LAND COMPENSATION BOARD

FOR THE PROVINCE OF ALBERTA

ORDER NO. 413 **FILE NO. 10933.0**

September 12, 2002

An Application to Determine Compensation payable for the expropriation of land, filed with the Land Compensation Board, pursuant to the Expropriation Act, R.S.A. 1980, Chapter E-16.

BETWEEN:

GUARANTY PROPERTIES LIMITED,
MPI REALTY CORP. ON BEHALF OF
GUARANTY PROPERTIES LIMITED PARTNERSHIP,
CLAREVIEW ESTATES INC. and
1147578 ONTARIO LIMITED

Claimants

- and -

THE CITY OF EDMONTON

Respondent

BEFORE:

THE LAND COMPENSATION BOARD FOR THE PROVINCE OF ALBERTA

SITTING MEMBERS:
- Fred Weber, Presiding Member
- Marilyn McAvoy, Member
- Doug MacKenzie, Member

APPEARANCES:

For the Claimant: - D. P. Mallon, Counsel
Prowse Chowne LLP

Witnesses:

- Guy Woo
- Kim C. MacKenzie
- John M. Kelly; and
- Brian S. Gettel.

For the Respondent: - Larry Reynolds, Counsel
The City of Edmonton

Witnesses:

- Randy Phillips; and
- Keith Fraser.

PLACE: Held in the City of Edmonton in the Province of Alberta on April 8, May 28 to May 31 and June 10, 2002 at the Office of the Land Compensation Board.

APPLICATION

Guaranty Properties Limited, MPI Realty Corp. on behalf of Guaranty Properties Limited Partnership, Clareview Estates Inc. and 1147578 Ontario Limited (the Claimants), have applied to the Land Compensation Board for an order fixing compensation to be paid by the City of Edmonton (the City) for the expropriation of a portion of their lands, measuring 8.53 acres.

The Claimants request the following compensation:

(i) $1,023,600.00 or $120,000.00 per acre for the market value of the expropriated land.

(ii) interest at the rate paid on a 90 day Bank of Canada Treasury Bill,

compounded annually;

(iii) the present value of their damages including:

(a) $299,546.00 for lost development profit;

(b) $50,894.00 for prepaid permanent area contribution charges (PAC);

(c) $37,298.00 for the expropriated land's share of the 144th Avenue boundary costs;

(iv) $12,500.00 for lost executive time incurred as a result of the expropriation.

(v) penalty interest; and

(vi) costs.

The City has agreed to the payment of the $12,500.00 claim for loss of executive time.

The matter of costs will be dealt with following this decision, upon application by either party.

BACKGROUND:

The expropriated land lies within the area known as the Clareview Town Centre. The town centre is subdivided by the CNR tracks which run in a north/south direction. The expropriated land is part of a 33.44 acre site known as Lot S, which is bordered by the tracks on the east, 137 Avenue on the south, Manning Drive on the west and 144th Avenue to the north.

As a result of a 1993 subdivision for transit parking, the parent title was effectively split into a north and south half. The Bel-MK engineering study (Exhibit 18) identifies the southern most 23.73 acres (south lands), which includes the expropriated land, as capable of being serviced from the existing infrastructure. The parties' appraisers estimated the value of the expropriated land as part of the south lands.

The south lands under the Neighbourhood Area Structure Plan (the Plan), Bylaw 9841, are designated for future highway commercial and general business use. On April 25, 2000, the effective date for valuation, the south lands were in agricultural production.

AGREED STATEMENT OF FACTS:

1. Clareview Estates Inc., Guaranty Properties Limited, and MPI Realty Corp. were at all relevant times, and continue to be, validly subsisting Ontario corporations extra-provincially registered in Alberta.

2. Guaranty Properties Limited Partnership was at all relevant times, and continues to be, a subsisting Ontario partnership extra-provincially registered in Alberta.

3. Clareview Estates Inc. is the registered legal owner of the fee simple of lands legally described as:
   PLAN 9221245
   LOT S
   CONTAINING 14.75 HECTARES (36.45 ACRES) MORE OR LESS
   EXCEPTING THEREOUT:

		HECTARES	(ACRES) MORE OR LESS
A)	PLAN 9320390 - SUBDIVISION	1.22	3.01
B)	PLAN 0022327 - EXPROPRIATION	3.45	8.53

   EXCEPTING THEREOUT ALL MINES AND MINERALS

and the former owner of the lands expropriated by the City of Edmonton, legally described as:

PLAN 0022327
AREA 'X' CONTAINING 0.375 HECTARES (0.93 ACRES) MORE OR LESS
AREA 'Y' CONTAINING 2.457 HECTARES (6.07 ACRES) MORE OR LESS
AREA 'Z' CONTAINING 0.618 HECTARES (1.53 ACRES) MORE OR LESS,

is Trustee on behalf of all of the other Claimants named in the Application for Determination of Compensation and is entitled to any rights and claims made on their behalf.

4. PACs for the Kennedale storm sewer have been paid by the Claimants.

5. Boundary Improvement Costs re: 144th Avenue have been paid by the Claimants.

6. The Claimants have a business history of land development including holding, servicing and selling land in the Edmonton region, particularly in North East Edmonton.

7. The Claimants and the Respondent agree that the average servicing cost on an area basis for the subject lands is $128,989.00 per hectare ($1.20 per square foot) as provided in the Servicing Cost Evaluation Report prepared by Bel-MK Engineering Ltd. dated September 20, 2000. The Respondent, while agreeing with this conclusion of the Bel-MK Engineering Ltd. report, does not agree with all of the facts set out in the report.

8. The Claimants and the Respondent agree that the rates of interest used for the calculation of the present value of any damages that may be awarded by the Board as well as for the calculation of any interest that may be awarded by the Board will be the rate of 90-day Bank of Canada Treasury Bills, compounded annually. For greater certainty, the average rate of 90-day Treasury Bills is agreed to be 5.57% for 2000, 3.74% for 2001, and 2.10% for 2002.

ISSUES TO BE DETERMINED BY THE BOARD:

1. What is the market value of the expropriated land?

2. Are the Claimants entitled to the damages claimed which include prepaid PAC, 144th Avenue boundary costs and lost development profit?

1. MARKET VALUE OF THE EXPROPRIATED LAND:

The Claimants estimated the market value of the expropriated land as $1,023,600.00 or $120,000.00 per acre. The City estimated market value as $639,750.00 or $75,000.00 per acre. The difference in the estimates reflects their determination of highest and best use.

The Claimants' Position on Highest and Best Use:

The Claimants concluded that the south lands were ripe for commercial and business development, immediately or in the short term. The lands were well suited for intense commercial development. The Claimants envisioned the creation of large lots which would cater to big box retailers, or hold appeal for the development of a mid sized power centre, which would in turn anchor the overall project (Exhibit 19, page 55).

Three experts and Mr. Guy Woo, the Property Manager for the Claimants, gave evidence touching on the issue of highest and best use.

Mr. Guy Woo:

Mr. Woo testified that the south lands were ripe for development in 1999 and 2000.

In the spring of 1999, Wal-Mart was looking at two sites for its future store; Lots 9 and 10 located on the east side of the tracks at 137 Avenue and 40th Street, and the south lands. Wal-Mart preferred Lots 9 and 10 because they were a compact site and readily serviceable. The site was designated for residential use under the Plan however, and this would have had to be amended before development could proceed. In the fall of 1999, Wal-Mart determined that Lots 9 and 10 were too small for their project. Mr. Woo stated he would have steered Wal-Mart to the south lands but they were no longer an option. The City had notified him in July 1999, of its intention to acquire a portion of those lands for transit parking. Instead, Mr. Woo suggested to Wal-Mart that it add Lot 11, located across the street from Lots 9 and 10 to the development. In January 2000, Wal-Mart and the Claimants entered into an agreement for the sale and development of Lots 9, 10 and 11.

Wal-Mart retained the services of Kim MacKenzie, a professional planner, to amend the Plan to permit development on Lots 9, 10 and 11. Mr. MacKenzie testified that the amendment took over two years and there was much local opposition to its passing. He advised his clients throughout the process that it was unlikely the amendment would pass. In 2001, Wal-Mart had plans drawn up for the north half of Lot S. In the event the amendment application was unsuccessful the Claimants held Lot S as a possible alternative for Wal-Mart.

In March 2002, the amendment to the Plan passed, permitting Wal-Mart to proceed

with its development. At that same time Mr. Woo contacted agents indicating that Lot S was now available for development. Mr. Woo hopes to attract mid to big size box users to the site.

Mr. Woo testified that had the expropriation not occurred, Wal-Mart would have located on the south lands. The south lands' zoning meant there would be less opposition to Wal-Mart's development.

Mr. Kim MacKenzie:

Mr. MacKenzie an expert in Land Use Planning and Urban Development, testified that from a land use perspective the south lands were ideally suited for intense commercial development, as a business park or power centre. He defined "power centre" as a commercial entity that is a destination centre. Shoppers travel by car to a centre anchored by box stores or large retailers. The spinal road system proposed for the south lands would ideally suit a power centre. The highway commercial zoning along Manning Freeway would appeal to uses which require more visibility, such as hotels, restaurants, or gas bars.

He based his opinion of the expropriated land's potential use on the following factors:

(i) excellent access from the arterial road network by way of Manning Freeway, 50th Street and 144th Avenue, and the LRT line;

(ii) excellent visibility from an elevated 50th Street and the LRT line;

(iii) the land use proposed complies with the Plan;

(iv) the expropriated land is part of the south lands which can be serviced from an extension of the existing infrastructure; and

(v) municipal reserves were prededicated and only a small portion of parent title would be required for internal or local roads. As a consequence, Lot S has a high amount of net developable land, enhancing its development potential.

On cross-examination Mr. MacKenzie acknowledged that on the effective date, the only access permitted under the Plan was a "right in-right out" from Manning Drive North. However the LRT expansion was part of the Plan and multi-directional access could be anticipated in the future. Even if the Plan did not provide for it, Mr. MacKenzie testified there was no reason why the City would not approve a proposal for multi-directional access.

Mr. MacKenzie was of the opinion that the south lands were not suitable for industrial development. Although an area along Manning Drive south of Lot S, exhibited mixed uses including industrial, the area was developed on an ad-hoc basis without proper planning. The expropriated land is part of the Clareview Town Centre which has been planned from its inception.

Mr. J. M. Kelly, Bel-MK Engineering:

Mr. Kelly, a professional engineer, testified that the average cost of servicing the south lands was $1.20 per square foot. His estimate did not include the cost of onsite utility oversizing which would increase the developer's front end costs. A portion of the oversizing

costs would be recovered from adjacent developments as they came on stream.

He testified that it would take two to three months to complete the servicing for the south lands.

Mr. Brian Gettel, Professional Appraiser:

Mr. Gettel, a professional appraiser, testified that the south lands were a holding entity awaiting commercial/business development, immediately or in the short term. His determination of highest and best use relied on many of the same factors referred to by Mr. MacKenzie including excellent access, compliance with the existing statutory plans, and ease of servicing.

Mr. Gettel submitted that the highest and best use of any property was ultimately determined by the market. From his review of available lands within Clareview Town Centre to meet the development trend of box stores anchoring secondary development, the lands along Manning Drive represented the logical location for the next wave of commercial development. He felt that the south lands were one of the few prime commercial sites of a sufficient size to accommodate large scale development. He noted that the ongoing and proposed residential growth in the area, would create a need for further commercial development.

From his review of business activities along Manning Drive, he concluded that the area around the expropriated land, did not have an "industrial flavour" and had not for a long period of time.

The City's Evidence on Highest and Best Use:

Mr. Keith Fraser, a professional appraiser, testified for the City on the issue of highest and best use. He concluded that the south lands would be further subdivided in accordance with the Plan, at which time the lands would be utilized for light industrial, general business and highway commercial use, of a less intensive nature than suggested by Mr. Gettel. The timing for development would be a minimum of four and most likely five or six years (Exhibit 16, page 18).

Mr. Fraser testified that the south lands would not be attractive to a major commercial tenant or box retailer, because of the weaknesses in the site's location and access. The south lands were isolated from the existing commercial focus east of the tracks. In his opinion, the proposed Wal-Mart development confirmed that the commercial core was east of the tracks. Commercial people for synergistic reasons, want to be near an existing development and the development existed east of the tracks.

He testified that access to the south lands was limited by the CNR tracks on the east

and lack of direct access from 50th Street because of its elevation. While access off Manning Drive North was good, on the effective date the only planned access was "right in-right out" from two points on Manning Drive. In Mr. Fraser's opinion, a major tenant would not locate on this site unless there was multi-directional access.

BOARD'S DETERMINATION OF HIGHEST AND BEST USE:

The Board finds that it cannot completely accept either party's position on highest and best use.

The City's conclusion on highest and best use focussed on the south lands' limited access and its location east of the tracks away from the established commercial centre.

On the issue of the site's access, both Messrs. Gettel and MacKenzie thought the site enjoyed "excellent access and visibility". Mr. Fraser, on the other hand, thought the lack of multi-directional access was a prime reason why a large anchor store would not locate there.

The Board would agree with Mr. Fraser's conclusion if there was no prospect of multi-directional access. The proposed LRT expansion was part of the 1991 Plan. The City appeared committed to the LRT expansion, as evidenced by the 1993 acquisition of the strip of land which divides Lot S for transit parking. For this reason Messrs. Gettel and MacKenzie testified that a knowledgeable purchaser would anticipate multi-directional access to facilitate buses turning into

the LRT station. Mr. Fraser, in his second appraisal Exhibit 25, page 20, made a similar comment immediately prior to selecting his final value.

The Board finds that even if the LRT was not part of the Plan, a developer could have constructed multi-directional access. Mr. MacKenzie testified that there was no reason why the City would not approve an application for multi-directional access. The Board accepts his evidence.

The Board finds that on the effective date, the south lands had good access with the potential for better access when multi-directional access was constructed. In fact, access may not be the deal-breaker Mr. Fraser suggested. He acknowledged in cross-examination that the South Edmonton Common developed beyond realtor expectations and it had poor access.

Mr. Fraser's other reason for his conclusion that the south lands would not develop as a "power centre", was its location. In his opinion the south lands' isolated location affected both the type and timing of development. He envisioned a less intensive commercial development which would include light industrial use.

While the Board agrees that the south lands' location west of the tracks would effect the timing of development it does not accept Mr. Fraser's findings on the type of development. The Board accepts Mr. Gettel's opinion that the south lands were one of the few commercial sites within the Clareview Town Centre of sufficient size to anchor box stores or a power centre. Mr. Woo

testified that Wal-Mart, at various points in its negotiations, considered Lot S as a possible, although not a preferred location. In the Board's view Wal-Mart's consideration of Lot S is evidence of a large retailer recognizing the potential of Lot S to develop in the manner proposed by the Claimants. Mr. Fraser testified that had Wal-Mart located on the south lands, his opinion of its highest and best use would completely change. The Board does not envision an industrial use on the south lands. It prefers Mr. Gettel's evidence that the surrounding area, which included old shopping centres, a hotel and a Canadian Tire store, did not have an industrial flavour.

The Board, with one exception, prefers the Claimants position on highest and best use.

The Board finds Mr. Gettel's opinion, that the south lands would develop immediately, or in the short term, overly optimistic. Mr. Woo testified that servicing to the site would only be undertaken if a tenant was secured. In early 1999 and 2000, the only commercial tenant showing any interest in the south lands was Wal-Mart. Wal-Mart, in the spring of 1999 and throughout its negotiations, preferred the east side of the tracks in spite of the need to redistrict those lands. This suggests to the Board that the market was not ready to locate to the south lands in April 2000.

Mr. Gettel testified that there were still some commercial sites to fill on the Superstore development (located east of the tracks). If the Wal-Mart application succeeded, some period of time would elapse before filling its secondary sites. In the Board's opinion, the time required to develop out the previous sites would delay development on the south lands. With the anticipated

residential growth in the area and the lack of large commercial sites suitable for big box stores, or power centres, the Board finds that the south lands would develop in the medium term. This holding period if factored into the appraiser's Cost of Development Approach, indicates a five year absorption period from the effective date.

Market Value of Expropriated Land:

The appraisers used the direct comparison and cost to development approaches to establish market value.

The Claimants:

Direct Comparison:

Mr. Gettel selected 6 comparables located throughout the City. With the exception of sale no. 5, the comparables were ripe for immediate commercial development. Sale no. 5, a 22 acres site located at St. Albert Trail in Mr. Gettel's opinion was suitable for mixed industrial/commercial development over a somewhat longer time frame than the expropriated land. The following is a summary of his comparables.

INDEX NO.	LOCATION	PARCEL SIZE	SALE PRICE / ACRE	SALE DATE
1	178 St. & 100 Ave.	21.65 Acres	$149,948.	Aug./97
2	St. Albert Tr. & 137 Ave.	24.61 Acres	$130,683.	Oct./98
3	Subject	33.44 Acres	$ 89,713.*	Jan./00

4	Calgary Tr. & Ellerslie Road	10.54 Acres	$192,857.**	Feb./00
5	St. Albert Tr. & 137 Ave.	22.00 Acres	$ 70,454.	June/00
6	184 St. & 100 Ave.	15.98 Acres	$109,512.	Sept./00
* Represents an unaccepted offer ** Represents the sale price per developable acre				

Mr. Gettel's comparable no. 3 was an offer made on all of Lot S (33.44 acres) in January, 2000. Under section 45 of the *Expropriation Act* the City objected to the Board considering this sale as it was made after the expropriation proceedings commenced.

Mr. Gettel adjusted his sales for several reasons including time of the sale, size and location and development potential. The following chart summarizes his adjustments.

COMPARABLE SALES ADJUSTMENT CHART

Index No.	1	2	3	4	5	6
Unadjusted Per Acre Value:	$149,948.	$130,683.	$89,713.	$192,857.	$70,454.	$109,512.
Terms of Sale:	-	-	-	-	-	-
Motivation:	-	-	1.15	-	-	-
Time:	1.15	1.10	-	-	-	-
Location/Develop-ment/Potential	.75	.85	1.15	.75	1.50	1.15
Size:	-	-	-	.80	-	.95

Soils/ Topography:	1.25	-	-	-	-	-
Servicing:	.80	.85	-	-	1.10	-
Improvements:	-	-	-	-	-	-
Composite Adjustment:	.86	.79	1.32	.60	1.65	1.09
Adjusted per Acre Value:	$128,955.	$103,240.	$118,421.	$115,714.	$116,249.	$119,368.

The adjusted sales indicated values ranging from $103,240.00 per acre to $128,955.00. Five of the six sales suggested a market value for the expropriated land exceeding $115,000.00. Mr. Gettel selected a $120,000.00 per acre for the market value of the expropriated land.

Mr. Fraser selected a total of 7 comparables of which only comparable no. 4 was common to Mr. Gettel's. Mr. Fraser chose his comparables on the basis that they would develop in the medium term (4 - 6 years) for general business, industrial and some commercial use.

The following chart summarizes the details regarding his comparables.

Comparable Sales Activity				
	INDEX NO. 1	**INDEX NO. 2**	**INDEX NO. 3**	**INDEX NO. 4**
Location:	184 St. & 109 Ave.	18410 118A Ave.	12555 Fort Rd.	137 Ave. & St. Albert Trail
Legal:	Ptn. of SE 8-53-25 W4	3/9623278	1/8722919	12/13A/8921633
Zoning:	AG	IB	IH	AGU
Site Size:	50.00 Acres	17.00 Acres	26.42 Acres	24.61 Acres
Sale Date:	Sep 1999	May 1997	Dec 1994	Agreement finalized Oct./98, closed Nov/99
Sale Price:	$2,000,000.00	$814,700	$2,956,200	$3,216,110
Price/Acre:	$40,000	$47,923	$111,893	$130,683
Vendor:	Gazez Investments/ Szlichcinski	Carruthers Implements Ltd.	286231 Alberta Ltd.	The Board of Trustees of Edmonton School District No. 7
Purchaser:	Western Asset Management	All Weather Windows	Revelstoke Home Centres Ltd.	Cedaridge Properties Inc.
Comments:	Unserviced land. Proposed site for industrial subdivision.	High exposure lot with frontage on 118 Ave. and Yellowhead Trail. Sale contingent on access to services.	Former Canada Packers site.	Services to the site. Extensive frontage along 137th Ave. and St. Albert Trail.

	INDEX NO. 5	INDEX NO. 6	INDEX NO. 7
Location:	144 Ave. & Manning Dr. N.	50 St. & 130 Ave.	13072 Yellowhead Tr.
Legal:	Ptn. of SW 25-53-24-4	3/9/9424055	Ptn. of 1,2/D/4877HW
Zoning:	AGU	IM	IM
Site Size:	8.20 Acres	7.66 Acres	9.86 Acres
Sale Date:	Jul 1996	Nov 1994	Feb 1998
Sale Price:	$246,000	$483,000	$700,000
Price/Acre:	$30,000	$63,055	$70,994
Vendor:	Fort Trail Truck Farms Ltd.	City of Edmonton	CBR Cement Canada Ltd.
Purchaser:	Delmor Hldgs. Ltd., Samcourt Hldgs, 538659 Alberta Ltd.	Springwood Properties Ltd.	13120 Yellowhead Trail Ltd.
Comments:	Located E. of Manning Dr. w/extensive exposure. Future commercial site	Site of commercial and cinema complex.	Servicable lot w/rail on the N. & Yellowhead on S. Multi-directional access close.

Unlike Mr. Gettel, Mr. Fraser did not make finite adjustments to his sales but ranked them as superior, inferior or as good compatibility to the south lands.

He eliminated the 2 high end sales (sales nos. 3 and 4) on the basis that they were immediately developable unlike the south lands. He felt sales 1, 2 and 5 at $40,000.00, $47,000.00 and $30,000.00 per acre set the low end "...such that we bracketed our value in the range of $65,000.00 to $85,000.00 per acre". Mr. Fraser selected $75,000.00 per acre as the market value of the expropriated land.

Cost of Development Approach:

The Board agrees with the appraisers that given the fact the owner of the expropriated land is a developer and that the cost of servicing the property is known some weight should be given to this method of valuation.

Both appraisers with a few minor exceptions used the same technique for the cost of development approach.

The appraisers' opinion of value using this approach differed primarily because of different land values and absorption time. Mr. Fraser estimated the sale price of the south land at $262,500.00 per acre based on a mix of general business and light industrial uses. Mr. Gettel's estimated the land value at $304,537.00 based on the sale of larger sites for box stores and smaller secondary commercial sites.

Mr. Fraser concluded that the south lands would develop in the medium term and estimated the property's value using a 4, 5 and 6 year absorption scenario. Mr. Gettel assumed the south lands would sell within 3 years of April 2000.

BOARD'S DETERMINATION:

As a result of the Board's findings on highest and best use it cannot accept either appraiser's opinion on market value.

The Board places little weight on Mr. Fraser's direct comparison evidence. His comparables no. 1, 2 and 7 are industrial properties. The Board has found that the south lands are not suitable for industrial development.

His sales 2 and 7, unlike the south lands, have no subdivision potential. Mr. Fraser did not make specific adjustments to the sales to account for the differences. His conclusions on value were made without much justification.

Mr. Gettel chose comparables based on their likelihood for immediate commercial development. The Board has found that the south lands will likely develop in the medium term of 5 years. As a consequence, the Board finds that Mr. Gettel's sales should be adjusted downward to reflect the south lands longer time to development. How much should they be adjusted? Any figure is somewhat speculative but if Mr. Gettel's adjustment for location/development potential is increased by .15%, the values indicated range from approximately $85,000.00 to $104,000.00 per acre.

The Board will not consider Mr. Gettel's sale no. 3 which was an offer for Lot S made after

the expropriation proceedings commenced based on its interpretation of section 45(b) of the *Expropriation Act*. That Section reads as follows:

> *45 In determining the value of the land, no account may be taken of*
>
> *(b) any value established or claimed to be established by or by reference to any transaction or agreement involving the sale, lease or other disposition of the land, if that transaction or agreement was entered into after the commencement of expropriation proceedings.*

Counsel for the Claimants referred the Board to an earlier decision as authority to consider the sale. In Hat Development Ltd. v. Medicine Hat (City) 43 L.C.R. 1, the Board held that the restrictions in s. 45(b) of the *Expropriation Act* relate to the lands expropriated and not the "remaining land". Counsel says that the offer in the present case was primarily concerned with the "remaining lands" and therefore the Board should consider it.

The Board finds the facts in the present case distinguishable from Hat. The offer was for all of Lot S including the expropriated land. It appears to the Board from the following references that the offer in the Hat case was for the land remaining after the expropriation. On page 16 - 17 of the Hat decision it states "...the agreements and offers referred to by the Respondent related to "the remaining land" not to the lands taken". Further down on page 17 it states "...Section 45(b) could not apply to any sale of the remaining lands of the owner following the transfer of title to the expropriated lands to the expropriating authority."

The Board does not accept either appraiser's estimate of value based on the cost of development approach. While the Board prefers Mr. Gettel's land value which is based on commercial sales it does not accept his 3 year absorption time. The Board has found a 5 year absorption time more reasonable.

If Mr. Gettel's land value and a 5 year absorption time are imputed into the appraisers' cost of development approach, the indicated market value is $90,000.00 per acre for Mr. Gettel and $96,673.00 per acre for Mr. Fraser.

The Board finds that the market value of the expropriated land is $95,000.00 per acre. This value is within the range indicated by Mr. Gettel's sales if they are adjusted to account for a longer time to development. The value is also supported by the cost of development method if the absorption time is extended to a medium term of 5 years.

2. <u>DISTURBANCE DAMAGE:</u>

<u>Kennedale Storm Sewer Charge:</u>

The Claimants front ended the cost of the Kennedale sewer. Under agreement the

City agreed to recover the costs of the storm sewer through a charge known as a permanent area contribution (PAC) and reimburse the Claimants its over expenditure. Lot S was also subject to PAC which was prepaid at the time of the sewer's construction. The Claimants now claim $50,894.00 representing the expropriated land's share of the prepaid PAC.

The City agrees with the calculation but denies liability for the payment. The City submits that the value of the prepaid PAC is reflected in the market value of the expropriated land. If market value is paid no additional compensation is due.

BOARD'S DETERMINATION:

The Board finds that the Claimants are entitled to the claim for the prepaid PAC either as a damage under section 42(b) of the Act or as an improvement not included in the market value of the land under section 50(a)(ii) of the Act. The amount was expended by the Claimants. If the City acquires the expropriated land without paying for the off site cost, the City will acquire a windfall at the Claimants' expense.

The Board accepts Mr. Gettel's evidence that he did not include the prepaid PAC in his determination of market value. If he had, he stated he would have increased the market value by the value of the prepaid PAC.

The Board is not satisfied that Mr. Fraser's opinion of value reflects the benefit of the prepaid PAC. If he did it is not apparent how he adjusted for it in the three appraisals prepared for the expropriated land. In his first appraisal dated November 1, 1999 (Exhibit 24), he did not mention the PAC and valued the expropriated land at $60,000.00 per acre. In his second appraisal dated June 22, 2000 the market value was increased to $75,000.00. In cross examination when questioned why his opinion of market value was increased to $75,000.00 on the second appraisal, Mr. Fraser answered "...we just came to the conclusion we were light on the first appraisal at $60,000.00 to be honest with you." In the third appraisal submitted at this hearing although he refers to prepaid PAC as one of the positive factors influencing value, his opinion of market value remains at $75,000.00 per acre.

The Board is not convinced that Mr. Fraser's analysis of market value did include the benefit of prepaid PAC.

144th Avenue Boundary Costs:

The Claimants and two other developers front ended the cost of constructing 144th Avenue which is adjacent to the north boundary of Lot S. Under an agreement with the City dated June 28, 1979 [Exhibit 5, Tab 18], the City agreed to recover and rebate the costs in accordance with a formula in the 1979 Standard Residential Servicing Agreement (Servicing Agreement) and the Uniform Rate Bylaw. The latter documents were not produced at the hearing.

Mr. Woo retained an engineering firm to estimate the cost of replacing 144th Avenue in the year 2000. He then distributed the cost amongst the parent parcels abutting 144th Avenue resulting in a per hectare rate of $15,700.00. The expropriated lands share of the boundary costs were calculated as follows:

3.45 hectares x $15,700.00 x 68.86% (The Claimants' share as one of 3 developers)

= $37,298.00

The City submits that the Board should deny this claim because it is a private contract dispute and the Board has no jurisdiction to hear it. The City, in the alternative states that the expropriated land does not abut 144th Avenue and is not liable to pay under the 1979 Agreement. The City argues that the Board cannot quantify the claim because the Claimants have failed to submit the Servicing Agreement referred to in the June, 1979 agreement.

BOARD'S DETERMINATION:

The City's obligation to recover and rebate the Claimants for the cost of 144th Avenue arises under the June, 1979 contract. The 1979 contract does not specify when the City's obligation to collect arises or quantify an amount if the obligation is triggered. It does refer to 2 other documents,

the 1979 Servicing Agreement and the Uniform Rate Bylaw and states that recoveries will be made in accordance with those documents. The documents were not produced. Mr. Woo for the Claimants in cross examination admitted that the 1979 Servicing Agreement was not part of the Claimants materials.

Whether these additional documents would clarify matters, the Board has no way of telling. In the Board's view their absence is fatal to the Claimants' claim.

The Board finds that the Claimants have not discharged the burden of proof in relation to this claim.

Lost Developer's Profit:

The Claimants' claim lost development profits of $299,546.00. The Claimants say, but for the expropriation, the expropriated land would have formed part of a development scheme upon which the Claimants would have earned profit. Mr. Gettel utilized the cost of development approach to calculate the loss.

The City relies on a recent Ontario Court of Appeal decision, 747926 Ontario Limited, [2001] O.J. No 3909 as authority for the position that lost development profits is not compensable under the Act. The loss of raw land to a developer is a loss of inventory. The Claimants after receiving market value can replace the inventory.

BOARD'S DETERMINATION:

The Board denies the claim for lost development profits as being too remote, too speculative.

The Claimants submitted a number of authorities where courts and tribunals have awarded lost profits as disturbance damages. The Board notes that in most of the cases cited the court or tribunal made a finding that the transaction upon which the profit could be earned, had a reasonable chance of occurring. In Mikalda Farms Ltd. v. Ontario (OMB July 19, 2001) the owners claimed for the loss of opportunity to develop a golf course. The owners prior to the expropriation had plans drawn up and had applied to the City for an amendment to the land use bylaw to permit a golf course. The Board found the development "was pursued with vigour."

The Ontario Divisional Court in 747926 Ontario Limited 51 OR (3d) 25 (reversed on appeal), in awarding a developer its lost profit found the lands were at the stage of imminent development and a sell out of residential lots "virtually guaranteed".

In Costello v. Calgary (5) (Justice J. Rooke, 1995 A.J. No. 27), the Plaintiff owned an existing 10 room motel and applied to the City for a permit to construct a 40 room hotel. The Court awarded the Plaintiff in a trespass action damages based on the loss profits from the 40 room hotel.

In the present case there is not the degree of certainty that development will proceed that existed in the above cases. The Claimants had not, on the effective date or any time since, applied

for an amendment to the land use bylaw or for a development permit. Mr. Woo testified that development on any portion of Lot S would not proceed until a tenant was found. There was no tenant in 2000. Mr. Woo stated that in the 10 years prior to the commencement of the expropriation proceedings, no one had offered to purchase Lot S or any portion of it.

The Claimants claim for loss of development profit is based on Mr. Gettel's finding that the south lands would develop immediately. He also stated that it would be difficult with the compensation received to replace the expropriated land with property of the same profit potential. The Board finds that the statement is not evidence. The Claimants could have gone to market and demonstrated the validity of this statement.

The Board finds that the Claimants have not discharged the burden of proof in relation to this claim.

Interest:

The parties have agreed that the interest paid on 90 day Bank of Canada Treasury Bills compounded annually shall be applied in the calculation of present value and on any interest award due. The Board accepts the formula and orders that the Claimants are entitled to the present value of the prepaid PAC ($50,894.00) calculated from April 25, 2000 to the date of payment.

The City made two payments to the Claimants for the market value of land; on June 30, 2000 the sum of $578,550, and on April 17, 2002, $61,200. Pursuant to Section 66 1(a) of the Act the Claimants are entitled to interest on the $231,800 being the difference between the City's initial payment and the Board's award of $813,200.00 from April 25, 2000 to April 17, 2002, and interest on the sum of $170,600 from April 18, 2002 to the date of payment.

The City's proposed payment (including the $61,200 paid on April 17, 2002) is less than 80% of the Board's award. Pursuant to Section 66 (4) the City shall pay the Claimant's penalty interest at the agreed rate on the sum of $231,800 from June 30, 2000 to April 17, 2002 and on the sum of $170,600 from April 18, 2002, to the date of payment.

SUMMARY OF THE BOARD'S AWARD:

The Board hereby awards compensation to the Claimants as follows:

(1) For the market value of the expropriated land the sum of $95,000.00/acre less any amounts received from the City;

(2) Interest pursuant to Section 66(1) and (4) of the Act, on the difference between the Board's award and the amount paid by the City in accordance with the Board's ruling;

(3) The present value of the prepaid permanent area contribution charge of $50,894; and

(4) Lost Executive time of $12,500.

Pursuant to the Agreed Statement of Facts, the City shall pay Clareview Estates Inc., the trustee of the Claimants.

LAND COMPENSATION BOARD

_____
Fred Weber, Presiding Member

_____
Marilyn McAvoy, Member

_____
Doug MacKenzie, Member