LAND COMPENSATION BOARD

FOR THE PROVINCE OF ALBERTA

ORDER NO. 436 **FILE NO. 10961.0**

May 4, 2005

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

BETWEEN:

JACK ALFRED ORDMAN
and
MARY ORDMAN,

Claimants

- and -

THE CITY OF RED DEER,

Respondent

BEFORE:

THE LAND COMPENSATION BOARD FOR THE PROVINCE OF ALBERTA

SITTING MEMBERS: John Mah, Q.C., Presiding Member
Karen Sinclair-Santos, Member
Lorne W. Wildeman, Member

APPEARANCES:

For the Claimants:

- Donald P. Mallon, Q.C., Counsel
- Brian Gettel, Appraiser
- Jack A. Ordman, Claimant

For the Respondent:

- Nick P. Riebeek, Counsel
- Gary Bresee, Appraiser
- Tom Warder, P.Eng., with the City of Red Deer

PLACE: Held in the City of Red Deer in the Province of Alberta on December 7 and 8, 2004 in the Main Floor Conference Room, Provincial Building, 4920 – 51 Street, Red Deer, Alberta.

APPLICATION AND BACKGROUND:

A portion of the Claimants' land located at 40th Avenue and 19th Street were formally expropriated on November 14, 2003, by the City of Red Deer for road widening and service road construction. The effective date of the taking is November 14, 2003.

At the time of the taking the Claimants' property measured 126.99 acres, (Claimants' land) and there were no improvements on the lands. The use of the Claimants' land was for agricultural purposes. The municipal land-use bylaw designates the subject property as

A1 – Future Urban Development. The land also falls within the boundary of the East Hill Area Structure Plan, which designates most of the subject parcel, except for the area adjoining Piper Creek, which is designated as park area, for future residential development. The area along the south boundary is designated restricted commercial.

The City expropriated 2.34 acres from the east periphery of the Claimants' land. After the taking the remaining land consists of 124.65 acres.

The Claimants request the following compensation for the expropriated lands:

(i) $128,700.00 for the market value of the expropriated land
(ii) $4,116.75 for damages incidental to the expropriation
(iii) An amount for interest and penalty interest as provided for in the Expropriation Act (Section 66)

The parties indicated to the Board that they have reached an agreement with respect to the following damages:

(a) $2,892.75 for fence replacement
(b) $612.00 for damages for interruption of a farm lease
(c) $2,000.00 for damages for owner's time and inconvenience under Section 56

That leaves for the Board to determine the market value of the Claimants' land, together with any interest that may be payable.

Expropriated Lands

Mr. Gettel, appraiser for the Claimants, estimated the market value of the Claimants' land on November 14, 2003, to be $128,700.00. Mr. Bresee, appraiser for the Respondent, estimated the market value at $80,000.00.

The appraisers agreed that the "Highest and Best" use of the Claimants' land is urban development. A portion of the parcel located along 19th Street consisting of approximately 25 acres is designated as future restricted commercial. The portion of the Claimants' land containing Piper Creek is designated for use for parks, and on subdivision will likely be dedicated as environmental reserve.

Where the appraisers disagree is on their interpretation of homogeneity. The issue is whether the land with potential for environment reserve (Piper Creek which consists of approximately 18.85 acres) should be included in the calculation of value. They also disagree on how the commercial lands on the south of the Claimants' land (comprising approximately 25 acres) should be factored into the calculation of the value of the Claimants' land.

The Claimants' evidence

Dr. Jack Alfred Ordman

Dr. Ordman, one of the registered owners of the Claimants' land, indicated in evidence that

Melcor Developments Ltd. approached the claimants on October 7, 2002, with an offer to purchase the Claimants' land for 3.5 million dollars. Later there was some discussion regarding a possible offer that amounted to

6 million dollars with various conditions attached. Melcor made a written offer to purchase on July 29, 2003, for 5.5 million dollars as referenced as Tab 9 in Exhibit 8. The summary in the offer is as follows:

> *Price - $5,500,000 ($43,310.00 per acre)*
> *Terms –Cash on closing*
> *Closing Date – January 31, 2004*
> *Deposit – Deposit of $100,000.00 to be paid in 5 monthly instalments to Alf & May Ordman commencing upon the signing of the formal Purchase agreement*
> *Purchase Condition – completion of a due diligence investigation by January 31, 2004*
> *Land Description – Southeast ¼ of 4-38-2-west of the 4th meridian containing 126.99 acres*

The Ordmans had earlier written to Melcor suggesting 5.5 million dollars cash. The Ordmans ultimately withdrew the offer pending the outcome of the Land Compensation Board hearings. Dr. Ordman emphasized that neither he nor his wife are currently involved in the business of selling land, nor had they previously taken any steps to sell the Claimants' land.

Appraisal evidence

Mr. Brian S. Gettel, B.Comm., AACI

Mr. Gettel presented to the Board an appraisal report dated March 2004.

He indicated that the south portion of the property which fronts 19th Street and Delburne Road has been designated restricted commercial. Mr. Gettel advised that to date there has been no commercial development on Delburne Road; Gaetz Avenue has been the preferred location for major commercial development.

Mr. Gettel spoke regarding the environmental reserve. He believes that the impact of the environmental reserve on land that can be developed is a significant factor. Land that backs onto a unique topographical feature or a man made lake generates prime values. He indicated in his appraisal that the environmental reserve comprises 21.99 acres. In further testimony, however he suggested that he would be prepared to accept the calculation of the City for the environmental reserve at 18.5 acres.

The municipal development plan shows the Claimants' land as basically a residential area, with Piper Creek proposed for park development. This was subsequently fine tuned through the East Hill Major Area Structure Plan, with the south 300 meters of the Claimants' land proposed for commercial use. Due to the proximity of the proposed commercial area to a landfill site, no food establishments or fast food restaurants will be allowed to develop on this proposed commercial area.

Mr. Gettel concluded that the residential land was suitable for short-term development with the commercial portion of the Claimants' land being more medium term, of five to seven years.

Recognizing the three types of land, the partial taking came from land Mr. Gettel considered to be totally developable residential land. He concluded that the southeast sector of Red Deer was a higher-end housing area and would appeal to the higher-end type of development, particularly because of Piper Creek.

Comparative Sales

Mr. Gettel presented five indices in support of his conclusions, three of which are highlighted here for ease of reference:

Index 2: This is the offer from Melcor Developments Ltd. on the Claimants' land. Since the taking was from a future residential portion of the property, Mr. Gettel suggests that the Board must look at the residential component of the property. The offer was for $5,500,000.00 or $43,310.00 per acre. Mr. Gettel calculated th developable acres to be 105 acres, which means that the sale price per net developable acre would be $52,381.00. Mr. Gettel also suggests that the presence of Piper Creek is deemed to be a very positive attribute, and that prestige lots would be yielded from this portion of the Claimants' land. Mr. Gettel believed that the impact of the commercial property was a neutral factor.

Index 3: Also known as the Ming property located east of the subject, also lying north of Delbrune Road with a parcel size of 136.16 acres sold for $4,600,000.00 or $33,783.00 per acre. This sale had favourable financing with the vendor carrying $3,600,000.00 at 4% over 5 years.

Index 4: This is referred to as the Anders property located immediately west of the index 3 and .8 km directly east of the Claimants' land. This was acquired for $6,344,400.00 for a unit value of $40,000.00 per acre with vendor carried financing at $3,000,000.00 at 6% for 5 years.

Analysis and conclusions

Mr. Gettel's adjustments were completed based on terms of sale, motivation, time, and location/development potential and physical characteristics.

Mr. Gettel presented a Comparable Sales Adjustment Chart on page 44 of his report, which is reproduced here for ease of reference.

COMPARABLE SALES ADJUSTMENT CHART

Index No.:	1	2	3	4	5
Unadjusted Sale Price/Acre:	$60.689.	$52,381.	$33,783.	$40.000.	$32,500.
Terms of Sale:	-	-	.95	-	-
Motivation:	-	1.05	-	-	1.65
Time:	1.10	-	-	-	-
Location/Develop-ment Potential:	.85	-	1.70	1.40	-
Size:	-	-	-	-	-
Soils/Topography:	-	-	-	-	-
Composite Adjustment	.94	1.05	1.62	1.40	1.65
Adjusted per Acre Value:	$57,047.	$55,000.	$54,728.	$56,000.	$53,625.

The only adjustment with respect to terms of sale was a downward adjustment on Index 3, which had the vendor take back financing below market rates. Indices 2 and 5 were adjusted upward for motivation, Index 2 because it was an offer that was refused and Index 5 because the offer was reportedly based on an outdated appraisal.

With respect to time, only Index 1 was adjusted as it occurred in 2002 and the upward adjustment reflected that the market was continuing to improve.

Mr. Gettel looked at the location and development potential and adjusted for the presence of Piper Creek, which required an adjustment upward to Index 3 & 4. Index 3, in the appraiser's opinion, would be a few more years away from development.

Index 3, the Ming property, was given a 70 percent adjustment because, in Mr. Gettel's opinion, it is a very plain piece of property and an inferior property to the Claimants' land. The appraiser rationalized the adjustment with the timing, and a very significant influence of Piper Creek. In his report, Mr. Gettel distinguishes both the Anders property and the Ming property from the Claimants' land primarily because of the presence of Piper Creek. Index 2 was an offer on the Claimant's land. The price per acre of $52,381.00 was calculated using net developable acres (including the commercial land). Mr. Gettel included the commercial land in his calculation on the basis of his conclusion that the commercial portion exerted a neutral influence on the value of the land. Mr. Gettel presented a Development Analysis (Exhibit 12) in support of his adjustments. The analysis was in three parts consisting of a commercial component, a residential component, and a second residential component analysis factoring in the influence of Piper Creek with the higher priced lots. The analysis used an estimate of Gross Sale proceeds, deducting development costs and factored in a developers profit of 15% to reach a net to land calculation, which resulted in a calculation of present value. Mr. Gettel emphasized that the commercial component of the land is really exerting a neutral influence on the value of the land, which he supported with his first analysis. In Mr. Gettel's opinion, this is primarily because it is going to take some time before Melcor could

really develop the commercial land. Once the residential area is built up the commercial activity would follow. Mr. Gettel's conclusion for present value in the Development Analysis was as follows:

> Commercial component: (net developable residential acreage)-$57,132.00/acre
> Residential component: $39,913.00/acre
> Residential component: (Piper Creek influence)- $59,016.00/acre

Mr. Gettel indicated that he spoke with Mr. Pelletier, as well as Ralph Young, both senior executives with Melcor. While Mr. Pelletier did not express the same view as Mr. Young, Mr. Young indicated that the commercial component of the land was several years away from development. Mr. Gettel concluded from his conversations with Mr. Young, that the commercial component was exerting a neutral influence on the value of the Claimants' land. Mr. Gettel advised the Board that his analysis in Exhibit 12 was similar to what a developer would prepare as a Cost-Benefit Analysis to determine a present value calculation. His analysis was based on the conclusion that a developer would not pay anything for the environmental reserve. The approach Mr. Gettel used in his adjustments was that Piper Creek enhanced the value of the remaining lands, however, in his view the Environmental Reserve itself is essentially valueless. He relied on the reasoning in the *Mannix v. Alberta (1983), 27, L.C.R. 13, ABQB* and *(1984), 31, L.C.R. 299, ACA* case to support this conclusion. He felt that the *United Management v. City of Calgary (1986), 36 L.C.R. 162* case could be distinguished from the facts of the present case because in that case the partial taking had potential areas of environmental reserve, as well as developable land. In this case the partial taking is exclusively what would be considered developable land.

Mr. Gettel concluded that the value of $55,000.00 per acre would apply to the partial taking and therefore compensation for the taking of 2.34 acres would be $128,700.00.

Respondent's Evidence

Tom Warder

Mr. Warder is the Engineering Services Manager with the City of Red Deer. He indicated to the Board that construction on the project involving the widening of 40th Avenue commenced in the late fall of 2003 and was completed in the summer of 2004. The taking was from along the east edge of the Claimants' land, with a deflection to avoid a large tower. Mr. Warder also confirmed that there has been significant growth in south Red Deer.

Mr. Warder pointed out the southerly 300 metres of the Claimants' land would be designated commercial, with the balance less the environmental reserve along Piper Creek, being residential. Mr. Warder explained to the Board that the East Hill Area Structure Plan encompasses the Claimants' land.

Directly south of the Claimants' land there is a closed landfill. Due to this fact, Alberta Environment imposes certain restrictions on the commercial development which will take place on the southerly portion of the Claimants' land. Specifically, food preparation business or restaurants will not be allowed.

Mr. Warder indicated that the services are presently in place for the Claimants' land to proceed to development. Therefore the Claimants' land and the Anders property are all imminently developable. He indicated that the Ming property could likely proceed with development in 2006.

Appraisal Evidence

Mr. Garry K Bresee P.Ag., AACI

Mr. Bresee presented an appraisal dated September 2004, which is an update appraisal of an earlier May 2003 appraisal.

Mr. Bresee indicated that the Claimants' land is A1- Future Urban Development, which is intended to allow a property to remain in agricultural use until such time as it is developed for urban purposes. The property falls within the East Hill Area Structure Plan, which shows most of the area being designated for future residential development with the green area along Piper Creek as park area and the area at the south along 19th street as restricted commercial.

The highest and best use for the Claimants' land, except for the area designated restricted commercial, would be residential development. The developable area is estimated to be approximately 102 acres. Approximately18.85 acres are not developable, and have been set aside as environmental reserve.

Mr. Bresee indicated that lots adjacent to Piper Creek would tend to be larger, more expensive lots, however, because they are larger lots, there would be fewer of them.

Comparative Sales

Mr. Bresee presented 5 Comparable Sales. Two of these comparables are highlighted here for ease of reference.

Comparable 1: The Anders Property sold in September of 2003, for 6.334 million. The purchase price works out to a per acre value of $40,000.00. The purchaser estimated a 10- 15 % premium was paid, because the developer was short of immediately developable property in the area and this was the only piece of immediately developable property at the time.

Comparable 2: The Ming property is located directly east. The sale price was $4.6 million. The parcel size was 136.16 acres. The price per acre for this property was $33,784.00.

Mr. Bresee took a different approach from Mr. Gettel and valued the Claimants' land based on the highest and best use as residential development with the highest and best use of the southerly portion as restricted highway commercial. He subtracted the commercial portion from the property in arriving at his value, comparing only the residential lands. Unlike Mr. Gettel, he included the environmental reserve in his calculation of value for the residential lands, a summary of his adjustments for the comparables are as follows:

Schedule of Comparables

	SUBJECT	COMP. 1	COMP. 2	COMP. 3	COMP. 4	COMP. 5
SALE DATE	-	Sept/'03	Sept/'03	Apr/'02	Sept/'01	Apr/'02
SALE PRICE	-	$6,344,400	$4,600,000	$3,000,000	$2,148,600	$1,635,720
PARCEL SIZE (ACRES)	Approx. 102	158.61	136.16	152.95	107.43	54.01
LOCATION	-	Inglewood East	Southeast	West Park Ext.	College Park	Kentwood
ZONING	A1	A1	A1	A1	Ag 'A'	A1
SERVICES	Unserviced	Unserviced	Unserviced	Unserviced	Unserviced	Unserviced
OTHER CHARACTERISTICS	Piper Creek	-	Vendor Fin.	Adj. Hwy. #2	Annex. Area	-
MOTIVE	-	Bldg. Site; Prem	-	-	NAL Trans.	Vendor Fin.
SALE PRICE/ACRE	-	$40,000	$33,784	19,614	$20,000	$30,285

Adjustments

TIME		1.00	1.00	1.35	1.20	1.15
TIME ADJUSTED BASE		40,000	33,784	26,479	24,000	34.828
LOCATION		1.00	1.10	1.15	1.25	1.15
LAND UTILIZATION		0.95	0.95	1.05	0.95	0.95
PARCEL SIZE		1.00	1.00	1.00	1.00	0.95
MOTIVE		0.90	0.90	1.00	1.20	0.95
CULMULATIVE ADJUSTMENT		0.855	0.941	1.208	1.425	0.986
INDICATED PRICE PER ACRE		$34,200	$31,790	$31,987	$34,200	$34,340

In Mr. Bresee's opinion, Piper Creek had two effects. Firstly, it would have a negative effect, because of the development density, with fewer lots on the parcel. The other effect would be to enhance the value of the lots bordering Piper Creek. The total area of the environmental reserve is approximately 20% of the total parcel.

Mr. Bresee indicated at one point during his testimony that he did not know if the effect of Piper Creek would be positive, negative or neutral. In his report, however, he considers adjustments

for land utilization, development density, and lot yield that might be projected for the comparable sale as compared to the Claimants' land. The presence of the environmental reserve would have a significant negative impact on the lot yield upon development, however this negative impact would largely be offset by the positive influence on the value of the lands on both sides of Piper Creek. Therefore Mr. Bresee applied a minor adjustment of 5% to comparables 1, 2, 4 and 5. Mr. Bresee confirmed that the adjustments are subjective, based on experience and knowledge of the market area.

With respect to the use by Mr. Gettel of the offer to purchase from Melcor on the Claimants' lands as a comparable, Mr. Bresee commented that the *Expropriation Act* contemplates a transaction between a *willing buyer and a willing seller*. He concluded that the Ordman's have shown that they are not willing. He also indicated that the offers from Melcor are for the whole property, which includes the commercial portion on the south. He felt that the commercial portion to the south makes this less reliable as a comparable.

Mr. Bresee indicated that the commercial development on the southern portion of the Claimants' lands would more likely be Highway commercial development. In his testimony, he gave a rough estimate of $2 million for the commercial portion of the Claimants' land based on $80,000.00 per acre. This was derived from a comparable on Gaetz Avenue and 19th street and a significant discount adjustment based on the location.

Mr. Bresee concluded that the value of the partial taking, based on his analysis of the comparables, was $34,000.00 per acre, for 2.34 acres, which amounts to $79,560.00 and rounded to $80,000.00.

Board Determination

The following questions must be addressed by the Board:

1. **What is the appropriate method of calculating the market value of the partial taking in this case?**
2. **Is the Claimants' land homogenous?**
3. **Should the south portion of the subject land designated as restricted commercial be taken out of the subject parcel in calculating value?**

Both Mr. Gettel and Mr. Bresee agreed that the highest and best use of the Claimants' land is urban development, with a portion of the parcel located along 19th street and consisting of 25 acres designated as future restricted commercial.

They disagree on the interpretation of homogeneity, and on whether the area designated for environmental reserve (Piper Creek which is approximately 18.5 acres) should be included in the calculation of value. They disagree on the impact the commercial development would have on the value of the Claimants' land.

The principles argued by each party are established by case law, which makes it essential to review and analyse these cases to determine which principles of evaluation should be applied.

This is a partial taking of a strip of land from a larger parcel of land. The Board must determine how to apply sections 41 and 42 of the *Expropriation Act R.S.A. 2000, c. E-1:*

Principles of Compensation

Determination of market value

41 *The market value of land expropriated is the amount the land might be expected to realize if sold in the open market by a willing seller to a willing buyer.*

Principles of compensation

42(1) *When land is expropriated, the expropriating authority shall pay the owner the compensation as is determined in accordance with this Act.*

(2) *When land is expropriated, the compensation payable to the owner must be based on*

(a) the market value of the land,

(b) the damages attributable to disturbance,

(c) the value to the owner of any element of special economic advantage to the owner arising out of or incidental to the owner's occupation of the land to the extent that no other provision is made for its inclusion, and

(d) damages for injurious affection.

The proper interpretive approach to adopt in interpreting the statute is as set out in section 10 of the *Interpretation Act R.S.A 2000, c I-8:*

10*. An enactment shall be construed as being remedial, and shall be given*

> *the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.*

There is an element of artificiality when the principle of a sale by a *willing seller to a willing buyer* is applied. The Board must ensure that the statutory requirements of the Act are satisfied. In the present case, we are faced with a partial taking of a long narrow strip along the edge of a property for the purpose of widening and upgrading a highway.

The first case to be considered by the Board in determining the approach to be taken when there is a partial taking, is *The Queen v. Bonaventure Sales Ltd. (1980), 22 LCR 164 Mcgillivray C.J.A. Court of Appeal pp164-at page 165*

> *… We are all of the opinion that the only method of arriving at the fair market value was to take a fair market value of the whole of each parcel and then attribute the per acre value to the acreage taken.*

Kerr v. Minister of Transportation (1981), 22 L.C.R. 179,119 D.L.R (3d) 386, which went further in the application of the method as outlined in the *Bonaventure case supra* at p 183-184

> *...However, in that case the parcel was composed of homogeneous acres. In the present case the owner's land in question is valued, part as highway commercial and part as recreation. The value of the former land is $4000 an acre and the value of the latter $1000 an acre. …The Queen v. Bonaventure Sales has no application except where the acreage is homogenous.*

In the *Kerr* case, the Board found, and the Court accepted that the highest and best use for

about half of the property was recreational and the remaining half had a highest and best use as highway commercial. In that case, the taking was entirely from the highway commercial parcel. The Court upheld the Board's finding that the proper method was to value the entire highway commercial parcel, ignoring the recreational parcel; determine a unit value for the highway commercial parcel and apply the unit value to the part taken.

The facts of the *Kerr (supra)* case are very similar to the present case. Evidence in that case established that the quarter section from which the taking took place did not have a uniform land use. In this case, we are dealing with a taking from the residential portion of the Claimants' land, which also contains a distinct commercial portion on the southern portion of the said land. There is a further difference in this case, as the Board must look not only at the commercial portion of the land but also at any impact that the environmental reserve would have on the value of the land taken.

The Board must apply each principle with common sense, and look at the particular facts of each case in making a decision. Another case referenced by the parties was *Mannix v. The Queen in Right of Alberta (1983), 27 L.C. R. 13,47 A.R. 81.* In that case the Alberta Court of Queen's Bench accepted the appraiser's approach that they must value the expropriated land as a separate and distinct parcel and if such parcel is found not to be developable then it essentially has no value. This case was later appealed to the Alberta Court of Appeal, reported as *Mannix v. Alberta [1984], A.J. No. 365, 31 L.C.R. 299.* The Court of Appeal noted that the appraisal evidence considered the environmental land as an amenity, which tended to enhance and was reflected in the value of the

lands taken.

The distinguishing factor from the present case is that, in the *Mannix (supra)* case, the taking was of the entire large parcel of land. In the present case, the taking was a partial taking of a strip of land from a large parcel. The court in *Mannix (supra)* did not address any of the issues that arise from a partial taking. Another fact of note was that nearly two-thirds of the total parcel would have had to be converted to undevelopable environmental reserve for which no compensation could be awarded. Further, in the *Mannix (supra)* case, the breakdown of the land into developable and undevelopable acreages was used to determine the value. The land in that case was found to have only one highest and best use.

Mr. Gettel followed the approach in the *Mannix* case. His position is that valuing the subject lands on the basis of developable acres is justified, particularly since any developer will be required to surrender the Piper Creek lands and environmental reserve.

It is the view of the Board that to take the reasoning from *Mannix* and then conclude that the developer is paying nothing for the land in the environmental reserve is an artificial approach to valuing the partial taking. If the environmental reserve adds to the value of the remainder of the land, the purchase price of the bordering land should reflect this added value.

The Board must determine whether to value the residential lands separately even though they

have the same highest and best use. There are cases before the Board that have valued distinct portions separately even thought the lands in question have the same highest and best use. Those cases require consideration.

Lorenz v. Lloydminster (City) (1982) 40 AR 148, 26 L.C.R. 157 Alta LCB

The parties in this case agreed that the highest and best use in this case was agricultural. The Board found that, in considering the application of the *Kerr* principle, this acreage was not homogenous, at page 6:

> *However it was very clear that within that general umbrella of agricultural use different parcels of land had very different agricultural uses and productivity. Thus in this sense the acreage is not homogenous. The flat land was relatively productive and suited to the growing of cash crops such as cereal grains or canola. Other parts of the owner's land were heavily treed and brushed and suitable only for pasturing livestock and yet other parts were suited to growing forage and silage crops and tame grass. It was the opinion of both appraisers that this lack of homogeneity must be recognized and that failure to do so and the valuation of the expropriated land on a composite acreage value would result in a severe inequity to the owners thereof. The Board agrees entirely with the position adopted by the appraisal witnesses and finds that in the present case the flat land and the riverbank land must be separately valued and the acreage value determined therefor applied respectively to the portions of the flat land and the river bank land taken.*

The appraisers in this case took the approach of valuing the riverbank land and the flat land separately. In this case the Board was dealing with a large farming unit, which was traversed by the North Saskatchewan River. The river and its banks dictated the use of substantial areas of the farm. In the Board's opinion, there is no similarity between the present case and the *Lorenz* case. In the

present case, the land in question is residential and the environmental reserve has a positive influence on the value of the land that is adjacent to the reserve.

Weyburn (City) v. Fowler [1984] 1 W.W.R.106

In this case, the land in question was part highway commercial and part recreational. The portion of the land expropriated did not have the same use as the whole 15-acre parcel. The land that was expropriated was not homogenous with the balance of the land so the Saskatchewan Court of Queen's Bench followed the principle in *Kerr* and valued the parts separately.

Helenslea Farming Ltd. v. County of Parkland No. 31(1985) 33 L.C.R. 133

In this case the Board followed the *Lorenz* case, however, this appears to be a result of the fact that both counsels agreed on the method of valuation. In any event, the decision was appealed and is reported as *Helenslea Farming Ltd. v. County of Parkland No. 31 (1987) 37 L.C.R. 191* and sent back to the Board with the following comments from Stevenson J J. A. at page 192:

> *The board's decision in Lorenz is not under attack. We do note that tests for compensation in unusual fact situations and appraisal evidence would be well served by application of the" before and after" test: the comparison of the market value of the entire parcel before the taking and the market value of the parcel after the taking in arriving at the market value of what was taken.*

The Board does not have appraisal evidence before it in the present case, to consider the approach suggested by Stevenson JJ. A. The Claimants argue that, while the before and after test has

not been used in this case, the Board must consider that the Claimants are now left with less developable land and the only way to economically reinstate the owners is to compensate for developable land.

19354 Yukon Inc. v. City of Calgary (2004), 84 L.C.R. 25

There is some useful discussion in this case, however the distinguishing fact is that the parties already agreed on the value of the whole parcel, as opposed to the Claimants' situation, where there is not agreement on the fair market value of the parcel as a whole. This case did not involve an expropriation and the conclusion is limited to the particular facts of the Claimants' case.

Marian v. Alberta 2001 ABQB 19, 294 A.R. 318

In this case, Veit J. applied the *Kerr* principle. She indicated that the portion of the lands fronting on the highway had potential for highway/commercial use, while the remainder of that quarter section could only be used as open space for recreational purposes.

United Management Ltd. v. City of Calgary (supra)

The *United Management* case is an example of a fact situation where the larger parcel has a single highest and best use and should not be divided. In this case the Board reviewed and considered the *Bonaventure (supra)* case, the *Kerr (supra)* case and the *Mannix (supra)* case. In discussing the approach taken in the *Mannix* case, the Board made the following comment at

page184:

> *In short the method of valuation which has been discussed is not unusual and is commonly applied in the market-place in arriving at the market value of land. The purpose and result of application of this method is to arrive at an over-all price for a large raw parcel of land which has not as yet been subdivided. It must be emphasized that it is a "method" or "approach" to valuation which is applied* ***after*** *the size of the parcel and its highest and best use have been determined. It is* ***not*** *a method or basis for determination of highest and best use. In the board's opinion it is an unwarranted distortion of this method or approach to extrapolate the mechanics thereof to a finding that certain parts of the raw parcel have a substantial value and that other parts have no value whatever.*

In the *United Management (supra)* case, there was a partial taking of a long narrow strip from a large parcel. The larger parcel was considered to be immediately available for residential development. The larger parcel contained some irregularly shaped portions that were environmentally sensitive and would not be considered developable. Unlike the present situation, the land that was taken was considered to be primarily undevelopable. In that case, the City relied on *Mannix (supra)* in its argument that the subject land should be divided into developable and undevelopable land, then the expropriated land must be placed in one of those categories and valued accordingly. The argument was essentially that the lands were not homogenous with regard to highest and best use and therefore there was a separate highest and best use for each separate parcel.

The Board refused to extend the *Kerr* rule to that extent and found that the large parcel was homogenous as to highest and best use and the *Bonaventure* rule was applied.

The Kerr Principle and its application to the current case

All of the cases described above explore the *Kerr* rule and its application. The cases help to define the parameters of the rule and the meaning of *homogenous use* within the context of that rule.

One of the important issues before the Board is homogeneity. The Board must determine highest and best use and homogeneity in the context of the marketplace. Market forces and conditions drive the purchase and development of land. The value of the land must be assessed in relation to how willing buyers and sellers view the type of land that is being valued. To cite an example, when purchasing agricultural land, buyers do not select to buy only the parts which are highly suited to agricultural use. There are often included in the larger parcel, some less favorable areas that may not be as suitable for agricultural use, such as sloughs or rocky areas or other poor quality areas. In situations such as the present case, where there is raw land for urban development, buyers and sellers do not only buy the parts that are developable. In these situations, the unsuitable parts are a factor to be considered when arriving at the total price for the parcel. It is the whole parcel that will be purchased or sold and for which the highest and best use is to be determined. In both the *Kerr (supra)* case and the *Lorenz (supra)* case, fact situations were presented where the larger parcel was to be divided as to the highest and best use. The *United Management (supra)* case and other board decisions (*Will Farms Ltd. v. Minister of Transportation, (1983) 30 L.C.R. 274, and Groten v. the Queen (1985) 33, LC.R. 211*) presented facts where the larger parcel had only a single highest and best use.

Determination of the highest and best use should lead to a valuation which reflects all of the strengths and weaknesses of the land in question and the compensation award which is an accurate and fair reflection of the value of the part taken. Determination of use is an essential step in every valuation of land and this determination must be made taking into consideration how buyers and sellers in that market buy and sell the kind of land, which is under consideration.

Commercial Portion of the Claimants' Lands

The facts in each case are unique. In *Kerr (supra)* the lands were divided into two distinct parcels. That case requires some refinement in its application to the case at hand. The Board is of the view that the *Kerr* approach is appropriate when considering the commercial versus the residential component of the land. The Board does not accept the evidence of Mr. Gettel that the commercial land has a neutral affect on the value of the parcel and therefore should be included in the valuation. This approach is contrary to the proper application of the *Kerr* principle. The Board prefers the approach taken by Mr. Bresee in applying the *Kerr* principle by valuing the residential portion of the lands separately from the commercial portion. It would have been helpful to the Board if Mr. Bresee had taken the approach one step further and provided a value for the commercial portion of the lands by using relevant comparables. This would have been most helpful in assessing the Ordman offer provided by Mr. Gettel as a reliable comparable. The Board finds that the use of the land is, therefore, not homogenous in this respect and accordingly the *Kerr* principle should apply. Approximately 25 acres of the Claimants' land is designated for commercial use. The appraisers

agree that the balance of the land is residential use and the taking is from the residential portion of the Claimants' land. Accordingly, the commercial component of the land should be valued separately.

Environmental Reserve Portion of the Claimant's Lands

The other issue in dispute is whether the Environmental reserve portion, Piper Creek, would be considered a different use because it is undevelopable land and the *Kerr* principal should apply here as it is applied in the *Mannix (supra)* case. The partial taking for the roadway was clearly residential use and not designated commercial use. The taking did not include any of the environmental reserve land.

The Board must consider this argument carefully. If the taking consisted of a large portion of environmental reserve, to use Mr. Gettel's analysis would be to apply only a nominal value to the expropriated lands. That result would be illogical, and does not appear to be the intent in *Mannix.* The Board is of the view that the *Mannix (supra)* case cannot apply to a partial taking. To do so in such a case could easily result in an absurdity. The situation where the environmental reserve is much larger than that in the instant case may result in an inflated value.

The Board must also consider that the taking in this case was from developable lands, however the developer will be in a position to develop the high end lots primarily on the lands

remaining. This conclusion is supported by Mr. Gettel's position of the very positive influence of Piper Creek on the surrounding lands.

If the undevelopable land adds to the value of the remainder, the purchase price of the land may not vary significantly from the purchase price of adjacent land. However as the environmental reserve percentage would increase, the price per acre of the parcel as a whole must change. Thus the environmental reserve will have an impact on the price, but it is not a logical extension of that principle to take this land out of the equation completely in evaluating the price and simply assume it has no value whatsoever.

Unlike the *Lorenz (supra)* case, Mr. Gettel did not provide two separate values for the separate types of land, he simply used the analysis to argue that the value of the entire parcel would only be applied to the developable acres and that in essence there would be no value for the environmental lands abutting the creek.

Mr. Gettel further supported his adjustments and conclusions with a Development Analysis. With the market value approach the buyer is comparing properties, which constitute the market value for the same class of property, with preference to the same general area. The market value approach is the preferred approach of the Land Compensation Board. The Board finds that the Development Analysis provided by Mr. Gettel did not provide sufficient detailed information. Although it was

helpful, in order to be relied upon, further detailed information and analysis would be required: a Development Plan, Analysis of the Direct Costs of Development as well as the Indirect Costs of Development and a detailed analysis of the subdivision plan. None of these elements were present in any detail in the analysis presented to the Board, and therefore the Board will not be attaching significant weight to the evidence as presented. In Mr. Gettel's own words, this was a *quick and dirty approach.*

This case requires careful analysis of the market as discussed above and a common sense application of the principles of law. The Board considers that the developer would purchase the raw land as a unit and finds that the residential portion of the owners land is therefore homogenous within the meaning of its use by the Court of Appeal in *Kerr*. As a result, the Board must determine the market value of the residential portion of the Claimants' land, on a per acre basis and apply such per acre value to the subject land.

Applying the above reasoning, the Board will review the various comparables in assessing value of the taking.

The Board prefers the comparables that are reasonably close in proximity, with similar characteristics to the Claimants' land. The nearest relevant comparables in this case appear to be the Anders property and the Ming property (Mr. Gettel's Comparables 3 and 4 and Mr. Bresee's

Comparables 1 and 2). Both appraisals contained these comparables, however they each approached them differently in their adjustments and analysis.

Firstly, however, the Board must address the offer on the Claimants' lands by Melcor (Mr. Gettel's Comparable 2) and the weight that should be attached to that offer as a comparable. This could have been a valuable comparable. It was made on the basis of a gross acreage price without a breakdown between developable and undevelopable land. The offer as presented by Melcor sets the value of $43,310.00 per acre, which clearly reflects the entire parcel. There is no reference in the offer to any distinction in value for the restricted commercial portion or the environmental reserve portion of the lands. As the Board has determined that the commercial portion of the land is to be valued separately and rejects the evidence that the commercial portion has a neutral effect on the value of the lands, the Melcor offer becomes less valuable as a comparable. As neither appraiser provided a comprehensive analysis of the commercial component with reliable comparables the Board is unable to place much emphasis on this offer.

The Board also finds that there is little value to Mr. Bresee's Comparable 4, which he referred to as somewhat non-arms length. The Board accepts the evidence presented by the Claimant in Exhibit 16 being the three corporate searches to establish that one party maintained ownership in both the purchaser and the vendor. Similarly, the Board will not consider Mr. Bresee's Comparable 5.

Mr. Bresee's Comparable 3 was a sale that was negotiated in 1999 and was based on an offer that ultimately was not accepted. This comparable is of little assistance to the Board and will not be considered.

With respect to Mr. Gettel's Indices 1 and 5, the similarities to the subject are somewhat too remote to be relevant; therefore they will be given less weight by the Board than his Indices 3 and 4.

The Board prefers the Ming and Anders comparables and will assess the adjustments made by the two appraisers in reaching the value. The sales are of somewhat similar land in similar situations in close proximity to the subject lands. The primary distinctions seem to be the presence of Piper Creek on the Claimants' lands and the existence of the commercial lands. However, with the application of the *Kerr (supra)* approach and removing the commercial portion of the land from the calculation there is a comparison of residential to residential land.

The Board must decide which of the appraiser's adjustments are appropriate to consider in arriving at the value. Both appraisers carried out the direct comparison approach using comparable sales and on that basis arrived at value. The Board is satisfied that an upward adjustment is required to these two comparables, and accepts the positive influence of the Piper Creek on the value of the lands. The Board finds that the adjustments made by the two appraisers were substantially different. The Board is of the view that Piper Creek would be a positive influence on the value of the

Claimants' lands. The Board also finds that Mr. Bresee's adjustments do not properly account for the positive influence of Piper Creek. The Board finds that there was sufficient appraisal evidence to permit the Board to consider and assess the comparables and the Board has applied its experience and expertise in making adjustments.

After carefully reviewing and comparing all of the above, the Board determines the market value of the residential portion of the Claimants' land to be $44,000.00 per acre. This unit value must then be applied to the 2.34 acres taken and results in an award of $102,960.00, the rounded sum of $103,000.00 payable to the Claimants as the market value of the land taken.

The Board awards to the owners for the market value of the subject land, the rounded sum of $44,000.00 per acre for 2.34 acres for a total value of $102,960.00 rounded to $103,000.00.

Costs

The Claimants' case was thorough. It was presented efficiently and in a professional manner. The Claimant has been highly successful in his claim. The Board finds the Claimants are entitled to be fully reimbursed for reasonable legal and expert costs.

If the parties are unable to agree, either party may apply to the Board to speak to costs.

THEREFORE IT IS ORDERED THAT:

The amount payable by the City of Red Deer to the owners for the Claimants' land is the sum of One Hundred and Three Thousand and 00/100 Dollars ($103,000.00) together with interest equivalent to the average annual interest paid in 90 day T-bills, compounded annually. This rate will be payable from November 14, 2003 on the outstanding amounts until paid in full.

LAND COMPENSATION BOARD

_____
John Mah, Q.C., Presiding Member

_____
Karen Sinclair-Santos, Member

_____
Lorne W. Wildeman, Member