

SURFACE RIGHTS ACT
RSA 2000
Chapter S-24
(hereinafter "the Act")

Before:

SURFACE RIGHTS BOARD
(hereinafter "the Board").

IN THE MATTER OF certain lands subject to a surface lease (L.S. 12-35 well site and roadway lease) in the North West Quarter of Section 35, Township 62, Range 2, West of the 4th Meridian, in the Province of Alberta, as described in Certificate of Title No. 012 163 597 (hereinafter referred to as "the said land").

Excepting thereout all Mines and Minerals.

B E T W E E N:

PARAMOUNT ENERGY OPERATING CORP.,

Operator,

- and -

RED FOX DEVELOPMENTS LTD.,
507752 ALBERTA LTD.

and

273293 ALBERTA LTD.,

Lessor.

D E C I S I O N

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 October 13, 2005, at Bonnyville, Alberta.

The Board inspected the area subject to the said lease on October 12, 2005.

PRESIDING BOARD:

- W. D. Fisher, Presiding Chair
- R. G. Pollock
- C. W. Downey

APPEARANCES:

For the Operator:

- Bonnie L. Jones, Surface Land Representative, with Paramount Energy Operating Corp.;
- John Gruber, with the law firm Thackray Burgess, Legal Counsel; and
- Ivan T. Weleschuk, P.Ag., A.R.A., of Berrien Associates Ltd.

For the Lessor:

- Wayne H. Kowalski, Q.C., with the law firm Kowalski & Company, Legal Counsel; and
- G. L. Gehlen, AACI, P.App., of Border City Appraisal Services Ltd.

EXHIBITS FOR IDENTIFICATION:

- Exhibit A: Copy of the surface lease dated November 9, 1994, as filed with the application.
Exhibit B: Application for review by a letter dated November 17, 2004.

EXHIBITS FILED:

- Exhibit 1: Surface Lease Amending Agreement.
Exhibit 2: Aerial Photo.
Exhibit 3: Area Overview Plan.
Exhibit 4: Border City Appraisal Services Ltd. Report.
Exhibit 5: Package of documents relating to the subject well site.
Exhibit 6: Berrien Associates Ltd. Report.
Exhibit 7: Area Overview Plan.
Exhibit 8: Page from the Southeast Area Structure Plan.
Exhibit 9: Copy of a Reclamation Certificate submitted by legal counsel for the Operator and received by fax at the Board Office October 14, 2005 as consented to by all parties at the hearing.

Exhibit numbers 1, 2, 3 and 4 were filed for the Lessor. Exhibit numbers 5 to 9, inclusive, were filed for the Operator.

AGREED FACTS:

1. The surface lease bears the effective date of November 9, 1994, and shows the original area occupied by the Operator to be 4.29 acres. Reclamation certificate and an amending agreement have since changed the acres to 2.52 as of the effective date.
2. The purpose of the surface lease is for a well site and access road.
3. The surface lease provides for a current rate of compensation of \$1,233.00 annually.
4. The Lessor has requested the rate of compensation be increased to \$100,000.00 annually.
5. The effective date of this review is November 9, 2004.

SUMMARY OF THE EVIDENCE:

The hearing was called to order at 9:30 a.m. Introductions were made, hearing procedures were outlined and the oath was administered to those giving evidence.

Lessor's Evidence:

Wayne H. Kowalski, representing the Lessor, began by presenting Exhibit 1, the Surface Lease Amending Agreement. That amendment and the attached plan shows the reduction of the lease area as a result of reclamation of the original access road and providing access from the new municipal road which was part of the commercial subdivision approved by the Town of Cold Lake and constructed by the Lessor.

3.....

With Exhibit 2, the aerial photo of the area, Mr. Kowalski noted the significant development in the area of the lease in recent years. Exhibit 3 further shows the development pressures on the lands in the area. Lots 1 to 4 have been zoned highway commercial and have been sold and developed. Mr. Kowalski, went on to say that the large site directly to the north of the subject well site was tentatively sold to Wal-Mart, and that sale was almost lost because the Operator would not remove the caveat from that unaffected portion of the lands. Likewise a sale to Tim Horton's on Lot 6 was also held in jeopardy for a lengthy period. Under pressure to have the well site caveats removed from those unaffected lands and to allow the creation of those parcels so they could be sold, the Lessor agreed to the Operator's reduction of the compensation.

Mr. Kowalski continued by saying the caveats were not actually removed from the unaffected lands until February 7, 2004. In April of 2004 the Operator informed the Lessor that they were going to be abandoning the well entirely.

Mr. Kowalski then referred to Exhibit 4, the Border City Appraisal report and he asked Mr. Gerry Gehlen to comment.

In summary he said:

In summary, the Cold Lake market is seen to be very strong at present- this is particularly true for residential commercial/service/retail developments and less so for industrial.

And

On a city-wide basis, demand for developable residential and commercial land is very strong at present. For commercial land this is particularly true for land fronting to highway #28 and/or near the Wal-Mart development. -very near the subject.

Mr. Gehlen then referred to the comparables section of his report. The 13 comparables vary in size from 0.2+ acres to 40.29 acres and prices between \$3,102.50 to \$550,000.00 per acre. Two of these are still for sale.

Mr. Gehlen's conclusion is that, in his opinion, the subject 37.1+ acre parcel value on the market would be \$1,000,000.00 or slightly less than \$30,000.00 per acre.

Operators Evidence:

Bonnie L. Jones, Surface Land Representative, Paramount Energy Operating Corp., presented Exhibit 5 and noted from the "Daily Completion / Workover Reports" included, that the well abandonment had been started on October 5, 2004 with the down hole work being completed by November 26, 2004. A Reclamation Certificate was applied for and the office received it on February 7, 2005, (Reclamation Certificate No. 216800-00-00).

Bonnie L. Jones then presented Exhibit 6, the Berrien report, and had Ivan Weleschuk highlight the findings in the report. He first noted that the original lease area was 4.29 acres and was reduced to 2.52 acres with the realignment of the access road. The subject well site is part of the unsubdivided remainder of the quarter being 37.11 acres, the other portions of the lands have been subdivided out and some of them are developed as commercial or highway commercial properties. The subject property is currently zoned urban reserve and the City considers amendments to that zoning as development applications are received. Mr. Weleschuk stated that in his opinion there appears to be ample lands of this type available in the area and these lands would be considered a "holding property" and would not reach the highest and best use for a period of at least five to ten years.

4.....

Mr. Weleschuk then discussed the comparable listings and sales in the report, his conclusions were that based on the information contained the smaller properties with good highway exposure and immediate development prospects are currently selling in the \$200,000.00+/- range and undeveloped property with good highway exposure in the 7-12 acre size is listing at \$58,500.00 to \$99,860.00 per acre. Mr. Weleschuk considers the subject property as considerably inferior to most of the comparables, especially relative to highway exposure and therefore suggests a value of the subject lands at less than \$50,000.00 per acre.

Mr. Weleschuk also offered the opinion that the lands should be considered as "Non-Occupied Lease Under Reclamation" because the physical facilities have been removed and are no longer creating a loss of use or nuisances therefore only a nominal compensation should be considered. On agricultural lands this nominal compensation has been in the order of \$100.00 per acre.

In conclusion, based on his observed use of the subject property, he does not see any loss of use or nuisances associated with the lease site and further because to the planning issues, he does not believe the existence of the lease on the title, as of the effective date, would have frustrated any potential property sale or prospective land uses. Considering the previous rental was \$1,266.67 per year with facilities on site. On that basis he concludes that an appropriate nominal rental should be \$1,000.00 per year.

Responding to a question from the Board the Operator committed to provide a copy of the Partial Reclamation Certificate for the reduction in the total acres because of the well site amendment in 2002 regarding the new access road.

FINDINGS OF FACT:

Reclamation Certificate No. 00175-486-00-00 issued on August 13, 2002, reclaimed the original access road comprising of 1.82 acres.

Surface Lease Amending Agreement dated March 11, 2002, covering the existing well site area (2.47) and a new access road area covering .05 acres.

Reclamation Certificate No. 0211401 issued on February 7, 2005, reclaimed the well site area covering 2.47 acres.

The subject and adjacent lands are currently used as commercial development and holding for future residential/commercial development.

The Lessor does not reside on the said land.

Under the provisions of the *Act*, the review herein is to become effective November 9, 2004.

The caveat on the Certificate of Title was discharged on February 7, 2004.

DETERMINATION OF COMPENSATION:

An annual 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.

Under the provisions of the *Act*, consideration for the review of the rate of compensation (section 27) 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)).

5.....

Loss of Use of the Area Granted:

Any award for loss of the productive use of the demised premises should reflect the returns reasonably expectable from that area over the short term and having regard to the type of uses being conducted on the remainder of the said land.

The Board has heard the comments of the Operator in that they have removed facilities from the lands. The Lessor has presented much evidence as to the market value of the subject but little to the question of loss of use. The Board will remind the Lessor that market value of the subject lands is not a factor in determining compensation for the review of compensation (section 27).

In evidence it noted the use of the site for soil storage, for what purpose and by whom was not provided. It does seem apparent from the photos and other evidence that the Operator's activities on site have been minimal in the past few years excepting for the reclamation work that was done this past year. It is clear the lands in the area are in transition to a more intensive residential or commercial use and the current reclamation work seems timely in anticipation of other higher and better uses on the horizon.

Adverse Effect on the Remaining Land:

The Board considers this to include the inconvenience to normal landowner activities in the vicinity of the demised premises and to account for problems which may arise from such things as trespass, perceived negative visual and other effects or unattended weed infestations encroaching off the demised premises etc.

The Board heard the Lessor's statements regarding delays in considering a partial discharge of caveats by the Operator and the difficulties that presented with prospective sales in the past. However there didn't appear to be other evidence of adverse effect or nuisances.

Having considered the relevant evidence in respect of the factors of loss of use, adverse effect, the Board finds a fair and adequate rate of compensation payable by the Operator under the surface lease to be \$5,000.00 per annum, effective November 9, 2004.

The Board acknowledged that a reclamation certificate was issued to the Operator on February 10, 2005, for the well site area. The Board will note that a small portion (0.05 acres) of the access road was not included in either of the reclamation certificates for which the Operator is still responsible for.

An Order will issue varying the rate of compensation payable under the Surface Lease from \$1,233.00 to \$5,000.00 per annum, effective November 9, 2004, and payable on that date in each year thereafter, unless and until varied by a further review.

INTEREST:

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. On November 9, 2004, the Bank rate was 2.75% and on November 9, 2005, the Bank rate was 3.25%.

COSTS:

In considering the matter of costs, it is the Board's opinion that only such costs as are reasonably incurred in or incidental to proceedings before the Board are costs as may be contemplated by section 39 in connection with proceedings under the *Act*.

Mr. Kowalski, representing the Lessor, submitted a claim for costs as follows:

6.....

The Border City Appraisal Report.....	\$1,400.00
Appearance by the Lessor.....	<u>\$1,000.00</u>
Total	\$2,400.00

Ms. Jones, for the Operator, said she has no objection to the costs claimed.

The Board will accept the cost claim as fair and reasonable and so fixes.

Dated at the City of Edmonton in the Province of Alberta this 9th day of January, 2006.

SURFACE RIGHTS BOARD

MEMBER