT REPORTER: Signature?

MR. QUINN: We'll waive signature.

MR. THOMAS DiCIANNI: Have you been ordering the deps?

MR. MATTHEW DiCIANNI: Yeah. Yeah. We'll take --

MR. THOMAS DiCIANNI: Order a copy.

MR. MATTHEW DiCIANNI: Yeah. We'll take --

MR. QUINN: I'll take a copy.

MR. MATTHEW DiCIANNI: Yeah. We'll take a copy, too. We'll order it.

THE COURT REPORTER: What format?

MR. MATTHEW DiCIANNI: Just PDF. We don't need the paper copy.

THE COURT REPORTER: Mr. Quinn, what format?

MR. QUINN: Oh, PDF.

MR. THOMAS DiCIANNI: Can we get a mini? Mini, right? Yeah.

(Witness excused.)

AND FURTHER DEPONENT SAITH NOT.

(Deposition concluded at 3:54 p.m.)

taken before SUSAN R. PILAR, CSR No. 84-003432, at Ancel Glink, P.C., 175 East Hawthorn Parkway, Suite 145, Vernon Hills, Illinois, commencing at 1:00 p.m. on April 20, 2021. Said witness was first duly sworn by me and then examined upon oral interrogatories. The questions and answers were taken via machine shorthand by the undersigned and reduced to computerized transcription. The foregoing is an accurate and complete record of said deposition.

The certificate annexed hereto applies only to the original transcript and copies signed and certified by me. I assume no responsibility for copies which have been reproduced beyond my direction or control.

The signature of the witness was waived by agreement of the parties herein.

The undersigned is not interested in this case, nor is of kin or counsel to any of the parties herein.

IN WITNESS WHEREOF, I hereunto affix my hand as Certified Shorthand Reporter in and for the State of Illinois, on April 28, 2021.

SUSAN R. PILAR, CSR
CSR No. 084-003432

Susan R. Pilar

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IN THE CIRCUIT COURT OF THE NINETEENTH JUDIIAL CIRCUIT
LAKE COUNTY, ILLINOIS

THE CITY OF NORTH CHICAGO Plaintiff, v. 2ND & MAIN LLC, UNKNOWN OWNERS and NON-RECORD CLAIMANTS Defendants.	)))))))))	19 ED 20

DEFENDANT'S REPLY IN SUPPORT OF ITS PARTIAL MOTION FOR SUMMARY JUDGMENT

NOW COMES 2nd & Main, LLC, by and through his attorneys, Churchill, Quinn, Richtman & Hamilton, Ltd., and for Reply in support of its motion for partial summary judgment, states as follows:

I. Introduction

The law is clear: a governmental entity may only exercise its eminent domain powers against a railroad if the taking does not interfere with the use of the property as a railroad. In its response, North Chicago argues that there is a question of material fact concerning whether the existing pipe, which is not built to railroad standards, interferes with the use of the property as a railroad. North Chicago claims this was the conclusion of its expert, Devin Moose. It wasn't.

Contrary to its representation in North Chicago's Motion, Moose's actual opinion is that tracks could not be laid on the northern portion of the property where the pipe is located. In its Response to 2nd & Main's Rule 2-1.04 Statement, North Chicago nominally disputes various statements, however, the basis for each of these disputes is a non sequitur and does not constitute an actual dispute of fact. Moreover, "[f]acts unrelated to the essential elements of the plaintiff's cause of action are immaterial, and no matter how sharply controverted, their presence in the

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record will not warrant denial of a motion for summary judgment." *Quinton v. Kuffer*, 221 Ill.App.3d 466, 582 N.E.2d 296, 300, 164 Ill.Dec. 88 (2nd Dist. 1991)

II. Undisputed Facts

2nd & Main owns real property in the city of North Chicago (hereafter the "Property") Rsp. to Rule 2-1.04 ¶1. The property is classified as a railroad by the Surface Transportation Board. Rsp. to Rule 2-1.04 ¶¶5-6. 2nd & Main plans to use the Property for railroad access including additional spur lines and as a storage area for shipping containers Rule 2.104 ¶7 and affidavit of Phil Dahl ¶6. 2nd & Main has already leased the property to Hussey Terminal Railroad Company. Rsp. to Rule 2-1.04 ¶8.

Sometime after 1901, North Chicago installed a 24-inch water main across the Property without obtaining an easement. Rsp. to Rule 2-1.04 ¶4. The existing 24-inch diameter pre-stressed concrete cylinder pipe water main on the 2nd & Main property is not sufficiently constructed for the purpose of supporting railroad loadings and does not meet railroad criteria for utility crossings. Rule 2-1.04 ¶13. The existing water main renders the northern portion of the Property, where the watermain is located, unusable for railroad purposes. Rule 2-1.04 ¶14.

III. Argument

a. The Motion should be granted because it is undisputed that the water main, as it presently exists, interferes with 2nd & Mains use of the railroad.

The existing watermain interferes with the Property's use as a railroad because it was not built to railroad standards and therefore cannot bear the weight of railroad tracks and other weight bearing activities. Under Federal law, a condemnation "that prevents or unreasonably interferes with railroad transportation is preempted by the Act." *Union Pac. R.R. Co. v. Chicago Transit Auth.*, 647 F.3d 675, 678 (7th Cir. 2011) In its Response, North Chicago does not take

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issue with this reading of the law. Instead, they argue that there are material fact disputes as to whether there is an interference. For the reasons that follow, the material facts are not actually disputed and support a finding that there is an interference.

The Moose Report states, in pertinent part, "The existing rail spur could resume without additional improvement to the water main infrastructure. The northern portion of the Property, between the exiting rail spur and northern property boundary, could be used for a variety of purposes, including but not limited to housing shipping containers or other material storage." (Moose Report, 4) Reading between the lines, what Moose is really saying is that 2nd and Main can use the northern portion of the Property so long as railroad tracks are not put on the northern portion. Not being able to place railroad tracks the northern portion of the property is an interference.

The Moose Report states further: "The area between the north Property line and rail spur, although not suitable to house additional rail lines, could be unutilized for other purposes…" (Moose Report, 5) The real conclusion of the Moose Report is that because of the water main, the northern portion of the Property is "not suitable to house additional rail lines."

North Chicago states that that it disputes that 2nd and Main intends to use the property as a railroad because "[North Chicago's] appraiser…opines that the Notice of Exemption adds no value to the Property because there is little opportunity for the Property to be used as a location where significant railroad operations take place." Rsp. to Rule 2-1.04 ¶7. Questioning the value of the Property as a railroad is not responsive to the fact that 2nd and Main's plan is to use it as a railroad. This fact is not disputed.

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North Chicago states that it disputes that "[t]he existing 24-inch diameter pre-stressed concrete cylinder pipe water main on the 2nd & Main property is not sufficiently constructed for the purpose of supporting railroad loadings and does not meet railroad criteria for utility crossings." Rsp. to Rule 2-1.04 ¶13. It states that Moose "opines that the water main can bear the weight of a railroad spur if it were to be constructed over the main." Rsp. to Rule 2-1.04 ¶13. The Moose Report says nothing of the sort and expressly comes to the opposite conclusion stating that the area where the water main lies is "not suitable to house additional rail lines." (Moose Report, 5) North Chicago then cites to the deposition of Peter Kolb for the proposition that "the water main does not run below the railroad spur." Rsp. to Rule 2-1.04 ¶13. This is true, but again, it in no way disputes that the existing pipeline could not support railroad loadings or meet the criteria for utility crossings. North Chicago provides the same flawed response to the statement that "[t]he existing water main renders the 2nd & Main property unusable for railroad purposes in the area over and north of the existing water main." Rsp. to Rule 2-1.04 ¶14.

b. The Motion should be granted because preemption under Federal Law does not require that the Defendant prove the economic viability of its business.

North Chicago argues that there "is simply not enough evidence to support its claim that the property will be used as a railroad hub…" Response, 3. 2nd & Main does not make the claim that the Property will "be used as a railroad hub," whatever that means in this context. 2nd and Main only claims that the Property has already been recognized by the Surface Transportation Board as a railroad property and that 2nd & Main has plans to use it as such. A railway track to a warehouse is just as preempted under Federal Law as a "railroad hub". North Chicago cites no authority for the proposition that the economic value or utility of a property is a factor in determining whether a condemnation is preempted. It is not a factor stated in the statute. Thus, an unprofitable railroad is just as preempted as a profitable one.

c. The Motion should be granted because under federal law the property can only be condemned if there is no interference and the water main, without fortification, is an interference.

North Chicago is arguing that the property should both be condemned and that it should not have to fortify the existing pipe. As discussed above, it is undisputed that unless the pipe is fortified, railroad tracks will not able to be placed on the northern part of the property. The maintenance of an unfortified pipe will interfere with railroad operations.

Under federal law, as explained above citing to *Union Pac. R.R. Co. v. Chicago Transit Auth.*, 647 F.3d 675, 678 (7th Cir. 2011), any condemnation which interferes with railroad operations is exempt. The Court should find that for North Chicago to succeed in its condemnation action, it must fortify the pipe so that it doesn't interfere with railroad operations. The relief sought in 2nd & Main's motion for partial summary judgment is for the Court to make this finding.

IV. Conclusion

Both North Chicago's Response to the Motion for Partial Summary Judgment and the Moose Report were carefully crafted to bury the lead—that Moose, himself, concludes that the existence of the unfortified watermain prevents the placement of tracks on the northern portion of the property. The statements marked disputed in the Response to Rule 2-1.04 Statement are pure obfuscation. When a party, as North Chicago does here, provides bases of support for its disputed facts that are not remotely responsive to the actual fact being disputed, it can only mean that there is really no dispute at all.

The interference is clear. There are no disputed issues of material facts. The motion should be granted.

Respectfully submitted,

By: _____
Attorney for Defendant

John W. Quinn
Churchill, Quinn, Richtman and Hamilton
2 S. Whitney St.,
Grayslake, IL 60030
(847)223-1500
Attorney No. 2270706
jquinn@grayslakelaw.com

C0463

IN THE CIRCUIT COURT OF THE NINETEENTH JUDIIAL CIRCUIT
LAKE COUNTY, ILLINOIS

THE CITY OF NORTH CHICAGO Plaintiff, v. 2ND & MAIN LLC, UNKNOWN OWNERS and NON-RECORD CLAIMANTS Defendants.	))))))))	19 ED 20

RESPONSE TO PLAINTIFF'S STATEMENT OF ADDITIONAL FACTS

NOW COMES 2nd & Main, LLC, by and through his attorneys, Churchill, Quinn, Richtman & Hamilton, Ltd., and for its Rule 2-1.04 Statement, states as follows:

PARTIES

1. The water main does not intersect the railroad spur on the 2nd & Main Property ("Property"). See Exhibit C, "Deposition Transcript of Peter Kolb," p. 77, In. 13-16. At no point does the water main travel underneath the railroad spur on the Property. *See id.*

Response: Admit

2. Devin Moose, a professional engineer with Aptim, Inc., with more than 35 years of experience, has reviewed the documents 2nd & Main and its experts relied upon to conclude that the water main is not sufficiently reinforced to bear the weight of railroad spurs operating on the Property.

Response: Admit

3. After reviewing these documents, Mr. Moose concludes that the water main will not substantially interfere with the operation of the railroad spur on the Property. Mr.

C0464

Moose describes his opinions, and provides his expert report, in an affidavit attached as Exhibit A.

Response: Deny—Mr. Moose does not conclude that the water main will "not interfere with the operation of the railroad spur" rather his affidavit states: "Based on my experience and review of the documents it is my opinion that the presence of the water main **does not substantially limit** the future use of the property." (Affidavit Paragraph 4 emphases added". In addition his report attached as an Exhibit to his affidavit states "The area between the north Property line and rail spur, **although not suitable to house additional rail lines**, could be utilized for other purposes, including but not limited to unloaded rail care storage area and other general material storage." (Highlighted portion of Moose Report page 5 attached as Exhibit 1.

4. According to Mr. Moose, the water main as currently constructed does not interfere with the Property's railroad use and will not interfere with any of 2nd & Main's proposed or future railroad uses of the Property. Exhibit A, ¶ 4.

Response: Deny—Mr. Moose does not conclude that the water main will "not interfere with the operation of the railroad spur" rather his affidavit states: "Based on my experience and review of the documents it is my opinion that the presence of the water main **does not substantially limit** the future use of the property." (Affidavit Paragraph 4 emphases added". In addition his report attached as an Exhibit to his affidavit states "The area between the north Property line and rail spur, **although not suitable to house additional rail lines**, could be utilized for other purposes, including

but not limited to unloaded rail care storage area and other general material storage." (Highlighted portion of Moose Report page 5 attached as Exhibit 1.

5. It is Mr. Moose's opinion that the presence of the water main does not limit 2nd & Main's ability to use the Property for railroad purposes or for a storage area for shipping containers and railroad access. *Id.* The existing rail spur could operate without additional improvement to the water main infrastructure. *Id.* The northern portion of the Property could be utilized without modification to the rail spur or water main. *Id.*

Response: Deny—Mr. Moose does not conclude that the water main will "not interfere with the operation of the railroad spur" rather his affidavit states: "Based on my experience and review of the documents it is my opinion that the presence of the water main **does not substantially limit** the future use of the property." (Affidavit Paragraph 4 emphases added". In addition his report attached as an Exhibit to his affidavit states "The area between the north Property line and rail spur, **although not suitable to house additional rail lines**, could be utilized for other purposes, including but not limited to unloaded rail care storage area and other general material storage." (Highlighted portion of Moose Report page 5 attached as Exhibit 1.

6. In Mr. Moose's opinion there is no need for this Court to award 2nd & Main the relief sought in the Motion, because the harm the Motion seeks to alleviate, the interference with railroad operation caused by the water main, does not exist. Exhibit A, Exhibit 1.

Response: Deny—Mr. Moose does not conclude that the water main will "not interfere with the operation of the railroad spur" rather his affidavit states: "Based on

my experience and review of the documents it is my opinion that the presence of the water main **does not substantially limit** the future use of the property." (Affidavit Paragraph 4 emphases added". In addition his report attached as an Exhibit to his affidavit states "The area between the north Property line and rail spur, **although not suitable to house additional rail lines**, could be utilized for other purposes, including but not limited to unloaded rail care storage area and other general material storage." (Highlighted portion of Moose Report page 5 attached as Exhibit 1.

7. Barton DeLacy is a licensed appraiser with more than 40 years of experience. Mr. DeLacy performed an appraisal of the Property, which is included with his affidavit attached as Exhibit B.

Response: Admit

8. Among the issues that Mr. DeLacy examined was whether the Surface Transportation Board designation that 2nd & Main received would have any impact on the value of the Property or the way the Property could be used in the future. Mr. DeLacy found that it did not. Exhibit B, ¶ 5.

Response: Admit—but deny his conclusions have any relevance to the motion for partial summary judgment.

9. Mr. DeLacy came to this conclusion because there is no demand for the use of the Property as a railroad hub or for the storage of shipping containers and railroad access. *Id.* Mr. DeLacy found that because the Property is located in an area of significant blight with low levels of economic activity and economic opportunity 2nd & Main's plans for the future use of the Property are not viable, *Id.*

C0467

Response: Admit—but deny his conclusions have any relevance to the motion for partial summary judgment.

By: _____
Attorney for 2nd & Main

John W. Quinn
CHURCHILL, QUINN, RICHTMAN & HAMILTON, LTD.
2 S. Whitney St., Grayslake, IL 60030
(847)223-1500
Attorney No. 2270706
jquinn@grayslakelaw.com
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C0468

As stated in the Applied Technologies opinion, a minimum distance of 15 feet from the edge of a railroad embankment to the centerline of the existing water main would need to be provided to allow for future excavation and repair of the line. The entire existing rail spur is greater than 15 feet from the centerline of the water main. The rail spur, therefore, could be utilized without modification to the rail line or the water main. The area between the north Property line and rail spur, although not suitable to house additional rail lines, could be utilized for other purposes, including but not limited to unloaded rail car storage and other general material storage

The environmental impacts to soil reported on the north adjacent property have contributed in only a minor fashion to the environmental degradation of the Property, and those on Property impacts appear to be attenuating through natural processes.

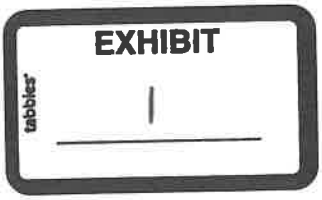
Environmental impacts on the north adjacent property were reported in the *Phase II Subsurface Soil Investigation* (Stateline Environmental, August 16, 2013 – **Attachment E**). The investigation was limited to the assessment of soil, including the collection of five (5) discrete soil samples from five (5) soil borings (B-1 through B-5) for laboratory analysis of the following constituents:

- volatile organic compounds (VOCs)
- semi-volatile organic compounds (SVOCs)
- polychlorinated biphenyls (PCBs)
- Priority Pollutant List (PPL) metals

The location of each soil boring is depicted on **Figure 2**. The soil boring locations were selected to assess the environmental condition of the southeast portion of the property in proximity to a known underground storage tank (UST) farm, and if present, whether those impacts were likely to have migrated onto the south adjoining property where the water main resides. No groundwater samples were collected, and groundwater conditions were not included in the report.

Soil impacts in excess of Tier 1 soil remediation objectives (SROs) published in 35 IAC Part 742, *Tiered Approach to Corrective Action Objectives (TACO)* were reported in four (4) of the five (5) samples collected. The following constituents of concern exceed their respective SROs, with maximum concentrations indicated:

- ethylbenzene – 310 milligrams per kilogram (mg/kg) in B-2
- toluene – 13,000 mg/kg in B-2
- xylenes (total) – 1,800 mg/kg in B-2
- benzo(a)pyrene – 1.2 mg/kg in B-2
- naphthalene – 2.9 mg/kg in B-1



2&M10692

C0469

IN THE CIRCUIT COURT OF THE NINETEENTH JUDIIAL CIRCUIT
LAKE COUNTY, ILLINOIS

THE CITY OF NORTH CHICAGO Plaintiff, v. 2ND & MAIN LLC, UNKNOWN OWNERS and NON-RECORD CLAIMANTS Defendants.	)))))))))	19 ED 20

ANSWER

NOW COMES the Plaintiff, 2nd & MAIN, LLC ("Defendant"), by and through its attorneys, CHURCHILL, QUINN, RICHTMAN & HAMILTON, LTD., for its answer to Plaintiff's complaint states as follows:

1. Defendant admits this allegation.

2. Paragraph 2 calls for a legal opinion and therefor Defendant makes no answer to this allegation.

3. Defendant admits this allegation.

4. Defendant admits the ordinance referenced in this paragraph was adopted but has insufficient information regarding the remaining allegations and therefore denies the same.

5. Defendant has insufficient information regarding the allegations in this paragraph and therefor denies the same.

6. Defendant states that the ordinance speaks for itself but has insufficient information regarding the remaining allegations and therefore denies the same.

7. Defendant denies this allegation.

8. Defendant has insufficient information regarding the allegations in this paragraph and therefor denies the same.

C0470

9. Defendant admits this allegation.

10. Defendant admits this allegation.

11. Defendant has insufficient information regarding the allegations in this paragraph and therefor denies the same.

12. Defendant admits this allegation.

AFFIRMATIVE MATTER---North Chicago's right to eminent domain is Limited by Federal Law

1. On March 6, 2017, 2nd and Main, LLC filed a Notice of Exemption under 49 C.F.R. § 1150.31 with the Surface Transportation Board. A copy of that filing is attached as Exhibit A.

2. On March 22, 2017, the Surface Transportation Board issued its decision regarding the Notice of Exemption. As a result of the decision, the exemption became effective April 5, 2017. A copy of that decision is attached as Exhibit B.

3. The Interstate Commerce Commission Termination Act of 1995 ("ICCTA") (49 U.S.C.A. §10101 *et. seq.*) abolished the Interstate Commerce Commission and gave the Surface Transportation Board exclusive jurisdiction over: (1) transportation by rail carriers and the remedies provided with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, tear switching, or side tracks, or facilities, even if the tracks are located, entirely in on state. 49 U.S.C. § 10501(b).

4. "The Termination Act expressly preempts "remedies provided under Federal or State law" and vests with the Surface Transportation Board (the "Transportation Board"), a federal agency, exclusive jurisdiction over "transportation by rail carriers" and "the construction…of…facilities…" Green *Mountain Railroad v. Vermont* 404 F.3d 638, 639 (2005).

C0471

5. As a result, North Chicago's right to eminent domain is limited because North Chicago is not permitted to interfere with the Defendant's operations as a railroad.

WHEREFORE the Plaintiff, 2nd & Main, LLC hereby prays that any relief provided be limited to the extent that it does not interfere with 2nd & Mains railroad operations.

COUNTER-CLAIM—TRESPASS

NOW COMES the Plaintiff, 2nd & MAIN, LLC ("Defendant"), by and through its attorneys, CHURCHILL, QUINN, RICHTMAN & HAMILTON, LTD., for its Counter-Claim against the City of North Chicago states as follows:

1. The Counter-Plaintiff, 2nd & MAIN, LLC, owns and possesses the following real estate (hereafter the "Property") located in North Chicago and described as follows:

> A Part of the North Half of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, described as follows: Beginning at a point on the Easterly Right of Way Line of the Chicago and North Western Railway Company, which point is 772.10 feet measured along said Right of Way Line Southerly of the intersection of said Right of Way Line with the Southerly Right of Way Line of the Elgin, Joliet and Eastern Railway Company; running thence East on a Line parallel with the South Line of said Northwest Quarter of the said Section 4, a distance of 515.8 feet the West Line of Marquette Street; thence Northerly along the West Line of Marquette Street, approximately 220 feet to the Southeast Corner of the former J.W. Aulson and Sons Corporation Property, more particularly described by Warranty Deed dated April 20, 1921 and Recorded April 26, 1921, as Document 201389; thence West 435 feet on the South Line of said Former J. W. Aulson and Sons Corporation Property to said Easterly Right of Way of said Chicago and North Western Railway Company; running thence in a Southerly direction along said Easterly Right of Way Line to the point of beginning, in Lake County, Illinois.

2. The Counter-Defendant, City of North Chicago was incorporated as a city in 1901.

3. After 1901, North Chicago or its agents, without obtaining an easement or other right to the property, installed a 24" water main pipe on the Property. That pipe is highlighted in yellow and shown on the attached Exhibit A.
4. North Chicago has at all times relevant owned, controlled and maintained this pipe on 2nd & Main's property and if a trespass is continuing any person in possession of the land at any time during its continuance may maintain and action for trespass. [See *Rosenthal v. City of Crystal Lake*, 171 Ill.App. 3d 428, 525 N.E. 2d 1176, 1181 (2nd Dist. 1988)]
5. By reason of the above actions North Chicago has wrongfully interfered with 2nd & Main's actual possessory rights in the Property and, as a result, 2nd & Main has and continues to suffer damages.

WHEREFORE the Plaintiff, 2nd & Main, LLC prays that a judgment be entered against North Chicago for damages in excess of $50,000, attorney's fees and costs of suit.

Respectfully submitted:

Attorney for 2nd & Main, LLC

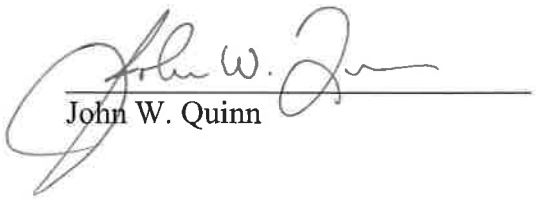
John W. Quinn
Churchill, Quinn, Richtman & Hamilton Ltd.
2 South Whitney St.
Grayslake, IL 60030
Phone: 847-223-1500
2270706
jquinn@grayslakelaw.com
G:\Litigation Files\2nd & Main, LLC\19 ED 20\Answer.docx

STATE OF ILLINOIS)
) ss.
COUNTY OF LAKE)

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, John W. Quinn, on oath deposes and says:

1. This answer contains certain statements of insufficient knowledge upon which to base a belief as to the truth or falsity of the allegations contained in the Complaint.

2. That said allegations of insufficient knowledge are true and correct.



John W. Quinn



BEFORE THE
SURFACE TRANSPORTATION BOARD

2ND & MAIN, LLC -- ACQUISITION AND OPERATION EXEMPTION -- NORLAND NORTH CHICAGO, IL	)	FINANCE DOCKET NO. 36106

NOTICE OF EXEMPTION
UNDER 49 C.F.R. § 1150.31

2ND & MAIN, LLC
1900 Marquette Street
North Chicago, IL 60062

Applicant

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1666
Chicago, IL 60604-1228
(312) 236-0204 (ph)
mcfarland@aol.com

Attorney for Applicant

Date Filed: March 6, 2017



C0475

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1666
CHICAGO, ILLINOIS 60604-1228
TELEPHONE (312) 236-0204
mcfarland@aol.com

THOMAS F. MCFARLAND

RECEIVED
MAR 06 2017

March 3, 2017

242739
ENTERED
Office of Proceedings
March 6, 2017
Part of
Public Record

By UPS overnight mail

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: Finance Docket No. 36106, *2nd & Main, LLC -- Acquisition and Operation Exemption -- Norland North Chicago, LLC*

Dear Ms. Brown:

Hereby transmitted is the original and 10 copies of Notice Of Exemption Under 49 C.F.R. § 1150.31 for filing with the Board in the above referenced matter.

This Notice is related to Finance Docket No. 36103, *Hussey Terminal Railroad Company and 2nd & Main, LLC -- Acquisition and Operation Exemption -- at North Chicago, Lake County, IL*. It is respectfully requested that the Notice of Exemption in F.D. 36103 be noticed to the public on the same date on which this Notice of Exemption is noticed to the public.

Also enclosed is a check in the amount of $1,900 for the filing fee.

Very truly yours,

/s/ Thomas F. McFarland

Thomas F. McFarland
Attorney for Applicant

TMcF:kl:enc:\1754-A\ltrSTB1

FEE RECEIVED
March 6, 2017
SURFACE
TRANSPORTATION BOARD

FILED
March 6, 2017
SURFACE
TRANSPORTATION BOARD

C0476

BEFORE THE
SURFACE TRANSPORTATION BOARD

2ND & MAIN, LLC -- ACQUISITION AND OPERATION EXEMPTION -- NORLAND NORTH CHICAGO, IL	))))	FINANCE DOCKET NO. 36106

NOTICE OF EXEMPTION
UNDER 49 C.F.R. § 1150.31

Pursuant to 49 U.S.C. § 10502 and 49 C.F.R. § 1150.31, *et seq.*, 2nd & Main, LLC (2&M) hereby provides notice of its class exemption for its acquisition from Norland North Chicago, LLC (Norland) and operation of approximately 540 feet of rail line at North Chicago, IL shown on a plat that is attached to this Notice as Appendix 1.

INFORMATION ABOUT 2&M REQUIRED BY 49 C.F.R. § 1150.33

The following is furnished pursuant to 49 C.F.R. § 1150.33:

(a) The full name and address of the applicant;

Applicant is 2nd & Main, LLC, (2&M), 1900 Marquette Street, North Chicago, IL 60062.

(b) The name, address, and telephone number of the representative of the applicant who should receive correspondence;

2&M's representative is Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, #1666, Chicago, IL 60604-1228, 312-236-0204.

(c) A statement that an agreement has been reached or details about when an agreement will be reached;

An agreement has been reached between 2&M and Norland for 2&M's acquisition and operation of the Rail Line.

C0477

(d) The operator of the property;

The operator of the property will be 2&M.

(e) A brief summary of the proposed transaction, including:

(1) The name and address of the railroad transferring the subject property;

The transferor of the property is Norland North Chicago, LLC, 1601 North Lewis Avenue, Waukegan, IL 60085-1761. Norland is believed to have acquired the Rail Line in bankruptcy prior to 2014 as a secured creditor of a prior owner of the Line, Edward Hines Lumber Co., which was later involuntarily dissolved.

(2) The proposed time schedule for consummation of the transaction;

The transaction will be consummated shortly after the exemption for the transaction becomes effective.

(3) The mileposts of the subject property, including any branch lines; and

The Rail Line does not have milepost numbers.

(4) The total route miles being acquired;

Approximately 540 feet of rail line is proposed to be acquired and operated.

(f) A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States; and

A plat showing the Rail Line is attached to this Notice as Appendix 1.

(g) A certificate that applicant's projected revenues do not exceed those that would qualify it as a Class III rail carrier.

2&M's projected revenues would not exceed those that would qualify it as a Class III rail carrier. *See* the Verification of Philip N. Dahl, President of 2&M, attached to this Notice as Appendix 2.

C0478

(h) Interchange Commitments.

There are no interchange commitments.

ADDITIONAL INFORMATION

Annual Revenues

In compliance with 49 C.F.R. § 1150.32(e), Applicant states that the projected annual revenue of 2&M created by the prior transaction did not exceed $5 million. *See* Appendix 2.

CAPTION SUMMARY

The Caption Summary required by 49 C.F.R. § 1150.34 is attached as Appendix 3.

LABOR PROTECTION

By virtue of 49 U.S.C. § 10901(c), labor protective conditions are not to be imposed in regard to the proposed exemption.

ENVIRONMENTAL AND HISTORIC CONSIDERATIONS

By virtue of 49 C.F.R. § 1106(c) and 49 C.F.R. § 1105.8(b)(1), no environmental or historic reporting is required in regard to the proposed exemption.

VERIFICATION

The verification of Philip N. Dahl, President of 2&M, is attached to this Notice as Appendix 2.

C0479

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, the Board should publish notice of the filing of this Notice of Exemption in the Federal Register no more than 16 days after filing of the Notice. *See* 49 C.F.R. § 1150.32(b).

Respectfully submitted,

2ND & MAIN, LLC
1900 Marquette Street
North Chicago, IL 60062

Applicant

/s/ Thomas F. McFarland

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1666
Chicago, IL 60604-1228
(312) 236-0204 (ph)
mcfarland@aol.com

Attorney for Applicant

Date Filed: March 6, 2017

C0480

Appendix 1

"Plat" as referred to in instrument recorded as Doc 164344 on April 7, 1916 in Book 2215 of Mortgages page 343.

EXHIBIT "A"

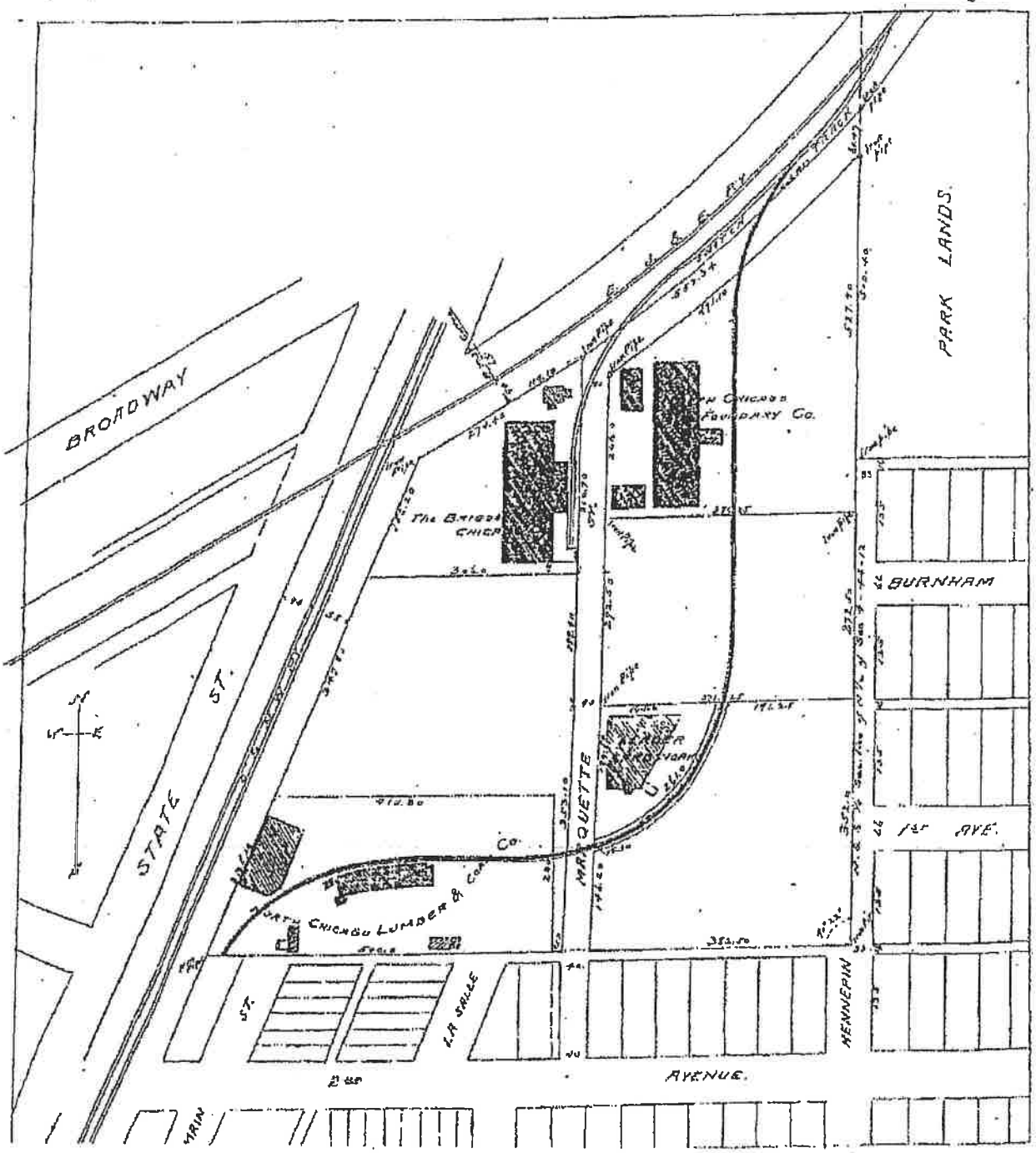
PLAT

Of that part of the N½ of the N.W.¼ of Sec. 4 T. 44 N. R. 12 E of 3rd P.M. Lying South of the C. M. & St. P. & C. R. R. Co's East of the C. & N.W. Ry.

NORTH CHICAGO, ILL.

Scale 100 feet per inch Oct 1915 R. J. Smith, C.E.

Plat of Addition to North Chicago as Recorded in Book X of Plats Page 32 in Lake County Records



C0481

Finance Docket No. 36106

Appendix 2

VERIFICATION

STATE OF ILLINOIS)
) SS:
COUNTY OF LAKE)

PHILIP N. DAHL, being duly sworn, states that he is President of 2nd & Main, LLC (2&M); that he has read the foregoing Notice of Exemption under 49 C.F.R. § 1150.31; that the projected revenues of 2&M would not exceed those that would qualify it as a Class III rail carrier; that the projected annual revenue of 2&M to be created by the proposed acquisition and operation would not exceed $5 million; and that all other facts set forth in the Notice of Exemption are true and correct.

PHILIP N. DAHL

SUBSCRIBED and SWORN to before me this 3rd day of March, 2017.

Notary Public

My Commission Expires: 1/19/21

"OFFICIAL SEAL"
LINDA GALLU
Notary Public, State of Illinois
My Commission Expires 1/19/2021

C0482

Finance Docket No. 36106

Appendix 3

CAPTION SUMMARY

SURFACE TRANSPORTATION BOARD

Notice of Exemption

STB Finance Docket No. 36106

2nd & Main, LLC -- Acquisition and Operation Exemption -- Norland North Chicago, LLC

2nd & Main, LLC (2&M) has filed a Notice of Exemption to acquire from Norland North Chicago, LLC and operate approximately 540 feet of rail line at North Chicago, Lake County, Illinois (the Rail Line). The Rail Line does not have milepost numbers. Comments must be filed with the Board and served on 2&M's representative, Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, Suite 1666, Chicago, IL 60604-1228, ph 312-236-0204.

The Notice is filed under 49 C.F.R. § 1150.31 *et seq.* If the Notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

By the Board

C0483

45729 SERVICE DATE – MARCH 22, 2017

DO

FR-4915-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36106]

2nd & Main, LLC—Acquisition and Operation Exemption—Norland North Chicago, LLC

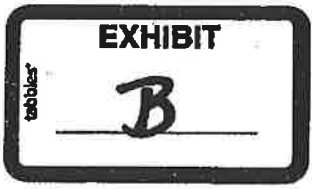
2nd & Main, LLC (2ML), a noncarrier, has filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from Norland North Chicago, LLC (Norland) and operate approximately 540 feet of rail line between a point of connection on its north end to a main track of the Elgin, Joliet & Eastern Railway Company (now Canadian National Railway Company) and a point of connection on its southwest end to a main track of the Chicago & North Western Railway Company (now Union Pacific Railroad Company), in North Chicago, in Lake County, Ill. (the Line). According to 2ML, there are no milepost designations on the Line.

The verified notice indicates that the transaction will be consummated shortly after April 5, 2017, the effective date of the exemption (30 days after the notice of exemption was filed).[1]

2ML certifies that its projected annual revenues as a result of this transaction will not result in its becoming a Class II or Class I rail carrier and will not exceed $5 million.

---

[1] 2ML's notice is related to a notice of exemption filed in Hussey Terminal Railroad Company—Acquisition & Operation Exemption—2nd & Main, LLC, Docket No. FD 36103, in which Hussey Terminal Railroad Company seeks Board authority to acquire the Line from 2ML. That notice is contingent upon this notice becoming effective.



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2ML states that there are no interchange commitments.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions to stay must be filed no later than March 29, 2017 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 36106, must be filed with the Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, a copy of each pleading must be served on Thomas F. McFarland, 208 South LaSalle St., Suite 1666, Chicago, IL 60604-1228.

Board decisions and notices are available on our website at "WWW.STB.GOV."

Decided: March 17, 2017.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

C0485

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT COURT OF LAKE COUNTY, ILLINOIS

THE CITY OF NORTH CHICAGO, Plaintiff, v. 2nd & MAIN, LLC, UNKNOWN OWNERS, and NON-RECORD CLAIMAINTS, Defendants.	)	19 ED 20

Motion for Partial Summary Judgment

NOW COMES Defendant/Counter-Plaintiff 2nd & Main, LLC, by and through its attorneys, Churchill, Quinn, Richtman & Hamilton, Ltd., and moves the Court for Partial Summary Judgment pursuant to 735 ILCS 5/2-1005 and in support thereof states as follows:

INTRODUCTION

There is no dispute that, long before the Defendant, 2nd & Main, LLC purchased the property that is the subject of the complaint ("the property"), sometime during the early 1960's, North Chicago ("the City") constructed a water main that runs from east to west across the northerly part of the Defendant's property. They did so without ever obtaining an easement. (Rule 2-1.04 Statement paragraph 4). That is why the City brought this action for condemnation in order to obtain such an easement. What makes this case unique

C0486

is that the property is legally a railroad, and as such, the City's right to condemn is limited. The purpose of this motion is to obtain a ruling regarding the limitation of the City's eminent domain powers.

DESIGNATION AS A RAILROAD

On March 6, 2017, 2nd and Main, LLC filed a Notice of Exemption under 49 C.F.R. § 1150.31 with the Surface Transportation Board. (Rule 2-1.04 Statement paragraph 5). On March 22, 2017, the Surface Transportation Board issued its decision regarding the Notice of Exemption. As a result of the decision, by operation of law pursuant to 49 U.S.C. 10501 and 9 CFR § 1150.32, the exemption became effective April 5, 2017. (Rule 2-1.04 Statement paragraph 6). Because of this, 2nd & Main plans to use the property as a storage area for shipping containers, railroad access and to place additional spur tracks on the property. (Rule 2-1.04 Statement paragraph 7). The property has been leased to Hussey Terminal Railroad Company for those purposes. (Rule 2-1.04 Statement paragraph 8)

PREEMPTION

"The Supremacy Clause of the United States Constitution provides that the Constitution and laws of the United States are "the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Thus, under the Supremacy Clause,

C0487

federal law "preempts state laws that interfere with, or are contrary to, federal law." *Union Pac. R.R. Co. v. Chicago Transit Auth.*, 647 F.3d 675, 678 (7th Cir. 2011)

The importance of this is that the Federal Government now has regulatory jurisdiction over the Defendant's property. In the *Union Pacific* case the Court summarized that stating:

In 1995, Congress enacted the Interstate Commerce Commission Termination Act and created the Surface Transportation Board to administer the Act. 49 U.S.C. §§ 10101, 10102(1). In the Act, Congress expressly conferred on the Board "exclusive" jurisdiction over the regulation of railroad transportation:

The jurisdiction of the Board over –

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b). Congress also defined "transportation" to include railroad property, facilities, and equipment "related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use." 49 U.S.C. § 10102(9). Congress's intent in the Act to preempt state and local regulation of railroad transportation has been recognized as broad and sweeping.

"Courts have treated preemption under the Act in a variety of ways. In 2005, the Board surveyed the different approaches in case law and suggested that

there were two manners in which state or local actions or regulations could be preempted: (1) categorical, or per se, preemption, and (2) "as applied" preemption. *CSX Transp., Inc. – Petition for Declaratory Order, STB Finance* Docket No. 34662, 2005 WL 1024490, at *2–3 (S.T.B. May 3, 2005); see also *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332 (5th Cir.2008) (describing the Board's framework). Categorical preemption occurs when a state or local action is preempted on its face despite its context or rationale. *Id* at *2. If an action is not categorically preempted, it may be preempted "as applied" based on the degree of interference that the particular action has on railroad transportation—this occurs when the facts show that the action "would have the effect of preventing or unreasonably interfering with railroad transportation." *Id* at 479.

So the question becomes, given this designation, can North Chicago condemn a portion of the Defendant's property for its water main? The answer is yes, provided they do not interfere with any of the Defendant's proposed or actual railroad uses. Any such interference is preempted by the "Termination Act". In *Green Mountain Railroad v. Vermont* 404 F.3d 638, 639 (2005) the Green Mountain Railroad Corporation proposed to build facilities on its property in Vermont and sought a declaration that Vermont's environmental land use statute was preempted by the Interstate Commerce Commission Termination Act. The Court found: "**The Termination Act expressly preempts "remedies provided**

under Federal or State law" and vests with the Surface Transportation Board (the "Transportation Board"), a federal agency, exclusive jurisdiction over "transportation by rail carriers" and "the construction ... of ... facilities...." 49 U.S.C. § 10501(b). The term "transportation" includes a "warehouse... yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail." 49 U.S.C. § 10102."

(Emphasis added)

THE WATER MAIN AS CURRENTLY CONSTRUCTED INTERFERES WITH THE PROPERTY'S RAILRAOD USE

Frank Furlan was the City's engineer when the water main was constructed in the 1960's. At his deposition he produced drawings of the water main located on the 2nd & Main property and adjoining properties that was prepared by Alvord, Burdick & Howson in 1961 on North Chicago's behalf. (Rule 2-1.04 Statement paragraph 9). That map showed property that was both railroad and non-railroad. The water lines are different depending on whether or not a railroad is involved. At his deposition Furlan testified that when constructing a water main under railroad property a carrier pipe is first installed, then the concrete water main is placed within the carrier pipe and it is filled with sand to carry the load. (Rule 2-1.04 Statement paragraph 10). This is done to avoid

putting the load of the railroad tracks on the water pipes. Instead, it is put on the outside casing. (Rule 2-1.04 Statement paragraph 11).

However, the water main across the 2nd & Main property was installed without a carrier pipe and is not to railroad standards. (Rule 2-1.04 Statement paragraph 12). Moreover, the existing 24-inch diameter pre-stressed concrete cylinder pipe water main on the 2nd & Main property is not sufficiently constructed for the purpose of supporting railroad loadings and does not meet railroad criteria for utility crossings. Thus, the existing water main renders the 2nd & Main property unusable for railroad purposes in the area over and north of the existing water main. (Rule 2-1.04 Statement paragraphs 12-14)

IT DOES NOT MATTER WHETHER OR NOT THE PROPERTY IS CURRENTLY BEING USED AS A RAILROAD

The Defendant anticipates that the City will argue that significant railroad operations are not now taking place on the property. That does not matter. The 8th Circuit stated in *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858, 862 (8th Cir. 2005) : " Finally, the Board can consider the railway's future plans as well as its current uses and make its own evaluation of how likely it is that the plans will come to fruition. Condemnation is a permanent action, and it can never be stated with certainty at what time any particular part of a right of way may become

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necessary for railroad uses." *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858, 862 (8th Cir. 2005).

CONCLUSION AND RELIEF SOUGHT

In the present case, North Chicago has brought condemnation proceedings, seeking to take an easement through the Property for the use of its water main. Using an as applied preemption analysis, if the condemnation interferes with 2nd and Main's use of the railroad property, then the condemnation will be preempted by Federal Law. On the other hand, if the condemnation does not interfere with the use of the Property as a railroad, then it will not be preempted. It follows then, that North Chicago may only take 2nd & Main's property to the extent that they can show that the taking would not interfere with its use as a rail road.

The reason that the Defendant seeks only partial summary judgment is that: "[f]ederal preemption does not apply to all situations where the use of property prevents or unreasonably interferes with railroad transportation; it applies to those situations where a regulation prevents or unreasonably interferes with railroad transportation. If a state or local government secures the use of property in a way that affects railroad transportation by contract or other agreement, there is no issue of federal preemption; but if it attempts to secure

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such use by regulation (in this case, by condemnation), then the possibility of federal preemption may arise." *Union Pac. R.R. Co. v. Chicago Transit Auth.*, 647 F.3d 675, 682 (7th Cir. 2011)

The Court need not bar this condemnation action, it need only fashion a remedy so that the taking will not interfere with the Defendant's use of the property as a railroad. That is not particularly difficult. The Court need only require that, if a judgment for condemnation is entered, that the existing water main be replaced by one that meets railroad standards at least as stringent as those set forth in the City's drawings by Alvord, Burdick & Howson. In addition, once the pipe is replaced, the property should be put back in the condition that existed before the replacement.

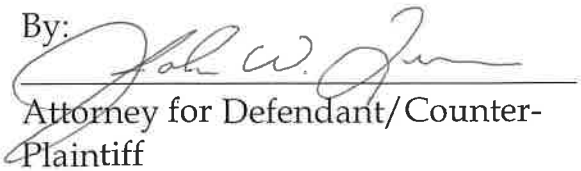
Wherefore, 2nd & Main, LLC prays that this Court order that:

A) In the event the City of North Chicago condemns an easement over the property set forth in its complaint that the existing water main be replaced and maintained by one that meets railroad standards at least as stringent as those set forth in the City's drawings by Alvord, Burdick & Howson and;

B) After the water main is replaced, the property should be put back in the condition that existed prior to the replacement, and;

C) For such other relief as this Court deems just and proper.

Respectfully submitted,

By: 

Attorney for Defendant/Counter-Plaintiff

John W. Quinn
CHURCHILL, QUINN, RICHTMAN & HAMILTON, LTD.
2 S. Whitney St., Grayslake, IL 60030
(847)223-1500
Attorney No. 2270706
jquinn@grayslakelaw.com

IN THE CIRCUIT COURT OF THE NINETEENTH JUDIIAL CIRCUIT
LAKE COUNTY, ILLINOIS

THE CITY OF NORTH CHICAGO Plaintiff, v. 2ND & MAIN LLC, UNKNOWN OWNERS and NON-RECORD CLAIMANTS Defendants.	)	19 ED 20

RULE 2-1.04 Statement

NOW COMES 2nd & Main, LLC, by and through his attorneys, Churchill, Quinn, Richtman & Hamilton, Ltd., and for its Rule 2-1.04 Statement, states as follows:

PARTIES

1. 2nd & MAIN, LLC, is the owner of the following real estate (hereafter the "Property") located in North Chicago and described as follows:

> A Part of the North Half of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, described as follows: Beginning at a point on the Easterly Right of Way Line of the Chicago and North Western Railway Company, which point is 772.10 feet measured along said Right of Way Line Southerly of the intersection of said Right of Way Line with the Southerly Right of Way Line of the Elgin, Joliet and Eastern Railway Company; running thence East on a Line parallel with the South Line of said Northwest Quarter of the said Section 4, a distance of 515.8 feet the West Line of Marquette Street; thence Northerly along the West Line of Marquette Street, approximately 220 feet to the Southeast Corner of the former J.W. Aulson and Sons Corporation Property, more particularly described by Warranty Deed dated April 20, 1921 and Recorded April 26, 1921, as Document 201389; thence West 435 feet on the South Line of said Former J. W. Aulson and Sons Corporation Property to said Easterly Right of Way of said Chicago and North Western Railway Company; running thence in a

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Southerly direction along said Easterly Right of Way Line to the point of beginning, in Lake County, Illinois.

2. The City of North Chicago is a municipal corporation.

FACTS SUPPORTING VENUE AND JURISDICTION

3. The property involved in this action is located in Lake County, Illinois.

UNCONTESTED FACTS

4. Sometime after 1901, North Chicago installed a 24 inch water main across the 2nd & Main's property without obtaining an easement. (Counter Complaint paragraph 3 and answer).

5. On March 6, 2017, 2nd and Main, LLC filed a Notice of Exemption under 49 C.F.R. § 1150.31 with the Surface Transportation Board. A copy of that filing is attached as Exhibit A to the Phil Dahl Affidavit. (Exhibit 1--Affidavit of Phil Dahl paragraph 4)

6. On March 22, 2017, the Surface Transportation Board issued its decision regarding the Notice of Exemption. As a result of the decision, the exemption became effective April 5, 2017. A copy of that decision is attached as Exhibit B to the Phil dahl Affidavit. (Exhibit 1--Affidavit of Phil Dahl paragraph 5)

7. 2nd & Main plans to use the property that is the subject of the suit and a storage area for shipping containers and railroad access. (Exhibit 1--Affidavit of Phil Dahl paragraph 6)

8. The property in question has been leased by 2nd & Main LLC to Hussey Terminal Railroad Company. (Exhibit 1--Affidavit of Phil Dahl paragraph 7)

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9. Attached as Exhibit 2, are drawings of the water main located on the 2nd & Main property and adjoining properties prepared by North Chicago's engineers Alvord, Burdick & Howson in 1961 and provided by Frank Furlan a former North Chicago city engineer.

10. When constructing a water main under railroad property a carrier pipe is first installed, then the concrete water main is placed within the carrier pipe and it is filled with sand to carry the load. (Deposition of Frank Furlan Exhibit 3 page 21 and Affidavit of Peter Kolb Exhibit 4 paragraph 7)

11. This is done to avoid putting the load of the railroad tracks on the water pipes. Instead, it is put on the outside casing. (Deposition of Frank Furlan page 21 and Affidavit of Peter Kolb Exhibit 4 paragraph 8))

12. The water main across the 2nd & Main property was installed without a carrier pipe and is not to railroad standards. (Affidavit of Peter Kolb Exhibit 4 paragraph 9)

13. The Existing 24-inch diameter pre-stressed concrete cylinder pipe water main on the 2nd & Main property is not sufficiently constructed for the purpose of supporting railroad loadings and does not meet railroad criteria for utility crossings. (Affidavit of Peter Kolb Exhibit 4 paragraph 10)

14. The existing water main renders the 2nd & Main property unusable for railroad purposes in the area over and north of the existing water main. (Affidavit of Peter Kolb Exhibit 4 paragraph 11).

Respectfully submitted,

By: _____
Attorney for 2nd & Main

John W. Quinn
CHURCHILL, QUINN, RICHTMAN & HAMILTON, LTD.
2 S. Whitney St., Grayslake, IL 60030
(847)223-1500
Attorney No. 2270706
jquinn@grayslakelaw.com
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C0498

IN THE CIRCUIT COURT OF THE NINETEENTH JUDIIAL CIRCUIT
LAKE COUNTY, ILLINOIS

THE CITY OF NORTH CHICAGO Plaintiff, v. 2ND & MAIN LLC, UNKNOWN OWNERS and NON-RECORD CLAIMANTS Defendants.	))))))))	19 ED 20

AFFIDAVIT OF PHIL DAHL

Under penalty of perjury pursuant to 735 ILCS 5/1-109, the affiant states as follows:

1. The affiant is above the age of 18 and if called as a witness to this cause of action will testify to the matters set forth in this Affidavit on his personal knowledge.

2. I am one of the Managers of 2nd & Main, LLC.

3. 2nd & MAIN, LLC, is the owner of the following real estate (hereafter the "Property") located in North Chicago and described as follows:

> A Part of the North Half of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, described as follows: Beginning at a point on the Easterly Right of Way Line of the Chicago and North Western Railway Company, which point is 772.10 feet measured along said Right of Way Line Southerly of the intersection of said Right of Way Line with the Southerly Right of Way Line of the Elgin, Joliet and Eastern Railway Company; running thence East on a Line parallel with the South Line of said Northwest Quarter of the said Section 4, a distance of 515.8 feet the West Line of Marquette Street; thence Northerly along the West Line of Marquette Street, approximately 220 feet to the Southeast Corner of the former J.W. Aulson and Sons



Corporation Property, more particularly described by Warranty Deed dated April 20, 1921 and Recorded April 26, 1921, as Document 201389; thence West 435 feet on the South Line of said Former J. W. Aulson and Sons Corporation Property to said Easterly Right of Way of said Chicago and North Western Railway Company; running thence in a Southerly direction along said Easterly Right of Way Line to the point of beginning, in Lake County, Illinois.

4. On March 6, 2017, 2nd and Main, LLC filed a Notice of Exemption under 49 C.F.R. § 1150.31 with the Surface Transportation Board. A copy of that filing is attached as Exhibit A.

5. On March 22, 2017, the Surface Transportation Board issued its decision regarding the Notice of Exemption. As a result of the decision, the exemption became effective April 5, 2017. A copy of that decision is attached as Exhibit B.

6. 2nd & Main plans to use the Property that is the subject of the suit, including the property that North Chicago seeks to condemn, for railroad purposes specifically for storage area for shipping containers, additional spur tracks and railroad access.

7. The property in question has been leased by 2nd & Main LLC to Hussey Terminal Railroad Company. A copy of the lease is attached as Exhibit C.

8. North Chicago's use of the easement will interfere with railroad operations if the water main is not constructed to at least the standards set forth on the drawings prepared by North Chicago's engineers Alvord, Burdick & Howson in 1961.

9. Further Affiant sayeth not.

Phil Dahl

C0500

John W. Quinn
Attorney number 22709706
Churchill, Quinn, Richtman & Hamilton Ltd.
2 South Whitney St.
Grayslake, IL 60030
Phone: 847-223-1500
jquinn@grayslakelaw.com



BEFORE THE
SURFACE TRANSPORTATION BOARD

2ND & MAIN, LLC – ACQUISITION AND OPERATION EXEMPTION – NORLAND NORTH CHICAGO, IL	))))	FINANCE DOCKET NO. 36106

NOTICE OF EXEMPTION
UNDER 49 C.F.R. § 1150.31

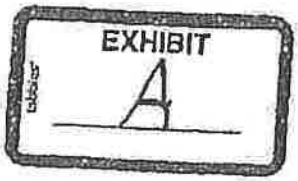
2ND & MAIN, LLC
1900 Marquette Street
North Chicago, IL 60062

Applicant

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1666
Chicago, IL 60604-1228
(312) 236-0204 (ph)
mcfarland@aol.com

Attorney for Applicant

Date Filed: March 6, 2017



C0502

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1666
CHICAGO, ILLINOIS 60604-1228
TELEPHONE (312) 236-0204
mcfarland@aol.com

THOMAS F. MCFARLAND

RECEIVED
MAR 06 2017

March 3, 2017

242739
ENTERED
Office of Proceedings
March 6, 2017
Part of
Public Record

By UPS overnight mail

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: Finance Docket No. 36106, *2nd & Main, LLC -- Acquisition and Operation Exemption -- Norland North Chicago, LLC*

Dear Ms. Brown:

Hereby transmitted is the original and 10 copies of Notice Of Exemption Under 49 C.F.R. § 1150.31 for filing with the Board in the above referenced matter.

This Notice is related to Finance Docket No. 36103, *Hussey Terminal Railroad Company and 2nd & Main, LLC -- Acquisition and Operation Exemption -- at North Chicago, Lake County, IL*. It is respectfully requested that the Notice of Exemption in F.D. 36103 be noticed to the public on the same date on which this Notice of Exemption is noticed to the public.

Also enclosed is a check in the amount of $1,900 for the filing fee.

Very truly yours,

/s/ Thomas F. McFarland

Thomas F. McFarland
Attorney for Applicant

TMcF:kl;enc:\1754-A\ltrSTB1

FEE RECEIVED
March 6, 2017
SURFACE
TRANSPORTATION BOARD

FILED
March 6, 2017
SURFACE
TRANSPORTATION BOARD

C0503

BEFORE THE
SURFACE TRANSPORTATION BOARD

2ND & MAIN, LLC -- ACQUISITION AND OPERATION EXEMPTION -- NORLAND NORTH CHICAGO, IL	))))	FINANCE DOCKET NO. 36106

NOTICE OF EXEMPTION
UNDER 49 C.F.R. § 1150.31

Pursuant to 49 U.S.C. § 10502 and 49 C.F.R. § 1150.31, *et seq.*, 2nd & Main, LLC (2&M) hereby provides notice of its class exemption for its acquisition from Norland North Chicago, LLC (Norland) and operation of approximately 540 feet of rail line at North Chicago, IL shown on a plat that is attached to this Notice as Appendix 1.

INFORMATION ABOUT 2&M REQUIRED BY 49 C.F.R. § 1150.33

The following is furnished pursuant to 49 C.F.R. § 1150.33:

(a) The full name and address of the applicant;

Applicant is 2nd & Main, LLC, (2&M), 1900 Marquette Street, North Chicago, IL 60062.

(b) The name, address, and telephone number of the representative of the applicant who should receive correspondence;

2&M's representative is Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, #1666, Chicago, IL 60604-1228, 312-236-0204.

(c) A statement that an agreement has been reached or details about when an agreement will be reached;

An agreement has been reached between 2&M and Norland for 2&M's acquisition and operation of the Rail Line.

C0504

(d) The operator of the property;

The operator of the property will be 2&M.

(e) A brief summary of the proposed transaction, including:

(1) The name and address of the railroad transferring the subject property;

The transferor of the property is Norland North Chicago, LLC, 1601 North Lewis Avenue, Waukegan, IL 60085-1761. Norland is believed to have acquired the Rail Line in bankruptcy prior to 2014 as a secured creditor of a prior owner of the Line, Edward Hines Lumber Co., which was later involuntarily dissolved.

(2) The proposed time schedule for consummation of the transaction;

The transaction will be consummated shortly after the exemption for the transaction becomes effective.

(3) The mileposts of the subject property, including any branch lines; and

The Rail Line does not have milepost numbers.

(4) The total route miles being acquired;

Approximately 540 feet of rail line is proposed to be acquired and operated.

(f) A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States; and

A plat showing the Rail Line is attached to this Notice as Appendix 1.

(g) A certificate that applicant's projected revenues do not exceed those that would qualify it as a Class III rail carrier.

2&M's projected revenues would not exceed those that would qualify it as a Class III rail carrier. *See* the Verification of Philip N. Dahl, President of 2&M, attached to this Notice as Appendix 2.

C0505

(h) Interchange Commitments.

There are no interchange commitments.

ADDITIONAL INFORMATION

Annual Revenues

In compliance with 49 C.F.R. § 1150.32(e), Applicant states that the projected annual revenue of 2&M created by the prior transaction did not exceed $5 million. *See* Appendix 2.

CAPTION SUMMARY

The Caption Summary required by 49 C.F.R. § 1150.34 is attached as Appendix 3.

LABOR PROTECTION

By virtue of 49 U.S.C. § 10901(c), labor protective conditions are not to be imposed in regard to the proposed exemption.

ENVIRONMENTAL AND HISTORIC CONSIDERATIONS

By virtue of 49 C.F.R. § 1106(c) and 49 C.F.R. § 1105.8(b)(1), no environmental or historic reporting is required in regard to the proposed exemption.

VERIFICATION

The verification of Philip N. Dahl, President of 2&M, is attached to this Notice as Appendix 2.

C0506

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, the Board should publish notice of the filing of this Notice of Exemption in the Federal Register no more than 16 days after filing of the Notice. *See* 49 C.F.R. § 1150.32(b).

Respectfully submitted,

2ND & MAIN, LLC
1900 Marquette Street
North Chicago, IL 60062

Applicant

/s/ Thomas F. McFarland

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1666
Chicago, IL 60604-1228
(312) 236-0204 (ph)
mcfarland@aol.com

Attorney for Applicant

Date Filed: March 6, 2017

C0507

Appendix 1

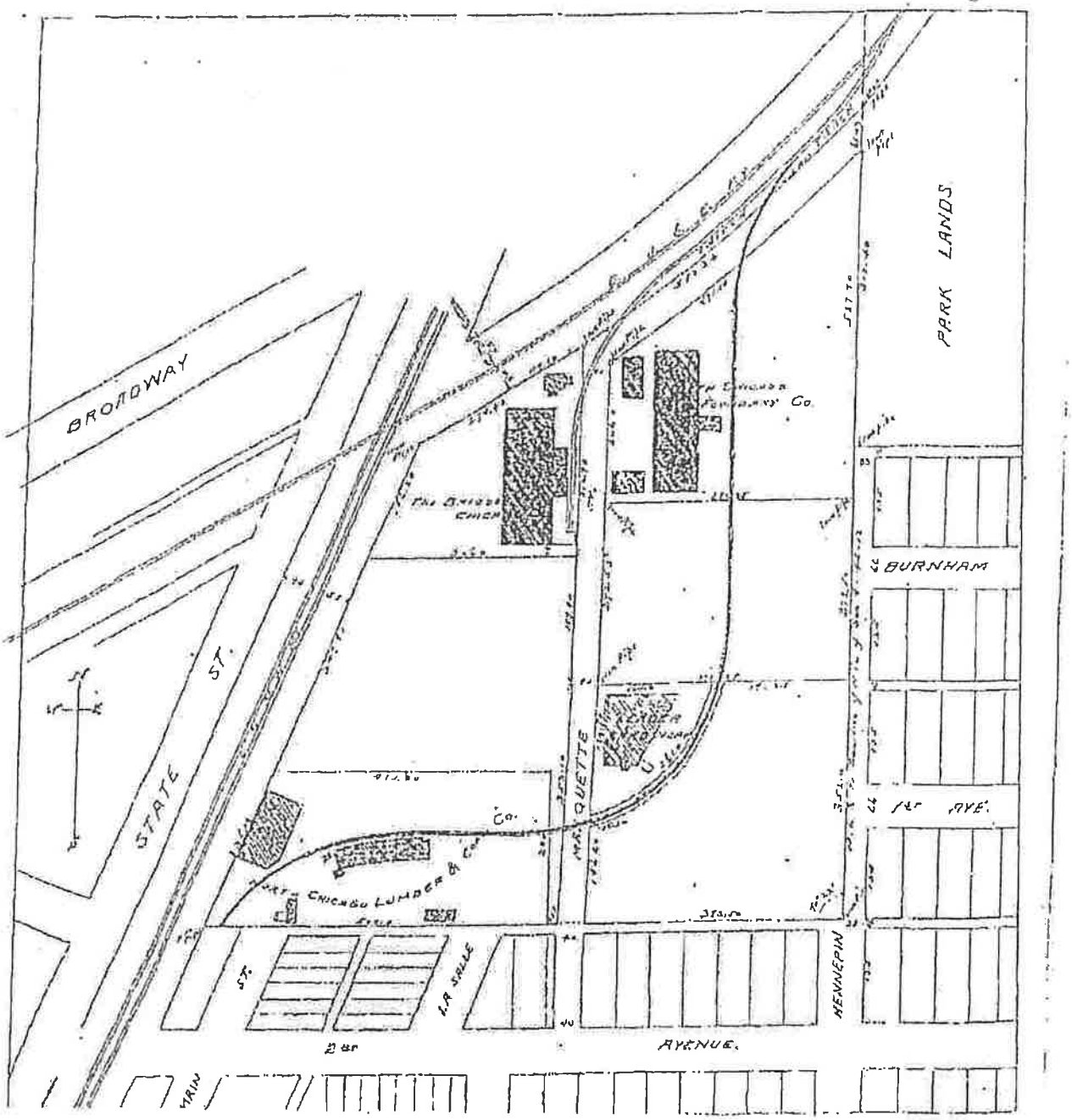
EXHIBIT "A"

PLAT

Of that part of the N½ of the NW¼ of Sec. 7 T 39 N R 12 E of 3rd P.M. Lying South of the E. J. & E. Ry. & East of the C. & N.W. Ry.

NORTH CHICAGO, ILL.

Scale 100 feet per inch Oct 1913 A. J. Smith, C.E.



C0508

Finance Docket No. 36106

Appendix 2

VERIFICATION

STATE OF ILLINOIS)
) SS:
COUNTY OF LAKE)

PHILIP N. DAHL, being duly sworn, states that he is President of 2nd & Main, LLC (2&M); that he has read the foregoing Notice of Exemption under 49 C.F.R. § 1150.31; that the projected revenues of 2&M would not exceed those that would qualify it as a Class III rail carrier; that the projected annual revenue of 2&M to be created by the proposed acquisition and operation would not exceed $5 million; and that all other facts set forth in the Notice of Exemption are true and correct.

PHILIP N. DAHL

SUBSCRIBED and SWORN to before me this 31st day of March, 2017.

Notary Public

My Commission Expires: 1/19/21

"OFFICIAL SEAL"
LINDA GALLU
Notary Public, State of Illinois
My Commission Expires 1/19/2021

C0509

Finance Docket No. 36106

Appendix 3

CAPTION SUMMARY

SURFACE TRANSPORTATION BOARD

Notice of Exemption

STB Finance Docket No. 36106

2nd & Main, LLC -- Acquisition and Operation Exemption -- Norland North Chicago, LLC

2nd & Main, LLC (2&M) has filed a Notice of Exemption to acquire from Norland North Chicago, LLC and operate approximately 540 feet of rail line at North Chicago, Lake County, Illinois (the Rail Line). The Rail Line does not have milepost numbers. Comments must be filed with the Board and served on 2&M's representative, Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, Suite 1666, Chicago, IL 60604-1228, ph 312-236-0204.

The Notice is filed under 49 C.F.R. § 1150.31 *et seq.* If the Notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

By the Board

C0510

45729 SERVICE DATE – MARCH 22, 2017

DO

FR-4915-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36106]

2nd & Main, LLC—Acquisition and Operation Exemption—Norland North Chicago, LLC

2nd & Main, LLC (2ML), a noncarrier, has filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from Norland North Chicago, LLC (Norland) and operate approximately 540 feet of rail line between a point of connection on its north end to a main track of the Elgin, Joliet & Eastern Railway Company (now Canadian National Railway Company) and a point of connection on its southwest end to a main track of the Chicago & North Western Railway Company (now Union Pacific Railroad Company), in North Chicago, in Lake County, Ill. (the Line). According to 2ML, there are no milepost designations on the Line.

The verified notice indicates that the transaction will be consummated shortly after April 5, 2017, the effective date of the exemption (30 days after the notice of exemption was filed).[1]

2ML certifies that its projected annual revenues as a result of this transaction will not result in its becoming a Class II or Class I rail carrier and will not exceed $5 million.

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[1] 2ML's notice is related to a notice of exemption filed in Hussey Terminal Railroad Company—Acquisition & Operation Exemption—2nd & Main, LLC, Docket No. FD 36103, in which Hussey Terminal Railroad Company seeks Board authority to acquire the Line from 2ML. That notice is contingent upon this notice becoming effective.

EXHIBIT
tabbies
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2ML states that there are no interchange commitments.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions to stay must be filed no later than March 29, 2017 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 36106, must be filed with the Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, a copy of each pleading must be served on Thomas F. McFarland, 208 South LaSalle St., Suite 1666, Chicago, IL 60604-1228.

Board decisions and notices are available on our website at "WWW.STB.GOV."

Decided: March 17, 2017.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

C0512

THIS AGREEMENT CONTAINS AN AUTOMATIC RENEWAL PROVISION

OPERATING AGREEMENT

THIS AGREEMENT, made and entered into as of the 10 day of August, 2017, between 2nd & Main, LLC and Lumberyard Storage, LLC (collectively referred to as "OWNERS") on the one hand and Hussey Terminal Railroad Company ("HTRC") on the other hand.

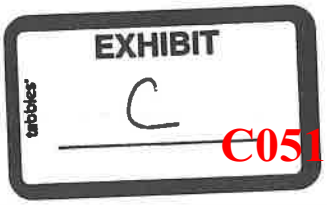
WITNESSETH

WHEREAS, 2nd & Main, LLC has acquired right-of-way and trackage located on and adjoining 2nd & Main's property in North Chicago, Illinois, that right-of-way and trackage is more particularly depicted on Exhibit A attached hereto ("the Owners trackage"); and

WHEREAS HTRC desires to operate and maintain 2nd & Main's Trackage and OWNERS property for the provision of rail service in the name of, and in behalf of, HRTC; and

WHEREAS, Lumberyard Storage, LLC owns the following property to wit:

PARCEL 1: That part of Government Lot 1 of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, bounded as follows: On the North by the South Line of Second Avenue as shown on the Plat of Bord Du Lac Bluffs ("C" of Plats, Page 37), extended West, on the Southeast by the northwesterly line of Main Street ("C" of Plats, Page 37), on the South by the North Line of 22nd Street extended East, and on the Northwest by a line drawn parallel with and distant 30 feet Southeasterly, measured at right angle from the Center Line of the most Southeasterly or East bound main track of the Chicago and North Western Transportation Company, as said main track is now located, in Lake County, Illinois, except that part conveyed as follows; that part of Government Lot 1 of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, more particularly described as follows: Beginning at the intersection of the existing north line of 22nd Street extended East and the northwesterly line of Main Street, shown in Bord Du Lac Bluffs Subdivision, thence on an assumed bearing of South 88 degrees 00 minutes 58 seconds West along said North Line extended East, 71.47 feet to the existing Easterly right of way line of the Union Pacific Railroad, formerly known as the Chicago and North Western Transportation Company; thence North 23 degrees 56 minutes 39 seconds East along said easterly right of way line, 424.88 feet; thence



south 64 degrees 55 minutes 06 seconds east, 64.56 feet to said northwesterly line of Main Street; thence South 23 degrees 45 minutes 40 seconds West along said northwesterly line of Main Street, 395.72 feet to the point of beginning, in Lake County, Illinois recorded September 13, 2005 as Document 5857311.

PARCEL 2: That part of the Southeast Quarter of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, lying Northwesterly of the Northwesterly line of Main Street, Lying Northerly of the North Line of Second Avenue and lying southeasterly of a line parallel with and distant 55 feet Southeasterly, measured at right angles from the center line of the most northwesterly or west bound main track of the Chicago and Northwestern Transportation Company as said main track is now located, in Lake County, Illinois.

PARCEL 3: That part of the South Half of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, described as follows: Beginning at the Northwest corner of that part of Navy property lying East of the Chicago and Northwestern Railroad, said corner being described as the point of intersection of the South Line of the North Half of the North Half of Section 4 and the easterly right of way line of the Chicago and Northwestern Railroad; thence East along the North Line of Navy property, 99.0 feet to a point thence South, at right angles to the last described course, 54.0 feet to the point of beginning of the tract of land being described; continuing thence South along the last described course extended, a distance of 84.70 feet to a point; thence West, parallel with the North Line of Navy property, 102.83 feet to a point; thence northeasterly, along a line, if extended would pass through a point on the North Line of Navy property 50.0 feet East of the Northwest corner thereof, a distance of 40.42 feet to a point; thence northeasterly 100.0 feet, more or less, to the point of beginning, in Lake County, Illinois.

PARCEL 4: That part of the South Half of the Northwest Quarter of Section 4, Township 44 North, Range 12 described as follows: Beginning at the Northwest corner of Navy property, which lies East of the Chicago and Northwestern Railroad right of way, said point being the intersection of the South Line of the North Half of the North Half of said Section 4 and the easterly right of way line of the Chicago and Northwestern Railroad, thence East along the Navy North property line 50 feet to the point of beginning of the parcel to be described, thence continuing along the last described course for a distance of 49 feet to a point; thence southerly at

C0514

a right angle to the last described line for a distance of 54 feet; thence deflecting 62 degrees to the right from a prolongation of the previous line for a distance of 100 feet to a point; thence northeasterly for a distance of 110 feet to the point of beginning, in Lake County, Illinois.

PARCEL 5: Portion of Navy property situated in the South Half of the Northwest Quarter of Section 4, Township 44 North, Range 12 East of the Third Principal Meridian, described as follows: Beginning at the Northwest corner of Navy property, which lies East of the Chicago and North Western Railroad right of way, said point being the intersection of the South Line of the North Half of the North Half of Section 4 and the easterly right of way line of the Chicago and North Western Railroad; thence East along the Navy property line approximately 28.25 feet to a point on the West Line of Main Street; thence along the West Line of Main Street on an approximate bearing of south 22 degrees 13 minutes West for a distance of a approximately 150 feet to a point; thence westerly parallel to the Navy North property line for a distance of approximately 28.25 feet to a point on the West Line of Navy property, also being the easterly right of way line of the Chicago and North Western Railroad; thence northeasterly on an approximate bearing of North 22 degrees 13 minutes East along the aforesaid common boundary line for a distance of approximately 150 feet to the point of beginning, in Lake County, Illinois.

PARCEL 6: That part of Nimitz Avenue, also known as Second Avenue, legally described as follows: "That part of Government Lot 1 of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, bounded as follows: On the North by the North Line of Second Avenue as shown on the plat of Bord Du Lac Bluffs ("C " of Plats, page 37) extended West, on the Southeast by the Northwesterly Line of Main Street ("C" of Plats, Page 37), on the South by the South Line of Second Avenue as shown on the plat of Bord Du Lac Bluffs ("C" of Plats, Page 37) extended West, and on the Northwest by a line drawn from the point of intersection of the South Line of Second Avenue extended West with a line lying 30 feet Southeasterly of as measured at right angles to and parallel with the center line of the most Southeasterly or Eastbound track of the Chicago and Northwestern Railway to a point of intersection with the North Line of Second Avenue extended West with a line lying 55 feet Southeasterly of as measured at right angles to and parallel with the Northwesterly or Westbound main track of the Chicago and Northwestern Railway, all in Lake County, Illinois.

WHEREAS, 2nd & Main, LLC, owns the following property to wit:

A Part of the North Half of the Northwest Quarter of Section 4, Township 44 North, Range 12, East of the Third Principal Meridian, described as follows: Beginning at a point on the Easterly Right of Way Line of the Chicago and North Western Railway Company, which point is 772.10 feet measured along said Right of Way Line Southerly of the intersection of said Right of Way Line with the Southerly Right of Way Line of the Elgin, Joliet and Eastern Railway Company; running thence East on a Line parallel with the South Line of said Northwest Quarter of the said Section 4, a distance of 515.8 feet the West Line of Marquette Street; thence Northerly along the West Line of Marquette Street, approximately 220 feet to the Southeast Corner of the former J.W. Aulson and Sons Corporation Property, more particularly described by Warranty Deed dated April 20, 1921 and Recorded April 26, 1921, as Document 201389; thence West 435 feet on the South Line of said Former J. W. Aulson and Sons Corporation Property to said Easterly Right of Way of said Chicago and North Western Railway Company; running thence in a Southerly direction along said Easterly Right of Way Line to the point of beginning, in Lake County, Illinois.

All of the above property being referred to as the "OWNERS property".

WHEREAS HTRC is agreeable to such operation and maintenance upon the terms and conditions herein contained.

NOW, THEREFORE, in consideration of the covenants and conditions contained herein the parties hereto agree as follows:

ARTICLE ONE

GRANT OF RIGHT TO OPERATE

AND MAINTAIN THE OWNERS TRACKAGE

OWNERS hereby grant HTRC the right to operate its trains, locomotives, cars, and equipment with its crews over the OWNERS trackage for the purpose of providing rail service to shippers and receivers located on such lines and to transport shipments by rail over such lines, and to maintain the OWNERS trackage, and (ii) HTRC agrees to operate and maintain the OWNERS trackage. HTRC

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reserves the right to operate trains, locomotives, cars and equipment on an as-needed basis, using a leased locomotive or a substitute, using its own personnel. HTRC will perform all necessary freight car switching at the OWNWERS property and will operate all freight car loading and unloading facilities on those properties. HTRC is also granted the right to coordinate the conduct of railcar switching and movement of freight cars on the subject site.

ARTICLE TWO

TERM; TERMINATION

Section 2.01 Term. Subject to earlier termination as provided herein, the term of this Agreement shall be one year from the date of this Agreement shown above; provided, however, that this Agreement will be renewed automatically for additional one year periods unless, no later than 60 days before its expiration, either of the OWNERS or HTRC provides written notice to the other party of its intent not to renew this agreement.

OWNERS may terminate this Agreement upon ten (10) calendar days written notice if by any reason most of the circulating shares in HTRC with right to a vote are no longer property of OWNERS or its parent or affiliated companies, or if any shares in HTRC are owned, directly or indirectly, by a competitor of OWNERS.

Section 2.02 Termination for Default. Either party may terminate this Agreement by written notice if the other party fails to perform any obligation required of it hereunder and fails to remedy such default within thirty (30) days after receipt of written notice of such default.

Section 2.03 Termination for Bankruptcy, Etc. Either party may immediately terminate this Agreement by written notice if the other party enters into or is placed in bankruptcy or receivership or is nationalized, become insolvent, or makes an assignment for the benefit of its creditors.

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ARTICLE THREE

SCOPE OF OPERATIONS AND MAINTENANCE AND COMPENSATION THEREFORE

The scope of operations and maintenance and the agreed compensation therefore are contained in Exhibit B hereto. The parties may amend Exhibit B from time to time by executing an amended scope of operations and maintenance and compensation.

ARTICLE FOUR

GOVERNMENT APPROVAL, ETC.

HTRC at its own expense shall obtain any and all governmental approvals, authorizations, permits, licenses, and exemptions that may be required for its operation and maintenance of the OWNERS property and trackage, and for the direct operation of locomotives and switching operations thereon.

ARTICLE FIVE

INSURANCE

HTRC shall be required to obtain and keep in force a commercial general liability insurance policy covering HTRC operation and maintenance of the OWNERS property and trackage, including public liability, personal injury, property damage, and contractual liability with per occurrence and aggregate limits of not less than $2 million. OWNERS shall be named as an additional insured in such policy. Upon reasonable request, HTRC shall make such policy available for inspection and review by OWNERS.

ARTICLE SIX

MANAGEMENT AND OPERATIONS

HTRC shall comply with the provisions of the Federal Safety Appliance Act, as amended, and all other federal, state, and local laws, regulations and rules respecting (i) the operations and maintenance of the OWNERS property and trackage, (ii) the operation, condition, inspection and safety

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of HTRC's trains, locomotives, cars, and equipment where such trains, locomotives, cars and equipment are being operated over the OWNERS property and trackage. HTRC shall indemnify, protect, defend, and save harmless OWNERS and its officers, agents and employees from and against all fines, penalties and liabilities imposed upon HTRC or its officers, agents and employees under such laws, rules and regulations by any public authority or court having jurisdiction in the premises, when attributable in any manner to the failure of HTRC to comply with its obligations under this article.

ARTICLE SEVEN

LIABILTIY AND INDEMNITY

Whenever any loss of, damage to, or destruction of any property whatsoever, or injury or death of any person or persons whomsoever occurs with the trains, locomotives, cars, or equipment of, or on account of HTRC, HTRC shall assume all liability therefore, and shall forever protect, defend, indemnify and save harmless OWNERS and its officers, agents and employees from and against any such liability, cost and expense, except if such loss, damage, injury or death was caused by HTRC.

ARTICLE EIGHT

ENVIRONMENTAL CONDITIONS

OWNERS shall indemnify HTRC for any and all Losses resulting from environmental conditions existing on the OWNERS property and trackage as of the commencement of operations by HTRC. HTRC shall indemnify OWNERS for any and all losses resulting from environmental conditions occurring or arising on the OWNERS property and trackage during the term of this Agreement except to the extent caused by the act or omission of OWNERS.

ARTICLE NINE

THIRD PARTY CLAIMS RELATING TO OWNERSHIP OPERATION

HTRC shall not cause any lien, claim, or encumbrance to be placed against the OWNERS property or trackage. If any such lien, claim or encumbrance shall be filed or placed against the

C0519

OWNERS property or trackage or any part thereof, HTRC agrees to discharge the same within 30 days after HTRC has notice thereof. If HTRC fails to do so, OWNERS shall have the right (but not the obligation) to pay or discharge any such liens, claims or encumbrances without inquiry as to their validity and any amount so paid, including interest, fees, charges, and expenses, shall be paid by HTRC to OWNERS, as applicable.

ARTICLE TEN

FINANCIAL STATEMENTS

If OWNERS shall so request, HTRC shall be required on a quarterly basis to provide statements reflecting its financial condition, such as a balance sheet and profit-loss statement.

ARTICLE ELEVEN

CONFIDENTIALITY

HTRC will keep secret and confidential at all times and will not disclose, divulge, or communicate any confidential or proprietary information provided by OWNERS hereunder, in any manner, directly or indirectly, to any third party, except as permitted by this Agreement, and except where that information:

(a) Is or later become publicly known under circumstances involving no breach of this Agreement by HTRC;

(b) Was already known to HTRC at the time it was received from OWNERS, not under an obligation of confidentiality, as evidenced by written documents in the possession of HTRC; or .

(c) Is made available to HTRC by a third party without secrecy obligations and without breach of an obligation to OWNERS.

C0520

HTRC may disclose confidential information only to those of its directors, officers, and employees who legitimately require it for the purposes permitted by this Agreement, and will use its best efforts to prevent any unauthorized disclosure by them.

Notwithstanding the termination of this Agreement, the obligations of HTRC under this Section 11 shall continue in force for ten (10) years after termination.

ARTICLE TWELVE

REAL PROPERTY TAXATION

HTRC agrees to file Illinois Department of Revenue Railroad Property Tax Forms (including but not limited to Illinois Department of Revenue forms, PTAX500 through 513 and 520A through 523, and 537) listing the OWNERS property as "railroad operating property" as defined in the applicable Illinois statues. HTRC shall pay the resulting property taxes or immediately fully reimburse OWNERS if OWNERS pay such taxes.

ARTICLE THIRTEEN

AMENDMENTS

This Agreement represents the entire understanding between the parties and supersedes and replaces any and all prior agreements between the parties relating to the subject matter hereof. This Agreement may not be amended except by a written instrument signed on behalf of each party by its authorized representatives.

ARTICLE FOURTEEN

ASSIGNMENT

Neither party may assign this Agreement without the prior written consent of the other, except that OWNERS may assign this Agreement to any entity which succeeds, by sale, merger, acquisition, transfer, or otherwise, to all or substantially all of its assets or business at OWNERS Facility.

C0521

ARTICLE FIFTEEN

MISCELLANEOUS

Section 15.01 Any notices, requests, or other communications hereunder shall be in writing and shall be deemed to have been duly given when made upon a party by personal service at any place where they may be found or by mailing such notices, requests, or communications by certified mail, postage prepaid and return receipt requested, or by nationally recognized courier, or by transmitting such notice by facsimile , in each case to the following addresses or facsimile numbers as the case may be:

(a) If to OWNERS: John W. Quinn
Churchill, Quinn, Richtman and Hamilton, Ltd.
2 South Whitney Street
Grayslake, Illinois 60030

(b) If to HTRC: John P. Dahl
360 Lake Street
Antioch, Illinois 60002

Either party may provide changes in the above addresses to the other party by a notice given to the other party in this Section 15.01.

Section 15.02 Governing Law. This Agreement shall be construed and enforced in accordance with the laws of the State of Illinois.

Section 15.03 Severability. If any provision in this Agreement shall for any reason be determined to be invalid or unenforceable, the balance of such provision and the remaining provisions of this Agreement shall nevertheless continue to be valid and enforceable as though the invalid or unenforceable provision had not been a part hereof.

Section 15.04 Titles. The title of the sections and subsections of this Agreement are for convenience of reference only and are not to be considered in construing this Agreement.

IN WITNESS WHEREOF, this Agreement has been executed by the parties hereon on the day and year first above written.

C0522

2nd & Main, LLC

By: _____
Authorized Representative

Lumberyard Storage, LLC

By: _____
Authorized Representative

Hussey Terminal Railroad Company

By: _____
Authorized Representative

C0523

Plat of Parcel & Easement acquired by Deed #81334 on April 7, 1916 in Book 2211 of Mortgages, page 449.

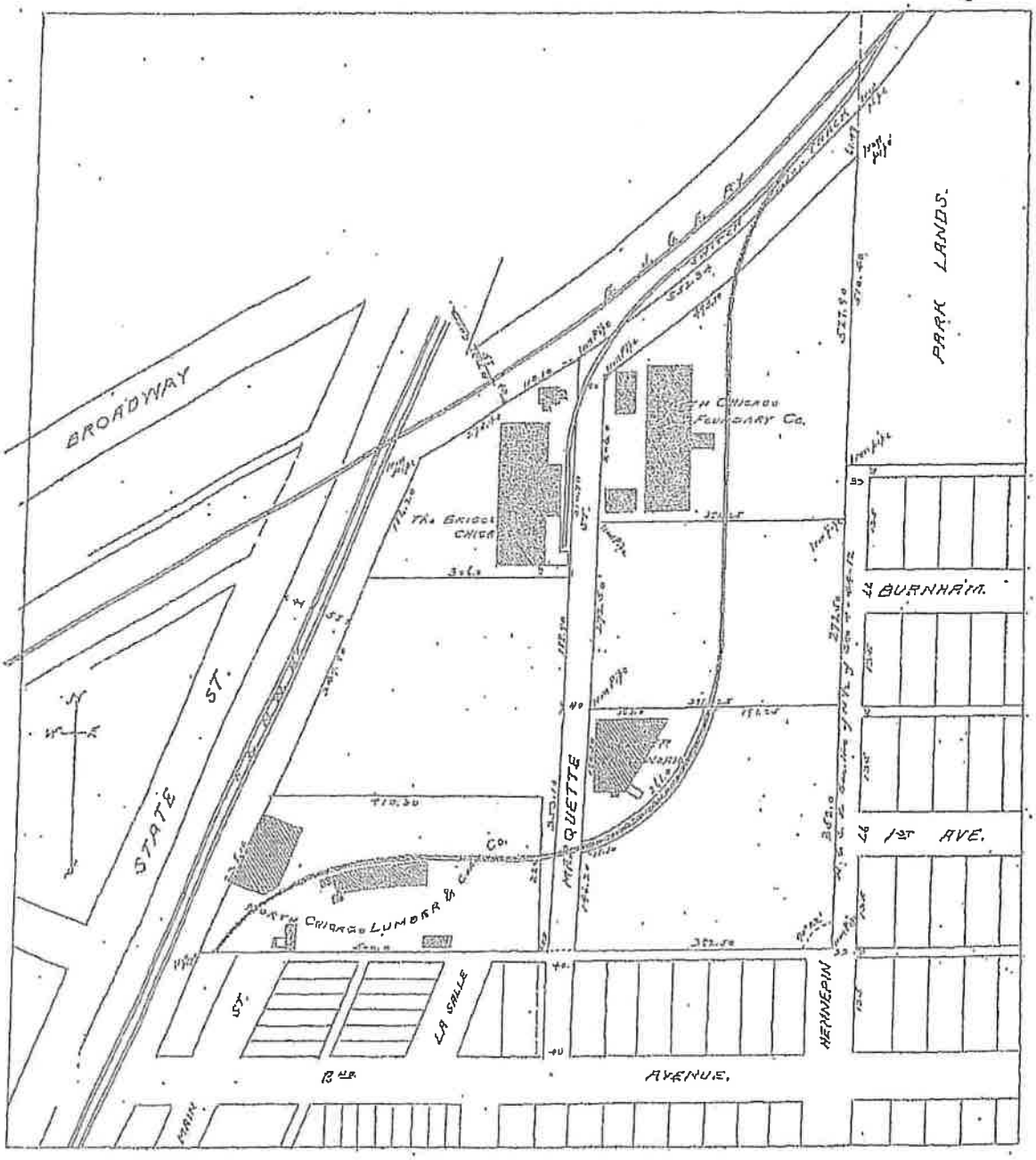
EXHIBIT "A"

PLAT

Of that part of the N½ of the NW¼ of Sec. 4 T. 44 N. R. 12 E of 3rd P.M. lying South of the E. J. & E. Ry. & East of the C. & N.W. Ry.

NORTH CHICAGO, ILL.

Scale 100 feet per inch Oct 1916 R. H. Smith, C.E.



C0524

Re: Westrocks Illinois Law firm and the agreement.

phil dahl

Tue 8/8/2017 9:58 AM

To:John W. Quinn <JQuinn@grayslakelaw.com>; Theresa Dahl <jpdahl1@yahoo.com>;

Ist year base rent of $2,800 per month to each owner

+ 25% of any incidental revenue parcel specific to each owner

Note we are all ready paying the real estate taxes and insuring the property.

Sent from Outlook

C0525

NORTH CHICAGO TERMINAL LEASE ADJUSTMENT

phil dahl

Sat 9/8/2018 11:19 AM

To:phil dahl <philipndahl@msn.com>; John W. Quinn <jquinn@grayslakelaw.com>; Theresa Dahl <jpdahl1@yahoo.com>;

Base lease to be $1000 per month to each owner

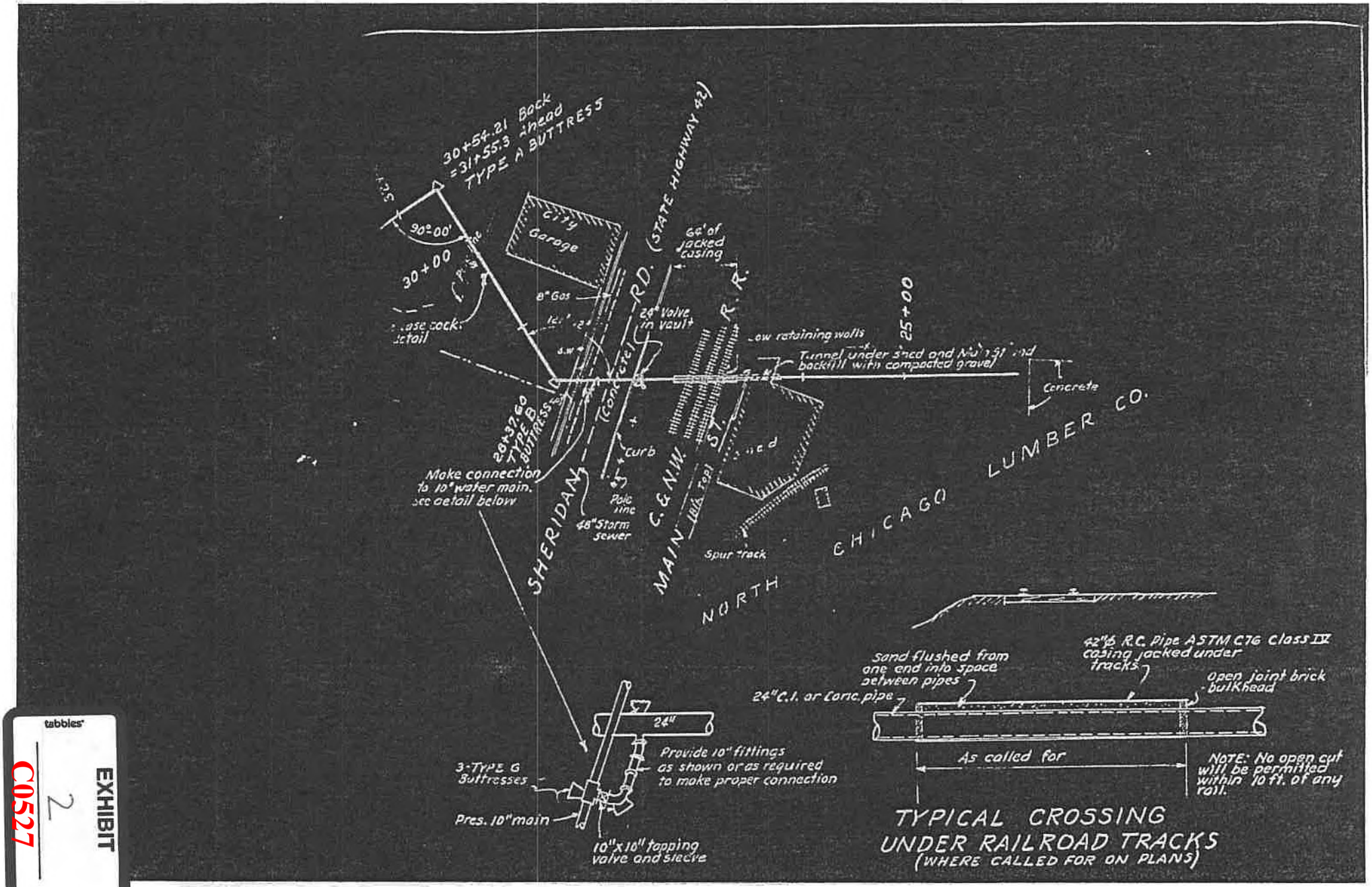
+ 7.5% of all transportation revenues received by HTRC to each owner

+ 25 % of any incidental revenue parcel specific to each owner

Starting 8-10-18

AGREED TO BY 2ND & MAIN LLC, LUMBERYARD STORAGE LLC AND HUSSEY TERMINAL RAILROAD COMPANY

Sent from Outlook



tabbies

EXHIBIT

2

C0527

STATE OF ILLINOIS)
) SS:
COUNTY OF L A K E)

IN THE CIRCUIT COURT FOR THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

2nd & MAIN, LLC, Plaintiff,	)	
vs.	)	No. 17 MR 1149
THE CITY OF NORTH CHICAGO, Defendant.	)	

The deposition of FRANK FURLAN, called by the Plaintiff, for examination, pursuant to notice, and pursuant to the provisions of the Illinois Code of Civil Procedure and the Rules of the Supreme Court pertaining to the taking of depositions for the purpose of **discovery**, taken before JENNIFER E. GARCIA, CSR, at 2 South Whitney Street, Grayslake, IL, on the 14th day of February, 2019, at the hour of 2:00 p.m.

EXHIBIT 3

A P P E A R A N C E S:

CHURCHILL, QUINN, RICHTMAN & HAMILTON, LTD.
2 South Whitney Street
Grayslake, IL 60030
847-223-1500
Jquinn@grayslakelaw.com
BY: MR. JOHN W. QUINN

Appeared on behalf of the Plaintiff.

ANCEL GLINK
140 S. Dearborn Street
Chicago, IL 60603
312-782-7606
Mdicianni@ancelglink.com
BY: MR. MATTHEW T. DICIANNI

Appeared on behalf of the Defendant.

ALSO PRESENT: Mr. Phil Dahl

* * * * *

I N D E X

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(Witness sworn.)

MR. QUINN: Let the record reflect that this is the discovery deposition of Frank Furlan, taken pursuant to notice and subject to the rules of the Nineteenth Judicial Circuit, the Illinois Code of Civil Procedure, and the Rules of the Illinois Supreme Court.

Frank, I am John Quinn, and I am representing 2nd & Main in this case. So you have had your deposition taken before, I assume?

THE WITNESS: Yes, I have.

MR. QUINN: So you know you have to answer out loud. And if you don't understand one of my questions, let me know and I will rephrase it so it's clearer.

THE WITNESS: I understand.

F R A N K F U R L A N,

called as a witness herein, having been first duly sworn, was examined and testified as follows, to-wit:

E X A M I N A T I O N

by Mr. Quinn:

Q. Okay. Would you state your name for the record?

A. Frank J. Furlan.

C0531

Q. And, Frank, what's your occupation?

A. Civil engineer and land surveyor.

Q. And can you tell me where you went to school and got your engineering degree?

A. Yes, I went to the University of Illinois, and then I went to the Chicago Technical College.

Q. Okay. What's the Chicago Technical College now?

A. It's a building down there on 20th and Michigan. I don't know what it is. It's not in existence anymore.

Q. Oh, it's not in existence anymore. I wondered if turned into IIT or something like that.

A. No, actually aside of that, it was they were both nonaccredited colleges when we went there, when I went there from '47 on, and then finally IIT became accredited, and because the Chicago Technical College didn't have a library onsite, they accredited IIT but not Chicago Technical. They were both using the John Carrara Library downtown.

Q. So I'm going to show you what we're going to mark as Deposition Exhibit No. 1, which is the notice of -- you know what, it's already marked here. Guess what, my secretary marked it, so we're just going to

use that one.

(Exhibit No. 1 marked for I.D., 02/14/2019.)

BY MR. QUINN:

Q. And that was the Notice of Deposition that went with the subpoena, and it asked you to bring some documents, and I see you brought some stuff with you today.

A. Yes, I did.

Q. Can you tell me what you brought?

A. Yes, I brought the original file folder from 1960 where we did the easements for the sanitary sewer and water main for the City of North Chicago. They were putting in a 24-inch water main, and they were putting in an also 24-inch sanitary sewer.

Q. Okay. Can I just take a look at that for a minute?

A. Certainly.

Q. Gee, where did you keep this stuff, Frank?

A. I kept them in my file cabinets. We had a fire, and that's why if you look at the outside of the cover, it's kind of singed around the corners.

Q. Old onionskin paper here.

A. We had to go up to the courthouse and trace

off different subdivisions and that on onionskin because there was no way of reproducing it.

Q. Those were the good old days.

A. Right.

Q. Okay. Well, let me, and you have got --

A. I brought a roll that was prepared originally by Alvord, Burdick & Howson who were the engineers for the City of North Chicago for this particular project for the sanitary sewer and water. This is a copy of their drawings that show the alignment of the water main.

MR. DAHL: Okay, we're up here.

THE WITNESS: Uh-huh, that is correct, and then that goes across the street.

MR. DAHL: Is that the depth?

THE WITNESS: Yes.

MR. QUINN: The depth is shown, what page is this?

THE WITNESS: That's on all the pages. The profile is shown on all the pages.

(Discussion had off the record.)

MR. QUINN: Why don't we, we're going come back to these surveys here, but there is a couple

things I want to find out first.

THE WITNESS: Sure.

MR. QUINN: So we're going to actually renumber these. We're going to make this No. 2.

(Exhibit No. 2 marked for I.D., 02/14/2019.)

BY MR. QUINN:

Q. What I am going to show you is a few surveys here, Frank, in pictures because what I am going to try to do as we start out here is figure out what lines are out on the property and what they are made of.

So I have marked this as Exhibit No. 2, this plat of survey. That's a survey you did in 1961, correct?

A. Correct.

Q. Now, does that show the water main that runs across the we'll call it the North Chicago Lumber property?

A. Yes, it does. It shows the route of the water main.

Q. At the time you did this in 1961, were you the City Engineer for North Chicago?

A. I was.

Q. And was there a line already there, or was

this brand new line?

A. This was brand new line.

Q. Okay. The whole way across the property?

A. Yes.

Q. Was there an existing line there before it?

A. No.

MR. QUINN: Okay, all right, okay. Now let's mark this as, okay, let's mark this as Exhibit No. 3.

(Exhibit No. 3 marked for I.D., 02/14/2019.)

MR. QUINN: Bear with me for one second because I am going to go get a marking pen.

(Brief recess.)

BY MR. QUINN:

Q. It's a little hard to see maybe, Frank, but what I have marked as Exhibit No. 3 here is one of the maps that we've come across in the course of the discovery and everything on this case. Have you seen this before?

A. Yes.

Q. Can you tell me what it is?

A. Yes, this was a second route that that water main was going to follow. When the Navy didn't allow

us to go straight down 2nd Avenue, this is the second location of where the water main was going to go. Goes up Marquette and goes on about the same alignment along the north property line of the lumber company. Then it comes south-southwesterly along the barns that were in there. Then it was going to cross at right angles to the railroad tracks to go up across the Chicago Northwestern and the Chicago Northern Milwaukee and across the City Yard.

Q. Okay. I am going to take that back from you and mark it with an orange to see if I have gotten the route.

I have just marked that in orange. Is that the route it was going to take?

A. That was one of the routes they were talking about, yes.

Q. Okay. Did that actually get installed there?

A. No.

Q. Okay. And let me show you one other thing that we also got in discovery.

MR. QUINN: And let's mark this as, what are we up to now, 4.

(Exhibit No. 4 marked for I.D., 02/14/2019.)

BY MR. QUINN:

Q. Now, the City of North Chicago is, I think they have been having an assessment or mapping done of their water lines, and so this is one of the documents, it's from one of the documents that was turned over to me regarding Dearborn & Companies, and when I looked at this, it appears to show the water line running in the area that is marked in orange on Exhibit 3 here.

A. That's about what it shows here, yes.

Q. Is that wrong?

A. Yes.

Q. Okay. Do you know why they might have put that in their assessment?

A. Yes, because they probably copied this off of the maps that were shown on those set of drawings previously, you know, that one you showed me there.

Q. This one?

A. Yeah. This was, this was the second route that we were -- the water main was going to come in. The first route was going to come from along the Navy all the way down 2nd Avenue until they got to the Northwestern tracks. Then it was going to cross the

Northwestern tracks and go down -- if I may?

Q. Oh yeah, no, we want to find out what's actually happened here, Frank, so whatever you need to refer to.

A. Showing you a Township map showing you 2nd Avenue is right here, isn't it?

Q. Is 2nd Avenue used to be Nimitz or is? 2nd Avenue, yeah, right there.

A. Right.

The water main comes up to Foss Park and comes into what is Hennepin Avenue here. Then it was going to come straight down 2nd Avenue all the way to the Northwestern tracks. Then it was going to cross -- yeah, Northwestern tracks. Then it was going to cross and come down this alley here between these two, down this city street.

The Navy at the time had control of all of this property all the way down through here and down through here. They said, no, we don't want you coming into our 2nd Avenue at the Navy gate, and we don't want you coming down Nimitz Avenue. Find yourself another route. We'll give you access to this building that was here was a warehouse building. They had us come north along the east side of the warehouse building, then

come west along the north side of the warehouse building to Marquette Avenue, then go north on Marquette Avenue and then along the northerly line of the lumber company, and then from the lumber company they came down parallel to the buildings that were there and back to basically 2nd Avenue, then across the street they had before, like basically like that's showing there. See here's the -- if I may?

Q. Sure.

A. On this drawing here, here's 2nd Avenue.

Q. We're looking at Exhibit 4 here.

A. Here's where the warehouse building was for the Navy. There was a gate here, and this property, this property here was all under the control of the Navy.

Q. Even the 2nd & Main property -- I'm sorry. Even the North Chicago Lumber Company?

A. No, not, that was the dividing line. The south line of North Chicago Lumber was the north line of the Navy property.

Q. Okay.

A. And the Navy said, no, we don't want you disturbing our gate here, our gatehouse, and we don't want you disturbing 2nd Avenue, so they said we'll give

you an easement to go north along this building and then out westerly to about where the lumber company was, and the lumber company was at the north end here, and they came down along the north line. Then they dropped down to the south, and then across the tracks at the south end of theirs buildings. That was the second route that they proposed.

Q. Okay. That was a route that they proposed, not the route that got put in?

A. Right.

Q. Okay.

A. Then, if I may?

Q. Sure.

A. The reason this route was changed Ollie Savel, who was manager of the lumber company, called me up and said, Frank, he said, can we do something different than putting this in? This is going to screw up our operation of the lumberyard because we had tracks in there, and they said, is there some other way we can go? I said, well, we can talk to the engineers Alvord, Burdick & Howson about coming straight across the railroad tracks and into the public works yard of the City and then going on from there. And that's how we arrived at that other location.

The biggest problem we had is that usually crossing the railroad you have to cross at 90 degrees, so Alvord, Burdick & Howson went back to the railroad and said, can we come straight across at a little bit of a skewed angle to your tracks? The railroad said, yeah, that's all right, we'll go along with that, so that eliminated all these bends in here and brought it straight across.

Now, that's a 24-inch concrete cylinder pipe. The individual joints on a concrete cylinder pipe had very little deflection, less than one degree of deflection. Any time you made a change in direction you had to buy a fitting to whatever your directional change was. By doing it straight across, we eliminated one, two, three, about four fittings in there and made it actually a nicer operation for that water main.

Q. So this was constructed in like 1960?

A. 1961, yeah.

Q. Do you have any idea why there wasn't actually an easement obtained from North Chicago Lumber?

A. No, I don't, because we prepared the drawing, and then I turned it over to Michael Pusen (phonetic) who was the City Attorney, and he was

supposed to get the easement from the lumber company --

Q. Okay.

A. -- under that new alignment going straight through and across, and that was going to put it underneath their sheds. Ollie said he had no problem with that as long as it went underneath the shed.

Q. Now, is this water line, does this come from the water treatment plant?

A. Yes, it came all the way from the treatment plant, it came across Foss Park, and then entered the Navy property at Hennepin Avenue.

Q. Where did they get the water from before this line was constructed?

A. There was a 12-inch line. There is a water tower that was in this area here. There is a 12-inch line that came right straight across someplace, I think, yeah, it's right down where this street is here.

Q. And was that 3rd Avenue?

A. Yeah. And that tower is right in this location here on an easement that was granted from the Navy back in 1918 or someplace back along in there. Anyhow, that's where the water tower was for the City. The 12-inch comes right across and goes to the back end of the alley here and runs down the alley.

Q. So this 24-inch, this new one was to replace or augment?

A. Augment it, yes.

Q. Got you. Okay.

Hang on for a minute now because I am completely out of my order what I was going to do.

A. Sure. I'm sorry.

Q. No, no, no. Actually, we're trying to figure out where everything is and what happened, so.

A. I am really surprised at that. I hadn't seen that one before. This is something new.

Q. That surprised us too, so it's caused a little bit of confusion here.

MR. QUINN: Now, so let me just see what I have already, what we've already used. We're up to 4, right? We have 4. Let's mark this as No. 5.

(Exhibit No. 5 marked for I.D., 02/14/2019.)

BY MR. QUINN:

Q. Now, Frank, this is another document that was given to my client by Josh Wheeler from North Chicago. Did you know Josh?

A. Yes, I know who he is.

Q. Okay. And on this drawing, it shows I think

the line that we've been talking about, and the word transite is written on it with an exclamation point; do you see that?

A. Uh-huh.

Q. Do you know what transite is?

A. Yes.

Q. What is it?

A. Cement asbestos. It's made by Johns Manville.

Q. Okay.

A. And that's not the pipe that was put in.

Q. Okay. What pipe was put in?

A. Concrete cylinder pipe.

Q. Okay. And what is concrete cylinder pipe?

A. Is a reinforced concrete pipe that has a steel cylinder built right into the wall, and that's manufactured by American Concrete Association or whatever it is. It's a different type of water main than transite.

Q. Okay. Do you have any idea why somebody would have written transite on this map?

A. Yeah, because it looks like from the outside, it looks like it could be transite.

Now, I don't know how Josh got this

information, but it was never a transite pipe.

Q. And were you there when it was installed?

A. I saw it, yes, sir. In fact, I also had to make an tap for the refiners and smelters later on for a water tap, and in order to tap it, they had to tap the pipe, and it was a concrete cylinder pipe.

Q. Who did you say did the tap?

A. The tap was done by William Sprig (phonetic), JR Meyers & Company. And that was maybe at least 15 years after the pipe was installed, or maybe later than that. That's why I am saying I knew what pipe was put in.

Q. Okay. And do you have -- is anything in the documents that you have there that are all spread out, the surveys or anything, that have the specifications or show, any documents that show what the pipe is made out of?

A. Let me take look at that.

It wouldn't show on our easements. This section here, does it say something here about --

Q. We're looking at the Alvord, Burdick --

A. Howson drawing.

Q. Yeah, I think the very first page.

A. Right. And on this section here, I think it

says something here about either concrete or cast iron, doesn't it?

Q. Why don't we turn it over so you are not reading upside down, and I will come around to you.

A. That's all right. I can find it real quick here.

Right here's the note: Cast iron or concrete pipe.

MR. QUINN: Okay. Matt, I am going to ask you, both of you this. Is there a way that you could give these to the North Chicago City Attorney and have them copied so we have a set?

MR. DICIANNI: Yeah, sure, I am sure we can do that.

MR. QUINN: Just send us a copy at my expense, but I want to get a copy I think that's full size so I can see it.

MR. DICIANNI: Yeah.

BY MR. QUINN:

Q. And what I am looking at here says, typical crossing under railroad tracks where called for on the plans. Do you use the same pipe everywhere, or is there a difference what you do under the railroad tracks?

A. No, the pipe is the same, but you put a carrier pipe in. In other words, you put the outside diameter is a carrier pipe, and then you slide the concrete pipe in this case through the carrier pipe. The railroad has a specification that any crossing has to be put in a steel shell pipe of certain thickness, I think 3/8 inch or something like that, and then you put your water main inside that pipe, and then you fill it full of sand to carry the load.

Q. Okay. So you have the pipe that is going everywhere else; then you get to the railroad track and you have this?

A. You have the casing.

Q. And you have the casing, and then you put sand in the casing?

A. You put the pipe in, the concrete water pipe that you use, you put it in, you have to on rollers, and then you fill it full of sand.

Q. Oh, okay. And why did they do that, the railroad?

A. Well, the railroad, it doesn't put the load of the railroad tracks on the water pipe. It puts it on the outside casing that supports the railroad tracks above it.

Q. There were some as-builts that were in this report I just showed you which are difficult to read, and I am just looking to see if they look like they are the same.

A. Let me take a quick --

Q. Sure.

MR. QUINN: That's from the booklet, but I blew them up a little bit bigger so you could see them kind of.

MR. DICIANNI: Okay.

BY THE WITNESS:

A. Yeah, this is Sheet 2. Yep.

BY MR. QUINN:

Q. Oh, okay. Well, you know what's odd about this to me, Frank, is they have got this sheet attached to their reports, but they end up with the drawing that shows it going south.

A. The other way. That's what I am saying that I remember saying the augering pit at this location when they were augering underneath the tracks for their casing pipe, that's where they put the water main.

Q. So there is no, in your opinion, there is no chance that there is two mains or two water lines?

A. No, no, no.

Q. If I can go back to Exhibit No. 1, the very -- or 2, No. 2 which is your survey.

A. Yes.

Q. That survey doesn't show any buildings on it.

A. No, it does not.

Q. Can you tell me why not?

A. No, just rather than confuse the issue, they asked us for a location of survey.

MR. QUINN: Okay. Well, let me show you -- what are we up to to now, 6?

(Exhibit No. 6 marked for I.D., 02/14/2019.)

BY MR. QUINN:

Q. This is a portion of a survey that was done for my client before he or as part of his purchase of the property. And it shows the 24-inch water main. You see that there, Frank?

A. Uh-huh.

Q. You know what I was wondering about is, were these buildings there before they put the water main in?

A. No.

Q. Okay.

A. The only building that was there before the water main was put in was --

Q. Here, why don't you just mark it for me.

A. This shed didn't come all the way up here, this way here. This was open. There was a shed here about like this, and then there was a little shed in this corner down here. And I think that does show someplace on --

Q. I will pull it back out.

A. Hang on here. I think it shows on that set there, please.

Yeah.

Q. Oh.

A. Here's the shed, and here's the tracks here, and there were two sets of tracks here, and that's why instead of coming down or following the shed, Ollie said take it straight across.

Q. And Ollie is?

A. It was Ollie Savel. He was the manager of the North Chicago Lumberyard at that time.

Q. And that shed is shown on the Page 1 of the Alvord, Burdick & Howson document here.

So then for whatever reason, North Chicago Lumber later built buildings on top of the

water main?

A. Yeah, yes.

MR. QUINN: Let's take a break for a couple minutes. I want to talk to Phil, if we can.

MR. DICIANNI: Okay.

MR. QUINN: The deposition has gone a little bit different than I thought it was, lot more information.

THE WITNESS: Okay.

(Brief recess.)

BY MR. QUINN:

Q. Okay. There is just a couple of more things I want to go over. Let me see if I can find the map that we started with here. Maybe it's Exhibit 2 -- Exhibit 3. That's the one with --

A. This one here.

Q. Yeah, with the line.

I will tell you what I didn't understand about this is down in the lower corner of this, there are dates in boxes. There is an April 3, 1944, looks like a January something, 1948?

A. I see them, yeah.

Q. In this line that's shown on here, this would have been for a route that was much later than

those dates.

A. Yes.

Q. So --

A. What are these dates?

Q. I don't know what those dates are.

A. Those are copies of tax plats. This was taken off a tax plat. This was a part of the tax plat.

Q. I see. We used to call them sidwells.

A. No, sidwells were the box -- these are actually, these are the tax plats that were at the Recorder's Office. We got these from the map department. When we were doing our survey work, we'd get copies of tax plats. And that was the piece of tax plat that somebody had applied that alignment on there.

Q. So this is a -- this would be a track map then?

A. Yeah, yes, sir.

Q. Okay. And that's why there would be this notation in the upper right that says taxing County Town Road and bridge and stuff like that?

A. Yes, sir.

Q. Okay. All right. Then can we look at these? These are as-builts that you brought?

A. Those are the drawings that we had of the

alignment.

Q. You know what I want to try to find out is how deep that 24-inch water main is on my client's property.

A. The best I can tell you, it looks like your client's property is here. Looks like it's about 650 -- about 655.

Q. 655 is the?

A. Is the elevation of the ground. And then, see, here's a shed, there is a shed, and the water main is down at about, that looks like the top is about 645.

Q. So where was the ground?

A. 655.

Q. So it's ten feet down?

A. About ten feet down, yes.

Q. Is that all the way across?

A. Yes, it's all the way across from where they started their auger pit which was underneath where the shed was and then underneath the railroad tracks, and then it went all the way across to the west side of Sheridan Road because they had to get underneath this storm sewer that was right in here, so they stayed down all the way across until they got to the west side of Sheridan Road, and then they came back up again to

about a five-foot depth.

Q. Okay. And that's shown on Page 1 here?

A. Page 1, yes.

Q. So a water main, is that like -- it's not like a sewer line where --

A. We don't have to follow a grade line because it's under pressure.

MR. QUINN: Let's go off the record for a second.

(Discussion had off the record.)

MR. QUINN: Let's go back on the record.

BY MR. QUINN:

Q. East of the shed, you go east of the shed.

A. Right.

Q. How deep is it, can you tell from these drawings?

A. It's supposed to be down about five feet.

Q. Five feet because --

A. If I may?

Q. Yeah, go ahead.

A. I know they were asking me how deep it was when they were digging for it out there, and they said they couldn't find it, and they said, well, they couldn't find it, and they couldn't dig any deeper than

their backhoe had, and it didn't go down 14 feet. Whatever they did, I couldn't tell you because I wasn't out there, but I do know they asked me about that.

Q. And by "they", who is that?

A. The City.

Q. The City, okay.

A. Yeah.

THE WITNESS: I think it was in relationship to I think last time, I believe, didn't you ask the City Water Department of how deep the water main was?

MR. QUINN: And for the record, Phil Dahl from 2nd and Main is here, and Frank just asked him a question.

Go ahead, Phil.

MR. DAHL: I asked, and they said it was deeper than they could reach.

THE WITNESS: But they couldn't reach 14 feet with the equipment they had. It's a backhoe on the back of their tractor, and they could reach just about nine or ten feet at the most.

MR. DAHL: Is that where --

MR. QUINN: Let's go off the record for a second here.

(Discussion had off the record.)

MR. QUINN: Let's go back on the record, and just let the record reflect that Phil Dahl may interject some things here, and then we'll be able to -- it will be easier to get everything out that we need to get out.

THE WITNESS: Sure. The question was how deep was the water main at the time it was put in. And my answer was that at the time, it was about five- to five-and-a-half foot of cover over the water main along the north line of the lumberyard.

Mr. Dahl said that they had dug out there, and if they would have been in the right location, they should have hit the water main at that five- to five-and-a-half-foot cover. They dug down about maybe nine or ten feet, and they couldn't find it, and the reason I say nine or ten is because that was the information that Josh Wheeler gave me. He said we can only dig down nine feet with the backhoe that we had.

MR. DAHL: Based on the elevation of the tracks that are currently on the property, would the property have been fairly level to the north, or did it drop off?

THE WITNESS: It was fairly level to the

north.

MR. DAHL: Okay, but -- All right.

THE WITNESS: Basically, there was no drop-off along the north property line.

MR. DAHL: Okay. And it would have been similar with the east Marquette Street; there was no drop-off where that pipe was put in?

THE WITNESS: That's correct.

MR. DAHL: Okay. So I would suggest that the elevation didn't change significantly.

THE WITNESS: That's very possible.

MR. DAHL: Okay. So the City must have looked in the wrong spot.

THE WITNESS: I think they did.

MR. QUINN: Okay. Well, I don't have any more. I can't add to anything that Phil said.

How about you, Matt?

MR. DICIANNI: Sure.

E X A M I N A T I O N

by Mr. Dicianni:

Q. Frank, I know you said that at the time the water main was put in there weren't the buildings on the property that are there now; is that correct?

A. That's correct.

Q. Do you know what buildings were on the property then?

A. Here, this shed, and there was nothing along the north line.

Q. And just for the record, the shed he's referring to is on --

A. Is on Page 1, yeah, on Page 1 of the drawing, it says shed and it shows the alignment going on the north end of the shed, and then if you look carefully, you can see that there is a little like extension of that shed which was a secondary shed, and that was the one that Ollie said was not worth very much.

Q. And those two sheds that were on the property at the time have been torn down?

A. I believe so, and I believe the surveys that we did subsequent to that, there was a surveyor that was Ed Peklay, he did a survey in 1999, and then we did another survey in 2010 that showed the buildings as they were at that particular time.

Here on Sheet 1, yeah, on Sheet 2 on the north end, there is no buildings shown along that north line. Coming off of Marquette Avenue here, there is no buildings shown on that north line. There wasn't

a building there.

Q. And you said that Ollie?

A. S-A-V-E-L.

Q. He decided to build the buildings over the water main?

A. Yes, afterwards, yes.

Q. And did he know that he was building buildings over the water main?

A. Certainly.

Q. Okay. Did Ollie Savel know that the water main was in existence?

A. Yes.

Q. Okay. And do you know how he would have known that?

A. He was the guy I talked to to change the route. He was out there when they were building it because he was there all the time.

Q. Do you have any idea how long Ollie Savel owned the property for?

A. No, I don't have an idea. I know it was for more than ten years.

Q. Okay. Do you know who owned the property after Ollie Savel?

A. As far as I knew, it was North Chicago

Lumber until such time as they sold it to you. The bank I know had a -- owned it. I think the bank foreclosed on the property, and we did the survey for the bank at the time in 19 -- in 2010.

Q. And do you know whether -- do you have any idea whether North Chicago Lumber was aware of the existence of that water main?

A. Yes, they were.

Q. How do you know that?

A. Because they seen it was put in at the time. Ollie was the owner or the manager, manager/owner I am not sure, and he was there for at least 25 years afterward.

Q. So Ollie Savel owned the property for 25 years?

A. At least, yeah.

Q. And he was aware of the water line the whole time?

A. Yes, he was.

Q. Do you know if he ever did anything to try to have the water line moved?

A. I don't know that information. It was never -- it never occurred at the time during the time I was the City Engineer for North Chicago, and that was from

1960 to 1989.

Q. Did you ever talk with anyone from Edward Hines Lumber Company?

A. No.

Q. Do you know if Edward Hines Lumber Company owned -- do you know anything about their ownership?

A. Yeah, I do. The reason I know about that is because I was on the bank board as a -- it was the NorStates Bank. It was Bank of Waukegan first, and then it was NorStates Bank.

Q. And you were on the bank board?

A. I was on the bank board for 42 years.

Q. Oh wow. What years were those?

A. 1974 through last year.

Q. Okay.

A. '76 to last year.

Q. Did you ever know a Mack Hines by chance?

A. No.

Q. Forgive me if I asked you this.

A. Sure.

Q. Do you have any idea whether Edward Hines Lumber Company knew about the water main?

A. I can't give you an answer. I don't know.

Q. Okay.

A. Wait a minute. If I may?

Q. Sure.

A. Let's see who we did the survey for.

They did because here's a survey that was done in 1999 by Peklay Surveying Company, and it was done for the Chicago Title Company and the Edward Hines Lumber Company, and it has that same note for the City of Waukegan -- or City of North Chicago water main.

Q. I see. Have we marked this as an exhibit?

MR. QUINN: I don't think so. You know what, though? That's attached to and we don't have to mark that. I will show you why here. Just a second.

That was attached to Frank's affidavit that he filed in this case. I think this is the same survey if you wanted to mark that.

MR. DICIANNI: Okay.

MR. QUINN: That would be what No. 7.

MR. DICIANNI: Okay, so let's mark this as Exhibit 7.

(Exhibit No. 7 marked for I.D., 02/14/2019.)

BY MR. DICIANNI:

Q. Frank, were you the one who prepared this

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survey which we've marked as Exhibit 7?

A. No, that was prepared by Peklay Surveying.

Q. Okay. And Peklay Surveying prepared this for Edward Hines Lumber Company?

A. Yes, here's the notation of who they prepared it for.

Q. So I want to just briefly go back to why there was never an easement recorded for this property. So to your knowledge, no easement was ever recorded for the water main that ran underneath the 2nd & Main property?

A. That's correct.

Q. And you said that you gave or you asked the City Attorney to do it?

A. I was instructed to prepare a survey for the easement. I prepared it, and then I turned it over to the City Attorney. He was the one that was to get all the easements for the entire line.

Q. Okay. So he must have just forgotten to get the easement or --

A. I can't tell you.

Q. Who knows.

A. Yeah, who knows.

Q. Or it never got recorded; that's the

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important part there.

A. It may have gotten lost in the shuffle because he did get easements for other parcels of property.

Q. So you said that you prepared a survey for that water main in 1961?

A. The easement.

Q. Yeah, for the easement.

A. Yes.

Q. In 1961 and then 2013 also?

A. 2010.

Q. 2010. And was there another year in between where they were prepared?

A. No, not me. The other one you are thinking about is Peklay survey in 1999.

Q. Okay. So just the survey in 1961 and the survey in 2010 were the only two you prepared?

A. Yes.

Q. And do you remember if there were any major changes between the surveys in 1961 and 2010?

A. Yes, there were because in 1961 all we did was prepare an easement drawing that had just a portion of the property. In 2010 we did a survey of the entire property including the strip that went down along the

railroad tracks.

Q. And there were new buildings on the property in 2010?

A. Yes.

Q. Do you happen to remember at all what buildings had been built in that interim period?

A. No, I can't tell you.

Q. Yeah, I am asking a lot there.

A. All I can say is that there were more buildings in 2010 than over there in '61.

Q. Do you know if the City ever dug up the water main over the years?

A. Not until they were looking for it. They never -- there was never any question about where that water main was for the 29 or 30 years that I was the City Engineer.

Q. Did you ever get the express permission of any of the property owners to operate the water main underneath their property?

A. Yes, we did from Ollie Savel.

Q. He gave you the express permission?

A. Yes. That's what I said. I did have a meeting with Ollie at the time we staked the second alignment that I was saying. The second alignment

being the one with the drop-down and around the buildings. When he saw that, when he saw a survey crew out there locating how it was going to go, that's when he called and said can we change this alignment, and that's when we had to go back to the railroad. I didn't have to go down, but the Zion Engineers Alvord, Burdick & Howson contacted the railroad to see if they would let us cross at, instead of at exactly a right angle, at a skewed angle so that the line was straight coming all the way across from the lumberyard all the way across the Northwestern Railroad Tracks and across the Sheridan Road.

Q. And throughout that whole time from 1961 to today, the water line has always had water; is that --

A. Yes.

Q. Have you ever been on the 2nd & Main property since you conducted the survey in 1961?

A. Oh, yes.

Q. Why did you go on the property?

A. I bought lumber there.

Q. Okay.

A. It was a lumberyard in North Chicago.

Q. Frank, I'd just like to go through some of these documents that you've brought here and just maybe

get you to comment on some of them. I'd like to look through them and just see if I have any questions here.

This is just a copy of what you brought before, right? This is the one that's titled Plat of Survey.

A. Yeah, but this is not the water main. There is easements here for the sanitary sewer here also because we had both. And if you look at the heading, it says an easement for and it's the maintenance of sanitary sewer. The other one says water main.

Q. Okay. So this one, I see, this one that says plat of survey of, and then a 25-foot easement for the construction and maintenance of a sanitary sewer?

A. Right.

Q. This shows the sanitary sewer and not the water main?

A. Right.

Q. Okay. And then this one too, it says plat of survey, a 22.5-foot easement for the construction and maintenance?

A. Sanitary and the water main. This was at the far west end. This was out by Dugdale Road and 20th Street. That's the farther west end before it goes across Green Bay Road.

Q. Okay.

A. And they were both in one easement there.

Q. Okay. Do you have any idea what this handwritten note is here?

A. Yeah, this is the quitclaim from the railroad to North Chicago. It describes a piece of property of Lots 1, 2, 3, and 4, and it probably could be the -- I assume that it's just a piece of property from one piece of property to the other, but I copied this probably from something at the Recorder's Office.

Q. Okay. Do you have any idea what these documents are?

A. Yeah, these are the handwritten legal descriptions for the sanitary sewer. These are handwritten legal descriptions for the sanitary sewer on this particular sheet.

Q. Okay. And these are the yellow pieces of paper and it's like graph paper?

A. Yes, and if you look, it also says, this one here says, a water main 12-and-a-half feet on either side at 25-foot easement, so they were handwritten products of the surveyors, probably myself. I didn't write these because this isn't my handwriting, but it was probably somebody in my office, one of the fellows

that was working on it for me.

Q. Are you still operating your office?

A. No, I closed up in June of 2014.

Q. Okay.

A. They tore the bank building down, tore my office out. At that point I decided that was enough.

Q. Do you know what this is on the onionskin paper?

A. Sure. This is a copy of the record plat showing Lots 1 through 4, and it would be part of Section 44412. It's part of a copy of a record plat of subdivision.

Q. Okay. Any idea what this table of numbers is here?

A. Yeah, this is staking -- showing the different cuts in Phil's wherever this was at. This was at the corner of 16 and Jackson, which is not on this site, but it's actually out there in the field showing elevations and telling how far down to put their whatever it was, sanitary or water main. In other words, when a survey crew goes out, they set wood hubs, and then they mark on the hubs what the depth has to be below the surface of the ground.

Q. Is this a title commitment for the property

there?

A. Uh-huh, could be. Let's see what it was. Here, see, it was Michael Pusen, the attorney. Anderson & White. Yeah, let's see what we have.

This is way out west. It's the north 33 feet of Lot D in South Waukegan. And it's a Ken Glick was the manager at the time of this document.

MR. QUINN: See, that's a name that doesn't mean anything to you, but it means everything to me. See, when I started, attorneys when they went into private practice usually came from either the State's Attorney's Office or the title company. And so I came from the title company, and Ken Glick came from Chicago Title too, so that's. Now that's not true anymore, but that was almost universally true, came from one place or the other.

MR. DICIANNI: Wow.

BY MR. DICIANNI:

Q. Oh, Michael Pusen, is he still alive?

A. No.

Q. No.

MR. QUINN: Ken Glick is. Ken Glick is still practicing, kind of, I don't know. I think he shows up at the office; I don't know how much he does.

I have seen him there.

THE WITNESS: I did a couple surveys for him just before I finished up in 2014. I seen Ken.

BY MR. DICIANNI:

Q. So this is the letter titled Elgin, Joliet, and Eastern Railway Company.

A. Right.

Q. And you were in talks with them about where to lay the water main?

A. Let me take a look at this real quick.

Yeah, this was a letter back from the railroad to Dean Snarsky who was the Assistant City Attorney saying that the alignment was all right. They had some comments about the angle and so forth and that, but that was the location for this water main.

Q. And then this here, this is another letter from the City Attorney to the railroad?

A. Yes.

Q. Go ahead.

A. This was letting them know where they wanted easements from the EJ & E.

Q. Were you ever in contact with the railroad company at all about where to lay the water pipe?

A. No. We were given the route based on what

the design engineers laid out.

Q. Before, we mentioned Ollie Savel. Were you -- have you ever met any of Ollie's kids before, like Fred Savel?

A. Yeah, yeah. What's Ollie's son's name? Ollie's son took over the operation of the lumber company after his father -- I wasn't sure after he passed or not, but he was there for a number of years before they sold it to Edward Hines.

Q. Okay. Fred, does that name ring a bell, Fred Savel?

A. No.

Q. Okay. He might have had a few different sons. I think one is Fred, but no.

Do you remember who the North Chicago Mayor was at the time you laid this water main?

A. Anton Macrowski.

Q. And then is this a picture of where the water main would run?

A. No, that whole series of pictures there are for the sanitary sewer.

Q. Okay.

A. And they were we shot and we had those shot because there was a lawsuit that was filed between the

contractors who was putting in the sanitary sewer and the City of North Chicago. The City went ahead and had the sanitary sewer laid out on the old Northshore and Milwaukee Railroad Tracks, the shoreline, and they had never contacted the railroad that they were going to get the easement from them. And low and behold, they started putting in this sanitary sewer and they got to the railroad and the railroad said, hey, where do you think you are going, you don't have any easements, and of course there was much discussion back and forth about that, but anyhow, the upshot of it was that the sanitary sewer, instead of going down the railroad tracks at that time, there was a unilateral change in direction to go straight down 16th Street, and that didn't happen because the contractor said, hey, that's not what I gave you a price on; we're not going to go that way, so.

Q. So the City has had some trouble for digging on properties without any easement before?

A. Well, they never got started digging because it got to the point where they were going to go in there, and then they decided. Then when they got the discussion with the contractor who was doing the sanitary sewer, the sanitary sewer that was being built

was started in a couple locations, and the sewer wasn't very good. In fact, I had taken -- at that point we had the equipment to televise the inside of the sanitary sewer, but all we could get from them at that point was Polaroid shots taken off of the TV screen.

I set up a motion picture camera in the trailer, and actually as the television camera was going through the sanitary sewer that was built, I was taking a motion picture film of the sewer. And that was part of the discussion we had when we were in court for the sanitary.

Q. And did you testify in that case?

A. Absolutely.

MR. QUINN: Some of the most fascinating film ever is the inside of the sewer line, if you have ever looked at it. I didn't have any idea that they filmed them until we had a big dispute with Conway Farms out there.

BY THE WITNESS:

A. At that point when I was doing this, all they would give you was a Polaroid. They didn't have the equipment to televise like they do now.

MR. QUINN: Oh yeah, yeah.

BY THE WITNESS:

A. Yeah, so that's why I set up my camera and used black-and-white 400-speed film to pick the information off the television screen.

MR. QUINN: There's nothing that a jury likes to see more than three or four hours of sewer film.

MR. DICIANNI: Sure, that's riveting stuff.

THE WITNESS: Yeah, it's so interesting.

BY MR. DICIANNI:

Q. And these papers, it looks like they are all about the sewer. So was the sewer line laid then at the same time as the water line?

A. Part of it.

Q. Okay.

A. But the part that was laid at the same time was torn out of the ground and redone, it was so bad.

Q. Any idea why it was torn out?

A. Sure. It was leaking. Instead of the line carrying sewage, it was carrying rain water. If you looked at the film, you could see that there was -- the way they built the sewer, at that point there was a different number of different joints that they had, and the joint that Alvord, Burdick & Howson had was a Jude

joint with a cement lining around the way cut. As the cameras was going through the sewer, you had joints that were offset at places where we couldn't get the camera through a 12-inch sewer, and there were places where the alignment for the sanitary was completely under water. They had broken grade so that the camera went completely under water on a 12-inch sewer. And at that point when we finally got done, there was a different contractor that was finally hired to put the E-sewer in after the lawsuit was settled, so the sanitary sewer, part of it was done at the same time the water main was put in, but the majority of it was finally done by a different contractor.

Q. During all your years in working with the property and in North Chicago, was the property always used as a lumberyard?

A. Yes.

Q. Do you know if that railroad next to it had ever -- or the rail spur that was on the property, do you know if that had ever been used?

A. Sure, yes, it was. There were two, there were two spurs on there. They went between the buildings that existed at the time. What they would do is they'd bring the rail cars in that had the lumber

in, then they'd shift the lumber to either side of the rail cars into the proper bins, and from the rail cars to the storage sheds for sale.

Q. You know, I just want to circle back to, I know you said earlier that Ollie Savel gave the City permission to use the water line. Did he ever -- did he tell you expressly that the City could put that water line in there, or do you know if he told anyone?

A. Yes, he did because they put the water line in.

Q. And the City wouldn't have done that had he not given them permission?

A. That's correct. We would have had no access to it if he hadn't given us permission.

Q. And you don't know if any of the other property owners gave the City permission to use the property -- I'm sorry -- to operate the water main, do you?

A. To operate it, no, they wouldn't operate it. They can install it on their property.

Q. Okay. But the subsequent property owners, they never objected?

A. Oh, you mean at the lumberyard?

Q. Yeah.

A. Not that I know of, no.

Q. Okay.

MR. DICIANNI: All right. Frank, I think that's all I have.

John, do you have anything else?

MR. QUINN: I have no more.

MR. DICIANNI: Okay.

MR. QUINN: Signature? Do you want to reserve or -- I am going to have it written up. I don't know if you want to read it or not.

THE WITNESS: No.

MR. QUINN: Okay, he waives signature.

COURT REPORTER: All right, why don't I do this on the record. Do you want to order?

MR. QUINN: Order, yes.

COURT REPORTER: Copy?

MR. DICIANNI: Sure.

(AND FURTHER DEPONENT SAITH NOT)

(WITNESS EXCUSED.)

C0579

STATE OF ILLINOIS)
) SS:
COUNTY OF L A K E)

I, JENNIFER E. GARCIA, CSR, a Notary Public within and for the County of Lake, State of Illinois, do hereby certify that I am a Certified Shorthand Reporter doing business in the County of Lake and State of Illinois; that the foregoing deposition is duly taken and sworn to before me at the time and place and for the purpose in the caption mentioned; that I reported by means of machine shorthand the testimony given at the foregoing proceedings and that the foregoing is a true and correct transcript to the best of my ability of the testimony given by the witness pursuant to my shorthand notes so taken as aforesaid.

I further certify that the taking of this deposition was pursuant to notice and that there were present at the taking of this deposition counsel on behalf of the plaintiff and counsel on behalf of the defendant.

I further certify that the reading and signing of said deposition was waived by the witness.

I further certify that I am not counsel

for nor in any way related to any of the parties to this suit, nor am I in any way interested in the outcome thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on this 23rd day of February, 2019.

Jennifer E. Garcia

JENNIFER E. GARCIA, CSR,
CSR License No. 084-003687

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IN THE CIRCUIT COURT OF THE NINETEENTH JUDIIAL CIRCUIT
LAKE COUNTY, ILLINOIS

THE CITY OF NORTH CHICAGO Plaintiff, v. 2ND & MAIN LLC, UNKNOWN OWNERS and NON-RECORD CLAIMANTS Defendants.	)))))))))	19 ED 20

AFFIDAVIT OF PETER E. KOLB

Under penalty of perjury pursuant to 735 ILCS 5/1-109, the affiant states as follows:

1. The affiant is above the age of 18 and if called as a witness to this cause of action will testify to the matters set forth in this Affidavit on his personal knowledge and to a reasonable degree of engineering and scientific certainty.
2. I received a B.S. in Civil Engineering from the University of Illinois in 1977. I am a licensed engineer in Illinois.
3. I functioned as the Chief Engineer for planning, design, and coordination of all capital improvement projects for Lake County, Illinois Public Works Department from 1992 to 2004.
4. I was the Director of Public Works for Lake County, Illinois from 2004 to 2016. A copy of my resume is attached as Exhibit A.
5. A copy of the report that I prepared in this matter is attached as Exhibit B.



6. Attached as Exhibit C, are drawings of the water main located on the 2nd & Main property and adjoining properties prepared by North Chicago's engineers Alvord, Burdick & Howson in 1961.
7. When constructing a water main under railroad property a carrier pipe is first installed, then the concrete water main is placed within the carrier pipe and it is filled with sand to carry the load.
8. This is done to avoid putting the load of the railroad tracks on the water pipes. Instead, it is put on the outside casing.
9 The water main across the 2nd & Main property was installed without a carrier pipe and is not to railroad standards.
10. The Existing 24-inch diameter pre-stressed concrete cylinder pipe water main on the 2nd & Main property is not sufficiently constructed for the purpose of supporting railroad loadings and does not meet railroad criteria for utility crossings.
11. The existing water main renders the 2nd & Main property unusable for railroad purposes in the area over and north of the existing water main.
12. Further Affiant sayeth not.

Peter E. Kolb

Peter E. Kolb, P.E.

John W. Quinn

Peter E. Kolb, P.E.

Mr. Kolb is a vice president at ATI with over 35 years of progressive, combined experience in public sector management and supervision in engineering, water supply, wastewater processes, and infrastructure refurbishment. He served as Director of the Lake County Public Works Department (LCPWD) in Illinois for 12 years, where he supervised 96 full-time employees. He also managed all department facilities necessary to provide water and wastewater services to over 300,000 retail and wholesale customers, including management of a $110 million Capital Improvement Program.

Education

- B.S., Civil Engineering, University of Illinois, 1977

Professional Registration

- Professional Engineer: California, Illinois

Professional Associations

- American Water Works Association, Illinois Section
- Fox Valley Operator's Association

Project Highlights

Peter has been managing the following projects since joining ATI in December 2016.

Central Lake County Joint Action Water Agency, Illinois
Lake Michigan Water Conversion

Project manager for design and construction coordination to extend the CLCJAWA water distribution system to provide Lake Michigan water to the Villages of Lake Villa and Lindenhurst and Lake County's Grandwood Park and Fox Lake Hills water systems.

Lake County, Illinois

Vernon Hills Water System Electrical Evaluation

Project manager for preparation of an electrical system evaluation for the Vernon Hills Water System.

Teal Lane Lift Station Sewer Rerouting

Project manager for the study of alternatives to reroute sanitary sewer flows from the Teal Lane Lift Station through the Village of Buffalo Grove sanitary sewer system.

Water Main and Sanitary Sewer Infrastructure Assessment

Project manager for the Assessment Study and resulting Five Year Capital Improvements Plan for the County's 305 miles of water and 388 miles of sewer assets.

Wells Abandonment Study

Project manger for preparation of a study to evaluate and recommend abandonment of well facilities in the Fox Lake Hills and Grandwood Park water systems after connection to the Central Lake County Joint Action Water Agency (CLCJAWA) water distribution systems.

Lake in the Hills Sanitary District, Illinois
District Engineer

District engineer working closely with the District Manager and Board to manage projects, maintain quality, oversee project timelines, and engage with stakeholders. Recent projects include a 1,700 foot roadway replacement, Beach Lift Station rehabilitation, electrical system evaluation, washwater pump replacement, and a sewer bypass.

Lakes Region Sanitary District (LRSD), Illinois
Interim District Manager

Peter has been working closely with both the LRSD and Lake County Boards on the process of dissolving the LRSD. More specifically, he is managing the day-to-day functions of the District, including coordination of legislative changes/ provisions that will allow the District to dissolve itself and enter into an agreement for transfer of all funds, assets, staff and service commitments to Lake County.

Village of Lake Villa, Illinois
Monaville Road Lift Station Improvements

Project manager for the design and construction of improvements to the aging lift station. The new station has a capacity of 2,445 gpm to handle 20-year peak hour design flows.

pekolb@ati-ae.com • (847) 265-7325

Applied Technologies
Engineers - Architects

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PETER E. KOLB, P.E.

Villages of Morton Grove and Niles, Illinois
Water Supply Conversion

Project manager for the Village's water supply conversions from the City of Chicago to the City of Evanston. Project involves 33,000 feet of 20-inch and 30-inch water transmission main, two pumping stations, a 7 million gallon reservoir, a crossing of the North Branch of the Chicago River, and a crossing of Interstate I-94.

Wheaton Sanitary District, Illinois
Preliminary Treatment Building Air Handling

Project manager for the study, design, and construction of air handling improvements.

LCPWD Director of Public Works, 2004-2016

Regional Biosolids Facility

Client manager for planning and design of the $30 million expansion of the Des Plaines River WRF. Project included a new biosolids dryer facility, modification of the existing activated sludge facilities for enhanced BPR, and conversion of aerobic digesters into fermentation basins.

General

- Directed operations, administration, and management of all County water supply facilities and sanitary sewage facilities.
- Managed 96 full-time personnel working in six operational areas that provide water and sewer services to 25,000 retail accounts and wholesale sewer service to 18 municipalities.
- Oversaw the operation and maintenance of 12 separate water supply and distribution systems, 3 water reclamation facilities, and 5 regional wastewater interceptor systems.
- Responsible for preparation and management of the Department's $40 million annual operating budget, long-range capital improvement program, and rates and fees. Also prepared all Public Works Committee agenda items, resolutions and ordinances.
- Acted as the County liaison for all water supply and sanitary sewer issues with municipalities and sanitary districts and negotiated agreements on behalf of the County for contractual services.
- Implemented an Automated Meter Reading Program that installed 21,000 water meters in all retail accounts to provide wireless automated readings, usage tracking, and leak detection capability for customers.
- Completed a $7.5 million upgrade of the Excess Flow Facilities in Round Lake Beach to mitigate unauthorized discharges during wet weather events.
- Spearheaded the creation of SSA #16 to fund the construction of a $46 million expansion of the Central Lake County Joint Action Water Agency system to bring Lake Michigan water to 4 communities.
- Managed the design and construction of $32 million in improvements to the Des Plaines River Water Reclamation Facility incorporating enhanced biological nutrient removal and biosolids drying facilities.
- Led the creation of the Des Plaines River Watershed Workgroup, a coalition of Lake County agencies created to collect and analyze data and develop strategies to improve water quality in the Des Plaines River.

Chief Engineer, 1992-2004

- Functioned as Chief Engineer for planning, design, and coordination of all capital improvement projects for the County's Public Works Department.
- Responsible for supervision of engineering personnel within the Engineering Division, review and approval of subdivision submittals, survey parties and contract administration.
- Developed and implemented Department goals, acted as County representative on water and wastewater related issues, and provided professional decisions on engineering and administrative problems.
- Managed several major projects.
  - Water System Improvements Pekara Drive Reservoir ($1.1 million)
  - Mill Creek Wastewater Treatment Plant Construction ($11.5 million)
  - Northeast Lake Interceptor Sewer Construction ($13.5 million)

C0592

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Clear Thinking

February 28, 2020

Mr. John W. Quinn, Esquire
Churchill, Quinn, Richtman & Hamilton LTD.
Two South Whitney
Grayslake, Illinois 60030

Subject: Phil Dahl Property – 2nd & Main LLC

Dear Mr. Quinn

The following report provides the findings and recommendations provided by Applied Technologies, Inc. (ATI) relative to the subject property in conformance with ATI's Proposal for Engineering Services dated January 21, 2020.

Background:

The subject property is identified as 2nd & Main Street, North Chicago, Lake County, Illinois, and is located approximately 35 miles north of the downtown area of Chicago, Illinois. The property consists of an irregular shaped parcel of land and is approximately 4.17 acres in size. The PINs for the subject property are 12-04-100-005, -015, -017, -029, -030, and -034. The subject property and adjoining properties are located in a commercial/industrial area. The property is zoned M3 by the City of North Chicago Zoning Department and is divided by Nimitz Avenue. The main facility is located to the north of Nimitz Avenue and there is a single overhang storage structure located on the southern portion of the subject property. The northern portion of the site is developed with a small office, several overhang storage structures and three (3) warehouse buildings. The two (2) large warehouse buildings were used for lumber storage and the smaller building housed power saws and planners. The site buildings are either wood-frame construction or metal panel buildings and are no longer in use for lumber sales operation. The northern and southern properties are enclosed with gated chain link fences.

The current property owner Mr. Phil Dahl is investigating options for potential use of the site as a storage area for shipping containers and railroad car access. Possible uses would entail constructing additional railroad spurs to provide access to the entire site. One of the challenges is in identifying underground utilities that are currently crossing the site and restricting potential future use of the property. There does not appear to be any easement

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documentation recorded for the 24-inch diameter water main or for the sanitary sewer main crossing the property. The water main is owned and operated by the City of North Chicago and the sewer line is owned and operated by the Great Lakes Naval Training Center (GLNTC). Other challenges include elimination of the migration of offsite contaminants from entering the property through groundwater infiltration along underground pipeline bedding and backfill trenches.

Impacts to soil and groundwater in excess of Illinois Environmental Protection Agency (IEPA) soil remediation objectives (SROs) were documented in a Phase II ESA completed in 2010 (EPI, 2010). The source of the impacts appeared to be the northern adjoining former Chemical Packaging property.

Scope of Work:

Mr. Dahl enlisted engineering services from ATI to provide for review of existing underground water and sanitary sewer utilities and to prepare recommendations on improvements necessary to maintain existing underground utilities in order to accommodate additional development proposed for the site or to possibly relocate these utilities. It is desired that the site be reconfigured with additional railroad spurs which would require either relocating underground utilities or protecting them in place. There is currently disagreement with the City of North Chicago, who owns and operates the water main on the property, regarding the future use of the property and the potential migration of contaminates from offsite. Mr. Dahl is the Defendant in a current lawsuit with North Chicago regarding the property. Engineering services include review of existing conditions, plans, soils reports, investigation of easement documentation, development of options for underground infrastructure improvements, and to make recommendations and presentations for discussion with affected parties with respect to long term use of the property.

Engineering services will also be provided to function as an expert witness to the client in deliberations with outside parties.

Findings:

Several documents were reviewed with respect to the property and underground utilities including the following:

- Water Mains Construction Drawings, Section 2 Sheets 1 and 2, for North Chicago prepared by Alvord, Burdick & Howson; July 1961.
- Phase II Subsurface Investigation prepared by Environmental Protection Industries (EPI); March 2010.
- ALTA/ACSM Land Title Survey prepared by Northern Illinois Survey Inc.; May 2010.
- Phase II Environmental Site Assessment (EAS) performed by Deigan & Associates, LLC; August 2013.

- Phase II Subsurface Soil Investigation prepared by Stateline Environmental Consulting Services, Inc; August 2013.
- Opinion Letter by JAS Environmental, Inc.; October 2014.
- Deposition of Mr. Frank Furlan, Northern Illinois Survey Inc, and former City of North Chicago City Engineer; February 2019.

Based on review of the listed documents it was determined that there exists a 24-inch diameter prestressed concrete cylinder pipe owned and operated by the City of North Chicago that runs through and beneath the property. This main runs from Marquette Street, westward to Sheridan Road, near the property line with the former Chemical Packaging site directly to the north. The watermain is the main transmission line conveying treated water from the City's water treatment plant on the shore of Lake Michigan to the City's water distribution system. The pipe was installed with conventional open trench methods, bedded with sand at pipe crossings, and backfilled with compacted gravel or tamped earth. The pipe was originally installed in 1961 at a depth of 4.5 feet of cover.

Water main that was installed under railroad tracks was encased in a 48-inch diameter steel casing that was bored and jacked under the tracks. The water transmission carrier pipe was installed inside the steel casing and then the remaining void space was filled with sand. Each end of the casing pipe was sealed with an open joint brick bulkhead. Construction of the water main used gravel or native material for backfilling the original trench. This material is more permeable than the undisturbed soils and offers a pathway for the migration of contaminants within the soil water or within the groundwater. Being more permeable the rate of migration within this preferential pathway can be up-gradient or cross-gradient to the point of release.

Also running through the property is a sanitary sewer line of unknown diameter, owned and operated by the GLNTC. The sanitary sewer line runs from the north property line to the south property line in essentially the midpoint of the property. This line may be a combined sewer as there are catch basins and manholes depicted on the drawings. Construction methods of this line are not known for certain, however it was most likely also constructed using open trench methods and used bedding and backfill materials as well. This material is more permeable than the undisturbed soils and offers a pathway for the migration of contaminants within the soil water or within the groundwater. Again, the rate of migration within this preferential pathway can be up-gradient or cross-gradient to the point of release.

A site visit was conducted on February 21, 2020. In attendance were the property owner, Mr. Phil Dahl, and Mr. Peter Kolb, P.E. of ATI. The goal was to confirm the location and orientation of the water main and sanitary sewer facilities on the site. Mr. Dahl indicated that the City of North Chicago had attempted to locate their water main on a previous date and had excavated in the area of the expected pipe location. The City had excavated to a depth of 10-feet below the surface but was not able to locate their water main. Evidence of this excavation remains. There are two sanitary sewer structures identified on the Title

Survey. One structure is a catch basin in the center of the property and was found to have an open grate cover. There is standing water at the bottom of the structure at about 9 feet deep and there is no apparent water flow as observed from the surface. Further north at the approximate location of the water main is a second catch basin structure depicted on the Title Survey. This structure was unearthed and found to have a solid manhole cover with a pick hole. Upon removing the manhole cover standing water was observed in the structure at about 9-feet deep. The bottom of the structure was found to be at about 9.75 feet deep. There was no apparent water flow in this structure. This may indicate that the two structures and the underground line are a combined sanitary sewer/storm sewer. Further investigation with the GLNTC is necessary to determine the use of this line and connected properties. If this line is no longer providing service to this property or others there may be the possibility of abandoning it and sealing off the preferential pathway blocking the migration of contaminants. If this line needs to remain in place there could possibly be a grout cutoff-wall constructed around the pipe at the northern most point of the property that would then seal off this preferential pathway.

The current owner of the railroad running along the west property line is the Union Pacific Railroad Company. Upon reviewing their criteria for encased non-flammable pipeline crossings, it was determined that each crossing of an underground utility would require installation of a steel casing pipe a minimum distance of 30-feet from the centerline of track to the near face of boring and jacking pits. This would require a minimum of at least 60 feet of steel casing for each railroad crossing.

With respect to the water main along the north property line a minimum distance of 15 feet from the edge of a railroad embankment to the centerline of the existing watermain would need to be provided the entire length of the watermain to allow for future excavation and repair of the line. Given the location of the existing water main this would render approximately 50 feet of area unusable for the entire east-west length of the north property line.

Several environmental studies have been performed at the site and conclusions reached corroborate findings that off-site migration of chemical contaminants present on the former Chemical Packaging site has affected the subject property. Chemical contamination has been documented on the former Chemical Packaging site specifically the presence of benzene, toluene, ethyl benzene, xylenes, naphthalene, and certain heavy metals have been found in soil samples in excess of applicable soil remediation objectives (SROs). Soil samples collected from the northern portion of the subject property have revealed the presence of ethyl benzene and xylenes in excess of SROs. Groundwater samples from borings have revealed the presence of benzene, ethyl benzene and xylenes in excess of groundwater remediation objectives (GROs). The presence of the water main and the sanitary sewer line have provided preferential pathways for the migration of these contaminates and will continue to do so until remediation is provided.

Conclusions and Recommendations:

a) An existing 24-inch diameter prestressed concrete cylinder pipe water main, owned and operated by the Plaintiff, crossing the Defendant's property is not sufficiently constructed for the purpose of supporting railroad loadings and does not meet railroad criteria for utility crossings.

b) The existing water main renders the Defendant's property unusable for railroad purposes in the area over and north of the existing water main. Conventional setbacks would be required of approximately 15 feet from the edge of a railroad embankment to the centerline of the watermain. Given the existing location of the water main this renders approximately 50 feet of area unusable for the entire east-west length of the property.

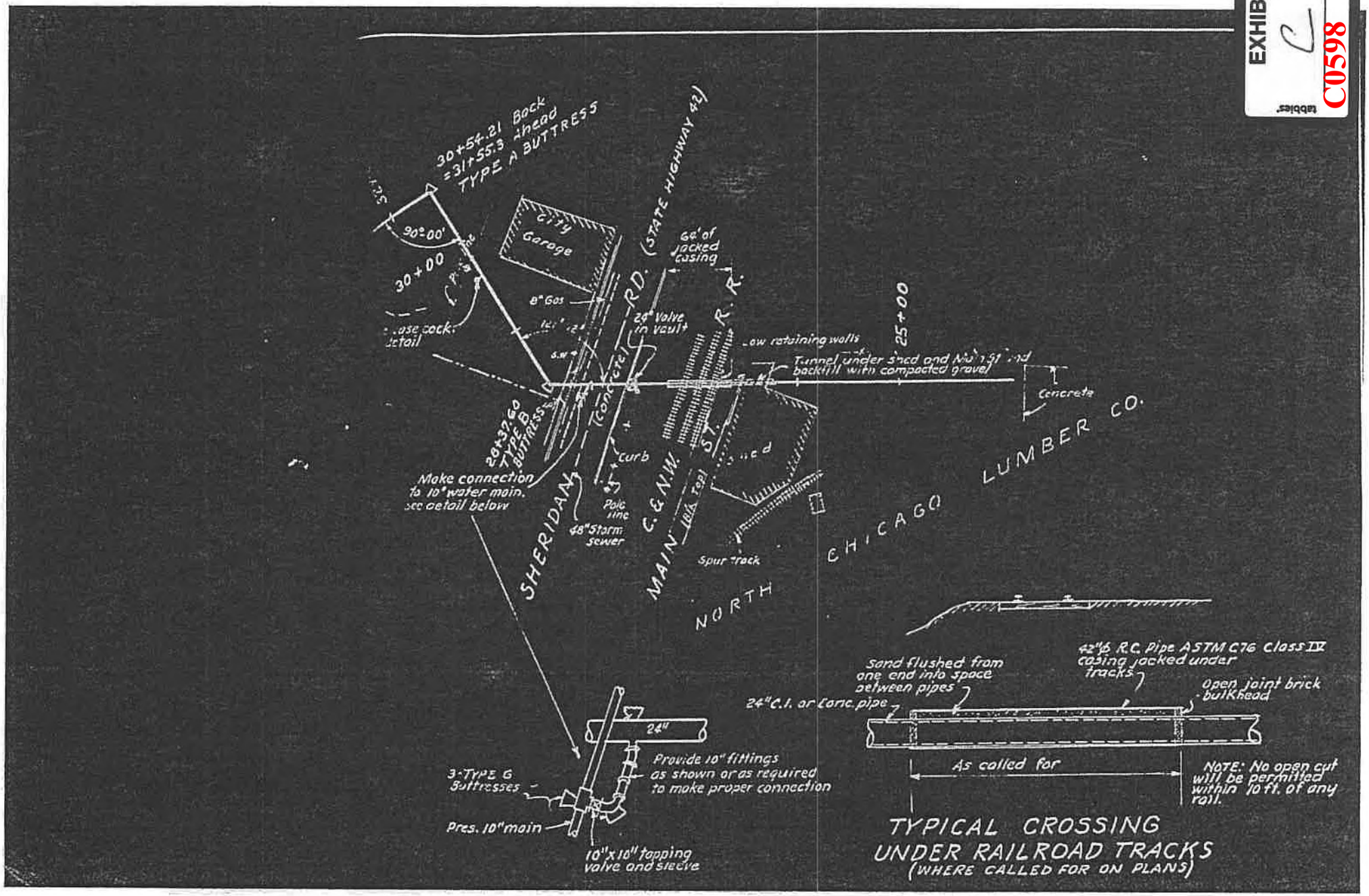
c) An existing sanitary sewer line, owned and operated by the Great Lakes Naval Training Center, runs from the property to the north down and across the Defendant's property to the south of the Defendant's property. The existing sewer line is not sufficiently constructed to meet railroad criteria for utility crossings. Each crossing would require a minimum of 30 feet of pipe casing on either side of the centerline of the track.

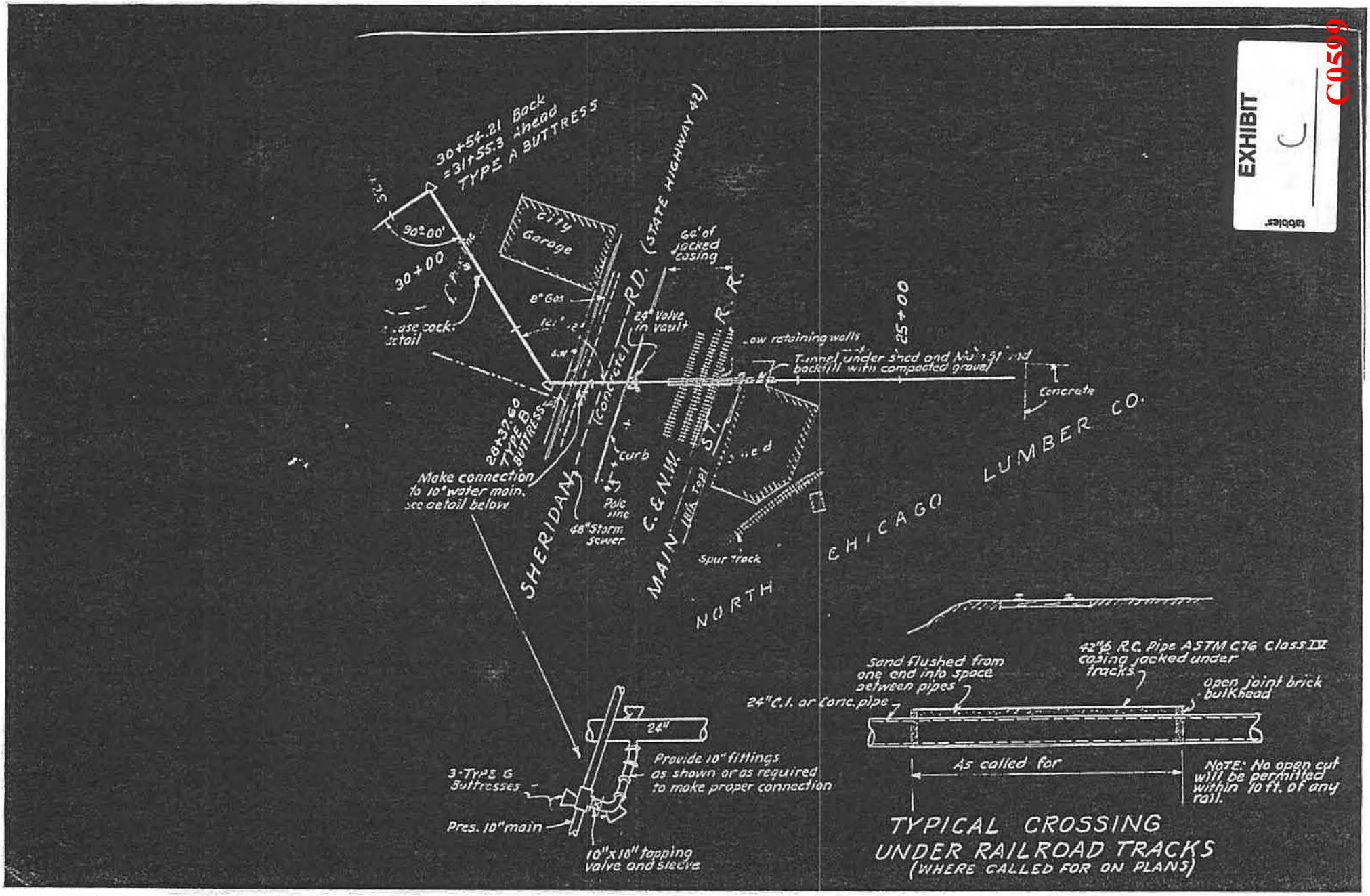
d) The property to the north of the Defendant's property contains environmental contamination and several environmental investigations have revealed the presence of contaminates migrating to the Defendants property. The Plaintiff's water main and the GLNTC sanitary sewer line act as preferential migration pathways for contamination to travel. Bedding material and backfill surrounding the pipes used in the construction of the water main and the sewer line provide a pathway for the migration of environmental contamination across the Defendants property and will continue to do so until remediation is provided.

Best regards,
Applied Technologies, Inc.

Peter E. Kolb

Peter E. Kolb, P.E.
Vice President


EXHIBIT
C0598
30+54.21 Back
=31+55.3 Ahead
TYPE A BUTTRESS
90°00'
30+00
City Garage
6" of jacked casing
(STATE HIGHWAY 42)
RD.
8" Gas
24" Valve in vault
R. R.
25+00
Low retaining walls
Tunnel under shed and backfill with compacted gravel
Concrete
LUMBER CO.
CHICAGO
NORTH
26+37.60
TYPE B
BUTTRESS
Curb
Make connection to 10" water main. See detail below
SHERIDAN
Pole line
48" Storm sewer
C. & N.W.
MAIN
ST.
Spur track
Sand flushed from one end into space between pipes
42"ϕ R.C. Pipe ASTM C76 Class IV casing jacked under tracks
Open joint brick bulkhead
24" C.I. or Conc. pipe
As called for
NOTE: No open cut will be permitted within 10 ft. of any rail.
24"
Provide 10" fittings as shown or as required to make proper connection
3-TYPE G Buttresses
Pres. 10" main
10" x 10" tapping valve and sleeve
TYPICAL CROSSING
UNDER RAILROAD TRACKS
(WHERE CALLED FOR ON PLANS)


EXHIBIT
C
C0599
30+54.21 Back
=31+55.3 Ahead
TYPE A BUTTRESS
90°00'
30+00
City Garage
64' of jacked casing
(STATE HIGHWAY 42)
RD.
8" Gas
24" Valve in vault
R. R.
25+00
Low retaining walls
Tunnel under shed and No. 1 Siding backfill with compacted gravel
Concrete
CHICAGO LUMBER CO.
28+37.60
TYPE B
BUTTRESS
Make connection to 10" water main, see detail below
Curb
Pole line
48" Storm sewer
SHERIDAN
C. & N.W.
MAIN
IEA Depot
ST.
Spur track
NORTH
24"
3-TYPE G Buttresses
Pres. 10" main
10"x10" tapping valve and sleeve
Provide 10" fittings as shown or as required to make proper connection
Sand flushed from one end into space between pipes
24" C.I. or Conc. pipe
42" ϕ R.C. Pipe ASTM C76 Class IV casing jacked under tracks
Open joint brick bulkhead
As called for
NOTE: No open cut will be permitted within 10 ft. of any rail.
TYPICAL CROSSING
UNDER RAILROAD TRACKS
(WHERE CALLED FOR ON PLANS)

STATE OF ILLINOIS)
) SS.
COUNTY OF L A K E)

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

THE CITY OF NORTH CHICAGO, Plaintiff,	)	
VS.	)	CASE NO. 2019 ED 20
2ND & MAIN, LLC; UNKNOWN OWNERS and NON-RECORD CLAIMANTS, Defendants.	)	

The proceedings before

THE HONORABLE JUDGE JOSEPH V. SALVI

July 13, 2021

The proceedings before **THE HONORABLE JUDGE JOSEPH V. SALVI**, taken before Jaime S. Friel, CSR, RPR, on June 23, 2021, at the hour of ten o'clock a.m., at 18 N. County Street, Waukegan, Illinois.

A P P E A R A N C E S:

MR. MATTHEW T. DiCIANNI, of the Law Offices of Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, PC
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(312) 782-7606
mdicianni@ancelglink.com

appeared on behalf of Plaintiff;

MR. JOHN W. QUINN, of the Law Offices of Churchill, Quinn, Richtman & Hamilton, Ltd.
Two S. Whitney Street
Grayslake, Illinois 60030
(847) 223-1500
jquinn@grayslakelaw.com

appeared on behalf of Defendants.

THE COURT: City of North Chicago/2nd & Main.

MR. QUINN: Yes.

MR. DiCIANNI: Good morning, Your Honor. Matthew DiCianni on behalf of Plaintiff, City of North Chicago.

THE COURT: Good morning.

MR. QUINN: And John Quinn on behalf of the Defendants, 2nd & Main.

THE COURT: Good morning. So you guys were both kind enough to send me the courtesy copies. So thank you. I've had time to review them. Is there anything preliminarily before we get into arguments that we need to discuss?

MR. QUINN: I don't think so, Judge.

MR. DiCIANNI: I don't think so.

THE COURT: All right. Mr. Quinn.

MR. QUINN: Thank you, Judge. This, as you know, involves the Interstate Commerce Commission Termination Act, and I'd guess we probably don't get too many of those cases in Lake County. There's no dispute that before my client purchased the

property around 1961 the City of North Chicago put in a water main easement -- or water main and they never got an easement for that.

Just so -- I brought the survey so you could kind of have a look to see what's going on. Here is the property. This is the property here, and then you can see the water main running along the north end of the property.

THE COURT: Okay.

MR. QUINN: And so what makes this property kind of unique -- and this is included -- this is one of the things that was included in the 201 statement -- or the 401 statement -- is this is a map of the property. Here's my client's property. This is from years ago, and the property is bounded -- there's two railroads that come by here, the Union Pacific and the Canadian National. So no overpass here.

So ultimately what my client would want to do in the future is run -- is a place where you can run the spur line

between the two railroads which don't really intersect because there's an overpass there if you come by on Sheridan Road.

So there's no dispute that the property has been designated as a railroad by the Surface Transportation Board. That's conceded in the response, and under the supremacy clause of the constitution the Federal law preempts state laws that interfere with or are contrary to Federal law. That's in the Union Pacific Railroad case that I cited.

And so also in the Union Pacific Railroad case they point out on page 68 that the Service Transportation Board has exclusive jurisdiction over the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located or intended to be located entirely in one state.

So even tracks that are intended

to be located are covered by this; and it also covers, according to the Union Pacific case, the facilities, equipment related. So warehouses, things like that are covered by the Act.

THE COURT: We don't disagree with that, right?

MR. DiCIANNI: That's correct, Your Honor.

THE COURT: Okay.

MR. QUINN: Okay. So there's two different ways that preemption takes place in these cases. One is categorical or pre- -- or per se preemption, and the other is as applied.

So, for example, if the City of North Chicago came in and said we're just going to come and condemn all this property, they couldn't do it because that would be categorically preempted. However --

THE COURT: You agree with that, right, Counsel?

MR. DiCIANNI: Not necessarily. It

depends. It's a fact-intensive inquiry, and so I don't think you can say that taking the entire property would be -- because it depends -- the issue is whether it unreasonably interferes with the railroad transportation --

THE COURT: Well, by taking it, it would, right? Well, you're saying it may not.

MR. DiCIANNI: It may not. It's a fact-intensive --

THE COURT: Go ahead, Mr. Quinn.

MR. QUINN: Okay. I -- again, I don't know how you could take it all and not interfere with the railroad.

So there was also an as-applied test that is used by the courts. So the question is here, as I said in my brief, the question is can the City of North Chicago take this property; and the answer is they can under the proper circumstances. They can do it so long as they don't interfere with the property and use as a railroad.

So the reason that we say they do is that when this was installed -- when the pipe was installed, it was not installed to railroad standards; and among the -- among the exhibits in my statement of facts is this Exhibit 2. And you can see here -- Because the pipe runs here and then goes across the railroad tracks. And you can see that there is a diagram for the way it has to go when it goes under the railroad tracks, and they basically put the pipe in a casing and then they surround the casing with sand. And that's what they did for the adjoining railroad property, but, of course, not for the property that ran under my client's. It's just straight -- a straight water main.

THE COURT: The idea is so it doesn't crush it.

MR. QUINN: So if something goes over it, it doesn't crush it.

So in my Rule 2-104 statement I had an opinion by our expert, who is Peter Kolb. Peter Kolb is an engineer. He's the

former Director of Public Works here at Lake County, and he opined that it's not built to railroad standards.

In the response that the City of Chicago -- or the City of North Chicago filed they -- they basically said that --

THE COURT: Well, let me read it and you tell me if this is what you're referencing.

"The presence of the water main does not substantially limit the future use of the property. The existing rail spur could resume without additional improvements to the water main infrastructure. The northern portion of the property, between the existing rail spur and the northern property bounding, could be used for a variety of purposes, including but not limited to, housing, shipping containers, or other materials."

Is that what you're --

MR. QUINN: That's what they say --

THE COURT: Okay.

MR. QUINN: -- in there. And if you

read that carefully, it doesn't say you can put -- it doesn't say you can put railroad tracks across there. It's really a glaring omission. If you look at it, obviously no engineer would say it's okay to build a railroad track over these pipes and then face the consequences if that water main caved in after the train went across it. So that's what --

THE COURT: Well, Mr. DiCianni, I mean, that's what it comes down to. Let's say for the sack of argument we just leave the water main as is and they're like, "okay, well, we're going to put a railroad right on it and we're going to have railroad stuff go right on it." Wouldn't it just likely crush it, and then what? Then what?

MR. DiCIANNI: Well, that's a disputed issue of fact, Your Honor, that should be decided at trial.

THE COURT: But that's not what the opinion says. Like Mr. Quinn points out -- Because what it really comes down to is that, is there a material issue -- an issue

of material fact, right, a genuine issue of material fact. And the -- but the way he -- the way he phrases his opinion is essentially saying, well, the way it is now it's fine. But what if they change the property so they want the railroad or the heavy part of -- and forgive my layman's terms -- to go over the main that has not -- does not have the casing? Then what?

MR. DiCIANNI: Well, his opinion is that that's not a possible use of the property.

THE COURT: Is that his opinion or somebody else's opinion? Is that his opinion too?

MR. DiCIANNI: Yes. And --

THE COURT: Okay.

MR. DiCIANNI: I mean, the first sentence there says, "The presence of the water main does not substantially limit the future use of the property."

THE COURT: Okay. But he says the -- And you can correct me if I'm wrong because

you probably know his opinion better than I do, but his opinion is, like, well, because of the nature of the plight of the area and the economic viability of such a use is really not foreseeable or possible. You know, that doesn't sound like an opinion to me. That just sounds like he's just speculating. I mean, who is he to say? Is he really an expert in terms of the economic use of property or is he an engineer?

MR. DiCIANNI: Well, that's true, Your Honor, but the issue is they have to show that there's some kind of viable use of the property in the future for -- where they could add additional rail spurs, and they haven't done that. They haven't shown that there's -- that it's viable.

THE COURT: What if the owner loves railroads and he wins the lottery and he doesn't care what he -- he doesn't care whether he makes money or not. He just loves railroads and he loves creating this railroad hub. This would prevent him from

doing that; am I correct?

MR. DiCIANNI: Not necessarily, and that's an issue of fact. And one other thing, Your Honor. What is the case law that says that future uses of property are preempted by the Termination Act? Where is it? Where's the Illinois case law? Where's the Seventh Circuit case law? There's an Eighth Circuit case, the City of Lincoln case, but that's not controlling.

THE COURT: Go ahead.

MR. QUINN: Well, that's what I was going to. The Federal law is what's controlling here. And the Eighth Circuit says, "Finally, the Board can consider the railway's future plans as well as its current uses and make its own evaluation of how likely it is that the plans will come to fruition. Condemnation is a permanent action. It can never be stated with certainty at what time any particular -- any particular part of a right of way may become necessary for railroad uses."

And so we intend to use this

property, and that's what the Phil Dahl affidavit says. We intend to use the property that they're seeking to condemn to put additional spur lines on there.

This is -- there's no disputed issue of fact as to that, and there's really no dispute that the property is not built to railroad standards. And, frankly, it would be irresponsible -- it would be irresponsible, really, to bring a train over that the way it's constructed now. But if they're not limited -- if the City's not limited -- apparently, it's not important to them -- but if they're not limited in this condemnation, that's the risk that's taken in the future.

THE COURT: Go ahead.

MR. DiCIANNI: With all due respect to Mr. Quinn, he never answered your question, Your Honor. What controlling authority states that future plans to use property as a railroad is preempted by the Termination Act? By my research, there is none.

Additionally, Your Honor, they

have to show more than what they've shown in order to -- to show that they're going to be able to use the property for railroad purposes in the future. This is their entire evidence, that they're -- have future plans to use the property for a railroad in the future.

Paragraph 6 of Phil Dahl's affidavit says, "2nd & Main plans to use the property that is the subject of the suit, including the property that North Chicago seeks to condemn, for railroad purposes, specifically for storage area for shipping containers, additional spur tracks, and railroad access."

There's no specific plan. They don't say that they're going to run tracks in a certain way or that they're going to build on this day and they can't do it because the railroad is preventing them from doing it.

Your Honor, this cannot be enough to show that there's going to be any interference with future plans to use the

property as a railroad.

As we state -- and I don't think there's any disagreement over this -- the water main does not currently intersect the railroad spur at all. This is just a demonstrative exhibit that's been used at depositions. I think we all agree to its accuracy.

The red shows where the rail spur goes now, and the yellow shows where the water main is on the property. So they don't intersect. There's no question that the water main does not prevent the property from being used for railroad purposes now.

THE COURT: So their expert says as it stands the use of this property would not be -- interfere by the fact that it's not -- the water main is not encased like it -- under railroad guidelines; and you're saying, well, we have future plans and those future plans may limit our use of the property in that we won't be able to run railroad spurs over that main.

MR. QUINN: That's exactly what I'm saying, Judge, and let me go back because counsel was talking about future use.

Let me go back to the Union Pacific case, which is a Seventh Circuit case, and on page 68 of that decision -- that was the summary judgment portion. It said, "Even if the property was not being used and Union Pacific had no immediate plans to use the property, a taking of this property would still prevent Union Pacific from using it for railroad purposes in the future."

That's exactly what Mr. DiCianni was talking about, and that's what the court said in the Seventh Circuit here in Illinois.

MR. DiCIANNI: I'm not sure exactly what he's referring to. I did not see anything in here that says that the future --

THE COURT: Well, take a look at it. Take a look at it.

Can I see it, Mr. Quinn?

MR. QUINN: Yes.

MR. DiCIANNI: What case did you say that was on?

MR. QUINN: I underlined it there. It's small print.

THE COURT: It says what you say it says.

MR. DiCIANNI: Regardless, Your Honor, they haven't shown -- Okay. So this opinion also says "a taking of this property would still prevent Union Pacific from using it for railroad transportation in the future."

They haven't shown that taking the property will prevent them from using it for railroad transportation in the future.

THE COURT: They have an expert that says that unless it -- the main is built in accordance to railroad specifications so that it protects the main with heavy railroad traffic going by it that they will be limited in their use of the property. So they would have to -- I presume would

have to go around the main somehow, prevent the track from intersecting the water main so as not to crush it or possibly crush it. I assume that would be a problem that they -- you wouldn't allow them to run a railroad -- or they wouldn't be allowed to run a railroad over a water main that isn't properly constructed for such a purpose.

And your expert just says, well, the way it's being used now is just -- it's fine. And I -- you know, I don't see a foreseeable -- I don't believe -- the engineer says I don't believe that there's an economic foreseeability to have such a property use; but I don't believe that's the standard, whether or not there is an economic feasibility to such a use. The question is, do they have the right to run -- irrespective of the condemnation, would they otherwise have the right to run railroad track through that property. They would, right?

But if we take the easement and the condemnation out, they would have the

right to run track however they want.

MR. DiCIANNI: One of the showings they need to make, though, is that that's viable, that that's possible; and they haven't done that in this motion. And, remember, all of the inferences need to be resolved in our favor for this.

So this is a fact issue, Your Honor, that needs to be decided at trial.

THE COURT: But where is -- where is that fact that says that they -- if they use the property as they say they want to use it, that it would be okay to run the main as it is now? Where --

MR. DiCIANNI: Well, our expert, I think you're going to see at trial, is going to testify, as he did in his deposition, that it's not viable to do that. The deposition was taken after the briefing in this case was done. Additionally --

THE COURT: The viability -- See, the -- he's an engineer, right?

MR. DiCIANNI: Yeah.

THE COURT: Why -- how is an engineer supposed to give an opinion as to the viability of the use of property?

MR. DiCIANNI: Well, our appraiser gives an opinion too.

THE COURT: Okay. That's who I thought.

MR. DiCIANNI: And the appraiser in his opinion says it's not viable either. That's relevant evidence in determining whether there's going to be future railroad use.

THE COURT: Okay. So let me go to you, Mr. Quinn, because somewhere in here you address that argument.

MR. QUINN: Right. And what I say, Judge --

THE COURT: And I forgot what you said.

MR. QUINN: What I say is the case law says -- it doesn't say it has to be economically viable. The case law says that they can't -- and, again, there's that quote from the Union Pacific case regarding the plans to use the property, a taking of

this property would still prevent it from using it in the future. So they don't even get to whether or not you would be using it.

They talk about -- in the City of Lincoln versus the Service Transportation Board they're trying to put a path in. They're trying to put --

THE COURT: Can I cut you off for one second?

MR. QUINN: Yeah.

THE COURT: Let me read your argument.

MR. QUINN: Okay.

THE COURT: Okay. So this is their argument: "North Chicago cites no authority for the proposition that the economic value or utility of property was a factor in determining whether a condemnation is preempted. It is not a factor stated in the statute. Thus, an unprofitable railroad is just as preempted as a profitable one."

Go ahead.

MR. DiCIANNI: Well, the burden --

again, the burden is on them to show that this is pre- -- to cite the relevant case law here, and it just -- so what -- I mean, what are they arguing then, that any property owner who owns any property can say that an eminent domain action is preempted because they might build a railroad on a property?

THE COURT: Well, if it's designated as railroad property, yes; right? So it's already been designated. They all agree that they have -- if not for this water main, they would be able to run the track all over -- at any part of this property.

The question is, can they run track over a main that is not protected as it should be under the railroad guidelines. See, there lies their problem. They know if you just -- you condemn it -- we allow the condemnation, the water main is either repaired or it remains the same -- I don't know why they did the condemnation. Maybe they realized they didn't get the easement and now they're getting it. But if we just

allow the water main to remain, they will not be able to use the property as they would if the water main was not there, correct?

MR. DiCIANNI: No. I don't necessarily agree with that. At his deposition our expert Devin Moose said that the line does not need to be reinforced to the same standard as the Union Pacific line because they're not running a Union Pacific railroad over it. They're running a rail spur over that and --

THE COURT: Do you have that? Would you be able to find that?

MR. DiCIANNI: We haven't even gotten the transcript yet.

THE COURT: Oh.

MR. DiCIANNI: I think it's going to come in the -- we got an email yesterday, I think.

THE COURT: Okay. So do you agree with that, Mr. Quinn?

MR. QUINN: No. No, I don't agree with that. He got argumentative at the end, but

at the beginning I asked him in that deposition whether it was his opinion you could run a railroad across that property, and he said it was not his opinion that you could do that.

THE COURT: Oh, okay. But the question is not a railroad. It sounds like there's a difference between a spur and a railroad, and it sounds like the railroad would require more protection than a spur presumably because there would be more weight and more traffic on a railroad as opposed to a spur.

MR. QUINN: Well, I don't recall that as being his testimony. I mean, there was a lot of stuff that was thrown out at the deposition, but they didn't file another affidavit or anything, a supplemental affidavit.

The plain and simple fact is that you -- it's not up to railroad standards and it's a danger if you put a track across there, and you couldn't get an engineer to say it's okay because nobody

would stake their reputation on that when the pipe caves in.

THE COURT: Yeah. My guess is you're right.

So now let's talk about the remedy that you request under the motion. Okay. So you're asking the Court to allow the condemnation but require that the easement be contingent upon them encasing the water main pursuant to railroad guidelines.

MR. QUINN: Yes, Your Honor.

THE COURT: Okay. Does the Court have such authority to craft such an order in a motion for summary judgment?

MR. QUINN: I think it does, Your Honor, and here's why. The only thing that the Court could do otherwise is enjoin them from taking the condemnation -- from doing the condemnation and ordering -- I suppose you could enjoin the condemnation and order them to remove the pipe, but we're not saying that. It's the City's main water line. We're saying that they have to

install it in such a way that it doesn't interfere with our property, and it's an important ruling because it affects the damages. Our damages actually go down if we win this motion because then presumably this line will be installed in such a way that it won't have any effect on our property.

MR. DiCIANNI: Your Honor, the proper standards to which the rail -- the water pipe should be reinforced, again, it's a fact issue that needs to be resolved after you and the jury hear the evidence of the expert witnesses because, you know, our engineer may say that it needs to be reinforced to a different standard than what their engineer says.

THE COURT: Yeah, but the order would craft it in such a way that it would have to be -- the water main would have to be reinforced pursuant to railroad guidelines. Nothing more, nothing less. And I -- it sounds like to me, the way it was articulated to me, that there are specific

guidelines by which the water main is protected when it intersects with a railroad -- railroad line. And if the Court were to do that, then, like Mr. Quinn said, the condemnation value would go down for them because it would be -- it wouldn't change the possible use of said property. And, now, I don't know the cost of creating a water main like that. It's probably fairly substantial, but I don't know.

So the question for you, though, Counsel, because your engineer does not say that -- he -- he intentionally, in the Court's view, crafts an opinion that avoids the answering of the question whether or not you need to reinforce a water main if it intersects with a railroad line by creating this standard based upon the current use of the property; and the Court does find today that future use of the property is something that it must consider. And they have articulated a future use that may require a railroad line to intersect with the water main. So the

next -- you know, when you said in your response -- and I'm not questioning it by any stretch -- that there is a genuine issue of material fact as to the opinion of what they're proposing, that is not 100 percent correct. It is correct that -- and I don't think Mr. Quinn would disagree -- the fact that the way the property is being used or the way that your expert says how it could be used would not require a reinforcement of the water main. That's not their concern. They do not want to be limited to the use of their property in that they may -- may not -- they may cross a railroad line with the water main.

So I guess I -- how do you craft that order, Mr. Quinn?

MR. QUINN: I would suggest, Your Honor, that the order require them to put the pipe in according to the standards that are set forth in the drawing that was used when the original pipe was put in. It's a part of the record. That's the -- Actually, I don't know their names, but

it's Exhibit C, and that was -- we deposed the City Engineer, Frank Furlan, who is probably about 90 years old, but he remembered everything. And he discussed what kind of pipe they had, but we have a drawing that shows how the pipe would have to be constructed.

THE COURT: So this drawing was created in the 1960s?

MR. QUINN: Yes.

THE COURT: And the standard used in the 1960s remains the same?

MR. QUINN: I believe it is, yes.

MR. DiCIANNI: Based on what? I mean, why do you believe it's the same?

MR. QUINN: Well, if there's some other standard if they -- but that is the standard that -- and our expert -- Union Pacific published something and he had those standards when he testified, but --

THE COURT: But those standards may change, and the technology may have changed.

MR. DiCIANNI: And why are the

standards for Union Pacific the same as a standard for a railroad spur too?

MR. QUINN: Well, as long as it's --

THE COURT: Why didn't they do it back then? Cost?

MR. QUINN: No, they didn't do it because it wasn't a railroad then. They did do it where they went across the railroad track. Because our property -- that's what makes the property unique, was the old North Chicago Lumber.

THE COURT: Okay.

MR. QUINN: So there's spurs coming off of there to -- there's spurs coming off. So there were spur tracks that come up, but the spur tracks never went across --

THE COURT: The water main.

MR. QUINN: -- the water main. And so when they put the water main in, it was up at the northern part of the property and it wasn't built to railroad standards because it wasn't a railroad. It's only become a railroad, you know, back three years ago.

THE COURT: All right. Well, I -- is

there a standard that the Court can require the City to follow in order to -- in order to be in compliance with the intent of the Court's ruling?

So if the Court grants the motion, you would, I imagine, concede the condemnation under these conditions, that the water main be replaced or put in pursuant to the original plans as set forth by that original village engineer or current railroad regulations.

MR. QUINN: Yes.

MR. DiCIANNI: That's an issue of fact that we would have to probably do additional discovery into.

THE COURT: As to whether --

MR. DiCIANNI: What the proper standard is.

THE COURT: Well, I mean, they do it all the time, right? They've got to run water lines by railroads all the time. So the standard has got to be known. We just don't -- the three of us just don't know what it is.

MR. DiCIANNI: Right. So I'm saying we need to figure that out before we issue any order.

THE COURT: Well, I -- I could do this. I could continue the ruling on this and then you could present that to me or we could have a status hearing, grant the motion, continue it for the presentation of those standards or just have it vague enough so that it -- the order is in compliance with the Court's intent that the village -- the City install a water main that is in compliance with the current railroad regulations when a railroad and water main intersect.

MR. DiCIANNI: I have a feeling that's something we might fight over in the future. So I'd like to have the order be as specific as possible as to what those standards are.

THE COURT: Well, that's pretty specific. I just don't know how to reference the standards. And we can come back for a status of clarification of order

if there's a question of what those requirements are.

MR. QUINN: Well, we have a -- they have their motion for summary judgment coming up on August 16th or 17th. We could do it that day, but our trial date is August 30th. And so a lot of the trial preparation is going to have to do with, you know, the --

THE COURT: Well, we can continue the trial. I mean, that's not a problem, if that's okay with you.

MR. QUINN: Well, I think that will be fine, Judge, but let's -- You want to come back on the 16th? We'll enter an order today on the summary judgment motion, and then it will be continued to the next hearing date for presentation of evidence regarding railroad standards?

THE COURT: Yeah, that's perfect.

MR. QUINN: Okay.

THE COURT: So what is your motion regarding, the condemnation itself?

MR. DiCIANNI: Yes. The condemnation

itself, and Mr. Kolb in his expert report made claims about environmental contamination. So our summary judgment motion all relates to environmental issues.

THE COURT: Okay. So it's more than just a condemnation.

MR. QUINN: Yeah.

MR. DiCIANNI: Right, it's their trespass.

MR. QUINN: We have a counterclaim for trespass. So there's a question -- they have a statute of limitations argument on it.

THE COURT: I saw it, but I didn't want to -- I didn't want to cloud my mind with other issues.

MR. QUINN: We'll draft an order in person, Judge.

THE COURT: Isn't that nice?

MR. QUINN: It is. Can we go off the record?

THE COURT: Yes.

(Whereupon, the proceedings concluded at 10:40 a.m.)

STATE OF ILLINOIS)
) SS:
COUNTY OF L A K E)

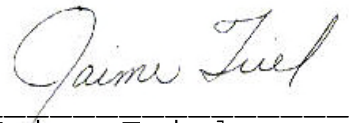
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I FURTHER CERTIFY that I am not a relative or employee or attorney or employee of such attorney or counsel, or financially interested directly or

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IN WITNESS WHEREOF, I have set my hand.



Jaime Friel
Certified Stenographic Reporter
Registered Professional Reporter
Certificate No. 84-004425

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IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

FILED
JUL 13 2021
Lake County Circuit Clerk

North Chicago)
)
vs.) Case No. 19ED20
)
2d & Main)

ORDER

This cause coming on 2d & main's motion for partial summary judgment with the Court considering the pleading an argument and being fully advised in the premises

IT IS ORDERED

The motion is granted. The city of North Chicago's water main shall be constructed and or replaced in accordance with current railroad standards
The matter is continued until August 17, 2021 at 1:30 P.M. for presentation of evidence as to current railroad standards.

ENTER:

Joseph V. Salvi
JUDGE

Dated this 13 day of July, 2021.

Prepared by:
Attorney's Name: John Quinn
Address: 2 S. Whitney
City: Grayslake State: IL
Phone: 847-223-1500 Zip Code: 60030
Fax:
ARDC: 2270706

171-94 (Rev. 10/11)

C0642

This form is approved by the Illinois Supreme Court and is required to be accepted in all Illinois Appellate Courts.

Instructions

Check the box to the right if your case involves parental responsibility or parenting time (custody/visitation rights) or relocation of a child.

Just below "Appeal to the Appellate Court of Illinois," enter the number of the appellate district that will hear the appeal and the county of the trial court.

If the case name in the trial court began with "In re" (for example, "In re Marriage of Jones"), enter that name. Below that, enter the names of the parties in the trial court, and check the correct boxes to show which party is filing the appeal ("appellant") and which party is responding to the appeal ("appellee").

To the far right, enter the trial court case number and trial judge's name.

☐ **THIS APPEAL INVOLVES A MATTER SUBJECT TO EXPEDITED DISPOSITION UNDER RULE 311(a).**

APPEAL TO THE APPELLATE COURT OF ILLINOIS

SECOND **District**

from the Circuit Court of

Lake **County**

In re

City of North Chicago

Plaintiff/Petitioner *(First, middle, last names)*

☑ **Appellant** ☐ **Appellee**

v.

2nd & Main, LLC

Defendant/Respondent *(First, middle, last names)*

☐ **Appellant** ☑ **Appellee**

Trial Court Case No.: 2019-ED-20

Honorable Joseph Salvi

Judge, Presiding

NOTICE OF APPEAL

In **1**, check the type of appeal.

For more information on choosing a type of appeal, see *How to File a Notice of Appeal.*

1. Type of Appeal:

- ☐ Appeal
- ☑ Interlocutory Appeal
- ☐ Joining Prior Appeal
- ☐ Separate Appeal
- ☐ Cross Appeal

In **2**, list the name of each person filing the appeal and check the proper box for each person.

2. Name of Each Person Appealing:

Name: City of North Chicago

First *Middle* *Last*

☑ Plaintiff-Appellant ☐ Petitioner-Appellant

OR

☐ Defendant-Appellant ☐ Respondent-Appellant

Name:

First *Middle* *Last*

☐ Plaintiff-Appellant ☐ Petitioner-Appellant

OR

☐ Defendant-Appellant ☐ Respondent-Appellant

C0643

In **3**, identify every order or judgment you want to appeal by listing the date the trial court entered it.

3. List the date of every order or judgment you want to appeal:

07/13/2021
Date

Date

Date

In **4**, state what you want the appellate court to do. You may check as many boxes as apply.

4. State your relief:

☑ reverse the trial court's judgment *(change the judgment in favor of the other party into a judgment in your favor)* and ☐ send the case back to the trial court for any hearings that are still required;

☑ vacate the trial court's judgment *(erase the judgment in favor of the other party)* and ☐ send the case back to the trial court for a new hearing and a new judgment;

☐ change the trial court's judgment to say: _____

☐ order the trial court to: _____

☐ other: _____

and grant any other relief that the court finds appropriate.

If you are completing this form on a computer, sign your name by typing it. If you are completing it by hand, sign by hand and print your name. Fill in your address and telephone number.

/s/ Matthew DiCianni
Your Signature

Matthew DiCianni
Your Name

140 S. Dearborn St. Suite 600
Street Address

Chicago, IL 60603
City, State, ZIP

(312) 604-9125
Telephone

Additional Appellant Signature

All appellants must sign this form. Have each additional appellant sign the form here and enter their name, address, and telephone number.

Signature

Name

Street Address

City, State, ZIP

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C0644

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In **1b**, check the box to show how you sent the document, and fill in any other information required on the blank lines.

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   First *Middle* *Last*

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   Email address: JQuinn@grayslakelaw.com

   b. By:
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   Date

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   Time

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☐ Mail from a prison or jail at:

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Name of prison or jail

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c. On: _____
Date

At: _____ ☐ a.m. ☐ p.m.
Time

Under the Code of Civil Procedure, 735 ILCS 5/1-109, making a statement on this form that you know to be false is perjury, a Class 3 Felony.

I certify that everything in the Proof of Service is true and correct. I understand that making a false statement on this form is perjury and has penalties provided by law under 735 ILCS 5/1-109.

If you are completing this form on a computer, sign your name by typing it. If you are completing it by hand, sign by hand and print your name.

/s/ Matthew DiCianni
Your Signature

Matthew DiCianni
Print Your Name

C0646

No. 2-
IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

City of North Chicago, Plaintiff/Appellant, v. 2nd & Main, LLC; Unknown owners and non-record claimants Defendant/Appellant.	)	Appeal from Circuit Court of Lake County Circuit Number: 2019-ED-020 Trial Judge: Joseph Salvi Date of Notice of Appeal: August 12, 2021 Date of Judgment: July 13, 2021 Date of Post-Judgment Motion Order: N/A

Affidavit of Matthew T. DiCianni

I, Matthew DiCianni, after being duly sworn, state under oath as follows:

1. I am over 18 years of age, and the statements made in this Affidavit are based on my personal knowledge. If called to testify, I could competently testify to the facts stated herein.
2. Every document in this Rule 328 Supporting Record is a file-stamped copy of a document filed with the circuit court.
3. To the best of my knowledge, every document filed with the circuit court is contained herein.

FURTHER AFFIANT SAYETH NAUGHT.

Under penalties as provided by law pursuant to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), the undersigned certifies that the statements set forth in this affidavit are true and correct.

Executed on August 12, 2021

Matthew DiCianni

SUBSCRIBED and SWORN to
before me this 12th day of August, 2021.

Petra C. Neugebauer
Notary Public

OFFICIAL SEAL
PETRA C. NEUGEBAUER
NOTARY PUBLIC, STATE OF ILLINOIS
My Commission Expires 03/12/2024


NORTH
CHICAGO
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C0651


UP
MTCE
LMT
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C0653

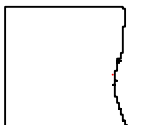

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C0655


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Subject Property





Lake County, Illinois

LakeCounty

Map Printed on 4/20/2020

N

Tax Parcel Lines

Tax Parcel Information

Disclaimer: The selected feature may not occur anywhere in the current map extent. A Registered Land Surveyor should be consulted to determine the precise location of property boundaries on the ground. This map does not constitute a regulatory determination and is not a base for engineering design. This map is intended to be viewed and printed in color.

C0657


arquette St
C0658

C0659

ALTA\ACSM LAND TITLE SURVEY

PARCEL 1: THAT PART OF GOVERNMENT LOT 1 OF THE NORTHWEST QUARTER OF SECTION 4, TOWNSHIP 44 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, BOUNDED AS FOLLOWS: ON THE NORTH BY THE SOUTH LINE OF SECOND AVENUE AS SHOWN ON THE PLAT OF BOARD OF LAC BLUFFS 1ST OF PLATS, PAGE 27), EXTENDED WEST, ON THE SOUTHEAST BY THE NORTHWESTERLY LINE OF MAIN STREET (1ST OF PLATS, PAGE 27), ON THE SOUTH BY THE NORTH LINE OF 22ND STREET EXTENDED EAST, AND ON THE NORTHWEST BY A LINE DRAWN PARALLEL WITH AND DISTANT 30 FEET SOUTHEASTERLY FROM (MEASURED AT RIGHT ANGLES) FROM THE CENTER LINE OF THE MOST SOUTHEASTERLY OF EAST BOUND MAIN TRACK OF THE CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, AS SAID MAIN TRACK IS NOW LOCATED, IN LAKE COUNTY, ILLINOIS.

PARCEL 2: A PART OF THE NORTH HALF OF THE NORTHWEST QUARTER OF SECTION 4, TOWNSHIP 44 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, DESCRIBED AS FOLLOWS: BEGINNING AT A POINT ON THE EASTERLY RIGHT OF WAY LINE OF THE CHICAGO AND NORTH WESTERN RAILWAY COMPANY, WHICH POINT IS 773.10 FEET MEASURED ALONG SAID RIGHT OF WAY LINE SOUTHERLY OF THE INTERSECTION OF SAID RIGHT OF WAY LINE WITH THE SOUTHERLY RIGHT OF WAY LINE OF THE ELGIN, JOLIET AND EASTERN RAILWAY COMPANY; RUNNING THENCE EAST ON A LINE PARALLEL WITH THE SOUTH LINE OF SAID NORTHWEST QUARTER OF THE SAID SECTION 4, A DISTANCE OF 215.8 FEET TO THE WEST LINE OF MARQUETTE STREET, THENCE NORTHERLY ALONG THE WEST LINE OF MARQUETTE STREET, APPROXIMATELY 220 FEET TO THE SOUTHEAST CORNER OF THE FORMER J.W. ALLISON AND SONS CORPORATION PROPERTY, MORE PARTICULARLY DESCRIBED BY WARRANTY DEED DATED APRIL 20, 1921 AND RECORDED APRIL 26, 1921 AS DOCUMENT 201586; THENCE WEST 435 FEET ON THE SOUTH LINE OF SAID FORMER J.W. ALLISON AND SONS CORPORATION PROPERTY TO SAID EASTERLY RIGHT OF WAY LINE OF SAID CHICAGO AND NORTH WESTERN RAILWAY COMPANY; RUNNING THENCE IN A SOUTHERLY DIRECTION ALONG SAID EASTERLY RIGHT OF WAY LINE TO THE POINT OF BEGINNING, IN LAKE COUNTY, ILLINOIS.

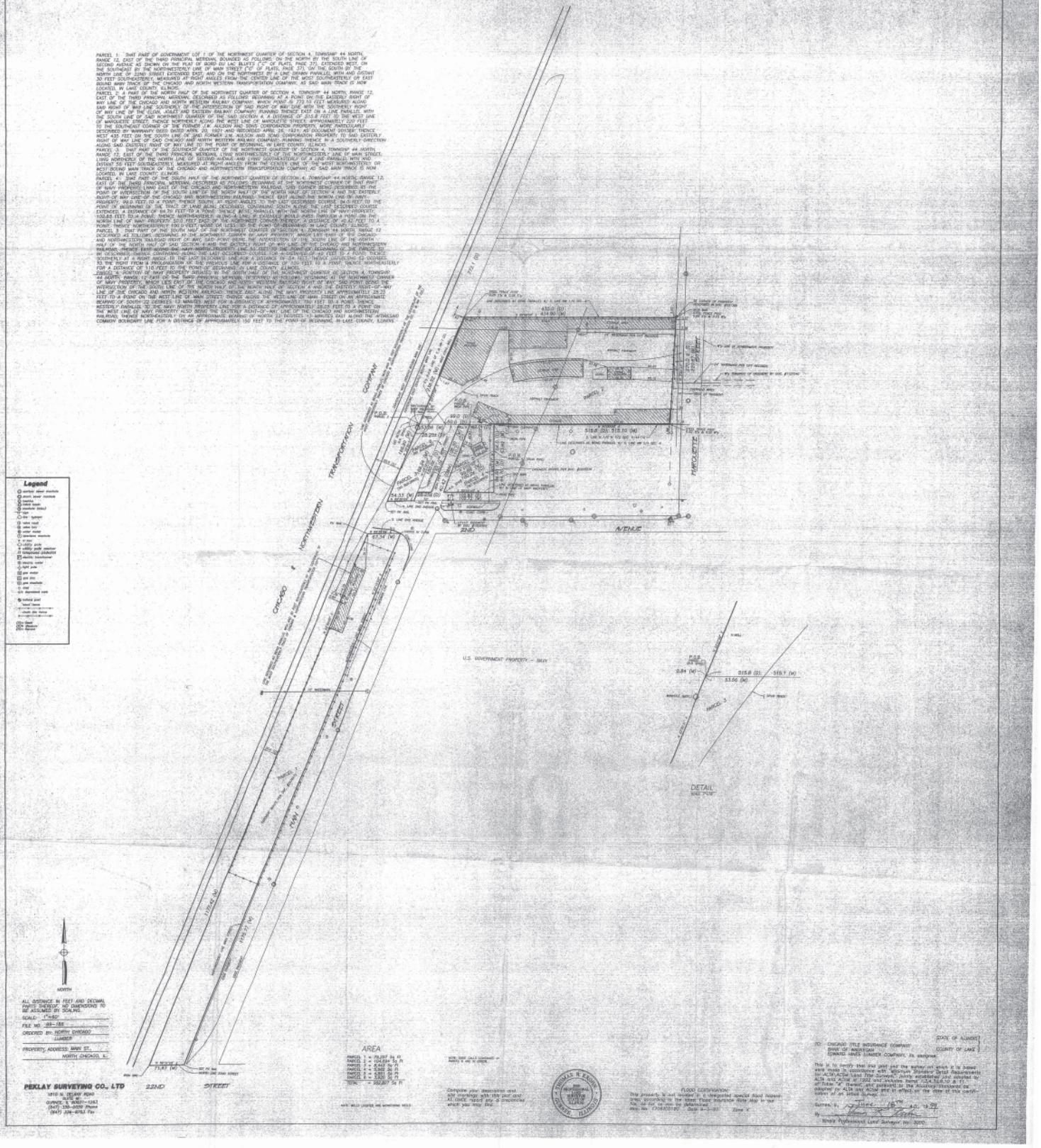
PARCEL 3: THAT PART OF THE SOUTHEAST QUARTER OF THE NORTHWEST QUARTER OF SECTION 4, TOWNSHIP 44 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, LYING NORTHWESTERLY OF THE NORTHWESTERLY LINE OF MAIN STREET, LYING NORTHERLY OF THE NORTH LINE OF SECOND AVENUE AND LYING SOUTHEASTERLY OF A LINE PARALLEL WITH AND DISTANT 55 FEET SOUTHEASTERLY, MEASURED AT RIGHT ANGLES FROM THE CENTER LINE OF THE MOST SOUTHEASTERLY OF EAST BOUND MAIN TRACK OF THE CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY, AS SAID MAIN TRACK IS NOW LOCATED, IN LAKE COUNTY, ILLINOIS.

PARCEL 4: THAT PART OF THE SOUTH HALF OF THE NORTHWEST QUARTER OF SECTION 4, TOWNSHIP 44 NORTH, RANGE 12, EAST OF THIRD PRINCIPAL MERIDIAN, DESCRIBED AS FOLLOWS: BEGINNING AT THE NORTHWEST CORNER OF THAT PART OF THE SOUTH HALF OF THE NORTHWEST QUARTER OF SECTION 4, TOWNSHIP 44 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, LYING EAST OF THE CHICAGO AND NORTHWESTERN RAILROAD, SAID CORNER BEING DESCRIBED AS THE POINT OF INTERSECTION OF THE SOUTH LINE OF THE NORTH HALF OF SECTION 4 AND THE EASTERLY RIGHT-OF-WAY LINE OF THE CHICAGO AND NORTHWESTERN RAILROAD; THENCE EAST ALONG THE NORTH LINE OF MARY'S PROPERTY, 99.0 FEET TO A POINT; THENCE SOUTH, AT RIGHT ANGLES TO THE LAST DESCRIBED COURSE, 94.5 FEET TO THE POINT OF BEGINNING OF THE TRACT OF LAND HEREIN DESCRIBED; CONTINUING SOUTH ALONG THE LAST DESCRIBED COURSE EXTENDED, A DISTANCE OF 94.79 FEET TO A POINT; THENCE WEST, PARALLEL WITH THE NORTH LINE OF MARY'S PROPERTY, 150.65 FEET TO AN ANGLE; THENCE NORTHWESTERLY ALONG A LINE, IF EXTENDED WOULD INTERSECT AT A POINT ON THE NORTH LINE OF MARY PROPERTY 300 FEET EAST OF THE NORTHWEST CORNER THEREOF, A DISTANCE OF 101.32 FEET TO A POINT; THENCE NORTHEASTERLY 100.0 FEET, MORE OR LESS, TO THE POINT OF BEGINNING, IN LAKE COUNTY, ILLINOIS.

PARCEL 5: THAT PART OF THE SOUTH HALF OF THE NORTHWEST QUARTER OF SECTION 4, TOWNSHIP 44 NORTH, RANGE 12 (EXCEPTING AS FOLLOWS: BEGINNING AT THE NORTHWEST CORNER OF MARY PROPERTY, RANGE LIES EAST OF THE CHICAGO AND NORTHWESTERN RAILROAD RIGHT-OF-WAY, SAID POINT BEING THE INTERSECTION OF THE SOUTH LINE OF THE NORTH HALF OF THE NORTH HALF OF SAID SECTION 4 AND THE EASTERLY RIGHT-OF-WAY LINE OF THE CHICAGO AND NORTHWESTERN RAILROAD; THENCE EAST ALONG THE MARY NORTH PROPERTY LINE 99.0 FEET TO THE POINT OF BEGINNING OF THE PARCEL TO BE DESCRIBED; THENCE CONTINUING ALONG THE LAST DESCRIBED COURSE FOR A DISTANCE OF 49.5 FEET TO A POINT; THENCE SOUTHERLY AT A RIGHT ANGLE TO THE LAST DESCRIBED LINE FOR A DISTANCE OF 94.79 FEET; THENCE DEFLECTING 53 DEGREES TO THE RIGHT FROM A PROLONGATION OF THE PREVIOUS LINE FOR A DISTANCE OF 150.65 FEET TO A POINT; THENCE NORTHEASTERLY FOR A DISTANCE OF 116 FEET TO THE POINT OF BEGINNING, IN LAKE COUNTY, ILLINOIS.

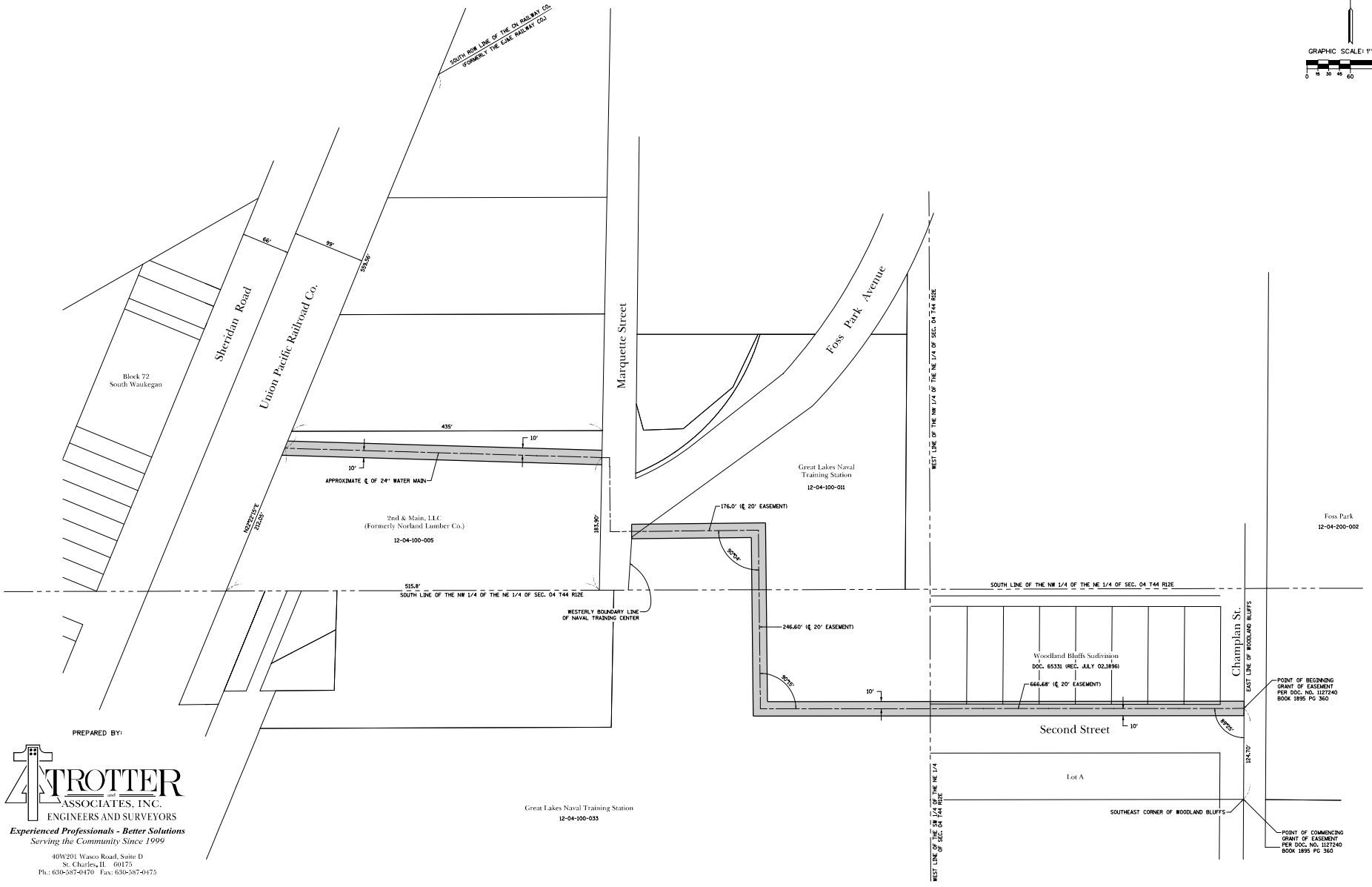
PARCEL 6: PORTION OF MARY PROPERTY SITUATED TO THE SOUTH OWN OF THE NORTHWEST QUARTER OF SECTION 4, TOWNSHIP 44 (NORTH, RANGE 12 EAST OF THE THIRD PRINCIPAL MERIDIAN, DESCRIBED AS FOLLOWS: BEGINNING AT THE NORTHWEST CORNER OF MARY PROPERTY, WHICH LIES EAST OF THE CHICAGO AND NORTH WESTERN RAILROAD RIGHT-OF-WAY; THENCE THE INTERSECTION OF THE CHICAGO AND NORTH WESTERN RAILROAD RIGHT-OF-WAY AND THE SOUTH LINE OF THE NORTH HALF OF THE NORTH HALF OF SECTION 4; THENCE EAST ALONG THE NORTH LINE OF MARY PROPERTY, 99.0 FEET; THENCE SOUTH, AT RIGHT ANGLES TO THE LAST DESCRIBED COURSE, 94.5 FEET TO A POINT; THENCE WEST, PARALLEL WITH THE NORTH LINE OF MARY PROPERTY, 99.0 FEET TO THE NORTHWEST CORNER OF MARY PROPERTY; THENCE NORTH ALONG THE WEST LINE OF MARY PROPERTY, 94.5 FEET TO THE POINT OF BEGINNING, IN LAKE COUNTY, ILLINOIS.

PARCEL 7: THAT PART OF GOVERNMENT LOT 1 OF THE NORTHWEST QUARTER OF SECTION 4, TOWNSHIP 44 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, BOUNDED AS FOLLOWS: ON THE NORTH BY THE SOUTH LINE OF SECOND AVENUE AS SHOWN ON THE PLAT OF BOARD OF LAC BLUFFS 1ST OF PLATS, PAGE 27), EXTENDED WEST, ON THE SOUTHEAST BY THE NORTHWESTERLY LINE OF MAIN STREET (1ST OF PLATS, PAGE 27), ON THE SOUTH BY THE NORTH LINE OF 22ND STREET EXTENDED EAST, AND ON THE NORTHWEST BY A LINE DRAWN PARALLEL WITH AND DISTANT 30 FEET SOUTHEASTERLY FROM (MEASURED AT RIGHT ANGLES) FROM THE CENTER LINE OF THE MOST SOUTHEASTERLY OF EAST BOUND MAIN TRACK OF THE CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, AS SAID MAIN TRACK IS NOW LOCATED, IN LAKE COUNTY, ILLINOIS.



Easement Exhibit

2nd & Main, LLC. v. City of North Chicago



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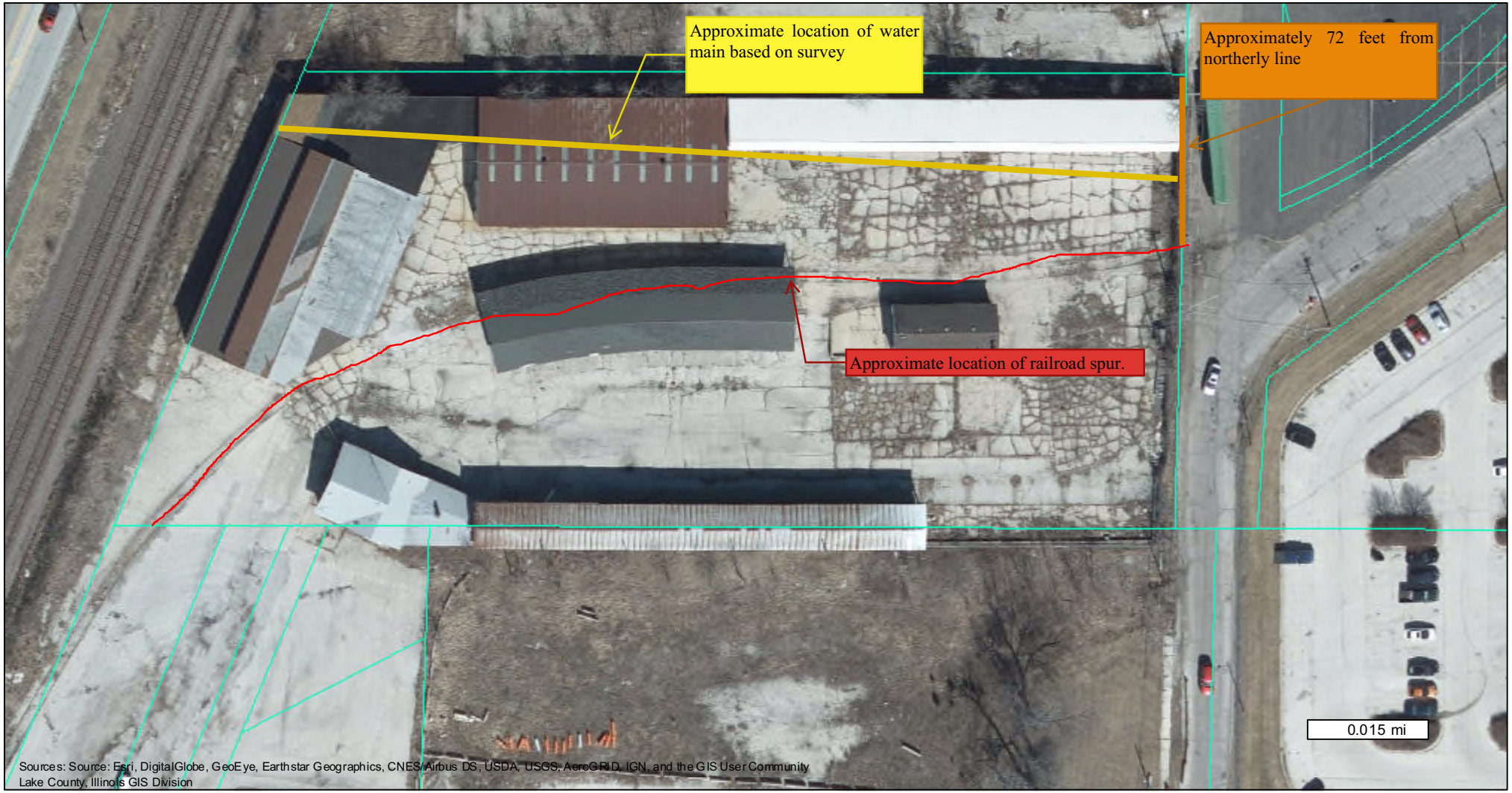
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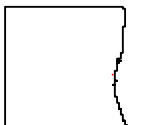
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C0660

Subject Property





Lake County, Illinois

LakeCounty

Map Printed on 4/20/2020

N

Tax Parcel Lines

Tax Parcel Information

Disclaimer: The selected feature may not occur anywhere in the current map extent. A Registered Land Surveyor should be consulted to determine the precise location of property boundaries on the ground. This map does not constitute a regulatory determination and is not a base for engineering design. This map is intended to be viewed and printed in color.

C0661



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Transcript of Philip Dahl

Date: October 25, 2018
Case: 2nd & Main, LLC -v- The City of North Chicago

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IN THE CIRCUIT COURT OF THE 19TH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

2ND & MAIN, LLC, Plaintiff,	)	
-vs-	)	No. 17 MR 1149
THE CITY OF NORTH CHICAGO, Defendant.	)	

The discovery deposition of PHILIP DAHL, taken before Helen Miller, a C.S.R. within and for the State of Illinois, pursuant to the provisions of the Code of Civil Procedure of the State of Illinois and the Rules of the Supreme Court thereof, pertaining to the taking of depositions for the purpose of discovery, taken at 175 East Hawthorn Parkway, Vernon Hills, Illinois, commencing at the hour of approximately 1:51 p.m., on October 25, 2018 pursuant to subpoena.

P R E S E N T

Churchill, Quinn, Richtman, Hamilton, Ltd.
BY: MR. JOHN W. QUINN
Two South Whitney
Grayslake, Illinois 60030
847.223.1500
jquinn@grayslakelaw.com

on behalf of Plaintiff;

Ancel Glink Diamond Bush DiCianni & Krafthefer
BY: MR. MATTHEW T. DiCIANNI
MS. MEGAN MACK
140 South Dearborn Street
Chicago, Illinois 60603
312.782.7606
mdicianni@ancelglink.com

on behalf of Defendant.

~O~

DEPOSITION OF
PHILIP DAHL
on the October 25, 2018

I N D E X

EXAMINATION	PAGE
BY MR. DiCIANNI	4

* * * * * *

E X H I B I T S

NUMBER	PAGE
PHILIP DAHL Deposition Exhibit(s)	
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Exhibit 2	59, 94, 97, 100
Exhibit 3	65
Exhibit 4	85

* * * * * *

PHILIP DAHL,

witness herein, called by the defendant for examination, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. DiCIANNI:

Q. Sir, could you please state and spell your name for the record.

A. Philip, P-h-i-l-i-p, N as Nancy, D-a-h-l.

MR. DiCIANNI: Let the record show that this is the discovery deposition of Plaintiff 2nd & Main LLC's 206(a)(1) witness, Philip Dahl, taken pursuant to notice to all parties and in accordance with the Illinois Code of Civil Procedure, the rules of the Illinois Supreme Court Rules and the local circuit court rules.

Q. Good afternoon, Mr. Dahl. Thank you for being here with me.

Have you ever taken a deposition?

A. Yes.

Q. So you probably know these rules, but I'm going to go over them again so we're all

clear.

When I ask a question, I need you to answer out loud and in words. And the reason for that is the court reporter can't take down shaking of the head, nodding and the court reporter also -- doesn't really make sense on the transcript if it says uh-huh or nuh-uh.

If I ask a question, please let me finish my question before you answer even if you know what I'm going to ask. Wait for me to finish and the reason for this again is just to give our court reporter here a chance to let me finish talking. She can't really take down two people talking at once. And I'll do my best not to talk over you or Mr. Quinn.

If you need to take a break at any time, just let me. This isn't an endurance contest. If you need a glass of water, that's fine. If you need to use the restroom, no problem. The only thing I ask is that you finish answering any question that's pending before you use the bathroom or take a break.

If you don't know the answer to a question, just say so. We don't want you to

C0667

guess. Sometimes, maybe a lot of times, I say things that are confusing or not clear. If that happens, please let me know and I will rephrase the question.

You're under oath right now which means that you are required to tell the truth the same way that you would be in a courtroom.

Does this all make sense to you?

A. Yes.

Q. Did you do anything to prepare for this deposition?

A. I reviewed the documents that I had.

Q. And I don't want you to tell me about the substance of any conversation, but did you meet with your attorney to prepare?

A. Yes.

Q. Mr. Dahl, let's just get a little bit of background information on you to start with.

When were you born?

A. June 27th, 1947.

Q. And where were you born?

A. Waukegan, Illinois.

Q. And did you grow up in Waukegan?

A. Most of my life.

Q. Did you go to high school in Waukegan?
A. Yes.
Q. Which high school?
A. Both. It was a split campus.
Q. Oh, okay, so Waukegan High School?
A. Yes.
Q. And did you graduate from high school?
A. Yes.
Q. Did you go to college?
A. Yes.
Q. Where do you go to college?
A. University of Illinois Champaign.
Q. Okay. And after you graduated -- and did you graduate from Champaign?
A. Yes.
Q. And what did you graduate with?
A. A degree in accounting.
Q. Okay. Did you stay there for a fifth year at U of I to get the masters degree in accounting?
A. No.
Q. But did you get a CPA?
A. Yes.
Q. Okay. When did you get a CPA?

C0669

A. 1973 I believe.

Q. And has your CPA been active since then?

A. Yes.

Q. So you graduated from U of I.

What did you do after that?

A. After I graduated from U of I, I had several accounting positions.

Q. Let's just go through some of them briefly. Did you work for one of the big accounting firms?

A. No.

Q. Did you work for your own shop then?

A. No.

Q. Okay. What did you do?

A. I worked for Echo Products in Wheeling as a general accountant.

Q. Okay. What did Echo Products do?

A. They did a variety of things. They did manufacturing. They did custom machinery equipment building. And they manufactured aluminum pots and pans. Another division did housewares and they also did resurfacing of commercial pots and pans.

Q. How long were you there?
A. Two years.
Q. And then what did you do after that?
A. After that I went to work in a family business.
Q. Okay. What was the family business?
A. Auto repair.
Q. And did you work as an accountant there?
A. No.
Q. Did you work as a mechanic?
A. Yes.
Q. How long did you do that for?
A. That was approximately 2 years.
Q. What did you do after that?
A. I became a manager of a processing plant, poultry.
Q. And how long did you do that for?
A. I did that for 6 months.
Q. What did you do you after that?
A. Then I went back to the family business and I taught college for one semester.
Q. Okay. Where did you teach college at?
A. Trinity Christian Palos Heights.

Q. And after you taught college, what did you do then?

A. I went to work as a public accountant.

Q. Where did you do that?

A. Waukegan.

Q. For a company up there?

A. Rose Christensen.

Q. What is Rose Christensen?

A. It's the company.

Q. Oh, is that an accounting firm?

A. Yes.

Q. And how long were you at Rose Christensen?

A. Until 1979. And then I went to Antioch and I became a partner in what was eventually Kirkpatrick and Dahl.

Q. How long were you at Kirkpatrick and Dahl?

A. Still.

Q. And is it still called Kirkpatrick and Dahl?

A. Yes.

Q. And you're a public accountant there?

A. Yes.

Q. What kind of clients do you have?
A. Variety.
Q. Are they companies, individuals?
A. Yes.
Q. Both of them?
A. Yes.
Q. Where is Kirkpatrick and Dahl?
A. Antioch, Illinois.
Q. Has it always been located in Antioch?
A. Yes.
Q. Do you live in Antioch?
A. Yes.
Q. How long have you lived in Antioch?
A. Since the early 80s.
Q. Do you --
A. Antioch area; Antioch itself 1995.
Q. Okay. And are you married?
A. Yes.
Q. What's your spouse's name?
A. Laurel.
Q. Do you have any children?
A. Two.
Q. What are their names?
A. Eric and John.

Q. So I know we talked about -- go ahead.
A. Can I back up?
Q. Yes.
A. The question was when I became a CPA. I was notified in -- I took the exam in '73; '74 I got my license.
Q. Okay. Yeah. That's how it works with attorneys too.
A. Just wanted to clarify.
Q. Thanks. I appreciate that. You take the bar exam as an attorney, and it takes a little while for you to get your license. So I appreciate you clarifying that.
In addition to working as an accountant, did you have any other business ventures?
A. Yes.
Q. Could you please describe what some of those are?
A. I had invested in a sweater company.
Q. Oh, which one?
A. It was -- we purchased East 10.
Q. East 10?
A. Yes. It was company in Tennessee,

Bristol, Tennessee.

Q. And did they make like cashmere sweaters or...

A. Primarily sports sweaters.

Q. Okay. And did you buy the entire company?

A. We bought what was sold, yes.

Q. And did you have any role in manufacturing the company on a day to day basis?

A. No.

Q. You were just a passive investor?

A. And the accountant.

Q. And the accountant.

Do you remember what year that was?

A. No.

Q. Would you say --

A. It would have been in the late 80s.

Q. Do you still have your equity stake in that company?

A. No.

Q. Did you sell it?

A. The company dissolved.

Q. Do you remember what year that was?

A. No.

90s, mid-90s?

A. Somewhere in there.

Q. Okay. So in addition to investing in the sweater company, what other business ventures have you had?

A. I own a -- I'm an investor in a peat mine operation.

Q. Oh, interesting. Where is that?

A. Antioch.

Q. Okay. I didn't know they still mined peat. What do they do with peat?

A. Soil amendment; raising earthworms.

Q. So what's soil amendment?

A. You add it to either your garden or you would see it in the box stores, the Menards, Home Depot in their garden center.

Q. Oh, I see. So they're the big bags of dirt that you see in the --

A. Or peat itself, yes.

Q. Okay. When did you invest in that company?

A. April 10th, 1990.

Q. And is that company still in business?

Q. Did you have an active role in that company?

A. Yes.

Q. What was your role?

A. What needed to be done.

Q. Were you responsible for the business decisions?

A. Yes.

Q. Did you do the accounting too?

A. Yes.

Q. How did you find out that you wanted to invest in a peat company?

A. It was a good investment.

Q. So in addition to that business venture any other business ventures?

A. Other than 2nd & Main, no.

Q. Okay. Well, let's talk about 2nd & Main for a minute then. So let's just get some background on it. When was 2nd & Main -- and that's an LLC, right?

A. Yes.

Q. When was 2nd & Main, LLC formed?

A. October of '13.

A. 2013.

Q. Why did you form 2nd & Main?

A. To acquire the property.

Q. Did 2nd & Main have any other business activities besides holding the property?

A. No.

Q. And did you use an attorney to form 2nd & Main?

A. Yes.

Q. And who was that attorney?

A. Michael W. Ganter.

Q. And who are the members of 2nd & Main?

A. Philip N. Dahl and Laurel J. Dahl's irrevocable trust dated in '14.

Q. And do you own the company 50/50?

A. No.

Q. What percentage of the company do you own?

A. 70%.

Q. Your wife owns 30%?

A. The trust owns 30%.

Q. Thank you. The trust owns 30%.

How much capital did you invest in the

A. $1,000.

Q. How much have you invested all together?

A. Over a quarter of a million in debt.

Q. So that's money that you borrowed from the bank then?

A. No.

Q. Where did you get the money from?

A. Self investment or retirement.

Q. Okay. And the only assets that 2nd & Main, LLC possesses is the property at 2nd & Main, North Chicago; is that correct?

A. That's correct.

Q. So in addition to your interest in the peat corporation and 2nd & Main, do you have any significant ownership interest in another LLC or corporation?

A. Yes, through a related party.

Q. Can you please describe that?

A. My spouse.

Q. And what's her investment or her holding?

A. She has an interest in Dahl's Auto

Chicago Fuel and Feed, LLC, and she is the actual owner now of the peat corporation, majority.

Q. So you said --

A. As I said, I was still employed and I still have the accounting practice and I have lumber yard storage which is another piece of property adjacent to 2nd & Main and I am a partner in a hunt club.

Q. Wow, that's a lot on your plate.

What's the hunt club that you do?

A. It's Macomb Hunt Club.

Q. Is that a hunting --

A. Yes.

Q. -- association?

What do you hunt?

A. Nothing.

Q. Oh?

A. There, I've never hunted there.

Q. Oh, okay. Why are you a member of it then if you don't hunt?

A. I thought I would be.

Q. You said that you've hunted, other

Q. What have you hunted?

A. I've hunted deer on a piece of property we owned in Wisconsin.

Q. So going back I think you said that you owned North Chicago Auto Repair; is that right?

A. No.

Q. North Chicago Auto Body?

A. No.

Q. What --

A. It was Dahl's Auto Reconstruction Company, Inc. and I said my wife owned that.

Q. Sorry. I got to take better notes here.

A. And I would like to clarify one thing.

Q. Sure.

A. We did have an operating farm in Wisconsin that was not a separate business entity form. It was a Schedule F that showed up on my personal tax return.

Q. Oh, what did you do on that farm, sir?

A. I was an investor.

Q. What kind of ownership interest did you have on that?

A. My wife and I owned it 100%.

Q. And do you still own that?

A. No.

Q. Did you sell it?

A. Yes.

Q. How did acquire your ownership interest in that?

A. Purchased.

Q. Turning back to Dahl Auto Reconstruction, Inc. -- is that right?

A. Dahl's Auto Reconstruction Company, Inc.

Q. Thank you for clarifying that.

That's located in North Chicago?

A. No.

Q. Where is that located?

A. Antioch.

Q. Antioch.

Is that the family business you were talking about?

Q. And did your father work there too?

A. Yes.

Q. And you said I believe that you owned a business in North Chicago besides 2nd & Main, LLC; is that correct?

A. I said, yes, that is Lumber Yard Storage, LLC and that we had North Chicago Fuel and Feed, LLC which is inactive right now.

Q. Okay. Thank you for clarifying that.

And North Chicago Fuel and Feed, what did that do?

A. That's always been inactive.

Q. Did you have plans to start a company?

A. An operating company.

Q. What would that have done?

A. It would have been shipping product off of 2nd & Main.

Q. When did you form that?

A. October of '13.

Q. I want to talk a little bit about the 2nd & Main property. Now, you said you purchased

'14. There was an offer on the property that was done in '13.

Q. Thank you. So you put an offer on the property in October, 2013?

A. Yes.

Q. And it didn't close until July, 2014?

A. July, '14, yes.

Q. That's kind of a long closing period. Why was there such a delay?

A. The bank, the sellers, Norland, did not have clear title to all the property that was offered for sale.

Q. Why didn't they have clear title to it?

A. I can't tell you that.

Q. You don't know what the answer is?

A. I'm saying I don't know why --

Q. Okay.

A. -- didn't get that. They had a title policy saying they owned it which is why I was -- why I made an offer on it. And then we come to

communicating with?

A. Scott Yall, the president of NorStates. On the negotiation there was a Joe Roberson who I dealt with regarding the actual operation at the -- or access to the property. He was the bank's representative.

Q. Is there anyone else that you dealt with over at Norland?

A. No -- NorStates.

Q. NorStates.

A. They did have a property manager that I met once on the property. I don't recall their name.

Q. So what made you want to purchase the 2nd & Main property?

A. I thought it was a good opportunity because of the rail access.

Q. What were your plans for the property when you purchased it?

A. To either have it as a lumber yard or as a incubator for contractors because there were

for?

A. $62,000.

Q. Do you think that was below market value?

A. No.

Q. So you think the property was worth about $62,000 when you bought it? It was pretty fair?

A. I think that was the price that the bank wasn't going to go below.

Q. So it's a pretty good size property, wouldn't you say? How big is it?

A. That parcel is about 2 and a half acres.

Q. So $62,000 for 2 and a half acres, that's not a lot of money for a lot of land. Why do you think it was so undervalued?

A. The bank wanted out. The bank had a significant debt that was non-performing and they wanted that off their books.

Q. And did you take over that debt?

Q. Do you know who they owed that to?

A. Who the bank was owed; it was Hines Lumber.

Q. So Hines Lumber had a lien on the property then for a million and a half?

A. Hines Lumber was the creditor to the bank. The bank took that property over in foreclosure.

Q. I see. Now, did Hines Lumber operate that -- or own that property before the bank did?

A. The bank was the mortgagor on the purchase of Hines in the late 90s, early 2000.

Q. And do you know how long Hines -- so Hines Lumber operated on that property at some point?

A. Yes.

Q. Do you know how long they operated on that property?

A. I believe the bank got the property back in 2010.

A. North Chicago Lumber.

Q. Why did it -- do you know why it changed from North Chicago Lumber to Hines Lumber?

A. No.

Q. Do you know anyone that worked at Hines Lumber?

A. Prior to my buying it, no.

Q. Since you've got bought it, have you interacted with anyone?

A. I have interacted with people that said their dad or grandfather had worked there. And I interacted with one person that stopped by one afternoon to know what was going on because they had worked there. Do I know who that person is? No.

Q. Do you know who any of the people are that you talked to?

A. No.

Q. Who said that that --

other than within the last 60 days to see if Hines would be interested in using the facility.

Q. You talked with -- do you know who you talked with at Hines about that?

A. No. Because I left -- I got put to a voicemail and there was no response back.

Q. You don't know whose voicemail you left a message on, do you?

A. No.

Q. What did you want to talk to Hines in terms of using their facility?

A. The possibility of shipping lumber and receiving lumber into the site.

Q. Have you talked with anyone else about shipping lumber or receiving lumber on the site?

A. Yes. I talked to Lee Lumber and they were not interested.

Q. Anyone else?

A. I did have someone check with Chain of Lakes Lumber and they were not interested.

characterization of what you said?

A. Since 2017 we've been looking to have that take place.

Q. Have you had any other ideas for business on that property?

A. We had looked at storage originally until something else took place and that was turned down by the city.

Q. What storage were you going --

A. Boats.

Q. Like commercial boats or just recreational vehicles?

A. Whomever would look to store a boat on the property or an RV.

Q. And you said the city turned that down?

A. The city would not allow us to do that.

Q. Did they give you a reason why?

A. Yes.

buffer yard?

A. Yes. They wanted -- when we purchased the property, the property was unsecured. We fenced and secured the property. Then when we went to use the property, the city said we could no longer use the fencing that they had approved 6 months earlier and they wanted it relocated 25 feet from where it was. And they wanted plantings on that property between the street and neighboring property and the fence.

Q. So like trees?

A. Trees, bushes.

Q. Do you know why they did that? Why they told you one thing and told you something else later?

A. They did change business -- or building economic development people.

Q. So one economic development person told you one thing and another one told you

He left just before we closed on the property.

Q. Steve Sielsca, does that sound right?

A. Again, I don't remember.

Q. And then who was the economic development you talked with afterwards?

A. It would be Ron Lance I believe was the next one. Prior to Steve there was a Joe Napalotano, and he left before we got more involved in the property.

Q. So you said you wanted to use the property as a boat storage. Did that fall through because the city wouldn't approve you doing that?

A. Yes.

Q. When approximately did that happen?

A. That was in the fall of 2014.

Q. So after fall of 2014 did you have any other business ventures?

A. Not in that -- not for that property

on the property?

A. We had asked about that, for a greenhouse.

Q. And what did the city say?

A. The city said, interestingly enough, they did not allow any controlled substances within the city limits contrary to the existence of AbbVie and Abbott who are manufacturers of controlled substances.

I also had looked to do a silage operation as a feed source which the city said that that was an agricultural activity and not allowed. And that was fermentation process similar to again what AbbVie is doing in their facility just north of us.

So I was looking to comply with what was being offered in the city and the city turned it down.

Q. And they turned it down because --

limits because it was agricultural as opposed to a fermentation process.

Q. But you said they were allowing AbbVie and Abbott to do that?

A. Yes.

Q. Any idea why there was a discrepancy?

A. No. Other than the fact that they did not want to cooperate.

Q. Any idea why they didn't want to cooperate?

A. It would be just speculation at this point in time.

Q. Okay. Well, I don't want you to speculate, I don't want you to guess.

Any other business operations on the property?

A. No.

Q. How much revenue have you made on the property?

underneath it?

A. Yes.

Q. When did you find that out?

A. In October of '13.

Q. How did you find that out?

A. Discussions with a perspective buyer.

Q. Which buyer?

A. David Henderson, JJ Henderson and Sons.

Q. So were you two bidding against each other on the property?

A. No.

Q. Why were you having conversations with them?

A. He had abandoned the thought of purchasing that property and his father knew I was interested in a project.

Q. Do you know why he abandoned it?

Q. That hadn't been disclosed on the title report?

A. Yes.

Q. Did the bank know about the water main?

A. I couldn't tell you when they knew. I couldn't tell you when they knew about the water main.

Q. But -- go ahead. Sorry.

A. (No verbal response.)

Q. So you said you couldn't tell me when they knew about the water main. That implies they did know about the water main at some point?

A. Yes.

Q. Do you know when that was?

A. No. Other than it would have been probably the same time that Henderson found out.

Q. Do you know whether any other property

if you knew that there was a water main running underneath it?

A. The water main was not going to be my problem.

Q. What do you mean by that?

A. It was either going to be removed or there would be an adjustment to leave it there.

Q. Did you think the water main would limit your ability to use the property?

A. The water main -- the exposure of a break is a risk that was always there and still there.

Q. And did you believe that that decreased the value of the property?

A. I couldn't have bought the property for less.

Q. So you said you bought the property for $62,000; is that correct?

7 times what you paid for it. Why such a
8 discrepancy there?
9 A. Because someone was willing to take a
10 loss didn't mean -- excuse me, I would clarify
11 that was the title insurance. Just because the
12 bank was willing to take a loss didn't mean I
13 would be willing to risk the reality of the
14 property.
15 Part of the reason that there was a
16 delay on the closing, I was giving the bank an
17 opportunity to file a claim on their title
18 insurance. Their policy did not have an
19 exclusion for the water main. And I said I would
20 wait and share half of the settlement.
21 Q. Did they ever file a claim?
22 A. No. They wanted to be rid of that
23 property.
24 Q. Why did they want to be rid of it so

Q. What did you learn about the environmental contamination?

A. The property had been contaminated by the property from the north, the adjacent property from the north. But as long as all of the property that I was purchasing was either under roof or under blacktop and concrete and I was not looking to disturb that, it was a non-issue.

Q. So basically you're saying as long as no one starts digging up the property, you wouldn't have had any environmental problems; is that what you're saying?

A. That's correct.

Q. How did you come to that conclusion?

A. The attorney that I hired to do the bonafide purchase.

A. Yes.

Q. Was it a -- I don't know how familiar you are with environmental tests, but they have a few phases, like a Phase 1, Phase 2; are you familiar with that?

A. He -- whatever he did, he was also supplied several Phase 1s and 2s that had been previously done on the property or the adjacent property.

Q. Do you know specifically what type of environmental contamination was on the property? So what toxic chemicals might have been in the ground?

A. Can I tell you which ones? No, but they were listed.

Q. And those chemicals didn't get there and this is just based on your knowledge from

A. That is my understanding.

Q. So why did you buy the property then if there was so much environmental contamination on it?

A. It was a nonissue.

Q. You thought as long as we don't have to dig up something on the property, then it won't be contaminated -- or it won't cause a problem?

A. That's correct; that's my understanding.

Q. But you also said that you knew that the water main was there when you purchased the property; is that right?

A. That's correct.

Q. Did you know that the existence of the water main might necessitate having to dig up on

Q. So does that mean the city?

A. Yes.

Q. I want to get into the environmental contamination in more detail in just a minute, but I just I want to finish up this line of questioning about the background of the property. Is there running water on your property?

A. Is there water on -- at my property right now?

Q. Yes. So is there like a toilet or a running --

A. There is.

Q. -- sink?

A. But the water has been shut off.

Q. When was it shut off?

A. Two years ago.

former owners and...

A. No.

Q. Was there running water on the property when you purchased it?

A. The water was available for reservicing, yes.

Q. Do you know how that water got supplied to the property?

A. Through the pipes from North Chicago that come down 2nd Street, I believe.

Q. Okay. I'd like to show you some pictures of the property, and let's mark this Exhibit 1.

(Exhibit 1 identified.)

And could you please take a moment to look through those pictures. Would you say that

first picture there, the one labeled 01.

A. Okay.

Q. And there's two pictures on that page. I want to talk about the top picture there. You see in the foreground of that picture there's rail tracks?

A. Yes.

Q. Are those rail tracks in use?

A. I believe the last time that there were trains on them was 2017 when they redid the intersection of Martin Luther King Drive with the tracks. I believe that was the time. And they've been in use for UPS service people to get on and off the tracks to examine.

Q. Okay. So there's -- I guess what I'm trying to get at, and perhaps I wasn't clear, it

Q. Oh, okay. I thought that there was another set of tracks that went through this grass right here (indicating)?

A. That's not my property.

Q. Oh, that's not your property, okay. That clarifies things for me. Okay.

Do you know who owns that property?

A. The UP.

Q. UP. So they actually own it or have an easement, do you know?

A. What are we talking about now?

Q. Sorry. The railroad tracks that go through the grass over there?

A. The railroad tracks that are on the -- within the grass in that picture, they're beyond the grass and that's their main lines.

And lumber yard storage owns those rail tracks to the best of your knowledge?

A. No.

Q. Who owns the rail tracks?

A. Union Pacific.

Q. Oh, they own -- okay.

A. They own those tracks that you see in the picture here.

Q. Okay. Thank you. I appreciate that clarification.

And you said the last time those were used was in 2017?

A. That I saw.

Q. Let's turn to Page 2.

A. Okay.

Q. And it's fair to say those 2 buildings on your property, the 2nd & Main property --
A. Yes.
Q. -- are those buildings vacant?
A. Yes.
Q. Have you ever registered those building as vacant with the city?
A. Excuse me, there's a distinction. They're empty, not vacant.
Q. What's the distinction?
A. You're asking me are they vacant according to the city of North Chicago's ordinance and they are not.
Q. It looks like there's nothing in them right now. Why wouldn't you say that they're vacant?
A. The property is being leased.
Q. You said the property is being leased?
A. Yes.
Q. Who is it being leased to?
A. Hussey railroad, Hussey Terminal Railroad Company.
Q. Hussey Terminal Railroad Company is leasing the entire property then?

A. Yes.
Q. From 2nd & Main?
A. Yes.
Q. How much are they paying 2nd & Main to lease the company?
A. It's a graduated rent.
Q. And can you just specify the terms of the graduated rent?
A. It's a thousand dollars guaranteed, 7 and a half percent of revenue and 25 percent of any ancillary activity on the property.
Q. Who owns Hussey Railroad Terminal?
A. I do.
Q. 100%?
A. Yes.
Q. And is that in -- what's the name of that --
A. Excuse me. That should have been put in as a business; that just came in.
Q. That's okay. Is that Hussey Railroad Terminal, LLC?
A. No, Inc.
Q. When was that formed?
A. January of 2017.

Q. Did you purchase that from someone?
A. I created it.
Q. And what does Hussey Railroad Terminal Inc. do?
A. It's a railroad that will be operating on 2nd & Main.
Q. Are you the only shareholder in --
A. Yes.
Q. Now, if I'm not mistaken, I believe in order to operate a railroad you need to register with the surface transportation board federal agency. Has that -- has Hussey Railroad done that?
A. Yes, we've been approved.
Q. Okay. And that allows you to operate in interstate?
A. It allows us to operate where we have track and where we have overhead agreement with any other railroad.
Q. So you would be permitted then to operate your -- to, say, ship something on those railroad tracks to Wisconsin?
A. Originate from our tracks.
Q. So how would Hussey Railroad make

money then? When rail tonnage goes over the tracks, it would charge a fee?

A. Yes.

Q. How much track does Hussey Railroad own?

A. Hussy Railroad has the rights to 540 feet.

Q. And all the track on the 2nd & Main property then?

A. Yes.

Q. What do you plan to do with Hussey Railroad?

A. Ship product.

Q. Any type of product?

A. Wood products.

Q. Wood products from 2nd & Main property?

A. From the property; not from -- it would be customers that would be using that as a transfer site.

Q. Does the existence of the water main affect the operation of the railroad on the property?

A. It's a risk.

Q. Can you explain how?
A. If it ruptures.
Q. And in addition to Hussey Railroad have you tried to get any other railroads to operate on the property?
A. There's I believe an agreement with the Union Pacific already.
Q. What's that agreement?
A. To ship to and from that property.
Q. And have they been shipping to and from that property?
A. Not since 2010 to my knowledge.
Q. Did you create that agreement with Union Pacific?
A. I believe the agreement was done in 1936.
Q. Oh, wow.
A. So no.
Q. So I don't know if you have knowledge of the agreement, but is it like --
A. No, I don't.
Q. Okay. Any other railroads have permission to ship on that property?
A. Originally the EJ&E Canadian National

now.

Q. Do they still have --

A. I couldn't tell you whether they still have that right.

Q. Let's turn back to these pictures here and again we're looking at Picture Number 2 and in this picture we see 2 buildings. Let's look at the picture -- at the building to the right of the picture.

Do you know what that building -- obviously said it's not being used now. Do you know what it was used for at one time?

A. Storage materials.

Q. Do you know what was stored in there?

A. No.

Q. What about the picture on the left? Is that -- do you know what -- did I say picture on the left? My apologies. Building on the left, do you know what was stored in there?

A. No.

Q. Let's turn to Picture Number 4. In Picture 4 here I believe the bottom picture depicts a building and then the top picture is a picture taken inside that building.

Do you know what was -- what that building was used for?

A. The building in the top picture?

Q. Yes. Is that -- is it fair to say that that's a picture inside the building at the bottom?

A. No.

Q. Oh.

A. It's fair to say that it's a picture of a building outside that building from the bottom.

Q. Oh, okay. Thanks for clarification that.

So let's just talk about the building -- the bottom picture and the building in there.

Do you know what that building was used for?

A. That's the same building that was in Picture 3.

Q. Oh, okay. Let's take a look at Picture 6, the building depicted there, would you say that's the main building?

A. Which building are we looking at now?

Q. So we're looking at the one in the --

A. Center of the picture.
Q. Center, yes.
A. That would be the office building.
Q. And you have an office in there?
A. That was the office building.
Q. Does that have electricity?
A. No.
Q. Was that where the running water was?
A. It is. When it is on the property, that's where it is.
Q. Have you done anything to try to -- it looks like there's a lot of weeds on the property. Have you done anything to try to eradicate those weeds?
A. We've mowed them.
Q. Who? You mowed them or did you hire someone?
A. I mowed them and I hired someone.
Q. Let's look at Picture Number 7 now. And I want to talk about the two buildings there at the top, left and right, they're kind of side by side to one another.
Do you know what those buildings used to be used for?

A. The picture nearest the utility poles was used as a chop shop to my understanding. And the building in the middle is that same building you showed me in Picture Number 2 and I do not know what that was for.

Q. Okay. Let's take a look at Picture Number 8. And is it accurate to say that that is a picture of the inside of the building shown on Page Number 1 at the top there?

A. Yes.

Q. Okay. Do you know what that building was used for?

A. Storage of lumber.

Q. Is it being used for anything now?

A. It's being repurposed to store bulk materials.

Q. What kinds of materials?

A. Whatever we have a customer for.

Q. Have you had any customers contact you about wanting to store stuff there?

A. Other than the storage, no, boat storage and car storage, no.

Q. And then let's turn to Picture 13. It looks like there's a building, almost like a half

building.

A. 13?

Q. Oh, sorry about that, 11. Sorry. Building 11 there --

A. Picture 11?

Q. Picture 11. Now I'm all discombobulated. Picture 11, you see there's like a half building there with like a open -- you know a side on it that's open. What was that building used for, do you know?

A. Lumber storage based on what it was built for.

Q. And would you have any plans to use that building?

A. Storage.

Q. Storage, okay.

A. There's no building I wouldn't plan to use for storage.

Q. Do you have any plans to rehab or renovate any of the buildings?

A. As needed. I thought I mentioned that we were repurposing this building here.

MR. QUINN: For the record what he's indicating is Picture Number 8.

MR. DiCIANNI: Thanks.

Q. Did you ever have any discussions with the city about selling one of those buildings?

A. Yes -- excuse me, no. I had no discussion with the city about selling any building on 2nd & Main.

Q. Oh, okay. Did you have a discussion about selling some other building?

A. Yes.

Q. What building was that?

A. That was a building on lumber yard storage.

Q. One quick question here: Did you ever know anyone with the last name of the Savel, S-a-v-e-l?

A. No.

Q. You never know a Fred Savel?

A. When you say know, you mean interact?

Q. That's a good question. Have you ever heard of a Savel?

A. There was someone by the name of Savel that I thought gave an affidavit. Do I know the person, no. Is that what you were referring to?

Q. Yeah. I wanted to know if you had

ever met him before?
A. No.
Q. I'd like to discuss now your communication with the city prior to the purchase of the property.
So, first of all, did you communicate with any city officials prior to your purchase of the property?
A. Joe Napalotano, I said, and Steve.
Q. What did you and Joe talk about?
A. The fact that the city didn't own all the property they were trying to sell me.
Q. So the city was trying to sell you property?
A. No. The city -- excuse me -- the bank didn't own all the property the city -- the city said that the bank didn't own all the property that the bank was trying to sell.
Q. So the city -- how did the city become aware of the potential sale?
A. I went in to find out what was going on in that -- on the property.
Q. You went into city hall?
A. Yes.

Q. And why did you go into city hall?
A. I was looking to get the property secured.
Q. And this was prior to your purchase of it?
A. Yes.
Q. And so the city -- did the city want the sale to go through?
A. I believe so.
Q. And that's why they told you that the bank didn't own all of the property because they wanted to try to facilitate the deal?
A. They were going -- they were explaining what was under the bank's control and what wasn't.
Q. So you said you spoke to Joe. Did you ever speak with Joe and Steve? And did you ever speak with Ron Lands?
A. Yes. That was after I had purchased the property.
Q. Did Joe or Steve ever tell you about the water main?
A. Joe gave me a schematic, I believe, of the property that showed a -- showed the railroad

tracks and the water main that was highlighted.

Q. And is that the first time you learned about the water main?

A. No.

Q. Do you remember when Joe gave that to you?

A. It had to be in October because he left the city shortly thereafter.

Q. And how did you say you learned about the water main, the bank told you?

A. No. David Henderson told me.

Q. That's right.

And what did the city say about the water main -- or what did Joe say about the water main?

A. He just said it was there.

Q. Did he say that the city ever dug up stuff on the 2nd & Main property?

A. The only time I'm aware of the city coming back on the property is shown in picture -- on Page 11.

Q. Okay.

A. Do you see the post with the fire extinguisher on it?

Q. Yes.
A. Do you see the weeds and the broken concrete in front of it?
Q. Yes.
A. That I believe was in October -- I believe it was October 13th, 2013 the city came onto the property to try to locate the water main and examined what the condition of it was. To my knowledge, that's the only time the city has been on the property since it was constructed.
Q. What did the city do to try to locate the water main?
A. It was my understanding that they opened the concrete, dug down approximately 10 feet, ran into water, ground water, and closed it up.
Q. So the city doesn't even know where the water main is then?
A. The city did not find the water main within 10 feet of the surface. They know where it isn't as far as the elevation.
Q. Okay. I want you to take a look at this. We can mark this as Exhibit 2
(Exhibit 2 identified.)

C0721

Let's take a look at that top picture there. Would you -- is it fair to say that that is an aerial representation of the 2nd & Main property?

A. Other than the lower right corner, yes.

Q. Okay. Would you be able to indicate on there approximately where the water main runs?

A. Based on the survey that was given to me, it would be ahead of the shadows running into the 2 buildings to the left. And that would also be corresponding to what the city shows on their plans.

Q. Would you mind just drawing that on there? I have a pen.

MR. QUINN: You can go ahead and do that.

THE WITNESS: Do you have a ruler?

MR. DiCIANNI: Yes.

THE WITNESS: (Indicating).

BY MR. DiCIANNI:

Q. Let's go back to your communications with the city prior to the purchase of the property. Did you ever communicate with someone

named Josh Wheeler?

A. Yes.

Q. Who was Josh Wheeler?

A. Josh was the building and grounds or public works director.

Q. And what did your communications consist of?

A. It was a meeting with him and I believe Ken Endress with the Navy. And it was on the availability of water and sewer on the property.

Q. And what did Josh tell you?

A. That's it was available.

Q. Water and sewer?

A. Yes.

Q. Did Josh say anything about the city cleaning up the property -- Strike that.

Did Josh say anything about the city remedying the environmental contamination on the property?

A. There was no discussion on that at that meeting. The meeting was focused on water and sewer availability.

Q. When did that meeting take place?

A. Sometime I believe in the fall of 2013.

Q. Was there any discussion with Josh Wheeler later about remedying the environmental contamination?

A. No, not to the best of my knowledge.

Q. Was there any discussion with any city official about remedying the environmental contamination?

A. Yes.

Q. Which city official?

A. Nimrod Warda.

Q. When did you and Nimrod talk about that?

A. It would have been in June or July of '14.

(Brief interruption.)

The city attorney doesn't account as an official, right?

Q. No, but did you meet with the city attorney?

A. Yes.

Q. Oh, which -- who did you meet with?

A. Chuck Smith.

Q. When did you and Chuck meet?
A. In May and June, both verbally on the phone with my attorney and also on site.
Q. May and June of 2014?
A. 2014.
Q. What did you and Chuck talk about?
A. The water main and the pollution along with getting certain pieces of property for the water main.
Q. And what did Chuck say in regards -- did he say anything specifically in regards to that?
A. He had agreed to -- the city had hired the same attorney I used for my environmental -- to file a RCRA complaint notice against the polluters.
Q. So the city hired someone to file a RCRA complaint?
A. Along with myself; it was a joint effort.
Q. Do you know what happened with the city's lawsuit?
A. The city dropped it. RCRA is not a lawsuit. It's a notice to sue.

Q. Oh, right.

A. You put -- my understanding was you put all the appropriate parties on notice hoping that someone is else will pick up the ball and run with it and force the cleanup.

Q. Was it your understanding that the city would be the one to pick up the ball and run with the suit?

A. No. It was my understanding that they would cooperate to get it done and cooperate with the cleanup on the site. And Chuck Smith wrote a letter to me to that effect. The RCRA complaint was amended prior to filing. The original complaint included the notice that there was a 24 inch water main in the area that could be polluted. The city removed that notice aspect. My -- it has been suggested that that was done for political reasons.

Q. That the city --

A. Did not want to disclose that they had a water main in polluted area especially with what took place with Flint, Michigan.

Q. How did you come to determine that?

A. It was removed from the notice. No

imminent harm humans, no reason to clean up the site.

Q. Did that change your opinion about or your feelings about whether you were going to go forward with purchasing the property?

A. No.

Q. Did the city ever talk to you about a proposed TIF district, a tax increment financing district near the property?

A. I'm in one; we were in one.

Q. Oh, yeah.

A. It was there before I even bought the property.

Q. Yeah, that's right. I'm going to hand you Exhibit 3. If you can take a minute and look through this and review these 5 pages.

(Exhibit 3 identified.)

A. Okay.

Q. Are these emails that were sent between you and various city officials?

A. I believe so.

Q. Okay. Let's turn to Page 4. These go in chronological order with the emails at the back being the earliest in time. This email on

Page 4, this is an email that you sent to city officials Nimrod -- or city employees, Nimrod Warda, Ronald Land and Michael Ganter was your attorney?

A. That's correct.

Q. Okay. When you say here, I wish to file a complaint for two non-conforming sites for buffer yards at a minimum, what is this referring to?

A. That the city was insisting that I put buffer yards around my property that had been fully developed lot line to lot line. And they were asking me to put in the setbacks and buffer yards.

Q. And when you say, I wish to file a complaint for two non-conforming sites, what --

A. The city I believe has an ordinance that allows anyone to file a complaint.

Q. Here you said if the roads have not been vacated, you wanted to file a complaint to have the road barricaded. Which road are you talking about?

A. I believe it was 23rd Place.

Q. Let's turn to Page Number 2. On this

C0728

page you say, I'm offended by this email from one of your staff members. Is that referring to the email on Page 3?

A. Yes.

Q. Okay. Do you know why you were -- do you remember why you were offended by that email?

A. The city official that I had referred to was basically complaining about my trying to get service from him.

Q. And that city official was Nimrod Warda?

A. Yes.

Q. How would you characterize your relationship with Nimrod Warda?

A. Poor.

Q. Why is it poor?

A. He was not honest regarding the RCRA complaint for starters and then has gone downhill since.

Q. So he told you that he -- the city was going to make sure the RCRA complaint got -- the RCRA suit was initiated and then he backed out of that?

A. No. He denied that the suit was even

going to be filed -- excuse me -- he denied the complaint existed when I was a party to it and I knew it was existing.

Q. When did he do that?

A. In July of '14 prior to it being filed.

Q. You said that the relationship was poor and it hasn't gone very well. Are there other incidents which the relationship was poor?

A. You're asking about the use of the property and it's been denied.

Q. So he's denied you using the property for certain?

A. He has said you need the buffer yards and you need the setbacks, okay. And there are numerous new developments that do not comply that did not get variances. Example would be Abbott or AbbVie on Sheridan Road, it has about a 3 foot setback.

Q. And they wanted you to get a bigger setback than that?

A. 15 to 25 feet.

Q. Did you ever come into city hall and demand a meeting with Nimrod?

A. No.

Q. Did you ever send any emails to harass Nimrod?

A. No. Emails I sent to him were to get use of my property.

Q. So I think Nimrod asked for you to have a sit down meeting with him here?

A. Where.

Q. On Page 5 he says -- second paragraph there: Please schedule a formal appointment to meet with my director and I via our executive secretary.

Did you ever have that meeting with him, that sit down meeting?

A. No. Because he asked to have it done with the executive director and I decided that there was no reason to tie up his time when I could go to Mr. Lantz. And as you see from Mr. Lantz, please deal with me directly, so why would I incur time with Mr. Nimrod if Mr. Lantz is asking me to deal with him directly.

And they're the same day, so why would I include Mr. Nimrod if Mr. Lantz says please deal with me directly.

Q. What's your relationship with Mr. Lantz like? Was that poor too?
A. No, it's good. He's no longer with the city.
Q. Did you ever talk with Victor Barrera?
A. Yes, once.
Q. What was that? What did you guys talk about?
A. The property; use of the property; the water main.
Q. Do you remember what the specifics of the conversation were?
A. The specifics on the water main was that we'd be here at this level. He also shared with me that the city turned down the opportunity to get the Canadian National property that cut through the industrial park. And I shared with him that was a very poor decision.
Q. Did he say why the city did that?
A. Yes, because he said that Canadian National expected to be compensated for the land that they were giving up. And I also asked him several questions on several of the other properties under the freedom of information as to

why there was no buffer yards and no frontage on other properties on the same street. The city had a vacated street and made a dead end lot which is in noncompliance with the city ordinances.

Q. Did the city ever make an amendment to its zoning code for you?

A. They made an amendment to allow for caretakers at storage facilities that did not apply to my property because it did not apply to sites that were contaminated. There were other storage facilities that had caretakers that were not in compliance -- I mean, that were -- that that ordinance satisfied but my property would not allow it.

Q. So what's a caretaker at a storage site? Someone who watches over --

A. Yes.

Q. -- the storage to make sure no one steals it?

A. Yes.

Q. Did you pay $200 for that --

A. Yes.

Q. -- amendment?

A. Yes.

Q. But they amended it -- the code in such a way that it wouldn't apply to your property?

A. As it stood right now or stood then. But remember I was looking to have the site cleaned up.

Q. Okay. So I'd like to get into the environmental contamination on the property in a little bit more detail.

So since you purchased the property, has there been any environmental testing done on the property?

A. No.

Q. So there hasn't been any Phase 1 or Phase 2 testing done in the last 4 and a half years since you purchased it?

A. Correct.

Q. Have you ever spoken with an environmental expert about the potential contamination on the property?

A. Yes.

Q. Who was that?

A. Adam Zacharski, Stateline

Environmental.

Q. When did you speak with him?

A. Several times.

Q. Within the last year, 2, 3, years?

A. When we -- probably within the last 3 years to find out that he -- well, actually when I bought the property and within the last year regarding this lawsuit.

Q. So when you talked with him when you bought the property, what did he tell you?

A. That he had been on the property because I had gotten his study for the property to the north from the city.

Q. Oh, so he did a study to the property to the north?

A. Yes. And he was on the property on October 13, '13 when the city tried to find their water main and the purpose he told me was to do an analysis of the soil around the water main to see what effect it may have on the water main.

Q. Do you know how he knew that?

A. Josh Wheeler hired him to do it.

Q. Oh, okay. So he was the one who actually did the testing on the property?

A. On the property to the north. He's the one who did the Stateline Environmental study which I believe you have a copy.

Q. Yeah. I think you turned that over in your discovery.

But did they also do environmental testing when they drilled down on your -- because you said they drilled on your property in October?

A. No. They opened up the ground, tried to find the water main, ran into water, closed it up.

Q. Okay. But -- and so they didn't do any environmental testing there?

A. Not to my knowledge. He did not say that they did.

Q. So Adam discussed with you the environmental contamination on the property to the north --

A. Per his study.

Q. Per his study.

Do you --

A. That I had a copy of.

Q. Okay. And that you gave to us.

Did he tell you about contamination seeping from that property onto your property?

A. That's what they were looking to test.

Q. Okay. Do you know if that ever tested that?

A. As I said, they opened it up and found ground water and quit.

Q. So you said that you've spoken with Adam a few times. When was the next time you spoke with him; do you remember?

A. It was sometime this year to find out specifically when they were on the property.

Q. And did you talk with them at all about potential contamination of your property?

A. No.

Q. And did you -- so did you meet with Adam again besides those two times?

A. No, not for the purposes of discussing -- he's in the Lion's Club with me in Antioch so --

Q. Socially?

A. Yes.

Q. But the two times that you -- so you only met two times to talk about environmental

contamination?

A. On that property.

Q. On that property.

Did Adam --

A. A few times; not -- don't limit me to two.

Q. Okay. Thank you. I appreciate you clarifying that.

Did Adam say -- did Adam ever say what would happen if the city had to drill down onto your property and repair the water main, like what kind of environmental contamination it would cause?

A. He was not speculating at all.

Q. Did Adam ever say what would be necessary to remedy the environmental contamination on your property?

A. No.

Q. Did he ever say what would be necessary to remedy the environmental contamination on the property to that north?

A. No.

Q. Has anyone ever told you what would be necessary to remedy the environmental

contamination on your property?
A. To me, no; in a report, yes.
Q. What report was that?
A. Diganson Environmental.
Q. Do you know whether that report was done?
A. March of 2013.
Q. And that report, did they take soil samples from --
A. I don't know what they did. I believe they had borings. And I could be wrong on the date, but it was 2013.
MR. QUINN: It was in the documents I produced, I believe.
MR. DiCIANNI: Okay. Thanks.
Q. Any other testing or report that described what needed to be done to remedy the environmental contamination on your property?
A. Not to solve that issue, no. There were other studies, which to my knowledge you have all of them through my answers, that I was made aware of.
Q. So I guess what I'm trying to figure out here is do we have any idea what kind of

damage would be caused if the city had to drill down on your property and repair the water main? That's what I'm trying to figure out here. Do you have any idea what the answer to that question is?

A. I have no idea how much damage their water main break is going to cause. Is it going to cause a wash out of 25 feet in diameter which will go almost to my property line? And then where is all of that product going to go? Is that going to be washed onto my property? Or is that already sucked into the city's water main in a siphon action like you see most of these large sink holes. You're asking me a hypothetical that I can't answer.

Q. Okay. Do you think you'd be able to build on top of the water main -- I should say build like a building on top of the water main?

A. I will answer you this way: The railroads have allowed water mains and gas mains and utility lines underneath their tracks. But they're built to very strict specifications. So do I believe I could build a building over the existing water main? No. Do I believe that the

water main -- that a water main could be constructed so that a building could be safely built over it? The answer is yes. But the existing water main that's there, no.

Q. Because it's too old or...

A. It's too old and it's not protected at a minimum of the level that the water main is protected -- that same water main is protected going underneath the railroad tracks.

Q. Do you know how the water main is protected going underneath your property? Is there concrete coating around it?

A. Not on my property; on the railroad property, yes.

Q. So it's just the metal tube then that goes underneath your property?

A. My understanding it's translate pipe which is not metal which is subject to breaking.

Q. Do you know when the water main was built?

A. It was built for the purpose of Abbott Park which would have been in the early 60s based on the survey that was provided by Mr. Furland.

Q. Yeah. Have you ever had -- do you

have any idea how much the city getting an easement to operate the water main on your property might cost?

A. More than they're willing to pay. There was a minimal cost to the city back in May of '14 that they turned down.

Q. Do you know how much that was?

A. Nothing in actual dollars.

THE WITNESS: Do we have that letter?

MR. QUINN: We may have it. I can't point to it here.

THE WITNESS: There were conditions, mainly zoning conditions and the city could have had a 10 foot water main for nothing. And they turned me down.

BY MR. DiCIANNI:

Q. So if the city just rezoned certain property, they could have --

A. Acquired it and then given up a couple of dead end streets, one dead end street into my property that they don't maintain.

Q. And they just would have deeded that over to you?

A. There was about 14 conditions -- when

I say 14 conditions, there were numerous conditions and then the others they would have followed through on the lawsuit and that was back in May before I purchased the property.

Q. Any idea why they didn't take you up on that offer?

A. No.

Q. So you said there's environmental contamination to the property to the north. Is there environmental contamination on the property owned by Lumberyard Storage, LLC?

A. Based on the studies that I've been supplied, the answer is no.

Q. Is there environmental contamination on the railroad property, do you know?

A. Which railroad property?

Q. The railroad property running to the west of you through --

A. You mean the Union Pacific?

Q. Union Pacific, yeah.

A. I don't think there have been any studies.

Q. What about any other neighboring properties besides that one to the north?

A. I don't believe there's been any studies.

Q. Okay. I'm not sure if I asked you this; I actually don't think that I did.

How did that property to the north become contaminated, do you know?

A. Do I know what uses were there?

Q. Yeah.

A. Going back into time there was paint solvents and adhesives. And there was I believe somewhere around 29 tanks on the property.

Q. Like underground storage tanks?

A. There were 29 tanks.

Q. And they had chemicals and...

A. That's right.

Q. And those chemicals seeped into the ground?

A. Seeped or spilled.

Q. And do you know how those chemicals got on your property? Did they go through the ground water? I don't want you to speculate; maybe if you know...

A. There's a concrete wall between my property for at least half of it on the north

side. And the property to the north of me is below grade as far as along my property. That's the reason why there's a wall.

Q. Does the wall go below ground too?

A. Well, it has to have footings.

Q. Yeah.

A. So the adjacent property next to me was at least 8 to 9 feet below grade. So if it seeped at ground level, it was 10 feet below my surface.

Q. Have you spoken with any other experts besides Adam Zacharski?

A. Ron Schreck.

Q. Who is Ron Schreck?

A. He's an environmentalist.

Q. When did you speak with him?

A. This summer.

Q. What did he tell you?

A. He said that the property to the north had originally an EPA cleanup number and it wasn't followed through. And I asked can you do that. He said as long as it's not an issue, meaning life safety, the site doesn't have to be cleaned up.

Q. So was it the U.S. EPA or the Illinois EPA?
A. I think it was the Illinois. I believe it was the Illinois.
Q. And you only spoke with him that one time?
A. I've spoken to him several times trying to get clarification on some issues.
Q. Does he have any idea how -- what kind of environmental contamination might occur if you were to -- the city were to dig up the water main and repair it? Did he ever say anything to you about that?
A. No.
Q. Have you spoken with any other environmental experts?
A. I have spoken to my sister who was retired from the University of Notre Dame in their risk management chemicals and I asked her about some of the chemicals that had shown up in the environmental studies.
Q. Anyone else besides your sister?
A. Not that I recall.
Q. I want to go through the letter that

Mr. Quinn sent to me a couple of months ago. Have you seen this letter?

A. Yes.

Q. We can mark that Exhibit 4.

(Exhibit 4 identified.)

And I'd like to go through some of these demands on here because that will give me a better sense what we can do to resolve this conflict. So I'd like to go through each one of these briefly.

So this first one here you said that you wanted the city to pay you $3,000 per month from the time you obtained the property to the time you filed the suit; and then from the date you filed the suit until the present time $8,000 per month.

Now I calculated that out and you owned the property for about 3 years before you filed the lawsuit and about a year and a half since you filed the lawsuit. So that would come out to damages worth about $212,000?

So I just wanted to ask you why do you believe that the easement is worth $212,000?

A. Should the city need to repair the

water main, they need to come on the property. What is the alterative? $3,000 for all of that property -- the $3,000 offer was for the entire property. That's what the city was offered to rent the entire property prior to the cleanup. And that gave the city -- in my mind a legitimate item that was damaged, their water main and they were getting 2 and a half acres and the building.

Q. Oh, okay. So you were going to sell the whole --

A. No, no. I was going to lease them the entire property for $3,000 a month as long as they were going to go ahead with the cleanup. So they had a valid basis -- a reason to receive damages for their water main that would have been destroyed in a cleanup.

Q. How did you come up with that $3,000 number?

A. They were getting $2,000 a month for raw land for a parking lot, a thousand dollars an acre.

Q. Where?

A. Right around the corner on Martin Luther King and Coleman -- or Commonwealth.

There's a truck lot there.

Q. Yeah. So they were getting $2,000 a month --

A. Right. And I said $3,000 for the north half of the property.

Q. And then how did you get $8,000 a month for the time of the lawsuit?

A. I'm a railroad and you're interfering with a better market for me.

Q. Did you ever talk to an appraiser to come up with those figures?

A. Not those figures, no. I had talked to an appraiser about the property before.

Q. Who was that appraiser?

A. Robert Schmidt.

Q. Do you know what the name of his --

A. Schmidt Appraisal.

Q. Where is he located?

A. He's passed away.

Q. Okay. Have you ever spoken with any other appraiser to find out how much your property might be worth?

A. Yes, it's ongoing as far as the valuation.

Q. Of the property?
A. Yes.
Q. Do you think it's worth more than $62,000?
A. Significantly more than $62,000.
Q. So it's appreciated quite a bit since you purchased it in 2014?
A. Yes.
THE WITNESS: Can I ask you a question?
MR. QUINN: Sure. Let's go off the record for a second.
(Discussion had off the record.)
THE WITNESS: The gas company needed an easement to run their gas line on Lumber Yard Storage which is the property -- they settled at $40 a square foot.
BY MR. DiCIANNI:
Q. The gas company sold --
A. No, they bought an easement for $40 a square foot.
Q. They bought an easement for $40 a square foot?
A. At the property next to me.

Q. At Lumber Yard Storage?
A. Yes.
Q. To run a gas easement?
A. Gas line.
Q. Why did they pay $40 an easement?
A. Because that's what it was worth to them because that's where they could cross.
Switching that to my property, that's what it's worth because that's the only spot that the city can cross on the UP.
Q. So it's your understanding that --
A. You asked me how I came up to that number. Do I feel the property is worth significantly more and the answer is yes.
Q. Okay.
A. The gas company doesn't over pay.
Q. Do you think the entire property is worth $40 a square foot?
A. Put to use as a railroad, I can't say for sure.
Q. Okay. Let's take a look at Number 2 there. It says the city will provide all maintenance and environmental cleanup at its sole expense unless and until the city at its own

expense institutes a RCRA suit to remedy in environmental issues on my client's property. My client will cooperate with any such suit.

So why -- there's a couple of things in here. I want to talk about the first clause here. Why would you expect the city to provide all maintenance and environmental cleanup at its sole expense?

A. On their easement. The city's position is we haven't disturbed the property at all. I'm saying if you do disturb it, you're responsible.

Q. Okay. So the city wouldn't be responsible for -- so the city would only be responsible for cleaning up the environmental impact if it had to drill under the ground and disturb...

A. They -- that's correct, but they would be instituting the RCRA suit to get the site cleaned up. And that might require disclosure of that water main to the environmental people. So that's the reason that it would be cleaned up.

Q. Have you ever reported the --

A. Yes.

Q. -- to the authorities?
A. Yes.
Q. Can you describe that?
A. Illinois EPA, the two congress and the senators for Illinois.
Q. And what did they do about it?
A. Referred it to the -- and I also notified the EPA. And they basically said there is no risk, human risk on the site.
Q. Did they know about the water main and the potential that it might be -- have to get dug up?
A. They knew about the potential water main.
Q. And they said that there was no human risk?
A. At this point -- at that point in time they were out several times. And Congressman Schneider could not talk to me because he had signed a confidentiality agreement between the city of North Chicago and Jeffrey Jeep regarding this matter.
Q. So Number 3, that's pretty self explanatory. I can understand why you would want

that.

But let's talk about Number 4. The city will be responsible for all property improvements and terminal damage and loss of use thereof caused by work done by the city in order to maintain, repair or replace the main.

So you basically just want the city to fix anything that might have been damaged on your property by replacing the water main; is that fair?

A. Or servicing it.

Q. Or servicing it, yes.

A. Yes.

Q. Number 5, the city will install at their expense the access from Marquette Street approved by Josh Wheeler preserving the switch track.

So what was the access from Marquette Street approved by Josh Wheeler?

A. It was access off of Marquette Street. The property originally did not have the street address. It was always referred to as 2nd & Main, I mean, the lumber yard. The city wanted that parcel to have a street address so they put

it on Marquette Street. They also wanted an access to Marquette Street.

The purpose of the access from the city standpoint is they need to get to their easement. And if they don't have that access on Marquette Street, they can't get to that easement.

Q. Yeah, that was a question I had actually. What is the address to the property? Is it 1940 Marquette Street?

A. Yes.

Q. And 1950 Marquette Street, that's the polluted property to the north; is that right?

A. If it goes that way, then it is.

Q. Number 6, the city will vacate and transfer clear title to my client for the portion of Main Street north of the north curb line of 2nd Street subject only to recorded easements as of June 26th, 2018.

So why did you want the city to vacate and transfer title to the portion of Main Street north of the north curb line of 2nd Street?

A. May I show you on one of the photos?

Q. Absolutely.

A. We're looking at a blank numbered --

MR. QUINN: We're looking at Dahl No. 2, the first page.

(Exhibit 2 identified.)

THE WITNESS: There's a 30 foot remnant of Main Street that comes from 2nd Street to short of the office building. It's that darker --

MR. DiCIANNI: Okay.

THE WITNESS: Okay, which has not been maintained by the city for 5 years.

MR. DiCIANNI: Okay.

THE WITNESS: During the winter they do not plow it, they do not service it at all. It's 30 feet. It can't be used for anything other than coming onto my property.

Lumber Yard Storage is on both sides, east and west, of that property. And for me I would like to close that access off by gating it so I don't have people coming onto property.

Several emails from the city has said we treat that as a private driveway. Well, I would just -- I can't stop someone from coming onto a public street and people use that as a

turn around.
BY MR. DiCIANNI:
Q. And they have a right to do it since it's a public street?
A. Right. They have a right to come onto that street, but they don't have a right to come onto Lumber Yard Storage and they can't turn around in a 30 foot location.
Q. Right. So they're inevitably going to go onto your property?
A. So that's why I'm saying I would like to have that vacated.
Q. And do people cut across your property there a lot, that parking lot?
A. By foot.
Q. By boot. Yeah.
A. And they're cutting across only to cross the railroad tracks.
Q. Someone did that when I was out there I noticed.
Let's talk about Number 7: The city will restore the access curb cut and easement south of the Lumber Yard Storage, LLC south gate to Main Street. Can you explain that?

A. Originally the North Chicago lumber property ran all the way down this Martin Luther King Street. The city bought the south roughly 400 feet of that to do their improvement at the intersection of Martin Luther King and Main Street and Sheridan Road.

I have a gate on the south end of my Lumber Yard properties that can't go anywhere. And I want to have access so I could drive out of that south portion instead of having to drive 700 feet north. I want to have use of that.

Q. Okay. Number 8, the easement will be governed under the terms currently used or revised by the Union Pacific for work on or by their property. I think you sent me the --

A. The agreement.

Q. The agreement, yeah. So I took a look at that.

Number 9, the city will grant Hussey Terminal Railroad Company exclusive rights to park on the west side of Main Street for the first 350 feet south of the south curb line of 2nd Street. Where are you talking about exactly?

A. Well, you don't have it in your

picture here unless I get to the big one.

Q. Yeah.

MR. QUINN: Dahl Exhibit 2, Page 2.

(Exhibit 2 identified.)

THE WITNESS: I should have used that for the other explanation.

Everything south of 2nd & Main is Lumber Yard Storage. Lumber Yard Storage comes down to where this bend is in Main Street. I was looking for access on the south end, what we were talking Point 7, give me access on that south end just to clarify our last point. And then along the north part of Main Street just south of 2nd, the property is blacktop -- or excuse me the street is blacktop between 2nd -- south of 2nd Street on the west side of Main Street east of Lumber Yard Storage there's parking available. I'd like to have that be an exclusive so that I can use that for parking.

Q. So you're talking about this --

A. What would be along here above this green strip.

Q. Yeah, okay.

A. Or into that green strip that that

would be exclusive parking for us so that we don't have other people there.

Q. And that would be for railroad clients then?

A. Or even employees.

Q. Number 10, the left turn onto only Main Street from westbound 2nd Street will be for through traffic only. The terminal will continue to have access from both the south and east on the vacated portions of 2nd Street and Main Street. So you talked about the vacated portions of 2nd Street and Main Street. So you want Main Street to be just a one way?

A. No. Currently Main Street going south, that 30 feet, I want it vacated but I still want to have access to use it. I don't want that street closed for my access.

Q. Okay.

A. The same thing with 2nd Street, I don't want to have that closed where I'm coming off of it from the west. But the -- coming from the east on Main Street, coming from -- excuse me -- coming from east on 2nd Street, there is a sign right now that says left turn only for

trucks and buses that's not adhered to. I just don't want it so that I can't put a truck coming from Marquette Street, that entrance that's going to be made, where it couldn't come back into my property off of 2nd Street. I don't want to have general people turning into my property, but I do want to have myself being able to do that.

Q. Let's go to Number 11. Why did you want the city to perform electrical work on the property?

A. No, no. I'm not asking the city to do anything on Number 11. I'm asking them to recognize that the electrical work doesn't have to be buried on this property.

The city has an ordinance that says all electrical work must be under ground, okay. That's one of the reasons that the office building does not have electrical service. I was not going to pay $50,000 to run electrical lines to them.

The railroad has a standard that says lines over rails must be -- have 24-foot clearance. Because this is a terminal, I would like to have the city's ordinance recognized as

not being valid on this as long as it's complying with railroad standards. I'm not asking for the city to do anything. I'm just saying I want to be able to restore electricity to my buildings, but I don't want to have to spend 40 to $50,000 to do it when I can do it overhead.

Q. Okay. Well, that's clarifies that.

12, the city will remove the guardrail fence the directional sign currently of the vacated portion of 2nd Street west of Main. So you just want them to remove the fence that's like right there?

A. No, the fence is down here.

MR. QUINN: And we're pointing at -- what exhibit are we pointing at.

MR. DiCIANNI: This is Dahl Exhibit 2, the top picture.

(Exhibit 2 identified.)

THE WITNESS: Okay. The fence would be right here.

BY MR. DiCIANNI:

Q. Now we're pointing to Dahl Exhibit 2, Page 2.

A. 2, right.

The fence area would be the -- and the directional sign is on the west side of that property. The Navy didn't put that thing in, the barricade and the fence up or the directional sign. The city has never admitted that they did it. But I'm only surmising -- and the UP says they didn't do it. But I'm surmising that that was done when the intersection was redone and the 2nd Street was closed off that the railroad asked for it. But I'm not going to be the one that takes it down.

And 13 is rather clear.

MR. DiCIANNI: Why don't we take a quick break. I want to use the restroom real fast. I have a couple more questions, not too many and hopefully we can wrap this up.

(A brief recess was taken.)

Back on the record and we'll finish this up.

Q. Just a few more questions here for you, Phil: Have you ever been in contact with anyone at the Great Lakes Naval Station?

A. Yes.

Q. Who have you been in contact with?

A. Ken Endress. He was the point man originally and then William Default.

Q. What did you and Ken talk about?

A. The initial discussion was whether or not I wanted to buy the Navy's property next to 2nd & Main.

Q. And what did -- so did they come to you with that offer?

A. That was at the Josh Wheeler meeting so, yes, he made the inquiry.

Q. And you didn't decide to buy that property?

A. At the time, no. But I have subsequently inquired if they were looking to sell.

Q. And what did they say?

A. Not yet.

Q. Any idea what the price of that property might be?

A. No.

Q. Has anyone ever trespassed into the fenced off portion of your property so --

A. Yes.

Q. Does that happen frequently?

A. To my knowledge it's only happened twice. And when they cut the lock, it's easy to trespass.

Q. Why are they trespassing on there?

A. They were looking to steal or that was the end result. Or they could drive up on the north part of Main Street that is north of 2nd and park.

Q. Why are they parking there?

A. It's convenient.

Q. Where they are trying to get to, surrounding property?

A. I don't know where they're -- yesterday I had my neighbor have one of his delivery trucks, a semi, parked there.

Q. Have you ever been in contact with the property owner at 1950 Marquette, the property to the north of you that's polluted?

A. No.

Q. Do you know who owns that property?

A. I want to say it's an LLC. It could have been the county. They've bought back taxes for I think about 7 years.

Q. Okay. Now, don't take offense to

this, but this is just a question I have to ask: Have you ever been convicted of a felony?

A. No.

Q. Have you ever been convicted of a crime involving dishonesty like perjury or fraud?

A. No.

Q. Okay.

MR. DiCIANNI: Those are all the questions I have.

John, do you have anything?

MR. QUINN: I have nothing.

We'll waive signature.

MR. DiCIANNI: We'll order a copy of the transcript.

MR. QUINN: And I'll take a copy. He'll take the original.

MR. DiCIANNI: Right, the original, sorry.

Email.

MR. QUINN: Yeah, email works for me.

(This deposition concluded at 4:13 p.m.)

~O~

STATE OF ILLINOIS)
) ss:
COUNTY OF LAKE)

I, Helen Miller, do hereby certify that heretofore, to-wit, on October 25, 2018, PHILIP DAHL personally appeared before me at 175 East Hawthorn Parkway, Vernon Hills, Illinois, in a cause now pending and undetermined in the Circuit Court of the 19th Judicial Circuit, Lake County, Illinois, wherein 2ND & MAIN, LLC is the Plaintiff and THE CITY OF NORTH CHICAGO is the Defendant.

I further certify that the said witness was first duly sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony then given by said witness was reported stenographically by me in the presence of the said witness, and afterwards reduced to typewriting by computer-aided transcription, and the foregoing is a true and correct transcript of the testimony so given by said witness as aforesaid.

I further certify that the taking

of this deposition was pursuant to subpoena and that there were present at the deposition the attorneys hereinbefore mentioned.

I further certify that I am not counsel for nor in any way related to the parties to this suit, nor am I in any way interested in the outcome thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand on this 5th day of November, 2018.



Certified Shorthand Reporter
C.S.R. No. 084-004434

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No. 2-21-0454

IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

The City of North Chicago,	)	
	)	
Plaintiff/Appellant,	)	Appeal from the 19th Judicial Circuit
	)	Lake County
v.	)	Case No. 2019 ED 20
	)	Hon. Joseph Salvi
2nd & Main, LLC; Unknown Owners and	)	Date of Notice of Appeal: August 12, 2021
Non-Record Claimants,	)	Date of Judgment: July 13, 2021
	)	
Defendant/Appellee.	)	

Brief and Argument of Plaintiff/Appellant City of North Chicago

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NATURE OF THE ACTION

Plaintiff/Appellant City of North Chicago appeals the trial court's award of summary judgment to Defendant/Appellee 2nd & Main, LLC on its affirmative defense. The City initiated a condemnation action against 2nd & Main's property to acquire an easement to operate a portion of a City water main. This water main has been in continual operation since 1961 but the City never acquired an easement for the portion that runs under 2nd & Main's property.

2nd & Main has a rail spur on its property. Although the rail spur is not in use nor currently intersects with the water main on the subject property, 2nd & Main claims to have plans to make it operational. It claims that once this happens it will build additional rail spurs on its property and these rail spurs may traverse over the water main. 2nd & Main argues that the water main is not sufficiently reinforced to bear the weight of the rail cars that will be transported on these spurs. As a result, it argues in its motion for partial summary judgment that the City's condemnation action is preempted by the Interstate Commerce Commission Termination Act (ICCTA).

The ICCTA preempts any local regulation, including a condemnation action, that unreasonably interferes with railroad transportation. 2nd & Main argued that the condemnation unreasonably interferes with railroad transportation because any future rail spurs it builds on its property that traverse over the water main are in danger of collapse because the water main is not sufficiently reinforced to bear their weight.

The trial court agreed and granted 2nd & Main's motion for summary judgment. It ordered the City to reinforce the water main so that it could bear the weight of some future rail spurs constructed on the property. It held that unless the City completed this

reinforcement the water main would unreasonably interfere with railroad transportation and thus the ICCTA would preempt the City from completing its condemnation action.

The trial court erred for three reasons. First, for ICCTA preemption to be found the local regulation must interfere with a railroad's current operations or imminent, future plans to expand railroad infrastructure. 2nd & Main failed to provide evidence showing this.

Second, even if 2nd & Main had provided this evidence, the City provided evidence rebutting it. Thus, whether the water main will unreasonably interfere with railroad transportation is a material issue of fact that should be decided by the jury.

Third, the trial court's order was a mandatory permanent injunction. Yet, 2nd & Main never presented evidence that it possessed a clear and ascertainable right in need of protection, irreparable harm would occur if injunctive relief were not granted, or that it had no adequate remedy at law. It never asked for a mandatory permanent injunction in its pleadings. It never filed a motion seeking a mandatory permanent injunction and no hearing was held on such a motion. Thus, the trial court did not have authority to issue such an order.

ISSUES PRESENTED

1) Whether the trial court erred in finding that the City's condemnation action is preempted by the ICCTA?
2) Whether the trial court erred in finding that there was no issue of disputed material fact as to whether the City's condemnation action would unreasonably interfere with railroad transportation on 2nd & Main's property?
3) Whether the trial court erred in issuing a mandatory permanent injunction even though 2nd & Main never presented evidence that it possessed a clear and ascertainable right

in need of protection, irreparable harm would occur if injunctive relief were not granted, or that there was no adequate remedy at law?

JURISDICTION

Supreme Court Rules 301 and 303 confer jurisdiction on this Court to hear the City's appeal from a final judgment order entered by the circuit court on July 13, 2021. This order disposed of all claims relating to 2nd & Main's affirmative defense. On August 12, 2021 the trial court added 304(a) language to the July 13, 2021 Order. Thus, this Court has jurisdiction to hear this appeal pursuant to Rule 304(a). Finally, the July 13, 2021 Order granted a permanent injunction in 2nd & Main's favor. Thus, this Court has jurisdiction pursuant to Rule 307(a)(1).

STATEMENT OF FACTS

A. The 2nd & Main Property

Defendant 2nd & Main, LLC owns an abandoned lumber mill in the City of North Chicago at 1940 Main St (2nd & Main's property will be hereinafter referred to as "the Property). C001-C081. The Property is severely blighted and no business activity currently takes place on it. C651-657; C694-95. 2nd & Main is a small business owned and controlled by one man, Phil Dahl. C677-78. Since purchasing the Property in 2014, Mr. Dahl has attempted to use the Property for a variety of business ventures, none of which has proven successful. C689-95. His latest business venture is to attempt to use the Property for large container storage. C689-91. An abandoned rail spur traverses the Property, running from Union Pacific railroad tracks that lie to the west of the Property to an abandoned lumber-storage shed. C658-661. Mr. Dahl would like to haul containers from rail cars on the Union Pacific tracks onto the Property, where they would be stored. C689-91.

2nd & Main has not presented any business plan that would make this idea come to fruition. No evidence has been presented that such a plan would be economically feasible. In fact, the City's appraiser opined that using the Property for container storage is not economically feasible because the Property is located in a blighted area with low levels of economic activity and opportunity. C390.

On March 17, 2017, 2nd & Main acquired a Notice of Exemption from the Surface Transportation Board. C104-C126. The Notice exempts the Property from local regulations affecting:

> "1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities…." 49 U.S.C.S. § 10501(b); *see also* 49 CFR 1150.31-34.

B. The Water Main

A portion of one of the City's twenty-four inch water mains runs underneath the Property. C658-661. The main provides water to a significant portion of the City's population. It was installed in 1961 and has been continuously operating ever since. C144. However, the City never acquired an easement to operate the water main underneath the Property, apparently because the City Attorney at the time the main was installed forgot to record it. C166-68. At this time the water main does not intersect the rail spur within the Property. C658-661.

There is no evidence that any of the previous owners of the Property objected to the City's operation of the water main without an easement until 2nd & Main purchased the Property in 2014. C166-68. Prior to 2nd & Main's purchase of the Property the City told 2nd & Main that it did not have an easement to operate the portion of the water main running

underneath its Property. C696-97. The City attempted to purchase an easement from 2nd & Main, but when that proved unsuccessful 2nd & Main filed an inverse condemnation lawsuit on July 13, 2017.

C. The Condemnation Actions

2nd & Main's inverse condemnation was captioned 2017-MR-1149 and was filed in the Circuit Court of Lake County. After considerable discovery the City determined that it had no viable affirmative defenses and admitted liability. The trial court ordered the City to commence condemnation proceedings, which it did on July 19, 2019. The condemnation proceedings are captioned 2019-ED-20, and this is the underlying case from which this appeal is taken. On May 13, 2021 2nd & Main filed a motion for partial summary judgment ("Motion"). C088.

D. 2nd & Main's Motion for Partial Summary Judgment

The Motion argued that the City's condemnation action was preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") (49 U.S.C. §§ 10101, *et seq.*). The ICCTA grants the Surface Transportation Board with the exclusive authority to regulate railroad transportation. Local regulations, including condemnation actions, that "unreasonably interfere with" "the movement of passengers or property, or both, by rail" are preempted by the ICCTA. 49 U.S.C. 10501; *Union Pac. R.R. v. Chi. Transit Auth.,* 647 F.3d 675, 681 (7th Cir. 2011).

2nd & Main argued that the City's condemnation action was preempted by the ICCTA because the water main is not sufficiently reinforced to bear the weight of a rail spur in the event that at some unspecified time in the future a new rail spur happens to be constructed over the water main. C092-95. 2nd & Main argued that the failure of the water main to be

sufficiently reinforced to handle this hypothetical scenario constituted an unreasonable interference with railroad transportation. *Id.* Therefore, the water main needed to be reinforced, now, to abate this hypothetical future interference with rail transportation. C095.

The entirety of the evidence 2nd & Main provided to support its claim that additional rail spurs will be added was one sentence in one affidavit from Phil Dahl stating, "2nd & Main plans to use the Property that is the subject of the suit, including the property that North Chicago seeks to condemn, for railroad purposes specifically for storage area for shipping containers, additional spur tracks and railroad access." C102.

Left unexplained was why the water main would be unable to support the loads that would be hauled by a future rail spur. C294-95. 2nd & Main presented evidence from an expert it hired who noted that the water main is not reinforced to the standards to which the Union Pacific Railroad would require it to be reinforced if it ran under Union Pacific tracks. C294-96. Of course, the water main does not run underneath Union Pacific tracks, at least not on the Property. C660-62. There is a considerable difference in the sizes of the loads hauled on Union Pacific tracks compared to the sizes that would be hauled on 2nd & Main's rail spurs. 2nd & Main's expert had no explanation as to why the water main would need to be reinforced to the same standards required by Union Pacific. C294. No other evidence was presented showing that the water main would be unable to bear the weight of a future rail spur. No evidence was provided that it would be economically viable to build additional rail spurs.

In contrast, the City provided evidence that the water main will not unreasonably interfere with railroad transportation. C202-397. The City's appraiser, Barton DeLacy,

examined whether the Surface Transportation Board Notice of Exemption had any impact on the value of the Property along with the economic viability of using the Property for railroad purposes in the near term. C255. In Mr. DeLacy's opinion there was no likelihood that it would be economically viable to use the Property for container storage or anything else involving the rail spur in the near or medium term. *Id.* The Property is located in a blighted area with low levels of economic activity which makes the demand for large container storage at the Property non-existent. C253-54. As such, Mr. DeLacy opined that there is no economic justification for 2nd & Main to construct additional rail spurs that may intersect with the water main. C255.

The City also retained an engineering expert, Devin Moose, to examine 2nd & Main's claim. C221-24. In Mr. Moose's opinion, the existing railroad spur could operate without additional improvement to the water main infrastructure. C223. The northern portion of the Property could be utilized without modification to the rail spur or the water main. C223-24. In Mr. Moose's opinion the harm 2nd & Main seeks to alleviate, the interference with railroad operations caused by the water main, does not exist. *Id.*

E. The Trial Court's Ruling and Appeal

Despite this, the trial court granted 2nd & Main's motion for partial summary judgment. C600-642. It held that 2nd & Main presented sufficient evidence to show that the condemnation would unreasonably interfere with railroad transportation on the Property and thus was preempted by the ICCTA. C622-24. The court ordered the City to reinforce the water main so that it would be able to bear the weight of an unspecified rail spur in the event one were constructed on the Property at some future time. *See* C625-34. Once this was done the water main would no longer unreasonably interfere with railroad

transportation and there would be no ICCTA preemption, the court held. *Id.* This would allow the City to complete its condemnation. *Id.*

Complying with the trial court's order will require the City to dig through environmentally contaminated soil to attempt to locate the water main. C281-86. It will then have to perform significant reconstruction on a sixty-year old pipe. This expensive, risky operation could cause much of the City's population to lose access to water. It would also leave the City jointly and severally liable for the environmental contamination on the Property under the Resource Conservation and Recovery Act (RCRA) (42 U.S.C § 6901, *et seq.*). This could potentially leave the City exposed to the entire clean-up cost for this contamination, which could run into the millions of dollars. *See Murtaugh v. New York*, 810 F. Supp. 2d 446, 469 (N.D.N.Y. 2011) (liability under RCRA is joint and several).

STANDARD OF REVIEW

Since this appeal is brought from a ruling on a motion for summary judgment, this Court should review this ruling *de novo. Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 93 (2010). The *de novo* standard affords little or no deference to the trial court's ruling. *Branson v. Dep't of Revenue*, 168 Ill. 2d 247, 265 (1995).

The preemptive effect of the ICCTA is a question of law that the court reviews *de novo. Franks Inv. Co. v. Union Pac. R.R. Co.*, 593 F.3d 404, 407 (5th Cir. 2010) (en banc). Because of the presumption against preemption, the party contending that preemption applies has the burden of persuasion. *Elam v. Kansas City So. Ry. Co.*, 635 F.3d 796, 802 (5th Cir. 2011).

APPLICABLE STATUTE

In 1995, Congress enacted the Interstate Commerce Commission Termination Act ("ICCTA") and created the Surface Transportation Board to administer the Act. *See* 49 U.S.C. §§ 10101, 10102(1). The ICCTA gave the Board exclusive control over the regulation of railroad transportation. The Act defines railroad transportation to include railroad property, facilities, and equipment "related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use." 49 U.S.C. 10102(9).

The ICCTA has an express preemption clause which states, "[e]xcept as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. 10501(b). Any action that "would have the effect of preventing or unreasonably interfering with railroad transportation" is preempted by the ICCTA. *Union Pac. R.R. v. Chi. Transit Auth.*, 647 F.3d 675, 679 (7th Cir. 2011). The Surface Transportation Board applies this standard by holding that "[f]or state or local actions that are not facially preempted, the section 10501(b) preemption analysis requires a factual assessment of whether [the] action would have the effect of preventing or unreasonably interfering with railroad transportation." *CSX Transp., Inc.*, 2005 WL 1024490, at *3.

Thus, a finder of fact must conduct a fact-specific inquiry whether a local regulation is preempted by the ICCTA by determining whether that regulation unreasonably interferes with railroad transportation. *See id; Union Pac. R.R.*, 647 F.3d at 679. A law will not be found to unreasonably interfere with railroad transportation if it has "a more remote or

incidental effect on rail transportation." *Florida E. Coast Ry. Co. v. W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001).

ARGUMENT

I. 2nd & Main's Plans to Expand Its Rail Infrastructure Are Too Vague to Preempt the City's Condemnation Action.

2nd & Main's claim that the water main will unreasonably interfere with railroad transportation on its Property was based on vague, conclusory statements in one affidavit. C102. For a condemnation action to be preempted by the ICCTA, the fact finder must be presented with evidence that shows that the condemnation will interfere with already-existing rail infrastructure or imminent, definitive plans to expand rail infrastructure.

2nd & Main presented one self-serving affidavit from its owner (without any corroborating extrinsic evidence) stating that "2nd & Main plans to use the Property that is the subject of the suit, including the property that North Chicago seeks to condemn, for railroad purposes specifically for storage area for shipping containers, additional spur tracks, and railroad access." C102. Based on this, the trial court concluded that the water main will unreasonably interfere with railroad transportation on the Property—even though the water main currently does not interfere with railroad transportation and no evidence was presented apart from this affidavit that it will interfere with railroad transportation. C600-42. This evidence alone is insufficient to justify ICCTA preemption.

When analyzing whether the ICCTA preempts this condemnation action, the court should start with a presumption against preemption. Courts should "address[ ] claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). "[B]ecause the States are independent sovereigns in our federal

system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). The party seeking to overcome the presumption against preemption bears a heavy burden. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997).

Several cases courts have held that the ICCTA can only preempt future condemnation actions when there is evidence that the condemnation will interfere with imminent, definite plans to expand railroad infrastructure. *See, e.g., Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525 (5th Cir. 2012); *City of Girard v. Youngstown Belt Ry. Co.*, 134 Ohio St. 3d 79 (Ohio 2012); *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404 (5th Cir. 2010).

In *City of Girard*[1] the court declined to find that the ICCTA preempted the city's condemnation action. *City of Girard*, 134 Ohio St. 3d at 92. Key to this holding was the court's finding that the railroad's argument that the condemnation would unreasonably burden rail transportation to be based on vague, ill-defined, speculative conclusions. *Id.* at 91. In *Girard*, like the instant matter, the property was not being used for railroad transportation at the time of the condemnation. *Id.* at 91-92. Therefore, the court analyzed whether the condemnation action unreasonably interfered with the railroad's future plans to use the property for railroad transportation. *Id.* at 92. The court noted that "[w]hile it is acceptable and sometimes necessary to consider a railway company's future plans when

[1] There is very little case law on ICCTA preemption in either Illinois or the 7th Circuit. There are more cases from other jurisdictions discussing ICCTA preemption but still not many. Given the dearth of these cases, it is common for courts ruling on ICCTA preemption to cite cases from other jurisdictions. *See, e.g., Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525 (5th Cir. 2012); *City of Girard v. Youngstown Belt Ry. Co.*, 134 Ohio St. 3d 79 (Ohio 2012). Thus, we have done the same in this brief.

determining if the ICCTA applies to an eminent-domain action, it is also necessary to consider whether it is likely that the railway company's plans 'will come to fruition.'" *Id.*

The court found that because the railroad had "no concrete plans to put these hypothetical plans" to develop the property for railroad use into being, it failed to satisfy its burden of persuasion to show that there was ICCTA preemption. *Id.* at 91. The railroad relied heavily on conclusory allegations, which the court found to be insufficient to support a finding of ICCTA preemption. *Id.* at 91. "Without anything more specific, Youngstown Railway's evidence of a general desire for future development is not enough to establish that the property will be used for railway transportation," the court held. *Id.*

Similarly, in *Texas Cent. Business* the court declined to find that the ICCTA preempted the city from passing regulations affecting the railroad's property. *Tex. Cent. Bus. Lines Corp.*, 669 F.3d at 534. The court came to this conclusion because the railroad's arguments that the local regulation would unreasonably burden railroad transportation were vague and based on speculation. "The mere prospect that there will be less space going forward, on this extensive tract, without definite plans to develop, and without an explanation of how future projects would be affected does not amount to an unreasonable burden at this time." the court held. *Id.* at 534-35.

The same thing happened in *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404 (5th Cir. 2010). In that case the court rejected a railroad's preemption argument because it relied upon generalizations and not specific evidence. *Id.* at 414-15. The court held that to find preemption there must be specific evidence that the local regulation will unreasonably interfere with railroad transportation. *Id.*

Here, the trial court was not presented with evidence that the water main either currently interferes with railroad transportation or will interfere with imminent, definite plans to expand railroad transportation. 2nd & Main only presented vague, speculative evidence to support its ICCTA preemption claim. It presented no evidence that its future plans would come to fruition. It only presented a general desire for future development. Thus, sufficient evidence was not presented to justify ICCTA preemption. This is particularly true considering the presumption against preemption and the deference that should be granted to the non-moving party when ruling on a summary judgment motion. *See Malmloff v. Cty. Treasurer*, 367 Ill. App. 3d 760, 764 (3d Dist. 2006) (when reviewing the grant of summary judgment the appellate court "must construe all of the pleading and other filings in the light most favorable to the non-moving party."). Based on this case law the trial court should not have granted summary judgment in 2nd & Main's favor.

Not only was the trial court's ruling inconsistent with established case law on ICCTA preemption, but it would virtually foreclose the ability of local governments to regulate railroad properties. The trial court's ruling opens the door to a railroad being able to stop a condemnation based on a few self-serving, conclusory, and speculative statements in an affidavit. This ruling expands the power of railroads at the expense of local governments. This would exacerbate the already considerable power disparity between the multibillion dollar national railroad companies and local governments, most of whom operate with a handful of staff on a tight budget.

II. Even if 2nd & Main's Plans Are Not Too Vague, Whether the Water Main Will Unreasonably Interfere with the Use of the Property for Railroad Transportation Is a Disputed Issue of Material Fact that Should Be Decided at Trial.

For the ICCTA to preempt this action, there must be a finding that the City's condemnation will "unreasonably burden or interfere with rail transportation." *Union Pac. R.R.*, 647 F.3d at 679. As the movant and the party seeking a finding of preemption, the burden of persuasion was on 2nd & Main to present evidence showing that there was no material factual dispute that the condemnation action would unreasonably interfere with railroad transportation. *See Elam v. Kansas City So. Ry. Co.*, 635 F.3d 796, 802 (5th Cir. 2011) (burden of persuasion lies with the party seeking ICCTA preemption); *Triple R Dev., Ltd. Liab. Co. v. Golfview Apartments I, Ltd. P'ship*, 2012 IL App (4th) 100956, ¶ 12 ("the movant always has the burden of persuasion on a motion for summary judgment....").

2nd & Main failed to meet this burden. It failed to show that the water main currently interferes with railroad transportation and failed to provide anything other than speculative assertions that it would unreasonably interfere with railroad transportation in the future.

Moreover, the City presented evidence that the water main would not unreasonably interfere with railroad transportation. C207-329. This created, at a minimum, a disputed issue of material fact. Therefore, there was no basis for the trial court to grant summary judgment. It should have let a jury decide whether the condemnation action would unreasonably interfere with railroad transportation.

2nd & Main predicated its motion for summary judgment on one fundamental assumption: that the water main interferes with its ability to construct additional rail spurs on the Property. C092-94. It provided scant evidence to support this claim. It is undisputed

that the water main does not currently interfere with railroad transportation on the Property. C294-95; 659-61.

Instead, 2nd & Main argued that the existence of the main will prevent it from constructing additional rail spurs on the property. C093-94. However, it provided no future plans to construct rail spurs that would be interfered with by the water main and no specifications for such rail spurs.

2nd & Main argued that the water main is not sufficiently reinforced to bear the weight of a rail spur running over the top of it. *Id.* In support of this argument its expert witness noted that the water main is not reinforced to the same degree that the Union Pacific railroad would require if the water main ran underneath its tracks. C294-96. From this he opined that the water main is not sufficiently reinforced to bear the weight of any future rail spur that may be built over it. *Id.* Nowhere did he explain why the standards that apply to the reinforcement of the water main under the Union Pacific tracks, which haul massive freights through its national commercial railroad operations, would apply to the few yards of cargo transportation on 2nd & Main's rail spur. C294-96. 2nd & Main presented no evidence as to why the water main would need to be reinforced to the Union Pacific standard.

Nor did 2nd & Main provide evidence showing why it would need to construct additional rail spurs that might intersect with the water main and thus require it to be reinforced. C097-201. No specific plans to build rail spurs that would intersect with the water main were provided. *Id.* No specific plans showing that there would be an economic justification to build additional rail spurs were provided. *Id.* And no specific plans showing

that building additional rail spurs would not exacerbate the already terrible environmental contamination on the property were introduced. *Id.*

The only evidence 2nd & Main provided suggesting that the water main would interfere with railroad transportation is one sentence in an affidavit from its owner stating that "2nd & Main plans to use the Property that is the subject of the suit, including the property that North Chicago seeks to condemn, for railroad purposes specifically for storage area for shipping containers, additional spur tracks, and railroad access." C102.

How does this show that the water main unreasonably burdens railroad transportation? Nothing was provided showing that the amount of rail traffic on 2nd & Main's property would decrease because of the water main. Nothing was provided showing that the revenue 2nd & Main could generate from the operation of the rail spur would decrease due to the water main. If one vague, conclusory statement constitutes sufficient evidence of interference with railroad transportation then how could any government ever complete a condemnation? Wouldn't any property owner be able to say that at some unspecified point in the future it might build a railroad spur and thus the government is preempted by the ICCTA from regulating it?

While 2nd & Main failed to even meet its burden of persuasion, the City provided credible evidence that the water main will not unreasonably interfere with railroad transportation. C202-397. This evidence by itself should have been enough to get this issue to the jury. The City's appraiser, Barton DeLacy, examined whether the Surface Transportation Board Notice of Exemption had any impact on the value of the Property along with the economic viability of using the Property for railroad purposes in the near term. C255. In Mr. DeLacy's opinion there was no likelihood that it would be economically

viable to use the Property for container storage or anything else involving the rail spur in the near or medium term. *Id.* The Property is located in a blighted area with low levels of economic activity which makes the demand for large container storage at the Property non-existent. C253-54. As such, Mr. DeLacy opined that there is no economic justification for 2nd & Main to construct additional rail spurs that may intersect with the water main. C255.

Moreover, the City retained an engineering expert, Devin Moose, to examine 2nd & Main's claim. C221-24. In Mr. Moose's opinion, the existing railroad spur could operate without additional improvement to the water main infrastructure. C223. The northern portion of the Property could be utilized without modification to the rail spur or the water main. C223-24. In Mr. Moose's opinion the harm 2nd & Main seeks to alleviate, the interference with railroad operations caused by the water main, does not exist. *Id.*

This evidence is sufficient to, at a minimum, call into question 2nd & Main's claim that the condemnation unreasonably interferes with rail transportation. It is not clear and free from doubt that the water main unreasonably interferes with railroad transportation and thus warrants ICCTA preemption. *See Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 102 (1992) ("Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt."). The City's evidence raises a fact question about whether the condemnation unreasonably burdens rail transportation and the City should have been permitted to present this evidence to a jury.

III. 2nd & Main Failed to Provide the Necessary Evidence to Show that It Was Entitled to a Permanent Injunction.

The July 13, 2021 Order is a mandatory permanent injunction, as it orders the City to perform a specific, permanent action—the reinforcement of the water main. C642. *See City of Carbondale v. Bower*, 332 Ill. App. 3d 928, 935 (5th Dist. 2002) (noting that a mandatory

injunction requires a party "to take specific actions"); *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 222 (2000) ("A permanent injunction is of unlimited duration....").

However, the evidence required for the trial court to enter this injunction was never presented. 2nd & Main never presented evidence that it possessed a clear and ascertainable right in need of protection, irreparable harm would occur if injunctive relief were not granted, or that there was no adequate remedy at law. *See Vaughn v City of Carbondale*, 2016 IL 119181, ¶ 44 (discussing the elements of a permanent injunction). No evidence was presented or argument made as to why money damages would not be appropriate. No evidence was presented of imminent harm.

Moreover, 2nd & Main never brought a motion for a permanent injunction. There was no hearing on the merits of the permanent injunction. This is reversible error. *See Buzz Barton & Assocs., Inc. v. Giannone*, 108 Ill. 2d 373, 388 (1985) (holding a permanent injunction issued without a hearing on the merits should be reversed by the reviewing court).

Nowhere in 2nd & Main's pleadings did it ask the court to award it a permanent injunction. C66-81. Thus, there was no authority for the court to grant a mandatory permanent injunction sua sponte. "It is an elementary rule of law that the issues in a case are formed by the pleadings and the allegations and proof must correspond, and a party cannot have relief under proof without allegations, nor under allegations without proof in support thereof." *Gault v. Sideman*, 42 Ill. App. 2d 96, 104 (1st Dist. 1963). "Accordingly a party must recover, if at all, on and according to the case he has made for himself by his pleadings, and he cannot make one case by his averments and have judgment on another

and different ground without amendment, even though the different ground is established by the proof." *Id.*

"[A] mandatory permanent injunction is an extraordinary remedy which is not granted as a matter of right, but in the exercise of sound judicial discretion and to be used only in cases of great necessity." *Stavros v. Karkomi*, 28 Ill. App. 3d 996, 1004 (1st Dist. 1975). They are not favored by the courts. *Town of Cicero v. Metro. Water Reclamation Dist.*, 2012 IL App (1st) 112164, ¶ 40. Here, the court issued a mandatory permanent injunction without the evidence in the record to support it, without conducting a hearing on the merits, and without any basis in the pleadings. It then issued a vague order that cannot be clearly implemented. This is reversible error. Thus, the July 13, 2021 Order should be vacated.

Conclusion

Reversing the trial court's ruling would not leave 2nd & Main without a remedy in the event the water main prevents it from building additional rail spurs in the future. If the company adds rail spurs and the water main interferes with those spurs, then 2nd & Main can seek a mandatory permanent injunction at that time requiring the City to reinforce the water main. Requiring the City to do so now is premature. 2nd & Main has not presented any evidence that the City's condemnation action will unreasonably interfere with railroad transportation on the Property. There is currently no reason to require the City to perform an expensive, risky procedure to reinforce the water main. Thus, this Court must vacate the trial court's order granting 2nd & Main's motion for partial summary judgment.

Respectfully submitted,

CITY OF NORTH CHICAGO

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Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is twenty pages.

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APPELLATE COURT 2ND DISTRICT

CERTIFICATE OF SERVICE

I, Matthew T. DiCianni, certify that I served the foregoing **Brief and Argument of Appellant City of North Chicago** by emailing a copy to:

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on the 16th day of September, 2021.

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[X] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

No. 2-21-0454

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

The City of North Chicago.,	)	Appeal from the Circuit
	)	the19th Judicial Circuit, Lake
Plaintiff-Appellant,	)	County, Illinois
	)	
v.	)	No. 2019 ED 20
	)	
2nd & Main, LLC, Unknown Owners and	)	The Honorable Joseph Salvi
Non-Record Claimants,	)	Judge Presiding
	)	
Defendant-Appellee.	)	

BRIEF OF THE DEFENDANT-APPELLEE

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I. NATURE OF THE CASE

This action was brought by the Plaintiff-Appellant, the City of North Chicago, to condemn property belonging to the Defendant-Appellee, 2nd and Main, to provide for an easement for the purpose of maintaining a water main across 2nd and Main's property. 2nd and Main's property, however, is a railroad and pursuant to the Interstate Commerce Commission Termination Act of 1995, it is under the exclusive jurisdiction of the Federal Government's Surface Transportation Board. Any condemnation of the property is exempted by federal law, unless the condemnation does not interfere with 2nd and Main's ability to operate the property as a railroad. 2nd and Main brought a motion for partial summary judgment asking the court to find that any water main constructed on the proposed easement be constructed to railroad standards so that it does not interfere with 2nd and Main's use of the property. The Circuit Court granted 2nd and Main's motion for partial summary judgment determining that the water main would have to be constructed according to railroad standards, a decision that North Chicago now appeals.

II. STATEMENT OF FACTS

The Appellee, 2nd and Main LLC ("2nd and Main"), purchased real property located at 1940 Marquette St, in North Chicago, Illinois ("the Property") in 2014. C0004. On March 5, 2017, 2nd and Main filed a Notice of Exemption under 49 C.F.R. § 1150.31 with the Surface Transportation Board. C0208. See also C0104-12. On March 22, 2017, the Surface Transportation Board issued its decision regarding the Notice of Exemption.

As a result of the decision, the exemption became effective on April 5, 2017. C0208. See also C0113-4.

At some point, over 50 years ago, the City of North Chicago ("North Chicago") installed a water main underneath the Property. C0002. North Chicago did not obtain an easement allowing this water main. C0208. On June 13, 2019, North Chicago filed its Complaint for Condemnation against 2nd and Main, seeking to obtain the necessary easement for the water main. C0001-5. 2nd and Main filed an Affirmative matter alleging, among other things, that North Chicago's right to eminent domain is limited because the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") gives the Surface Transportation Board the exclusive jurisdiction over railroad property and thus, North Chicago is not permitted to interfere with 2nd and Main's railroad operations. C0067-8.

Thereafter 2nd and Main filed a Motion for Partial Summary Judgment, arguing that if the easement interferes with 2nd and Main's use of the railroad property, it will be preempted by the ICCTA, but on the-other-hand, if the condemnation does not interfere with the use of the Property as a railroad, then it will not be preempted. C0094. The Motion argued that the only way to do this would be for any easement to require that the water main be constructed to meet railroad standards. C0095.

In its Local Rule 2-1.04 Statement, 2nd & Main stated, as an undisputed fact, that 2nd & Main plans to use the property as "a storage area for shipping containers and railroad access." C0208. While North Chicago nominally disputed this point, it provided no contradictory evidence, instead only stating that its expert opined that "there is little opportunity for the Property to be used as a location where significant railroad operations

take place." 2nd and Main alleged that the Property has already been leased to the Hussey Terminal Railroad Company and this fact was undisputed. C0209.

In its Local Rule 2-1.04 Statement, 2nd & Main stated as undisputed that the existing water main "across the 2nd & Main property was installed without a carrier pipe and is not to railroad standards." C0209. North Chicago nominally disputed this fact, stating that its expert, Devin Moose, opined that the water main can bear the weight of a railroad spur if it were constructed over the main." C0209. However, Moose's actual report states, in pertinent part, "The area between the north property line and rail spur, although not suitable to house additional rail lines, could be utilized for other purposes." C224. 2nd & Main argued that the undisputed inability to place tracks over the water main constituted an interference with 2nd & Main's ability to operate a railroad. C0459-61.

On July 13, 2021, the Circuit Court granted 2nd and Main's Motion for Partial Summary Judgment finding that "North Chicago's water main shall be constructed and or replaced in accordance with current railroad standards" and set the matter for a future date "for presentation of evidence as to current railroad standards." C0642. North Chicago now challenges this order via interlocutory appeal.

III. ARGUMENT

"Courts have treated preemption under the Act in a variety of ways. In 2005, the Board surveyed the different approaches in case law and suggested that there were two manners in which state or local actions or regulations could be preempted: (1) categorical, or *per se,* preemption, and (2) 'as applied' preemption." *Union Pacific*

Railroad Company v. Chicago Transit Authority, 647 F.3d 675, 679 (7th Cir. 2011) The 7th Circuit determined "that for the condemnation case before us, an 'as applied' analysis is more appropriate than an analysis for categorical preemption," noting that a "condemnation is a peculiar type of regulation, one specifically limited in scope to the ownership or use of one particular piece of property." *Id.* at 679. The Court explained further that "a condemnation is not a rule of general applicability because each instance necessarily varies with the facts of the case and the specific property subject to the condemnation." *Id.* at 679-680. "Using an 'as applied' analysis, the question then becomes whether the state condemnation for a perpetual easement over Union Pacific's Right of Way prevents or unreasonably interferes with railroad transportation." *Id.* at 680.

Here, North Chicago brings a condemnation action seeking to take an easement over 2nd & Main's railroad property, as such, the central question of this case with whether granting North Chicago and easement will unreasonably interfere with 2nd & Main's ability to operate a railroad.

a. 2nd and Main's plans are not too vague to constitute interference.

i. Preemption may occur even if there is a lack of definite or imminent plans to use a railroad property.

North Chicago's contention is that the ICCTA only preempts condemnation actions "when there is evidence that the condemnation will interfere with imminent, definite plans to expand railroad infrastructure." (Appellant's Brief, 11) This contention, however, runs counter to the 7th Circuit's decision in *Union Pacific Railroad Co. v. Chicago Transit Authority,* which emphasized several times in its holding that a

condemnation action was preempted when that the proposed taking would prevent the railroad from using the property in the future.

In *Union Pacific,* a railroad leased a portion of its property to the Chicago Transit Authority. As such, the railroad had no present plans to use that portion of the property in the future. The 7th Circuit noted that the "property is valuable railroad land owned by [the railroad] that [the railroad] could use for additional railroad lines if it was unoccupied." *Id.* At 681. The Court further explained that "[e]ven if the property was not being used and Union Pacific had no immediate plans to use the property, a taking of this property would still prevent Union Pacific from using it for railroad transportation in the future." *Id.* at 681.

In both *Union Pacific* and the present case, the plaintiff was already in possession of the property it seeks to condemn. In *Union Pacific,* the CTA sought to condemn a portion of railroad property that it was already leasing. Here, North Chicago is seeking an easement for its existing water main. In both cases, the plaintiffs' existing use of the property it sought to condemn prevented the railroad entity from using the property itself. "The CTA's use of the [leased] Right of Way has a significant impact on railroad transportation: it prevents [the railroad] from using the property itself for additional tracks." *Id.* at 682. Similarly, the water main, being insufficiently reinforced, prevents 2nd & Main from installing new tracks above the water main.

In *City of Lincoln v. Surface Transportation Board,* Lincoln planned to condemn a portion of the right of way of a rail line owned by the Lincoln Lumber Company ("LLC") to improve its storm drain system and to build a pedestrian trail. 414 F.3d 858, 859 (8th Cir. 2005) Lincoln filed a declaratory judgment action with the Surface

Transportation Board seeking a determination that its condemnation action would not be preempted. *Id.* at 859. "[T]he Board framed the issue as whether the proposed taking would prevent or unduly interfere with railroad operations and interstate commerce." *Id* at 860. LLC had argued to the Board that it currently used the space to move freight, store lumber, unload railroad cars and stage unloaded freight for further movement into shipper facilities, and it asserted that it might rebuild a sidetrack and construct a terminal facility. *Id.* "According to the Board all of these activities are part of transportation by rail as defined in 48 U.S.C. §10102(9), and the proposed trail could interfere with these activities." *Id.* "The Board found that Lincoln had not adequately refuted LLC's contention that it needed all of the right of way to satisfy its present and future rail needs." *Id.*

Lincoln appealed to the 8th Circuit Court of Appeals. The Circuit Court affirmed the Board, holding that "the Board can consider the railway's future plans as well as its current uses and make its own evaluation of how likely it is that the plans will come to fruition." *Id.* at 862. Rather than applying a definite and imminent standard to LLC's future plans, the 8th Circuit emphasized the permanent nature of a condemnation, noting that "'it can never be stated with certainty at what time a particular part of a right of way may become necessary for railroad uses.'" *Id.* quoting: *Midland Valley R.R. Co. v. Jarvis,* 29 F.2d 539, 541 (8th Cir. 1928)

In *14500 Limited v. CSX Transportation, Inc.,* No. 1:2012cv01810 – Document 11 (ND Ohio 2013) the Plaintiff had fenced a portion of property belonging to a railroad for a period of over 20 years and brought a claim for adverse possession. The Defendant railroad argued that the ICCTA preempted Ohio's adverse possession law, declaring that

land sought by adverse possession was necessary for it to "maintain sufficient flexibility to expand or reconfigure its operations" and that since the railyard "is located in a densely populated urban area that lacks available property nearby for the expansion, ... the loss of the property at issue would have serious, negative consequences on rail transportation." *Id.* Ruling in favor of the Defendant railroad company, the Court found that "the ICCTA preempts Plaintiff's adverse possession claim because the evidence presented demonstrates that the taking of Defendant's property would affect railroad transportation in the future." *Id.*

In support of its contention that 2nd & Main must show immanent definite harm, North Chicago, cites three cases: *City of Girard v. Youngstown Belt Ry. Co.,* 134 Ohio St. 3d 79 (Ohio 2012), *Tex Cent. Bus. Lines Corp. v. City of Midlothian,* 669 F.3d 525 (5th Cir. 2012), and *Franks Inv. Co. LLC v. Union Pac. R.R. Co.,* 593 F.3d 404 (5th Cir. 2010). Unlike the *Union Pacific* case decided by the 7th Circuit, these cases are from other jurisdictions.

In *Girard,* the Supreme Court of Ohio declined to find preemption where a railroad claimed that it wanted to use vacant property "in the future for expansion and development in order to accommodate the growing interstate railway business in the area," explaining that "[w]ithout anything more specific...a general desire for future development is not enough to establish that the property will be used for railway transportation." *Girard* at 91.

Girard differs from the present case because the railway company was the owner of a 55-acre parcel of land and the railway operated a track that ran along the outside of the eastern border of that parcel. *Id.* at 80. The city sought to condemn a portion 41.5

acres of the parcel, leaving the railway to retain the 13.5 acres of the parcel located near the existing track and right-of-way. *Id.* at 80. The 41.5 acres sought by the city was vacant land. *Id.* at 91. The Ohio Supreme Court stated, "in some cases it has been appropriate to look to a railway company's future intentions, even without concrete plans, in order to determine whether a taking would eventually unreasonably interfere with railway transportation," but that "[t]his principle does not extend to an undeveloped parcel of land containing no rail line and no right-of-way." *Id.*

Unlike the circumstances in *Girard,* 2nd & Main's property is not undeveloped, it has existing rail tracks and an existing building. North Chicago's appraisal of the property includes an "Improvement Summary" noting the existence of a "wooden lumber warehouse, steel framed and sided sheds," and "small office." C0038. And unlike the large property at issue in *Girard,* 2nd and Main's property is only 2.71 acres. C0040. Thus, the entirety of the 2nd and Main's property is in close proximity to the existing tracks and existing improvements. This cannot be compared to the taking of the undeveloped portion of property in *Girard.*

This is also where *Girard* differs with the 7th Circuit's *Union Pacific* case. The 7th Circuit noted that in cases where condemnation was not preempted, the condemnation was "sufficiently insignificant that it did not interfere with railroad transportation." *Union Pacific* at 682. In *Girard,* the taking did not interfere with the railroad because it left a significant portion of land where the railroad conducted its activities. Here, there is a significant impact since 2nd and Main's property is relatively small and the existence of an unreinforced water main would prevent activities from occurring on that portion of the land.

Texas Cent. considered whether various ordinances were preempted under the ICCTA. *Id.* at 528. What is noteworthy is that the property at issue consisted of 243 acres, but the railroad used 20 acres for transloading and sought to build silos adjacent to these 20 acres. *Id.* The Fifth Circuit held that the silo project was exempt under the ICCTA from regulations, but declined to hold that "everything [the railroad] does on its largely vacant 243-acre leasehold is beyond the reach of the City's regulation." *Id.* at 534. As in *Girard,* and unlike 2nd & Main's property, the property at issue in *Texas Cent.* featured extremely large portions of undeveloped land. Moreover, *Texas Cent.* was not a condemnation action and did not seek to permanently take the railroad's land. Thus, the 5th Circuits ruling did not have the effect of barring the railroad's future use of the property, it only left that issue to be determined down the road.

In the *Union Pacific* case, the 7th Circuit emphasized that the "railroad corridor through Chicago is valuable for railroad transportation, and although Union Pacific has no current plans to use the property because of the CTA's operations, there is little doubt that it would be used whenever it became available" and "Union Pacific would lose valuable property rights in the condemnation..." *Id.* at 683. Because 2nd and Main's property is small, there is little doubt that the portion where the water main runs would be used for new tracks and/or storage, once the water main is reconstructed to railroad standards. If the main is not brought to railroad standards and 2nd and Main is not able to build on it, then it would be losing valuable property rights.

Franks has very little relevance to the matter at hand. *Franks* was not a condemnation case, rather, the plaintiff owned land adjacent to property owned by a railroad. *Id.* at 406. There were four existing railroad crossings over the railroad tracks

on the railroad property, which were used by the plaintiff. *Id.* Plaintiff filed suit to prevent the railroad from removing the railroad crossings. *Id.* The railroad defended arguing that the state law action to preserve the crossings was preempted by the ICCTA. *Id.* The 5th Circuit found there was no preemption because the railway failed to tie any specific problems to the four crossings at issue. *Id* at 415.

b. There is no question of fact that the water main will interfere with 2nd and Main's use of the railroad.

Both the 2nd and Mains expert, Peter Kolb, and North Chicago's expert, Devin Moose concluded that the existing water main is insufficient to support overhead rail tracks.

Peter Kolb stated that "When constructing a water main under railroad property a carrier pipe is first installed, then the concrete water main is placed within the carrier pipe and is filled with sand to carry the load." C0589. "This is done to avoid putting the load of the railroad tracks on the water pipes." C0589. "Instead, [the load] is put on the outside casing." C0589. "The water main across the 2nd & Main property was installed without a carrier pipe and is not to railroad standards." C0589. "The existing 24-inch diameter pre-stressed concrete cylinder pipe water main on the 2nd & Main property is not sufficiently constructed for the purpose of supporting railroad loadings and does not meet railroad criteria for utility crossings." C0589. "The existing water main renders the 2nd & Main property unusable for railroad purposes in the area over and north of the existing water main." C0589.

The Report of Devin Moose does not refute any of these points. The Moose Report states, in pertinent part, "The existing rail spur could resume without additional

improvement to the water main infrastructure. The northern portion of the Property, between the exiting rail spur and northern property boundary, could be used for a variety of purposes, including but not limited to housing shipping containers or other material storage." C0348. Reading between the lines, what Moose is really saying is that 2nd and Main can use the northern portion of the Property so long as railroad tracks are not put on the northern portion. The Moose Report states further: "The area between the north Property line and rail spur, although not suitable to house additional rail lines, could be utilized for other purposes..." C0352. Thus, the real conclusion of the Moose Report is that because of the water main, the northern portion of the Property is "not suitable to house additional rail lines."

c. The Court did not grant a permanent injunction.

i. The partial motion for summary judgement does not grant injunctive relief, but rather, it describes the nature and the extent of the easement should the court grant the condemnation.

In its brief, North Chicago argues that the July 13, 2021 granting 2nd & Main's partial motion for summary judgment constituted injunctive relief, which it claims was not sufficiently supported by the evidence. (Appellant's Brief, 17). This argument is unavailing, however, because 2nd and Main did not seek a mandatory injunction, nor did the Court award one in its July 13, 2021 order.

In conjunction with its Answer to North Chicago's Complaint for Condemnation, 2nd and Main filed an affirmative matter alleging that as a result of the ICCTA, North Chicago's right to eminent domain is limited because North Chicago is not permitted to interfere with 2nd and Main's operations as a railroad. C0067-8. In the prayer for relief

for its Affirmative Matter, 2nd and Main prayed that the Court find that any relief afforded to North Chicago in its condemnation action "be limited to the extent that it does not interfere with 2nd & Main's railroad operations." C0068.

Similarly, in its Motion for Partial Summary Judgment, 2nd and Main argued that North Chicago's "right to condemn is limited" and stated that the purpose of the motion was "to obtain a ruling regarding the limitation of North Chicago's eminent domain powers." C0088-9. The Motion argued that the ICCTA did not prevent any condemnation from occurring, but rather that the Court could "fashion a remedy so that the taking will not interfere with the [2nd & Main's] use of the property as a railroad" by requiring that if a judgment for condemnation is entered, that North Chicago's water main meet minimum railroad standards. C0095. This is not injunctive relief, but rather, a limitation on the scope of the easement.

"An easement is a right or privilege in the real estate of another...." *Beloit Foundry Company v. Helen Goodall Ryan,* 28 Ill.2d 379, 388 (1963) "Where an easement exists by express grant, its use must be confined to the terms and purposes of the grant." *Duresa v. Commonwealth Edison Co.,* 807 N.E.2d 1054, 1063 (1st Dist. 2004). "If an easement is limited in scope or purpose, the property owner is entitled to prevent the burden of the easement from being increased." *Id.*

An easement, thus, can be limited in scope and subject to terms. Here, North Chicago is seeking the grant of an easement through its condemnation proceeding. What is unique about the present case is that, because of the ICCTA, North Chicago can take an easement through eminent domain proceedings only if the easement doesn't unreasonably interfere with railroad operations. In granting 2nd and Main's motion for partial summary

judgment, the Circuit Court essentially determined that an easement allowing the existing pipe would be preempted because the existing pipe interferes with railroad operations. For an easement to be viable in light of the ICCTA, the easement must be limited in scope and subject to terms requiring that the water main "be constructed and or replaced in accordance with current railroad standards." C0642.

Contrary to the arguments of North Chicago, the Order of July 13, 2021 does not constitute mandatory injunctive relief, because it is not mandatory, rather, it is a condition of the easement that they are seeking. North Chicago is free to dismiss its complaint for condemnation and relocate its water main somewhere else. All this order does is make the determination that any easement granted to North Chicago will include a term required that the water main be built to current railroad standards.

The July 13, 2021 order should be read as a limitation of the easement to be granted at the end of the condemnation proceeding, not as requiring North Chicago to construct a new water main as mandatory injunctive relief. First, the order states that the "Motion for Partial Summary Judgment is granted." C0642. The motion for partial summary judgment makes it clear that it is asking that the court determine that "if a judgment for condemnation is entered, that the existing water main be replaced by one that meets railroad standards..." C0095. Second, North Chicago has no right to replace the water main absent it acquiring an easement through condemnation.

ii. North Chicago waived this argument by failing to make it at the Trial Court.

In its Appellate Brief, North Chicago argues that the relief sought by 2nd and Main is tantamount to a permanent injunction, but that "2nd & Main never presented evidence

that it possessed a clear and ascertainable right in need of protection, irreparable harm would occur, or that there was no adequate remedy at law" and that 2nd & Main never brought a motion for permanent injunction." (Appellant's Brief, 18) North Chicago did not, however, raise any of these issues in response to 2nd and Main's Motion for Partial Summary Judgment.

In its Response to the Motion for Partial Summary Judgment, North Chicago identified the relief requested by 2nd and Main, stating that 2nd & Main argues that the interference of the water main "requires this Court to 'fashion a remedy so that the taking will not interfere with the Defendant's use of the property as a railroad.'" C0202. "Thus," North Chicago goes on to say, "for this Court to grant this Motion, there must be no dispute that the water main interferes with the use of the Property as a railroad." C0202. Nowhere in the Response did North Chicago argue that 2nd and Main was asking for a mandatory injunction and nowhere does North Chicago argue that 2nd and Main should be denied this relief because it failed to present evidence of a right in need of protection, irreparable harm, and that there was no adequate remedy at law, nor does North Chicago argue that the motion for partial summary judgment was procedurally improper.

Even if the relief requested by 2nd and Main in its Motion for Partial Summary Judgment did constitute injunctive relief, North Chicago did not raise this argument in response to the motion or at any other time in front of the Circuit Court. "It is axiomatic that questions not raised in the trial court are deemed waived and may not be raised for the first time on appeal." *Western Casualty & Surety Co. v. Brochu,* 105 Ill.2d 486, 500 (1985). This argument should be deemed waived.

IV. CONCLUSION

The water main, as it currently exists on the Property, is not built to railroad standards. Any proposed easement must address this issue, otherwise the water main will interfere with 2nd and Main's use of the property as a railroad and thus, would be preempted by the ICCTA. Therefore, the Circuit Court was correct to grant 2nd & Main's partial motion for summary judgment, requiring that any water main used on the prospective easement be constructed to meet railroad standards.

WHEREFORE, and for all the reasons stated above, Defendants-Appellees, 2nd & Main respectfully request the Appellate Court affirm the order of July 13, 2021 and remand this matter for further proceedings.

Respectfully Submitted:

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Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341 (a) and (b). The length of this brief, excluding the pages containing the cover, the statement of points and authorities, and the certificate of compliance is **15 pages.**

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No. 2-21-0454

IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

The City of North Chicago,	)	
	)	
Plaintiff/Appellant,	)	Appeal from the 19th Judicial Circuit
	)	Lake County
v.	)	Case No. 2019 ED 20
	)	Hon. Joseph Salvi
2nd & Main, LLC; Unknown Owners and	)	Date of Notice of Appeal: August 12, 2021
Non-Record Claimants,	)	Date of Judgment: July 13, 2021
	)	
Defendant/Appellee.	)	

Reply Brief of Plaintiff/Appellant City of North Chicago

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Oral Argument Requested

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There are two issues in this appeal. The first is whether the City of North Chicago's ("City") condemnation of a parcel that includes its water main would interfere with railroad activity and thus is preempted by the Interstate Commerce Commission Termination Act of 1995, 49 U.SC. § 10101 et seq., ("ICCTA"). And the second is whether the court had the authority to issue a permanent injunction mandating that the City construct a new replacement water main that "meets railroad standards." In brief, the City's water main does not interfere with railroad activities and the court lacked the authority to issue this injunction in light of its failure to consider the legal standards for imposing injunctive relief. The court's grant of 2nd & Main, LLC's ("2nd & Main") Motion for Partial Summary Judgment should be reversed and its Order requiring the City to install a replacement water main should be vacated.

I. The City's Water Main Does Not Interfere With Railroad Activities So That Condemnation of the Property Is Not Preempted by the ICCTA.

For the ICCTA to preempt this action, there must be a finding that the City's condemnation will "unreasonably burden or interfere with rail transportation." *Union Pacific R.R. v. Chicago Transit Auth.*, 647 F.3d 675 (7th Cir. 2011). As the movant and the party seeking a finding of preemption, the burden of persuasion was on 2nd & Main to present evidence showing that the condemnation action would unreasonably interfere with railroad transportation. *See Elam v. Kansas City So. Ry. Co.*, 635 F.3d 796, 802 (5th Cir. 2011) (burden of persuasion lies with the party seeking ICCTA preemption); *Triple R Dev., Ltd. Liab. Co. v. Golfview Apartments I, Ltd. P'ship*, 2012 IL App (4th) 100956, ¶ 12 ("the

movant always has the burden of persuasion on a motion for summary judgment…."). 2nd and Main did not meet its burden here.

2nd & Main's Motion for Partial Summary Judgement essentially argued that the City's condemnation action is preempted by the ICCTA unless the water main is replaced with a water pipe that meets "railroad standards." C0091. The underlying question posed is whether the existing water main interferes with railroad activities by preventing 2nd & Main from installing additional rail spurs. *See* 2nd & Main's Brief at 10-11.

As 2nd & Main acknowledges in its Motion, "significant railroad operations are not now taking place on the property." C0093. And 2nd & Main does not dispute the opinion of the City's engineering expert, Devin Moose, that the existing water main does not interfere with any use of the existing rail spur or any other kinds of planned railroad activities, such as storage. *See* C0223-24. Rather, 2nd & Main argues that there is interference with railroad activities based on its unformed vague possible plan to install one or more additional spurs at some unspecified point in the future. C0093; 2nd & Main's Brief at 10-11.

While 2nd & Main is correct that courts do take future plans into account when assessing preemption, nothing in the case law it cites compels a finding of preemption in this case. The City acknowledges that there is a Seventh Circuit case which suggests that a nondefinite potential future use can be considered as grounds for preemption, *Union Pacific R.R. v. Chicago Transit Auth.*, 647 F.3d 675 (7th Cir. 2011), but that case is distinguishable. It involved a 2.8 mile right-of-way that has been leased to the Chicago Transit Authority (CTA) for decades, which the CTA sought to condemn to obtain a perpetual easement. *Id.* at 676. On the elevated Right of Way, Union Pacific operates

three railroad tracks and CTA operates two rapid transit tracks only five feet away. *Id.*, *id.* at 680. The court found, "The CTA's use of the Right of Way has a significant impact on railroad transportation: it prevents Union Pacific from using the property itself for additional tracks; and it affects Union Pacific's current railroad operations, including requiring Union Pacific to use nonstandard procedures to maintain the Right of Way." *Id.* at 682.

Unlike the instant case, however, *Union Pacific* involved a property owned by a railroad and being actively used as a railroad at the time preemption was analyzed. Moreover, the CTA's use – which would be made permanent by an easement – already imposed burdens on Union Pacific because the close parallel tracks required Union Pacific to use special maintenance procedures. *Id.* So, the observation that Union Pacific could also decide to add more tracks was not necessary to the decision. The *Union Pacific* case itself thus does not rest on possible future plans and provides limited guidance here.

The second case 2nd & Main relies on, *City of Lincoln v. Surface Transportation Board*, 414 F.3d 858 (8th Cir. 2005), does not assist its case because the burden of proof and scope of review were so different. There, the City of Lincoln had brought a declaratory judgment action before the Surface Transportation Board requesting a finding that its proposed condemnation action would not be preempted. *Id.* at 858. Unlike in this summary judgment motion, the burden of proof was on the City to show that its proposed easement across a railroad right of way would not interfere with railroad operations. The City wanted to acquire a portion of the right of way of an actively used rail line to build a bike path. *Id.* The property owner objected because a narrower right of way would make

maintenance more difficult and also it planned to add a side track because of increasing rail traffic. *Id.* at 859. The Board held for the property owner and the City appealed to the Eighth Circuit, which applied the administrative review standard, finding that it could not disturb the Board's holding unless it was arbitrary and capricious and that its review was thus extremely narrow in scope. *Id.* at 860.

In *Lincoln*, the Eighth Circuit identified a standard for when and how future plans should be taken into account in determining preemption. It noted that "the Board can consider the railway's future plans as well as its current uses *and make its own evaluation of how likely it is that the plans will come to fruition.*" *Id.* at 862 (emphasis added). In other words, plans that are very unlikely to come to fruition would not be a proper basis for preemption.

In *City of Girard v. Youngstown Belt Ry. Co.*, 979 N.E. 2d 1273 (Ohio 2012), the Ohio Supreme Court emphasized the principle established in *Lincoln* that: "[w]hile it is acceptable and sometimes necessary to consider a railway company's future plans when determining [preemption of] an eminent domain action, it is also necessary to consider whether it is likely that the railway company's plans 'will come to fruition.'" *Id.* at 1286 (quoting *Lincoln*, 414 F. 3d at 862). In *Girard*, the City sought to condemn an undeveloped parcel of land that was part of a railway yard owned by a railway company, which featured an active track along one side of the yard. *Id.* at 1276. The railway company had argued that in the future, it might want to use the railway yard to accommodate the growing interstate railway business in the area. *Id.* at 1286. Given the lack of any concrete plans and the fact that the condemnation would not affect any previously constructed rail line, the court held that the City's eminent domain action

would not unreasonably interfere with railway transportation and so was not preempted. *Id.* at 1287. 2nd & Main tries to distinguish *Girard* based on the size of the property at issue and the fact that it was undeveloped. Those facts were relevant, but the essential analysis was whether the property owner's proposed future plans were likely to come to fruition. One important part of the court's reasoning was the fact that the railway company had not added the track over a period of some fifteen years. *Id.*

2nd & Main's third case, *14500 Ltd. V. CXS Transp., Inc.*, 2013 U.S. Dist. LEXIS 398806 (N. D. Ohio), is distinguishable from the instant case and provides a good example of how likely future plans must be. While the court found preemption (of an adverse possession lawsuit) based on potential future use of the property, in that case, the property was adjacent to an existing, heavily-used railroad yard. The court found persuasive that because rail traffic through the railyard had increased in recent years, it was "critical that the [] Railyard maintain sufficient flexibility to expand or reconfigure its operations to accommodate the increased traffic," *id.* at *9, and thus adverse possession of that parcel would affect railroad transportation and so was preempted. *Id.* at *13.

All three of the cases 2nd & Main cited are distinguishable because they involved currently active railroad operations where the proposed future use was deemed likely because it was helpful to the continuation and improvement of those operations and likely needed to meet increasing demand. Two of the cases, *Union Pacific* and *Lincoln*, also involved current interference with railroad operations from the proposed condemnation; they did not depend on finding a future issue.

In the instant case, the proposed condemnation (and the existing water main) present no interference with any existing railroad operations. And the chance of any future interference is both unlikely and unproven.

It is unlikely because 2nd & Main's claim that it plans to add additional spurs is nothing more than a bare allegation, a single line in Phil Dahl's affidavit. C0102. He presented no specific plans and 2nd and Main did not even argue that there is any need for such additional tracks. In addition, like in *Girard*, 2nd & Main has owned the property for a number of years and it has made no move to add a spur and has barely taken action to use the existing rail spur.

In addition, the City submitted proof that that the property is very unlikely to be used in this way. The City's appraiser, Barton DeLacy, examined the economic viability of using the property for railroad purposes. C255. In Mr. DeLacy's opinion, there is no likelihood that it would be economically viable to use the property for container storage or anything else involving rail spurs in the near or medium term. *Id.* The property is located in a blighted area with low levels of economic activity which makes the demand for large container storage at the property non-existent. C253-54. As such, Mr. DeLacy opined that there is no economic justification for 2nd & Main to construct additional rail spurs that may intersect with the water main. C255.

And it is unproven because 2nd & Main's engineering expert, Peter Kolb, was not able to show that the existing water main would interfere with installing a new spur, even if that plan was ever carried out. Kolb testified that the existing water main is not reinforced to the same extent as would be required if the Union Pacific Railroad was running over it.

C0294-96. But an exchange with the City's attorney shows that this does not prove the possibility of future interference.

> Q: . . . my question is why would the pipe need to be reinforced to the same standard when it crosses underneath the spur as it would when it crosses underneath the actual railroad tracks?
>
> A: I'm using that as a basis. . . . I don't know if it's any less – requirement of less or not, but I used the standard specifications for pipes under railroad lines.

C0297.

To understand why this is a wrong move, it is helpful to understand exactly what a "spur" is and how it differs from an active railroad line. The Union Pacific Railroad defines "spur" to mean: "Short, usually dead-end section of track used to access a facility or loading/unloading ramp. It also can be used to temporarily store equipment." Union Pacific Railroad, *Railroad Terms*, WWW.UP.COM, https://www.up.com/aboutup/reference/glossary/railroad_terms/index.htm#49 (last visited Dec. 2, 2021).

There is no evidence to support that the water line would have to be reinforced to the same extent if there was a spur above it as it would if the entire weight on the Union Pacific railroad regularly bore down on it. In fact, the trial judge in this case recognized as much when he stated: "It sounds like there's a difference between a spur and a railroad, and it sounds like the railroad would require more protection than a spur presumably because there would be more weight and more traffic on a railroad as opposed to a spur." C0624. That comment itself demonstrates that at least a fact question defeats 2nd & Main's motion for summary judgment.

2nd & Main did not meet its burden of showing that summary judgment is warranted. The evidence is sufficient, at a minimum, to create a fact question on 2nd & Main's claim

that the condemnation unreasonably interferes with rail transportation. It is not clear and free from doubt that the water main unreasonably interferes with railroad transportation and thus warrants ICCTA preemption. *See Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 102 (1992) ("Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt."). 2nd and Main did not present sufficient evidence to carry its burden of persuasion on the preemption question and, at a minimum, there are questions of fact that should be presented to a jury.

II. The Court Lacked the Authority to Issue Injunctive Relief Ordering the City to Construct a New Replacement Water Main on the Property.

The trial court's July 13, 2021 Order ("Order") must be overturned because it is an injunction without any finding of the required legal basis for injunctive relief. The Order is a mandatory permanent injunction because it orders the City to perform a specific, permanent action—the reinforcement of the water main. *See* C642 ("It is ordered: … The City of North Chicago's water main shall be constructed and or replaced in accordance with current railroad standards").

2nd & Main argues that the Order is not an injunction, it is merely the remedy requested by 2nd & Main in its Motion for Partial Summary Judgment. 2nd & Main seeks to transform its identity by saying it is only "a limitation on the scope of the easement." 2nd & Main Br. at 12. Characterizing the Order this way does nothing to change its essential nature. A mandatory injunction is an order that requires a party "to take specific actions." *City of Carbondale v. Bower*, 332 Ill. App. 3d 928, 935 (5th Dist. 2002). "A permanent injunction is [one] of unlimited duration…." *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 222 (2000). Telling the City that is required to build a new or improved

water main is requiring a specific, permanent action. Affixing a different label cannot mean that the Order escapes its nature as injunctive relief.

This principle of substance over form is especially clear in the Rule 307(a) context. As explained in its opening brief, this Court has appellate jurisdiction of the instant case under both Rule 304(a)(trial court special finding of right to appeal judgment as to fewer than all claims) and Rule 307(a)(interlocutory appeal as a matter of right over orders granting injunctions). Appellant's Brief at p.3. In determining whether there is an appealable injunction, the Illinois Supreme Court has specifically recognized: "An apple calling itself an orange remains an apple. Actions of the circuit court having the force and effect of injunctions are still appealable even if called something else." *In re A Minor*, 127 Ill. 2d 247, 260 (1989). The Court there recognized that an "injunction" is "'a judicial process, by which a party is required to do a particular thing, or to refrain from doing a particular thing....'" *Id.* at 261 (citation omitted). See also *Goodrich Corp. v. Clark*, 361 Ill. App. 3d 1033, 1039 (4th Dist. 2005)(courts look at substance over form in determining whether there is an injunction for purposes of Rule 307(a)).

2nd & Main further asserts that the City could just dismiss this condemnation lawsuit and relocate its water main. But that misses the point and the procedural posture of this case. The trial court could have denied the City's request for approval of condemnation on grounds of preemption, but it had no authority to allow condemnation (which it did not clearly do in its Order) and then – rather than determine just compensation – fashion an unusual injunctive remedy.

Not surprisingly, the trial court itself questioned whether it had the authority to draft this kind of order in a motion for summary judgment. *See* C0625. The court was right to

question its authority. It cannot take this equitable action without making each of the findings necessary to issue a permanent injunction. "To be entitled to a permanent injunction, a party 'must demonstrate (1) a clear and ascertainable right in need of protection, (2) that he or she will suffer irreparable harm if the injunction is not granted, and (3) that no adequate remedy at law exists.'" *Vaughn v. City of Carbondale*, 2016 IL 119181, ¶44 (internal citation omitted).

In particular, it has long been established that a court will not grant equitable relief if the plaintiff has an adequate remedy at law. *Horwitz v. Sonnenschein Nath & Rosenthal*, 2018 IL App (1st) 161909, ¶31. In fact, the absence of an adequate remedy at law is more than just an element of an equitable claim, it is a condition precedent to seeking equity itself. *Id.* A remedy at law is inadequate only where "'monetary damages cannot adequately compensate the injury and the injury cannot be measured by pecuniary standards.'" *Hensley Constr., LLC v. Pulte Home Corp.*, 399 Ill. App. 3d 184, 190 (2d Dist. 2010) (quoting *Franz v. Calaco Development Corp.*, 322 Ill. App. 3d 941, 947 (2d 2001)).

2nd & Main did not present any evidence that money damages are inadequate here or that any of the injunction requirements are met, and the court made no such findings. "[A] mandatory permanent injunction is an extraordinary remedy which is not granted as a matter of right, but in the exercise of sound judicial discretion and to be used only in cases of great necessity." *Stavros v. Karkomi*, 28 Ill. App. 3d 996, 1004 (1st Dist. 1975). *See also Kopchar v. City of Chicago*, 395 Ill. App. 3d 762, 772 (1st Dist. 2009) (quoting *Sadat v. American Motors Corp.*, 104 Ill. 2d 105, 115 (1984)) ("'In Illinois it has been recognized that an injunction is an extraordinary remedy which may be granted when the

plaintiff establishes that his remedy at law is inadequate and he will suffer irreparable harm without the injunctive relief.'") Injunctions are not favored by the courts. *Town of Cicero v. Metro. Water Reclamation Dist.*, 2012 IL App (1st) 112164, ¶ 40. Here, the court issued a mandatory permanent injunction without asking for or obtaining any evidence in the record to support it. It then issued a vague order ("railroad standards") that cannot be clearly implemented. In fact, the very vagueness of the Order highlights the trial court's failure to find sufficient evidence to justify the Order. This is reversible error. Thus, the July 13, 2021 Order should be vacated.

2nd & Main's secondary argument, that the City waived this argument by not presenting it to the trial court, fails as both a matter of fact and based on the legal principles regarding waiver. First, in its response to 2nd & Main's Motion for Partial Summary Judgment, the City in substance did raise arguments relevant to elements of an injunction, even if not using the specific language 2nd & Main argues was required. The City argued that there was no need for the relief sought (the injunction) because there was no harm to alleviate in that 2nd & Main failed to show interference with railroad operations caused by the water main. City Response Brief at p. 2. In effect, then, the City argued that 2nd & Main had no clear right in need of protection by an injunction. The City also argued in its response brief that 2nd & Main failed to explain why the requested relief was needed. *Id.* at p. 4. This translates to an argument that 2nd & Main failed to show irreparable harm in the absence of the injunctive relief sought.

Moreover, 2nd & Main's waiver argument misapprehends the nature of waivers. Appellate courts are "not bound by the principle of waiver and, in the interest of a just result, [can] elect to address [any] argument[] which has merit." *Keefe-Shea Joint Venture*

v. City of Evanston, 332 Ill. App. 3d 163, 170 (1st 2002) (citing *American Federation of State, County & Municipal Employees, Council 31 v. County of Cook,* 145 Ill. 2d 475 (1991)) (choosing to address argument regarding injunctive relief that was raised for the first time on appeal).

As the Illinois Supreme Court has recognized:

> [W]e note that the waiver rule is an admonition to litigants, not a limitation upon the jurisdiction of a reviewing court. In this regard, we have recognized that the responsibility of a reviewing court for a just result and for the maintenance of a sound and uniform body of precedent may sometimes override the considerations of waiver that stem from the adversarial nature of our system.

American Federation of State, County & Municipal Employees, Council 31 v. County of Cook, 145 Ill. 2d 475, 480 (1991). *See also People v. Shipp*, 2020 IL App (2d) 190027, ¶37 (quoting same) ("waiver is a limitation on the parties and not the court").

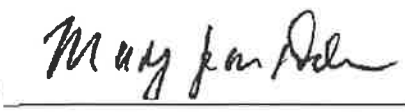
Here, addressing the City's arguments against the trial court's injunction is necessary in order to preserve important rules of equity. Allowing the trial court to fashion this remedy without adhering to any of the requirements for mandatory permanent injunctions would set a dangerous precedent and weaken a venerable legal principle. This is not a case where this Court should blindly follow a waiver argument. Instead, this Court should vacate the Order and reverse the grant of 2nd & Main's Motion for Partial Summary Judgment.

CONCLUSION

For all the reasons stated above, this Court should reverse the trial court's grant of partial summary judgment and vacate its Order.

Respectfully submitted,

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Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 13 pages.

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CERTIFICATE OF SERVICE

I, Mary Jean Dolan, certify that I served the foregoing **Reply Brief of Appellant City of North Chicago** by emailing a copy to:

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[X] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

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IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

The City of North Chicago, Plaintiff/Appellant, v. 2nd & Main, LLC; Unknown Owners and Non-Record Claimants, Defendant/Appellee.	)	Appeal from the 19th Judicial Circuit Lake County Case No. 2019 ED 20 Hon. Joseph Salvi Date of Notice of Appeal: August 12, 2021 Date of Judgment: July 13, 2021

Supplemental Brief of Plaintiff/Appellant City of North Chicago

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Oral Argument Requested

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Whether, once the trial court found the condemnation complaint preempted, it thereafter had authority to enter relief other than dismissing the complaint with prejudice, or whether further condemnation proceedings or requests for relief must be brought before the Surface Transportation Board.

ARGUMENT

Introduction

This Court has asked the parties for supplemental briefing on the following question:

> Whether, once the trial court found the condemnation complaint preempted, it thereafter had authority to enter relief other than dismissing the complaint with prejudice, or whether further condemnation proceedings or requests for relief must be brought before the Surface Transportation Board.

Order (Jan. 25, 2022). The Court further stated that "the parties should assume that the trial court had authority to make the preemption finding and should focus on the impact of that finding with respect to its authority thereafter." *Id.*

This is a two-part question. Regarding the first part, it is the City's position that the trial court did not have the authority to issue an injunction. It could have denied the City's request for approval of condemnation on grounds of preemption, and then dismissed the case, but it had no authority to (implicitly) allow condemnation and then – rather than determine just compensation – fashion an unusual injunctive remedy. As explained in the City's Reply Brief, the trial court itself questioned whether it had the

authority to draft this kind of order. C0625. Moreover, the trial court did this without making any of the findings necessary to issue injunctive relief.

As to the second part, "whether further condemnation proceedings or requests for relief must be brought before the Surface Transportation Board," there is no clear answer found in the precedent. But if this Court concludes there may be preemption, there is authority and good reason to let the Surface Transportation Board ("Board") exercise its discretionary authority to decide the solution to this complex, unique question. That is what should happen when there is potential interference with remote future plans for a spur and the condemnation is for an easement for a water main that has been in place for some 60 years.

Before addressing the question presented, it is helpful to review the basic legal underpinnings. In 1995, Congress enacted the Interstate Commerce Commission Termination Act ("ICCTA") and created the Surface Transportation Board to administer the Act. *See* 49 U.S.C. §§ 10101, 10102(1). The ICCTA gave the Board exclusive control over the regulation of railroad transportation. *Id.* The ICCTA has an express preemption clause which states, "[e]xcept as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. 10501(b). The legal test for ICCTA preemption is whether the proposed action "would have the effect of preventing or unreasonably interfering with railroad transportation." *Union Pac. R.R. v. Chi. Transit Auth.*, 647 F.3d 675, 679 (7th Cir. 2011).

The other point to clarify is the meaning of the Notice of Exemption issued by the Board in 2017. C0113. Acquisition of rail lines is subject to regulatory requirements

requiring the Board issue a certificate of approval before such acquisition is allowed. 49 U.S.C. § 10901. A non-carrier may bypass the pre-approval requirements of 49 U.S.C. § 10901 by filing with the Board a notice of exemption under 49 C.F.R. §§ 1150.31-35. Issuance of this exemption means only that a Board certificate is not required for acquisition. *See generally City of Ottumwa v. Surface Transp. Bd.*, 153 F.3d 879, 882 (8th Cir. 1998) (explaining notices of exemption).[1] It has no further relevance to the preemption question at issue in this appeal.

I. There is No Clear Support for Mandatory Board Jurisdiction of the "Remedy"

The only point that is well-settled is that issues involving the federal preemption provision contained in 49 U.S.C. § 10501(b) can be decided either by the Board or the courts in the first instance. *See, e.g., Jie Ao*, FD 35539, 2012 STB LEXIS 206, *7-8;

---

[1] Note that there is some uncertainty regarding why the Board issued a Notice of Exemption in this case. The ICCTA appears to make an exception for property involving only rail spurs rather than regular rail lines:

> The Board does not have authority under this chapter [49 USCS §§ 10901 et seq.] over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

49 USCS § 10906. It has been argued that this provision means that spurs are outside the jurisdiction of the Board and thus not subject to preemption by the ICCTA. But at least one court has rejected that argument and held that it means only that Board "approval is not required prior to the construction, acquisition, operation, abandonment or discontinuance" of spurs. *Cedarapids, Inc. v. Chi., Cent. & Pac. R.R. Co.*, 265 F. Supp. 2d 1005, 1013 (N.D. Iowa 2003).

This is, however, a further reason showing that rail spurs are distinct from regular rail lines. The Board has more expertise than a court to unravel the meaning of this for purposes of finding preemption.

Union Pac. R.R. Co. v. Taylor Truck Line, Inc., 2018 U.S. Dist. LEXIS 163881, *9 (W.D. La.).

An extensive review of the judicial and administrative decisions uncovered no clear answer to the specific question presented regarding whether the Board has mandatory jurisdiction of any post-preemption-finding remedy. In almost all cases, the Board and the courts merely decided yes or no on the question of preemption under the ICCTA. There was no case uncovered where a court or the Board invented an injunctive "remedy" in a preemption case. There is no reliable support for the proposition that after a trial court decides that there is preemption, any further proceedings or remedy must be decided by the Board. There was one Ohio appellate court case that found preemption and said that its holding was preliminary, that the Board should consider what remedy if any the plaintiff was entitled to, but it did not cite any support and it was reversed by the Ohio Supreme Court for another reason, because it found there was no preemption. *City of Girard v. Youngstown Belt Ry. Co.*, 196 Ohio App. 3d 271, 286 (2011), *rev'd*, 134 Ohio St. 3d 79 (2012). *See also 14500 Ltd. v. CSX Transp., Inc.*, 2013 U.S. Dist. LEXIS 39806, *16 (N.D. Ohio) (stating that some courts, upon finding preemption by the ICCTA, have stayed the action and referred the claim to the Board for further proceedings, but citing no cases). More typically, after finding preemption, the court simply affirms or reverses the court below. *See, e.g.*, *Girard*, 134 Ohio St. at 92; *Union Pac. R.R. v. Chi. Transit Auth.*, 647 F. 3d 675, 683 (7th Cir. 2011).

II. Given the Complexity of the Situation Where the Water Main Has Been in Place for Sixty Years, Only the Board Has the Necessary Expertise to Fashion a Creative Solution, So the Board Should Exercise its Discretionary Authority

There is, however, clear reliable precedent for seeking the Board's expert opinion on the question of preemption on a complex case – even after a trial court has made its own decision. *See City of Ozark v. Union Pac. R.R. Co.*, 843 F.3d 1167, 1173 (8th Cir. 2016). In *Ozark*, the trial court had held that the reinstallation of an above-grade railroad crossing that had been torn down some fifteen years earlier was not preempted by the ICCTA. 149 F. Supp. 3d 1107, 1116 (W.D. Ark. 2015), *rev'd,* 843 F.3d 1167, 1173 (8th Cir. 2016). The trial court in *Ozark* decided that there could be no preemption because the railroad had caused any interference by installing a side track after what the court found to be an illegal closing of the previously existing crossing, which had been there for decades. *Id.* In this case, of course, there is also a longstanding use by the city, here the 60-year-old water main, and the potential interference would be caused by a possible future installation of a rail spur over that long-term use. So, both cases involved the adding (or claiming it will add in the future) a new railroad use following long-term municipal use of the property.

The Eighth Circuit found that there was evidence indicating preemption but that the Surface Transportation Board was the entity most suited to making that decision. 843 F.3d at 1173. Importantly, it stated: "if presented the preemption issue the agency could determine that *any* order restoring this Crossing is preempted, or that some accommodation of the parties' interests may be compatible with sound rail transportation, in which case state law rights and duties would come into play." *Id.* (emphasis in original). What this means is that the Board has the expertise and the authority to find

preemption and nonetheless allow a city to use the railroad's property in a way that is compatible with "sound rail transportation."

The Eighth Circuit's solution would be appropriate here. It decided: "In these circumstances, it would be appropriate for the district court to defer entry of a final judicial determination whether the City's claims are preempted if the City requests an opportunity to petition the [Board] for a declaratory order resolving the issue of its exclusive jurisdiction." *Id.*

The procedure for obtaining the Board's decision was as follows. "[O]n remand, the City sought leave from the district court to petition the Board for a declaratory order to resolve any issues concerning the Board's jurisdiction, and the district court granted such leave. . . the City [then] filed a petition for declaratory order with the Board. . . ." *City of Ozark, Ark.*, FD 36104, 2017 STB LEXIS 130, *5-6. The Board first acknowledged that "[t]he Board and the courts have concurrent jurisdiction to determine questions of federal preemption under 49 U.S.C. § 10501(b), applying existing court and Board precedent." *Id.* at *6 n.2.

Nonetheless, the Board proceeded to accept jurisdiction of the preemption issue that the federal trial court had already decided. The Board explained: "The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to terminate a controversy or remove uncertainty. The Board finds it appropriate to issue a declaratory order addressing the at-grade crossing controversy here." *Id.* at *6. The Board then reached a conclusion contrary to that of the trial court, finding that the proposed at-grade crossing would unreasonably interfere with railroad

operations and that any state or local action requiring reinstallation of the crossing was therefore preempted. *Id.* at *7.

Similarly, while the Board does not appear to have mandatory jurisdiction of this case, this is also a complex case involving long-term public use of the relevant property and it is appropriate for the Board to be the entity to decide what should be done. Indeed, the instant case presents a far more difficult conundrum than did *Ozark*, where the municipal use had been discontinued for some time. In this case, the water main for which the City now seeks a formal easement has existed on what is now 2nd & Main's property since 1961, for over sixty continuous years. C0602-603.

The City strongly believes that there is no preemption here or, at the very least, that the question is inappropriate for summary judgment. As established in the Reply Brief, the proposed condemnation (and the existing water main) does not interfere with any existing railroad operations, and the chance of any future interference is both unlikely and unproven. It is unlikely because 2nd & Main presented only the most inchoate, speculative of plans to add an additional rail spur (see C0102, a single line in Phil Dahl's affidavit), and the City's experts opined that using the property in question for railroad purposes was not viable. C0255.

Even more significantly, it is unproven, so summary judgment was wholly unjustified. 2nd & Main's own engineering expert could not definitively say that the water main would interfere with the proposed additional rail spur. Instead, when explaining railroad standards, he testified only regarding the type of reinforcement needed to run the Union Pacific Railroad over a water main. When asked, he admitted that he did not know what whether any engineering standards required using the same degree of reinforcement

for a spur as for a fully-operational railroad or whether, as seems logical, less, or none at all, would be needed. C0297. After all, the existing spur has crossed over the Navy's water line for longer than could be determined, without incident.

The trial court admitted that "it sounds like the railroad would require more protection than a spur presumably because there would be more weight and more traffic on a railroad as opposed to a spur." C0624. And yet, he nonetheless – without having any proof of possible future interference – inexplicably ordered the City to reconstruct its 60-year old water main to satisfy "current railroad standards." C0642. Tellingly, the trial court further admitted that he did not know what those standards might be and stated that this should be figured out at a future hearing. C0631-633. If evidence is obtained regarding what type of construction is needed underneath a spur (versus a railway line), it may show that the existing water main meets the standard for a spur, so that there is conclusively no preemption. 2nd & Main clearly did not meet its burden of proof.

But in the event that this Court concludes that there may be preemption, then the Board should be asked to terminate the controversy using its discretionary authority. The problem will not be resolved by simply dismissing the City's condemnation suit because the water main will still remain in place, as it has for 60 years. And the trial court's injunction was an uninformed and legally invalid effort to end the controversy.

The Board has the special expertise necessary to figure out the best solution to this intractable problem. "As the agency authorized by Congress to administer the [ICCTA], the Transportation Board is uniquely qualified to determine whether state [action] should be preempted by the [ICCTA]." *Emerson v. Kan. City S. Ry. Co.*, 503

F.3d 1126, 1130 (10th Cir. 2007) (quoting *Green Mountain R.R. Corp. v. Vermont,* 404 F.3d 638, 642 (2d Cir. 2005) (internal quotation marks omitted)).

Just like the Eighth Circuit observed in *Ozark*, in such a complex case, it is the Board that has the ability to determine if "some accommodation of the parties' interests may be compatible with sound rail transportation." 843 F.3d at 1173. The Board could use its unique expertise on railways to determine the perplexing issues presented here.

Ordering the City to reconstruct the water main would have an exorbitant cost and be an overwhelming burden on the public purse. Through no fault of the City, the property may be contaminated, so that unnecessary ground disruption may cause significant collateral problems not even calculable at this time. Doing so without any proof that it is needed in order to possibly someday install an imagined rail spur is unwarranted and should not be allowed to stand. If this Court declines to reverse the trial court on the issue of preemption or on its remedy, then the next best course is to remand with instructions to send the entire case to the Board so it can use its special expertise on this unique and difficult public problem.

CONCLUSION

For all the reasons stated above, the City first respectfully requests that this Court reverse the trial court's grant of partial summary judgment and vacate its Order. In the alternative, if this Court is concerned that there may be preemption, then the City respectfully requests that this Court remand this case to the trial court with directions to stay the proceedings and allow the City to petition the Surface Transportation Board to make the decision on the issue of preemption and any possible remedy.

Respectfully submitted,

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APPELLATE COURT 2ND DISTRICT

Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 10 pages.

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Certificate of Service

I, Mary Jean Dolan, certify that I served the foregoing **Supplemental Brief of Appellant City of North Chicago** by emailing a copy on the 8th day of February, 2022 to:

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[X] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true an correct.
4867-8216-9356, v. 1

No. 2-21-0454

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

The City of North Chicago.,	)	Appeal from the Circuit
	)	the19th Judicial Circuit, Lake
Plaintiff-Appellant,	)	County, Illinois
	)	
v.	)	No. 2019 ED 20
	)	
2nd & Main, LLC, Unknown Owners and	)	The Honorable Joseph Salvi
Non-Record Claimants,	)	Judge Presiding
	)	
Defendant-Appellee.	)	

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ARGUMENT

1. Eminent Domain cases are typically handled by the state court and are sometimes referred to the Surface Transportation Board for Assistance.

"The Federal preemption provision contained in 49 U.S.C. 10501(b), as broadened by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), protects railroad operations that are subject to the Board's jurisdiction from state or local laws or regulations that would prevent or unreasonably interfere with those operations." *Maumee & Western Railroad Corporation,* STB Finance Docket No. 34354 at 2. But this broad Federal preemption does not completely remove any ability of state or local authorities to take action that affects railroad property." *Id.* "To the contrary, state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety." *Id.* "Thus, acquisition of an easement by eminent domain to permit a crossing of railroad track in connection with construction of a new public street would not implicate the Federal preemption 49 U.S.C. 10501(b) unless it would prevent or unreasonably interfere with railroad operations." *Id.*

In *Maumee,* the City of Napoleon, Ohio sought to build a railroad crossing over tracks owned by the Maumee railroad. *Id.* at 1. Maumee argued that section 10501(b) "would preempt any exercise of state eminent domain power with respect to railroad property," but the STB found that "this interpretation is overbroad." *Id* at 2. "Courts have held that Federal preemption can shield railroad property from state eminent domain law, but these holdings have been in situations where the effect of the eminent domain law

would have been to prevent or unreasonably interfere with railroad operations." *Id.* While eminent domain actions for easements which interfere with railroad operations are preempted, the STB explained that "routine non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations or pose undue safety risks." *Id.* The STB explained that "[t]hese cases are typically resolved in state courts." *Id.* "When federal preemption issues are raised, they may be removed to federal court," but "[i]n either case, courts can, and regularly do (sometimes with input from the Board through referral), make determination as to whether proposed eminent domain actions would impermissibly interfere with railroad operations." *Id.*

It can be gleaned from the Maumee case that the primary decision for the state court to make was whether the proposed easement for railroad crossing interfered with the railroad or not. If it did, then the claim was preempted, if it didn't, then it wasn't. This is similar to the matter at hand.

Here, North Chicago is seeking an easement for a water main. North Chicago's complaint does not specify whether they are seeking an easement for a pipe consistent with railroad standards which would allow 2nd & Main to operate on the surface of the property or they are seeking a more extensive easement which would prevent 2nd & Main from operating above ground because the easement allows for a pipe that is not consistent with railroad standards.

The problem with North Chicago's Complaint is that it does not sufficiently describe the easement they are seeking. In paragraph 9, North Chicago states a meets and bounds outline of the area of the easement, but only states that it is for "the construction

and maintenance of a watermain" over the described part of the parcel. C 3. The Complaint does not state the depth at which the watermain is to be located, nor does it identify the specifications of the watermain to be constructed and maintained.

North Chicago's Complaint does not specify whether the easement they are seeking is to construct and maintain a pipe that is consistent with railroad standards or whether they are seeking to construct and maintain a pipe that falls below railroad standards. In the partial motion for summary judgement, 2nd & Main asked for the Court to find that an easement allowing for a pipe consistent with railroad standards was not preempted, but that an easement that allowed a substandard pipe was preempted.

While the trial court's order granting partial summary judgment implicitly found that a complaint seeking a substandard pipe was preempted, the order also implicitly found that a pipe which was constructed to railroad standards wasn't preempted.

Having found that an easement for a substandard pipe was preempted, the Court should not have dismissed the case. It is well settled that "a cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery." *Marshall v. Burger King Corp.*, 856 N.E.2d 1048, 1053 (2006). Here, North Chicago is entitled to recover an easement allowing for pipe built consistent with railroad standards. It would be wrong to dismiss their complaint because they cannot get the precise easement they are seeking or all of the easement they are seeking.

2. The exclusive-remedies provision determines the scope of the ICCTA's preemption of the state law.

The ICCTA creates exclusive federal regulatory jurisdiction and exclusive federal remedies. Specifically, the ICCTA provides:

> The jurisdiction of the [STB] over—
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law. *49 U.S.C. § 10501(b).*

"Section 10501(b) thus has two sentences: the first 'defining the authority of the STB in dealing with the fundamental aspects of railroad regulation, and barring others from interfering with those decisions by making the jurisdiction exclusive;' and the second providing that the 'remedies available at the STB dealing with `rates, classifications, rules, ... practices, routes, services, and facilities of such carriers, are exclusive.'" *Elam v. Kansas City,* 635 F.3d 796, 805 (5th Cir. 2011), quoting: *Franks Inv. Co. LLC v. Union Pacific Railroad.,* 593 F.3d 404, 409-410 (5th Cir. 2010). "The exclusive-remedies provision is "the relevant part of Section 10501(b)" for determining the scope of the ICCTA's preemption of state law." *Elam* at 805.

The exclusive remedies provision only preempts "laws that have the effect of *managing* or *governing* rail transportation." *Id.* However, "§ 10501(b) does not expressly preempt generally applicable state laws that have a mere remote or incidental effect on rail transportation." (Internal quotations omitted) *Id.* "If a state law is not expressly preempted by the ICCTA, it still may be impliedly preempted if, as applied to a particular case, it has "the effect of unreasonably burdening or interfering with rail transportation." (Internal quotations omitted) *Id.*

3. Federal Courts and the STB do not have exclusive jurisdiction over North Chicago's action, because the ICCTA does not completely preempt North Chicago's claim for condemnation.

"Under the well-pleaded complaint rule, a federal court does not have federal question jurisdiction unless a federal question appears on the face of the plaintiff's well-pleaded complaint." *Id* at 803. "Accordingly, there is no federal question jurisdiction if the plaintiff properly pleads only a state law cause of action." *Id.* "That federal law might provide a defense to a state law cause of action does not create federal question jurisdiction." *Id.*

"An exception to the well-pleaded complaint rule arises when Congress 'so completely preempt[s] a particular area that any civil complaint raising this select group of claims is necessarily federal in character.'" *Id.* quoting *Gutierrez v. Flores,* 543 R.3d 248, 252 (5th Cir. 2008). "Under the 'complete preemption' doctrine, what otherwise appears as merely a state law claim is converted to a claim `arising under' federal law for jurisdictional purposes because the federal statute so forcibly and completely displaces state law that the plaintiff's cause of action is either wholly federal or nothing at all." *Elam* at 803. "The question in complete preemption analysis is whether Congress

intended the federal cause of action to be the exclusive cause of action for the particular claims asserted under state law." *Id.*

After reviewing the House Report on the ICCTA, the 5th Circuit Court of Appeals concluded that Congress primarily sought to prevent the economic regulation of railroads. *Id.* Thus, while "[t]he preemptive effect of § 10501(b) may not be limited to state economic regulation, but economic regulation is at the core of ICCTA preemption." *Id* at 806. It follows then that Section 10501 (b) completely preempts state laws (and remedies based on such laws) that directly attempt to manage or govern a railroad's decisions in the economic realm. *Id* at 807. When a claim attempts to mage or govern a railroad's decisions in the economic realm, that claim "is either wholly federal or nothing at all." *Id.*

Complete preemption must be distinguished from "defensive preemption" *Id.* at 803. Defensive preemption does not create federal jurisdiction and simply "declares the primacy of federal law, regardless of the forum or the claim." *Id.* "As a general matter, complete preemption is less common and more extraordinary than defensive or ordinary preemption." *Id.* "Indeed, complete preemption is a "narrow" exception to the well-pleaded complaint rule." *Id.*

In *Elam,* the Court considered whether either of two negligence claims against a railroad were completely preempted so as to give the federal courts jurisdiction. In one count, the plaintiffs in *Elam* claimed that a railroad was negligent in failing to follow Mississippi's anti-blocking statute which sought to regulate railroad operations as to train speed, length, and scheduling. *Id* at 807. The railroad raised preemption under the ICCTA as a defense to the negligence claim. *Id.* The Court found that this claim for negligence was completely preempted, characterizing trains speed, length and scheduling

as belonging to the economic realm. *Id.* Thus, even though preemption defenses don't normally vest a federal court with jurisdiction, because the court found there was complete economic preemption, the court found that there was federal jurisdiction.

The other negligence claim in *Elam* was a typical negligence claim seeking damages for a typical crossing accident did not attempt to manage the railroads economic decision. *813.* This typical claim for negligence is not considered complete preemption and thus would not create federal jurisdiction.

This distinction between these two types of negligence is instructive in the present case. Here, North Chicago brings a complaint for condemnation pursuant to the Eminent Domain Act of Illinois (735 ILCS 30/1-1-1, *et seq.*). C 1. "A condemnation is a peculiar type of regulation, one specifically limited in scope to the ownership or use of one particular piece of property." *Union Pacific Railroad Company v. Chicago Transit Authority,* 647 F. 3d 675, 679 (7th Cir. 2011) While most regulations are "rule of general applicability," a condemnation is different in that each action applies to a specific piece of property, thus each condemnation is surrounded by a unique set of circumstances." *Id.*

North Chicago seeks to acquire an easement for the purpose of operating a water main under 2nd & Main's property. C 1-2. It is clear that North Chicago is not seeking the easement for the purpose of regulating railroad operations, rather, North Chicago wants to maintain its water main and would seek to acquire the easement regardless of what the property is used for. Just because a condemnation might impact a railroad economically, that does not mean that North Chicago intended to directly regulate 2nd & Main's use of the property. Because condemnation is not a direct attempt to regulate rail road operations, North Chicago's claim is not completely preempted and does not create

federal jurisdiction. This means that 2nd & Main, could not have removed the case to federal court based on its preemption defense.

4. The State Court has Jurisdiction. Referral to the STB (Primary jurisdiction applies to federal not state court, and referral to STB is not required.

Section 11704(c)(1) provides that "a person may file a complaint with the Board under section 11701(b) of this title or bring a civil action to enforce liability against a rail carrier providing transportation subject to the jurisdiction of the Board under this part." When North Chicago filed this action in State Court it elected that remedy pursuant to Section 11704(c)(1).

In *Elam*, the plaintiff tried to argue that the STB had exclusive jurisdiction over the matter, arguing that the ICCTA provided that the STB has "exclusive" jurisdiction over remedies provided in the ICCTA. *Id.* 808. One reason that the Fifth Circuit rejected this argument, the Court explained, was that Section 11704(c)(1) provided that "a person may file a complaint with the Board under section 11701(b) of this title *or bring a civil action under subsection (b) of this section* to enforce liability against a rail carrier." *Id.* at 809.

Moreover, the Fifth Circuit explained that the "doctrine of primary jurisdiction attempts to maintain "proper relationships between the courts and administrative agencies" by suspending judicial process pending the "referral" of certain issues to an administrative agency. *Id.* "Despite its name, the doctrine of primary jurisdiction is 'not related to the subject matter jurisdiction of the district court over the underlying action." *Id.* The doctrine of primary jurisdiction "presumes original federal subject matter jurisdiction" and "referral of an issue to the administrative agency does not deprive the court of jurisdiction...." *Id.*

In a State Court case deciding that a condemnation case was not necessarily preempted the Ohio Supreme Court Stated: "The presumption of concurrent jurisdiction can be overcome only if (1) the federal statute expressly vests jurisdiction exclusively in the federal courts, (2) the legislative history unmistakably implies that jurisdiction was to be vested exclusively in the federal courts, or (3) state jurisdiction is clearly incompatible with concurrent federal jurisdiction." *City of Girard v. Youngstown Belt Ry. Co.*, 2012 OHIO 5370 (Ohio 2012).

The Surface Transportation board put it as follows: "But neither the court cases, nor the Board's precedent, suggest a blanket rule that any eminent domain action against railroad property is impermissible. Rather, routine non-conflicting uses, such as non-exclusive easements for at grade crossings, sewer crossings, etc., are not preempted so long as the would not impede rail operation or pose undue safety risks." *Maumee & Western Railroad* Decision Docket 34354, March 2, 2004 at 1.

"These crossing cases are typically resolved in state courts. When federal preemption issues are raised they may be removed to federal courts. In either case, state courts can, and regularly do (sometime with input from the Board through referral), make determinations as to whether proposed eminent domain actions would impermissibly interfere with railroad operations." *Id.* at 2.

This all means that the referral of a case to the STB is optional and is meant as aid to the courts, it does not however affect the jurisdiction of the courts to hear the matter. Thus, the state court of Illinois has jurisdiction to hear this matter moving forward and

North Chicago should not now, after filing in State Court, seek to move this matter to Federal Court in hopes of obtaining a better result.

5. It would be wrong for this matter to be referred to the STB or for North Chicago to refile the case in front of the STB, because North Chicago elected its remedy.

Section 11704 (c)(1) gives a plaintiff the opportunity to file a claim in front of the STB or to bring civil proceeding. In this matter, North Chicago has already elected to bring its claim in the state courts of Illinois. The Circuit Court in Illinois has already ruled on a motion for summary judgment on a substantive issue of the case.

The Interstate Commerce Act, the precursor to the ICCTA, provides: "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right *to pursue both of said remedies,* and must in each case elect which one of *the two methods of procedure* herein provided for he or they will adopt." *United States v. Kansas City Southern R Ry.,* 217 F.3d 763, 771 (8th Cir. 1954) Similarly, a plaintiff in an action that could be heard before the STB board should be required to either litigate in the courts or litigate in front of the STB. In would be unfair, and contrary to the judicial economy, however, for North Chicago to bring its action in front of the Illinois Courts, lose on a substantive issue, and then get a second bite of the apple in front of the STB.

CONCLUSION

North Chicago concludes by stating that: "[a]fter all, the existing spur has crossed over the Navy's water line for longer than could be determined without incident". There is no Navy water line running across 2nd & Main's property. The only water line on the Property is the City's water line that trespasses on to 2nd & Main's property. That water ,aomwas installed without a carrier pipe and is not to railroad standards. The existing 24-inch diameter pre-stressed concrete cylinder pipe water main on the 2nd & Main property is not sufficiently constructed for the purpose of supporting railroad loadings and does not meet railroad criteria for utility crossings. C 192, C 200.

Eminent Domain proceedings concerning railroad property are typically heard by state courts, rather than the Surface Transportation Board. Because preemption is simply a defense rather than being complete preemption, the case is properly in the state court and is not removable to the federal courts. The Surface Transport Board could get involved on a referral basis for guidance and input, but no referral has been made. The Trial Court implicitly found that an easement allowing for the construction and maintenance of a substandard pipe would be preempted, however, the North Chicago could still recover an easement allowing them to construct and maintain a watermain that is consistent with railroad standards. The Trial Court was correct not to dismiss the North Chicago's Complaint when North Chicago still had the possibility of recovering this relief.

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IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

The City of North Chicago,	)	
	)	
Plaintiff/Appellant,	)	Appeal from the 19th Judicial Circuit
	)	Lake County
v.	)	Case No. 2019 ED 20
	)	Hon. Joseph Salvi
2nd & Main, LLC; Unknown Owners and	)	Date of Notice of Appeal: August 12, 2021
Non-Record Claimants,	)	Date of Judgment: July 13, 2021
	)	
Defendant/Appellee.	)	

Supplemental Reply Brief of Plaintiff/Appellant City of North Chicago

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Oral Argument Requested

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Introduction

This Court asked the parties for supplemental briefing on this specific question:

> Whether, once the trial court found the condemnation complaint preempted, it thereafter had authority to enter relief other than dismissing the complaint with prejudice, or whether further condemnation proceedings or requests for relief must be brought before the Surface Transportation Board.

Order (Jan. 25, 2022).

As discussed in the City's opening Supplemental Brief, there is no precedent supporting trial court authority to order an injunction requiring the City to install a new water main because the requested easement to operate the 60-year-old existing water main would be preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §10501(b). Instead, the proper course was to dismiss the case.

The City did find and provide one case suggesting that the Surface Transportation Board ("Board") has mandatory jurisdiction of any remedy following a court finding of preemption. City's Brief at 4. In addition, it provided precedent showing that courts sometimes do refer a case to the Board at that point in the proceedings. *Id.* And the City's Supplemental Brief showed that in complex circumstances like this one, a court can refer the whole case to the Board for its input, even after a trial court finding of preemption. *Id.* at 5-6.

2nd & Main, however, made absolutely no attempt to address any of the points and precedent presented by the City. Instead, it went off on a tangent to argue that this case could not have been removed to federal court, which is not an issue here, and provided a

superficially appealing election of remedies argument that was based on a non-applicable statute.

As demonstrated below, if the Court decides not to reverse the trial court's decision (because at a minimum, there is a fact question regarding any possible future interference with railroad transportation), the next best course in this intractable situation is to refer the case to the Board for its expert input. Nothing in 2nd & Main's misguided brief suggests otherwise. Indeed, 2nd & Main does not even respond to this request.

I. Precedent Provided by the City and Unaddressed by 2nd & Main Shows that the Court Can and Should Refer This Case to the Board

While 2nd and Main spent much time arguing this point, the City already had stated that it is well-settled law that courts and the Board have concurrent jurisdiction of ICCTA preemption questions. *See* City Brief at 3. As this Court said to assume, there is no question that the trial court had jurisdiction to address the preemption issue in this case. The question is what to do now, where the trial court (implicitly) found preemption and then invented a novel injunctive "remedy" to the difficult problem of the City's water main, which has been in place for sixty years.

As the City showed in its Supplemental Brief, in most cases there is no further remedy and courts simply dismiss the case after a finding of preemption. Some courts, however, refer to the Board for further proceedings after a finding of preemption. *See 14500 Ltd. v. CSX Transp., Inc.*, 2013 U.S. Dist. LEXIS 39806, *16 (N.D. Ohio) (stating that some courts, upon finding preemption by the ICCTA, have stayed the action and referred the claim to the Board for further proceedings). At least one court, which was reversed on other grounds, found that it was mandatory to do so. *See City of Girard v.*

Youngstown Belt Ry. Co., 196 Ohio App. 3d 271, 286 (2011), *rev'd on other grounds*, 134 Ohio St. 3d 79 (2012) (stating that its holding of preemption was preliminary because the Board should consider what remedy if any the plaintiff was entitled to). At a minimum, these cases show that referral to the Board at this stage of the case is an option. 2nd & Main did not try to distinguish or even mention these cases in its brief.

In addition, as the City showed in its Supplemental Brief, especially where there is a complicated longstanding municipal presence in the area, it is also appropriate to refer the entire case to the Board for its special expertise – even after a trial court decision on the issue of preemption. This Court should follow the guidance of the Eighth Circuit in *City of Ozark v. Union Pac. R.R. Co.*, 843 F.3d 1167, 1173 (8th Cir. 2016). In *Ozark*, the trial court had held that the reinstallation of an above-grade railroad crossing that had been torn down some fifteen years earlier was not preempted by the ICCTA. 149 F. Supp. 3d 1107, 1116 (W.D. Ark. 2015), *rev'd,* 843 F.3d 1167, 1173 (8th Cir. 2016). The Eighth Circuit found that there was evidence indicating preemption but, rather than simply reverse, it decided that the Surface Transportation Board was the entity most suited to making that decision. 843 F.3d at 1173.

Importantly, it stated: "if presented the preemption issue the agency could determine that *any* order restoring this Crossing is preempted, or that some accommodation of the parties' interests may be compatible with sound rail transportation, in which case state law rights and duties would come into play." *Id.* (emphasis in original). The Eighth Circuit's solution is appropriate here because the Board has the special expertise and the authority to properly evaluate this longstanding situation and to find a solution that accommodates both parties' interests.

The procedure is clear and should be followed in this case. On remand, the City of Ozark sought and the court granted leave to petition the Board for a declaratory order to resolve the case, and the city filed a petition for a declaratory order with the Board. *City of Ozark, Ark.*, FD 36104, 2017 STB LEXIS 130, *5-6. While acknowledging that the Board and the courts have concurrent jurisdiction over ICCTA federal preemption questions, *id.* at *6 n.2, the Board nonetheless proceeded to accept jurisdiction of the preemption issue that the federal trial court had already decided. The Board explained: "The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to terminate a controversy or remove uncertainty. The Board finds it appropriate to issue a declaratory order addressing the at-grade crossing controversy here." *Id.* at *6. The Board then reached a conclusion contrary to that of the trial court, finding that the proposed at-grade crossing would unreasonably interfere with railroad operations and that any state or local action requiring reinstallation of the crossing was therefore preempted. *Id.* at *7.

Again, 2nd & Main nowhere in its brief responded to or even mentioned the *City of Ozark* case, which was the heart of the City's argument that the entirety of this case should be referred to the Board for its special expertise. The water main for which the City now seeks a formal easement has existed on what is now 2nd & Main's property since 1961, for over sixty continuous years. C0602-603. Only the Board has the experience and knowledge necessary to find the best accommodation of the parties' interests here.

Strangely, 2nd & Main admits that state courts can refer a preemption case to the Board for its guidance and input, but then simply says that "no referral has been made."

2nd & Main Brief at 11. *See also* 2nd & Main Brief at 9, quoting *Maumee & Western Railroad*, FD 34354 (STB March 2, 2004) at 2 (state courts regularly decide "(sometimes with input from the Board through referral)" whether proposed eminent domain actions are preempted). The fact that no referral has yet been made does not, however, answer the Court's question of whether such a referral should be made.

II. 2nd & Main's Arguments Are Misguided and Unhelpful.

A. Most of 2nd & Main's Brief is Irrelevant Because the Parties Agree on State Court Jurisdiction to Hear a Preemption Defense to an Eminent Domain Case.

2nd & Main spends a substantial portion of its Supplemental Brief building an argument that the City could not have removed the case to federal court. *See* 2nd & Main Brief at 4-10. There is no reason to analyze that argument here because it is not at issue and so is irrelevant. The City acknowledged from the beginning the undisputed fact that the state court had jurisdiction to hear the preemption issue in the first instance and that its jurisdiction was concurrent with the Board. *See* City Brief at 3.

B. 2nd & Main's Election of Remedies Argument is Based on an Irrelevant Statute.

2nd and Main argues that the ICCTA provides persons with the choice of whether to file their claims before the Board or the courts and suggests that once a party has chosen state court, there is no role for the Board. This is wrong for two reasons.

First, the statute cited by 2nd and Main is not relevant here. 2nd & Main quotes Section 11704(c)(1) of the ICCTA, 49 U.S.C. §11704(c)(1), which states, "a person may file a complaint with the Board under section 11701(b) of this title or bring a civil action to

enforce liability against a rail carrier providing transportation subjection to the jurisdiction of the Board under this part." 2nd & Main Brief at 8 (quoting statute). But Section 11704 of the ICCTA is entitled "Rights and remedies of persons injured by rail carriers," 49 U.S.C. §11704. Thus, it does not apply here, where the City filed its eminent domain action in state court and 2nd & Main brought up the ICCTA as a preemption defense. Note that this is also clear from the outdated predecessor statute 2nd & Main inexplicably quotes, the Interstate Commerce Act, which refers to suits for the recovery of damages. *See* 2nd & Main Brief at 10 (providing no cite for superseded statute it quotes).

Second, as shown above, 2nd & Main itself stated that state courts often refer preemption questions to the Board for its guidance and input. So, the "election of remedies" theory floated by 2nd & Main clearly has no legs.

This is a unique case because the use for which the City requests an easement has already been on the property for 60 years, which makes the trial court's ill-advised finding of preemption particularly problematic. The trial court's solution was to improperly issue an injunction that required an evaluation of the requirements for a possible rail spur, which he was not equipped to do. As shown above, there is precedent for referring to the Board at this stage of the litigation. This Court should do so here because this is a case where the Board's special expertise is uniquely required.

CONCLUSION

For all the reasons stated in its briefs, the City first respectfully requests that this Court reverse the trial court's grant of partial summary judgment and vacate its Order. In the alternative, if this Court is concerned that there may be preemption, then the City

respectfully requests that this Court remand this case to the trial court with directions to stay the proceedings and allow the City to petition the Surface Transportation Board to make the decision (i) on the issue of preemption and any possible remedy or, at a minimum, (ii) on any further condemnation proceedings, requests for relief or remedies that follow the trial court's implicit finding of preemption.

Respectfully submitted,

CITY OF NORTH CHICAGO

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Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 7 pages.

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Certificate of Service

I, Mary Jean Dolan, certify that I served the foregoing **Supplemental Reply Brief of Appellant City of North Chicago** by emailing a copy on the 28th day of February, 2022 to:

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[X] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

2022 IL App (2d) 210454-U
No. 2-21-0454
Order filed March 21, 2022

NOTICE: This order was filed under Supreme Court Rule 23(b) and is not precedent except in the limited circumstances allowed under Rule 23(e)(l).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE CITY OF NORTH CHICAGO, Plaintiff-Appellant, v. 2ND & MAIN, LLC, and UNKNOWN OWNERS AND NON-RECORD CLAIMANTS, Defendant-Appellee.	)	Appeal from the Circuit Court of Lake County. No. 19-ED-20 Honorable Joseph V. Salvi, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Brennan concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in granting defendant's summary judgment motion. However, due to the court's implicit preemption finding, we reverse in part, vacate the remedy section of the court's judgment, and remand.

¶ 2 Plaintiff, the City of North Chicago, appeals the trial court's decision granting defendant, 2nd & Main, LLC, partial summary judgment. We reverse in part, vacate the remedy section of the court's judgment, and remand.

¶ 3 I. BACKGROUND

¶ 4 A. Complaint

¶ 5 In June 2019, plaintiff filed a condemnation complaint, seeking to acquire through eminent domain an easement across defendant's property for the public purpose of operating an existing water main. Plaintiff alleged that the water main had existed for more than 50 years, was an integral part of its water system, and would be difficult and expensive to remove. The easement would run along the water line and be around 20-feet wide. According to plaintiff, its good-faith attempt to negotiate an easement purchase from defendant was unsuccessful, in part because the parties were unable to agree upon just compensation.[1] The complaint provided the legal description of the parcel, which includes a railway line, as well as the easement plaintiff sought.

[1] According to plaintiff's opening brief, the water main was installed in 1961, but plaintiff's attorney never recorded an easement for it. The water main has since operated continually, and plaintiff asserts that no prior property owner has objected to plaintiff's operation of the water main without an easement. When defendant bought the property in 2014, plaintiff attempted to purchase an easement for the water main, but those negotiations were unsuccessful. Accordingly, in 2017, defendant initiated an inverse condemnation proceeding. See, *e.g.*, *Kaskaskia Land Co., LLC v. Vandalia Levee & Drainage District*, 2019 IL App (5th) 180403, ¶ 22 ("Inverse condemnation is a cause of action that allows a landowner to recover compensation for the taking of property interests in circumstances where the governmental entity involved has not initiated eminent domain proceedings."). As plaintiff determined that it had no viable affirmative defenses, it admitted liability, and the court ordered plaintiff to commence condemnation proceedings, which it did in 2019. As such, it is the court's ruling on defendant's partial summary judgment motion concerning plaintiff's 2019 complaint that gives rise to this appeal. (We note that no claims or arguments concerning, for example, prescriptive easements, constructive notice, or unrecorded easements being binding on subsequent purchasers, are raised).

¶ 6 In its answer, defendant asserted that plaintiff's right to eminent domain was barred by affirmative matter because, to the extent condemnation would interfere with railway transportation, federal law preempted plaintiff's cause of action. Specifically, defendant noted that the Interstate Commerce Commission Termination Act of 1995 (ICCTA) (49 U.S.C. § 10101 *et seq.* (1995))), grants the Surface Transportation Board (Board) exclusive jurisdiction over transportation by rail carriers, including the construction and operation of spurs or side tracks, and preempts state law. See 49 U.S.C. § 10501(b). Defendant explained that, on March 6, 2017, it filed with the Board a notice of exemption (see 49 C.F.R. §1150.31), and, on March 22, 2017, the Board issued an exemption, effective April 5, 2017. Accordingly, defendant prayed that any relief provided to plaintiff be limited because condemnation could not interfere with railroad operations. In addition to its affirmative defense, defendant filed a counterclaim, alleging that, where plaintiff had installed a 24-inch water main on the property without having obtained an easement or other rights to do so, it committed trespass.

¶ 7 B. Summary Judgment Motion

¶ 8 Defendant later moved for partial summary judgment. Defendant noted that there was no dispute that, in the 1960's and without obtaining an easement, plaintiff constructed a water main on what is now defendant's property. However, defendant noted, the property is unique in that it is a railroad, which limits plaintiff's powers to condemn the property through eminent domain. Specifically, defendant argued that federal preemption applied, such that plaintiff's condemnation action could proceed only to the extent that it did not interfere with defendant's actual or proposed operations as a railroad. Defendant noted that it planned to place additional rail spurs on the property, and to use the site, including the portion that plaintiff sought to condemn, for railroad access and as a storage facility for shipping containers. Defendant has leased the premises to

Hussey Terminal Railroad Company (Hussey) for those purposes. Accordingly, defendant argued that the water main as currently constructed interferes with railroad operations because the existing 24-inch diameter, pre-stressed, concrete cylinder pipe is not constructed to support railroad loads and is not built to railroad standards. Rather, to construct a water main under a railroad, defendant explained, a carrier pipe is first installed, a concrete pipe is placed within the carrier pipe, and it is then filled with sand. This process distributes the load from the railroad tracks onto the carrier pipe, rather than the water pipe. Defendant's expert, Peter Kolb, opined that the existing water main is "not sufficiently constructed for the purpose of supporting railroad loadings and does not meet railroad criteria for utility crossings." Further, Kolb opined, and defendant alleged, that, "[t]he existing water main renders [defendant's] property unusable for railroad purposes in the area over and north of the existing water main."

¶ 9 Defendant acknowledged that, to the extent it did *not* interfere with railroad operations, plaintiff's condemnation action was not preempted. As such, defendant explained, it was moving for only partial summary judgment, requesting that the court fashion a remedy such that any allowed taking not interfere with railroad operations. Specifically, defendant requested an order that, if a judgment for condemnation entered, plaintiff (1) must replace the existing water main with one that meets current railroad standards; and (2) after the water main is replaced, return the property to the condition that existed prior to the replacement. Defendant attached to its summary judgment motion an affidavit from one of its managers, Phil Dahl; the application for and exemption it had received from the Board; the lease agreement, dated August 10, 2017, with Hussey; drawings of the existing water main prepared by plaintiff's engineers; the deposition of plaintiff's former engineer, Frank Furlan; and an affidavit and report prepared by civil engineer Kolb.

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¶ 10 In response, plaintiff argued that whether the existing water main interferes with defendant's use of the property as a railroad was a disputed issue of material fact. Specifically, plaintiff noted that defendant's motion was predicated on the notion that the existing water main interferes with its ability to construct rail spurs on the property. Plaintiff disputed that claim, asserting that its expert, Devin Moose, had opined that the existing rail spur on the property can operate without changes to the water main, as the water main does not run beneath that spur, and that the northern portion of defendant's property can be used without modification to the water main. Further, plaintiff continued, defendant's future use of the property for railroad purposes was also a question of material fact, as defendant had not established that plans for "significant" railroad use as a railroad hub or for storing shipping containers was likely or economically viable. Plaintiff did not dispute that defendant had leased the property to Hussey. However, plaintiff's appraisal expert, P. Barton DeLacy, opined that the Board's exemption did not alter the value of the property, which is located in a blighted area with low levels of economic activity, and, therefore, there was no likelihood the property could be used for storing shipping containers, as a railroad hub, or for railroad access. Finally, plaintiff argued that defendant had not established that it was entitled to the summary relief it was seeking, as it did not explain why the specifications presented on certain drawings (*i.e.*, those pertaining to a water main running under a railway line) would be the appropriate standard for constructing a water main for the railroad purposes defendant was proposing (*i.e.*, such as where the water line intersects merely a rail spur). Plaintiff concluded that there was simply no basis for the court to order it to replace the water main to certain standards. In support of its response, plaintiff submitted Moose's affidavit and report, DeLacy's affidavit and report, and Peter Kolb's April 20, 2021, deposition.

¶ 11 In reply, defendant pointed out that, contrary to its representation, plaintiff's expert did *not* opine that the existing pipe did not interfere with railroad operations; rather, Moose's opinion, in fact, stated that tracks could *not* be laid on the northern portion of the property where the pipe exists. Not being able to place tracks on the northern part of the property, defendant argued, is an interference. Further, it noted that questioning the value of the property as a railroad is not responsive to the undisputed fact that defendant plans to use it as a railroad.

> "[Defendant] does not make the claim that the property will 'be used as a railroad hub,' whatever that means in this context. [Defendant] only claims that the [p]roperty has already been recognized by the Surface Transportation Board as a railroad property and that [defendant] has plans to use it as such. A railway track to a warehouse is just as preempted under [f]ederal [l]aw as a 'railroad hub.' [Plaintiff] cites no authority for the proposition that the economic value or utility of a property is a factor in determining whether a condemnation is preempted. It is not a factor stated in the statute. Thus, an unprofitable railroad is just as preempted as a profitable one."

Defendant argued that plaintiff's position is that the property should both be condemned and that it should not have to fortify the existing pipe. However, it is undisputed that, unless the existing pipe is fortified, railroad tracks will not be able to be placed on the northern part of the property and the maintenance of an unfortified pipe will interfere with railroad operations. As such, defendant concluded, the court should find that, for plaintiff to succeed in its condemnation action, it must fortify the pipe so that it does not interfere with railroad operations.

¶ 12 C. Hearing and Trial Court's Ruling

¶ 13 On July 13, 2021, the trial court held a hearing on defendant's motion. Defense counsel showed the trial court the property's survey, pointing out where the water main runs across the

north end of the property, and further noted that two railroads, Union Pacific Railroad Company (Union Pacific) and Canadian National Railway Company (Canadian National), use the rail line that runs along the property. Counsel explained that defendant wished, in part, to "run the spur line between the two railroads." Counsel noted that it was undisputed that the property has been designated a railroad, as well as that the Board possesses exclusive jurisdiction over, in part, the construction and operation of rail spurs and side tracks. Plaintiff's counsel agreed that plaintiff did not dispute those points. Defense counsel further explained that, when the water main was constructed, a portion running across the property was not built to railroad standards, and it explained the process for reinforcing a water main within a concrete pipe and with sand to sustain the load borne by railroad activity. The court interjected, "[t]he idea is so that something doesn't crush it." Counsel continued that plaintiff's expert, Moose, did *not* opine that additional tracks could be placed over the existing water line, which was a "glaring omission" and "obviously, no engineer would say it's ok to build a railroad track over these pipes and then face the consequences if that water main caved in after the train went across it." The court asked plaintiff's counsel, for the sake of the argument, what if defendant simply put rail tracks over the existing water main and had railroad "stuff" go over it, "wouldn't it literally crush it? And then what? Then what?" Plaintiff's counsel responded that it was a disputed question of fact, but the court disagreed, noting that plaintiff's expert (Moose) had essentially crafted an opinion that avoided answering the question whether the water main required reinforcement, if it were to intersect with a new railroad line. The court noted that Moose opined only that the water main did not need additional construction, given the property's *present* use, but that Moose did not say that the water main could support *additional* rail spurs or tracks that might be constructed over it. Plaintiff's counsel argued that defendant's future plans were not adequately specific and further queried whether any property

owner could hypothetically and without specific plans claim that an eminent-domain action is preempted because it might build a railroad on the property. The court countered, however, that the property here had already been designated railroad property, a fact that was undisputed, and that, but for the water main, defendant would be able to construct tracks over the property however it wished. The court noted that whether there is a way to use the property *without* reinforcement of the water main is not defendant's concern; rather, defendant did not want to be limited in how it used its property.

¶ 14 The court ultimately agreed that future use of the property was a proper consideration, and it noted that defendant had articulated a future use that may require a railroad line to run over the water main. Further, the court noted that, if it simply allowed the condemnation with no changes to the water main, defendant would not be able to use its property the same way it could if there was no water main there. The court then questioned the parties about defendant's requested remedy:

> "COURT: So now let's talk about the remedy that you request under the motion. Okay. So you're asking the Court to allow the condemnation but require that *the easement be contingent* upon them encasing the water main pursuant to railroad guidelines.
>
> DEFENSE COUNSEL: *Yes, Your Honor.*
>
> COURT: Okay. Does the Court have such authority to craft such an order in a motion for summary judgment?
>
> DEFENSE COUNSEL: I think it does, Your Honor, and here's why. The only thing that the Court could do otherwise is enjoin [plaintiff] from taking the condemnation—from doing the condemnation and ordering—I suppose you could enjoin the condemnation and order them to remove the pipe, but we're not saying that. It's [plaintiff's] main water

line. We're saying that they have to install it in such a way that it doesn't interfere with our property, and it's an important ruling because it affects the damages. Our damages actually go down if we win this motion because then presumably this line will be installed in such a way that it won't have any effect on our property.

PLAINTIFF'S COUNSEL: Your Honor, the proper standards to which the rail—the water pipe should be reinforced, again, it's a fact issue that needs to be resolved after you and the jury hear the evidence of the expert witnesses because, you know, our engineer may say that it needs to be reinforced to a different standard than what their engineer says.

COURT: Yeah, but the order would [be] craft[ed] it [*sic*] in such a way that it would have to be—the water main would have to be reinforced pursuant to railroad guidelines. Nothing more, nothing less. And—it sounds like to me, the way it was articulated to me, that there are specific guidelines by which the water main is protected when it intersects with a railroad—railroad line. And if the Court were to do that, then, like [defense counsel] said, the condemnation value would go down for them because it would be—it wouldn't change the possible use of said property. And, now, I don't know the cost of creating a water main like that. It's probably fairly substantial, but I don't know." (Emphases added.)

¶ 15 As such, the court agreed with plaintiff that the relevant requirements for reinforcing the water main to railroad standards required clarification. The court granted defendant's partial summary judgment motion, (1) implicitly finding that, to the extent that plaintiff's condemnation would interfere with railroad operations on defendant's property, preemption applied, (2) ordering that plaintiff's "water main shall be constructed and[/]or replaced to current railroad standards," which would then, presumably, allow plaintiff to complete its condemnation, but (3) continuing

the case for presentation of evidence on the appropriate current railroad standards for water main construction.

¶ 16 Plaintiff filed an interlocutory appeal pursuant to Illinois Supreme Court Rule 307(a) (eff. Nov. 1, 2017) (interlocutory appeal as of right concerning injunctive relief). Further, on September 24, 2021, we allowed plaintiff to supplement the record with the trial court's August 12, 2021, order, pursuant to Illinois Supreme Court Rule 304(a) (eff. March 8, 2016) (appeals from final judgment that do not dispose of entire proceeding), finding that there is no just reason to delay appeal of its July 13, 2021, order.[2] On August 19, 2021, we allowed appellant's unopposed request to proceed with a briefing schedule as appropriate under Rule 304, as opposed to the accelerated briefing schedule that would be necessary for appeals under Rule 307.

¶ 17 II. ANALYSIS

¶ 18 On appeal, plaintiff asks that we reverse summary judgment in defendant's favor. Specifically, plaintiff argues that summary judgment was improper because defendant's plans to expand its rail infrastructure are too vague to preempt the condemnation action. Further, plaintiff argues that, even if the plans are not too vague, whether the water main will unreasonably interfere with the use of the property for railroad transportation is a disputed issue of material fact that should be decided at trial. Finally, plaintiff argues that defendant failed to provide the necessary evidence to demonstrate that it was entitled to a permanent injunction.

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[2] We denied, however, plaintiff's request to supplement the record with additional documents that were not before the trial court on summary judgment, such as Dahl's deposition testimony. To the extent that those documents were included in the appendix that accompanied plaintiff's opening brief, we disregard them.

¶ 19 Summary judgment is proper when the pleadings, depositions, admissions, and affidavits on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016). We review *de novo* the trial court's summary judgment ruling. *Nationwide Financial, LP v. Pobuda*, 2014 IL 116717, ¶ 24. Moreover, we review *de novo* a court's determination of the preemptive effect of a federal statute. *Union Pacific R.R. Co. v. Chicago Transit Authority*, 647 F.3d 675, 678 (7th Cir. 2011).

¶ 20 A. The Plans Are Not Too Vague for Preemption

¶ 21 Plaintiff argues first that defendant failed to demonstrate that the water line interferes with a railroad's current operations or imminent plans to expand railroad infrastructure, and, therefore, the trial court improperly found that the ICCTA preempts the condemnation action. Plaintiff asserts that defendant's claim that the water main will unreasonably interfere with railroad transportation on the property is based entirely on one, self-serving statement from Dahl that "[defendant] plans to use the property that is the subject of the suit, including the property [plaintiff] seeks to condemn, for railroad purposes specifically for storage area for shipping containers, additional spur tracks, and railroad access." Plaintiff asserts that there is "no corroborating evidence" for the statement, yet the court determined that the water main will unreasonably interfere with railroad transportation, "even though the water main currently does not interfere with railroad transportation and no evidence was presented apart from this affidavit that it will interfere with railroad transportation." Plaintiff continues that this evidence, alone, is insufficient to justify ICCTA preemption because the ICCTA preempts a condemnation action only when there is evidence that the action will interfere with imminent, definite plans to expand railroad infrastructure. Here, plaintiff argues, defendant presented vague, speculative evidence to support its ICCTA preemption claim, only a general desire for future development, and no

evidence that its plans would come to fruition. Plaintiff concludes that ICCTA preemption was not established and, where courts adopt a presumption against preemption and deference must be given to the non-movant on summary judgment, the court's ruling has opened the door to a railroad being able to stop a condemnation action based solely on a few self-serving, conclusory, and speculative statements in an affidavit.

¶ 22 Defendant responds that summary judgment was appropriate and that its plans are not too vague to demonstrate interference and preemption. Defendant asserts that plaintiff's position that only interference with imminent, definite plans to expand railroad infrastructure requires preemption runs counter to the decision in *Union Pacific*, wherein the court held that a condemnation action was preempted even when the proposed taking would have prevented the railroad from using the property how it might wish in the future. *Union Pacific*, 647 F.3d at 681. Defendant notes condemnation may not be preempted in cases where the action is sufficiently insignificant that it would not interfere with the railroad transportation. But, defendant argues, the taking here would not be insignificant, because its property is relatively small and the uncontested evidence established that, if the water main is not brought to railroad standards, defendant cannot build new tracks over it. Defendant concludes that the trial court did not err in finding that, to the extent plaintiff's condemnation would interfere with defendant's plans for railroad activity, it was preempted by the ICCTA. We agree.

¶ 23 As summarized in *Union Pacific*, federal law preempts state laws that interfere with, or are contrary to, federal law; relevant here, in enacting the ICCTA, Congress provided the Board with exclusive jurisdiction to regulate railroad transportation. *Union Pacific*, 647 F.3d at 678; 49 U.S.C. § 10501(b). Specifically:

"The jurisdiction of the Board over—

(1) *transportation by rail carriers*, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) *the construction*, acquisition, operation, abandonment, or discontinuance of *spur*, industrial, team, switching, *or side tracks, or facilities*, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, *the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law*." (Emphases added.) 49 U.S.C. § 10501(b).

¶ 24 The ICCTA defines "transportation" as including:

"(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, *property*, facility, instrumentality, or equipment of any kind *related to the movement of* passengers or *property*, or both, *by rail*, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, *storage*, handling, and interchange of passengers and property[.]" (Emphases added.) 49 U.S.C. § 10102(9).

"Congress's intent in the Act to preempt state and local regulation of railroad transportation has been recognized as broad and sweeping." *Union Pacific*, 647 F.3d at 678; see also *CSX Transportation, Inc. v. Georgia Public Service Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996) ("It is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations").

¶ 25 The question here is whether plaintiff's proposed condemnation establishing an easement over the property for the water main is a regulation of railroad transportation that is preempted by

the ICCTA. "A condemnation is a peculiar type of regulation, one specifically limited in scope to the ownership or use of one particular piece of property," thus, rendering *per se* preemption in all condemnation actions improper. *Union Pacific*, 647 F.3d at 679-80. However, a condemnation action may be preempted "as applied," if, as to the property at issue, condemnation "would have the effect of preventing or unreasonably interfering with railroad transportation." *Id.* at 679-80. There exists a general presumption against preemption, and the party contending that preemption applies bears the burden of persuasion. See, *e.g.*, *Texas Central Business Lines Corp. v. City of Midlothian*, 669 F.3d 525, 529 (5th Cir. 2012). However, the presumption against preemption applies with less force when the field at issue is one such as railroads, which have a significant historical federal presence. *Id.*

¶ 26 Here, plaintiff does not dispute that defendant's property is designated railroad property, generally covered by the ICCTA, *or* that defendant's proposed alterations concern transportation as defined by the ICCTA.[3] Rather, plaintiff's argument is that defendant failed to meet its burden of persuasion to establish preemption because it failed to demonstrate that condemnation will interfere with specific, imminent plans for future railroad operations. Plaintiff asserts that defendant produced no design plans to add rail spurs or additional tracks, nor other corroboration for Dahl's affidavit statement that there exist plans to use the property for storing shipping

[3] We note that the exemption that defendant received from the Board refers to defendant as a "noncarrier." The Board's exclusive jurisdiction, however, concerns "transportation by rail carriers". 49 U.S.C. § 10501(b). The parties do not mention defendant's possible status as a noncarrier or whether that status affects preemption here, although, in supplemental briefing, plaintiff for the first time suggests that the import of defendant's exemption is unclear. For purposes of our analysis, we treat the issue as undisputed.

containers, adding spur tracks, and additional railroad access. Plaintiff asserts that, where defendant's alleged plans are only vague and speculative, it cannot demonstrate the interference necessary to establish preemption.

¶ 27 First, we disagree that Dahl's affidavit was the sole evidence defendant proffered to demonstrate plans of operating and expanding its railroad operations. The record reflects that, in 2014, defendant purchased the property and then, in 2017, applied for and received an exemption from the Board. The application and exemption documents explained that defendant wished to acquire and operate a section of rail connecting the Union Pacific and Canadian National lines, and that, upon receipt of the exemption, Hussey would seek authorization to acquire defendant's line. Further, Dahl attested that the property was leased to Hussey, and defendant attached the lease agreement, which includes language reflecting plans for Hussey to acquire and operate the rail line, to provide rail service, to perform freight car switching on the property, and to use facilities on the property for freight car loading and unloading. In contrast to plaintiff's suggestion that defendant's plans are only speculative, collectively, these actions and documents corroborate Dahl's affidavit statement concerning defendant's intended use of the property, and, while defendant did not submit engineering drawings or plans of additional tracks or spurs, an intent to construct them would be a natural extension of the statements and agreements in evidence. Accordingly, plaintiff's argument that one statement in Dahl's affidavit was defendant's sole support for its planned use of the property is inaccurate.

¶ 28 Next, plaintiff acknowledges that courts have held that plans for future railroad use are a relevant consideration but argues that preemption does not apply where the plans are not specific and imminent. The cases it cites for that authority, however, are distinguishable. See, *e.g.*, *Texas Central Business Lines Corp. v. City of Midlothian*, 669 F.3d 525 (5th Cir. 2012) (no preemption

where railroad's arguments that local regulations would burden transportation were speculative, and where there were no definite plans for development or explanation of how future projects would be affected; however, unlike here, a condemnation action affecting permanent ownership rights was not at issue, and the regulations concerned the railroad's alleged desire to build new silos, with the court commenting that not "everything [the railroad] does on its largely vacant 243-acre leasehold is beyond the reach of the City's regulation."); *Franks Investment Co., LLC v. Union Pacific R.R.*, 593 F.3d 404 (5th Cir. 2010) (no preemption where there was no specific evidence that the local regulation would unreasonably interfere with railroad transportation; however, again, this was not a condemnation action and concerned a neighboring property owner's action to prevent the railroad from removing existing crossings); *City of Girard v. Youngstown Belt Ry. Co.*, 979 N.E.2d 1273 (Ohio 2012) ("[w]hile it is acceptable and sometimes necessary to consider a railway company's future plans when determining if the ICCTA applies to an eminent-domain action, it is also necessary to consider whether it is likely that the railway company's plans 'will come to fruition' "; no preemption where the railroad had only a hypothetical, general desire for future development, but "no concrete plans" to do so, and where it had not added the allegedly desired track over a period of 15 years; however, unlike here, the railroad company owned 55 acres of land, the portion the city wished to condemn was undeveloped, vacant land with no existing rail line and no right-of-way; defendant here, only a *few* years after purchasing the property, signaled its intent to commence increasing railroad operations by seeking an exemption with the Board and entering into a lease agreement with Hussey). Thus, while we do not necessarily take issue with the reasoning or conclusions reached by the courts in plaintiff's cited cases, we do not find them particularly helpful here.

¶ 29 Plaintiff notes that the authority upon which defendant relies is also distinguishable, in that, although preemption was found, they involved active railroad operations where future use was deemed likely because it would improve those operations and meet increasing demand in the area. See, *e.g.*, *Union Pacific*, 647 F.3d at 675; *City of Lincoln v. Surface Transportation Board*, 414 F.3d 858 (8th Cir. 2005); *14500 Ltd. v. CSX Transp., Inc.*, 2013 WL 1088409 (N.D. Ohio 2013). While it is true that significant railroad operations are not now taking place on the property, there are already existing tracks and a rail spur there, and defendant apparently wishes to increase the property's railroad activity level: that is one point of these proceedings.

¶ 30 Ultimately, we determine that, although *Union Pacific* contains distinguishable facts, certain elements of the court's reasoning are helpful. See, *e.g.*, *State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶¶ 33-35 (uniformity of the law is an important factor in deciding how much deference to afford federal court interpretations of federal law; "if the federal courts are split, we may elect to follow those decisions we believe to be better reasoned"). In *Union Pacific*, for almost 50 years, the Chicago Transit Authority (CTA) had leased from Union Pacific a right-of-way, operating trains on tracks running parallel to Union Pacific's tracks. When the parties could not agree to new lease terms or a lump-sum payment for a permanent easement, the CTA began condemnation proceedings. The court found that the CTA's threatened condemnation of 40% (approximately 13 acres) of the railroad's right of way would be an unreasonable interference with the railroad's current operations, but *also* that, if it were unoccupied (*i.e.*, not used or taken by the CTA), the railroad *could* use the land for additional railroad lines. *Id.* at 681. The court noted that, even where there were no current plans to use it, the Board had previously recognized value in railroad property that might later be needed for railroad purposes. *Id.* (citing *Norfolk Southern Ry. Co.*, 2010 WL 691256, *4 (S.T.B. Feb. 26, 2010)). As such, the

court determined, "[e]ven if the property was not being used *and* Union Pacific had *no immediate plans* to use the property, a taking of this property would still prevent Union Pacific from using it for railroad transportation in the future." (Emphases added.) *Id.* The court concluded that the CTA's use of the right of way significantly impacted railroad transportation because it prevented Union Pacific from using the property itself for additional tracks. *Id.* at 682. Indeed, the tracks the CTA operated were located only five feet away from Union Pacific's tracks. Thus, "although Union Pacific has no current plans to use the property because of the CTA's operations [under the lease], there is little doubt that it would be used whenever it became available."[4] *Id.* at 683.

¶ 31 While factually distinguishable in many ways, we agree with defendant that *Union Pacific*'s rationale is persuasive. Plaintiff does not contest that, unlike in some of its cited cases, defendant's property is already railroad property with existing tracks and an existing spur. Plaintiff does not dispute that, again unlike its cited cases, defendant's property is not large and undeveloped; rather, it is apparently approximately 2.5 acres in size with a few (albeit relatively rustic) structures built on it and the water line running across the width of it. Like in *Union Pacific*, where the railroad's future development would likely be impacted by allowing the CTA to take some of its property only five feet away from existing railroad lines, here, there would likewise be little room for defendant to construct upon the property to expand railroad operations without

[4] The court also noted that no unreasonable interference and, thus, no preemption had been found in certain cases concerning utility easements, but those decisions reflect analysis, again, of the degree to which the easement would impede rail operations or pose undue safety risks. See *id.* at 682, n.9; see also *Lincoln Lumber Co.-Petition for Declaratory Order*, STB Finance Docket No. 34915, 2007 WL 2299735 (S.T.B. Aug. 10, 2007); *Maumee & Western R.R. Co.-Petition for Declaratory Order*, STB Finance Docket 34354, 2004 WL 395835 (S.T.B. March 2, 2004).

encountering plaintiff's water line. Thus, even if defendant has not presented specific drawings or plans reflecting imminent construction of new rail lines or spurs, plaintiff's taking could unreasonably interfere with defendant's plans to do so. Plaintiff may be frustrated that, for more than 50 years, its authority to operate the water main without an easement went unchallenged by prior owners, particularly when it does not agree that continued operations would impact defendant's railroad. Yet, the CTA was also likely frustrated that for 50 years, pursuant to its agreement with the railroad, it used the same tracks over which it wished to obtain an easement, likewise believing that its continued operations would not impact the railroad's future operation. However, in both cases, allowing the *user* of railroad property to become an easement *owner* on that property impacts the railroad's ability to operate as it might wish in the future.

¶ 32 This leads us to another aspect of *Union Pacific* that we find relevant here. There, the court reasoned that condemnation would negatively impact the strength of Union Pacific's legal remedies:

> "In addition, the fact that Union Pacific would have available legal remedies to enforce an easement's obligations does not make these remedies equivalent to those it has as a landlord; a lessor with the ability to oust the lessee if it fails to uphold its lease obligations is in a stronger position than a party filing a lawsuit to enforce the terms of an easement. In short, Union Pacific would lose valuable property rights in the condemnation, and the CTA would gain perpetual control of the property without it being subject to termination—a manner of control that the CTA currently does not enjoy." *Id.*

¶ 33 Here, at oral argument on the partial summary judgment motion, the trial court touched upon what might happen if plaintiff were allowed condemnation without defendant's requested parameters, and we revisit that scenario now. Plaintiff opines that, without specific construction

plans, preemption is premature, and, so, the court should allow condemnation with no water main reinforcements; then, if defendant wants to add rail spurs or tracks in the future and the water main interferes with that construction, defendant can seek a mandatory permanent injunction, requiring plaintiff to reinforce the water main. This assertion does not adequately recognize the shift in defendant's legal position between the present and proposed scenarios. If plaintiff is allowed the easement without conditions, defendant loses certain enforceable property rights over that condemned portion. See, *e.g.*, *Kaskaskia*, 2019 IL App (5th) 180403, ¶ 21 (an easement is a legal interest in the property of another). As far as we can tell, if defendant then wished to construct additional rail lines or spurs, its options would be limited to: (1) not doing so, frustrating its desired operations as a railroad; (2) proceeding without regard to the existing water main, potentially crushing it and risking legal exposure (if, in light of the water main, it were even able to obtain the necessary plans, permits, etc., to construct); or (3) absorbing the costs of yet more litigation to obtain a court order requiring plaintiff, now the easement owner, to dig up and reinforce its water main. In contrast, where defendant presently owns the property and plaintiff has no easement, defendant is simply seeking that any condemnation relief be conditional, so as to avoid the three scenarios outlined above. Construction to reinforce the water main might be expensive, but, presumably, so would removing or re-routing the water line around the property. Defendant is not presently arguing that plaintiff should remove and re-route the water line but, technically, it probably could. In other words, defendant is in a stronger position to protect its property rights now than it will be if condemnation is allowed and it later begins railroad construction. Plaintiff asserts that defendant has not demonstrated that its construction plans are economically viable, but, even if that is relevant, *allowing* condemnation without limitations would likely prove economically damaging to future railroad operations. As in *Union Pacific*, we agree that

preemption applies where condemnation would unreasonably interfere with defendant's future use of the property for railroad purposes, which, here, includes the economic impact that defendant's loss of legal advantage would likely entail. In sum, based upon this record, the trial court did not err in finding that, as pleaded, plaintiff's proposed condemnation action is preempted.

¶ 34 B. No Genuine Issue of Material Fact

¶ 35 Next, plaintiff argues that there exists a material factual dispute as to whether the condemnation action would unreasonably interfere with railroad transportation. Plaintiff argues that defendant presented no evidence that the water main currently interferes with railroad transportation and only speculative assertions that it would unreasonably interfere with railroad transportation in the future. For example, plaintiff notes, although defendant asserted that the water main will prevent it from constructing additional rail spurs, it provided no plans or specifications for such rail spurs, let alone plans showing that new rail spurs would intersect with the water main. Nor did its expert explain why the standards that apply to the reinforcement of the water main under Union Pacific tracks, which haul massive freights nationally, would apply to the few yards of cargo transportation on defendant's rail spur. Plaintiff argues that no evidence demonstrated that the amount of rail traffic or revenue from operating a rail spur on defendant's property would decrease because of the water main. Further, plaintiff asserts that it presented evidence that the water main would *not* unreasonably interfere with railroad transportation, creating a disputed issue of material fact. It notes that DeLacy appraised the property and opined that there was no likelihood that it would be economically viable to use the property for container storage. In addition, engineering expert Moose opined that the existing railroad spur could operate without additional improvement to the water main infrastructure and that the northern portion of the property could be utilized without modification to the existing rail spur or the water main. In

sum, plaintiff argues, summary judgment was improper because its evidence raises a fact question about whether the condemnation unreasonably burdens rail transportation.

¶ 36 Defendant responds that its expert, Kolb, and plaintiff's expert, Moose, both concluded that the existing water main is insufficient to support rail tracks. Kolb concluded that the existing water main was installed without a surrounding carrier pipe and sand, which would avoid putting the load of railroad tracks directly onto the water pipes and, therefore, it does not meet railroad criteria for utility crossings because it cannot support railroad loadings. Moose, in turn, did not refute any of Kolb's points. Moose opined that the water main did not require improvements for the existing rail spur and that the area between the existing spur and the northern property boundary line, "although *not* suitable to house additional rail lines," (emphasis added.) could be used for a variety of "other purposes." Reading between the lines, defendant asserts, plaintiff's expert concluded that, because of the water main, the northern portion of the property is "not suitable to house additional rail lines." As such, there is no genuine dispute that the water main interferes with use of the railroad. We agree.

¶ 37 Defendant's expert testified that the water main as currently constructed cannot support additional rail lines. Specifically, Kolb opined that the existing water main is "not sufficiently constructed for the purpose of supporting railroad loadings and does not meet railroad criteria for utility crossings." Further, Kolb opined, "[t]he existing water main renders [defendant's] property unusable for railroad purposes in the area over and north of the existing water main." In his affidavit and report, Moose did not contradict these points. As noted by defense counsel and the trial court at oral argument on the summary judgment motion, Moose's opinion was carefully crafted to avoid the main question, leaving a glaring omission. Moose opined that "the area between the north property line and rail spur, *although not suitable to house additional rail lines*,

could be utilized for *other* purposes, including but not limited to unloaded rail car storage and other general material storage." (Emphases added.) Further:

> "Based on my experience and review of the documents it is my opinion that the presence of the water main does not substantially limit the future use of the property. The *existing* rail spur could resume without additional improvement to the water main infrastructure. The northern portion of the [p]roperty, *between the existing rail spur and the northern property boundary, could be used for a variety of purposes, including but not limited to housing shipping containers or other material storage.* The rail spur, therefore, could be utilized without modification to the rail line or the water main." (Emphases added.)

¶ 38 Although Moose opined that the water main did not require improvements for the *existing* rail spur, the water main does not run beneath that spur. He did not opine that the water main could sustain construction of additional spurs or lines crossing over it on the northern portion of the property. As it is undisputed that, unless the existing pipe is fortified, railroad tracks will not be able to be placed on the northern part of the property and the maintenance of an unfortified pipe will interfere with railroad operations, there exists no genuine issue of fact.

¶ 39 However, we do agree with plaintiff, *as did the trial court*, that questions about the appropriate construction standards themselves remain at issue. We would also note that, although plaintiff complains that defendant did not present specific plans reflecting imminent construction or that would support defendant's position that the current water main is not built to sufficient standards, the trial court continued the case for a hearing on this very issue; namely, the court acknowledged that a rail spur might not move as much traffic or weight as a railroad and, therefore, a hearing must be held to determine the appropriate current railroad standards. That hearing would

necessarily require evidence as to whether defendant anticipates building rail tracks, rails spurs, or both, as well as the current railroad standards for water mains intersecting with those railroad elements. Thus, although the court granted defendant's partial summary judgment motion, it nevertheless reserved for hearing the issue of what reinforcements would be required for the existing water main to satisfy current railroad standards.

¶ 40 In sum, defendant presented evidence that the existing water main is not constructed to support additional rail lines, and plaintiff did not rebut this evidence. There is, therefore, no genuine issue of material fact on the question whether the water main would interfere with defendant's future operations.

¶ 41 C. No Permanent Injunction was Entered; Remand Required

¶ 42 Plaintiff next argues that the court's order constitutes a mandatory permanent injunction, as it orders plaintiff to perform a specific, permanent action, *i.e.*, reinforcement of the water main, yet defendant did not present evidence to establish the elements necessary for an injunction. Specifically, plaintiff argues that defendant did not show that it possessed a clear and ascertainable right needing protection, irreparable harm in the absence of injunctive relief, or the lack of an adequate remedy at law. See, *e.g.*, *Vaughn v. City of Carbondale*, 2016 IL 119181, ¶ 44. Further, plaintiff emphasizes that no evidence was presented about imminent harm, nor as to why money damages would not be appropriate. It notes that the absence of an adequate remedy at law is a condition precedent to an injunction, and a remedy at law is only inadequate where "monetary damages cannot adequately compensate the injury." *Hensley Construction, LLC v. Pulte Home Corp.*, 399 Ill. App. 3d 184, 190 (2010). Plaintiff notes that defendant never requested a mandatory permanent injunction, and no hearing on an injunction was held; thus, it contends that the court lacked authority to issue such relief. As a permanent injunction is an extraordinary

remedy, issued here without evidentiary support or a hearing, plaintiff argues that the court's order must be vacated.

¶ 43 Defendant responds first that the court did not grant a permanent injunction. It contends that it never sought a permanent injunction, nor did the court award one, because the relief describes the nature and extent of the easement, should the court grant the condemnation. Defendant notes that, in its answer and affirmative defense, it asserted that plaintiff's eminent domain rights were limited and prayed that any relief afforded to plaintiff be limited to the extent that it does not interfere with defendant's railroad operation. In addition, in its summary judgment motion, defendant again argued that plaintiff's right to condemn is limited, noting that the ICCTA did not prevent any condemnation, but that the court should fashion a remedy so that the taking will not interfere with [defendant's] use of the property as a railroad by requiring that, if a judgment for condemnation is entered, plaintiff's water main meet minimum railroad standards. Defendant argues that the court's order does not constitute mandatory injunctive relief because it is not mandatory. Rather, it is merely a condition of the easement plaintiff seeks:

> "[Plaintiff] is free to dismiss its complaint for condemnation and relocate its water main somewhere else. Defendant asserts that this relief is a limitation on the scope of any easement, not injunctive relief. All this order does is make the determination that any easement granted to [plaintiff] will include a term [requiring] that the water main be built to current railroad standards."

¶ 44 Defendant concludes that the order should be read as a limitation of any easement granted at the end of condemnation proceedings, not as requiring plaintiff to construct a new water main as mandatory injunctive relief because it requested only that the water main be replaced to current

standards "if a judgment for condemnation is entered," and, notably, that plaintiff "has no right to replace the water main absent it acquiring an easement through condemnation."

¶ 45 In addition, defendant asks that we find plaintiff's argument forfeited. Again, it notes that plaintiff never argued below that defendant did not establish the elements required for a permanent injunction. The argument plaintiff raised in response to defendant's requested relief on summary judgment concerned only whether the water main interferes with the use of the property as a railroad. Plaintiff did not argue that defendant was asking for a mandatory injunction or should be denied such relief due to a failure of proof. As such, defendant urges, the argument is forfeited.

¶ 46 In reply, plaintiff asserts that forfeiture is a limitation on the parties, not the courts. Further, it argues that no matter how the order is characterized, its nature is one of injunctive relief, because it orders plaintiff to perform a specific, permanent action. Plaintiff claims that defendant's assertion that plaintiff could simply dismiss the condemnation lawsuit and relocate its water main ignores the procedural posture of this case. "The trial court could have denied [plaintiff's] request for approval of condemnation on grounds of preemption, but it had no authority to allow condemnation (which it did not clearly do in its order) and then—rather than determine just compensation—fashion an unusual injunctive remedy."

¶ 47 We agree with defendant that it neither asked for an injunction, nor did the court grant one. Defendant requested only conditional relief: *if* the court granted plaintiff an easement, *then* plaintiff should be required as a condition of that easement to reinforce its water main. The court verified this request at oral argument:

> "COURT: So now let's talk about the remedy that you request under the motion. Okay. So you're asking the Court to *allow the condemnation but require that the easement be contingent upon them encasing the water main pursuant to railroad guidelines.*

DEFENSE COUNSEL: *Yes, Your Honor.*

COURT: Okay. Does the Court have such authority to craft such an order in a motion for summary judgment?

DEFENSE COUNSEL: I think it does, Your Honor, and here's why. *The only thing that the Court could do otherwise is enjoin [plaintiff] from taking the condemnation*—from doing the condemnation and ordering—*I suppose you could enjoin the condemnation and order them to remove the pipe*, but we're not saying that. It's [plaintiff's] main water line. We're saying that they have to install it in such a way that it doesn't interfere with our property, and it's an important ruling because it affects the damages. Our damages actually go down if we win this motion because then presumably this line will be installed in such a way that it won't have any effect on our property." (Emphases added.)

¶ 48 As noted above, the court was fully aware that its order concerned placing a limitation or contingency upon any allowed condemnation. Generally, expressly granted easements may contain limitations in scope and purpose. See, *e.g.*, *Duresa v. Commonwealth Edison Co.*, 348 Ill. App. 3d 90, 101-02 (2004) ("If an easement is limited in scope or purpose, the property owner is entitled to prevent the burden of the easement from being increased."). Defendant here also noted for the court the alternative that plaintiff interestingly raises for the first time now—denying condemnation—but plaintiff certainly never argued in response that, if the court found preemption applied, it could only deny plaintiff condemnation, not enter the type of relief defendant was seeking. For this reason, although plaintiff is correct that forfeiture is a limitation upon the parties not the court, and we can overlook forfeiture when necessary to obtain a just result or to maintain a sound and uniform body of precedent (*Jill Knowles Enterprises, Inc. v. Dunkin*, 2017 IL App (2d) 160811, ¶ 22), honoring the forfeiture here would not be inappropriate. Plaintiff's failure to

raise the injunctive-relief argument led the court to believe that plaintiff's position was simply that no preemption applied or that fact issues existed, not that, if the court found preemption, it must simply deny condemnation and could not enter defendant's requested relief.[5]

¶ 49 In addition, plaintiff's contention that the court should have outright denied condemnation is an overly simplistic suggestion that would do little to advance resolution of the current issues. The parties' litigation apparently arose when defendant filed an inverse condemnation complaint, which plaintiff agreed it could not defend. Plaintiff's main water line runs beneath defendant's property, so it tried to purchase the easement. After the parties were unable to agree upon a fair purchase price, plaintiff filed its condemnation action, defendant asserted that plaintiff's eminent-domain powers are limited, given the property's railroad status, and defendant also filed a counterclaim for trespass. Accordingly, the court was not being asked by any party on summary judgment to outright deny condemnation or enter an injunction, and it was aware that (1) the parties had already been down the road of trying, unsuccessfully, to assess appropriate monetary remedies; (2) defendant was requesting that condemnation be denied *only* to the extent that it would interfere with railroad operations *and* that relief be *contingent* on fixing the water main; and (3) plaintiff raised no argument that the court could not impose such relief, that the requested relief constituted an improper injunction, or that, if the court found preemption, it should simply deny the condemnation.

¶ 50 Nevertheless, although we disagree with plaintiff's characterization of the order as injunctive, we question whether the court, upon implicitly finding that the condemnation action as pleaded was preempted, properly entered relief. While there is no dispute that the trial court had

[5] Plaintiff's position in its reply brief that it did argue against an injunction "in substance," though not using the specific language concerning injunctive relief, is, at best, a stretch.

jurisdiction to determine the preemption issue, which it implicitly resolved in defendant's favor, preemption suggests that the Board would be better positioned to decide relief, as opposed to the court's decision here to "fix" or "avoid" preemption by crafting relief that *it* deemed would result in noninterference (or, perhaps, not-unreasonable interference), with railroad operations. As such, after oral argument, we asked the parties to file supplemental briefs on whether the court's authority to order such relief was impacted by the preemption finding. Specifically, our order stated:

> "The trial court's order granting partial summary judgment implicitly found that the condemnation complaint as pleaded is preempted by the ICCTA. On the court's own motion, the parties are ordered to file supplemental briefs on the issue whether, once the trial court found the condemnation complaint preempted, it thereafter had authority to enter relief other than dismissing the complaint with prejudice, or whether further condemnation proceedings or requests for relief must be brought before the Surface Transportation Board. For purposes of the supplemental briefing, the parties should assume that the trial court had authority to make the preemption finding and should focus on the impact of that finding with respect to its authority thereafter."

¶ 51 The supplemental briefing is complete and, having considered the parties' submissions, we conclude that it is appropriate to remand this case for the trial court to order plaintiff to petition the Board for declaratory relief. In *City of Ozark, Arkansas v. Union Pac. R.R. Co.*, 843 F.3d 1167, 1171 (8th Cir. 2016), the court noted that, if there is no showing of unreasonable interference with rail transportation, then a court may proceed to resolve the dispute applying relevant state law condemnation principles. "However, if the court concludes that a proposed [ ] easement would unreasonably interfere, then the [ICCTA's] preemption provision grants the [Board] exclusive

jurisdiction, and the lawsuit or condemnation proceeding *must be dismissed or enjoined* for lack of jurisdiction." (Emphasis added) *Id.* at 1171. The court continued that, while the Board has encouraged courts (as here) to resolve disputes based on applicable state law, if the dispute involves "routine non-conflicting use," in "many cases," parties have petitioned the Board for an order declaring its position on the preemption issue, with the agency sometimes conducting declaratory order proceedings. *Id.* at 1172. The court cited a case where an appellate court had remanded to a trial court, instructing it to "direct" the plaintiff railroad to petition the Board " 'to resolve any issues concerning the [Board's] jurisdiction.' " *Id.* (quoting *Wichita Terminal Ass'n, BNSF Ry. & Union Pac. R.R.*, 2015 WL 3875937, *2 (S.T.B. June 22, 2015)). Accordingly, in the case before it, the court noted that there was evidence on summary judgment supporting the railroad's position that reopening a specific crossing would impede rail operations or pose undue safety risks (*i.e.*, triggering preemption), therefore:

> "[o]n this record, it appears that an order reopening the crossing is within the [Board's] exclusive jurisdiction [citation]. But, as the [Board's] decision in *Wichita Terminal* illustrates, if presented the preemption issue the agency could determine that any order restoring this crossing is preempted, or that some accommodation of the parties' interests may be compatible with sound rail transportation, in which case state law rights and duties would come into play." (Emphasis added.) *City of Ozark*, 843 F.3d at 1173.

The court then held it appropriate, if the plaintiff requested an opportunity to petition the Board for a declaratory order resolving the issue of its exclusive jurisdiction, for the district court to defer entry of a final preemption determination. *Id.*

¶ 52 Here, we agree that the record supports the trial court's implicit preemption finding. However, the court did not dismiss or enjoin the action; rather, it crafted relief to circumvent

preemption. As dismissing the complaint will not aid the controversy because plaintiff is seeking an easement for a water main that already exists on defendant's property (and we remain mindful that defendant has a counterclaim for trespass), enjoining the action and seeking input from the Board is the most appropriate approach. We do not find persuasive defendant's arguments suggesting that we should not refer this matter to the Board and, indeed, defendant ultimately acknowledges that referring a case to the Board is an option meant to aid the court. Accordingly, we reverse in part, vacate the remedy section of the court's judgment, and remand the case with directions for the trial court to stay proceedings and direct plaintiff to petition the Board to resolve the parameters of its jurisdiction and any relief compatible with the parties' interests.

¶ 53 III. CONCLUSION

¶ 54 For the reasons stated, the judgment of the circuit court of Lake County is reversed in part, vacated in part, and remanded.

¶ 55 Reversed in part, vacated in part, and remanded.

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

North Chicago

vs.

2nd & Main

Case No. 19 ED 20

FILED

APR 20 2022

2nd Centennial Wilmington
CIRCUIT CLERK

ORDER

This cause coming on pursuant to order on the status hearing for all parties present in the premises

IT IS HEREBY ORDERED

Proceedings are stayed and the plaintiff is ordered to obtain the Surface Transportation Board to resolve the parameters of its jurisdiction and for any relief compatible with the parties' positions.

The Petitions to the STB shall be filed in 30 days.

The matter is set for status on August 10, 2022 at 9:00 AM in C-303.

ENTER:

Joseph V. Salvi
JUDGE

Dated this 20 day of April, 2022.

Prepared by:
Attorney's Name: John Quinn
Address: [illegible]
City: [illegible] State: IL
Phone: [illegible] Zip Code: 60030
Fax:
ARDC: 2270706

171-94 (Rev. 10/11)

CO930

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 36619

THE CITY OF NORTH CHICAGO, ILLINOIS'
PETITION FOR DECLARATORY JUDGMENT

AFFIDAVIT OF DAVID C. JOHANSON

I, David C. Johanson, being duly sworn, depose and state the following:

1. I have personal knowledge of the facts set forth herein and if called to testify I can competently attest to the matters set forth herein.

2. I am an experienced professional engineer with extensive experience in railroad design and construction. My credentials and resume are attached as Exhibit 1.

3. All of the statements and opinions set forth in this Affidavit are true and correct and offered with a reasonable degree of professional engineering certainty.

4. In reaching my opinions stated herein, I reviewed relevant excerpts of the following materials, which I understand are part of the record submitted in this proceeding and which were provided to me by the attorneys for the City of North Chicago:

a. Expert Opinions of Devin A. Moose and John P. Low;

b. Market Value Appraisal by DeLacey Consulting, LLC;

c. Deposition of Peter Kolb; and

d. The Property Tax Map marked to indicate the location of the subject water main and existing rail spur.

5. In reaching my opinions stated herein, I also reviewed and am familiar with the following:

a. Union Pacific Railroad Industrial Track Specifications last revised: May 21, 2021;

b. American Railway Engineering and Maintenance-of-Way Association Manual for Railway Engineering 2019;

c. Lake County, Illinois Tax Parcel Viewer (https://maps.lakecountyil.gov/taxparcelviewer).

6. I have knowledge of, and am familiar with, the design and construction of rail lines, including main and spur lines throughout the United States, and cost-benefit analyses typical of railroad car strategy and storage practices.

7. Union Pacific Railroad (UPRR) and American Railway Engineering and Maintenance-of-Way Association (AREMA) have similar requirements on providing casing around carrier pipes (water main). UPRR allows AREMA requirements for tracks UPRR serves outside of its right-of-way. AREMA Section 5.3 Guidelines for Pipelines Conveying Non-Flammable Substances would guide casing requirements for this water main. The existing water

main is a carrier pipe conveying a non-flammable substance. Per AREMA Section 5.3, the length of the casing pipe under tracks shall be a minimum distance of 30' from center of outside track (measured perpendicular to the tracks) when the end of the casing is below ground.

8. In reviewing the available property tax records and property ownership of the site and the adjacent parcels, the only current rail access to the 2nd & Main, LLC parcel is through an adjacent parcel owned by Lumberyard Storage LLC. It is unclear if 2nd & Main, LLC has trackage rights or an easement over this parcel.

9. For the reasons set forth herein, it is my opinion based on my experience in the field of railroad design and construction to a reasonable degree of professional certainty, the locations where reinforcement of the existing water main is necessary, based on AREMA standards, can only be determined with a specific site development plan showing track locations. To my knowledge no such plan exists.

10. For the reasons set forth herein, it is my opinion based on my experience in the field of railroad design and construction to a reasonable degree of professional certainty, the property owner's current rail alignment does not conform to the current UPRR standards. Specifically, the existing horizontal degree of curvature is approximately 18 degrees (319.62-foot radius) whereas the current UPRR standards require a maximum degree of curvature of 10 degrees (573.69-foot radius).

11. For the reasons set forth herein, it is my opinion based on my experience in the field of railroad design and construction to a reasonable degree of professional certainty, it is uncertain if the site would be able to receive service from the UPRR due to (1) the access easement issue mentioned above and (2) existing substandard geometry on the site.

12. For the reasons set forth herein, it is my opinion based on my experience in the field of railroad design and construction to a reasonable degree of professional certainty, if there were a valid easement and the site were to receive rail service from UPRR, the current design standards and site constraints would significantly limit the length and location of a new rail spur. Exhibit 2 shows the only practical alignment which would meet the current UPRR horizontal alignment standards and maximize track length. As illustrated in Exhibit 2, the new spur alignment would be a maximum length of approximately 330' which would store between five (5) and seven (7) rail cars (different types of rail cars have different lengths). If this plan were implemented, a maximum length of 127' of water main would require encasement based on AREMA standards.

13. For the reasons set forth herein, it is my opinion based on my observations of railroad cost-benefit analyses, it is unlikely for this site to receive service from UPRR due to the significant amount of existing rail volumes on the current UPRR North Line (including

passenger rail). It is unlikely that it would be cost effective for UPRR to disrupt this major line connecting Milwaukee and Chicago by providing service to the parcel.

14. For the reasons set forth herein, it is my opinion based on my experience in the field of railroad design and construction to a reasonable degree of professional certainty, in general, operating railroads are typically members of the Association of American Railroads, participate in Raillink, have active Interline Agreements with Class I railroads that they are connected to, and Active Industrial Track Agreements with Class I railroads if the operating railroads are connected. Based on the materials provided to me, I have no knowledge if 2nd & Main, LLC has any of these agreements in place.

David C. Johanson, P.E.

Dated: June 17th, 2022

State of Illinois
County of McHenry

This instrument was acknowledged before me, Joshua D. Jewell, Notary Public on June 17, 2022 by David C. Johanson.

OFFICIAL SEAL
JOSHUA D JEWELL
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 03/22/26

EXHIBIT 1

HANSON
ENGINEERING | PLANNING | ALLIED SERVICES

David C. Johanson, PE | Senior Project Manager / Logistics Discipline Manager

David is a roadway, rail, and municipal senior project manager with more than 24 years of experience developing projects from concept through final permitted plans and resolving site issues to bring facilities into compliance for permitting and final development. He has also performed construction observation and survey on multi-million-dollar heavy construction projects.

He draws upon his design and construction experience to apply workable and cost-effective designs and solutions to each project. His experience includes diverse transportation and municipal infrastructure improvement projects, as well as rail and land development projects. He has been responsible for roadway projects, ranging from single intersections up to larger, comprehensive NEPA studies. David is an experienced project/design engineer for a variety of roadway, rail, and municipal engineering projects, including conceptual design through final engineering and construction.

EXPERIENCE

24 Years

EDUCATION

BS, Civil Engineering, University of Illinois – Urbana-Champaign, 1998

REGISTRATION / LICENSURE

Professional Engineer, Georgia, #041943
Professional Engineer, Illinois, #062-056246
Professional Engineer, Iowa, #22341
Professional Engineer, Indiana, #PE12100438
Professional Engineer, Kansas, #23981
Professional Engineer, Massachusetts, #52722
Professional Engineer, New Jersey, #24GE05711500
Professional Engineer, New Mexico, #22574
Professional Engineer, North Dakota, 9993
Professional Engineer, Pennsylvania, #PE83973
Professional Engineer, South Dakota, #13217
Professional Engineer, Texas, #127130

SELECTED PROJECT EXPERIENCE

Petrochemical Company Rail Yard Feed, Canada
Rail Yard Technical Lead. Hanson assisted the client with the front end engineering and design (FEED) phase for the rail facilities of a new plastics production plant in Alberta, Canada. The scope included a 1,200-railcar rail yard and associated operating tracks to support the production units, connecting track to the Canadian National Railway, a rail car wash and a light car repair facility, a fueling station for road and rail vehicles and rail car indexers for the rail car wash and rail car loading buildings.

Polypropylene Plant Rail Planning Support, Gulf Coast, U.S. Yard
Rail Layout and Design Reviewer. The project owner engaged Hanson to prepare a white paper to document our review and analysis of the currently provided plot plan for rail traffic at the owner's Gulf Coast, U.S., site for a new polypropylene plant. Hanson was asked to review connection to the BNSF/UP 50/50 line for direct service into the facility; review the traffic connections for rail to loading from the SIT yard; review the traffic connections for rail

from loading to the SIT yard; and review the necessary tail track, inbound and outbound tracks for sufficient length with new arrangement. Hanson was later asked for some rail layout alternatives that provided either operational improvements or cost savings.

Harris and Ford Site/Building Development and Rail Connection, Lawrence, IN
Project Manager. Harbour Contractors and Hanson were engaged to explore the potential for adding CSX rail service to their existing production facility. Hanson provided initial concept planning to demonstrate how the site could be served by rail meeting the railroad's operational requirements and meeting Harris and Ford's business goals. We identified constraints of the sire and developed a feasible rail layout that was used for initial discussions with the CSX and the client. Hanson provided consultation on wetland issues and developed a memo describing the likely impacts of permitting on the project.

Steel Dynamics Dynamo Project, San Patricio, TX.
QA/QC Reviewer. Hanson provided environmental and engineering site selection due diligence for a 4 million ton per year electric arc furnace steel mill, including eight sites in three states. The due diligence included evaluation of desktop review of FEMA 100-year flood boundary, availability of road and rail access to the site, proximity of electric transmission lines, and availability of low total dissolved solids raw water. Hanson performed a preliminary geotechnical evaluation, and an in-depth environmental evaluation including a Phase I Environmental Site Assessment (ESA), desktop archaeological review, a geophysical survey to locate historic oil and gas exploration and production sites and a limited Phase II ESA of the final selected Sinton-Welder Site.

Oil Terminal Facility, New Mexico
Responsible for the development of the oil trans-load facility in northwestern New Mexico. The project included the design and coordination of an 8000' rail loop and associated lead tracks. The facility was designed to initially accommodate 18,000 Barrels per day. Mr. Johanson was responsible for the concept design of the overall project including offsite road improvements. Mr. Johanson was responsible the management of the civil design including the integration of the oil terminal designer's site and coordination with geotechnical engineer and drainage designer. The project included coordinating a new railroad grade crossing as well as improvements to a New Mexico State Highway (NM Route 122).

Illinois Route 47 and Ware Road Intersection Improvements, Woodstock, Illinois
Mr. Johanson oversaw the design of intersection improvements at Illinois Route 47 and Ware Road in the City of Woodstock, Illinois. The project consisted of addition of auxiliary lanes on Route 47. The vertical profile of the state highway was also changed in order to improve the sight distance at the intersection, improving the safety at the intersection. Mr. Johanson provided design guidance to junior staff for the development of the phase II plans. The project was processed through IDOT local roads and included on the IDOT Letting. The design of the project was completed in early 2011 with the construction work occurring in 2012.

Farnsworth Bridge over Indian Creek, City of Aurora, Illinois
Mr. Johanson managed and coordinated Phase I and II engineering for a bridge replacement and associated roadway reconstruction. The project included coordination with IDOT, FHWA and IDNR as well as the City of Aurora. The project was initiated to replace degrading crossing and solve local flooding issues. The Phase I work includes a Project Development Report. The project includes hydraulic modeling and permitting for floodway/floodplain compensatory storage requirements. The project was processed as a Group II Categorical Exclusion. An open house public hearing was conducted in accordance with IDOT and FHWA policies. Contract plans, specifications and estimates were developed for an IDOT letting.

Prospect Street, Marengo, Illinois
Mr. Johanson was the client contact and oversaw the design of the Prospect Street Project for the City of Marengo. The project consisted of the channelization of Prospect Street at the intersections of US Route 20 and IL Route 176. Mr. Johanson provided guidance to the junior staff, preformed quality control reviews on the work and maintained communication with the City of Marengo. The project challenges included having to coordinate with the adjacent high school and tight proximity of businesses at the intersection of US Route 20 and Prospect Street. The project was process through IDOT local roads and included on the IDOT letting.

Charles Mill Road, City of McHenry, Illinois
The project consisted of developing contract documents for the Charles Miller Road between Illinois Route 31 and River Road, in the City of McHenry. The project was led by McHenry County Division of Transportation. Mr. Johanson provided design of the signalized intersections at River Road, Green Street and Illinois Route 31. Mr. Johanson also developed the maintenance of traffic plan for the project. Mr. Johanson also integrated the drainage features identified in the Location Drainage Study into the phase II plans. The project was included on the IDOT letting and processed through the Bureau of Local Roads.

Illinois Route 120 and Illinois Route 31, City of McHenry, Illinois
The project consisted of developing contract documents for the intersection of Illinois Route 120 and Illinois Route 31, in the City of McHenry. The project was led by City of McHenry. Mr. Johanson provided design of the three signalized intersections. Mr. Johanson also developed the maintenance of traffic plan for the project. Mr. Johanson also integrated the drainage features identified in the Location Drainage Study into the phase II plans.

Kennedy Road Shared Use Bike Trail, United City of Yorkville, Illinois
Managing and coordinating Phase I and II engineering for bike trail parallel to Kennedy road. The project was processed as a Group II Categorical Exclusion with report. An open house public hearing was conducted in accordance with IDOT and FHWA policies. Contract plans, specifications and estimates were developed for an IDOT letting. It is anticipated that the $1,125,000 project will be constructed in 2016.

Ackman Road Extension, McHenry County Division of Transportation, Illinois
The project included a 4,000-foot extension of Ackman Road along with two corresponding intersection improvements. Scope consisted of providing preliminary engineering, environmental review, and final design services for the project.

Ayer Street Downtown Reconstruction, City of Harvard, Illinois
Project involved the complete design engineering, landscape and streetscape design for five blocks along the City of Harvard's downtown main street (Ayer Street). Project included pavement reconstruction (resurfacing including brick pavers, reconstructed sidewalk, new storm sewer, revised business access, landscaping, lighting and planters, benches, etc. for streetscape amenities.

East Gateway Development Traffic Impact Study; Geneva, Illinois
The Study determined the East Gateway Development site's generated traffic and identified improvements to the existing roadways serving and affected by the Development, including Illinois Route 38. Results were presented in technical memoranda and reports. David developed Synchro traffic models identifying impacts to the existing roadway system from the development.

Haligus Road Improvements, Village of Lake in the Hills, Illinois
Project involved a Phase 1 Study and Design Report for reconstructing approximately half a mile of roadway. Several horizontal alignments were studied based upon impacts to the surrounding area (existing residents, wetlands, etc.), construction cost, traffic, etc. The existing Intersection with the Village's Public Works driveway was be studied to realign and better define the three-leg intersection. Existing and future (2030) traffic capacity analysis of the roadway segment is included. An accident analysis was performed to determine if the corridor is a High Accident Location. A Project Development Report (BLR 22110) and corresponding exhibits were also prepared.

Huntley Crossings (Illinois Route 47 Widening), Village of Huntley, Illinois
The Huntley Crossings is a phased project containing a retail center with approximately 720,000 square feet of space with over 3,400 parking stalls. The project includes the redesign of existing Powers Road as well as 0.75 miles of Illinois Route 47 and two fully signalized intersection plans. The project consisted of completing a traffic impact analysis, traffic signal warrant analysis, and an intersection design study for improvements to the intersections. This project also included the production of preliminary and Final Plats of Subdivision and all Plats of Survey necessary to annex and zone the property in question into the Village of Huntley. Both an Existing Drainage Plan (EDP) and a Proposed Drainage Plan (PDP) were developed along with a Stormwater Management Report summarizing the design of the drainage infrastructure on the site.

Illinois Route 19 and Wood Dale Road, City of Wood Dale, Illinois
This roadway intersection is complicated by the Metra railroad crossing at grade over the north and east legs. The goal of this project was to separate grades on at least one of the legs of the intersection. The project consisted of developing a grade separated design plan for a Bypass Road connecting the west leg of Irving Park Road with the north leg of Wood Dale Road. This plan was reviewed and accepted by the City of Wood Dale, the Illinois Department of Transportation, DuPage County, Metra, and the Illinois Commerce Commission.

I-55 Rehabilitation, Weber Road to US Route 30, Illinois Department of Transportation, District 1
This project involved Phase II engineering services for the widening and resurfacing of I-55 between U.S. Route 30 (Plainfield Road) and Weber Road. This project covers approximately 6.85 miles and crosses through the municipalities of Bolingbrook, Romeoville, Plainfield, and Joliet. The Phase II final engineering services included topographic and design surveys and 3D laser scanning, roadway and bridge design, drainage analysis and design, erosion control, signing and pavement marking layout, maintenance of traffic, landscaping, structural design, and other related tasks needed to complete final plans, specifications and estimates. David prepared maintenance of traffic plans and traffic staging plans.

Johnsburg Road Reconstruction, McHenry County Division of Transportation, Illinois
This 1.5 mile CMAQ-funded Phase I Engineering project involves the widening and resurfacing of Johnsburg Road to improve the capacity and level of service for the intersections to reduce emissions. Improvements are being completed on the intersecting streets of Riverside Drive, Spring Grove Road, and Chapel Hill Road. Improvements include widening to provide intersection channelization, traffic signals and adding a continuous third lane to function as a median/left turn lane. The intersecting streets will also be widened to provide channelization at their intersections with Johnsburg Road.

Comprehensive Traffic Study, City of McHenry, Illinois
The purpose of this project was to address and identify current and future traffic concerns within the City of McHenry. This study identifies the steps necessary to accomplish the City of McHenry's goal to "create and

establish a community transportation system which promotes safe and efficient transportation, while providing the flexibility necessary to maintain positive economic vitality and growth."

Miller Road Improvements, Village of Lake in the Hills, Illinois
Project involved a Phase 1 Study and Design Report for reconstructing the existing pavement on approximately 0.3 miles of roadway. Several horizontal and vertical alignments were studied based upon existing elevations, impacts to the surrounding area (existing residents, wetlands, etc.), construction cost, traffic, etc. The existing intersection of Miller Road and Crystal Lake Road was studied to realign and better define the three-leg intersection. The Existing and future (2030) traffic capacity analysis of the roadway segment was included. An accident analysis was performed to determine if the corridor is a High Accident Location.

Milwaukee Avenue Reconstruction, Village of Niles, Illinois
Project involves preparing a Phase I project report (Categorical Exclusion, Group, II), and Phase II Contract Plans. Project highlights include pavement widening and resurfacing to provide four 11-foot-wide lanes, water main, sidewalk, and curb and gutter replacement as well as traffic signals modernization and signal interconnections.

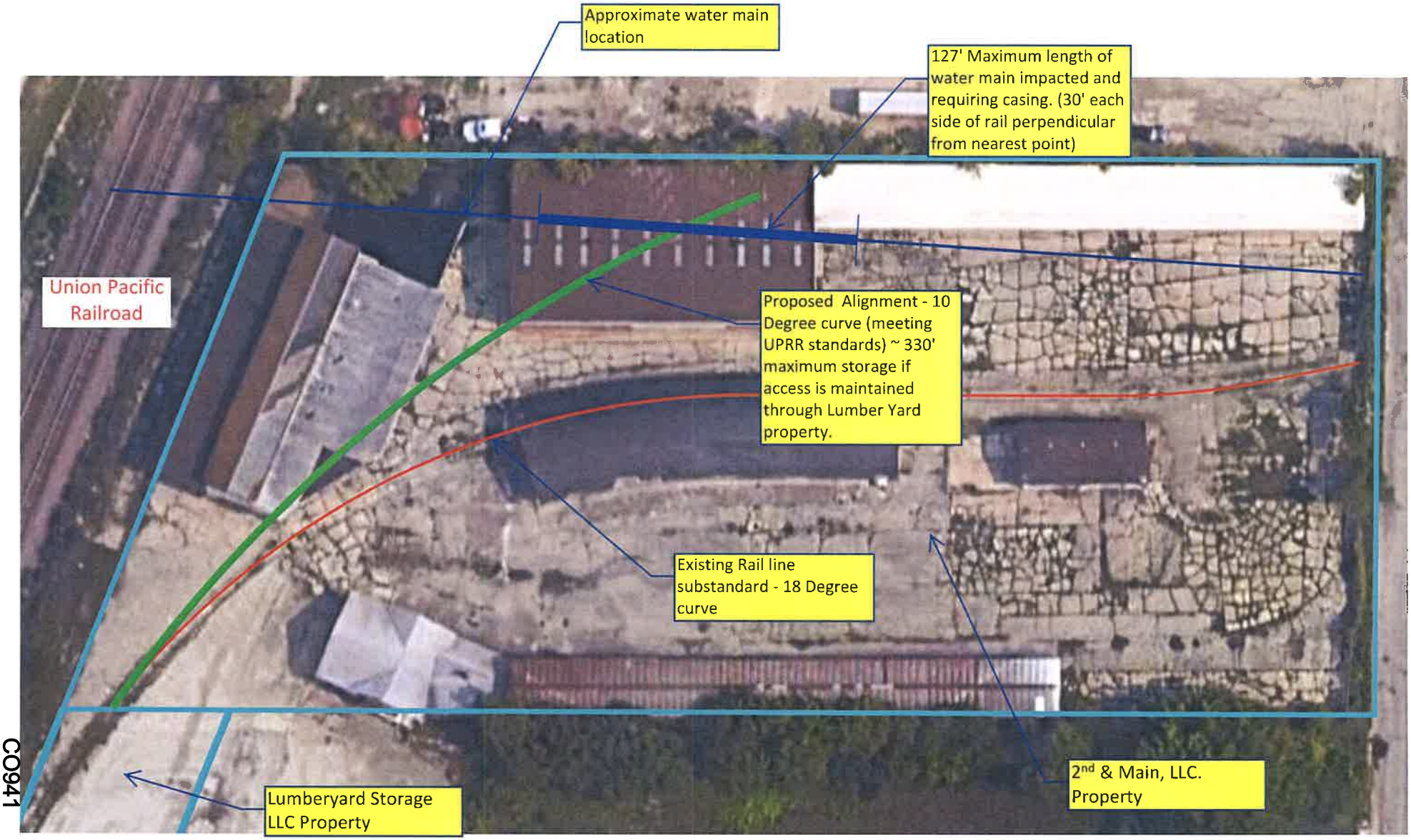
Peterson and Alleghany Roads, Village of Grayslake, Illinois
The project involved the reconstruction and expansion of the intersection of Alleghany Road and Peterson Road. The existing roads consist of two lane sections approaching their intersection, where they have been widened to provide intersection channelization with a temporary traffic signal. The scope of work includes widening Peterson Road to provide an additional through lane, widening on Alleghany to provide dual left turn lanes, and the installation of a permanent traffic signal. Roads under the jurisdiction of the Lake County Division of Transportation.

Prairie Parkway Engineering Study, Illinois Department of Transportation, District 3
This study evaluates the need for future transportation improvements in northeastern Illinois due to the areas' increasing growth demands and traffic congestion. The general study area includes Kane, Kendall, Grundy, DeKalb, LaSalle, and Will counties. The project entailed stormwater management planning for a 1,600-square-mile study area related to the Prairie Parkway, a proposed highway in the study area. This planning included hydraulic analysis of more than 100 bridges and culverts with watersheds ranging from 34 acres to 111 square miles. The analysis included calculation of flows using HEC-1 and USGS Regression Equations. Of these one hundred crossings, the design team prepared hydraulic reports for 32 culverts and five bridges. The project team has also provided preliminary design services for portions of the proposed roadway improvements. David developed roadway geometry for approximately 30 crossroads and overpasses using Geopak design software for a 30-mile Phase I design project.

Traffic Study, City of Washington, Illinois
Project involved a traffic impact study for a 14-acre commercial site in Washington, Illinois. The study included developing site-generated traffic and studying the impacts of the site traffic on Business Route 24 using traffic modeling software.

OTHER FIRM EXPERIENCE

Engineering Enterprises, Inc., Project Manager, Sugar Grove, IL 2013 to 2014
HR Green Company, Project Engineer II, McHenry, IL 2005 – 2013
V3 Companies, Project Engineer, Woodridge, IL 1999 – 2005
TJ Lambrecht Construction, Surveyor, Joliet, IL 1998 – 1999



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EXHIBIT 2