ALBERTA SURFACE RIGHTS BOARD
(the "Board")

Citation: TAQA North Ltd. v. SL Developments Inc. 2013 ABSRB 580

Date: 2013-08-23
File Nos. SL2011.0324
Decision No. 2013/0580

In the matter of the *Surface Rights Act*, RSA 2000, c S-24 (the "Act")

And in the matter of land in the Province of Alberta within the:
SE ¼-29-38-1-W5M as described in Certificate of Title No. 112 332 001 +20
(the "Lands")

BETWEEN:

TAQA NORTH LTD.,

Operator.

and

SL DEVELOPMENTS INC.,

Lessor,

BEFORE: D. A. Sibbald, Q. C.
(the "Panel")

DECISION

APPEARANCES:

For the Lessor: Steve Bontje, Principal, SL Developments Inc.
Janet McCready and Elena Semenova , Counsel, Peacock Linder & Halt LLP
Robert Berrien, Berrien Associates Ltd.
Clayton Ganson, Stantec Inc.

For the Operator: Rian Levick and Laurier Laprise, Landmen
Daron K. Naffin, Counsel, Bennett Jones LLP
Robert Telford, McNally Land Services Ltd.
Bryan Romanesky, CITYTREND (Romanesky Urban Planning and Management Ltd.)

BACKGROUND

The Board received an application from the Lessor pursuant to Section 27 of the *Act* for a review of the compensation payable under a surface lease (the "Lease") for a well site and access road. In accordance with Section 27(11) of the Act, the Board convened a hearing at Red Deer, Alberta, on April 10 and 11, 2013, for a review of the compensation payable under the Lease.

At the opening of the hearing, counsel for both parties confirmed that the effective date for this review is October 29, 2011, and that timely notice had been provided by the Operator under Section 27(4) of the *Act*.

The parties requested that the Panel reserve the determination of what costs are payable under Section 39 of the *Act*.

At the suggestion of counsel for the Lessor, the Panel conducted a site inspection under Section 24 of the *Act* after the conclusion of the first day of the hearing. As the parties were advised on April 11, 2013, the Panel did not enter the leased lands but observed the site and surrounding land from a vehicle while located on public roadways. Those observations provided a better perspective of the location of the developments described below.

2.0 FACTUAL OVERVIEW: THE LAND AND THE WELL SITE

As a result of an annexation in 2006, the Lands are located within the Town of Sylvan Lake, Alberta, (Sylvan) towards the central southern boundary of the municipality.

In general terms, Sylvan has grown east, south, and west from a core area adjacent to the lake. The land to both the north and west of the SE ¼-29-38-1-W5M (SE ¼) in which the Lands are located have been essentially completely built out with residential subdivisions and associated uses. The land to the east and south are largely undeveloped.

The Lessor acquired the Lands in 2002. The current principals of the Lessor acquired control of the corporation through a share acquisition in 2006.

As a result of various subdivisions between 2008 and 2012, the Lands now consist of approximately 100 acres. Those subdivisions and the associated planning approvals have resulted in the development of several single family homes near the northern boundary of the SE ¼ in a development. To date, construction has occurred on less than half of the almost 100 lots. A church and police station are located in the extreme northeast area of the SE ¼. A four-storey, multi-family residential development is in place near the southeast corner of SE ¼. The plans allow for another similar development to the north in the future.

A storm water management facility is located near the northwest corner of the SE ¼.

More details concerning the status of the planning process are set out below in the Findings and Analysis section of this decision.

To the south of the single family development, a multiple pipeline right-of-way crosses the Lands from northeast to southwest. A subdivision for a school site to the north of the right-of-way and toward the centre of the Lands was registered in 2012. It allows for the use of the land above the right-of-way as play fields.

The subject well site is located just south of the right-of-way, approximately halfway between the east and west boundaries of the SE ¼. Access to the well site is by a roadway from the southeast corner of the SE ¼, which runs along the southern boundary of the Lands and then turns to the north to the well site. The parties agreed that the area covered under the Lease for the well site and access road is 5.68 acres.

The facilities on the well site consist of a well head, a compressor station with an internal combustion engine and a tank. The oil produced from the well is transported from the site by truck approximately

once per month. Fuel for the engine is supplied by an underground pipeline which follows the path of the access road.

The remainder of the Lands are undeveloped and, although previously used for agricultural production, are now sitting dormant.

3.0 RELEVANT LEGISLATION

For ease of reference, the relevant sections of the *Act* are set out in Appendix A.

4.0 EXHIBITS

A list of the exhibits and information filed during the hearing is set out at Appendix B.

5.0 POSITIONS AND KEY SUBMISSION OF THE PARTIES

5.1 The Lessor

A central part of the Lessor's position is that the Lands are no longer used for agricultural purposes and that the compensation payable under the Lease should reflect that change.

Robert Berrien (Berrien), an appraiser with extensive experience in providing opinion evidence on compensation assessments under the *Act*, testified on behalf of the Lessor. He opined that the highest and best use of the Lands is "…Urban Development, with the area of the well site and access road lease specifically as Medium Term Future Low Density Residential land." [1]

The Lessor submits that in the absence of the well site and access road (the leased land), the phasing or sequencing of development would have proceeded differently. The leased land is currently part of Phase 4. Clayton Ganson (Ganson), a civil engineer, testified that under a "natural phasing" the leased lands would have been included in Phases 1 and 2 and would have been developed earlier than now contemplated.

Berrien then provided an analysis that in light of a 100-metre setback requirement under the Energy Resources Conservation Board Guide 56 a total area of 14.19 acres cannot be developed until the well site is reclaimed. That area includes the actual lease area and the setback area plus the loss of developable lots adjacent to those areas which could not be developed due to "typical development practices…and economic reasons." [2] The later categories were supported by the evidence of Ganson. The acreage of the leased lands, being 5.68 acres, are used to calculate the compensation for loss of use and the remaining 8.51 acres outside the leased site are used to calculate compensation for adverse effect.

The next step in Berrien's analysis was to establish a market value for the land. Based on his assessment of seven "indicators", i.e. comparable sales, he concluded that the market value was $130,000.00 per acre. He then applies a yield rate, alternatively a "cap rate" of 6.5 percent "or an interest [borrowing] rate estimate of 6.3%."

The foregoing analysis led Berrien to opine that the appropriate compensation arising from the delay in development for loss of use and adverse effect for each of the five years after the effective date are as follows:

[1] Exhibit 2 – Berrien Associates Ltd. report at page 14
[2] Exhibit 2 – ibid. at page 20

a. Loss of use[3]

- 2011 - $46,519.00
- 2012 - $48,666.00
- 2013 - $50,813.00
- 2014 - $53,960.00
- 2015 - $55,107.00

b. Adverse effect[4]

- 2011 - $69,697.00
- 2012 - $72,914.00
- 2013 - $76,130.00
- 2014 - $79,348.00
- 2015 - $82,564.00

Relying on information from Ganson, Berrien opined that additional adverse effect compensation should be payable for the "Costs of Staging," being the cost to build a temporary road and sanitary line. It was submitted that those costs arose because the area covered by the Lease resulted in the staging of the development advancing in a different sequence than would have occurred had the Lease not been in place. Those costs were said to be $155,778.00 plus an additional estimated $23,367.00 in associated extra engineering costs.

5.2 The Operator

The core of the Operator's position is that the Lessor has not yet suffered a loss from the inability to develop the leased lands. In addition, it is argued that several of the alleged losses are not compensable because the Lessor purchased the Lands with the intention of developing them when the Lease was already in place. As such, it is submitted that any extra costs associated with developing the site around the leased lands ought to have been reflected in the acquisition cost.

The Operator rejects the Lessor's submission that in the absence of the Lease the Lands would have been developed in a different sequence. It relies on the admission of Ganson that typically development flows from one area to the next and does not "leap frog" across undeveloped areas. Bryan Romanesky (Romanesky), a qualified planner, supported that position. He pointed out that the Town of Sylvan Lake's South Area Structure Plan which includes the Lands states: "It is anticipated that subdivision and development will generally be contiguous with existing development; 'leapfrogging' of development is to be avoided."[5] The land to the north of the Lands has been fully developed for some time, and it would be expected that development would flow from north to south as has occurred rather than 'leap' over the utility right-of-way to the area to the south as suggested by Ganson.

The Operator submits that based on the existing planning approvals, the Lessor would still need to apply for and obtain approval for a land use redesignation, subdivision approval and a development permit before being able to proceed. Romanesky opined that in a best case scenario it would take about two years

[3] Exhibit 2 – ibid. at replacement pages 28 and 29. The value using the interest rate has been provided since Berrien indicated it was the preferred rate.
[4] Exhibit 2 – ibid. at pages 30-32. Berrien's categories of Lease Origin Impact Areas and Setback Origin Impact Area have been combined. The value using the interest rate has been provided since Berrien indicated it was the preferred rate.
[5] Exhibit 2 – ibid. Tab 5 at page 18

to obtain those approvals. To date, only Phase 1 has received such approvals. Applications have not been filed for Phases 2 through 4.

Robert Telford (Telford), an appraiser who like Berrien has extensive experience in providing opinion evidence on compensation assessments under the *Act*, testified on behalf of the Operator. He provided evidence that there was a significant increase in the population of Sylvan between 2000 and 2008. He pointed out that since that time the population has remained relatively stable with only about 100 residential building permits being issued annually since 2009.[6]

The Operator relied on that information and the limited construction in Phase 1, as described above, to submit that there is insufficient market demand to support proceeding with applications for the required approvals.

Relying on Berrien's acknowledgment that the Lessor will not suffer a loss until development occurs, the Operator submits that the position advanced by the Lessor is speculative and that the Lessor has not met burden of proving the losses alleged.

Telford provided three potential methods of determining compensation[7]:

- Encumbered property with a restricted or limited use - He opined that to date no losses have been incurred since the limited or restricted use was known at the time of acquisition but the Lessor would spend some additional time each year, which he estimated would be compensable for adverse effect at $400.00;
- Encumbered property with an income stream – The income stream would be the annual compensation of $2,600.00 payable under the Lease when the property was acquired. Telford did not consider this method appropriate since he did not consider a stream of income or revenue to be a "use" under the *Act* but, if accepted, would add the additional $400.00 as above;
- Encumbered property taking inflation into consideration – This method would add an inflation factor to the current annual compensation payable under the Lease but was rejected for the same reason as set out for the previous method but, if accepted, would add the additional $400.00 as above.

The Operator presented information about the compensation payable under 11 surface leases within Sylvan or the Sylvan/Red Deer County Intermunicipal Plan Area. It was submitted that no applicable "pattern of dealings"[8] could be ascertained nor that any of those circumstances are sufficiently similar to form the basis of determining compensation in the present case.

The Operator proposes that the Panel either award annual compensation reflecting only the additional time spent by the Lessor to deal with Lease matters, which is estimated at $400.00, or leaving the annual compensation at the current annual rate of $2,600.00 as contemplated under Section 27(11) by confirming the rate.

5.0 ISSUES

The Panel considered the following issues when reviewing the rate of compensation for the Lease:

[6] Exhibit 3 – McNally Land Services Ltd. report at pages 19 - 21
[7] Exhibit 3 – ibid. at pages 31 - 34
[8] See for example *Livingston v. Siebens Oil & Gas Ltd. (1978), 8 A.R. 439 (C.A.) at para. 11*

1. What is the rate of compensation payable under the Lease effective as of October 29, 2011?

    - Is compensation payable under the market value rate of return approach?
    - Is compensation payable for additional expenses associated with a temporary road and sanitary sewer line?
    - Is compensation payable based on only the extra time spent by the Lessor?
    - Is compensation payable based on the evidence of comparables?

2. What, and to whom are costs payable under Section 39 of the *Act*?

6.0 DECISION

1. The rate of compensation effective as of October 29, 2011, is $5,000.00 per year.

2. The issue of the costs payable under Section 39 of the Act is reserved. The parties are to provide written submissions in accordance with the timelines set out below.

7.0 FINDINGS AND ANALYSIS

7.1 Overview

Section 27 of the *Act* provides an opportunity to the parties to a surface lease to seek a determination of the rate of compensation annually payable under the lease. As stated in *Nexen Inc. v. Farm Air Properties et al*[9] *(Farm Air)*:

> *The purpose of Section 27 is thus to provide for a review every five years of the rate of compensation. As such, the Legislature has created a mechanism for a reconsideration of that rate in light of changing circumstances within that time period. Those changes must, of course, be related to the "compensation payable on an annual or other periodic basis ... in respect of those matters referred to in Section 25(1)(c) and (d)."*

In the vast majority of cases heard by the Board, compensation is based on losses associated with agricultural production on the land at issue. The Lands in the present case were previously used for agricultural production but are now sitting dormant in expectation of use for residential development.

The Lessor submits that compensation should be based on the increase in market value of the land as it comes closer to being ready to develop. The basis for assessing compensation is reliant on there being a delay in the development of the Lands and associated losses. The Operator says that until development occurs or is at least imminent, no additional compensation is payable.

7.2 Market Value Rate of Return Approach

The implicit foundation of this approach is that the Lease has resulted in a delay in the Lessor's ability to develop the land for resale. Two questions need to be addressed:

a. Is there is a reasonable likelihood that the Lands will be developed? If not, there is no loss to be compensated.

b. In the absence of the Lease, would the Lands have been developed or at least would development be imminent? If not, there is no compensable loss.

[9] Board Decision 2008/0182 at page 11

The first question is not in dispute. The parties are in agreement that it is likely that the Lands, including the leased land, will be developed for residential use at some point in the future. That conclusion is supported by the current approval status which includes the following:

- Annexation into Sylvan in 2006;
- The South Area Structure Plan (2006) which provides planning guidance for approximately nine quarter sections and identifies the Lands as future residential development land;
- Urban Reserve land use designation under the Town of Sylvan Lake Land Use Bylaw which provides for future subdivision and development;
- The Beacon Hill Outline Plan (2007) which provides for future residential development in four phases.

The parties disagree on whether the Lease has delayed development of at least a portion of the Lands.

As outlined above, some development has occurred on the SE ¼. Phase 1 under the Beacon Hill Outline Plan encompasses a generally L-shaped portion of the SE ¼ across most of the northern boundary and down the eastern boundary. Land use redesignation, subdivision approvals, and building permits were obtained to allow for construction to start in 2008 of single family homes in the northern portion and a multifamily development in the southeast area.

To date, no further applications for land use redesignation, subdivision approvals, or building permits have been made for Phases 2, 3 and 4. Phase 2 covers an area which is largely north of the pipeline right-of-way on the west side of the SE ¼. Phase 3 covers the area south of the pipeline right-of-way on the west side of the SE ¼. Phase 4, which includes the leased land, is located in the central portion of the SE ¼ south of the pipeline right-of-way.

The Lessor submitted that if the Lease was not in place the sequence of development would have been different. It was suggested that Phase 1 would have encompassed essentially the entire eastern half of the SE ¼ south of the pipeline right-of-way, including the leased land area. The evidence does not support such a finding. Under such a proposal, the entire area north of the pipeline right-of-way which is adjacent to the developed areas to the northwest of the SE ¼ would have been part of Phases 3 and 4.[10] The result would have left almost half of the SE ¼ sitting vacant and being 'leap-frogged' for development in the southeast portion. Although services were installed for the multifamily development in the southeast, the Panel is persuaded by the evidence of Ganson and Romanesky that contiguous development is the norm. Romanesky's training and experience as a planner provides a further basis to accept the reliability of his opinion that a proposal not to follow the flow of development already in place from the west and north would be an unlikely scenario.

Construction in Phase 1 started in 2008. As set out above, it is far from complete in 2013. Berrien provided information about the significant growth in Sylvan's population from 1996 to 2008. He failed to provide the information presented by Telford that there has been little growth since 2008. Berrien also did not provide the information that both the value and the number of Sylvan residential building permits peaked in 2007, dropped substantially in 2008, and has remained relatively stable.[11]

The Lessor has chosen not to proceed with applications to allow for the development of Phases 2 and 3, which do not include the leased land. The evidence supports a finding that the delay in further development is not the presence of the Lease but rather the lack of market demand. Romanesky opined

[10] Exhibit 2 - Appendix 10
[11] Exhibit 3 – Telford Report at pages 19 - 21

that even in a best-case scenario it would take approximately two years to complete the application process for the next phase. There was little, if any, evidence to suggest that the Lessor plans to re-activate its active development of the SE ¼ in the near term.

In summary, the Panel finds that the evidence does not establish, on a balance of probabilities, that the Lease has resulted in the Lands not being developed or at least that such development is imminent.

It is also noteworthy that the Lease was in place and registered on title when the current principals of the Lessor acquired that corporation in 2006 for the express purpose of development. The facts in *Farm Air* are distinguishable. In that case, the operator had provided the landowner with an estimated time by which the well would be abandoned which was not achieved. The evidence in the present case does not disclose any reasonable basis for such an expectation. In addition, in *Farm Air*, development was delayed because of contamination arising from the well. Moreover, in *Farm Air*, development had proceeded on all but one remaining area around the well site, unlike in the present case where only a portion of one phase has proceeded to construction and some 100 acres are still undeveloped.

In *Rywood Resources Ltd. v. Winfield Power Company Ltd. et al*[12] ("*Rywood Resources*") a panel of the Board used the land market value rate of return approach to determine the compensation payable under a right of entry. One factor which distinguishes the facts of that case from the present scenario is that when the owner acquired the land the well site was not registered on title. As such, no notice of the site was given to the purchaser. In addition, as noted in the Lessor's written argument in the present case, in *Rywood Resources*, "imminent development was delayed due to the operations"[13] of the operator.

Similarly, in *Muntean v. GNE Resources Ltd.*[14] the Court assessed compensation based on the market value rate of return approach but in that case the land was a much smaller parcel and, as best as can be determined from reviewing the reasons, no further approvals were required to proceed with development.

The Lessor relied on *True Energy Inc. v. Kitching*[15] and *Anterra Energy Inc. v. Moncrieff*[16] to support an argument that if the highest and best use of the Lands is no longer agricultural compensation should not be based on a loss of crop but rather should be based on a "loss of rights," one of which is the right to develop the land.

In *True Energy*, compensation was being determined for an initial taking under a right of entry order. The Court upheld the Board's determination of loss of use based on $250.00 per acre and adverse effect of $4,911.31 on the basis that "this unique parcel was naturally separate from the whole of the parcel and had a unique development potential and in all likelihood there is a market demand for this type of property." Those factors are distinguishable from the present case.

In *Anterra*, a panel of the Board found that $1,500.00 per year was the appropriate compensation for the loss of use when the land, although zoned agricultural had a highest and best use of country residential/ recreational. The amount was not based on a market value rate of return approach but rather appears to be global assessment. Interestingly, the Panel reverted to using farmland comparables to set compensation for adverse effect at $2,000.00 per year. While the *Anterra* decision provides some guidance that using agricultural comparables to determine loss of use may be inappropriate when the land is no longer used for that purpose, it does not support the use of a market value rate of return approach.

[12] Board Decision No. 99/0080
[13] Lessor's Written Argument at page 3
[14] 143 A.R. 197 (Q.B.)
[15] 452 A. R. 356 (Q.B.)
[16] 2008 CarswellAlta 2428 (ASRB)

In summary, the Panel finds that the evidence does not establish, on a balance of probabilities, that the Lease has resulted in the Lands not being developed or at least that such development would be imminent. The factual basis for compensation to be payable based on a market value rate of return approach has not been established. As such, it is unnecessary to determine the appropriateness of the proposed quantification of such a claim.

7.3 Additional Expenses

The Lessor seeks compensation for two types of additional expenses as adverse effect:

- To build a temporary road and sanitary sewer line - $155,778.00;
- Extra engineering costs for temporary road and sanitary sewer line - $23,367.00.

The basis of the claim is that these costs were incurred due to the presence of the leased land and are described as "Cost of Staging." In other words, it is submitted that in order to proceed in the sequence described above as Phases 1 to 4, additional costs were incurred.

The amount of these costs was not challenged, but the Operator disputes that they are compensable as adverse effect.

The Panel has found above that the sequence of development was not driven by the location of the leased land. That alone is grounds to reject this component of the claimed compensation. If the costs were incurred because of the order of development, and the presence of the lease was not the reason for that order, then no compensation is payable.

Ganson acknowledged that it would have been known that additional costs would be required to develop the Lands knowing that the well site was present. While the details of such costs may not have been known at the time the current principals acquired the Lessor corporation, it was the intent to develop the Lands knowing that the site was there. Steve Bontje testified that SL Developments Inc. is in the business of land development and has about 1000 acres in Alberta either in the planning or construction stage. As stated in *Farm Air* at pages 12 - 13:

> *The Board views the fact that the Site was in place and producing sour gas when Farm Air or its corporate successor acquired the land as a major obstacle to establishing this loss. Manning testified that there was no record of any such consideration in the corporate documents from the time. Nevertheless, the matter at hand is significantly different from a situation where a landowner with a prospective intention to develop property is restricted from doing so by the intrusion of the granting of a right of entry. The result may also be different if while a party owns rural land with a surface lease or right of entry and residential or commercial growth expands to that property such that development a real possibility. Another distinguishing fact in the present case is that the sole purpose of Farm Air acquiring this land was to hold it for development with the knowledge that there are limitations on that ultimate use.*
>
> *…*
>
> *The simple reality is that it was known at the time of acquisition that there was a sour gas facility on the land which would limit the design possibilities. Following Nexen's commitment to attempt to reclaim the Site by May 2005, it was also known that the setback almost certainly be significantly reduced in the near term. Although it was not until January 2008 that the Reclamation Certificate was issued and even later corrected to include the proper Plan, a claim that the efficiency of the development was restricted by a known obstacle at the time of acquisition is not supportable.*

Although the panel in *Farm Air* was addressing whether the claimed losses for design inefficiencies were compensable, the same principle applies to the extra costs sought in the present case. The leased land and the facilities were in place when SL Developments Inc. was acquired in 2006. The intention was to develop the land with knowledge of the site and facilities.

In summary, the Panel finds that the claimed extra expenses are not compensable

7.3 Compensation only for the Extra Time of the Lessor

Telford's opinion is essentially that on a technical level there is no loss of use because the Lands are sitting dormant and not being used. The Panel does not accept that a landowner is not entitled to compensation while an operator uses the surface of the land. To make such a finding would be inconsistent with a central purpose of the *Act*, being to provide fair and reasonable compensation to a landowner when the land is used by an operator.

7.4 Compensation Based on the Comparables

The Operator provided information about the compensation paid under 11 surface leases in the area[17]. The Operator submitted that there was not sufficient similarity between the circumstances of the land use covered by those agreements and the present case to provide any real guidance in determining compensation, let alone establish a pattern of dealings. The Lessor took the same position.

The Panel recognizes that the comparables contained in Exhibit 6 have a number of different characteristics than the Lands. Nevertheless, in the absence of other reliable evidence, the Panel considers those comparables to be the best available information upon which to base a determination of the fair and reasonable rate of compensation.

Three of those comparables have an annual rate of compensation of $15,000.00. Those sites have significantly different features than the Lands. Comparable #4 is located within a completely developed commercial area within Sylvan. Comparable # 6 is located adjacent to a residential lakefront development in the northeast portion of Sylvan. Development plans are already in place for this site. Comparable # 8 is a multi-well battery and single-well battery located on land northeast of Sylvan used as a berry farm. It is reasonable to expect that an operating berry farm would have a calculable loss of use to support a higher rate of compensation. The Panel places essentially no weight on these rates of compensation because of the distinguishing features.

The rate of compensation for the remaining eight comparables ranges from $3,100.00 to $5,000.00. None of these sites are located within Sylvan but are located within the Sylvan Lake/Red Deer County Intermunicipal Development Plan (IDP).

Three of the sites, Comparables #7,# 9 and #10, are located northwest of Sylvan within what is described on the map from the IDP as natural area. Although no direct evidence was provided, the Panel interprets that to mean that the likelihood for any future development would be limited. The site with a rate of compensation of $3,100.00, Comparable #7, is described as being a suspended gas well. Comparable #5 is located within an area of the IDP identified for industrial use.

The remaining four sites, Comparables #1, #2, #3, and #11, are all located within the IDP to the west of Sylvan between Highways 11 and 11A. Like the Lands, they are all identified as being for future

[17] Exhibit 6

residential use. The rate of compensation for those four sites ranges from $4,300.00 to $5,000.00. The rate of compensation for Comparable #3 at $5,000.00 includes additional compensation for a second well.

The Panel recognizes that these future residential comparables have characteristics which differentiate them from the Lands. Those characteristics include the above-ground facilities located within the leased areas and the effective dates which range from August 2009 to September 2012. Nevertheless, these comparables provide evidence of a relatively narrow range of compensation for land being used for similar uses as the Lands.

In the absence of other reliable evidence upon which to base a determination for the fair and reasonable rate of compensation payable under the Lease, the Panel relies upon the information of the compensation payable for these four future residential lands.

The compensation payable for Comparable #3 of $5,000.00 reflects the presence of the second well. On the other hand, the Lands, unlike the future residential comparables, are located within the limits of Sylvan.

On balance, the Panel finds that an award of a rate of compensation of $5,000.00, being at the upper end of the range for the future residential comparables, is fair and reasonable.

8.0 COSTS

As requested by the parties, the issue of what costs are payable under Section 39 of the *Act* and to whom those costs are payable is reserved. If the parties are unable to resolve that issue, written submissions, in duplicate, are to be provided to the Board in accordance with the following timelines:

- The Lessor - within three weeks of the date of this decision;
- The Operator - within two weeks of receiving the Lessors' submission; and
- The Lessor's Reply, if any - within one week of receiving the Operator's submission.

The parties are reminded of the provisions of Rule 31(1) and (2) of the Surface Rights Board Rules and are asked to provide their submissions in a manner which complies with the requirements of the Rule addressing the factors to be considered as set out in the Rule.

9.0 ORDERS

An Order will issue determining the rate of compensation payable by the Operator as noted above.

Dated at the City of Edmonton in the Province of Alberta on August 23, 2013.

SURFACE RIGHTS BOARD

MEMBER

APPENDIX A

LEGISLATION:

Relevant sections of the *Surface Rights Act:*

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.

(10) Repealed 2009 c31 s11.

11) The Board shall hold proceedings to determine the rate of compensation 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.

RSA 2000 cS-4 s27;2009 c31 s11

APPENDIX B

EXHIBITS FILED

Exhibit Number:	Exhibit Description:	Exhibit Filed By:
1	Section 27 Application with attachments	Agreement
2	Report of Berrien Associates Ltd., dated March 8, 2013, with replacement pages	Lessor
3	Report of McNally Land Services Ltd., dated March 15, 2013	Operator
4	Report of CITYTREND., dated March 18, 2013	Operator
5	Hierarchical Planning Pyramid Diagram	Operator
6	Binder of Comparables	Operator
7	Historical Land Title Certificate and Transfer of Land	Operator
8	Beacon Hill Site Plan	Operator
9	Storm Water Management Drawing from Area Structure Plan	Operator
10	Resume of Clayton Ganson	Lessor

ADDITIONAL INFORMATION FILED

1. Written Argument of Lessor
2. Written Argument of Operator