

SURFACE RIGHTS ACT
(hereinafter "the Act")

Before:

SURFACE RIGHTS BOARD
(hereinafter "the Board").

IN THE MATTER OF certain lands subject to a surface lease in Lot 4, Plan 9822408 (SE ¼-8-49-7-W5M), in the Province of Alberta (hereinafter referred to as "the said land"). Excepting thereout all Mines and Minerals.

B E T W E E N:

EXXONMOBIL CANADA ENERGY,

Operator,

- and -

WESTPOINT PROPERTIES INC.,

Lessor.

DECISION

Upon application by the Lessor for review of the rate of compensation payable in respect of a surface lease in the said land; and upon the Board being satisfied that conditions precedent to the application had been met; the Board held a hearing on the application on January 13, 2003, at Edmonton, Alberta.

PRESIDING BOARD:

- S. S. Schumacher, Q.C., Presiding Chairman
- W. D. Fisher
- J. E. Logan

APPEARANCES:

For the Operator:

- Mr. Peter L. Miller, with ExxonMobil Canada Energy, Legal Counsel;
- Mr. Elton J. Mather and Mr. Douglas C. Rowden, with ExxonMobil Canada Energy, Surface Land Representatives; and
- Mr. Don L. Hoover, AACI, P.Ag., C.M.C., with Serecon Valuation & Agricultural Consulting Inc.

For the Lessor:

- Mr. Dan Carroll, with the law firm Field Atkinson Perraton, Counsel;
- Ms. Rebecca Sober, with the law firm Field Atkinson Perraton, Student-at-law;
- Mr. Wayne MacKinnon, Director and Shareholder of Westpoint Properties Inc.; and
- Mr. Kevin Zeiner, AACI, of Shaske & Zeiner Appraisal Consultants Ltd.

EXHIBITS FOR IDENTIFICATION:

Exhibit A: Copy of the surface lease as filed with the application.

Exhibit B: Letter of Application dated July 19, 2002.

EXHIBITS FILED:

Exhibit 1: Lessor’s appraisal report.

Exhibit 2: Operator’s written submission.

Exhibit 3: Operator’s appraisal report.

Exhibit 4: Comparable map.

Exhibit numbers 1 and 4 were filed for the Lessor. Exhibit numbers 2 and 3 were filed for the Operator.

AGREED FACTS:

1. The surface lease bears the effective date of November 1, 1954, and shows the area occupied by the Operator to be 2.73 acres.
2. The purpose of the surface lease is for a battery site.
3. The surface lease provides for a rate of compensation of \$1,623.72 annually.
4. The effective date of review is November 1, 1999.

SUMMARY OF THE EVIDENCE:

Oath Waived

Lessor’s Evidence:

Mr. Carroll presented the case for the Lessor, calling on Mr. MacKinnon to outline the history and context of the subject lease, and Mr. Zeiner for an appraisal to support the Lessor’s request for compensation.

Mr. Carroll, on behalf of his client, requested that the rate of annual compensation under the subject Surface Lease be increased to \$32,023.00. He stated that after an analysis of all the factors, which affect the value of the subject property, that compensation payable to the owner as set out under Section 25(1) (c) of the Surface Rights Act would be as follows (Exhibit 1):

Compensation Payable Under Section 25(1)(c) — Loss of Use	\$24,570.00
Compensation Payable Under Section 25(1)(d) — Adverse Effect	
◆ Nuisance and Noise	\$ 1,900.00
◆ Non-usable Land	\$ 5,373.00
Total Compensation	\$32,023.00*

* The Board notes an error in calculation.

3.....

Mr. Carroll identified three main issues of contention between the parties:

Issue #1.

The parties disagree as to the per acre value of the subject property.

Issue #2.

The parties agree that compensation should amount to 10% of the value. However, the Lessor is seeking a 10% return whereas the Operator contends that various deductions must be made from this amount.

Issue #3.

The Lessor argues that he is entitled to compensation for a strip of land outside of the subject lease that is rendered undevelopable by the existence and physical location of the subject.

Mr. Carroll called upon Mr. MacKinnon, to provide the Board with background information.

Mr. MacKinnon confirmed that the owner of the subject is Westpoint Properties Inc. of which he is a shareholder and a director.

Mr. MacKinnon testified that the land containing the subject lease was purchased for subdivision and/or development in 1998. This parcel consists of 17.2 acres and is located within the Town of Drayton Valley. The subject lease comprising 2.73 acres is located within the 17.2 acre parcel (Exhibit 1, pages 9 and 17). The battery site (subject lease) was established in 1954.

Mr. MacKinnon testified that he is a Realtor with 21 years of experience and has lived in Drayton Valley since 1978. He stated that as a Realtor/developer he is experienced in farms, acreages, residential and commercial property sales and development.

Mr. MacKinnon noted that the 17.2 acre parcel was completely serviced at the time it was purchased.

Mr. MacKinnon stated that in the opinion of Mr. Keith Smith, a local surveyor, this land is as developable as that located across 50th Street to the east. Although the land located to the east features a higher elevation and slopes down to the west, and the 17.2 acre parcel containing the subject lease features an elevation lower than 50th Street and continues to slope to the west, the cost of developing these lands are the same. Moreover, Mr. MacKinnon asserted that unlike the property to the east, there will be no costs associated with excavation on his property. As well, both properties are zoned for commercial and/or light industrial development.

With respect to leasing commercial properties, Mr. MacKinnon testified that certain expenses incurred by a landowner are paid by the tenant under the terms of a triple net lease. These expenses include taxes, insurance, minor repairs and maintenance. Mr. MacKinnon noted that the triple net approach is typically applied to the leasing of commercial properties in Drayton Valley and is therefore applicable to the subject lease.

Mr. MacKinnon also stated that he is currently paying the property taxes for the subject lease.

Mr. MacKinnon drew the Board's attention to a strip of his land located along the east boundary of the lease (Exhibit 1, page 27). He argued that the subject lease renders this land unusable and is therefore seeking annual compensation in the amount of \$5,373.00 to offset his loss. Mr. MacKinnon also noted the existence of a strip of land located north of the unusable parcel is designated for use as a service road in any subsequent subdivision plan.

Mr. Carroll called upon Mr. Kevin Zeiner to present and make comment on his professional appraisal.

Mr. Zeiner directed the Board's attention to pages two and three of Exhibit 1, which

4.....

summarizes the methodology utilized to determine the annual compensation payable by the Operator to the Lessor under the Surface Rights Act.

Briefly, Mr. Zeiner indicated that compensation should be based on typical land lease rates for vacant land. Mr. Zeiner stated that vacant lands are leased on the basis of a percentage of the market value of the land. In this case, Mr. Zeiner noted that the generally accepted practice is to base an annual lease on 10% of market value and this is the rate utilized in his analysis.

The Direct Comparison Approach was used to arrive at a final estimate of \$90,000.00 per acre as the market value of the lands affected by the subject lease.

In regard to adverse effect, Mr. Zeiner stated that conditions have changed dramatically since the initial signing of the lease. The original lease occurred when the land was vacant farmland and the original compensation would have been based on those conditions. However, at present the lands are subdivided with potential for commercial development. The location of the existing lease renders a portion of the remaining site as undevelopable. Mr. Zeiner found this to be a form of injurious affection that must be taken into account in the Board's determination of compensation under the heading of adverse effect. The measurement of this effect would be on the basis of a land lease for the area affected which is estimated to contain 0.597 acres more or less.

In addition to the above calculated compensation, Mr. Zeiner found that normal noise and nuisance factors must be considered under adverse effect in the amount of \$1,900.00 per annum.

For the purpose of establishing a background, Mr. Zeiner referred the Board to Exhibit 1, pages 8, 9, 10, 12, 13, and 27. Together, this information established the location of the subject in the south central section of Drayton Valley at 3450 50th Street, its shape, dimensions, topography, services, present use, and its proximity to other commercial properties. Mr. Zeiner noted that in particular, land on 50th Street features commercial development including commercial strips, hotels, a funeral home and other businesses.

With respect to land use classification (Exhibit 1, page 10) Mr. Zeiner testified that the subject lands are designated as CMX (Commercial - Single Industrial) as set out by the Town of Drayton Valley's Land Use Bylaw. Mr. Zeiner referred the Board to Exhibit 1, pages 14 and 15 which sets out the general purpose of the CMX districting, a listing of permitted and discretionary uses, site coverage, height parameters, set backs, parcel sizes, general regulations, special provisions and design guidelines.

Mr. Zeiner referred the Board to Exhibit 1, page 18, which sets out his findings as to Highest and Best Use. In this case he found that the location of the subject lands sets the probable use of same. The subject site has frontage on 50th Street, which is a major north/south roadway. Development along 50th Street is commercial and hence, the front portion of the subject would be utilized for commercial purposes. The rear portion with frontage on the proposed Brougham Drive could be developed for commercial use but also has the possibility of being developed for an industrial use.

Mr. Zeiner proceeded to outline his estimate of land value through the direct comparison approach (Exhibit 1, pages 19 to 28).

Mr. Zeiner noted that the market value of the subject land must be determined in order to establish the appropriate land lease rate. As the subject is vacant land Mr. Zeiner stated that the annual lease rate should be calculated on the basis of 10% of its market value. Mr. Zeiner stated that his comparables are drawn from the sales of Commercial-Single Industrial parcels that reflect a commercial use because the battery site is located within the subject and would otherwise be developed to a higher commercial use.

Mr. Zeiner has chosen to place the greatest weight on those transactions which occurred most concurrent with the effective date of appraisal.

5.....

In considering the aspect of size Mr. Zeiner argued that although it is generally agreed that smaller parcels of land will most often sell at a higher per-unit value than will larger parcels, there are situations where this guideline does not apply. In particular, Mr. Zeiner asserted that the subject lands will be subdivided into smaller parcels similar to those located to the east across 50th Street. Therefore he has chosen not to consider any adjustment for size.

Mr. Zeiner went on to assert that the subject will “in all probability” be subdivided into smaller parcels. Therefore, adjustments were made in consideration of the likelihood of subdivision.

Mr. Zeiner directed the Board to Exhibit 1, pages 22 to 25 which provide the details, locations, adjustments, and adjusted valuations for seven selected comparables. What follows is a brief encapsulation of Mr. Zeiner’s analysis:

Comparable #1

Sale Date: April 1998
 Sale Price: \$270,000.00
 Land Use Classification: CMX
 Area: 2.18 acres
 Price Per Acre: \$123,853.00
 Adjusted Price Per Acre: \$86,697.00

Comparable #2

Sale Date: January 1999
 Sale Price: \$321,000.00
 Land Use Classification: CMX
 Area: 3.21 acres
 Price Per Acre: \$100,000.00
 Adjusted Price Per Acre: \$90,000.00

Comparable #3

Sale Date: July 2001
 Sale Price: \$150,000.00
 Land Use Classification: CMX
 Area: 1.5 acres
 Price Per Acre: \$100,000.00
 Adjusted Price Per Acre: \$90,000.00

Comparable #4

Sale Date: September 2001
 Sale Price: \$80,000.00
 Land Use Classification: CMX
 Area: 1.01 acres
 Price Per Acre: \$79,208.00
 Adjusted Price Per Acre: \$91,089.00

Comparable #5

Sale Date: January 1998
 Sale Price: \$200,000.00
 Land Use Classification: CMX
 Area: 2.02 acres
 Price Per Acre: \$99,010.00
 Adjusted Price Per Acre: \$89,109.00

Comparable #6

Sale Date: February 1997
 Sale Price: \$100,000.00
 Land Use Classification: CMX
 Area: 1.01 acres
 Price Per Acre: \$99,010.00
 Adjusted Price Per Acre: \$89,109.00

Comparable #7

Sale Date: August 2001
 Sale Price: \$280,000.00
 Land Use Classification: CMX
 Area: 2.72 acres
 Price Per Acre: \$102,941.00
 Adjusted Price Per Acre: \$92,647.00

With respect to adverse effect Mr. Zeiner directed the Board to Exhibit 1, pages 25 and 26. He stated that he was not able to locate comparable data for adverse effect in an urban setting. Therefore, given the location of the subject battery site in a currently undeveloped portion of the subject site, he is of the opinion that rural comparables could be used, with the probable compensation falling in the upper range. These comparables were drawn from the Marriot Report and ranged between \$1,408.00 and \$1,891.00. As compensation should fall in the upper end of the range Mr. Zeiner finds \$1,981.00 rounded to \$1,900.00 to be fair and reasonable compensation for adverse effect.

In addition Mr. Zeiner is of the opinion that the subject site is suffering from a form of injurious affection that has resulted in changes to the site by way of subdivision, as well as changes in zoning and subdivision potential. He argued that the original lease occurred when the land was

6.....

vacant farmland and the original compensation would have allowed for these conditions. Today, the lands are subdivided with commercial development potential. The location of the existing lease renders a portion of the remaining site as undevelopable and this is a for of injurious affection that must be taken into account in the determination of compensation payable to the owners. This would fall under adverse effect and would be calculated on the basis of a land lease for the area affected, calculated on the same basis as loss of use.

Mr. Zeiner has estimated that the area affected would contain 0.597 acres and the amount of the additional adverse effect or injurious affection would be calculated as follows:

$$0.597 \text{ acres @ } \$90,000.00 \text{ per acre} \times 10\% \text{ lease rate} = \$5,373.00$$

In his conclusion Mr. Zeiner found that the total annual compensation payable by the Operator to the Lessor is as follows:

Loss of Use	\$24,570.00
Adverse Effect:	
• Nuisance and Noise	\$ 1,900.00
• Non-usable Land	<u>\$ 5,373.00</u>
Total Compensation	\$32,023.00*

* The Board notes an error in calculation

Operator’s Evidence:

Mr. Peter L. Miller presented the case for the Operator, calling on Mr. Mather and Mr. Rowden to provide background and contextual evidence and Mr. Hoover to present the appraisal of the subject.

Mr. Mather advised the Board that the Operator had initiated this rental review for the purpose of establishing a fair rate for a number of leases in the Drayton Valley area. In regards to the subject, the Operator noted that past compensation had been based upon agricultural values but this approach was no longer suitable for the subject which is located within the Town of Drayton Valley. Mr. Mather testified that the problem of determining fair compensation for the subject is complex and largely without precedent. Mr. Mather also told the Board that the Operator had devised a fair approach with the assistance of Serecon Valuation & Agricultural Consulting Inc. As a result, 17 of a total of 22 in town leases have settled on the basis of Serecon’s appraisal and two other leases were settled prior to Serecon’s involvement.

Mr. Douglas Rowden presented the Operator’s position (Exhibit 2) to the Board.

In brief, the Operator has made an offer of annual compensation based on values provided by Serecon Valuation & Agricultural Consulting Inc. through their independent expert appraisal of the subject property. The Operator’s offer of annual compensation is as follows:

Loss of Use: 2.73 acres @ \$5,000.00 per acre.....	\$13,650.00
Adverse Effect	<u>\$ 2,500.00</u>
Total Annual Compensation	\$16,150.00

Mr. Rowden noted that the existing annual rental is \$1,623.72 and the resultant increase in the Operator’s offer is \$14,526.28.

Mr. Rowden presented the Board with a listing of 19 surface leases located within the Town of Drayton Valley (Exhibit 2, page 4). Compensation ranged between \$600.00 and \$21,600.00 per annum.

7.....

Mr. Rowden also testified that the subject land is presently used for agriculture and the current annual rental of \$1,623.72 reflects the current agricultural use of this land.

Mr. Rowden also told the Board that the Operator's facility on the subject is a satellite and not a battery. In essence, a satellite is not as busy, cleaner, quieter and has few installations than a battery.

At the outset, Mr. Rowden noted that Serecon had compiled its comparables from actual rental reviews rather than sales.

In reviewing the Operator's comparables, Mr. Rowden testified that the 2-8 site and the 8-8 site were considered to be the most cogent indicators of the value of the subject.

The 2-8 site contains 4.49 acres and is zoned CMX. Serecon's appraisal of loss of use is \$1,000.00 per acre, adverse effect is \$1,500.00, yielding a total annual compensation of \$5,990.00.

The 8-8 site contains 2.70 acres and is zoned CMX. Serecon's appraisal for loss of use is \$4,000.00 per acre, adverse effect is \$1,500.00, yielding a total annual compensation of \$12,300.00.

Appraiser's Evidence:

Mr. Hoover provided the Board with a brief overview of his written appraisal (Exhibit 3).

As a preliminary matter, Mr. Hoover stated that the 17.2 acres containing the subject lease is only usable if it is filled to bring the grade up to the existing on 50th Street to the east.

In referring to the table of comparables, Mr. Hoover stated that in his opinion the 8-17 and the 2-17 were more applicable to the subject lease.

The 8-17 contains 3.82 acres and is zoned for industrial use. The appraised loss of use is \$5,000.00 per acre, adverse effect is \$2,500.00 and indicates a total annual compensation of \$21,600.00.

The 2-17 contains 1.2 acres and is zoned for industrial use. The appraised loss of use is \$5,000.00 per acre, adverse effect is \$1,500.00 and indicates a total annual compensation of \$7,500.00.

With respect to the strip of land deemed to be undevelopable by the owner, Mr. Hoover asserted that any injurious affection arising from this issue had been dealt with at the original time of taking. Moreover, he stated that the Lessor accounted for the satellite installation and the associated severance of the strip of land along the east boundary of the subject lease in 1998 when he purchased the 17.2 acre property for \$22,000.00 per acre.

Mr. Hoover noted that the subject property is currently a holding property across the main street (50th Street) from commercial development. It is his opinion that the land would likely be developed for commercial purposes. Therefore, he believes that the loss of use and adverse effect would be based on the economic losses incurred on an annual basis with a commercial use as its highest and best use.

Loss of Use:

In his determination of loss of use, Mr. Hoover noted that he compiled rental rates for commercial land in Drayton Valley. As well, he compiled commercial rental rates in Edson and Whitecourt as they are similar sized urban centres with similar economic activity. The market value for commercial properties is determined so as to express the rental rates on a market value basis. Mr. Hoover stated that the market rental rates for commercial lands were compiled on a per acre basis and therefore a per acre annual rental rate was determined. This data will provide the annual loss of use on a per acre basis.

Mr. Hoover also stated that he utilized a standard formula used by real estate agents and

8.....

lessees of commercial bareland or land with minimal improvement and applied an expected interest return (10%) on the market value of the land. From this, he stated landowner expenses are deducted.

Mr. Hoover referred the Board to Section 6.3 of Exhibit 3, which sets out his comparables drawn from serviced commercial land sales. He found that sale prices for serviced commercial lots vary throughout the Town of Drayton Valley. There are two primary commercial roadways in Drayton Valley, 50th Avenue and 50th Street, as well as the junction on Highway #22. However, the mix between commercial and service or light industrial also has a bearing on land values. The ten sales analyzed provide a mix by these various areas and land use variations and therefore provide a range in values of \$40,540.00 to \$143,478.00 per acre. All sales occurred between 1997 and the present.

On the basis of his analysis, Mr. Hoover found that the market value for serviced commercial property within Drayton Valley is estimated to be from \$35,000.00 to \$143,000.00 per acre. The subject property is considered to have a value of \$50,000.00 per acre as at March 13, 2001.

Mr. Hoover outlined two approaches taken to determine the income potential for commercial bareland (Section 6.4, Exhibit 3). These are the actual rentals of commercial land and the formula or process used in the marketplace to arrive at a rental rate.

In his discussions with owners and others in the real estate business Mr. Hoover found that rental terms are short. Most estimated that the rental of the properties was temporary in nature and overall properties were rented on average 50% of the time.

Mr. Hoover testified he found gross commercial property rental rates in Drayton Valley, Edson, Whitecourt and Nisku to range from \$5,549.00 to \$11,613.00 per acre. This covers the range of properties from undeveloped, unserviced, to properties fenced and gravelled and with services.

Information obtained for the Nisku Industrial Park indicated rental rate from \$21,600.00 per year for a fenced, serviced, gravelled three acre site for equipment storage which was valued at \$100,000.00 per acre. This resulted in a gross rent of \$7,200.00 per acre per year, or a return of about 7.2%.

To arrive at a loss of use through this approach, the landowner expenses for property taxes, management fees, interest on operating costs, and any recovery (depreciation) of improvements would be deducted. These expenses can amount to \$2,000.00 to \$3,700.00 per acre.

Mr. Hoover found that overall, the estimated net return to bareland commercial properties ranges from \$3,500.00 to \$7,910.00 per acre depending on the extent of improvements and the location (value) of the property.

Mr. Hoover testified that his investigations have indicated that owners of commercial land in Drayton Valley, Edson, Whitecourt, and Nisku will rent these lands for 10% of the property value plus taxes. This is a standard "formula" for commercial bareland rental.

Mr. Hoover noted that the vacancy rate or conversely, the amount of time a property can be rented varies considerably. This variance is dependent upon local economic circumstances. The amount of time land is rented in the aforementioned areas varied from 40% to 80%. Mr. Hoover has chosen to apply a rental occupancy rate of 75% to his analysis.

The values determined by recent sales in Drayton Valley for serviced commercial land varied from \$40,540.00 to \$143,478.00 per acre. Applying a 7.5% (10.0% @ 75% occupancy) rate to this would produce a gross rental of \$3,790.00 to \$10,760.00 per acre.

Deducting expenses consisting of a management fee, interest on operating costs and recovery improvements (depreciation) which amounted to \$2,050.00 to \$3,700.00 per acre results in a net return to commercial bareland ranging from \$1,740.00 to \$7,060.00 per acre.

Mr. Hoover noted that his analyses resulted in a range of values for the net return to commercial bareland that fell between a low of \$1,740.00 per acre to a high of \$7,060.00 per acre

depending on the stage of development and/or the market value of the property. When expressed as a percentage of market value the return results in a range of 5.1% to 7.5%.

Given the specific characteristics of the subject, Mr. Hoover estimated that the applicable commercial bareland rental rate is \$5,000.00 per acre.

Adverse Effect:

Mr. Hoover stated that although it appears that there is no established pattern, compensation for adverse effect is minimal where the Highest and Best Use of adjacent land is industrial. Typical Surface Rights Board awards for adverse effect range from \$1,500.00 to \$1,700.00 per year on rural lands where there is no residential improvement.

As the compensation for adverse effect is subjective, Mr. Hoover stated that in his opinion compensation for adverse effect for lands with a commercial Highest and Best Use would fall in the range of \$1,500.00 to \$1,700.00 where there is minimal impact to a maximum of \$2,500.00 per well site and access road.

In the case of the subject property, Mr. Hoover asserted that in his opinion, adverse effect will fall in the upper range at \$2,500.00 per year.

Summary of Loss of Use and Adverse Effect

Loss of Use: 2.73 acres @ \$5,000.00 per acre.....	\$13,650.00
Adverse Effect	<u>\$ 2,500.00</u>
Total Annual Compensation	\$16,150.00

DETERMINATION OF COMPENSATION:

A rate of compensation must logically be presumed to compensate for those losses or damages which are of a recurring or continuing nature during the term of the lease. Generally, these include the loss of an area of productive land and the adverse effect, nuisance and inconvenience to the normal use and occupation of the remaining land.

As the Board was not privy to the initial fixing of the rate, it can only premise that what factors were considered by the parties on the execution of the lease are compatible with that now presented in evidence before the Board, subject of course to any changes in circumstances which may have occurred during the intervening period.

Under the provisions of the Act, consideration of a rate of compensation is to be given in respect of loss of use of the area granted (section 25(1)(c)), and the adverse effect, nuisance, inconvenience and noise arising or that might arise from the area granted and the operations conducted thereon (section 25(1)(d)).

The issue facing the Board is that of determining a fair and reasonable level of annual compensation payable by the Operator to the Landowner for the use of 2.73 acres located within the Town of Drayton Valley.

Upon conducting a review of the evidence presented by the parties the Board finds as follows:

Loss of Use:

Given the urban location of the subject, traditional methods for determining loss of use on agricultural lands are insufficient indicators of fair compensation. In this instance the parties have agreed that a fair method for determining fair compensation for loss of use is to consider the income potential from comparable commercial properties and apply this information to the circumstances at hand.

Upon examination, the Board has found that the parties differ significantly in their approach to determining the income potential of the subject lease. The Board however, finds the Operator's position to be more persuasive.

10.....

Both parties agreed that compensation should be based on typical land lease rates for vacant land. The parties also agree that vacant lands are leased on the basis of a percentage of their market value and in this case the parties agree that 10% of market value has been deemed as an acceptable rate.

Disagreements between the parties have arisen with respect to the market value of the subject land, adjustments for vacancy rates, and adjustments for landowner expenses including taxes, insurance, minor repairs and maintenance.

Market Value of the Subject Land:

The comparables presented by the Lessor ranged in size from 1.1 acres to 3.21 acres. In his report (Exhibit 1) Mr. Zeiner stated that although it generally agreed that smaller parcels of land will most often sell at a higher per unit value than will larger parcels, there are situations where this guideline does not apply. In particular, Mr. Zeiner argues that the 17.2 acre parcel containing the subject lease will be subdivided into smaller parcels similar to those located across 50th Street.

The Board chooses to disagree with Mr. Zeiner on the aforementioned issue. At present, the 17.2 acre property containing the subject lease has not been subdivided into parcels that are similar in size to the comparables cited by Mr. Zeiner in support of his determination.

Further, no application for subdivision has been made, no plans for subdividing the 17.2 acre parcel were submitted in evidence, and no mention has been made as to the expenses that will be incurred in the plan preparation, the approval process, preparing the site, and servicing individual parcels with power, water, sewer, drainage and access.

In light of these findings, the Board considers the Lessor's valuation of the 17.2 parcel to be speculative only. And therefore, the Board rejects Mr. Zeiner's per acre evaluation of \$90,000.00.

The Board finds the analysis presented for the Operator by Mr. Hoover to be more plausible in its methodology and findings. Mr. Hoover reviewed the sales of serviced commercial lots that were similar in size to those presented by Mr. Zeiner. However, because the comparables reviewed by Mr. Hoover were also subdivided into parcels that are significantly smaller than the 17.2 acre parcel containing the subject lease, the Board found these to pose the same difficulties as those presented by Mr. Zeiner. Simply stated, the sales comparables are not comparable to the subject.

Mr. Hoover's analysis of commercial bareland income (Exhibit 3, Section 6.4) provided the Board with the most cogent evidence upon which to base its determination of annual compensation for loss of use. Mr. Hoover found that bareland commercial properties ranged in annual rent on a per acre basis from \$3,500.00 to \$7,910.00 per acre depending on the extent of improvements and the location of the property. The Board found the example drawn from Nisku industrial park to be particularly persuasive. As the main hub of commercial/industrial activity in the Edmonton region, bareland in Nisku is likely to garner higher per acre rents and have a lower vacancy rate than Drayton Valley. Mr. Hoover's testimony in regards to Nisku indicated that a fenced, serviced, gravelled, three acre site for equipment storage would rent for \$21,600.00 per year. With a per acre value of \$100,000.00 this would result in a gross rental of \$7,200.00 per acre per year or a return of 7.2%.

The Board considers the Nisku comparable as a strong indicator that the Operator's offer of compensation for loss of use is fair.

The Board also agrees with Mr. Hoover that to arrive at a loss of use by taking this approach, landowner expenses for property taxes, management fees, interest on operating costs and any recovery (depreciation) of improvements can range between \$2,000.00 and \$3,700.00 per acre and must be deducted.

The Board accepts Mr. Hoover's findings as to the variability in vacancy rates which indicate that bare commercial lands are rented between 40% and 80% of the time they are available. Uses are transient in nature as opposed to rentals of properties with built facilities that tend to house more permanent business uses.

In formulating his conclusion, Mr. Hoover applied a 75% occupancy rate in his valuation of the income potential of the subject. The Board finds this to be generous.

In its findings, the Board is convinced that on the basis of Mr. Hoover's estimate, that the per

acre value of the 17.2 acres containing the subject lease in the amount of \$50,000.00 is fair and reasonable. Similarly, as net returns on rental ranged between 5.1% and 7.5%, Mr. Hoover's estimate of net return of \$5,000.00 or 10% market value is also fair and reasonable.

With respect to the 17.2 acre parcel containing the subject lease, the Board finds that although its zoning and location indicate development potential, this potential has yet to be realized. Further, the Board wishes to remind the Landowner that the opportunity for a future review is available in 2004 and if circumstances have changed the Board will take this into consideration.

Ultimately, due to significantly smaller sizes of the sales comparables presented by both parties and the fact that the 17.2 acre parcel containing the subject is not subdivided into small service lots, the Board is inclined to accept Mr. Hoover's valuation.

Therefore, for loss of use the Board finds that the Operator shall pay the Lessor on an annual basis as follows:

2.73 acres @ \$5,000.00 per acre.....\$13,650.00

Adverse Effect:

Based on his appraiser's findings, the Lessor has requested \$1,900.00 per annum for loss of use. The Operator's appraiser found that adverse effect will fall in the upper end of the range and has recommended an annual payment of \$2,500.00.

The Board finds no reason to vary the Operator's offer and so fixes annual payment for adverse effect in the amount of \$2,500.00.

Unusable Land:

The Lessor has argued that the location of the existing subject lease renders a portion of the remaining site undevelopable and is requesting additional compensation for adverse effect in the amount of \$5,373.00.

The Board disagrees with the Lessor. Firstly, the Board finds that any injurious affection arising from the location of the subject lease should have been considered at the original time of taking in 1954. As well, the Board finds that when the Lessor purchased the 17.2 acre parcel in 1998 for \$22,000.00 per acre it is reasonable to assume that the effect exerted by the subject lease on the developability of the rest of the property had been taken into account as a matter of prudence.

Summary of Loss of Use and Adverse Effect

Loss of Use: 2.73 acres @ \$5,000.00 per acre.....	\$13,650.00
Adverse Effect	<u>\$ 2,500.00</u>
Total amount payable by the Operator to the Lessor on an annual basis	\$16,150.00

On the relevant evidence heard, the Board finds a fair and adequate rate of compensation payable by the Operator under the Surface Lease, to be \$16,150.00 per annum, effective November 1, 1999.

An Order will issue varying the rate of compensation payable under the Surface Lease from \$1,623.72 to \$16,150.00 per annum, effective November 1, 1999, and payable on that date in each year thereafter unless and until varied by a further review.

INTEREST:

The Lessor initiated the proceedings for review by letter dated July 19, 2002.

Under Section 27(15)(c), the Board may make an order regarding the payment of interest that

it considers appropriate. The Board considers the Bank of Canada rate on the due date of the rental payment to be appropriate interest on the balance of annual compensation due. In the years 1999 to 2002, the bank rates were as follows:

November 1, 1999.....4.75%,
November 1, 2000.....6.00%,
November 1, 2001.....3.00%, and
November 1, 2002.....3.00%,

COSTS:

In considering costs, it is the Board’s opinion that the fundamental principle in fixing costs is that a party entitled to an award of costs is entitled to be reimbursed for any reasonable costs reasonably incurred in and incidental to the proceedings before the Board, and necessary to the determination of fair compensation payable for that which gave rise to the proceedings.

The Lessor claimed costs in the amount of \$9,953.05 and provided a detailed breakdown of same. Of this total, Solicitor costs amounted to \$5,585.94, Appraiser costs amounted to \$3,327.11, and the Lessor’s claim in the amount of \$1,040.00 for preparing for, travelling to, and attending the hearing.

The Operator argued that it is not proper for the Board to award a claim of this size as it is clearly excessive and moves this type of proceeding into a whole new dimension.

The Respondent argued that the circumstances surrounding this hearing are not ordinary. As the subject lease is located in an urban setting this case involves the application of new principles and is in effect a test case with correspondingly high legal and appraisal expenses.

The Board, having considered the above comments, hereby awards costs to the Lessor in the amount of \$7,500.00 and fixes same.

Legal Costs	\$4,000.00
Appraisal	\$2,500.00
Personal.....	<u>\$1,000.00</u>
	<u>\$7,500.00</u>

Dated at the City of Edmonton in the Province of Alberta this 24th day of April, 2003.

SURFACE RIGHTS BOARD

CHAIR