

LAND COMPENSATION BOARD
FOR THE PROVINCE OF ALBERTA

ORDER NO: 427

FILE NO: 10938.0

March 2, 2004

An Application to Determine Compensation, filed with the Land Compensation Board pursuant to the Expropriation Act, R.S.A. 2000, Chapter E-13

BETWEEN:

PETER MITCHELL FRIESEN,
LEANNA MARGARET FRIESEN,
and CARLENE ANN FRIESEN,
BY THEIR ATTORNEY OLGA FRIESEN
and
OLGA FRIESEN,

Claimants

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA
AS REPRESENTED BY THE MINISTER OF INFRASTRUCTURE,

Respondent

BEFORE:

THE LAND COMPENSATION BOARD FOR THE PROVINCE OF ALBERTA

SITTING MEMBERS:

- S. S. Schumacher, Q.C., Presiding Member
- J. Logan, Member
- Marilyn McAvoy, Member

**Land Compensation Board
Order No. 427**

APPEARANCES:

- For the Claimants:
- D. P. Mallon, Q.C., Counsel
 - Witnesses:
 - Olga Friesen
 - Brian S. Gettel, B.Comm., AACI
- For the Respondent:
- S. A. Franklin, Counsel
 - Witness:
 - James E. Wall, AACI, P.App.

PLACE: Held in the City of Edmonton in the Province of Alberta on January 14 and January 15, 2004, in the Offices of the Land Compensation Board.

APPLICATION AND BACKGROUND:

The Claimant's lands consist of two adjacent parcels known as the SE 18 and SW 18 located adjacent to Highway 34, 19 miles northeast of Grande Prairie. A tree sheltered building site is located in the northwest quadrant of SE 18 and contains a house, barn, garage, granaries and a shed. Access to the site is via a driveway across the SW 18 to the highway. Services and improvements to the fenced building site include a well, septic system, power, yard lights and two dugouts.

On October 17, 2000, Infrastructure expropriated 7.62 acres from the SW 18 and 9.10 acres from the SE 18 (expropriated lands) for highway right of way. Some of the Claimant's

**Land Compensation Board
Order No. 427**

buildings and improvements are within the right of way and the remaining buildings are now too close to the highway under the County's set back requirements.

The owners of the expropriated lands have appointed their mother, Olga Friesen (Claimant) as their attorney to make and enforce any claims respecting the expropriated lands.

The Claimant requests compensation of \$281,500.00 for the expropriation consisting of the following claims;

- (i) \$25,355.00 for the market value of the expropriated lands and improvements;
- (ii) \$34,906.00 for injurious affection/severance;
- (iii) \$34,825.00 for lost rental;
- (iv) \$175,341.00 for the development of a new building site consisting of the following;
 - (a) yard replacement \$101,162.00
 - (b) driveway maintenance \$14,876.00
 - (c) driveway approach for the SW 18 \$3,000.00
 - (d) driveway trees for the SE 18 \$51,375.00
 - (e) driveway fence on the SE 18 \$1,798.00
 - (f) Claimant's time and expense \$3,130.00;
and,
- (v) \$11,073.00 to move buildings to new building site.

**Land Compensation Board
Order No. 427**

Infrastructure proposes compensation of \$85,265.00 based on the following;

- (i) \$22,300.00 for the market value of the lands;
- (ii) \$9,500.00 for the reduction in the value of the remaining lands (injurious affection);
- (iii) \$9,095.00 to move the buildings to the new building site; and
- (iv) \$44,370.00 for the development of a new building site made up of the following costs;
 - (a) new well \$10,165.00
 - (b) septic system \$7,490.00
 - (c) power and telephone \$8,025.00
 - (d) driveway approach and maintenance \$11,375.00
 - (e) dugouts \$4,815.00
 - (f) site preparation \$2,500.00

Infrastructure in December, 2000 paid \$85,300.00 to the Claimant.

Infrastructure during the course of the hearing agreed to the claim of \$3,130.00 for the Claimant's time and expense in dealing with the expropriation and the determination of compensation. The Board's award will reflect the agreement.

The Claimant requests the Board determine the amount of compensation payable. The Board will deal with each of the Claimant's requests for compensation.

**Land Compensation Board
Order No. 427**

(i) Market Value of the Expropriated Lands and Improvement

The following chart summarizes the appraisers' estimates of the market value of the expropriated lands.

<u>Mr. Gettel (Claimant)</u>			<u>Mr. Wahl (Infrastructure)</u>	
SW 18	\$1,850/acre x 7.62 acres =	\$14,097.00	1,611.00/acre x 7.62 acres =	\$12,276.00
SE 18	\$1,100/acre x 9.10 acres =	<u>\$10,010.00</u>	1,101.00/acre x 9.10 acres =	<u>\$10,019.00</u>
	Total	\$24,107.00		
	Plus:			
SE 18	the garage	<u>\$ 1,248.00</u>		
	Total	<u>\$25,355.00</u>	Total	<u>\$22,295.00</u>

The appraisers found that the Claimant's lands were best suited for subdivision for country residential use in the immediate to short term. Mr. Gettel utilized the direct comparison approach comparing the expropriated lands to other unsubdivided lands with potential for country/residential use.

Mr. Wahl utilized the cost to subdivision approach. His subdivision consisted of two residential lots from the SW 18 and three lots from the SE 18. In his opinion the most easterly lot in the SW 18 and the three lots in the SE 18 were worth \$35,000.00/lot. The most westerly lot in the SW 18, lacking a view of the Smokey River Valley, was worth \$25,000.00. He subtracted the cost of subdivision from the sales revenue of each parcel and arrived at a value/acre by dividing the total acreage into the value of each parcel.

**Land Compensation Board
Order No. 427**

Board's Determination:

There is only a slight difference in the appraisers' opinions on market value. The difference disappears if three rather than two lots are subdivided from the SW 18. Mr. Wahl testified that there was an abundance of small acreages (5 acres or less) for sale near Grande Prairie. The Claimant's lands are 19 miles from Grande Prairie and at that distance Mr. Wahl stated there was more of a market for larger parcels between ten and twenty acres. Prior to the expropriation, the SW 18 measured 34.14 acres, which would allow for the subdivision of three 11 acre lots. Mr. Wahl admitted in cross-examination that if an owner could subdivide three lots out of a 35-acre parcel, the owner would be better off economically. Mr. Wahl gave no reason why it was not possible to create three lots from the SW 18.

If three lots are carved out of the SW 18 they will be smaller and less regularly shaped than Mr. Wahl's projected two lots. The Board recalculates the indicated value of the SW 18 as follows:

Projected Sales Value = \$70,000.00 [based on lot values going from west to east of \$20,000, \$20,000.00 and \$30,000.00].

Less projected subdivision costs of \$7,000.00 = \$63,000.00

$\$63,000.00 \div 34.14 \text{ acres} = \$1,845.34 \times 7.62 = \$14,061.51$

**Land Compensation Board
Order No. 427**

If the above amount is added to Mr. Wahl's value for the lands expropriated from the SE 18, the market value for the expropriated lands is very close to Mr. Gettel's estimate of \$24,107.00.

The garage was located within the area expropriated and has been removed. The Board finds Mr. Gettel's value of \$1,248.00 reasonable. The Board awards \$25,355.00 for the market value of the expropriated lands and the garage.

Damages Attributable to Disturbance:

Disturbance damages arising from the expropriation fall into three general categories;

- rental loss;
- cost to develop new building site; and
- injurious affection.

The Board will analyze each of the Claimant's claims under the general categories.

Rental Loss - \$34,825.00:

The Claimant's Position:

The Claimant claims \$34,825.00 for lost rental made up of the following claims:

- (i) \$23,000.00 or \$500/month relating to a lease with B. Atkins for the period June 1, 1996 to April 30, 2000;
- (ii) \$10,000.00 for losses relating to a lease with S. Atkins dated May 1, 2000; and
- (iii) \$1,825.00 for reduced pasture rental in 2001.

**Land Compensation Board
Order No. 427**

(i) \$23,000.00 - B. Atkings lease - June 1996 - April 2000:

Since 1985 the Claimant's building site has been boarded up and unused except for vacations. In 1988 the Claimant intended to move back but became ill. In the 1990's she decided to rent the property with the intention of returning in 1999. In 1994 the Claimant met with her nephew, B. Atkings who agreed to rent the building site for \$500.00/month starting in the spring of 1995. In the winter of 1995 Mr. Atkings heard rumors of a highway twinning which could affect the building site. Mr. Atkings delayed moving and in April 1996 the Claimant was officially notified of Infrastructure's plans to expand the highway. In June 1996, Mr. Atkings attended an open house regarding the highway and was told that land acquisitions would occur within a year. Relying on this information he decided against moving.

The Claimant claims \$23,000.00 or \$500.00/ month in lost rental for the period June, 1996 to April 30, 2000.

(ii) \$10,000.00 - S. Atkings lease - May 1, 2000:

In July 1997 the Claimant was notified that acquisitions for the highway would occur in the next couple of months. The Claimant and land agents for Infrastructure negotiated sporadically between 1997 and 2000. In October, 1999 a Notice of Intention to Expropriate was served on the Claimant. In April 2000, the Claimant's sister's boyfriend told her that the alignment for the highway had changed and the building site

**Land Compensation Board
Order No. 427**

would be unaffected. Relying on this information the Claimant entered into a written lease with her sister for the entire property for five years to commence May 1, 2000. Terms of the lease included a rental of \$500.00/month and a provision that either party could terminate the lease on three months notice and payment of \$6,000.00.

On April 27, 2000 Infrastructure advised the Claimant that the highway alignment had not changed. The Claimant asked her sister to delay moving and agreed to pay her \$500.00/month for each month of delay. By letter dated July 28, 2000 the Claimant was served with another Notice of Intention to Expropriate. In August, 2000 the Claimant terminated the lease and paid her sister \$6,000.00.

The Claimant claims \$10,000 for losses associated with the K. Atkings lease made up of the following;

- (i) \$2,000.00 paid by the Claimant to her sister to delay moving for the months May through August, 2000;
- (ii) \$2,000.00 in lost rental for months May through August, 2000; and
- (iii) \$6,000.00 penalty for early termination.

(iii) \$1,825.00 for reduced rental on pasture:

The Claimant's lands were rented for pasture. There were dugouts located within the area expropriated. Infrastructure in December 2000 forwarded funds to the Claimant to replace the dugouts but it was too late to construct them in time for the 2001 season.

**Land Compensation Board
Order No. 427**

Typical market rent for the pasture was \$2,805.00. The lack of water meant the rent in 2001 was reduced to \$1,980.00. The Claimant claims the difference in rental of \$1,825.00.

Infrastructure's Position:

Infrastructure's expert did not address lost rental revenue in his report. Mr. Franklin, counsel for Infrastructure, conceded that the claim for reduced pasture rent was appropriate but objected to the two other claims.

Counsel argued that a long-term lease was inconsistent with the Claimant's plans to return to the property. Regarding the proposed lease with B. Atkings, counsel referred to the absence of any evidence showing that the Claimant's nephew intended to rent the property.

Regarding the written lease with the Claimant's sister, counsel found the timing of such a lease unusual given the Claimant's knowledge of the impending expropriation.

Boards Determination:

The Board awards \$1,825.00 for the reduced pasture rental. The lack of water causing the reduction in rental was caused by the expropriation.

**Land Compensation Board
Order No. 427**

The Board denies the claim for losses associated with the B. Atkings lease. The Board is not convinced that the discussions between the Claimant and her nephew had reached the stage where a lease had been finalized. The Claimant testified that the lease was to begin in the spring of 1995. Her nephew missed the spring moving date and had not moved in the winter of 1995 when he first heard rumours of the highway expansion. The Claimant testified that the rumours were the reason her nephew delayed moving. The Board finds that the events suggest there was no firm arrangement between the Claimant and her nephew regarding the property. The Claimant did not receive official notice of the highway expansion until April 1996, a full year after the alleged lease was to have commenced. In June 1996 B. Atkings was told by government representatives that acquisitions would occur in 1997, nearly two years after the lease was to have commenced. The Board finds the expropriation was not the reason the lease failed to materialize.

Regarding the lease between the Claimant and her sister, S. Atkings, the Board agrees with counsel for Infrastructure that the punitive terms of the lease are suspicious. The Board cannot understand why, given the Claimant's intention to move back to the property, and her awareness of the impending expropriation, she would expose herself to a penalty of \$6,000.00 for early termination of the lease.

The Claimant's reason for proceeding with the lease is also somewhat suspicious. She concluded that the expropriation had been cancelled based on her sister's boyfriend's advise that

**Land Compensation Board
Order No. 427**

the highway alignment had changed. It makes no sense to the Board that the Claimant would not confirm the change with representatives from Infrastructure.

The Board finds the Claimant's agreement to pay her sister a further penalty of \$500.00/month unreasonable considering the Claimant knew that the highway alignment had not changed.

The Board finds that neither the \$6,000.00 nor the \$2,000.00 penalties qualify as a reasonable loss which was the natural and reasonable consequence of the impending expropriation.

The Board acknowledges that the threat of expropriation hung over the Claimant's lands for four years starting in 1996. It was reasonable for the Claimant to lease the lands during this period. The Board awards \$2,000.00 for lost rental for the period May through August, 2000.

Cost to Develop New Building Site:

The buildings, following the expropriation, are precariously close to the new property line which drops off towards the highway. Both appraisers in their analysis of compensation included an amount for a new building site further back from the highway.

The following chart summarizes the parties' estimated costs for a new building site;

**Land Compensation Board
Order No. 427**

Chart 1

	<u>Item</u>	<u>Claimant</u>	<u>Infrastructure</u>
1.	site preparation	\$4,280.00	\$2,500.00
2.	new driveway	\$15,354.00	\$8,025.00
3.	driveway maintenance - Gettel - \$7,438/	\$14,876.00	\$2,800.00
4.	new well	\$11,235.00	\$10,165.00
5.	new septic system	\$8,453.00	\$7,490.00
6.	power and telephone	\$9,866.00	\$8,025.00
7.	new dugout	\$5,280.00	\$4,815.00
8.	tree planting around building site	\$34,106.00	not addressed (n/a)
9.	trees adjacent to driveway	\$51,375.00	n/a
10.	fenced yard site	\$2,588.00	n/a
11.	driveway approach SW 18	\$3,000.00	n/a
12.	owner supervision during construction	\$10,000.00	n/a
13.	driveway fence	\$1,798.00	n/a
14.	Claimant's time and expense	\$3,130.00	agreed to

Counsel for Infrastructure, Mr. Franklin submitted that the Board is not compelled to award an amount for a new building site. He argued that prior to the expropriation the abandoned buildings were uninhabitable and that the highest and best use of the property had changed from the time when they were occupied.

**Land Compensation Board
Order No. 427**

The Board's Determination

The Board finds that Mr. Franklin's position overlooks that the site improvements, including the septic field, water, power and dugouts are consistent with the new highest and best use of the Claimant's lands as country residential. The improvements have value.

Section 50 of the *Expropriation Act* obligates the expropriating authority in respect of disturbance damages to pay "reasonable costs and expenses that are the natural and reasonable consequence of the expropriation". The Board finds that the effect of expropriation was to make the improvements and building site unusable and the Claimant is entitled to be compensated for the loss.

Infrastructure has agreed to item 14.

Chart 1 Items 8-13

The Board will firstly review items 8-13 on Chart 1 which were not part of Infrastructure's proposed compensation package.

Mr. Wahl in his forthright manner admitted that it would be reasonable to compensate the owners for a fenced yard site (Item 10) and the owner's time supervising construction of the improvements (Item 12). He would award less than the \$10,00.00 claimed for supervision.

**Land Compensation Board
Order No. 427**

The Board awards \$2,588.00 for fencing the yard site and \$7,000.00 for construction supervision which represents 10% of the building site costs awarded by the Board. The Board does not consider driveway maintenance as a construction cost.

Mr. Gettel's fencing costs for the yardsite (Item 10) included an amount for fencing along the east side of the driveway. Ms. Friesen requests a further \$1,798.00 for fencing the west side (Item 13). The Board denies this request. Fencing existed along the west property line which is one of the reasons why Mr. Gettel chose to locate the driveway along the property line.

Mr. Wahl's proposed building site is located along the west boundary of the SE 18 to take advantage of the existing tree cover. This is one of the reasons why his estimate of compensation did not include an amount for tree replacement. Mr. Gettel's proposed building site is directly south of the existing site, on high ground to take advantage of the river valley view. His proposed building will not have the tree cover that the Claimant enjoyed on the previous site.

The Board finds the Claimant's selection of a new building site with a view of the river reasonable. The previous site enjoyed such a view. It follows then that it is reasonable to replace the tree cover the Claimant enjoyed at the previous site. (Item 8 - Chart 1) Mr. Gettel calculated the cost to replace the trees at \$34,106.00 for 170 trees. The Board, in its inspection of the site and review of the aerial photographs, noted that much of the shelter consisted of native

**Land Compensation Board
Order No. 427**

trees and bush. The Board reduces the amount claimed by half or \$17,000.00 to reflect the quality of the existing vegetation.

In addition to the trees identified by Mr. Gettel, the Claimant requests the cost of placing trees on either side of the new driveway. (Item 9) The Board denies this claim. The pre-expropriation driveway ran across the adjacent quarter to the building site and the trees from that quarter sheltered the driveway. The proposed driveway is sheltered by trees from the adjacent quarter not unlike its pre-expropriation state.

Prior to the expropriation a farm approach existed from the highway to the west side of the SW 18. The approach was removed because of the expropriation and the Claimant requests \$3,000.00 to replace it. (Item 11) The Board denies this claim. The Board determined market value of the Claimant's lands based on its immediate subdivision potential for country residential use. The farm approach is not consistent with the new highest and best use.

Chart 1 - Items 1-7

The appraisers and the Claimant all agree that the items numbered 1-7 on Chart 1 are necessary costs in the construction of the new building site. Where they disagree is in their estimates of costs. The appraisers' estimates were based on discussions with local contractors. For the items numbered 1, 4, 5, 6 and 7 there is no basis upon which the Board can say it prefers

**Land Compensation Board
Order No. 427**

one cost estimate over the other. For these items the Board awards the slightly higher costs identified by Mr. Gettel to ensure that the Claimant is not out of pocket.

The Board has found the Claimant's location for a new building site reasonable. Its location is the reason Mr. Gettel's estimate for the cost of a new driveway is higher than Mr. Wahl's. The Board awards Mr. Gettel's estimate of \$15,354.00 for this item.

Regarding the claim for increased maintenance costs because of the longer driveway the Board prefers Mr. Gettel's calculation of \$7,438.00. His selection of an adjustment period of 20 years given the age of the current titleholders seems more reasonable than Mr. Wahl's 15 years.

Moving Costs

Both appraisers in their estimates of compensation included an amount to relocate the buildings to a new building site.

Board's Determination:

The buildings at the time of expropriation had been abandoned for over 15 years and vandalized during that period of time. The Board finds it unlikely that buildings in such a run down state would be relocated. The Board finds it more reasonable to compensate the Claimant for the market value of buildings estimated by Mr. Gettel at \$5,149.00. The amount, in the Board's opinion, reflects the \$1,800.00 spent on upgrades in 2000.

**Land Compensation Board
Order No. 427**

Injurious Affection:

The Claimant's Position:

Mr. Gettel concluded that the Claimant's lands in the SW 18 would suffer a loss in value as a result of the expropriation. He testified that the reduced size and resulting irregular shape of the lands might result in a loss of profitability and flexibility of subdivision. Mr. Gettel estimated the loss to the remaining lands in SW 18 at 10% or \$4,906.00.

The Claimant, Ms. Friesen, relying on the fact that it is not possible to create three lots in the SW 18 claims a loss in value of \$14,906.00. For the SE 18 she estimates the loss in value at \$20,000.00 due to the change in access from a paved highway to the county gravel road.

Infrastructure's Position:

The expropriation eliminated a portion of the planted shelterbelt in the SW 18 and some of the trees in the vicinity of the existing building site in the SE 18. Highway construction will bring the road closer to the Claimant's lands increasing noise levels to the SW 18 and the future building site. Mr. Wahl testified that the effect of the foregoing would decrease the market value of the lots in the SW 18 and the new building site. He estimated a 10% loss in value or \$9,500.00.

The Board's Determination

The Board prefers Mr. Gettel's estimate of \$4,906.00 for injurious affection.

**Land Compensation Board
Order No. 427**

Mr. Wahl's concern regarding the elimination of trees and corresponding loss in value is addressed in the Board's award to replace the trees around the new building site.

The Board finds that Mr. Wahl and Ms. Friesen in calculating the loss failed to take into account that the Claimant received market value for the lands expropriated.

Regarding Ms. Friesen's concerns over the loss of direct access from pavement, there is no evidence to support either the loss or the amount claimed.

Interest and Present Value

The Board utilizes the average annual interest paid on 90 Treasury Bills, compounded annually, as the rate of interest and means of calculating present value.

Either party may reply to the Board if there is a dispute regarding the calculation of interest or present value.

Summary of the Board's Award

The Board awards the following;

- (i) \$25,355.00 for the market value of the expropriated lands and the garage and interest on the difference between the proposed payment and the Board's award from October 17, 2000 to the date of payment;

**Land Compensation Board
Order No. 427**

- (ii) \$4,906.00 for injurious affection and interest on the difference between the proposed payment and the Board's award from October 17, 2000 to the date of payment;
- (iii) \$2,000.00 for lost rental present valued from the date of loss to the date of this award;
- (iv) \$1,825.00 for reduced pasture rental present valued from July 1, 2001 to the date of this award;
- (v) \$88,494.00 for the cost of a new building site less any amounts paid by Infrastructure present valued from October 17, 2000 to the date of this award. Building site costs refer to the following items;
 - site preparation \$4,280.00
 - new driveway \$15,354.00
 - driveway maintenance \$7,438.00
 - new well \$11,235.00
 - new septic system \$8,453.00
 - power and telephone \$9,866.00
 - new dugout \$5,280.00
 - tree planting \$17,000.00
 - fenced yard site \$2,588.00
 - owner's supervision during construction \$7,000.00
- (vi) \$5,149.00 for the market value of the buildings less any amounts paid by Infrastructure present valued from October 17, 2000 to the date of this award;
- (vii) \$3,130.00 for the Claimant's time and expense; and
- (viii) Interest on items (iii) to (vi) from the date of this award until payment is made in full.

**Land Compensation Board
Order No. 427**

LAND COMPENSATION BOARD

S. S. Schumacher, Q.C., Presiding Member

J. Logan, Member

M. A. McAvoy, Member