

LAND COMPENSATION BOARD
FOR THE PROVINCE OF ALBERTA

ORDER NO: 425

FILE NO: 10855.0

January 28, 2004

An Application to Determine Compensation, filed with the Land Compensation Board pursuant to the Expropriation Act, R.S.A. 2000, Chapter E-13

BETWEEN:

WILLIAM G. BRESE and RITA M. BRESE

Claimant

- and -

THE CITY OF EDMONTON

Respondent

BEFORE:

THE LAND COMPENSATION BOARD FOR THE PROVINCE OF ALBERTA

SITTING MEMBERS:

- S. S. Schumacher, Q.C., Presiding Member
- Marilyn McAvoy, Member
- J. Logan, Member

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APPEARANCES:

For the Claimant: - D. P. Mallon, Q.C., Counsel
Prowse Chowne LLP

- Witnesses:

- William G. Brese
- Olga Lovatt
- John F. Wasmuth, AACI

For the Respondent: - D. S. Debrinski, Counsel
The City of Edmonton

Witnesses:

- Bill van der Meer
- John R. Andrew, MCIP, ACP
- Brian S. Gettel, AACI

PLACE: Held in the City of Edmonton, in the Province of Alberta on October 20, 21, 22, 23, 28, 29 and November 7, 2003, at the Offices of the Land Compensation Board.

APPLICATION AND BACKGROUND:

On March 11, 1997, the City expropriated a portion of the Claimant's property located in Edmonton at the junction of 45th Avenue and 17th Street for roadway upgrading and construction.

At the time of the taking the Claimant's property measured 32.16 acres ("Claimant's lands") and was improved with an older residence, which had been renovated, as well as several service buildings including a garage, shed, hip roof barn and several smaller utility buildings. It

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was zoned for agriculture use and under the Municipal Area Structure Plan designated for future business and medium industrial use.

The City expropriated 14.7 acres (“expropriated lands”) consisting of a strip of land adjacent to 45th Avenue (Whitemud Drive) and 17th Street.

The Claimant requests the following compensation for the expropriated lands;

- (i) \$193,725.00 or \$13,125.00 per acre for the market value of the expropriated lands;
- (ii) \$35,660.00 for injurious affection to the residual lands;
- (iii) \$6,052.00 for the cost of the installation of the driveway, including the cost of the land acquired for such driveway;
- (iv) \$154,100.00 for the lost capital appreciation of the expropriated or similar lands;
- (v) \$14,231.00 being the projected professional fees associated with the acquisition of replacement property;
- (vi) \$50,000.00 for disturbance damages in respect of the noise, dust, light pollution, loss of topsoil and other consequences of the construction of a major roadway adjacent to their home;
- (vii) an amount for interest and penalty interest as provided for in Section 66 of the *Expropriation Act*;
- (viii) present value of the claims for damages from March 11, 1997, to the date of this hearing calculated based on the average annual interest yields on 90 day Canada Treasury Bills; and
- (ix) costs in accordance with Section 35 and 39 of the *Expropriation Act*.

The City proposes compensation for the expropriated lands as follows:

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- (i) \$147,600.00 or \$10,000.00 per acre for the market value of the expropriated lands; and
- (ii) \$2,635.00 for the loss of pasture land, which includes the cost of reseeded and fence construction

The City took no position on the calculation of the interest and present value. The matter of costs will be dealt with following this decision by application of either party.

The Board will deal with each of the Claimant's requests for compensation.

(i) \$193,725.00 or \$13,125.00 per acre for the market value of the expropriated lands:

Mr. Wasmuth, the appraiser for the Claimant, estimated the market value of the expropriated lands on March 11, 1997 (effective date) as \$193,725.00 or \$13,125.00 per acre. Mr. Gettel, appraiser for the City, estimated the market value as \$147,600.00 or \$10,000.00 per acre.

The appraisers agreed that the highest and best use of the Claimant's lands was an investment holding property ripening to business and medium industrial development within the medium term of 7 to 15 years. Both appraisers utilized the direct sales comparison approach to determine market value. The difference in their estimates of market value is a reflection of the indices selected, and the adjustments made to common indices.

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The Appraisal Evidence:

The Claimant:

Mr. Wasmuth relied on 7 indices. His indices 1, 2 and 5 correspond to Mr. Gettel's indices 11, 7, and 8. The following chart summarizes the appraisers' adjusted values for the common indices.

Adjusted Values/Acre - Common Indices

Index: Mr. Wasmuth

W1 \$9,984.00/acre
W2 \$12,582.00/acre
W5 \$12,053.00/acre

Index: Mr. Gettel

G11 \$10,039.00/acre
G7 \$10,537.00/acre
G8 \$ 9,313.00/acre

The latter 2 indices show the most profound difference in values. Index W2 / G7 located at 17th Street and 70th Avenue, sold in 1994 for \$15,727.00 per acre. Both appraisers adjusted the sale price downwards to reflect that the index was located in an area where industrial development existed and full services were available to the property line. Mr. Wasmuth adjusted the sale price by 15% and Mr. Gettel 30% for this factor.

Index W5 / G8, a 38.15-acre site, located at 76th Avenue east of the Sherwood Park Freeway sold in 1994 for \$10,957.00 per acre. There was existing industrial development in the area and both appraisers adjusted the sale price downwards to reflect this; Mr. Wasmuth by 5% and Mr. Gettel by 15%. Mr. Wasmuth positively adjusted the sale price by 15% for the cost of earth moving as the index had more low lying land than the Claimant's lands. Mr. Gettel made

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no such adjustment stating that the work consisted of moving earth from higher to lower areas on site. Mr. Gettel referred to a drainage ditch on site as a negative factor, but made no specific adjustment for it.

Two of Mr. Wasmuth's remaining 4 indices are located outside southeast Edmonton. Index 3, an 8.03-acre site located at 199th Street and 107th Avenue, sold in May, 1996, for \$11,166.00 per acre. After adjusting the sale price upwards to reflect the superior location of the Claimant's lands and its well-drained topography, Mr. Wasmuth's adjusted value was \$14,516.00/acre.

Mr. Gettel felt index 3 was a poor comparable because it was fully treed, had organic soil, was significantly smaller and had poor access. In his experience the market would differentiate between a property 8 acres in size and the Claimant's lands of 30 to 40 acres.

Mr. Wasmuth's index 4, an 18.41-acre site located at 156th Street and 137th Avenue, sold in 1995 for \$8,419.00 per acre. The sale price was adjusted upwards for location and the presence of lowlands for an adjusted value of \$10,524.00.

Mr. Gettel testified that the adjusted value of index 4 was typical for the time period.

Mr. Wasmuth's remaining 2 indices 6 and 7, sold after the effective date. Index 6, a 22 acre site located at 17th Street and 51st Avenue, sold in September, 1997, for \$9,670.00. Mr.

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Wasmuth adjusted the sale price positively for location (5%) and the cost of earth moving for rough site preparation (30%) for an adjusted value of \$13,055.00.

Mr. Gettel testified that Mr. Wasmuth had over adjusted for the cost of site preparation. He stated that typical site preparation costs range between \$3,000.00 and \$4,000.00/acre which was the cost noted for index 6.

Mr. Gettel's index 12 is the 1997 listing of Mr. Wasmuth's index 6. Mr. Gettel adjusted the list price downwards by 20%. He made a positive adjustment of 10% for location and topography for an adjusted value of \$9,700.00/acre.

Mr. Wasmuth's index 7, a 62-acre site, located immediately south of the Claimant's lands sold in April 1998, for \$12,000.00 per acre. Mr. Wasmuth adjusted the sale price upwards by 10% and 5% for low-lying lands and location. His adjusted value was \$13,200.00 per acre. He did not adjust for time because his review of the market showed little or no change in values between 1994 and 1998.

Mr. Wasmuth placed the greatest reliance on indices 5, 6 and 7 which indicated values of \$12,053.00, \$13,055.00 and \$13,200.00 respectively. His final estimate of value of the Claimant's lands was \$12,500.00 which he adjusted upwards by 5% to reflect that the expropriated lands were superior to the overall property. His final estimate of value for the expropriated lands was \$13,125.00 per acre.

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Mr. Gettel criticized Mr. Wasmuth's reliance on indices 6 and 7. He testified that sales of serviced land showed an increase in values occurring in the second half of 1997 which continued into 1998. Mr. Gettel stated that any index where the sale date occurred after June 1997 would have to be adjusted for time. In his opinion indices 6 and 7 should have been adjusted for time by 15% and 25% respectively. The resulting adjusted values would be \$9,900.00/acre for index 6 and \$10,500.00/acre for index 7.

Mr. Gettel's Sale Indices:

In addition to the common indices discussed above, Mr. Gettel referred to eight other sales located in southeast Edmonton. Indices 1 through 6 all sold between 1990 and 1993. Mr. Gettel justified the use of older sales because the oversupply of industrial land meant that prices were relatively stable between 1990 and early 1997. The six sales indicated an adjusted per acre value range of \$8,750.00 to \$11,112.00.

His remaining two indices, 9 and 10 sold in 1996. Index 9, a 22.44 acre site located at Meridian Street and 70th Avenue, sold in March, 1996, for \$7,462.00 per acre. He adjusted the sale price upwards by 25% because of the expropriated lands' superior access, resulting in an adjusted value of \$9,327.00 per acre.

Index 10, a 109.73-acre site, located at 34th Street and 84th Avenue sold in November 1996, for \$5,000.00/acre. Mr. Gettel felt the index, because of its size, would require further subdivision before development and adjusted the sale price upwards by 25%. Index 10 had low-

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lying lands and Mr. Gettel made a further adjustment of 15% for fill before development. His adjusted value for index 10 was \$9,350.00 per acre.

Relying on his range of values, Mr. Gettel selected \$10,000.00/acre as his estimate of the market value of the expropriated lands.

Board's Determination:

Two of Mr. Wasmuth's indices, 1 and 4, were within the range of values suggested by Mr. Gettel. The remaining five indices' exceeded Mr. Gettel's range. Those sales are as follows.

<u>Index</u>	<u>Adjusted Value</u>	<u>Per Acre</u>
W2	\$12,582.00	(Mr. Gettel's G7 at \$10,537.00)
3	\$14,516.00	
W5	\$12,053.00	(Mr. Gettel's G8 at \$9,313.00)
W6	\$13,055.00	(Mr. Gettel's G12 at \$9,700.00)
7	\$13,200.00	

The Board's analysis will concentrate on these five indices.

The difference in the appraisers' estimates of value for indices W2/G7 and W5/G8 is explained by the adjustments made for location or development potential and physical features. The Board, on the evidence, can find no basis to prefer one appraiser's adjustment for location or development potential over the other's.

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On sale W5/G8 Mr. Wasmuth adjusted the sale price upwards by 15% because in his opinion significant earth moving was required in order to market the lots. The Board finds that the adjustment is too high based on Mr. Gettel's observation that the earth moving simply involved pushing earth from higher areas on site to lower areas. No fill was imported so the cost of moving the earth would be minor. A reduction in the adjustment for physical features would lower Mr. Wasmuth's adjusted value for index 5.

The Board places little weight on Mr. Wasmuth's index 3. The Board is persuaded by Mr. Gettel's evidence that the smaller size of the index, and its poor access, made it a "very poor comparable".

The Board has two concerns with the adjustments made to Mr. Wasmuth's index 6; the absence of an adjustment for time and the size of the adjustment for physical features. The Board will deal with the latter adjustment first.

Mr. Wasmuth adjusted the sale price of index 6 by 30% for the cost of site preparation. The Board finds the adjustment too high. It is persuaded by what appears to be Mr. Gettel's greater familiarity with the cost of site preparation. Mr. Gettel reported that most sites require recontouring before development and the typical cost is between \$3,000.00 and \$4,000.00/acre, which is the cost noted for index 6.

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Mr. Wasmuth's indices 6 and 7 were transferred after the effective date. The Board finds with sales of this type, there is an onus on the party relying on them to establish that the sales are reflective of the market on the effective date. Mr. Wasmuth's explanation did not satisfy the onus. In Exhibit 11, his market value report, he concluded based on his seven indices, that there was no clear trend in industrial land values over the period 1994 to 1998. The reliability of his conclusion is questionable when considered in relation to other statements in his reports.

In Exhibit 21 a report dated February 25, 2002, which was updated by Exhibit 12 for the hearing, Mr. Wasmuth stated;

"8. That the market demand for commercial/industrial lands in the subject area has increased considerably since March 11, 1997..."
[Pg. 6]

In Exhibit 12, Mr. Wasmuth stated;

E8. "...recent absorption rates and demand for such lands have been fairly strong and the market demand has experienced growth since 1997. This has created upward pressure on industrial land values and resulted in higher sale prices as well as listing prices." *[Pg. 14]*

It is not apparent from the above statements when the higher prices occurred.

Mr. Gettel in Exhibit 36 attempted to pinpoint when industrial sale prices spiked. Exhibit 36, a summary of sales of serviced land from one industrial subdivision, showed that the average sale price dramatically increased after June 1997. He used serviced land because there was more

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data to review. He felt there was correlation between serviced and unserviced land due to their similar value increases between 1997 and 2003. The Board finds his explanation reasonable.

The Board is aware of the concerns with Mr. Gettel's Exhibit 36, most significantly that he used the transfer date to pinpoint the date when sale values changed. Mr. Mallon pointed out that the transfer date could occur several days or months after the parties agreed on a price. Mr. Gettel responded that as long as the transfer date was consistently used there should be no concern. The Board accepts his explanation.

Exhibit 36, the Board finds, raises a doubt regarding Mr. Wasmuth's conclusion that no time adjustment was appropriate for his indices 6 and 7. Mr. Gettel's opinion that prices were increasing is confirmed by the sale of his index 5. It sold in September of 1997 for 10.5% more than its sale price in 1993.

Mr. Wasmuth placed the greatest reliance on his indices 5, 6 and 7. The Board's findings regarding his adjustments for physical features and time would result in lower indicated values. For example on index 6, if the adjustment for physical features is reduced by 10% and a time adjustment of 10% is applied, the adjusted value per acre is \$11,120.50. If index 7 is adjusted by 15% for time, the adjusted value is \$11,400.00/acre.

The Board finds that the market value of the Claimant's lands is \$11,400.00/acre. The value is within the range suggested by Mr. Gettel and is supported by Mr. Wasmuth sales 5, 6

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and 7 as adjusted by the Board. There is no basis for attributing a higher value to the expropriated lands than the parent parcel. In the Board's opinion the partial taking is representative of the property as a whole. Of the 32.16 acres comprising the Claimant's lands only between one and two acres were classified as lowland. The market value of the expropriated lands is \$167,580.00.

(ii) \$35,660.00 for injurious affection to the residual lands:

The Claimant claims \$35,660.00 for injurious affection to the residual lands. The claim consists of the following;

- (a) \$15,000.00 for a loss in value to the improvements caused by the taking and the staged freeway construction; and
- (b) \$20,660.00 for a loss in value to the residual lands (bare land).

The Board will address each element of the claim.

(a) The Value of the Improvements:

Mr. Wasmuth valued the improvements which included a well-maintained house, garage, hip barn and several out buildings at \$60,000.00.

During the time period of rural residential use, Mr. Wasmuth noted in his report "*...the construction of the freeway and the inherent traffic, noise, nighttime lighting, as well as the nuisance and increased accident risk caused by alteration to the driveway approach have all contributed to a less desirable rural residence.*" [Exhibit 11]

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His best estimate of the loss in value to the improvements was 25% or \$15,000.00.

The City, relying on its appraiser's analysis, denied the claim. Mr. Gettel stated that if the buildings had value, it was only during the holding period of between 7 and 15 years. If the property sold in that time a purchaser would offset taxes and the demolition costs from the potential rental revenue. As a consequence the improvements added very little value.

Mr. Gettel testified that the expropriation and the future freeway did not exert a negative influence on the value of the improvements. Prior to expropriation the Claimant's lands were subject to high traffic volumes and noise from train traffic.

Mr. Gettel's studies of major roads in urban and rural settings indicated that values were affected where the separation between residence and road was less than 125 feet. At 500 feet, Mr. Gettel stated the Claimant's residence was well beyond the distance where you would expect to see an impact on value.

Board's Determination:

The Board denies the claim for lost improvement value. Although the traffic levels have increased since the expropriation, the Claimant's lands were exposed to significant noise from high volumes of vehicle and railway traffic prior to the taking [Exhibit 28 - 1996 - 12,700

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vehicles/day]. The residence is shielded by trees and after the expropriation is a significant distance from the right-of-way. In the Board's opinion the increase in traffic volume would not cause a loss in value to the improvements.

(b) Reduction in the Value of the Residual Lands (Bare Land)

The Claimant's:

Mr. Wasmuth estimated the reduction in value to the Claimant's residual lands at 10% or \$20,660.00. His estimate relied on the evidence of Ms. Olga Lovatt, a professional planner. Ms. Lovatt was retained to assess the impact of the expropriation on the future industrial development of the Claimant's lands. Her report assumed that when the land developed the industrial lots would be one acre in size.

Ms. Lovatt concluded that the Claimant's lands post-expropriation were inferior to their pre-expropriation state for the following reasons:

- (i) on subdivision the access connection south of 45th Avenue would be lost. Access would be located on the south property line. This made the development of the Claimant's lands more dependent on development of the lands south of the Claimant.
- (ii) the most likely design of the subdivision, given the one access point resulted in an awkward internal traffic system with two cul-de-sacs. Industrial users do not like cul-de-sacs; and
- (iii) a greater number of irregular shaped lots with limited exposure to Whitemud Drive. Irregular shaped lots could be reduced but only at the expense of lot yield.

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Mr. Wasmuth testified that it was difficult to quantify some of the negatives on an empirical basis. However his analysis of sales indicated that the average price of a regular shaped lots was 8% higher than triangular shaped lots. In his opinion the increase in irregular shaped lots post expropriation would affect the value of the remaining lands by 3 to 4%. He estimated that the total loss in value for all the post expropriation negatives was 10% or \$20,660.00.

The City:

The City's planning expert, Mr. Andrew reported the negative impacts of the expropriation as follows;

- (i) the loss of right in/right out access south of 45th Avenue rendered the property more dependent on development to the south; and
- (ii) a decrease in direct exposure to 17th Street.

Following the completion of his report, Mr. Andrew met with City representatives who advised “...*there was some possibility that that right-in/right-out (access) could be provided along 17th Street in addition to the all-directional access under certain circumstances.*” The new information changed his conclusion on the Claimant's lands being dependent on development of other lands.

Mr. Andrew testified that the most likely scenario for post expropriation development design was Ms. Lovatt's figure 2, which was similar to his figure (4). Given industrial users' dislike of cul-de-sacs, Ms. Lovatt's figure (4) showing 2, seemed an unlikely design. Lot yield,

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Mr. Andrew stated, was more of a concern to residential development than industrial. He was more concerned with ratio of road length, which represented a cost, to net developable land. He noted there was very little difference in the ratio before and after the expropriation. Mr. Andrew testified that shape and size of lots in industrial development is determined by the developer's perception of the market. A design scenario which included lots, which were not perfectly square or rectangular in shape, caused him no concern.

Board's Determination:

Both Mr. Wasmuth and Ms. Lovatt testified that they relied on Mr. W. van der Meer's (city engineer) representation that when the Claimant's lands subdivided the only point of access would be at the south boundary of the property. The issue of whether one or two access points would be permitted is critical to the planners' conclusion that the Claimant's lands after expropriation were more dependent on development of other lands.

The Board finds that the City's evidence does not go so far as to say that two access points would be permitted; rather, it suggests it might be permitted in some circumstances. Neither Mr. Andrew, nor any other City witness, elaborated on what those circumstances would be.

The Board in reviewing Mr. van der Meer's testimony is not sure what he meant. In cross-examination he stated if the Claimant's lands were subdivided all directional access would be located at the south end of the property. When asked if that would mean that the current

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access point would be lost he stated, *“That’s right. I’d say if it was developed to -- to that type of development, and it has a lot to do with the amount of traffic ... then it would need to be at one location and at the all-directional access point.” [Transcript 663]*

The Board finds that the assumption made by both planners that there would be only one access point is a reasonable one. The loss of access rendered the Claimant’s lands after expropriation more dependent on development to the south.

The Board is not convinced that Ms. Lovatt’s other conclusions are correct. The Board agrees with Mr. Andrew that the most likely development scenario is his figure 4 and Ms. Lovatt’s figure (2). This scenario has two less lots overall but fewer irregular shaped lots than Ms. Lovatt’s figure 4 and no unnecessary cul-de-sacs. The Board relies on Mr. Andrew’s explanation that lot yield in industrial development may not be as significant as it is to residential development. The Board finds that costs, as represented by the ratio of road length to net developable land, may be just as or more significant than lot yield. There was no difference in the ratio before and after the expropriation.

For the dependency on development of other lands and the decrease in exposure to 17th Street, the Board awards \$10,000.00, which represents a 5% loss in value to the remaining lands.

- (iii) **\$6,052.00 for the cost of the installation of the driveway, including the cost of the land acquired for such driveway;**

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The Claimant claims \$6,052.00 for the cost to relocate the driveway including the cost of the land necessary to accommodate it. The cost will arise if 17th Street develops to 4 lanes prior to the development of the Claimant's lands for industrial use. At that time, it will be necessary to change the point of connection. In calculating the claim Mr. Wasmuth assumed the driveway would be replaced in eight years.

The City:

Mr. Gettel testified that he did not calculate compensation for the loss of the driveway because he could not pin point when the change in access would occur. City representatives indicated that the development of 17th Street from two to four lanes would occur sometime in the distant future. Mr. Gettel, because of the limited life span of the improvements, felt there was a possibility that the highest and best use of the property would occur before any change in access caused by the upgrading of 17th Street.

The Board's Determination:

The Board denies the claim for the cost of relocating the driveway. The parties both agree that the twinning of 17th Street is dependent on the development and the ensuing traffic along 17th Street. Both parties agree that a substantial period of time will pass before the twinning occurs. Mr. van der Meer thought it could be 10 or 15 years. His estimate of a longer time period is supported by Exhibits 28 and 29 which show no increase in traffic along 17th Street and Whitemud Drive between 1996 and 2002. The Board finds there is a greater

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likelihood that access will change due to the development of the Claimant's lands than development on 17th Street.

(iv) \$154,100.00 for the lost capital appreciation of the expropriated or similar lands:

Mr. Wasmuth concluded that the claim for loss capital appreciation arose due to the Breses' inability to acquire replacement property with the proceeds provided by the City. The loss of investment opportunity he stated "*...must be taken into account in order to make the owners economically whole, or ...provide for economic reinstatement.*" Mr. Wasmuth testified it would cost \$24,000.00/acre to purchase replacement property in October, 2003. The Claimant in addition to the proposed payment required \$154,100.00 to purchase replacement property as of October 6, 2003.

Mr. Wasmuth, in preparing his report [Exhibit 12], relied on Mr. Brese's evidence that he could find no replacement property. Mr. Brese testified that during negotiations with the City he indicated a preference for a land exchange consisting of a portion of the Weiss lands located immediately south of the Claimant's lands. In July, 1996 the City advised the Claimant that it was unable to acquire the Weiss lands and that the Claimant should pursue negotiations. Upon receipt of the proposed payment in March, 1997, Mr. Brese commenced his search for unserviced industrial property in southeast Edmonton valued at \$10,000.00 per acre. He restricted his search to properties which had the same development potential as the expropriated lands. Following his search he "*...concluded that the best potential for me for replacement property was the land south of us...*", the

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Weiss property. He contacted the Weiss family and was told of an option agreement on the property which expired in December 1997. In early January 1998 he offered the Weiss family \$200,000.00 for 20 of their 62.15 acres. The offer was rejected and the Weiss property sold in April 1998 to the holder of the option agreement for \$12,000.00/acre. The Claimant offered the new owners \$12,000.00/acre for 20 acres which was also refused.

The Claimant testified that they continue to look for replacement property but most outlying properties are beyond the time period to development that they intend to hold property.

The City:

The City's submits that the claim for lost capital appreciation is nothing more than an attempt to change the date for determining market value. Although the *Expropriation Act* does not specify a valuation date, previous Board decisions have fixed it on the date the Certificate of Approval is registered; in this case March 11, 1997.

The City argues that the duty of an expropriation authority under the Act is to pay market value for the land on the effective date. If there is an underpayment the Act also provides sanctions in the way of interest. Market value does not include damages.

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Mr. Gettel testified there were a number of properties available for purchase in 1997 and 1998 which would have permitted the Claimant to participate in capital gains. Mr. Gettel referred to his sale G5 which sold in 1993 for \$190,000.00, in 1997 for \$210,000.00, in 2000 for \$500,000.00 and in 2003 for \$695,000.00.

Mr. Gettel testified that lost capital gains is a hindsight issue which could not be anticipated at the time of acquisition. The evidence indicates there were opportunities to participate in the market but the Claimant chose not to participate.

Board's Determination:

The Board denies the claim for lost capital appreciation.

The *Expropriation Act* section 42(2)(a), states that the owner is to receive market value for the land taken. If the authority fails to pay market value then the Act provides a sanction by way of interest. In the Board's interpretation, these two sections exhaust the Claimant's redress for compensation for market value. The claim for lost capital appreciation is an additional claim for compensation which is not authorized by the Act.

If the Board is wrong in its interpretation of the Act, and an owner is entitled to claim as a disturbance damage lost capital appreciation then the Board finds the facts in this case do not support such a finding.

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If damages are to be awarded they must be the natural and reasonable consequence of the expropriation. The Board finds that the claim for lost capital appreciation is not the natural and reasonable consequence of the expropriation.

Mr. Wasmuth in his report states the losses claimed “...*arise due to the Breses’ inability to acquire a replacement property with the proceeds provided by the City...*”. Mr. Wasmuth did not search the market for comparable or replacement properties, but relied on Mr. Brese’s statement that he could find none. Mr. Brese never indicated that the lack of funds was the reason for failing to find replacement lands. He testified that “*there wasn’t any industrial land as such on 23rd Avenue that I could... that I was able to locate.*”

The Board finds that the Claimant early in the expropriation process identified the Weiss property as the only suitable replacement property. The City informed the Claimant in July, 1996 that its negotiations with the owners of the Weiss property had failed and the Claimant should continue negotiations in their own right. Mr. Brese, in January, 1998, made a formal offer to purchase part of the Weiss property. His offer was rejected. The decision to pursue the Weiss property to the exclusion of other investment opportunities was entirely in the control of the Claimant. At examinations for discovery, Mr. Brese gave the following answers:

“Q Okay. Can you explain why you didn’t make any efforts after January of 1998 to find a replacement property for the 14.76 acres that were expropriated?”

A My focus was on finding replacement proximity in direct proximity to the piece that I had in the Millwoods area.

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Q. Okay. Now, what are you -- can you be a little more specific in terms of what you mean by direct proximity? Are you talking adjacent to your property like the Weiss property?

A That is correct.

Q. Okay. So, was it fair to say, then, that if you didn't, if you weren't able to obtain the property adjacent to your property that you could consolidate with your remaining property, you weren't interested in looking for replacement property?"

"A That's correct."

"Q Okay. When it was rejected by Donald and his sister that is why you didn't make any other efforts to obtain replacement property then?"

A Correct.

Q Did you communicate that to Mr. Wasmuth when you had the extensive discussion with him about preparing the appraisal report?

A I certainly told him about the efforts we made to add to the property that we presently reside on by acquiring the property south of us.

Q Okay. But, what my question was did you communicate to him if you couldn't obtain that parcel you weren't going to make any effort to obtain any other parcel?

A Let's say I didn't make any effort that isn't that I wouldn't make any effort to. There is a difference. Because, if I find a parcel that particularly interested me I certainly might acquire it.

Q Okay.

A But I hadn't made any effort from the time that I made the offer to the Weiss Swaddle owners and to this point in time."

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The Claimant was in control of investing the expropriation compensation. The fact that the property selected by the Claimant could not be acquired and the Claimant chose to invest in a lower earning opportunity is not a consequence of the expropriation.

The claim is for lost capital appreciation or for a loss of an investment opportunity. There were opportunities available for investment at the time of the expropriation as demonstrated in Exhibits 38 through 41. Mr. Brese testified that he was aware of the 1997 listing of Mr. Gettel's index 5 but rejected it because of access problems. This property has tripled in value since 1997.

The Board adopts Mr. Gettel's analysis that a claim for lost capital appreciation is a hindsight issue. No one can predict how the market will change and for that reason the Board finds the claim for lost capital appreciation too remote, too speculative.

- (v) **\$14,231.00 being the projected professional fees associated with the acquisition of replacement property:**

Section 50(b) of the *Expropriation Act* states as follows:

- (b) *when the premises taken do not include the owner's residence, the owner's costs of finding premises to replace those expropriated, if the lands were not being offered for sale on the date of the expropriation;*

Mr. Wasmuth calculated the cost of finding replacement property as follows:

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	\$
Real Estate Buyers Agent Fee	4,500
Appraisal Fee	1,800
Real Property Report	1,000
Survey Fees (If Subdivision Required)	3,000
Environmental Site Assessment	2,000
Legal Fees and Disbursements	<u>1,000</u>
Subtotal	13,300
GST	<u>931</u>
ESTIMATED TOTAL ACQUISITION COSTS	<u>14,231</u>

The City objects to a number of the items claimed for the following reasons;

- (i) real estate commission is paid by the vendor not the purchaser;
- (ii) if the Claimant purchases bare land there is no need for a real property report;
- (iii) if replacement property is for sale there is no need to subdivide; and
- (iv) no environmental assessment would be necessary as potential replacement property would be in agricultural use or vacant.

Board's Determination:

The Board agrees with the City's position regarding the real estate fee and real property report and denies the claim for those items. The Board approves the cost of the other items claimed. It is likely the Claimant will not find property 14 acres in size and a survey will be necessary in order to subdivide a portion from a larger holding. Property in agricultural use does not preclude the need for an environmental site assessment. There may be buried fuel tanks or other uses which would necessitate the assessment.

The Board awards \$7,800.00 plus GST for the cost of finding replacement property.

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- (vi) **\$50,000.00 for disturbance damages in respect of noise, dust, light pollution, inconvenience, loss of topsoil and other consequences of the construction of a major roadway adjacent to their home:**

The Claimant:

The Claimant asked the City if they could sell the topsoil from the expropriated lands to a contractor. Although the City initially agreed, it subsequently refused and the Claimant seeks \$16,000.00 for the lost sale.

The remainder of the \$50,000.00 claim relates to the Claimant's loss of use and enjoyment of their lands during construction of the roadway. Starting in May of 1997 construction activities ran around the clock. Mr. Brese complained and the City restricted its hours to 7:00 a.m. to 11:00 p.m., six days a week. At the end of each shift the contractor's equipment continued to run during cool down, and refueling trucks serviced the equipment until 2:00 a.m. Workers arrived on site prior to 7:00 a.m. to start up their equipment.

A borrow pit was located east of the Claimant's lands and trucks hauled dirt to the construction site. As the pit got deeper the trucks would get louder, revving up to make the climb. Pile driving went on for six weeks and the noise was constant and deafening.

Mr. Brese testified that the noise from the construction activity prevented a normal conversation in the yard. Dust and exhaust from the equipment blew onto the

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Claimant's lands from the construction site. The City would only control the dust if the Claimant complained.

The City:

The City argues there is no basis for the claim for topsoil. The topsoil is part of the lands it acquired.

Regarding the remainder of the claim the City submits relief should be denied for two reasons; the Act does not authorize compensation for nuisance and the Claimant did not call factual evidence to support the amount claimed.

The Board's Determination:

The Board denies the claim for topsoil. The topsoil was part of the land expropriated and paid for by the City.

The Board finds that the intensity of the construction activity deprived the Claimant of the enjoyment of their lands. Mr. and Mrs. Brese are avid gardeners. Simple pleasures such as enjoying their yard or having guests over were made impossible during the period of construction.

Although the harm in this case is related to the expropriation, the loss of enjoyment was caused by the construction of the works for which the land was acquired. Section 56(b) of the

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Expropriation Act contemplates such a loss under the heading incidental damages. The prerequisites for compensation under this section are as follows:

- (i) only a portion of the owner's land is taken; and
- (ii) the incidental damages result from the construction or use of the works for which the land is acquired.

The Claimant's claim satisfies both of the above requirements.

The quantification of the claim is difficult but that is not a reason to deny it. The Board restricts compensation for the loss of enjoyment to the months when the Claimant would typically enjoy outdoor activities; May through October in 1997, and April through October in 1998. As for an economic measurement of the loss, Mr. Gettel estimated that the Claimant's residence would rent for \$750.00/month. A prospective renter would heavily discount the rent during construction. The Board awards the claimant \$7,800.00 for incidental damages based on a discount of 80% for 13 months.

(vii) and (viii) An Amount for Interest and Penalty Interest as provided for in Section 66 of the *Expropriation Act*; and present value of the claims for damages from March 11, 1997, to the date of this hearing calculated based on the average annual interest yields on 90 day Canada Treasury Bill;

The Board utilizes the average annual interest paid on 90 day Treasury Bills, compounded annually as the rate of interest and the means of calculating the present value of damages

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No penalty interest is awarded as the proposed payment of \$147,600.00 is more than 80% of the Board's award for market value and the reduction in market value of the residual lands. The Claimant is entitled to interest on the difference between the proposed payment and \$167,580.00 from March 11, 1997, to the date of payment.

Damages including the reduction in market value to the residual lands are to be present valued from the date they were incurred to the date of this award. Incidental damages awarded under s.56 of the *Act* are deemed to have been incurred at the rate of \$600.00 per month at the beginning of each month, for the period May to October 1997 and April to October 1998. The Claimant is entitled to interest on the present value of the damages from the date of the award, to the date of payment.

Either party may apply to the Board if there is a dispute regarding the calculation of interest or present value.

Summary of the Board's Award

The Board Hereby Orders as Follows;

The City shall pay to the Claimant:

- (i) \$167,580.00 for the market value of the expropriated lands and interest on the difference between the proposed payment and the Board's award from March 11, 1997 to the date of payment;

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- (ii) \$10,000.00 for the reduction in market value to the residual lands, present valued from March 11, 1997 to the date of the award;
- (iii) \$7,800.00 plus GST for the cost of finding replacement property, present valued from March 11, 1997 to the date of the award;
- (iv) \$7,800.00 for incidental damages present valued from the date they were incurred to the date of the award; and
- (v) interest on items (ii), (iii) and (iv) from the date of the award to the date of payment.

LAND COMPENSATION BOARD

S. S. Schumacher, Q.C., Presiding Member

Marilyn A. McAvoy, Member

J. Logan, Member