THE LAND COMPENSATION BOARD

FOR THE PROVINCE OF ALBERTA

ORDER NO. 170

FILE NOS. 10305
10312
10313

Wednesday, May 25, 1983

IN THE MATTER OF "The Expropriation Act" being Chapter E-16 of the Revised Statutes of Alberta 1980.

IN THE MATTER OF an application by Paterson Park Ltd., Brenda E. Bellingham, John Mitchell, J. A. Fraser Implement Co. Ltd., Leonard L. Stewin and Turq Developments Ltd. to the Land Compensation Board to determine the compensation payable by the Town of Grand Centre for the expropriation of those lands hereinafter more particularly described.

BETWEEN:

PATERSON PARK LTD., BRENDA E. BELLINGHAM, JOHN MITCHELL, J. A. FRASER IMPLEMENT CO. LTD., LEONARD L. STEWIN and TURQ DEVELOPMENTS LTD.

- and -

THE TOWN OF GRAND CENTRE

BEFORE:

THE LAND COMPENSATION BOARD FOR THE PROVINCE OF ALBERTA

APPEARANCES:

Mrs. P. A. Smith	:	Counsel for the Claimants Paterson Park Ltd., John Mitchell, J. A. Fraser Implement Co. Ltd., Leonard L. Stewin and Turq Developments Ltd.
D. P. Mallon Esq.	:	Counsel for the Claimant Brenda E. Bellingham

Land Compensation Board, Alberta

Order No.: 170

W. H. Kowalski Esq. : Counsel for the Respondent

O R D E R

The applications were made by Paterson Park Ltd., Brenda E. Bellingham, John Mitchell, J. A. Fraser Implement Co. Ltd., Leonard L. Stewin and Turq Developments Ltd. respectively (hereinafter called "the Owners") pursuant to the provisions of the Expropriation Act for an Order of the Board fixing the compensation to be paid by the Town of Grand Centre (hereinafter called "the Town") to the Owners as a result of the expropriation by the City of certain land described as.

Firstly:

> The North East Quarter of Section Twenty-One (21) Township Sixty-Two (62), Range Two (2), West of the Fourth (4th) Meridian containing 159 acres more or less, excepting thereout all mines and minerals, registered in the names of Paterson Park Ltd. and Brenda E. Bellingham each as to an undivided one-half interest.
>
> (hereinafter called "Parcel A")

Secondly:

> A Portion of the South East Quarter of Section Twenty Eight (28), Township Sixty Two (62), Range Two (2), West of the Fourth (4th) Meridian containing 135.29 acres more or less excepting thereout all mines and minerals, registered in the names of John Mitchell, J. A. Fraser Implement Co. Ltd.

and Turq Developments Ltd. each as to an undivided one-quarter interest and Paterson Park Ltd. and Leonard L. Stewin each as to an undivided one-eighth interest.

(hereinafter called "Parcel B")

(the aforesaid Parcels A and B are hereinafter sometimes collectively referred to as "the expropriated land").

The hearing was held in the City of Edmonton on the 9th, 10th, 11th and 12th of May, 1983. On May 12th, 1983 the Board heard oral argument by counsel.

All preliminary matters leading up to the hearing were established as having been properly completed or were waived by the parties. It was established that the effective date of the expropriation was June 2, 1981 and the parties were agreed that this was the effective date for valuation of Parcel A and Parcel B. It was established that the respective Owners were served with Notices of Proposed Payment and that on November 4, 1981 a proposed payment in the amount of $191,000.00 was made to the Owners of Parcel A and on October 30, 1981 a proposed payment in the amount of $189,405.00 was made to the Owners of Parcel B. The date of possession was not agreed to and will be discussed and determined subsequently in this order.

The interest in Parcel A and Parcel B taken by the Town is an estate in fee simple and in each case the taking was of the entire parcel owned by the respective Owners. The work or purpose for which the land was expropriated was for the construction and operation of a sewage lagoon.

The expropriated land is located south of the Town of Grand Centre, Parcel B is approximately one half mile south of the Town boundary while Parcel A adjoins Parcel B to the south and is thus approximately one mile south of the Town boundary. The topography of Parcel A is generally flat to undulating with some depressional areas which collect water. There are no improvements on Parcel A and at the time of taking portions of the land were under cultivation for agricultural purposes and the remainder was unimproved grazing land. The topography of Parcel B is generally flat with a depressional area in the north east corner. Parcel B had located thereon three old farm buildings but it was common ground to the appraisal witnesses that such buildings added no value to the property and they were ignored in the valuation thereof.

The expropriation of Parcel A and Parcel B involved the

taking of two separate parcels of land owned by different Owners. However the parties agreed that the compensation hearing with respect to both parcels should be heard simultaneously as a substantial part of the evidence to be presented applied to both parcels. The Board acceded to the request of the parties in that regard and pursuant to Rule 14 of the Board's Procedure Regulations (Alberta Regulation 15/75) ruled that the applications would be heard simultaneously. Hereinafter in this order the discussion of the evidence and the findings of the Board with respect thereto shall apply to both Parcel A and Parcel B except where otherwise specified.

The issues presented and to be determined by the Board are as follows:

A. To determine the highest and best use of the expropriated land.

B. To determine the market value of Parcel A and Parcel B and the amount of compensation to be awarded to the respective Owners thereof.

C. To deal with and determine certain claims for disturbance damages advanced on behalf of Paterson Park Ltd.

D. To deal with interest and costs.

On behalf of the Owners the following witnesses were called and gave evidence. Mr. W. T. Candler, a planning consultant, presented a report and gave evidence as to the land use of the expropriated land and the potential future use thereof. Mr. E. J. Shaske, an appraiser, presented two appraisal reports and gave evidence as to the highest and best use and the market value of Parcel A and Parcel B. Mr. J. T. Wilson, a research assistant, who had assisted Mr. Shaske in researching the material contained in the aforesaid reports gave evidence with respect thereto. Mr. R. S. Bellingham, one of the Owners, principal shareholder of Paterson Park Ltd., gave evidence as to the history of ownership of the expropriated land, plans for the development thereof and disturbance damages claimed by Paterson Park Ltd. On behalf of the Town the following witnesses were called and gave evidence. Mr. M. Sword, senior municipal planner with the Department of Municipal Affairs, gave evidence with respect to the preparation and adoption of the General Municipal Plan for the Town. Mr. K. N. Fraser, an appraiser, presented an appraisal report and gave evidence as to the highest and best use and the market value of the expropriated land. Mr. D. L. Sanna, an appraiser, presented an appraisal report and gave evidence as to the market value of the expropriated land. Mr. D. Lenihan, town manager for the Town, gave evidence with

respect to the General Municipal Plan for the Town and the events surrounding the taking of the expropriated land. Mr. S. Rymut, development officer for the Municipal District of Bonnyville, gave evidence with respect to the Land Use Bylaw of that municipal district and as to the policies of the district with respect to industrial subdivision and development. Mr. W. Belbeck, a real estate agent, gave evidence as to the market conditions prevailing in the Grand Centre - Cold Lake area in the period 1979 to 1981.

The Board will now deal with the issues raised and its findings thereon.

(A) The Determination of the Highest and Best Use of the Expropriated Land.

Mr. Shaske was of the opinion that the highest and best use of the expropriated land was "as a holding property ripening into an eventual industrial subdivision and development". In that highest and best use Mr. Shaske considered Parcel B to be superior to Parcel A and the Board will deal with that aspect subsequently in this order. Mr. Fraser was of the opinion that the highest and best use for the expropriated land was continuation of the existing use for limited agricultural production. Mr. Sanna did not make a specific finding as to highest and best use but the gist

of his report and evidence leads to the conclusion that he regarded the expropriated land as agricultural land with some added speculative value.

The foregoing divergence in opinion as to highest and best use led the three appraisers to markedly different opinions as to the value of the expropriated land. Mr. Shaske estimated the market value of Parcel A to be $6,000.00 per acre and Parcel B to be $9,500.00 per acre. Mr. Fraser estimated the market value to be $1,400.00 per acre and he attributed the same value to both Parcel A and Parcel B. Mr. Sanna estimated the market value of Parcel A to be $1,200.00 per acre and Parcel B to be $1,800.00 per acre. In the face of such a wide difference of opinion by the expert witnesses as to the value of the expropriated land it is necessary to make a detailed analysis of and findings with respect to the highest and best use thereof.

The expropriated land is situated in the Municipal District of Bonnyville and therefor regard must be had to the planning and land use documents in place in that District. The land is also situated within a mile of the corporate limits of the town of Grand Centre and consequently regard was also directed to the planning and land use documents in place for the Town.

Furthermore the land is immediately adjacent to the boundary of the airport for Canadian Forces Base - Cold Lake and lies within the Noise Exposure Factor contours in the 30 to 40 range for that airport. Consequently the impact thereof on future development must be considered.

The expropriated land is subject to the provisions of Land Use Bylaw 700 of the M. D. of Bonnyville (Exhibit No. 43) passed by the municipal council on July 25, 1978. Under the provisions of that Bylaw the expropriated land is classified as "Controlled Urban Development District". It was the opinion of Mr. Shaske and Mr. Candler that the "Controlled Urban Development District" classification is essentially a holding classification and does not represent the ultimate or end use which may be permitted for land subject thereto. The Board accepts and agrees with that opinion. Even so the discretionary uses under such classification contemplate a number of types of industrial development and use. Counsel for the Town placed strong emphasis on an extract from a September 18, 1980 meeting of the municipal council (Exhibit No. 20) wherein the following resolution was passed:

"Industrial Subdivisions	Council has set the following criteria for Industrial Subdivisions in the Municipal District of Bonnyville until such time as a general Municipal Plan has been prepared and adopted for the Municipal District:

a) the proposed development must be:

1) located two miles from an existing urban centre with the exception of Industrial Parks at Community Airports.

2) located at least two miles from Recreation Lakes.

3) located on marginal farm land except for specific site requirements which may be demonstrated by developer.

4) located along and all weather (paved) road or the developer being prepared to pave the access from the industrial development to an existing paved road.

5) located on lands subdivided for industrial uses and no rezoning of country residential parcels to industrial parcels shall be permitted."

The foregoing is of course a statement of council policy as to future industrial development and as such must be carefully considered. It is clear however that it is an interim policy "until such time as a general Municipal Plan has been prepared and adopted."

The location of the expropriated land within one mile of the corporate boundary of the Town of Grand Centre also required a review of the planning documents in place for the Town and specifically the General Municipal Plan for Grand Centre passed in December, 1979. Under that Plan the lands within the Town boundaries

immediately to the north of the expropriated land are classified for use as a mix of industrial and commercial development and use. The aforesaid Plan provides for a staged development of such lands moving from north to south in the direction of the expropriated land.

A great deal of evidence and argument was presented as to the necessity of having the expropriated land annexed into the Town before industrial development could occur and that it was unlikely that such annexation would occur in the foreseeable future. Mr. Shaske was of the firm opinion that the land could be developed to an industrial use under the jurisdiction of the Municipal District and that therefor such use was not dependent on annexation. The critical factor is that of market demand for industrial land and the timing of such demand. That issue will be dealt with subsequently herein. In the Board's opinion, based on an analysis of the planning documents and policies in place, there was no serious or insurmountable impediment to future development of the expropriated land for industrial purposes within either the Town planning documents in place or the Municipal District documents in place. The demand for industrial land usage would of course have to mature and it would be necessary to obtain the necessary approvals before any such development would occur.

As previously stated the expropriated land falls within the 30 - 40 Noise Exposure Factor contours for the airport located adjacent thereto. In the Board's opinion this location excludes any consideration of residential development and use of the expropriated land. It also creates constraints on the industrial development of such land. There was introduced in evidence a draft of "The C.F.B. Cold Lake and Cold Lake - Grand Centre Airport Vicinity Protection Area Regulations" designed to place constraints on land use in the vicinity of those airports. These regulations were not passed or in effect at the effective date and indeed have been the subject of considerable controversy and have not at the present date been passed. Notwithstanding that such regulations have not been passed common sense dictates and indeed it was common ground to all parties to these proceedings that the existence and use of the airport would place constraints on private developments adjacent thereto. It was agreed that there would be height restrictions on structures placed in the area and that uses which would create hazards or problems to operation of the airport would be restricted or prohibited. It was also common ground that a further level of approvals, namely the Department of National Defence, would be required for development on such land. The Board agrees that the foregoing places additional constraints on future industrial development of the expropriated land but the

Board does not accept or agree that such constraints are fatal to future development. Both Mr. Shaske and Mr. Candler were of the opinion that a substantial range of industrial uses could be permitted and the Board concurs with that opinion.

It was common ground to all parties that the topography and physical features of both Parcel A and Parcel B presented no serious constraints to industrial development. The location of the expropriated land appears to be in the path of future industrial development and such development would not be incompatible with surrounding land uses. The Canadian National Railway line runs along a portion of the westerly boundary of Parcel B. Both Mr. Shaske and Mr. Candler were of the opinion that the railway made a very significant contribution to the feasibility and viability of industrial development on Parcel B. The witnesses for the Town were of the opinion that rail access was not a significant factor. In the Board's opinion rail access, while not a critical factor to future industrial development, is a positive attribute of Parcel B when considering future industrial use.

In the Board's opinion there is no doubt that the most critical factor in determining the highest and best use of the expropriated land is the demand for industrial usage or the timing

of future development. The analysis and determination of this critical factor is extremely difficult in the present case in view of the unique situation which prevailed in the area during the time period in question. The Cold Lake-Grand Centre-Bonnyville area is the location of major heavy oil deposits in the Province of Alberta. During the late 1970's a very high degree of interest and activity on the part of a number of resource companies with holdings in the area in developing such deposits and extracting oil therefrom was evident. Esso Resources Ltd. in particular had reached an advanced stage of planning with respect to such development. Development of these heavy oil deposits requires a very elaborate and expensive array of extraction and processing facilities and this in turn results in a relatively labour intensive operation both with regard to construction and subsequent operation of such facilities. At least by 1979 Esso Resources Ltd. may be said to have been poised on the threshold of embarking on a major extraction project. There were protracted negotiations with the various levels of government to work out such matters as the price of the oil to be produced, royalty rates, taxation factors and the multitude of other matters necessary to the successful launching of the project. In October of 1980 the Federal Government announced the National Energy Policy and over the next 12 to 18 months the legislation necessary to the implementation of such policy was being

worked out and put in place. Throughout the period of planning and projections for the development of the heavy oil project and particularly after the announcement of the National Energy Policy an aura of uncertainty and speculation persisted. At the same time a substantial degree of optimism existed that one or more such projects would indeed proceed. The evidence indicated that the prevalent opinion of those holding land in the area was that the question was when would such projects proceed rather than whether such projects would proceed. That opinion or view appears to have prevailed up until July 1981, approximately one month after the effective date herein, when Esso Resources Ltd. announced that it was disbanding its planning team for the heavy oil project. That announcement appears to have been generally interpreted as putting the entire project on hold for an indefinite period of time. It is against this background that the market activity with respect to real estate in the area must be reviewed and analyzed.

All of the appraisal witnesses were agreed that, for the reasons set out above, in the year 1979, there was a very volatile and active market in the area involving parcels of land of 160 acres and larger in size. Parcels of that size were being actively traded on the basis that such parcels were suitable for subdivision

and development for residential, industrial and commercial uses to accommodate the anticipated population explosion which would result when one or more of the heavy oil projects proceeded. The witnesses were agreed that this was a speculative market in which unimproved land was being purchased with a view to subdivision and development for future residential, industrial and commercial needs generated by the impending heavy oil development projects. Many of the buyers and sellers in this market were established and sophisticated land developers. Others were what may be termed speculative purchasers. The level of market activity continued at a somewhat less frantic pace through the early part of 1980 and to as late as August of that year. None of the three appraisal witnesses were able to find and produce in evidence any sales whatever of parcels of land of this size and type during the period from August 1980 to the effective date for valuation, namely, June 2, 1981. Mr. Shaske, on the one hand and Messrs. Fraser and Sanna, on the other, had very different opinions as to the reasons for this lack of market activity and sales and the implications to be drawn therefrom.

Mr. Shaske in his analysis had considered in excess of 30 transactions which had occurred in the environs of Cold Lake and Grand Centre during the 1979-80 period above referred to. It was his opinion that during such period virtually all of the available

land in the area had been purchased by developers and speculators. It was his opinion that due to the uncertainties which have previously been described those purchasers were holding their land pending a determination as to whether the heavy oil developments were going to proceed or not. Consequently for the period August 1980 to June 2, 1981 there was no market activity as there was no land available for sale. Mr. Shaske was very firm in his opinion that, as a result of his investigation and analysis, he did not find any evidence whatever that there had been a decline in market values over the period August 1980 to June 2, 1981.

Both Mr. Fraser and Mr. Sanna were of the opinion that the reason that there were no sales during the period in question was that there were no buyers in the market place, that is to say, no one was interested in purchasing properties. Both were also of the opinion that market values had declined substantially during such period. In the Board's opinion neither Mr. Fraser or Mr. Sanna produced any concrete or substantive evidence to support the opinion expressed that market values had declined. Such evidence as was adduced in support of their respective conclusions was very sparse and inconclusive. Both Mr. Fraser and Mr. Sanna referred to two or three instances where purchasers were in default of their purchase

obligations. Apart from the fact that such examples were very few in number no evidence was adduced as to the nature, reasons or details of such defaults and it was not clear whether default occurred before or after the effective date herein. Evidence was led through Mr. Belbeck, presumably in support of the position adopted by Fraser and Sanna, that Mr. Belbeck had listed two or three properties for sale in late 1980 and early 1981 and had been unable to attract any purchasers. In response to a question put to him by the Board Mr. Belbeck stated that in the time period in question he was not aware of any instance where land owners were prepared to list their lands for sale for less than they had paid for them. It must be observed that in each instance cited by Mr. Belbeck the asking price was very substantially in excess of the acquisition price paid by the owner listing the property. The Board finds that the position adopted by both Mr. Fraser and Mr. Sanna that there had been a substantial decline in market values during the period August 1980 to June 2, 1981 is completely unsubstantiated by the evidence presented. Indeed such evidence as was presented, if it has any probative value at all, tends to support the position put forward by Mr. Shaske.

It was the opinion of Mr. Shaske that the timing of future

development on the expropriated land was not a significant factor in arriving at the highest and best use thereof. Mr. Shaske took the position that all of the comparable sales which he had used in his reports faced the same uncertainties and speculative elements as the expropriated land, all had been purchased with a view to future intensive development and use for residential, industrial or commercial purposes. He was of the opinion that such sales accurately reflected the market conditions which prevailed during the period in question and the response of willing buyers and sellers in that market.

It is clear that the circumstances and market conditions which existed in this area at the time period in question must be considered to be highly unusual. The Board has carefully weighed and assessed all of the foregoing evidence and for the reasons previously stated herein the Board accepts the position adopted by Mr. Shaske with respect to the timing of future development and its impact on the valuation of the expropriated land.

For the same reasons the Board accepts the opinion of Mr. Shaske as to the highest and best use of the expropriated land, namely, as a holding property ripening into an eventual industrial

subdivision and development. The Board also accepts the opinion of Mr. Shaske that Parcel B is superior to Parcel A in such future use. Parcel B has the potential for rail connection, is closer to the Town boundary, has the clear potential to be developed independent of Parcel A whereas Parcel A would more likely be developed in conjunction with Parcel B. Parcel B also has somewhat more favourable topographic and physical features than Parcel A.

(B) The Determination of the Market Value of the Expropriated Land and the amounts to be awarded to the respective Owners thereof.

Appraisal reports and estimates of market value were presented by Messrs. Shaske, Fraser and Sanna all of whom are accredited appraisers and were accepted by the Board as such.

As previously stated Mr. Fraser found the highest and best use of the expropriated land to be for continued agricultural use and consequently arrived at an estimate of value accordingly. He advised the Board that in selecting the comparable sales which he used he sought out lands which could be considered as primarily agricultural lands. He selected 9 sales or indices which reflected unadjusted values in the range of $2,000.00 - $3,000.00 per acre. He then for reasons which were not clearly explained applied negative adjustments in the order of 50 percent

to arrive at his estimate of value for the expropriated land of $1,400.00 per acre. Mr. Fraser clearly did not have proper regard to the location, land use classification and potential of the expropriated land. The adjustments which he made to the sales data used were not satisfactorily explained and were not supported by the evidence presented. The Board does not accept the estimate of value given by Mr. Fraser and does not find his report and evidence to be of assistance in determining the market value of the expropriated land.

The appraisal report presented by Mr. Sanna requires explanation and comment. Mr. Sanna advised the Board that a Mr. O. G. Wasiuta had prepared the report and that it was signed by Mr. Sanna as "reviewing appraiser". It became very clear during the examination of Mr. Sanna with respect to the content of that report that he had not reviewed in any detail the documentary evidence from which the sales data had been derived. He was unable to say whether sales had been confirmed through discussions with vendors or purchasers. He was vague as to whether or not he had viewed and inspected the lands being used for comparative purposes. In short Mr. Sanna was not in a position to answer proper and appropriate questions put to him in cross-examination. The

Board is aware of the practice whereby accredited appraisers may use research assistants and others to assist in accumulating data and preparing appraisal reports and it may be that such is an accepted practice in the appraisal profession. However where such reports are presented in compensation hearings before this Board the appraiser presenting the report must be prepared to answer questions regarding the content of that report. It should be obvious that the purpose of presenting the report and the appraiser at a compensation hearing is to provide the opportunity to test and explore the data and information contained therein and the conclusions reached therein. The absence of such opportunity renders the probative value of the conclusions reached unreliable as a source upon which to found a sound decision. The Board has on occasion permitted the research assistant or other person who assisted in preparation of an appraisal report to be called and to give evidence with respect to matters in the report which the appraiser is unable to respond to. Indeed in the present case Mr. Wilson was called for that very purpose in connection with the testimony given by Mr. Shaske. The key consideration is that there must be full opportunity afforded to explore, question and test the evidence presented and the conclusions reached by the expert witness. In the case of Mr. Sanna that key consideration

or test was not met and consequently the Board attaches no weight to the appraisal report and evidence of Mr. Sanna.

The Board now turns to the evidence presented by Mr. Shaske whereby he arrived at his estimate of the market value of Parcel A and Parcel B. While Mr. Shaske presented separate reports with respect to Parcel A and Parcel B the majority of the data, information and analysis contained in those reports is common to both parcels of land and the Board deals with the same accordingly.

Mr. Shaske listed, examined and considered 33 transactions in arriving at his final estimates of market value. In his evidence Mr. Shaske made it clear that in arriving at his final conclusions as to value he had placed primary emphasis and weight on his Sales No. 1, 7 and 8 with respect to Parcel B and his Sales No. 1, 7, 8 and 15 with respect to Parcel A.

Sale No. 1 took place in August 1980 and involved the sale of a parcel containing 149.08 acres. The land is located one half mile directly to the east of Parcel A. Mr. Shaske found the potential for future use of Sale No. 1 to be the same as that of the expropriated land. The sale parcel did not have rail access which

was considered to be a negative factor. It had less favourable topography. It was somewhat more favourably located with respect to NEF contours but was still within the 30 to 35 range. The unadjusted sale price was $9,525.00 per acre.

Sales No. 7 and No. 8 are both similar in size to the expropriated land. Both of these sales are located some distance to the north of the expropriated land and lie to the west of the Town of Cold Lake. In Mr. Shaske's opinion both of these parcels had similar future potential for industrial development to that enjoyed by the expropriated land. The Board accepts and agrees with that assessment. Both sale parcels 7 and 8 are more favourable located than is the expropriated land with respect to the constraints imposed by proximity to the airport and the impact of NEF factors. The unadjusted sale price of Sale No. 7 was $9,031.00 per acre and Sale No. 8 was $8,668.00 per acre. Sale No. 7 transacted in January 1980 while Sale No. 8 took place in October 1979.

Sale No. 15 is similar in size and lies about 2 miles due east of the expropriated land. This sale took place in January 1980 for an unadjusted sale price of $5,410.00 per acre.

The Board finds, on the evidence presented, that each of the foregoing sales is fairly comparable with the expropriated land and can be relied upon as giving a reliable indication of value.

For the reasons previously set out herein in discussing market conditions in the area Mr. Shaske did not consider it appropriate to make adjustments for time of sale. He did not quantify the adjustments which were necessary to account for the various positive and negative features briefly set out in the above description of the sale properties. He did however, state that he had considered and weighed such factors in arriving at his final conclusions as to value. In conclusion Mr. Shaske estimated the market value of Parcel A to be $6,000.00 per acre and the market value of Parcel B to be $9,500.00 per acre. The Board was impressed with the careful and thorough analysis which Mr. Shaske made of this somewhat unusual and difficult valuation. The Board finds the evidence of Mr. Shaske to be the best evidence as to the market value of Parcel A and Parcel B and accepts his conclusions as to the value thereof.

The Board finds the market value of Parcel A to be

$6,000.00 per acre which calculated and rounded gives a total value of $955,000.00 and awarded that amount to the Owners of Parcel A.

The Board finds the market value of Parcel B to be $9,500.00 per acre which calculated and rounded gives a total value of $1,285,000.00 and awards that amount to the Owners of Parcel B.

(C) Claims for Disturbance Damages.

Several claims for disturbance damages were advanced on behalf of Paterson Park Ltd. No claims for disturbance damages were made by any of the other Owners. These claims and the Board's findings with respect thereto are as follows:

(1) A claim for $1,200.00 paid to Stewart Weir and Associates in connection with preparation of an application of subdivision for Parcel B. This work was done in late 1978 or early 1979. The evidence satisfied the Board that the application had been completely abandoned prior to and unconnected with the

expropriation of Parcel B. The Board finds that this cost or expense is unrelated to the expropriation and was not lost or thrown away as a consequence thereof. The claim is dismissed.

(2) A claim for $115.00 for legal fees paid. These fees were paid for legal advice sought by Paterson Park Ltd. as a result of a May 23, 1980 letter received from W. J. Francl and Associates indicating that the lands owned by Paterson Park Ltd. would be expropriated. The Board finds such costs to have been directly and appropriately incurred in connection with the expropriation and allows such claim.

(3) A claim for $650.00 for professional services rendered by B. A. McKearney, a planning consultant. The only evidence presented was a 2 page letter from Mr. McKearney which discussed in a general way the future potential of the subject land. It was not clear what the purpose of the letter was or what use, if any, was made of it. The Board dismisses this claim.

(4) A claim for $10,000.00. This claim arises out of an "Offer to Purchase and Agreement for Sale" whereunder "Kerman Investments Ltd. and Nominees" offered to purchase from Nu West Group Limited and Carma Developers Ltd. approximately 3 acres of land in Eastgate Business Park in or near Edmonton. A non-refundable down payment of $10,000.00 was made under this agreement. It was the evidence of Mr. Bellingham that such purchase was made for the sole benefit of Paterson Park Ltd. and that Paterson Park Ltd. had paid the $10,000.00 payment. It was further the evidence of Mr. Bellingham that Paterson Park Ltd. was unable to complete the transaction due to delay in receiving the Proposed Payment for the expropriation of Parcel B and consequently forfeited and lost the said $10,000.00. The Board is not satisfied that any clear connection was established between this transaction in Edmonton and the expropriation of Parcel B near Grand Centre. In any event the Board finds that such action, if so connected, was premature on the part of Paterson Park Ltd. and the loss thereby incurred is not reasonably or directly attributable to the expropriation of

Parcel B. Parcel B was expropriated effective June 2, 1981 and the above agreement was entered into June 16, 1981. There was no evidence whatever that there was that degree of urgency in obtaining alternative land to that which had been expropriated or that such acquisition represented such alterative land. The onus is on the Claimant to establish such claim. That onus has not been met and the Board dismisses this item of claim.

(D) Interest and Costs.

Pursuant to Section 66 of the Act, the Board must determine the interest, if any, payable to the Owner and the just rate at which such interest is to be calculated. The Board finds the just rate of interest to be 16 percent per annum. Such rate of interest has been selected having regard to the prime lending rates of interest charged by chartered banks over the period with respect to which interest applies.

Pursuant to Section 66(2) the date upon which the Owners gave up possession must be established. The evidence was that no Notice of Possession was served on the Owners by the Town pursuant

to Section 64 and no agreement or understanding as to the date of possession was entered into by the parties. Counsel for the Owners took the position that under these circumstances the date of possession should be concurrent with the date upon which the certificate of approval was registered in the Land Titles Office, namely June 2, 1981 and cited this Board's decision in Community Shopping Developments Ltd. et al v City of Edmonton (1980) 19 L.C.R. 57 in support of that position. In the Community Shopping case the Board at page 77 stated:

> "Section 64(2) (now Section 66(4)) requires that the date upon which the Owners gave up possession of the expropriated land must be established. Counsel for the City and for the Owners were not agreed as to the date of possession. Counsel for the Owners argued that the date of possession should be concurrent with the date upon which the certificate of approval was registered in the Land Titles Office, namely, September 3, 1976. Counsel for the City referred the Board to s.62 (rep. & sub. 1976, c.57, s. 2(6)) of the Act which sets out the procedure by which the expropriating authority may obtain possession and minimum periods within which notices may be served under that section. However, there was no evidence before the Board that the City had served upon the Owners any notice of possession pursuant to s. 62. The expropriated land was vacant land and was not being used by the Owners in any way at the date of expropriation. Under these circumstances the Board finds that the Owners relinquished any effective use of the land upon registration of the certificate of approval and deems that the City took possession of the expropriated land on September 3, 1976."

The facts in the present case are on all fours with

the Community Shopping case and the Board follows that case and finds that the date of possession herein was June 2, 1981.

Sub-section (3) of Section 66 provides as follows:

> Section 66(3) If the expropriating authority has delayed in notifying the owner of the proposed payment beyond the prescribed time, the Board shall order the expropriating authority to pay additional interest on the value of the land and severance damage, if any, from the beginning of the delay until the proposed payment is or was made, at the same rate as that prescribed in subsection (1).

The Town has delayed in notifying the Owners of the proposed payment beyond the prescribed time. The Notice of Proposed Payment should have been served on or before August 30, 1981 and was not served until, in the case of Parcel A, November 4, 1981 and, in the case of Parcel B, October 30, 1981. By order of Mr. Justice J. B. Feehan, dated August 27, 1981, the time for serving the said Notices of Proposed Payment was extended but the said order specifically preserved the rights of the Owners pursuant to Section 66(3). The Board therefore finds that additional interest shall apply pursuant to Section 66(3):

(a) with respect to Parcel A for the period of 66 days on the sum of $955,000.00.

(b) with respect to Parcel B for the period of 61 days on the sum of $1,285,000.00.

The Board has considered the provisions of Section 66(5) and under the circumstances here present finds no reason to refuse to allow additional interest under sub-section (3) of Section 66.

Pursuant to Section 66(4) the amount of the proposed payment with respect to each of Parcel A and Parcel B was less than 80 percent of the amount of compensation awarded therefor. Consequently, the Board must consider the application of sub-sections (4) and (5) of Section 66. The Owners claimed such additional interest. No evidence with respect to this issue was presented on behalf of the Town and the issue was not addressed in closing argument on behalf of the Town.

The Board is very keenly aware that in the present case the awarding of additional interest pursuant to Section 66(4) will constitute an onerous burden on the expropriating authority, the Town of Grand Centre. Consequently the Board has had very careful regard to sub-sections (4) and (5) of Section 66 which govern the awarding of such additional interest and the conditions under which the Board may refuse to do so. Those sub-sections read as follows:

> Section 66(4) If the amount of the proposed payment is less than 80% of the amount awarded for the interest

> taken and severance damage, if any, the Board shall order the expropriating authority to pay additional interest at the same rate as that prescribed in subsection (1), from the date of notifying the owner of the proposed payment until payment, on the amount by which the compensation exceeds the amount of the proposed payment.
>
> (5) Notwithstanding subsections (3) and (4), if the Board is of the opinion that a proposed payment of less than 80% of the amount awarded for the interest taken and severance damage, if any, or any delay in notifying the owner of the proposed payment is not the fault of the expropriating authority, the Board may refuse to allow the owner additional interest for the whole or any part of any period for which he would otherwise be entitled to interest.

Where the circumstances exist as set out in the opening words of sub-section (4), and clearly those conditions are present here, the sub-section goes on to say "---the Board shall order the expropriating authority to pay additional interest ---" (emphasis added by the Board). The wording used in sub-section (4) is mandatory and any discretion left to the Board with respect thereto must be found in sub-section (5). In sub-section (5) the grounds upon which the Board may refuse to award additional interest are stated as "---if the Board is of the opinion---" that such failure on the part of the expropriating authority "---is not the fault of the expropriating authority, the Board may refuse to allow the owner additional interest for the whole or any part of any period for which he would otherwise be entitled to interest" (emphasis added by the

Board). Firstly the Board would observe that the language used, namely, "otherwise be entitled" would appear to emphasize the mandatory nature of the award of additional interest provided for in sub-sections (3) and (4). Secondly the only ground upon which the Board may exercise its discretion to refuse to allow additional interest is where the Board is of the opinion that, the delay (in the case of notification of proposed payment) or shortfall (in the case of an insufficient proposed payment), "is not the fault of the expropriating authority."

The Board has previously herein dealt with the application of sub-section (5) to the award of additional interest pursuant to sub-section (3) of Section 66 and nothing further need be said in that respect. With respect to the application of sub-section (5) to a claim made under sub-section (4) Section 66 the Board has dealt with this issue in two previous cases, namely, Diehl et al v Minister of Transportation (1981) 23 L.C.R. 170 and Double F Motel Ltd. et al v Minister of Transportation (1981) 22 L.C.R. 78. In the Double F Motel case at page 93 the Board stated:

> "It was argued by counsel for the Minister that in this case the Board should, pursuant to s-s.(5), refuse to allow the Owners additional interest on the ground that the discrepancy between the amount of the proposed payment and the amount awarded was "not

the fault of the expropriating authority". The argument so advanced was in the Board's opinion tenuous. Counsel argued that the provisions of s. 64(4) and (5) were designed to ensure that expropriating authorities tender proposed payments arrived at in good faith and based on the best approximation to market value that can be obtained and, conversely, were designed to discourage token or unrealistic payments being tendered. The Board does not disagree. However, the Board does not accept or agree with the argument advanced by counsel for the Minister with respect to where "the fault for the discrepancy lay". While not stated in precisely those terms the argument appeared to revolve around the fact that it was the appraisal report and estimate of value prepared by the Minister's appraiser that was wrong and that the Minister, relying on such report, tendered the proposed payment and cannot be said to be "at fault". The Board does not propose to deal exhaustively with the meaning of the phrase "is not the fault of the expropriating authority" as used in s. 64(5). Clearly, for example, if the owner were to refuse access to the property or to withhold pertinent information about it and for those reasons a proposed payment was tendered which was substantially below the amount finally awarded s. 64(5) might well be applied. However that is an entirely different thing from taking the position that if the tribunal disagrees with the estimate of value given by the experts for the expropriating authority that fact brings into play s.64(5) so as to disqualify the owner from receiving additional interest under s. 64(4). Interpretation of s. 64(5) in that manner would result in substantial emasculation of the plain meaning and intention not only of that subsection but also of s-s. (4) of s. 64."

In the Diehl case at pages 179 and 180 the Board confirmed and followed the decision in the Double F Motel case.

The argument presented in both those cases was that the expropriating authority had acted in good faith in tendering the proposed payment because it had relied upon the report of an accredited appraiser estimating the market value of the land and had determined and made the proposed payment on the basis of that report. In both cases, for the reasons given, the Board found that such fact taken alone did not present an adequate or sufficient ground upon which to base refusal to allow additional interest. In the Board's opinion clearly the expropriating authority must do more than simply state that it relied upon an appraisal report in determining the proposed payment if it is to succeed in providing a basis for the Board to exercise its discretion under Section 66(5). That fact alone does not establish the good faith or absence of fault on the part of the expropriating authority where Section 66(4) comes into play. As stated in the Double F Motel case "Interpretation of Section 66(5) in that manner would result in substantial emasculation of the plain meaning and intention not only of that sub-section but also of sub-section (4) of Section 66."

In every case "the good faith" or "absence of fault" on the part of the expropriating authority must be determined on the basis of the facts and evidence presented. In the present case the Board has previously dealt at some length with the market conditions

which prevailed in the area over the time periods in question and the very active and volatile nature of those conditions. The Board has also dealt with the inconsistencies and short comings of the appraisal reports received by and acted upon by the Town and the vast disparity between those reports and the reports obtained by the Owners. While the Board must be careful to avoid reviewing this matter in hindsight the Board is of the opinion that at the time in question, namely the period from about June to October 1981, there were sufficient indications present in the information available to the Town to dictate caution and further investigation before relying upon the appraisal reports received by the Town. The aggregate amount of the proposed payment tendered for Parcels A and B was $380,405.00. The aggregate amount awarded by the Board as compensation for the market value of the expropriated land is $2,240,000.00. Thus the proposed payment tendered represents payment of approximately 17 percent of the market value of the expropriated land.

For the foregoing reasons the Board finds that it must award additional interest pursuant to sub-section (4) of Section 66 and further finds no reason to refuse to allow such additional interest pursuant to sub-section (5) of Section 66.

The Board awards additional interest to the Owners

pursuant to Section 66(4) at the rate of 16 percent computed as follows:

(a) with respect to Parcel A interest shall be computed from November 4, 1981 (the date upon which the proposed payment was tendered to the Owners) until paid, upon the sum of $764,000.00 being the amount by which the compensation awarded exceeds the amount of the proposed payment.

(b) with respect to Parcel B interest shall be computed from October 30, 1981 (the date upon which the proposed payment was tendered to the Owners) until paid, upon the sum of $1,095,595.00 being the amount by which the compensation awarded exceeds the amount of the proposed payment.

In computing the additional interest awarded pursuant to Section 66(4) the Board is of the opinion that under all of the circumstances of this case it would be unreasonable to calculate such interest on a compounded basis. The Board finds that such additional interest shall be calculated on the basis of simple interest on a per annum base at the rate of 16 percent per annum.

The Owners shall have their costs of the within proceedings as hereinafter provided.

Land Compensation Board, Alberta

Order No.: 170

THEREFORE IT IS ORDERED THAT

1. The amount of compensation payable by the Town to the Owners (Paterson Park Ltd. and Brenda E. Bellingham) is the sum of Nine Hundred Fifty Five Thousand Dollars ($955,000.00) together with interest thereon at the rate of 16 percent per annum, compounded annually, computed from June 2, 1981 until paid, with proper adjustments taking into account any monies previously paid by the Town to such Owners.

2. The Town shall pay to the Owners (Paterson Park Ltd. and Brenda E. Bellingham) additional interest pursuant to Section 66(3) with respect to the sum of $955,000.00. The amount of such additional interest shall be calculated at the rate of 16 percent per annum for the period of 66 days.

3. The Town shall pay to the Owners (Paterson Park Ltd. and Brenda E. Bellingham) additional interest pursuant to Section 66(4) with respect to the sum of Seven Hundred Sixty Four Thousand Dollars ($764,000.00) being the amount by which the compensation awarded exceeds the amount of the proposed payment. The amount of such additional interest shall be calculated at the rate of 16 percent per annum, computed from November 4, 1981 until paid.

4. The amount of compensation payable by the Town to the Owners (John Mitchell, J. A. Fraser Implement Co. Ltd., Turq Developments Ltd., Paterson Park Ltd., and Leonard L. Stewin) is the sum of One Million Two Hundred Eighty Five Thousand Dollars ($1,285,000.00) together with interest thereon at the rate of 16 percent per annum, compounded annually, computed from June 2, 1981 until paid, with proper adjustments taking into account any monies previously paid by the Town to such Owners.

5. The Town shall pay to the Owners (John Mitchell, J. A. Fraser Implement Co. Ltd., Turq Developments Ltd., Paterson Park Ltd., and Leonard L. Stewin) additional interest pursuant to Section 66(3) with respect to the sum of One Million Two Hundred Eighty Five Thousand Dollars ($1,285,000.00). The amount of such additional interest shall be calculated at the rate of 16 percent per annum for the period of 61 days.

6. The Town shall pay to the Owners (John Mitchell, J. A. Fraser Implement Co. Ltd., Turq Developments Ltd., Paterson Park Ltd. and Leonard L. Stewin) additional interest pursuant to Section 66(4) with respect to the sum of One Million Ninety Five Thousand Five Hundred Ninety Five Dollars ($1,095,595.00)

being the amount by which the compensation awarded exceeds the amount of the proposed payment. The amount of such additional interest shall be calculated at the rate of 16 percent per annum, computed from October 30, 1981 until paid.

7. The Town shall pay to the Owner, Paterson Park Ltd. for disturbance damages the sum of One Hundred Fifteen Dollars ($115.00) together with interest thereon at the rate of 16 percent per annum computed from the date 30 days after the date of service of this order, until paid.

8. The Town shall pay to the Owners the Owners' reasonable costs of and incidental to the application and hearing before this Board in such amount as may be agreed upon and failing such agreement at such amount as may, upon application to the Board, subsequently be taxed and allowed by the Board.

LAND COMPENSATION BOARD

Kenneth J. Boyd, Chairman