

SURFACE RIGHTS ACT RSA 2000 Chapter S-24
(the “Act”)

Before:

SURFACE RIGHTS BOARD
(the “Board”).

IN THE MATTER OF lands subject to a right of entry order within the Province of Alberta described as a certain portion of the NE 1/4, Sec. 35, Twp. 72, Rge. 6, W6M (the “Land”).

B E T W E E N:

NEWALTA CORPORATION,

Operator,

- and -

BRIAN ROWNEY,
DAVID KING
and
ATCO GAS AND PIPELINES LTD.

Respondents.

DECISION

The Board held a hearing on October 7, 2010, at Grande Prairie, Alberta, to consider an application by the Respondents for a review of the Rate of Compensation payable pursuant to Section 27 of the *Act*.

PRESIDING PANEL (the Panel):

Edward V. Zenko,
Morley Blanch
Leonard Dunn

Presiding Chair

APPEARANCES:

For the Respondents:

- Brian Rowney, Landowner;
- Robert Berrien, Appraiser, Berrien Associates Ltd.; and
- Darryl Carter, Solicitor, Darryl Carter & Company

For the Operator:

- Kendall Erickson, Newalta Corporation
- Brian Telford, Appraiser, McNally Land Services Ltd.; and
- Heidi Meldrum, Solicitor, Parlee McLaws LLP

BACKGROUND

The Board issued a Right of Entry Order (E2048/84) on July 25, 1984, for a well site and short access road in legal subdivision (L.S.) 16 of the Land. Since then, the Operator for the Right of Entry Order has changed a number of times along with the use of the well site. The Right of Entry Order is currently held by Newalta Corporation (Newalta). Newalta has an Energy Resources Conservation Board (ERCB) licence to use the well site as a disposal well for water produced in conjunction with oil or gas from an area bounded on the North by Township 80, on the South by Township 60, on the East by Range 2, and on the West by Range 11 (both West of 6th Meridian), by injection into the Cadotte member via a well on the Land.

In addition, the Land has been subdivided since the granting of the Right of Entry Order. The well site and access road covered by the Right of Entry Order is now located within Lot 1B, Block 1, Plan 0626936 and Lot 1B is 14.88 acres in size. Lot 1B (the subject site) is currently owned jointly, as an undivided 1/2 interest, by Brian Rowney and David King.

The Respondents applied, pursuant to s. 27 of the *Act*, for a determination by the Board, of the Rate of Compensation payable. The Board received the application on August 10, 2009 and the Parties participated in a Pre-Hearing Dispute Resolution Conference (DRC) on May 20, 2010. At the DRC, the date for the hearing was set for October 7, 2010, and that disclosure would be two weeks before the hearing.

Both Parties agreed that: the commencing anniversary date for the Rate of Compensation determination is July 25, 2009, in accordance with s. 27(14) of the *Act*; the area granted to the Operator under Right of Entry Order E2048/84 is a total of 3.67 acres; the subdivision for Lot 1B, in its current format, was registered with the Land Titles Office on November 6, 2006; Lot 1B is zoned RM-2 Rural Medium Industrial by the County of Grande Prairie No. 1; and the current Rate of Compensation is \$2,300.00 per year.

PRELIMINARY ISSUES

The Panel indicated to the Parties that in accordance with s. 24 of the *Act* the Panel may conduct an examination of the subject site at the conclusion of the hearing, and the Panel notes that it did so.

Both Mr. Berrien and Mr. Telford were subsequently accepted as experts in real estate appraisal and compensation matters related to surface rights cases.

All evidence was given under oath.

ISSUES TO BE DECIDED

1. What is the appropriate method of determining the Rate of Compensation?
 - a. Is there a Pattern of Agreements in the area?
 - b. If there is a Pattern of Agreements, are there cogent reasons for departing from it?
2. In accordance with s. 27(1)(d) of the *Act*, what is the appropriate Rate of Compensation payable under Right of Entry Order E2048/84?
 - a. What is the Loss of Use by the Respondents of the area granted to the Operator per s. 25(1)(c) of the *Act*?
 - b. What is the Adverse Effect of the area granted to the Operator on the remaining land of the Respondents and the Nuisance, Inconvenience, and Noise that might be caused by or arise from or in connection with the operations of the Operator per s. 25(1)(d) of the *Act*?
3. Was proper notice given by the Operator to the Respondents under s. 27(14) of the *Act*?
 - a. If not, should Interest be awarded pursuant to s. 27(15) of the *Act*?

BOARD FILINGS

- Exhibit A: An "Agreed Statement of Facts" provided to the Board by the Parties.
- Exhibit B: Board Order No. 2504/91 varying the Rate of Compensation and further amending Orders Nos. E2048/84 and E2562/84 dated December 19, 1991.
- Exhibit C: Respondents' application to the Board for review of the Rate of Compensation.

EXHIBITS FILED

- Exhibit 1: Respondents' Statement.

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- Exhibit 2: Sketch Plan of the Well Site within Lot 1B, Block 1, Plan 0626936 and the surrounding area.
- Exhibit 3: Report prepared by Berrien Associates Ltd. entitled "Evaluation of Annual Compensation for Right of Entry Order E 2048/84 Ptn NE 1/4 35-72-6 W6M".
- Exhibit 4: Plans/Maps provided by Mr. Berrien indicating the location of the Operator's comparable agreements.
- Exhibit 5: Photo of the well site taken from the North.
- Exhibit 6: Report prepared by McNally Land Services Ltd. entitled "Estimate of Annual Compensation Right of Entry Order E2048/84 Located on Lot 1B; Block 1; Plan 062 6936 (Ptn NE 1/4 35-72-06-W6M) Located in the County of Grande Prairie".

The Respondents filed Exhibits 1, 3 and 4 and the Operator filed Exhibits 2, 5, and 6.

SUMMARY OF THE RESPONDENTS' INFORMATION

Mr. Brian Rowney, as a joint landowner and on behalf of the Respondents' provided and commented on Exhibit 1, as well as provided other verbal testimony and commentary on the "Telford" (Exhibit 6) and "Berrien" (Exhibit 3) reports yielding the following information:

- The subject site is currently zoned RM-2, Rural Medium Industrial (RM-2) and as such, affects the Rate of Compensation.
- The Telford report acknowledges the subject site is zoned RM-2 but continually compares it to agricultural or AG zoned land.
- Comparisons should be made on an industrial-to-industrial basis not on an industrial-to-agricultural basis.
- Newalta is running a commercial disposal well venture on the subject site and they are competing commercially with the Peak Energy Services Ltd. (Peak) operation that is immediately to the east, across Highway 2.
- If Newalta did not have the disposal well on the subject site, they would be in a position to drill one and operate it themselves.
- Once the subject site had been rezoned to RM-2, they had hoped that Newalta would expand their operation onto the newly rezoned area.
- At 14.88 acres, the size of Lot 1B, is not a practical size for farming and they have no intention to farm it.
- They are commercial property developers who lease or sell land in order to make a living.
- They have no formal agreement to rent or farm the remainder of Lot 1B other than a verbal agreement that it can be farmed in order to keep the weeds under control.
- Other than the Rate of Compensation for the subject site, they do not receive any other revenue for Lot 1B.
- When they tried to market the remainder of Lot 1B they had the following feedback from potential clients:
 - Safety concerns since there had been a previous explosion on the Newalta site that blew a tank lid clear across the highway and people remember the incident.
 - Environmental issues since the Newalta site drains onto the remainder of the subject site and contamination is a concern.
- They originally purchased the subject site with the hopes of leasing it to Peak but Peak ultimately chose the site to the east, which they also own and lease to Peak.
- They consider the subject site a prime commercial property since it is adjacent to commercial property to the north, east, and the area to the north has a proposal to have development that is even more commercial.
- It is their contention that the area is changing from agricultural to commercial.
- They are requesting that the Rate of Compensation be set at \$41,177.40 per year based on their Peak lease across the highway, which is at \$935.00 per acre per month as it is the same corner type property with the same land use.

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- They do not agree with Mr. Berrien's conclusion that there should be a reduction in Rate of Compensation as the subject site is not fenced or gravelled, as are other comparable sites. It was their contention that the subject site could easily be fenced and gravelled with a 5 to 10 year payout on the investment.

On cross-examination, Mr. Rowney provided the following information:

- He does not live on the subject site but lives not far away.
- Subdivision of the subject site into 14.88 acres was a relatively recent occurrence.
- With respect to Exhibit 2, a sketch of the subject site and surrounding area he indicated, of the roughly 15 acres subdivided out of the quarter, 3 acres were to the west of the well site and 10 acres was to the south.
- The size of the subdivided out portion changed during the process and changed from 3 acres to 10 acres and ultimately close to 15 acres.
- Newalta's operation was in existence at the time of the negotiations to purchase/subdivide the Land.

Mr. Robert Berrien, Appraiser for the Respondents', provided and commented on Exhibit 3, as well as other verbal testimony and commentary on the "Telford" report yielding the following information:

- He had viewed the subject site on October 13, 2009 and it is located on the southwest corner of the intersection of Highway 2 and Mercer Hill Road.
- He considered three different approaches to estimate the appropriate compensation:
 - Empirical approach whereby the losses are appraised using current data and information, applicable to the area.
 - Review of Board and Court of Queen's Bench decisions.
 - Pattern data, whereby the rents being paid by other operators for similar takings are considered.
- Loss of Use is based on the actual zoning of the subject site, which is RM-2, Rural Medium Industrial District under the County of Grande Prairie No. 1 Land Use Bylaw (LUB).
- The subject site is located one mile north of the heart of the Hamlet of Clairmont, which is home to dozens of small, independent oilfield and construction service businesses, as well as a number of larger, branch facilities for oilfield businesses nearly all requiring yards for trucks, tanks, and equipment storage.
- There is a large industrial park beside the highway in Clairmont and a number of smaller rural industrial sites exist in the immediate area and along Highway 2 as far north as Sexsmith, as well as east and west on Mercer Hill Road.
- The area immediately to the north of the subject site is within the Mercer Hill Area Structure Plan.
- The Peak site to the east is zoned RM-4, Highway Industrial District, which is a variation of the RM-2 zoning and has similar Uses.
- As indicated on the LUB map for the East Half of Township 72 Range 6 W6M, there is a high density of industrialization in the area caused by the various industrial zoning and noted that even those parcels zoned CR, Country Residential (CR) allow home occupations with shops and truck storage.
- The RM-2 zoning allows for a very wide range of Uses, including Oilfield Support Service, which is one of the most common users of industrial sites.
- Oilfield Support Services is a legal Use contemplated by the LUB in the RM-2 district and therefore is legal and conforming.
- Most of the Discretionary Uses listed in the LUB for the RM-2 can be found in the area.
- As indicated on the Newalta sign, at the entrance to the site, the area is an Oilfield Waste Management Facility, which is an industrial Use, not for the production of minerals.
- Only the active portion of the Newalta lease is currently fenced.
- The Highest and Best Use, as outlined in the Real Estate Appraisal Terminology by Byril N. Boyce and reiterated on page 9 of his appraisal report, applies to both bare land and improved property.

- Although the *Act* refers to “Highest Approved Use”, he considers this virtually the same as Highest and Best Use.
- The Highest and Best Use for the subject site is Rural Industrial Land suitable for a wide range of purposes as outlined in the LUB with agriculture Uses being appropriate in the interim.
- Although most of the site is being farmed, it is not agricultural land and the much Higher and Better Use, Rural Industrial, must be considered when addressing the compensation and the agricultural aspects need to be ignored.
- He defines compensation as “that which makes up for a loss or privation, a recompense” whose principle is to make the party suffering the loss whole again, neither better nor worse than before.
- Almost without exception, he felt that there must be a margin for error in determining compensation and that margin of error or where a judgement call is to be made; they must be made in favour of the landowner or the person who is to receive the compensation.
- The two empirical approaches that have been used by the Courts and the Board in the past have been return on investment or “rent” on investment and comparison of one lease to one or more other leases.
- The return on investment approach was not used since both an accurate estimate of land value and an accurate survey of market rates are required.
- The comparison of leases of nearby lands with similar Uses was preferred, as it does not require the lease information to show what percentage of the land’s value will represent the return on investment.
- The direct comparison approach was used to determine compensation using available commercial lease agreements, a summary table of which follows:

Index No.	Land Use Zoning	Lease Term	Lease Size Acres	Rent Month/Acre	Comments
1 a	RM-4	10 yrs	10	\$935.00	Outside Clairmont, gravelled, fenced, no services
1 b	RM-3	2 yrs	3	\$1,666.00	Inside Clairmont, fenced, shack, fully serviced
1 c i	RM-3	Monthly	1	\$1,300.00	Inside Clairmont, yard only
1 c ii	RM-3	Monthly	2	\$1,000.00	Inside Clairmont, back half on another site
1 c iii	RM-3	Monthly	4	\$1,300.00	Inside Clairmont, yard only

- He then discounted 1a as it is gravelled and fenced, 1b as it is fully serviced with a fence and skid shack, and 1c i to iii as they are inside Clairmont and for their short term (monthly) nature.
- Although Newalta has gravelled the area covered by the Right of Entry, the remainder is not and so was considered as unimproved.
- The lease rate for the subject site should be lower than any of the comparable rates as it is outside of Clairmont and is unimproved but not significantly lower than the Peak lease, as the subject site is an extremely visible site.
- Based on his empirical approach, he concluded that an appropriate lease rate for the subject site should be \$750.00 per month per acre.
- No Board or Court decisions were provided but he noted that he had followed the empirical analysis endorsed by the Courts thereby merging the empirical and previous decision approaches.
- With respect to the Pattern of Dealings approach, he indicated that the only pattern that would be useful is the pattern or valuation set by similar commercial leases.
- He noted that the Courts have previously stated that the Pattern of Dealings concept applies to commercial leases and that the income stream approach should only be used to determine the Rate of Compensation if there are no comparable commercial leases. As such, his empirical approach is a Pattern of Dealings approach, as well.
- He concluded that the best estimate of the appropriate Rate of Compensation for the subject well site and access road is \$33,000.00 per year.

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- With respect to the Telford report he noted that:
 - It contained no Highest and Best Use section.
 - Although the remainder of the subject site was being used for agriculture, he disagreed that other Uses were only speculative.
 - The three sites under the Negotiated Agreements section do not cover the same uniqueness of the subject site.
 - As indicated in Exhibit 4, all three comparables are a significant distance away from the subject site, being either west of Grande Prairie or near Spirit River.
 - All three comparables are zoned agricultural or AG and therefore are not the same as a 15 acres sited zoned industrial adjacent to a major highway.

On cross-examination, Mr. Berrien provided the following information:

- The subject site is being farmed in conjunction with the remainder of the quarter section but is being farmed for the purposes of weed control and as such, he ignored the agricultural Use.
- The subject site is not within the Mercer Hill Area Structure Plan and that costly improvements to Highway 2 – Mercer Hill Road intersection, required by the Transportation Department, will render implementation of the Mercer Hills area structure plan uneconomical.
- The maps provided in Appendix 4 of his report are from the LUB, some of the industrial sites are vacant but with leases, and the CR sites do allow for some industrialization through Home Occupations.
- In respect to his comparables, one was across the highway and three are in the McCrae Industrial Area that is south east of the subject site but within the Hamlet of Clairmont.
- He felt that the five lease comparables was sufficient for the assessment.
- He did not look for other disposal well locations per se but for industrial sites with similar zoning, size, industrial Use, and within the area.

SUMMARY OF THE OPERATOR'S INFORMATION

Mr. Kendall Erickson, on behalf of the Operator and as General Manager of Newalta's northern business unit, provided and commented on Exhibit 2 and 5, as well as provided other verbal testimony yielding the following information:

- He oversees the facility from a higher-level management position but has been to the subject site.
- Exhibit 5, being a photograph of the site, indicates that: there are four water tanks; three buildings which house electrical equipment, the injection pump, and the wellhead; and the site is partially fenced.
- The site operates as a disposal well for oilfield wastewater and industrial water and they have an ERCB licence for operation of the disposal well.
- Since he has been responsible for the site, it has always been a disposal well operation and was unsure when the Use changed but thought it was in between 1993 and 1998.
- They access the site 1 to 2 times per day with a pick-up truck and water for disposal is delivered tanker truck 1 to 2 times per day.
- It is anticipated that the facility has between 5 and 10 years of remaining operational life.
- When the end of the operational life is reached, the area will be reclaimed back to its original land Use, which is agriculture.

Mr. Robert Telford, Appraiser for the Operator, provided and commented on Exhibit 6, as well as other verbal testimony and commentary on the "Berrien" report (Exhibit 3) yielding the following information:

- The purpose of the report was to estimate the annual compensation (Rate of Compensation) for the 3.67 acre well site and access road.

- On the air photo of the site he superimposed the various pipelines that are on the subject site with the red coloured one being a natural gas line and the orange ones being other pipelines.
- The Operator is currently using a smaller area than indicated in the Right of Entry Order.
- The photographs of the site indicate that it is fenced and there is a soil berm along portions of the south and west boundary.
- He visited the site on May 21 and August 26, 2010 and currently, the remainder of the land is being used for agriculture - cultivation.
- There is no disagreement that under the LUB the subject site is zoned RM-2 and he indicated what the Purpose and the Permitted and Discretionary Uses were for the RM-2 zone.
- The majority of the subject site has a Canadian Land Inventory (CLI) soil capability for agriculture rating of Class 2⁸c3²T.
- The history of the subject site is as follows:
 - A 2003 subdivision of 10 acres encompassed the well site and access road and was purchased by the existing owners in 2003.
 - The subject site was increased to a total of 14.88 acres in 2006 with the additional area being added to the south boundary.
 - As of the effective date (commencing anniversary date), the well site and access road comprised approximately 25 percent of the total area.
 - The remainder of the subject site is not fenced and access is by a farm approach west of Newalta's facility.
- The review of the site and data indicated the land Use is as follows:
 - Although classified under the LUB as RM-2 the physical use of the subject site at the commencing anniversary date and afterwards was for the production of agricultural crops.
 - The County of Grande Prairie No. 1 confirmed that there had been no recent development applications submitted as of August 26, 2010.
 - The land Use designation allows for a variety of industrial Uses.
- There are two accepted methodologies used to estimate the Rate of Compensation and these are:
 - Empirical approach.
 - Pattern of negotiated Agreements or Dealings.
- The Loss of Use approach by the empirical method yielded the following:
 - Being located in Alberta Agriculture's, Risk Area 19, the Peace River soil zone, and considering the CLI soil class there are very few limitations that adversely affect continuous agricultural production on the subject site.
 - Utilizing information from the occupant the crop rotation is 2 to 3 years of wheat and 1 year of canola with average wheat yields of 40 bushels per acre and 30 bushel per acre for canola.
 - The gross average return for Canola is \$304 per acre and \$311 per acre for wheat.
 - Based on a 5-year rotation of three years wheat and two years Canola, the average gross loss would be \$308.00 per acre.
- The Adverse Effect, Nuisance, Inconvenience, and Noise approach by the empirical method resulted in the following:
 - The occupant uses large equipment to farm a significant number of acres and a typical farming pattern is used in which extra turns and time is required to farm around the well site but no other issues were noted.
 - There is no formal arrangement with the landowners other than the occupant will farm the land to control the weeds until the property is developed.
 - The additional time to farm around the well site is estimated to be 4.5 to 6.0 hours per crop season and based on current custom rates and specific equipment hourly rate of between \$150.00 and \$350.00 per hour (depending on equipment size), potential loss of inputs due to extra corners, anticipated overlap of 0.5 to 1.0 acre would result in a total Adverse Effect of \$1,910.00.
- The combined Rate of Compensation for the 3.67 acre well site and access road would be \$3,040.00 (rounded) consisting of Loss of Use \$1,130.36 plus Adverse Effect of \$1,910.00

- The Negotiated Agreement or Pattern method yielded the following:
 - The Newalta facility is unique as it is an injection well, located in a mixed Use area, in a parcel of land that although zoned RM-2 by the LUB, is being farmed.
 - Using proximity, land Use designation, and actual land Use as the search criteria resulted in a number of locations between the subject site and Grande Prairie along Highway 2.
 - The operators of those sites indicated that Loss of Use was being paid at \$300.00 per acre and Adverse Effect ranged from \$1,900.00 to \$2,500.00 but it is noted that the majority of the sites were for a single well head with minimal activity.
 - Using either battery sites or disposal well sites and similar commencing anniversary dates as the search criteria resulted in three locations that were considered similar to Newalta’s site as follows:

Ref No.	Operator	Date	Location	Land Use	Area (acres)	Status	Activity	Comp.
1	Conoco	Apr, 08	NE1/4 4-72-8-W6M	cult	3.56	Active – Satellite Facility	Operator daily	\$5,000. Total
2	EnCana	Dec, 09	NW1/4 36-72-8-W6M	cult	6.79	Active – Battery Facility	Field Ops 8 people & tanker truck every 2 nd day	\$9,000. Total
3	Deep Well Services	Oct, 10	SE1/4 18-78-5-W6M	cult	5.61	Tank Farm, Pump Site & Disposal Well	Operator Daily & 1-2 tanker trucks/day	\$6,300.00 Total \$350.00 Loss of Use \$4,335.00 Adverse Effect

- He acknowledged that these sites were somewhat distant from the subject site, they are zoned agricultural AG under the LUB, and that disposal wells are not generally close to one another.
- From the above the range in Loss of Use is \$300.00 to \$350.00 per acre with the most recent being at \$350.00 while the range of Adverse Effect ranged from \$4,000.00 to \$7,000.00.
- Reference 3, Deep Well Services (a competitor of Newalta) would be the most similar comparable and it has an Adverse Effect amount of \$4,335.00.
- Using the above analysis the Rate of Compensation is estimated to be \$5,450.00 per year consisting of Loss of Use of \$300.00 per acre and Adverse Effect of \$4,335.00
- The subject site is not within the Mercer Hill Area Structure Plan and development in that area would be in the future as Alberta Transportation has downloaded significant interchange development cost onto the development.
- There are a number of industrial sites in proximity to the subject site and a number are for rent.
- He did not observe a “For Rent” sign on the subject property.
- The current zoning was adopted in 2005 or 2006.
- With respect to the Berrien report he noted that:
 - It ignored the actual physical use of subject site as of the commencing anniversary date as it is being farmed not used as an industrial site.
 - Use of the Peak lease was not applicable.
 - Land value is most impacted by Highest and Best Use.
 - The *Act* does not require that the Highest and Best Use have to apply to all compensation factors.

On cross-examination, Mr. Telford provided the following information:

- Different terminology may have been used in his report for the subject site, the subject property, and subject parcel but the report is a 14.88 acre lot with a 3.67 acre well site and access road.
- He agreed that the subject site was being used as a well site and access road and the remainder was being farmed as of the commencing anniversary date.

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- Of the 3.67 acre well site and access road, the majority of it is being used for the injection/disposal well but a small portion outside the fenced area may be farmed.
- If a new well has being applied for, reasonable compensation would depend on the land Use, what is permitted or approved, and what the property is being used for.
- One cannot ignore the existing well as it is a factor in determining the Rate of Compensation.
- He ruled out compensation based on a commercial Use for the subject site, as there were a number of other commercial properties for rent in the area.

- The existing well has an Adverse Effect on the remainder of the subject site but he was unsure on what it would be, as it is only one of the factors to be looked at.
- The existing well could have some Adverse Effect on commercialization of the subject site as it would have to be included into the commercial development.
- His calculation of the Adverse Effect amount of \$4,335.00 was based on the most relevant of his comparables (Ref. No. 3), which is near Spirit River and consists primarily of the extra time associated with farming around a well site.
- Ref. No. 3 does not have the same commercial development potential, as does the subject site.
- The most common use of the Highest and Best Use determination is the determination of the amount of compensation on an initial taking but it is not exclusive to initial takings.
- Highest and Best Use or Approved Use is one of the factors he looks at when determining the Rate of Compensation.
- One does not have a Loss of Use until there is a Loss of Use or if a Loss of Use is imminent in the form of a lease or about to sign a lease.
- He did not think commercial development of the subject site would take place in the near future.
- His Rate of Compensation amount is based on what purpose the adjacent land is being used for.
- He could not find another comparable site along the highway industrial corridor with an injection/disposal well on it, and as such, the site is unique.
- If the remainder of the subject site was being used for commercial purposes or was being prevented from being used for commercial purposes he would have looked at potential commercial losses in his evaluation of the Rate of Compensation.

On cross-examination, Mr. Erickson provided the following information:

- If land is zoned commercial and they wanted to have a facility on it, they would expect the landowner to ask for commercial rates if he wanted to lease it out.

FINDINGS OF FACT

1. The “effective date” for the Right of Entry Order (E2048/84) is July 25, 1984.
2. The Right of Entry Order (E2048/84) was originally for a well site and access road totalling 3.67 acres in the NE1/4 Section 35 Township 72 Range 6 West of the 6th Meridian (NE1/4 Sec 35-72-6-W6M).
3. A portion of the NE1/4 Sec 35-72-6-W6M, containing the well site and access road covered by the Right of Entry Order (E2048/84), was subdivided out.
4. The 3.67 acre well and access road covered by the Right of Entry Order (E2048/84) is now located in Lot 1B, Block 1, Plan 0626936.
5. The current format of Lot 1B, Block 1, Plan 0626936 was registered with the Land Titles Office on November 6, 2006
6. At the commencing anniversary date and as of the hearing date, Lot 1B, Block 1, Plan 0626936 was 14.88 acres in size.
7. At the commencing anniversary date and as of the hearing date, the Respondents, Brian Rowney and David King, owned Lot 1B, Block 1, Plan 0626936 each as an undivided one half interest.
8. Newalta Corporation currently holds the Right of Entry Order (E2048/84).
9. The commencing anniversary date for this review of the Rate of Compensation is July 25, 2009.

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10. Lot 1B, Block 1, Plan 0626936 is located within the County of Grande Prairie No. 1 and more specifically within the Hamlet of Clairmont.
11. Lot 1B, Block 1, Plan 0626936 is subject to the County of Grande Prairie No. 1's Land Use Bylaw.
12. Under the County of Grande Prairie No. 1's Land Use Bylaw, Lot 1B, Block 1, Plan 0626936 is zoned Rural Medium Industrial (RM-2) District.
13. Under the County of Grande Prairie No. 1's Land Use Bylaw, Agricultural Operation(s) is neither a Permitted nor Discretionary Use allowed in the Rural Medium Industrial (RM-2) District.
14. The County of Grande Prairie No. 1's Land Use Bylaw definition of Agriculture Operation(s) includes the cultivation of land and the production of agricultural field crops, e.g. farming.

DECISION

1. The Panel finds that the comparable agreements provided by both the Operator and the Respondents fail to establish that a Pattern of Agreements exists.
2. The Panel orders that the Rate of Compensation be increased from \$2,300.00 to \$10,220.00 per year in accordance with s. 27(1)(d) of the *Act* commencing on the July 25, 2009 anniversary date.
3. Proper notice, as prescribed under s. 27(14) of the *Act*, was not given by the Operator therefore, Interest at the Bank of Canada rate on July 25, 2009 is applicable, as provided for in s. 27(15)(c) of the *Act*.

ANALYSIS

1. What is the appropriate method of determining the Rate of Compensation?

a. Is there a Pattern of Agreements?

The Operator, through their expert's evidence, argues that there is a Pattern of Agreements that should apply to the subject site. In the expert's report, Section 6 Annual Compensation, it is indicated that two accepted methodologies can be used to estimate the Rate of Compensation for impacted lands: these being empirical and Pattern of negotiated Agreements, or Dealings. The report goes on to provide an estimate of the Rate of Compensation based on the two methods although the second method is subsequently identified as negotiated agreements with no explicit reference to a Pattern of Agreements.

Since the Pattern of Agreements was first adopted by the courts in the late 1970's subsequent courts have struggled with what a Pattern of Agreements encompasses. So far, various courts have identified nearly two dozen different considerations which subsequent courts and by extension the Board and this Panel may want to be addressed by those alleging a Pattern of Agreements exists in order to aid in determining if one does, in fact, exist. The considerations include but are not limited to: rights granted; nature of the parties; nature of the negotiations; type of land; use of the land; type of crops grown; crop rotation; expected return on crops; location of the site (corner, border, centre); size of site; presence or absence of an access road; type of well (oil or gas); degree of noise, nuisance, and inconvenience; frequency of site visits or servicing; region within the Province; area to which the pattern is said to apply and why it is applicable to the site; the total number of sites there are within the defined area; proximity of the agreements to the site; an indication of the number of sites reviewed in the defined area so as to determine how the agreements are related to the site, an indication of the number of parties, both operator and landowners, represented by the agreements; an indication of why other sites, reviewed or not, were not included in the agreements, an explanation as to why agreements not supporting the pattern can be excluded for the agreements, and if both the amount of compensation and the Rate of Compensation have been included in the agreements.

The Operator's expert did indicate that the subject site is unique as it is an injection well, located in a mixed Use area, on land designated by the LUB as Rural Medium Industrial RM-2 but is being farmed. The first attempt to find agreements that would establish a Pattern of Agreements was made by looking for sites that were in close proximity to the subject site, of similar land Use designation, the same actual land Use, and with various operators. This attempt yielded a number of agreements but no individual agreements were provided, only a brief narrative summary of the results. The second attempt, was to find agreements for sites that had more intensive activity, such as a battery site or disposal well. This attempt yielded three sites and of these, the Rate of Compensation for two of them was indicated only as a total number. The only information provided on these three agreements was in the form of a summary table. Further, all three were on lands designated by the municipal authority as agricultural, not industrial.

The expert for the Respondent, after a number of commercial leases had been collected proceeded to apply a discount or adjustments to all of them for one reason or the other. The Panel does not accept the concept of the application of discounts or premiums for that matter, to a Pattern of Agreements.

The Respondents, through their expert's evidence, indicate in Section E Pattern of Dealings, that given the unique situation, the only pattern that would be useful is the pattern (or valuation) set by similar leases and then goes on to indicate that their empirical approach establishes a Pattern of Agreements. What the Respondents' expert has provided with the commercial leases is, in fact, appraisal evidence common in expropriation cases through the presentation of comparable leases/sales, which have been adjusted, for similarities and divergence from the subject site.

The Panel agrees with both experts that the subject site is indeed unique and notes that the number and quality of the comparables put forward, to establish the Pattern of Agreements, do not account for the subject site's uniqueness.

Neither party provided detailed information on a sufficient number of the items to be considered in the determination if a Pattern of Agreements exists. Information not presented or addressed, included the nature of the parties, nature of the negotiations, area to which the pattern is said to apply, the total number of sites that are within the defined area, an indication of the number of sites reviewed in the defined area so as to determine how the agreements are related to the site, an indication of the number of parties represented by the agreements, and an explanation as to why agreements not supporting the Pattern of Agreements can be excluded. Hence, the Board was unable to find that a Pattern of Agreements exists for the subject site.

Given that neither Party was able to establish that a Pattern of Agreements is applicable to the subject site, there is no need for the Panel to determine if there are cogent reasons for departing from it.

2. *In accordance with s. 27(1)(d) of the Act, what is the appropriate Rate of Compensation payable under Right of Entry Order E2048/84?*

As the Panel has found that no Pattern of Agreements is applicable to the subject site, it must turn its attention to s. 27 of the *Act* in order to determine what is the appropriate Rate of Compensation.

- a. What is the Loss of Use by the Respondents of the area granted to the Operator per s. 25(1)(c) of the *Act*?

The Operator, through their expert's evidence, presented evidence on Loss of Use under Section 6.1 Empirical Approach to establish what gross returns would be based on an anticipated crop rotation of three years of wheat and two years of canola, average wheat and canola crop yields for the area and average market prices for wheat and canola. The analysis is based on the subject site being used for agricultural pursuits of cereal or oilseed crop in conjunction with the remainder of the quarter section and resulted in a weighted gross return of \$308.00 per acre.

The choice of determining the Loss of Use, based on agricultural pursuits, is incorrect, in this instance. The Operator's expert acknowledged a number of times that the subject site is zoned RM-2 under the LUB at the time of the commencing anniversary date and as of the date of the hearing. He went on to present excerpts from the LUB with respect to the Section 24: Rural Medium Industrial (RM-2) District including the purpose of the district and the Permitted and Discretionary Uses.

A review of the Permitted and Discretionary Uses reveals that Agricultural Operation(s), as defined in Section 1 (12) of the LUB, is neither a Permitted nor Discretionary Use in the RM-2 district. Hence, under s. 643(1) of the *Municipal Government Act* (MGA) agricultural operation(s) or farming became a legally non-conforming Use when the subject site was rezoned from what would have been the Agricultural (AG) District under the LUB. The Use of the subject site for agricultural purposes can continue as per s. 643(2) of the MGA, but that Use is a tenuous one given that if the agricultural Use or the intention of agricultural Use is discontinued for 6 months then any further Use of the land must conform to the LUB.

The Respondents contend that they have no intention of ever farming the subject site and that they have a verbal agreement with the landowner of the remaining quarter section to keep the weeds on the subject site under control.

The Operator makes note that, as of the commencing anniversary date, no recent development applications had been submitted to the County of Grande Prairie No. 1. The Panel notes, unlike a number of other applications in which potential future development plans have been raised as a reason for increased rates of compensation, in this instance, rezoning has already occurred. A number of Permitted Uses, all of an industrial nature, could immediately proceed on the subject site, if the proposed development conforms to all of the requirements of the LUB, in accordance with s. 642(1) of the MGA. In addition, there are a significant number of Discretionary Uses all of an industrial nature that could proceed on the subject site, if the County of Grande Prairie No. 1 deemed them appropriate for the subject site and issued a development permit, in accordance with s. 642(2) of the MGA.

Also, if Newalta determined that it wanted to cease operations and immediately reclaim the site to its original condition of agriculture, the Respondents would have no legal way of extending the agricultural operations Use to the reclaimed area in accordance with s. 643(4) of the MGA.

In any event, agricultural use of the subject site is no longer an approved use or even the Highest and Best Use of the land and any estimate of the Loss of Use based on continued agricultural Use is not appropriate.

Given that the Panel has given no weight to the Operator's empirical approach to determining the Loss of Use portion of Rate of Compensation, it now must turn its mind as to the amount of weight to give to the Respondents' empirical approach. The empirical approach of the Respondents' expert was to deal directly with the comparison of the commercial lease rates on nearby lands with similar utility that were available as the most direct approach. It has the benefit of eliminating the need for a detailed determination of land value and the need for the lease information to contain what percentage of land value represents the return on investment. Five lease agreement results were presented including the lease agreements or monthly invoices for those leased on a month-to-month basis. The expert report acknowledges the different land Use zoning, location of the sites relative to the subject site, term of the lease, and leasehold improvements and then applies adjustment factors to the various leases to bring them to a common denominator with the subject site.

Although the above may be the correct approach to take in cases of expropriation, it is not so here. To receive compensation for Loss of Use, there must be an actual Loss of Use. The Respondents' expert approach is based on the premise that the remainder of the subject site is being rented or leased out at a rate of \$750.00 per acre per month but it is not. Therefore, the Panel has also given no weight to the Respondents' expert's empirical approach to Loss of Use.

The Respondents, through their evidence, do not currently receive any income from the remainder of the subject site. The land is being held for potential commercial development only and the Panel accepts the Respondents' evidence that it is not being used for agricultural purposes. There is no Loss of Use from a commercial sense, as there is currently no rental or lease agreement on the remainder of the subject site. However, were the access road and well site not present, the Respondents would be able to rent out the area for agricultural purposes at \$40.00 to \$60.00 per acre. Therefore, the Panel sets the Rate of Compensation for Loss of Use at \$60.00 per acre or \$220.00 per year (rounded) for the 3.67 acres..

- b. What is the Adverse Effect of the area granted to the Operator on the remaining land of the Respondents and the Nuisance, Inconvenience, and Noise that might be caused by or arise from or in connection with the operations of the Operator per s. 25(1)(d) of the *Act*?

The Operator, through their expert's evidence, presented evidence on Adverse Effect, Nuisance, Inconvenience, and Noise under Section 6.1 Empirical Approach based on the subject site being used for agricultural pursuits of cereal or oilseed crop in conjunction with the remainder of the quarter section.

The choice to determine Adverse Effect, Nuisance, Inconvenience, and Noise based on agricultural pursuits is incorrect, in this instance as it is based on a Use which is neither Permitted nor Discretionary in the RM-2 zone.

The Respondents, through their expert's evidence focused on the Loss of Use of the area granted to the Operator and so did not specifically address the issue of Adverse Effect of the area granted to the Operator on the remaining land of the Respondents or the Nuisance, Inconvenience, and Noise that might be caused by or arise from or in connection with the operations of the Operator.

There is a tangible Adverse Effect on the remaining land of the Respondents due to the presence of area granted to the Operator, which is currently being used for the purposes of a disposal well, as it does affect the Respondents ability to lease or develop the remaining land. Having rejected the Operator's approaches to the determination of Adverse Effect, the Panel is left with precious little information to base their decision on. The Panel therefore considered the Land Use zoning of the subject site, the permitted and discretionary Uses, the actual use, the fact that no comparables were provided with RM-2 zoning, the zoning of the comparables provided, the location and size of the subject site, and its uniqueness. After considering the forgoing and on balance, the Panel sets the Rate of Compensation for Adverse Effect at \$9,000.00 per year.

Notwithstanding the subject site is not being used for agricultural purposes the Respondents do suffer Nuisance, Inconvenience, and Noise caused by and arise from the operations of the Operator given the number of vehicles, both large and small, which visit the site on a daily basis and by having to deal with the Right of Entry Order. Having received no relevant evidence on this issue the Panel is left to assess what the Rate of Compensation should be for Nuisance, Inconvenience, and Noise on their own. Reviewing previous court and Board decisions, on balance the Panel sets the Rate of Compensation for Nuisance, Inconvenience, and Noise at \$1,000.00 per year.

In assessing the Respondents' request that the Rate of Compensation be fixed at the same rate they are receiving for the Peak site across Highway 2, the Panel gave it little weight since it does not account for the difference in zoning and leasehold improvements nor tangible Loss of Use and Adverse Effect.

3. Interest

Under Section 27(15)(c) of the *Act*, the Board may make an order regarding the payment of Interest that it considers appropriate. The Respondents' application to the Board stated that notice by the Operator, as prescribed by the *Act*, was not given on time but was given nearly a year late. The Operator did not contest this assertion. Therefore, Interest should be awarded. In the absence of a persuasive alternative proposal, the Panel awards interest at the Bank of Canada rate in effect on the commencing anniversary date of the review.

The Bank of Canada rate on July 25, 2009 was 0.5 percent.

COSTS

The Parties advised the Panel that costs have been agreed upon. As a result, there is no requirement for the Panel to address this issue.

ORDERS

An order will be issued setting out the new Rate of Compensation as stated above. In addition, an amending Order will be issued changing the land description to Plan 0626936, Block 1, Lot 1B (NE ¼-35-72-6-W6M) as described in Certificate of Title No. 062 509 106.

Dated at the City of Edmonton in the Province of Alberta on August 9, 2011.

SURFACE RIGHTS BOARD

MEMBER