File No. SL2009.0254 Decision No. 2011/0203

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

Before:

SURFACE RIGHTS BOARD
(the "Board").

IN THE MATTER OF certain lands subject to a surface lease in the Province of Alberta described as the W ½, Sec. 7, Twp. 43, Rge. 25, W4M (the "Lands").

B E T W E E N:

CANADIAN NATURAL RESOURCES LIMITED,

Operator,

- and -

ALFRED LAWRENCE BREITKREUZ,
LINDA MARIE BREITKREUZ
and
RENEWABLE IDEAS INC.,

Lessors.

On June 16, 2011, the text on page 12 was corrected by inserting "6" between "April" and "2011" in the sentence before the signature.

DECISION

PRESIDING PANEL

D. A. Sibbald, Q. C., Presiding Chair (the Panel)

APPEARANCES

For the Operator: Rod Scoville and Lance Schelske of Canadian Natural Resources Limited

For the Lessors: Alfred Lawrence Breitkreuz, Lessor
Jim O'Keefe of Renewable Ideas Ltd.

1.0 BACKGROUND

The Lessors Alfred Lawrence and Linda Marie Breitkreuz ("Breitkreuz or the "Lessors") applied to the Board pursuant to Section 27 of the *Act* for a review and determination of the rate of compensation payable under an Alberta Surface Lease, dated May 31, 2000 (the "Lease").

The Lease is for a well site and access road which covers a total of 7.31 acres on the land described above. The Breitkreuzs are the owners of a 3.62 acre portion of the leased lands located in the southwest quarter. The remaining leased lands are in the northwest quarter and are owned by Renewable Ideas Inc. (Renewable).

The Operator, Canadian Natural Resources Limited (CNRL), and Renewable reached an agreement on the annual rate of compensation under the Lease for the portion of the lease lands owned by Renewable.

Through the dispute resolution prehearing process, it was agreed that a hearing would be held to determine the annual rate of compensation payable for the portion of the leased lands on the

southwest quarter. In accordance with Section 27(11) of the *Act*, the Board convened a hearing at Red Deer, Alberta, on January 25, 2011.

The parties agreed that the effective date for this determination is May 31, 2010.

2.0 EXHIBITS

The following exhibits were filed at the hearing:

1. Application under Section 27 with the appended June 2, 2009, letter from CNRL re review of annual compensation, Alberta Surface Lease dated May 31, 2000, and Assignment of Lessor's Interest, dated May 10, 2001 ;
2. Subdivision layout as submitted to Ponoka County;
3. Subdivision layout as approved;
4. Contour map;
5. November 29, 2010, email with Royal Lepage Listing for 1 Country Ridge Lane;
6. Summary prepared by Alfred Breitkreuz;
7. June 4, 2009, letter from Ponoka County;
8. Appraisal report of Walters Mackie Valuations Inc.;
9. Restrictive covenant, dated January 25, 2010;
10. CNRL submission and documents; and
11. Agreements for CNRL comparables and certificates of title for subdivided lands.

Exhibit 1 was filed by the Panel. Exhibits 2 through 9 were filed on behalf of the Lessors. Exhibits 10 and 11 were filed on behalf of CNRL.

3.0 PRELIMINARY ISSUE

3.1 Background to Preliminary Issue

The day after the hearing, Alfred Breitkreuz made a written request to the Board to make additional submissions with respect to two matters. First, he requested the opportunity to provide documentary information concerning comparable listings and sales of property which he had disclosed to CNRL but misplaced at the hearing. Secondly, he asked permission to submit photographs and a topographical map of one of the comparables presented by CNRL at the hearing. He submitted that he had been surprised by CNRL's submissions at the hearing concerning this comparable.

Mr. Breitkreuz' request was provided to CNRL who responded in writing on February 4, 2011 by saying they did not object to the first request but objected to the second request. CNRL maintained that the Surface lease and survey of the comparable in question had been provided to Mr. Breitkreuz as part of CNRL's pre-hearing disclosure package and as such so no reason for further information concerning the comparable should be admitted.

Mr. Breitkreuz provided a further written submission on February 7, 2011 in response to CNRL's position. He maintained that the information about this comparable was first provided to him at the hearing and requested that not only that information but the second binder, which was marked as an exhibit at the hearing, be stricken from the record in its entirety. He then stated: in light of the above request, I am withdrawing my previous request to submit additional information even though CNRL had received it prior to the disclosure deadline.

3.2 Preliminary Issue to be Decided

Should the Panel remove from the record documentation which was entered as an exhibit at the hearing?

3.3 Decision on Preliminary Issue

The request to have evidence admitted at the hearing removed from the record is denied.

3.4 Analysis of Preliminary Issue

It was determined during the course of the hearing that CNRL intended to submit some documentation which had not previously been disclosed. Mr. Breitkreuz was provided with the opportunity to review that information and confirmed that he was not taken by surprise by any of it and did not object to the documents being entered as exhibits.

As part of the prehearing disclose, CNRL provided Mr. Breitkreuz with a binder containing the surface leases and survey plans for the sites it intended to rely on as comparables. At the hearing there was some question if the documents for one of those sites had been included. This is the comparable which is the subject of Mr. Breitkreuz concern. It was ultimately determined that the documentation was included, and CNRL provided some information concerning the site. Mr. Breitkreuz cross-examined CNRL about the site. He spoke about the site and was clearly familiar with it. At no time during the hearing did Mr. Breitkreuz express any concern about a lack of notice that CNRL would provide evidence about that site nor did he object to the use of the documentation.

Extraordinary circumstances would be necessary to direct that evidence which was admitted at a hearing be removed from the record after the hearing. No such circumstances exist in the present case; therefore, the request is denied. Since Mr. Breitkreuz has withdrawn his request to submit other information, the Panel will proceed to consider the evidence as submitted at the hearing.

4.0 THE PARTIES' KEY SUBMISSIONS AND POSITIONS

4.1 The Lessors

The central submission of Alfred Lawrence Breitkreuz is that there is a loss of development potential because of the presence of the wellsite and access road (the Site). He maintains that the presence of the Site results in a reduction of the number of lots that can be developed for sale and thus a loss of revenue. An annual rate of compensation of $18,100.00 was proposed.

4.2 CNRL

It was acknowledged that some of the land in the southwest quarter owned by the Breitkreuzs has been subdivided and is currently being developed as acreage lots. CNRL submits that the land adjacent to the Site continues to be used for agricultural production and that compensation should be based on that use. It was argued that any loss of development revenue because of the Site has not yet been incurred. CNRL proposed that the annual rate of compensation should be $3,800.00 based on loss of use at $400.00 per acre for 3.62 acres and adverse effect of $2,358.00.

5.0 ISSUES

5.1 What is the rate of compensation?

5.1.1 Was a pattern of dealings applicable to the rate of compensation established?

5.1.2 If no applicable pattern was established, what compensation is payable under Sections 25(1)(c) and (d) of the Act?

5.2 What, if any, interest should be awarded?

5.3 What, if any, costs are payable?

6.0 RELEVANT LEGISLATION

The relevant provisions of the Act are as follows:

Determining compensation

25(1) *The Board, in determining the amount of compensation payable, may consider, …*

(c) the loss of use by the owner or occupant of the area granted to the operator

(d) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator,

Review of rate of Compensation

27(1) *In this section,*

(a) "lessor" means a party to a surface lease who is entitled to receive compensation under that surface lease;

(b) "operator" means an operator who is obligated to pay compensation under a surface lease to a lessor, or who is obligated to pay compensation under a compensation order to a respondent;

(c) "parties" means,

(i) with respect to the review or fixing of a rate of compensation under a surface lease, the operator and the lessor, and

(ii) with respect to the review or fixing of a rate of compensation under a right of entry order, the operator and the respondent;

(d) "rate of compensation" means the amount of compensation payable on an annual or other periodic basis under a surface lease or compensation order in respect of the matters referred to in section 25(1)(c) and (d).

(2) *For the purposes of this section,*

(a) the term of a compensation order shall be computed from the date the original right of entry order to which it relates was made, and

(b) the term of a surface lease shall be computed from the effective date of the lease.

(3) *This section applies to compensation orders and surface leases*

(a) that provide for the payment of compensation on an annual or other periodic basis, or

(b) that do not provide for the payment of compensation on an annual or other periodic basis but relate to major power transmission line structures as defined or designated in the regulations.

(4) *An operator shall give a notice to the lessor or respondent, as the case may be,*

(a) on or within 30 days after the 4th anniversary of the date the term of the surface lease commenced or the right of entry order was made, as the case may be, where the term of the surface lease commenced or the right of entry order was made on or after July 1, 1983, or

(b) where the term of the surface lease commenced or the right of entry order was made before July 1, 1983, on or within 30 days after July 1, 1987.

(5) *A notice under subsection (4) shall state*

(a) that the operator wishes to have the rate of compensation reviewed,

(b) that the lessor or respondent, as the case may be, has a right to have the rate of compensation reviewed, or

(c) where no rate of compensation has been fixed, that the lessor or respondent, as the case may be, has a right to have a rate of annual compensation fixed,

in respect of the compensation years of the term subsequent to the year in which notice is given.

(6) *If either party indicates pursuant to a notice under subsection (4) that that party wishes to have the rate of compensation reviewed or fixed, the parties shall enter into negotiations in good faith for this purpose.*

(7) *When the parties agree on a rate of compensation*

(a) under a surface lease, the parties shall amend the lease in accordance with their agreement or enter into a new lease, and

(b) under a compensation order, the parties shall notify the Board in writing of the rate agreed on and the Board shall vary the compensation order accordingly.

(8) *If, by the end of the compensation year in which the notice is given, the parties cannot agree on a rate of compensation, the party desiring to have the rate of compensation reviewed or fixed may make an application to the Board for a hearing to determine the rate of compensation.*

(9) *An application pursuant to subsection (8) shall set out*

(a) the name and address of the operator,

(b) the name and address of the lessor or respondent, as the case may be,

(c) the rate of compensation under the surface lease or compensation order, and

(d) the amount the applicant believes to be a reasonable and fair rate of compensation,

and the application shall be accompanied with a copy of the surface lease, if applicable, and any other documents or material the applicant considers to be relevant to the application.

(9.1) *The Board may by notice in writing require an applicant to provide any additional information that the Board considers necessary for its proceedings by the time specified in the notice.*

(10) *Repealed 2009 c31 s11*

(11) *The Board shall hear the application and, as soon as it is convenient afterwards, shall make an order fixing, confirming or varying the rate of compensation payable commencing on the anniversary date of the surface lease or compensation order, as the case may be, next following the date notice was given under subsection (4).*

(12) *An order under subsection (11) may be appealed as though it were a compensation order under section 23.*

(13) *With respect to the review or fixing of a rate of compensation under a surface lease, when the Board makes an order varying or fixing the rate of compensation, the order operates to amend the surface lease in respect of the rate of compensation under it, notwithstanding anything contained in the surface lease.*

(14) *The operator shall give a notice that complies with subsection (5) to the other party on or within 30 days after every 5th anniversary date after the date notice should have been given under subsection (4) for as long as the surface lease or right of entry order, as the case may be, is in effect and subsections (6) to (13) apply to that notice.*

(15) *If the operator fails to give a notice required by subsection (4) or (14), the lessor or respondent, as the case may be, may within a reasonable time after the failure, give a notice to the operator stating that the lessor or respondent wishes to have the rate of compensation reviewed or fixed and in that case*

(a) subsections (6) to (13) apply,

(b) the Board may, notwithstanding subsection (11), make its order as to the rate of compensation effective from the same date it would have been effective if the operator had given notice as required by subsection (4) or (14), and

(c) the Board may make any order regarding the payment of interest that it considers appropriate.

Costs

39(1) *The costs of and incidental to proceedings under this Act are in the discretion of the Board.*

7.0 DECISION

7.1 The annual rate of compensation payable under the Lease for that portion of the leased lands on the lands legally described as Plan 022-1147 Lot 1, Block 1 effective (SW-7-43-25-W4M) as of May 31, 2010 is $4,308.00.

7.2 No interest is awarded.

7.3 Costs totaling $1,500.00 are payable to Alfred Lawrence Breitkreuz and Linda Marie Breitkreuz, jointly .

8.0 ANALYSIS

8.1 Factual Overview

The Lands are located approximately 1.1 kilometers northwest of Ponoka, Alberta, in Ponoka County.

The Panel accepts the evidence of Mr. Breitkreuz that when he and his wife acquired the southwest quarter, they did so with the intention of developing country residential sites on that property. He had previously developed properties in the city of Lacombe as well as both Lacombe and Ponoka counties.

The precise dates of the events leading to that acquisition are not clear. The Panel accepts Mr. Breitkreuzs' evidence that the wellsite was not on the land when the offer to purchase was made. Prior to closing, however, it was disclosed to him by the vendor that a wellsite was going to be constructed on the northern portion of the southwest quarter. In spite of that knowledge, no change was made in the amount of the offer. Mr. Breitkreuz acknowledged that the northern portion was a part of the southwest quarter on which he planned to pursue the residential development. He stated that the southeast part of the quarter could not be developed because of the presence of a lake which can be seen in the aerial photo on the fourth page of Exhibit 8.

As noted above, the Lease is dated May 31, 2000, and the certificates of title in Exhibits 8 and 11 provide evidence of a caveat for a surface lease with CNRL being registered on July 5, 2000.

The original Lessor under the Lease was Patricia King Hill, and she assigned her interest in the Lease to the Breitkreuzs as the new registered owners by an agreement dated May 10, 2001 (Exhibit 1).

While it is not clear that the precise location and dimensions of the wellsite were known by the Breitkreuzs when they acquired the property, the Panel finds that they knew that the well was going to be constructed in an area where they intended to attempt to develop country residential properties.

The southwest quarter was divided into two more or less equal parcels after the acquisition by the Breitkreuzs. The certificates of title at Schedule 2 to Exhibit 8 reference registration of that division on March 8, 2002. The Lease is on the northern portion legally described as Plan 022-1147 Lot 1, Block 1.

Mr. Breitkreuz testified that the southwest quarter was zoned for agricultural use when he and his wife purchased it but was reclassified as country residential district by Ponoka County in the spring of 2009. After the rezoning, an application was made to subdivide out 36 parcels for lots in the northwest part of the quarter on both of the divided parcels. The lot layout plan (Exhibit 2) that Breitkreuz testified was submitted with the application indicates that it was intended that a total of 28 lots would be developed.

The approving authority rejected that layout but approved, subject to certain conditions, a revised layout with a total of 33 lots (Exhibit 3).

Mr. Breitkreuz testified he intended to proceed with development in two phases. The subdivision of 21separate lots in phase 1 (Exhibit 3) was registered on title on March 2, 2010 (Exhibit 11).These lots are all on the western side of the land. Mr. Breitkreuz testified that development of phase 1 has proceeded with the installation of services and lots being listed for sale. To date, one lot has sold. Phase 2 development, which is in the northern section and closer to the well site (Exhibit 3), has not started but is planned to commence in the spring of 2011.

The land in the area adjacent to the wellsite continues to be used for agricultural production. The only evidence of the crops produced is referred to in Exhibit 10 as a mix of brome and alfalfa hay and hay production (pages 1 and 3).

As described in Exhibit 10, the wellsite access road enters Plan 022-1147 Lot 1, Block 1 from the north and runs straight south approximately 125 meters to the wellsite. Both the road and wellsite are surrounded by barbed-wire fencing. There is a meter shack and a 50 bbl. tank on the site. The site is inspected daily by a field operator in a pickup truck. Approximately once a month, a tank truck is used to remove produced water.

8.2 Rate of Compensation

8.2.1 Pattern of Dealings

The first step in determining the rate of compensation payable under a surface lease is to consider if the evidence establishes that "there are such a number of deals established so that it may be said that a pattern has been established by negotiation between the landowners and oil companies in a district" (*Livingston v. Siebens Oil & Gas Ltd.* (1978), 8 A.R. 439 (C.A.) at para. 11).

CNRL presented evidence of compensation paid under 51 surface leases on land within approximately 17 miles of the wellsite. It was not specifically submitted that these agreements supported a pattern of dealings but rather that they provide good guidance as to what compensation rates are for the area. (Exhibit 10 at page 5)

The Panel finds that no applicable pattern of dealings was established. The basis for that conclusion is threefold:

a. While the surface leases were provided, little information was provided about the lands under lease, the use to which the land is put, or the wellsites. A table summarizing some information was included at Tab 8 of Exhibit 10, but simply describing the land use as hay or cultivated and the well type as single well, single well and access road or home quarter is of little assistance in determining the similarity of the sites to the subject site.

b. There is a lack of information as to when the agreement on compensation relied upon was made. Although the date of the original surface lease is known, the compensation relied upon was said to be the current rate, but when that rate was established was not disclosed.

c. The compensation relied upon falls within a relatively wide range:

   - Adverse effect from $1,265.00 to $2,630.00
   - Loss of use from $200.00 to $400.00 per acre.

8.2.2 Compensation for Loss of Use and Adverse Effect

Consideration was then given to each of the two components set out in Section 25(1)(c) and (d) of the *Act* of the rate of compensation defined in Section 27(1)(d) of the *Act*. They are typically referred to as loss of use and adverse effect.

Loss of use is "the loss of use by the owner or operator of the area granted to the operator." (Section 25(1)(c) of the *Act*)

Adverse effect is made up of two components: tangible and intangible. The tangible component typically relates to the adverse effect of the area granted to the operator on the remaining land and the intangible component relates to the nuisance, noise and inconvenience associated with the operator's activities. (Section 25(1)(d) of the Act)

8.2.3 Analysis of Breitkreuzs'Position

Mr. Breitkreuz presented a loss of use calculation totaling $74,970.00 and adverse effect of $10,000.00 (Exhibit 6). He proposed that the annual rate of compensation should be $18,100.00 but testified that that amount was not based on any portion of the loss of use or adverse effect he presented but rather was a reasonable amount.

The loss of use amount was calculated as follows:

a. There are currently 21 lots under development in phase 1.
b. The list price per lot (Exhibit 5) is $129,900.00
c. The expected revenue from the 21 lots is $2,727,900.00
d. The costs of developing (electrical & engineering, road work, ATCO gas, Fortis, misc. costs and Bemoco) phase 1 total $228,000.00
e. The net profit per lot will be $119,000.00.
f. A reduction by seven of the number lots that could be developed due to the wellsite and road.
g. Lost net profit from the reduced number of lots is $833,000.00
h. Based on a 9 per cent rate-of-return, the loss of use is $74,970.00

No mathematical or other basis for the $10,000.00 proposed for adverse effect was provided.

The Panel rejects this approach to quantifying the rate of compensation on several grounds.

First, this approach is, at best, an analysis for the adverse effect of the area granted to the operator on the remaining land not for loss of use of the area granted since the amount is calculated on land outside the area granted.

Second, the Breitkreuzs knew the wellsite was going to be constructed when they purchased the property. Mr. Breitkreuz submitted that the wellsite results in a reduction of seven lots in the number that can be developed and some of the lots become less attractive. The evidence does not support a finding that such an impact was not known or at least not capable of being estimated when the land was purchased. No effort was made to obtain a reduction in the price paid for the land when this information was disclosed after the offer. Whether a reduction in development potential was a factor in the initial payment made under the Lease to the prior owner is not known but it is reasonable to infer that the vendor considered the wellsite a material factor to the price and thus felt obligated to disclose it before the transaction closed.

Third, there are several speculative aspects to the approach presented. Those include:

- The revenue used is based on the list price of lots in phase 1. Only one lot has sold and the price was $80,000.00 (Exhibit 10 at Tab 12). Mr. Breitkreuz attempted to explain that the price reflected a special arrangement with the purchaser. In any event, it is the only sale to date.
- The claimed lost lots will be in phase 2 and the pricing has not been established – not even list pricing
- The number, if any, of lost lots was not established. Mr. Breitkreuz testified that he submitted Exhibit 2, which shows 28 lots, with his subdivision application and that Exhibit 3, which shows 33 lots, is the approved layout. The rationale for the layout change, which includes different lot shapes, was not established. When asked to explain the use of the number of seven for lost lots, Mr. Breitkreuz testified that he could not remember the exact calculation.

- The costs used are related to phase 1, and there was insufficient evidence to find that similar costs will be incurred for phase 2.
- The appropriateness of using of a 9 per cent rate-of-return was not supported by the evidence.
- While the evidence supports a finding that some of the Ponoka County's conditions for development of phase 2 have been satisfied, Mr. Breitkreuz testified that there is a lot left to do.

The adverse effect amount of $10,000.00 was seemingly pulled out of the air, since no rationale was provided to support it.

Mr. Breitkreuz submitted as evidence an appraisal report dated April 22, 2009 (Exhibit 8). He acknowledged that it was not particularly relevant to the issues but wanted it to be considered as evidence of the status of development. The Panel did review the report and found some of the background information helpful. The opinions on value were given no weight in the Panel's determinations for several reasons. First, the value of the land on a per-acre or *en bloc* basis is not directly an issue. Second, the effective date of the appraisal is April 16, 2009, being almost a year before the effective date of this determination, and there had been intervening developments, including changes to the layout of the subdivided lots from that assumed in the report. Third, the appraiser was not made available for questioning. Fourth, the purpose of the report was stated to be for "asset valuation purposes to assist in allocation of applicable taxes and in the placing of a mortgage" (page 3).

8.2.4 Analysis of CNRL's Position

The compensation for loss of use proposed by CNRL of $400.00 per acre is the highest of any of the comparables provided. The three comparables which allocate that amount for loss of use are surface leases entered into between August 2009 and August 2010. All three are on cultivated land.

As a result, the timing is close to the effective date of May 31, 2010, and the use of the land is, at least in general terms, similar to the subject Land. Moreover, the use of agricultural comparables reflects the reality that as of the effective date and through to the date of the hearing the land near the wellsite was used for agricultural production. At the hearing CNRL acknowledged that if development occurs or even becomes imminent on the surrounding land a different approach may become appropriate. At present, the most convincing evidence of the proper compensation for loss of use is that contained in the comparables.

On balance, the Panel finds that annual compensation effective May 31, 2010, for loss of use is $1,448.00 based on $400.00 per acre for the 3.62 acres taken.

CNRL stated that its proposed annual compensation for adverse effect of $2,358.00 considers both tangible and intangible factors. There was little, if any, evidence of any tangible factors presented. Instead, CNRL relies on the range of compensation in its agricultural comparables to support the reasonableness of that amount.

For the reasons set out, the Panel cannot support the approach presented by Mr. Breitkreuz to determine compensation for the impact of the wellsite on the development of the remaining land. In the absence of any other probative evidence, the comparables are the best evidence presented upon which to formulate compensation for adverse effect.

A review of those comparables would support the reasonableness of CNRL's position in the typical agricultural situation. It does not however reflect the additional nuisance and inconvenience associated with attempting to proceed with a development on lands near a wellsite. Although assessing appropriate compensation is challenging, in the circumstances of this particular situation, a $500.00 allocation is considered appropriate.

Therefore, the Panel finds that annual compensation for adverse effect effective May 31, 2010, is $2,860.00 (rounded).

8.3 Summary of the Rate of Compensation

The Panel finds that the annual rate of compensation payable effective May 31, 2010, is:

- Section 25(c) – loss of use - 3.62 acres @ $400 per acre - $1,448.00
- Section 25(d) – adverse effect - $2,860.00

Annual Rate of Compensation $4,308.00

9.0 INTEREST

Section 27(15) provides the Board with a discretion to "make any order regarding the payment of interest that it considers appropriate" when an operator does not provide notice under Section 27(4) of the Act.

It was acknowledged by the Lessor that CNRL provided notice by way of a letter dated June 2, 2009. (Exhibit 1) Therefore, the Panel will not award interest.

10.0 COSTS

10.1 Background on Costs and Parties' Submissions

Costs were not addressed at the hearing. On January 31, 2011, the Board requested written submissions from the parties.

The Board requested the Lessors to provide their submission by February 18, 2011. A submission was received by t he Board on February 17, 2011, requesting $3,200.00 for the appraisal (Exhibit 8) and $2,500.00 for work done with realtors and the Red Deer real estate board along with research to obtain comparable land values.

The Board requested CNRL to provide its submission by March 4, 2011. A submission dated February 28, 2011, was received by the Board on March 1, 2011.

CNRL took the position that the cost of the appraisal should not be recoverable on the basis that it was not prepared for the purposes of the hearing. The basis of CNRL's position was twofold:

- The appraisal stated that it was prepared to assist in the allocation of applicable taxes and in the placing of a mortgage; and
- The appraisal was dated April 22, 2009, and the Lessors' application to the Board was not made until December 2, 2009.

CNRL stated that it requires Mr. Breitkreuz to provide a breakdown of hours worked and at what rate the work is being billed at.

The Board requested the Lessors provide any reply submission by March 14, 2011. On March 23, the Board noted that the CNRL submission had not been provided to the Lessors, so it was sent on that date with a request for an extension to March 28, 2011 for the Lessors' reply submission.

The Board received the Lessors reply submission on March 22, 2011. It was submitted that the Panel should disallow CNRL's submission because it was not provided to the Lessors as requested by the Board and was not received by the Lessors until 17 days after the original timeline.

The following quotations are from the Lessors' submissions in response to CNRL's positions:

- Appraisal:

  When I had originally contacted Waters Mackie Valuations, I had asked for an appraisal for mortgage purposes. I wanted an unbiased figure and felt that if I made it known that it was for surface lease purposes the appraisal might be skewed in my favor to benefit me. I wanted a true value. There never was any intent for a mortgage as the property was paid for in cash when purchased 10 years ago. No money was required for the land development as this was also paid for by cash and I have never requested any sort of financing for any property.

- Time Spent:

  At disclosure CNRL presented me with a binder containing approximately 4-500 pages, which they claimed were comparables. I spent 32 1/2 hours checking out most all the leases within a 20 mile radius to see which ones were within a residential subdivision to truly make them a comparable property. As it turned out none of them were, but I still had to check them out if they were to be true comparables as CNRL claimed.

  I spent over 10 hours obtaining comparable acreage listings and all MLS acreage sales in the past 2 years in the surrounding area. These were obtained through contact with the Red Deer Real Estate Board and Mike Gouchie with Royal Lepage. I compiled lists of all current MLS acreage listings within 7 miles and all MLS acreage sales in the area during the past 2 years. These were presented to CNRL as part of the disclosure materials.

  I have over 40 years of real estate, building and land development experience and charge my time out at $100 per hour. I spent well over 42 hours in preparation for the hearing which I charged out at a reduced rate of $60 per hour.

10.2 Decision and Analysis of Costs Issue

The Panel denies the Lessors' request that CNRL's costs submission be disallowed. CNRL provided the Board with its submission within the time requested. The Lessors were provided with an opportunity to reply, which they did. The Panel finds there is no basis to conclude that the Lessors were prejudiced by the failure to provide them with the CNRL submission at the time it was sent to the Board.

Under Section 39 of the *Act*, costs of and incidental to the proceedings under this *Act* are in the discretion of the Board. Rule 31 of the Board's Rules states as follows:

> ***31. Costs Award***
>
> *(1) The Board may award costs to a party if the Board is of the opinion that the costs are directly and necessarily related to the proceeding. A request for costs must include:*
>
> *(a) reasons to support the request;*
>
> *(b) a detailed description of the costs sought; and*
>
> *(c) copies of any invoices or receipts for disbursements or expenses.*
>
> *(2) In making an order for the payment of a party's costs, the Board may consider:*
>
> *(a) the reasons for incurring costs;*
>
> *(b) the complexity of the proceeding;*
>
> *(c) the contribution of the representatives and experts retained;*
>
> *(d) the conduct of a party in the proceeding;*
>
> *(e) whether a party has unreasonably delayed or lengthened a proceeding;*
>
> *(f) the degree of success in the outcome of a proceeding;*
>
> *(g) the reasonableness of any costs incurred;*
>
> *(h) any other factor the Board considers relevant.*

Appraisal Report

As set out in Section 8.2.3 above, Mr. Breitkreuz acknowledged at the hearing that the appraisal was not particularly relevant to the issues and for the reasons set out the Panel placed no weight on the opinions set out in the appraisal.

One of the factors for the Panel to consider as set out in Rule 31(2)(a) is the reason for incurring costs. On its face the appraisal was obtained for purposes other than this hearing. It did not directly address the issues to be determined at the hearing.

Rule 31(2)(h) provides that the Panel may consider any other factor it considers relevant. In this case the limited relevance of the appraisal is such a factor. The value of the land was not at issue. The appraisal provided very little evidence that was of assistance to the Panel in making its determination of the rate of compensation.

The Panel finds that $3,200.00 claimed is excessive in light of the nature of the appraisal and the issues before the Panel. An award of $500.00 will be allowed on the basis that the appraisal did provide some background information which assisted the Panel.

Time Spent

The Lessors' claim is for Mr. Breitkreuz's time inspecting the sites presented by CNRL as comparables (32.5 hours) and obtaining comparables with the assistance of Royal Lepage (10 hours). A rate of $60.00 per hour is proposed.

The Panel accepts that Mr. Breitkreuz would want to inspect CNRL's comparables but does not accept as reasonable that it would take the equivalent of four eight-hour days to do so. Similarly, spending time to assemble comparables is a reasonable course of action, but no comparables were presented at the hearing. As such, the Panel has no basis to conclude the time was usefully spent.

The Panel finds that Mr. Breitkreuz is entitled to costs for time he did spend in preparing for and attending the hearing. Considering the nature of the issues and the factors set out in Rule 31(2), the Panel awards $1,000.00.

10.3 Summary of Costs

The Panel finds that costs are payable are payable to Alfred Lawrence Breitkreuz and Linda Marie Breitkreuz, jointly, in the following amounts:

- Appraisal report - $500.00
- Time spent - $1,000.00

Total $1,500.00

11.0 ORDERS

An Order will issue

(a) varying the rate of compensation payable under the Lease from $1,400.00 to $4,308.00 per annum, effective May 31, 2010, and payable on May 31 in each year after unless and until varied by a further review; and

(b) awarding costs payable by the Operator in the amount of $1,500.00 to Alfred Lawrence Breitkreuz and Linda Marie Breitkreuz, jointly.

Dated at the City of Edmonton, in the Province of Alberta on April 6, 2011.

SURFACE RIGHTS BOARD

MEMBER

File No. SL2009.0254 Decision No. 2011/0203

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

Before:

SURFACE RIGHTS BOARD
(the "Board").

IN THE MATTER OF certain lands subject to a surface lease in the Province of Alberta described as the W ½, Sec. 7, Twp. 43, Rge. 25, W4M (the "Lands").

B E T W E E N:

CANADIAN NATURAL RESOURCES LIMITED,

Operator,

- and -

ALFRED LAWRENCE BREITKREUZ,
LINDA MARIE BREITKREUZ
and
RENEWABLE IDEAS INC.,

Lessors.

DECISION

PRESIDING PANEL

D. A. Sibbald, Q. C., Presiding Chair (the Panel)

APPEARANCES

For the Operator: Rod Scoville and Lance Schelske of Canadian Natural Resources Limited

For the Lessors: Alfred Lawrence Breitkreuz, Lessor
Jim O'Keefe of Renewable Ideas Ltd.

1.0 BACKGROUND

The Lessors Alfred Lawrence and Linda Marie Breitkreuz ("Breitkreuz or the "Lessors") applied to the Board pursuant to Section 27 of the *Act* for a review and determination of the rate of compensation payable under an Alberta Surface Lease, dated May 31, 2000 (the "Lease").

The Lease is for a well site and access road which covers a total of 7.31 acres on the land described above. The Breitkreuzs are the owners of a 3.62 acre portion of the leased lands located in the southwest quarter. The remaining leased lands are in the northwest quarter and are owned by Renewable Ideas Inc. (Renewable).

The Operator, Canadian Natural Resources Limited (CNRL), and Renewable reached an agreement on the annual rate of compensation under the Lease for the portion of the lease lands owned by Renewable.

Through the dispute resolution prehearing process, it was agreed that a hearing would be held to determine the annual rate of compensation payable for the portion of the leased lands on the

southwest quarter. In accordance with Section 27(11) of the *Act*, the Board convened a hearing at Red Deer, Alberta, on January 25, 2011.

The parties agreed that the effective date for this determination is May 31, 2010.

2.0 EXHIBITS

The following exhibits were filed at the hearing:

12. Application under Section 27 with the appended June 2, 2009, letter from CNRL re review of annual compensation, Alberta Surface Lease dated May 31, 2000, and Assignment of Lessor's Interest, dated May 10, 2001 ;
13. Subdivision layout as submitted to Ponoka County;
14. Subdivision layout as approved;
15. Contour map;
16. November 29, 2010, email with Royal Lepage Listing for 1 Country Ridge Lane;
17. Summary prepared by Alfred Breitkreuz;
18. June 4, 2009, letter from Ponoka County;
19. Appraisal report of Walters Mackie Valuations Inc.;
20. Restrictive covenant, dated January 25, 2010;
21. CNRL submission and documents; and
22. Agreements for CNRL comparables and certificates of title for subdivided lands.

Exhibit 1 was filed by the Panel. Exhibits 2 through 9 were filed on behalf of the Lessors. Exhibits 10 and 11 were filed on behalf of CNRL.

3.0 PRELIMINARY ISSUE

3.1 Background to Preliminary Issue

The day after the hearing, Alfred Breitkreuz made a written request to the Board to make additional submissions with respect to two matters. First, he requested the opportunity to provide documentary information concerning comparable listings and sales of property which he had disclosed to CNRL but misplaced at the hearing. Secondly, he asked permission to submit photographs and a topographical map of one of the comparables presented by CNRL at the hearing. He submitted that he had been surprised by CNRL's submissions at the hearing concerning this comparable.

Mr. Breitkreuz' request was provided to CNRL who responded in writing on February 4, 2011 by saying they did not object to the first request but objected to the second request. CNRL maintained that the Surface lease and survey of the comparable in question had been provided to Mr. Breitkreuz as part of CNRL's pre-hearing disclosure package and as such so no reason for further information concerning the comparable should be admitted.

Mr. Breitkreuz provided a further written submission on February 7, 2011 in response to CNRL's position. He maintained that the information about this comparable was first provided to him at the hearing and requested that not only that information but the second binder, which was marked as an exhibit at the hearing, be stricken from the record in its entirety. He then stated: in light of the above request, I am withdrawing my previous request to submit additional information even though CNRL had received it prior to the disclosure deadline.

3.2 Preliminary Issue to be Decided

Should the Panel remove from the record documentation which was entered as an exhibit at the hearing?

3.3 Decision on Preliminary Issue

The request to have evidence admitted at the hearing removed from the record is denied.

3.4 Analysis of Preliminary Issue

It was determined during the course of the hearing that CNRL intended to submit some documentation which had not previously been disclosed. Mr. Breitkreuz was provided with the opportunity to review that information and confirmed that he was not taken by surprise by any of it and did not object to the documents being entered as exhibits.

As part of the prehearing disclose, CNRL provided Mr. Breitkreuz with a binder containing the surface leases and survey plans for the sites it intended to rely on as comparables. At the hearing there was some question if the documents for one of those sites had been included. This is the comparable which is the subject of Mr. Breitkreuz concern. It was ultimately determined that the documentation was included, and CNRL provided some information concerning the site. Mr. Breitkreuz cross-examined CNRL about the site. He spoke about the site and was clearly familiar with it. At no time during the hearing did Mr. Breitkreuz express any concern about a lack of notice that CNRL would provide evidence about that site nor did he object to the use of the documentation.

Extraordinary circumstances would be necessary to direct that evidence which was admitted at a hearing be removed from the record after the hearing. No such circumstances exist in the present case; therefore, the request is denied. Since Mr. Breitkreuz has withdrawn his request to submit other information, the Panel will proceed to consider the evidence as submitted at the hearing.

4.0 THE PARTIES' KEY SUBMISSIONS AND POSITIONS

4.1 The Lessors

The central submission of Alfred Lawrence Breitkreuz is that there is a loss of development potential because of the presence of the wellsite and access road (the Site). He maintains that the presence of the Site results in a reduction of the number of lots that can be developed for sale and thus a loss of revenue. An annual rate of compensation of $18,100.00 was proposed.

4.2 CNRL

It was acknowledged that some of the land in the southwest quarter owned by the Breitkreuzs has been subdivided and is currently being developed as acreage lots. CNRL submits that the land adjacent to the Site continues to be used for agricultural production and that compensation should be based on that use. It was argued that any loss of development revenue because of the Site has not yet been incurred. CNRL proposed that the annual rate of compensation should be $3,800.00 based on loss of use at $400.00 per acre for 3.62 acres and adverse effect of $2,358.00.

5.0 ISSUES

5.1 What is the rate of compensation?

5.1.1 Was a pattern of dealings applicable to the rate of compensation established?

5.1.2 If no applicable pattern was established, what compensation is payable under Sections 25(1)(c) and (d) of the Act?

5.2 What, if any, interest should be awarded?

5.3 What, if any, costs are payable?

6.0 RELEVANT LEGISLATION

The relevant provisions of the Act are as follows:

Determining compensation

25(1) *The Board, in determining the amount of compensation payable, may consider, …*

(c) the loss of use by the owner or occupant of the area granted to the operator

(d) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator,

Review of rate of Compensation

27(1) *In this section,*

(a) "lessor" means a party to a surface lease who is entitled to receive compensation under that surface lease;

(b) "operator" means an operator who is obligated to pay compensation under a surface lease to a lessor, or who is obligated to pay compensation under a compensation order to a respondent;

(c) "parties" means,

(i) with respect to the review or fixing of a rate of compensation under a surface lease, the operator and the lessor, and

(ii) with respect to the review or fixing of a rate of compensation under a right of entry order, the operator and the respondent;

(d) "rate of compensation" means the amount of compensation payable on an annual or other periodic basis under a surface lease or compensation order in respect of the matters referred to in section 25(1)(c) and (d).

(2) *For the purposes of this section,*

(a) the term of a compensation order shall be computed from the date the original right of entry order to which it relates was made, and

(b) the term of a surface lease shall be computed from the effective date of the lease.

(3) *This section applies to compensation orders and surface leases*

(a) that provide for the payment of compensation on an annual or other periodic basis, or

(b) that do not provide for the payment of compensation on an annual or other periodic basis but relate to major power transmission line structures as defined or designated in the regulations.

(4) *An operator shall give a notice to the lessor or respondent, as the case may be,*

(a) on or within 30 days after the 4th anniversary of the date the term of the surface lease commenced or the right of entry order was made, as the case may be, where the term of the surface lease commenced or the right of entry order was made on or after July 1, 1983, or

(b) where the term of the surface lease commenced or the right of entry order was made before July 1, 1983, on or within 30 days after July 1, 1987.

(5) *A notice under subsection (4) shall state*

(a) that the operator wishes to have the rate of compensation reviewed,

(b) that the lessor or respondent, as the case may be, has a right to have the rate of compensation reviewed, or

(c) where no rate of compensation has been fixed, that the lessor or respondent, as the case may be, has a right to have a rate of annual compensation fixed,

in respect of the compensation years of the term subsequent to the year in which notice is given.

(6) *If either party indicates pursuant to a notice under subsection (4) that that party wishes to have the rate of compensation reviewed or fixed, the parties shall enter into negotiations in good faith for this purpose.*

(7) *When the parties agree on a rate of compensation*

(a) under a surface lease, the parties shall amend the lease in accordance with their agreement or enter into a new lease, and

(b) under a compensation order, the parties shall notify the Board in writing of the rate agreed on and the Board shall vary the compensation order accordingly.

(8) *If, by the end of the compensation year in which the notice is given, the parties cannot agree on a rate of compensation, the party desiring to have the rate of compensation reviewed or fixed may make an application to the Board for a hearing to determine the rate of compensation.*

(9) *An application pursuant to subsection (8) shall set out*

(a) the name and address of the operator,

(b) the name and address of the lessor or respondent, as the case may be,

(c) the rate of compensation under the surface lease or compensation order, and

(d) the amount the applicant believes to be a reasonable and fair rate of compensation,

and the application shall be accompanied with a copy of the surface lease, if applicable, and any other documents or material the applicant considers to be relevant to the application.

(9.1) *The Board may by notice in writing require an applicant to provide any additional information that the Board considers necessary for its proceedings by the time specified in the notice.*

(10) *Repealed 2009 c31 s11*

(11) *The Board shall hear the application and, as soon as it is convenient afterwards, shall make an order fixing, confirming or varying the rate of compensation payable commencing on the anniversary date of the surface lease or compensation order, as the case may be, next following the date notice was given under subsection (4).*

(12) *An order under subsection (11) may be appealed as though it were a compensation order under section 23.*

(13) *With respect to the review or fixing of a rate of compensation under a surface lease, when the Board makes an order varying or fixing the rate of compensation, the order operates to amend the surface lease in respect of the rate of compensation under it, notwithstanding anything contained in the surface lease.*

(14) *The operator shall give a notice that complies with subsection (5) to the other party on or within 30 days after every 5th anniversary date after the date notice should have been given under subsection (4) for as long as the surface lease or right of entry order, as the case may be, is in effect and subsections (6) to (13) apply to that notice.*

(15) *If the operator fails to give a notice required by subsection (4) or (14), the lessor or respondent, as the case may be, may within a reasonable time after the failure, give a notice to the operator stating that the lessor or respondent wishes to have the rate of compensation reviewed or fixed and in that case*

(a) subsections (6) to (13) apply,

(b) the Board may, notwithstanding subsection (11), make its order as to the rate of compensation effective from the same date it would have been effective if the operator had given notice as required by subsection (4) or (14), and

(c) the Board may make any order regarding the payment of interest that it considers appropriate.

Costs

39(1) *The costs of and incidental to proceedings under this Act are in the discretion of the Board.*

7.0 DECISION

7.1 The annual rate of compensation payable under the Lease for that portion of the leased lands on the lands legally described as Plan 022-1147 Lot 1, Block 1 effective (SW-7-43-25-W4M) as of May 31, 2010 is $4,308.00.

7.2 No interest is awarded.

7.3 Costs totaling $1,500.00 are payable to Alfred Lawrence Breitkreuz and Linda Marie Breitkreuz, jointly .

8.0 ANALYSIS

8.1 Factual Overview

The Lands are located approximately 1.1 kilometers northwest of Ponoka, Alberta, in Ponoka County.

The Panel accepts the evidence of Mr. Breitkreuz that when he and his wife acquired the southwest quarter, they did so with the intention of developing country residential sites on that property. He had previously developed properties in the city of Lacombe as well as both Lacombe and Ponoka counties.

The precise dates of the events leading to that acquisition are not clear. The Panel accepts Mr. Breitkreuzs' evidence that the wellsite was not on the land when the offer to purchase was made. Prior to closing, however, it was disclosed to him by the vendor that a wellsite was going to be constructed on the northern portion of the southwest quarter. In spite of that knowledge, no change was made in the amount of the offer. Mr. Breitkreuz acknowledged that the northern portion was a part of the southwest quarter on which he planned to pursue the residential development. He stated that the southeast part of the quarter could not be developed because of the presence of a lake which can be seen in the aerial photo on the fourth page of Exhibit 8.

As noted above, the Lease is dated May 31, 2000, and the certificates of title in Exhibits 8 and 11 provide evidence of a caveat for a surface lease with CNRL being registered on July 5, 2000.

The original Lessor under the Lease was Patricia King Hill, and she assigned her interest in the Lease to the Breitkreuzs as the new registered owners by an agreement dated May 10, 2001 (Exhibit 1).

While it is not clear that the precise location and dimensions of the wellsite were known by the Breitkreuzs when they acquired the property, the Panel finds that they knew that the well was going to be constructed in an area where they intended to attempt to develop country residential properties.

The southwest quarter was divided into two more or less equal parcels after the acquisition by the Breitkreuzs. The certificates of title at Schedule 2 to Exhibit 8 reference registration of that division on March 8, 2002. The Lease is on the northern portion legally described as Plan 022-1147 Lot 1, Block 1.

Mr. Breitkreuz testified that the southwest quarter was zoned for agricultural use when he and his wife purchased it but was reclassified as country residential district by Ponoka County in the spring of 2009. After the rezoning, an application was made to subdivide out 36 parcels for lots in the northwest part of the quarter on both of the divided parcels. The lot layout plan (Exhibit 2) that Breitkreuz testified was submitted with the application indicates that it was intended that a total of 28 lots would be developed.

The approving authority rejected that layout but approved, subject to certain conditions, a revised layout with a total of 33 lots (Exhibit 3).

Mr. Breitkreuz testified he intended to proceed with development in two phases. The subdivision of 21separate lots in phase 1 (Exhibit 3) was registered on title on March 2, 2010 (Exhibit 11).These lots are all on the western side of the land. Mr. Breitkreuz testified that development of phase 1 has proceeded with the installation of services and lots being listed for sale. To date, one lot has sold. Phase 2 development, which is in the northern section and closer to the well site (Exhibit 3), has not started but is planned to commence in the spring of 2011.

The land in the area adjacent to the wellsite continues to be used for agricultural production. The only evidence of the crops produced is referred to in Exhibit 10 as a mix of brome and alfalfa hay and hay production (pages 1 and 3).

As described in Exhibit 10, the wellsite access road enters Plan 022-1147 Lot 1, Block 1 from the north and runs straight south approximately 125 meters to the wellsite. Both the road and wellsite are surrounded by barbed-wire fencing. There is a meter shack and a 50 bbl. tank on the site. The site is inspected daily by a field operator in a pickup truck. Approximately once a month, a tank truck is used to remove produced water.

8.2 Rate of Compensation

8.2.1 Pattern of Dealings

The first step in determining the rate of compensation payable under a surface lease is to consider if the evidence establishes that "there are such a number of deals established so that it may be said that a pattern has been established by negotiation between the landowners and oil companies in a district" (*Livingston v. Siebens Oil & Gas Ltd.* (1978), 8 A.R. 439 (C.A.) at para. 11).

CNRL presented evidence of compensation paid under 51 surface leases on land within approximately 17 miles of the wellsite. It was not specifically submitted that these agreements supported a pattern of dealings but rather that they provide good guidance as to what compensation rates are for the area. (Exhibit 10 at page 5)

The Panel finds that no applicable pattern of dealings was established. The basis for that conclusion is threefold:

a. While the surface leases were provided, little information was provided about the lands under lease, the use to which the land is put, or the wellsites. A table summarizing some information was included at Tab 8 of Exhibit 10, but simply describing the land use as hay or cultivated and the well type as single well, single well and access road or home quarter is of little assistance in determining the similarity of the sites to the subject site.

b. There is a lack of information as to when the agreement on compensation relied upon was made. Although the date of the original surface lease is known, the compensation relied upon was said to be the current rate, but when that rate was established was not disclosed.

c. The compensation relied upon falls within a relatively wide range:

   - Adverse effect from $1,265.00 to $2,630.00
   - Loss of use from $200.00 to $400.00 per acre.

8.2.2 Compensation for Loss of Use and Adverse Effect

Consideration was then given to each of the two components set out in Section 25(1)(c) and (d) of the *Act* of the rate of compensation defined in Section 27(1)(d) of the *Act*. They are typically referred to as loss of use and adverse effect.

Loss of use is "the loss of use by the owner or operator of the area granted to the operator." (Section 25(1)(c) of the *Act*)

Adverse effect is made up of two components: tangible and intangible. The tangible component typically relates to the adverse effect of the area granted to the operator on the remaining land and the intangible component relates to the nuisance, noise and inconvenience associated with the operator's activities. (Section 25(1)(d) of the Act)

8.2.3 Analysis of Breitkreuzs'Position

Mr. Breitkreuz presented a loss of use calculation totaling $74,970.00 and adverse effect of $10,000.00 (Exhibit 6). He proposed that the annual rate of compensation should be $18,100.00 but testified that that amount was not based on any portion of the loss of use or adverse effect he presented but rather was a reasonable amount.

The loss of use amount was calculated as follows:

a. There are currently 21 lots under development in phase 1.
b. The list price per lot (Exhibit 5) is $129,900.00
c. The expected revenue from the 21 lots is $2,727,900.00
d. The costs of developing (electrical & engineering, road work, ATCO gas, Fortis, misc. costs and Bemoco) phase 1 total $228,000.00
e. The net profit per lot will be $119,000.00.
f. A reduction by seven of the number lots that could be developed due to the wellsite and road.
g. Lost net profit from the reduced number of lots is $833,000.00
h. Based on a 9 per cent rate-of-return, the loss of use is $74,970.00

No mathematical or other basis for the $10,000.00 proposed for adverse effect was provided.

The Panel rejects this approach to quantifying the rate of compensation on several grounds.

First, this approach is, at best, an analysis for the adverse effect of the area granted to the operator on the remaining land not for loss of use of the area granted since the amount is calculated on land outside the area granted.

Second, the Breitkreuzs knew the wellsite was going to be constructed when they purchased the property. Mr. Breitkreuz submitted that the wellsite results in a reduction of seven lots in the number that can be developed and some of the lots become less attractive. The evidence does not support a finding that such an impact was not known or at least not capable of being estimated when the land was purchased. No effort was made to obtain a reduction in the price paid for the land when this information was disclosed after the offer. Whether a reduction in development potential was a factor in the initial payment made under the Lease to the prior owner is not known but it is reasonable to infer that the vendor considered the wellsite a material factor to the price and thus felt obligated to disclose it before the transaction closed.

Third, there are several speculative aspects to the approach presented. Those include:

- The revenue used is based on the list price of lots in phase 1. Only one lot has sold and the price was $80,000.00 (Exhibit 10 at Tab 12). Mr. Breitkreuz attempted to explain that the price reflected a special arrangement with the purchaser. In any event, it is the only sale to date.
- The claimed lost lots will be in phase 2 and the pricing has not been established – not even list pricing
- The number, if any, of lost lots was not established. Mr. Breitkreuz testified that he submitted Exhibit 2, which shows 28 lots, with his subdivision application and that Exhibit 3, which shows 33 lots, is the approved layout. The rationale for the layout change, which includes different lot shapes, was not established. When asked to explain the use of the number of seven for lost lots, Mr. Breitkreuz testified that he could not remember the exact calculation.

- The costs used are related to phase 1, and there was insufficient evidence to find that similar costs will be incurred for phase 2.
- The appropriateness of using of a 9 per cent rate-of-return was not supported by the evidence.
- While the evidence supports a finding that some of the Ponoka County's conditions for development of phase 2 have been satisfied, Mr. Breitkreuz testified that there is a lot left to do.

The adverse effect amount of $10,000.00 was seemingly pulled out of the air, since no rationale was provided to support it.

Mr. Breitkreuz submitted as evidence an appraisal report dated April 22, 2009 (Exhibit 8). He acknowledged that it was not particularly relevant to the issues but wanted it to be considered as evidence of the status of development. The Panel did review the report and found some of the background information helpful. The opinions on value were given no weight in the Panel's determinations for several reasons. First, the value of the land on a per-acre or *en bloc* basis is not directly an issue. Second, the effective date of the appraisal is April 16, 2009, being almost a year before the effective date of this determination, and there had been intervening developments, including changes to the layout of the subdivided lots from that assumed in the report. Third, the appraiser was not made available for questioning. Fourth, the purpose of the report was stated to be for "asset valuation purposes to assist in allocation of applicable taxes and in the placing of a mortgage" (page 3).

8.2.4 Analysis of CNRL's Position

The compensation for loss of use proposed by CNRL of $400.00 per acre is the highest of any of the comparables provided. The three comparables which allocate that amount for loss of use are surface leases entered into between August 2009 and August 2010. All three are on cultivated land.

As a result, the timing is close to the effective date of May 31, 2010, and the use of the land is, at least in general terms, similar to the subject Land. Moreover, the use of agricultural comparables reflects the reality that as of the effective date and through to the date of the hearing the land near the wellsite was used for agricultural production. At the hearing CNRL acknowledged that if development occurs or even becomes imminent on the surrounding land a different approach may become appropriate. At present, the most convincing evidence of the proper compensation for loss of use is that contained in the comparables.

On balance, the Panel finds that annual compensation effective May 31, 2010, for loss of use is $1,448.00 based on $400.00 per acre for the 3.62 acres taken.

CNRL stated that its proposed annual compensation for adverse effect of $2,358.00 considers both tangible and intangible factors. There was little, if any, evidence of any tangible factors presented. Instead, CNRL relies on the range of compensation in its agricultural comparables to support the reasonableness of that amount.

For the reasons set out, the Panel cannot support the approach presented by Mr. Breitkreuz to determine compensation for the impact of the wellsite on the development of the remaining land. In the absence of any other probative evidence, the comparables are the best evidence presented upon which to formulate compensation for adverse effect.

A review of those comparables would support the reasonableness of CNRL's position in the typical agricultural situation. It does not however reflect the additional nuisance and inconvenience associated with attempting to proceed with a development on lands near a wellsite. Although assessing appropriate compensation is challenging, in the circumstances of this particular situation, a $500.00 allocation is considered appropriate.

Therefore, the Panel finds that annual compensation for adverse effect effective May 31, 2010, is $2,860.00 (rounded).

8.3 Summary of the Rate of Compensation

The Panel finds that the annual rate of compensation payable effective May 31, 2010, is:

- Section 25(c) – loss of use - 3.62 acres @ $400 per acre - $1,448.00
- Section 25(d) – adverse effect - $2,860.00

Annual Rate of Compensation $4,308.00

9.0 INTEREST

Section 27(15) provides the Board with a discretion to "make any order regarding the payment of interest that it considers appropriate" when an operator does not provide notice under Section 27(4) of the Act.

It was acknowledged by the Lessor that CNRL provided notice by way of a letter dated June 2, 2009. (Exhibit 1) Therefore, the Panel will not award interest.

10.0 COSTS

10.1 Background on Costs and Parties' Submissions

Costs were not addressed at the hearing. On January 31, 2011, the Board requested written submissions from the parties.

The Board requested the Lessors to provide their submission by February 18, 2011. A submission was received by t he Board on February 17, 2011, requesting $3,200.00 for the appraisal (Exhibit 8) and $2,500.00 for work done with realtors and the Red Deer real estate board along with research to obtain comparable land values.

The Board requested CNRL to provide its submission by March 4, 2011. A submission dated February 28, 2011, was received by the Board on March 1, 2011.

CNRL took the position that the cost of the appraisal should not be recoverable on the basis that it was not prepared for the purposes of the hearing. The basis of CNRL's position was twofold:

- The appraisal stated that it was prepared to assist in the allocation of applicable taxes and in the placing of a mortgage; and
- The appraisal was dated April 22, 2009, and the Lessors' application to the Board was not made until December 2, 2009.

CNRL stated that it requires Mr. Breitkreuz to provide a breakdown of hours worked and at what rate the work is being billed at.

The Board requested the Lessors provide any reply submission by March 14, 2011. On March 23, the Board noted that the CNRL submission had not been provided to the Lessors, so it was sent on that date with a request for an extension to March 28, 2011 for the Lessors' reply submission.

The Board received the Lessors reply submission on March 22, 2011. It was submitted that the Panel should disallow CNRL's submission because it was not provided to the Lessors as requested by the Board and was not received by the Lessors until 17 days after the original timeline.

The following quotations are from the Lessors' submissions in response to CNRL's positions:

- Appraisal:

  When I had originally contacted Waters Mackie Valuations, I had asked for an appraisal for mortgage purposes. I wanted an unbiased figure and felt that if I made it known that it was for surface lease purposes the appraisal might be skewed in my favor to benefit me. I wanted a true value. There never was any intent for a mortgage as the property was paid for in cash when purchased 10 years ago. No money was required for the land development as this was also paid for by cash and I have never requested any sort of financing for any property.

- Time Spent:

  At disclosure CNRL presented me with a binder containing approximately 4-500 pages, which they claimed were comparables. I spent 32 1/2 hours checking out most all the leases within a 20 mile radius to see which ones were within a residential subdivision to truly make them a comparable property. As it turned out none of them were, but I still had to check them out if they were to be true comparables as CNRL claimed.

  I spent over 10 hours obtaining comparable acreage listings and all MLS acreage sales in the past 2 years in the surrounding area. These were obtained through contact with the Red Deer Real Estate Board and Mike Gouchie with Royal Lepage. I compiled lists of all current MLS acreage listings within 7 miles and all MLS acreage sales in the area during the past 2 years. These were presented to CNRL as part of the disclosure materials.

  I have over 40 years of real estate, building and land development experience and charge my time out at $100 per hour. I spent well over 42 hours in preparation for the hearing which I charged out at a reduced rate of $60 per hour.

10.2 Decision and Analysis of Costs Issue

The Panel denies the Lessors' request that CNRL's costs submission be disallowed. CNRL provided the Board with its submission within the time requested. The Lessors were provided with an opportunity to reply, which they did. The Panel finds there is no basis to conclude that the Lessors were prejudiced by the failure to provide them with the CNRL submission at the time it was sent to the Board.

Under Section 39 of the *Act*, costs of and incidental to the proceedings under this *Act* are in the discretion of the Board. Rule 31 of the Board's Rules states as follows:

> ***31. Costs Award***
>
> *(1) The Board may award costs to a party if the Board is of the opinion that the costs are directly and necessarily related to the proceeding. A request for costs must include:*
>
> *(a) reasons to support the request;*
>
> *(b) a detailed description of the costs sought; and*
>
> *(c) copies of any invoices or receipts for disbursements or expenses.*
>
> *(2) In making an order for the payment of a party's costs, the Board may consider:*
>
> *(a) the reasons for incurring costs;*
>
> *(b) the complexity of the proceeding;*
>
> *(c) the contribution of the representatives and experts retained;*
>
> *(d) the conduct of a party in the proceeding;*
>
> *(e) whether a party has unreasonably delayed or lengthened a proceeding;*
>
> *(f) the degree of success in the outcome of a proceeding;*
>
> *(g) the reasonableness of any costs incurred;*
>
> *(h) any other factor the Board considers relevant.*

Appraisal Report

As set out in Section 8.2.3 above, Mr. Breitkreuz acknowledged at the hearing that the appraisal was not particularly relevant to the issues and for the reasons set out the Panel placed no weight on the opinions set out in the appraisal.

One of the factors for the Panel to consider as set out in Rule 31(2)(a) is the reason for incurring costs. On its face the appraisal was obtained for purposes other than this hearing. It did not directly address the issues to be determined at the hearing.

Rule 31(2)(h) provides that the Panel may consider any other factor it considers relevant. In this case the limited relevance of the appraisal is such a factor. The value of the land was not at issue. The appraisal provided very little evidence that was of assistance to the Panel in making its determination of the rate of compensation.

The Panel finds that $3,200.00 claimed is excessive in light of the nature of the appraisal and the issues before the Panel. An award of $500.00 will be allowed on the basis that the appraisal did provide some background information which assisted the Panel.

Time Spent

The Lessors' claim is for Mr. Breitkreuz's time inspecting the sites presented by CNRL as comparables (32.5 hours) and obtaining comparables with the assistance of Royal Lepage (10 hours). A rate of $60.00 per hour is proposed.

The Panel accepts that Mr. Breitkreuz would want to inspect CNRL's comparables but does not accept as reasonable that it would take the equivalent of four eight-hour days to do so. Similarly, spending time to assemble comparables is a reasonable course of action, but no comparables were presented at the hearing. As such, the Panel has no basis to conclude the time was usefully spent.

The Panel finds that Mr. Breitkreuz is entitled to costs for time he did spend in preparing for and attending the hearing. Considering the nature of the issues and the factors set out in Rule 31(2), the Panel awards $1,000.00.

10.3 Summary of Costs

The Panel finds that costs are payable are payable to Alfred Lawrence Breitkreuz and Linda Marie Breitkreuz, jointly, in the following amounts:

- Appraisal report - $500.00
- Time spent - $1,000.00

Total $1,500.00

11.0 ORDERS

An Order will issue

(a) varying the rate of compensation payable under the Lease from $1,400.00 to $4,308.00 per annum, effective May 31, 2010, and payable on May 31 in each year after unless and until varied by a further review; and

(b) awarding costs payable by the Operator in the amount of $1,500.00 to Alfred Lawrence Breitkreuz and Linda Marie Breitkreuz, jointly.

Dated at the City of Edmonton, in the Province of Alberta on April «date», 2011.

SURFACE RIGHTS BOARD

MEMBER