

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE EXPROPRIATION ACT



- and -

**IN THE MATTER OF AN APPLICATION** by **JOVIN ENTERPRISES LTD.** to determine compensation, including legal and other costs reasonably incurred, to be paid to it by the **MUNICIPALITY OF THE COUNTY OF ANTIGONISH** for the expropriation of land located at 70 Henry Lane, Antigonish, Nova Scotia

**BEFORE:** Dawna J. Ring, Q.C., Member

**APPLICANT:** **JOVIN ENTERPRISES LTD.**  
Robert H. Pineo, LL.B.  
Jeremy P. Smith, LL.B.

**RESPONDENT:** **MUNICIPALITY OF THE COUNTY OF ANTIGONISH**  
Adam Rodgers, LL.B.

**HEARING DATES:** December 5-6, 2016

**WRITTEN SUBMISSIONS:** January 4, 18, 25, 2017

**ORAL SUBMISSIONS CANCELLED:** February 1, 2017

**DECISION DATE:** **April 28, 2017**

**DECISION:** **Partial compensation is set at \$309,000. Board retains jurisdiction to decide costs and interest.**

## TABLE OF CONTENTS

I	SUMMARY.....	3
II	FACTS .....	4
	A.    General .....	4
	B.    Jovin.....	4
	C.    Planning Documents .....	9
	D.    James Hardy .....	14
	E.    Sean Day .....	21
	F.    Michael E. MacInnis .....	26
III	ISSUES.....	28
IV	LAW .....	29
V	FINDINGS.....	34
	A.    Highest and Best Use.....	34
	1.    Highest Economic Value .....	34
	2.    Probability of Development.....	36
	a)    Town's Interest .....	37
	b)    Development Agreement .....	38
	(1)    Currently Available .....	39
	(2)    No Flood Mapping.....	39
	(3)    Permitted Uses.....	40
	(4)    No Aquifer Restriction .....	40
	(5)    Flood/Stormwater Management Plan.....	41
	(6)    Council Approval .....	43
	(7)    Value as of Expropriation Date.....	45
	c)    Flood Mapping and Rezoning .....	46
	(1)    Finish Flood Mapping .....	47
	(2)    Adopt Flood Mapping .....	50
	(3)    Portion Rezoned .....	52
	(4)    Inaction of the Owners .....	53
	3.    Conclusion.....	54
	B.    Market Value of the Lands Taken .....	54
	C.    Business Loss .....	57
	D.    Injurious Affection.....	57
	E.    Prejudgement interests and costs .....	58
VI	CONCLUSION .....	58
	APPENDIX "A" .....	59

## I SUMMARY

[1] Pursuant to the *Expropriation Act*, R.S., c. 156, (also "Act"), Jovin Enterprises Ltd. ("Jovin") brought a claim for various compensation, costs and interest as a result of lands expropriated by the Municipality of the County of Antigonish ("County") for the public purpose of securing a water supply.

[2] The main issue was the highest and best use of the property. The parties disagreed on the applicable law and use.

[3] The hearing took place in Antigonish on December 5-6, 2016. Due to the facts agreed upon by the parties, the Board heard from the appraiser for each party: James Hardy for Jovin and Michael E. MacInnis for the County; Florence MacDonald on behalf of Jovin, and the Town's Planner, Sean Day, appearing under subpoena. The Board requested the parties provide submissions relating to the probability of the highest and best use. Written submissions were filed on January 4, 18 and 25, 2017. The parties were also granted the opportunity to provide oral submissions on February 2, 2017. On February 1, 2017, the parties and Board agreed this would be cancelled.

[4] After considering all of the evidence and submissions of the parties, the Board finds that the highest and best use of the lands is medium density residential development. Assessing development discounting factors, the Board finds the market value between a willing seller and a willing buyer would be \$50,000 per acre for the lands taken resulting in compensation of \$265,000. The Board finds the remaining lands were injuriously affected and sets compensation in the amount of \$44,000. The total compensation for both is \$309,000. The Board retains jurisdiction to decide Jovin's claims for costs and interest, if the parties are unable to agree.

[5] As the Board finds the highest and best use is not the properties' existing use, Jovin is not seeking its alternative business loss claim. Consequently, the applicable facts and arguments have not been addressed. If issues are not addressed in the Decision, they were not pivotal to it.

## **II FACTS**

### **A. General**

[6] The parties agree the expropriation was for a public purpose to secure the water supply. The expropriation date is July 25, 2014. The County has completed the tasks required by the *Act*, including the payment of 75% of the appraised value as determined by the County.

[7] The lands in question are within the Town of Antigonish (also "Town"). They are located within a few blocks of Main Street and less than a kilometre from St. Francis Xavier University ("St. F.X.").

### **B. Jovin**

[8] Florence MacDonald is an officer, treasurer, and director of Jovin. The three other officers include her sisters: Adelaide, Mora and Claire. Ms. MacDonald testified her mother and father owned numerous properties in Antigonish and, in 1980, incorporated Jovin as a land-holding company.

[9] The lands were originally one large parcel located to the north west of College Street. It was bordered by the Wrights River (also "River") and on the south west by MacLellan Street, single family residences, and a multi-unit apartment building. On

the south east it is adjacent to a mobile home park and single family residences. Across College Street are industrial uses and municipal services.

[10] Since owning the lands, the River was diverted, College Street was altered, and a strip of property running from College Street to the west was sold to the Town for a proposed road which was not, and will not, be constructed ("highway lands"). The highway lands divided the original parcel into two sections, where each remains accessible to the other by a right-of-way over the highway lands. The Board will address the northern lands along the River as the "River property". The "Southern property" identifies the lands bordering the residential developments and MacLellan Street. When both parcels are referenced collectively, they are called "the Lands". The Lands consist of approximately 14.14 acres and, generally, its topography is flat.

[11] The property expropriated by the County is the River property. In the expropriation documents, it is identified as Lots P and R. The lots consist of 6.5 acres of land. The lots include a portion of the diverted riverbed and a small remnant of land on the other side of the River, which are not included in this matter. With these excluded, Mr. Hardy determined the River property consists of approximately 5.3 acres, has approximately 1,240 feet of water frontage along the River, and is accessed from College Street along Henry Lane. These facts were not contested. In general, the River property is PID No. 10080570.

[12] The Southern property consists of 8.61 acres and has access from MacLellan Street. The Southern property is PID numbers 10080588 and 01301498. Jovin is claiming the Southern property has been injuriously affected because of the

amenities it lost by the expropriation of River property, including no longer having access to river frontage.

[13] Based on flood mapping done in 1977, the Lands are in the Flood Way area, and zoned Conservation. Construction of permanent structures is not permitted, except through cut and fill methodology, all of which will be discussed in more detail below.

[14] In 1993, Jovin signed a License and Option Agreement for 12 months with the County permitting it to dig wells and explore the possibility of using the River property to extract water. In 1994, Jovin and the County entered into a 20 year lease Agreement for the County to build facilities for the extraction and treatment of water. An Agreement of June, 1995, clarified some terms of the 1994 Agreement. Specifically, if a further agreement was not reached at the expiry of the 20 year lease, the County would have to remove all improvements from the lands, unless the parties agreed otherwise. With this use, a portion of the north west area of the Lands are in the Aquifer Protection Area.

[15] The lease was to expire on May 31, 2014. On April 5, 2012, the County's solicitor sent a letter to Jovin to initiate license renewal discussions. With no response, on May 20, 2014, Council for the County approved to expropriate the River property. The expropriation documents were registered in the Registry of Deeds on July 25, 2014.

[16] Ms. MacDonald contacted Sean Day, the Director of Planning and Building Services for the Town. Mr. Day provided a letter dated October 21, 2014, informing Ms. MacDonald of the new flood mapping and amendments the Town was undertaking. As a result, Mr. Day advised the Lands would likely be removed from the Flood Way area and could be developed with some commercial and more dense residential including townhouses, semi-detached dwellings, etc. His letter reads as follows:

In response to your email of October 6, 2014, I can provide the following information:

In the early 80s, Antigonish was one of several communities in Nova Scotia which became the subject of the Federal Provincial Flood Damage Reduction Program. The findings of this program, including mapping and regulation protocols, were officially adopted by the Town in 1994.

In 2010 the Town applied for funding assistance from the Province for purposes of updating our flood risk mapping. The catalyst for this effort was the acquisition of highly accurate digital elevation modeling (DEM) as a consequence of LIDAR becoming available for the area.

Work commenced in late 2010 and an initial report was issued in 2011. In addition to the local DEM, waterway cross sections were surveyed and considerable information was collected regarding the Antigonish Harbour Watershed and the various natural and manmade storm systems which contribute to it. Review of the first round of modelling turned up inconsistencies which required further study. Resolving this has turned out to be an iterative process with, at times, large gaps between updates. A few weeks ago, we received what will likely prove to be the final version which will go to Council and the public for adoption. This will form part of a larger amendment to Environmental Policy in Antigonish. It is expected that public meetings concerning these amendments will occur early in the new year.

In regard to your lands located between MacLellan Street and the Wrights River, it has been determined that the various improvements which have taken place over the last several decades have resulted in substantially less flooding than was predicted in the initial flood modelling work from the 80s. This is depicted in the screen capture I sent you recently. Once adopted, lands no longer expected to flood in a 1:20 year flood return event will be zoned for development. In the past, this area would likely have featured R1 zoning however we are moving to more inclusive, higher density housing development patterns within Town and it is likely that the lands will be zoned as a Comprehensive Development District. This could contain some commercial as well as various forms of residential such as townhouses, semi-detached dwellings etc. As some, or most of the land will remain within the floodway fringe, development will be somewhat constrained so as to minimize loss of flood storage. Our mapping indicates that the vast majority of the parcel of land in question falls within the Town limits and would be subject to these amendments.

I trust this answers your questions in relation to amendments currently being undertaken by the Town as they may affect your property. Should you have any further questions, please do call.

[Exhibit J-6, Tab 15, p. 146]

[17] Attached to the October letter was a copy of the most recent floodwater map for the Lands. The following is the map provided by Mr. Day with Mr. Hardy's outline of the River and Southern properties in red, as included in his Appraisal Report dated February 9, 2016. The property between these two parcels is the highway lands.



Updated Flood Map

[ibid, p. 103]

[18] This map showed that almost all of the River property was no longer in the area that floods on average once in 20 years (1-20), Flood Way, but is rather in the area that on average will flood once in 100 years (1-100), Flood Way Fringe (“Fringe”). Approximately 75% of the Southern property is in the Fringe.

[19] Ms. MacDonald also stated Jovin entered in a Right of First Refusal with Boudrot Properties Inc. (“Boudrot”) in March 2014, to purchase the Southern property (Exhibit J-6, Tab 13), although the document is unsigned. The term was two years ending in March 2016. Jason Boudrot purchased the adjacent trailer park.

[20] As a result of the expropriation of the River property, Jovin claimed for the following compensation under the *Act*:

1. compensation for the market value of the River property;

2. compensation for the Southern property being injuriously affected as a result of the above expropriation;
3. in the alternative, if the highest and best use of the properties is its current use, Jovin seeks compensation for business losses; and
4. interest and costs.

For the latter, Jovin requests the Board retain jurisdiction to determine these after it renders its decision on the above compensation.

### **C. Planning Documents**

[21] As the remaining witnesses, the appraisers and planner, referenced the Town's relevant planning documents, the Board will review those at this juncture in the Decision.

[22] The Town adopted its Municipal Planning Strategy ("MPS") and Land Use By-laws ("LUB") in 1994. Mr. Day testified there have been approximately 60 amendments since that time.

[23] The MPS describes Antigonish as being located halfway between the Regional Municipalities of Halifax and Sydney. At the time, it was the 13<sup>th</sup> largest town in Nova Scotia. It encompasses approximately five square kilometres (or 1,000 acres of land) [Exhibit J-12, p. 7].

[24] The Town is described as an urban service centre for the area [p. 10]. The major employers listed are St. F.X., St. Martha's Regional Hospital, Scotsburn Dairies, National Philatelic Centre, R.K. MacDonald Nursing Home and the Antigonish District School Board [p. 7]. In his Report, Mr. Hardy described the Town as having a market

area that draws from Antigonish, Pictou and Guysborough counties. Recent retail developments included Walmart, Atlantic Superstore and Central Building Supplies, and ancillary retail on the outskirts. Major employers in Antigonish County include Sodexo Marriott Services and North Atlantic Seafood Corporation [Exhibit J-6, Tab 15, p. 106]. Mr. Hardy noted the 2011 statistics identified the Town's population at 4,524 [p. 105].

[25] The introductory paragraphs to the Residential policies under Section 4 of the MPS, state how the above unique features of the Town result in a variety of housing needs and the requirement for flexibility to meet changing market demands:

#### **4.1 Residential Policies**

The Town of Antigonish as an urban service centre with a hospital and a university has a variety of housing needs. This is reflected by the comparatively high percentage of non-single family housing (38 percent) and the similarly high percentage (38 percent) of rental accommodation. In order to meet the variety of demands, Council is of the opinion that a number of residential zones have to be created. ...

The policies and provisions of the MPS and implementing bylaws must be sufficiently flexible to meet changing market demands as well as to achieve the goals of the Strategy, ensuring that innovative alternatives to meeting the Strategy objectives can be utilized.

[Exhibit J-12, p. 10]

[26] It further notes the Town's need to make more land available for development. One avenue to achieve this was changing the slope on which construction could occur, with appropriate erosion control methods:

In order that more land may be available for development, construction may now occur on slopes as steep as 33% on average over 50 feet. The previous maximum was 20%.

[ibid]

[27] The introduction to the Conservation subsection states that flooding in the Town is affected by the West and Wrights Rivers, Brierly Brook and the Harbour:

#### **Flooding**

The location of Antigonish at the confluence of the Wright's and West rivers, Brierly Brook and at the mouth of Antigonish Harbour, contributes to one of the most serious problems in Antigonish: flooding. Flooding may be caused by heavy rain events, but also, in

Antigonish, it may result from ice jamming during melt periods. It is also influenced by tidal surges.

[Ibid, p. 44]

[28] It states the Canada-Nova Scotia Flood Damage Reduction Program mapped the floodplain areas affecting various communities, including Antigonish. The flood maps and conditions were printed in 1977, issued in 1983 and adopted by the Town when it approved its MPS in 1994:

Flood Damage Reduction Program

In 1994, the Town adopted the findings of the Canada-Nova Scotia Flood Damage Reduction Program for the Antigonish area. This had the effect of prohibiting development on lands identified as flooding on a 1:20 year basis (the Floodway), and allowing conditional development on lands predicted to flood on a 1:100 year basis (the Floodway Fringe). These provisions, as adopted by Council, applied to all land within the Floodway and Floodway Fringe but excluded those areas which, prior to adoption, had been filled or otherwise developed such that the Flood Damage Reduction Mapping, printed in 1977 and issued in 1983, was no longer current.

[Exhibit J-12, p. 44]

[29] The *Municipal Government Act*, SNS 1998, c. 18 as amended (“MGA”), incorporates various Statements of Provincial Interest including the Statement Regarding Flood Risk Areas (“SPIF”). Policy 4.6.1, states the Town’s intention to comply with SPIF. The applicable flood Policies and LUB are attached as Appendix “A”.

[30] The SPIF provisions severely restrict any modification of lands in the Flood Way. In general, it only allows roads, parking lots or temporary uses. Development in the Fringe is permitted, except residential facilities for people with ambulatory issues and uses relating to hazardous materials. It reads:

2. For *Flood Risk Areas* that have been mapped under the Canada-Nova Scotia Flood Damage Reduction Program planning documents must be reasonably consistent with the following:

- (a) within the *Floodway*,
- (i) development must be restricted to uses such as roads, open space uses, utility and service corridors, parking lots and temporary uses, and

- (ii) the placement of off-site fill must be prohibited;
- (b) within the *Floodway Fringe*,
  - (i) development, provided it is floodproofed, may be permitted, except for
    - (1) residential institutions such as hospitals, senior citizen homes, homes for special care and similar facilities where flooding could pose a significant threat to the safety of residents if evacuation became necessary, and
    - (2) any use associated with the warehousing or the production of hazardous materials,
  - (ii) the placement of off-site fill must be limited to that required for floodproofing or flood risk management.
- 3. Expansion of existing uses must be balanced against risks to human safety, property and increased upstream and downstream flooding. Any expansion in the Floodway must not increase the area of the structure at or below the required floodproof elevation.

[31] The MPS incorporates the above, while excluding from the Flood Way any existing developments (Policy 4.6.3). The MPS directs that any lands in the Flood Way must be designated Conservation on the Generalized Future Land-Use Map (Policy 4.6.2) and are restricted to the above SPIF uses (Policy 4.6.6 and 4.6.7).

[32] The MPS designates lands in 1-100 flood areas as Fringe (Policy 4.6.2) which may be developed as noted above with floodproofing (Policy 4.6.4) and to a maximum area (Policy 4.6.5). These Policies are further expanded in LUB 5.26.

[33] The SPIF permits developments contrary to the above with a hydrotechnical study:

- 5. Development contrary to this statement may be permitted provided a hydrotechnical study, carried out by a qualified person, shows that the proposed development will not contribute to upstream or downstream flooding or result in a change to ~~flood water~~ [floodwater] flow patterns.

[MGA, Schedule B]

[34] An amendment was made to the MPS in November of 2007 to adopt this provision. It permits development in the Flood Way by development agreement using cut

and fill methodology, provided there is a supporting hydrological report by a professional engineer which may be required to be peer reviewed, Policy 4.6.8 and 4.6.9. (As the hydrological report referred to in Policy 4.6.9 is more commonly referred to as “flood/stormwater management plan”, the Board will use the latter.)

[35] The introduction to these Policies included the Town’s desire to locate additional lands for developments:

Alteration of Floodway Boundaries

Since 1994, the Town has sufficed with development opportunities presented by Floodway Fringe lands and other, marginal lands. As these are largely used up however, and with recent developments such as the establishment of a “Big Box” power centre on the outskirts of Town, we are led to consider the possibility of altering the Floodway boundary.

The provisions of the SPIF require that planning documents must identify Flood Risk Areas consistent with the FDRP mapping and that no net gain of fill may be permitted within the Floodway. However, a provision exists whereby development may occur in areas identified as floodway provided a hydrotechnical study indicates that the development may be facilitated without increasing flood risk or impairing flood water flow. ... [Emphasis added]

[Exhibit J-12, p. 46]

[36] Before the Board, Mr. Day described the effect of the cut and fill policies:

Our cut-and-fill does but that policy primarily applies to the 1-in-20. So basically, in the 1-in-20 what you would be doing is moving, through development agreement, the line differentiating between the 1-in-20 and the 1-in-100 in such a way that land which was deemed floodway and not developable would then become within the 1-in-100 and could be developed. And so we’re actually, through that hydrological modelling process, we’d be moving that line.

[Transcript, December 5, 2016, p. 148]

[37] Mr. Day also stated there has not been a comprehensive review of the MPS since its adoption more than 22 years ago. He testified the new CAO is interested in having this task completed in the next fiscal year, being April 1, 2017, to March 31, 2018.

**D. James Hardy**

[38] By agreement, James Hardy was qualified to provide expert opinion evidence on all aspects of real estate appraisal and expropriation compensation, including: property valuation, injurious affection, and CUSPAP and USPAP Standards.

[39] Mr. Hardy has worked full time with the Altus Group Limited since 2007. He graduated with a Bachelor of Commerce in Finance before taking post-graduate courses in valuation. With his Appraisal Institute of Canada (AACI) designation and International Right-of-Way Association Certificate, he is certified to appraise all types of properties. Mr. Hardy is the current President of the Nova Scotia Real Estate Appraisers Association and has held, or currently holds, executive positions in the Atlantic Chapter and Eastern Canada sections of the International Right-of-Way Association.

[40] Mr. Hardy has performed appraisals for an array of properties including residential (individual and subdivisions), commercial, and special purpose properties like hospitality and manufacturing. He has specialized in right-of-way compensation for transportation, utility, hydro and pipeline. Mr. Hardy has conducted between 50-60 expropriation appraisals; approximately 60% for the expropriating authority and 40% for the landowners. He has not previously testified before a Court or Tribunal as an expert witness.

[41] Under cross examination by Mr. Rodgers, Mr. Hardy stated he is currently in the Antigonish area approximately once every three months. Altus did extensive work in the area for the Highway #104 realignment, conducting approximately 60% of the appraisals. He has not done a lot of residential appraisals within the Town, itself, but has

done commercial ones, including two currently underway for Nova Development and S&F Smith.

[42] Mr. Hardy prepared an appraisal report for Jovin valuing the compensation claims as of the expropriation date of July 25, 2014, Exhibit J-6, Tab 15.

[43] Mr. Hardy testified to the scope and preparation of the work he performed to determine his opinions and the facts and documents upon which they were based. This work included viewing of the Lands, sales, and various relevant documents including the expropriation documents, land agreements, MPS, LUB, surveys and maps. He spoke with the Town's planner and Ms. MacDonald. He also viewed two of the three sales Mr. MacInnis considered.

[44] Mr. Hardy, both in his report and oral evidence, stated the foundation for the market value of a property is its highest and best use. The definition used by appraisers is as follows:

The reasonably probable and legal use of vacant land or of an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value.

[Exhibit J-6, Tab 15, p.108]

[45] Mr. Hardy stated that when there are improvements existing on the property, the highest and best use is considered the existing use, until the value of the land as vacant exceeds the value of the property in its current use.

[46] After expanding upon the criteria noted within the definition, Mr. Hardy stated his analysis specifically included the following:

- General and specific location of the subject site
- Size, shape, topography and accessibility potential
- Servicing potential with respect to municipal infrastructure

- Zoning and development restrictions
- General development trends in the area of the subject property
- Current market conditions.

[Exhibit J-6, Tab 15, p. 109]

[47] Central to Mr. Hardy's opinions were Mr. Day's letter of October 21, 2014, and the recent flood mapping conducted by the Town. Regarding flood mapping, Mr. Hardy also stated these results were addressed in the Town's Municipal Climate Change Action Plan ("Climate Plan"). The Climate Plan recommended a review for ways to develop the flood areas, as there is little developable land. Mr. Hardy's report states:

These results were identified in the Town of Antigonish Municipal Climate Change Action Plan prepared by K. Malhotra of the Climate Change Adaption Committee in 2013. Furthermore it was a recommendation of the report that a review of new ways to build in flood-prone zones should be reviewed as there is little development land remaining in the town.

[Exhibit J-6, Tab 15, p. 102]

[48] Critical components of Mr. Day's letter included the Town's desire to rezone developable lands, and that rezoning could include mid-density residential type development.

[49] Mr. Hardy testified that in discussions with Planning Services, he understood the highway lands would be able to be integrated into any combined development of both the River and Southern properties (Transcript p.46).

[50] In reaching his conclusion on the highest and best use, Mr. Hardy testified that, in addition to the above, he also considered the MPS, Climate Plan, the Town moving undevelopable lands into developable, conformity with development in the area, changes that have occurred elsewhere in the Town, and the likelihood of the development being permissible.

[51] Mr. Hardy determined the highest and best use of the Lands were as vacant and for the following uses:

**Highest and Best Use — Before the Taking**

The Highest and Best Use of the larger parcel is considered to be for short to near-term mid-density residential development.

**Highest and Best Use — Lands Taken**

The Highest and Best Use of the lands taken are considered to be for residential development in conjunction with neighbouring holdings.

**Highest and Best Use —After the Taking**

The Highest and Best Use of the remaining holdings is considered to remain for short to near-term mid-density residential development.

[Exhibit J-6, p. 109]

[52] Mr. Hardy testified “short to near-term” means it could take a developer three to five years to complete the process to develop the land. “Mid-density residential” is more than single family dwellings and is consistent with Mr. Day’s letter of being able to include “townhouses, semi-detached dwellings, etc.” Others have also described this as “medium density residential”, which is the phrase the Board will use in this Decision.

[53] For the highest and best use of the River property, Mr. Hardy testified that its greatest value is achieved when it is developed in conjunction with the Southern property. In other words, if the Southern property is developed with medium density residential, so would the River property. On cross-examination, Mr. Hardy testified that if for any reason the River property was given a different zoning than the Southern property, in his view the highest and best use of the former is to be contributing to the overall development of both properties and could, for example, be used as park land as part of the master plan of this development.

[54] Of the various land valuation methods, Mr. Hardy used the direct comparison approach. Mr. Hardy testified that due to the characteristics of the Lands, he thought it was beneficial to consider a spectrum of sales. These included various

properties having one or more of the following characteristics: zoned Conservation, Flood Way or Fringe; restrictive zoning; mid-range values; and/or raw property and those ready for development (at a retail state), (Transcript, p. 39).

[55] The list of sales Mr. Hardy considered are:

Expropriation of Jovin Enterprises Ltd.  
Antigonish, Nova Scotia  
100540



116

Address PID	Vendor Purchaser Status	Closing Date Adjusted Price	Area (ac) Area (s.t.)	Price/Acre Price/s t	Time Adj. \$/s.t.
1 Spruce Lane, Lower West River 01210012 & 01210004	Sears' Eastern Automobile Sales Limited Thomas F. Hayne Contracting Limited Closed	23-Oct-14 \$80,000	7.25 315,810	\$11,034 \$ 0.25	\$11,034 \$0.25
2 Lot 14-1AB Briery Way, Post Road 10122203	Municipality of the County of Antigonish Roderick & Joan Hadley Closed	22-Jul-14 \$20,000	0.19 8,276	\$105,263 \$ 2.42	\$105,263 \$2.42
3 Brookside Way, Antigonish 01209022	Brian & Yvonne Lynch Mark & Regina Fuller Closed	05-Jun-13 \$59,130	3.50 152,460	\$16,894 \$ 0.39	\$17,470 \$0.40
4 Brookside Way, Briery Brook 10010155	Crockett Country Incorporated Municipality of the County of Antigonish Closed	25-Feb-13 \$59,500	0.5 21,780	\$119,000 \$ 2.73	\$124,068 \$2.85
5a Lot RL-09-1 Haley Road, Antigonish 10035772	Northeast Timber Company Limited Riavan Investments Limited Closed	15-Feb-11 \$400,000	1.24 53,014	\$322,581 \$ 7.41	\$337,119 \$8.20
5b Lot 09-1 Haley Road, Antigonish 10110732	Northeast Timber Company Limited Riavan Investments Limited Closed	16-Jun-09 \$181,988	0.58 25,494	\$311,440 \$ 7.15	\$362,216 \$8.32
5c Lot 07-1 Haley Road, Antigonish 10103315	Northeast Timber Company Limited Riavan Investments Limited Closed	03-Dec-07 \$100,000	1.64 71,438	\$60,976 \$ 1.40	\$74,701 \$1.70
	Riavan Investments Limited Land Assembly	\$681,988	3.46 150,907	\$196,859 \$ 4.52	
6 19 Silverwood Drive, Antigonish 01219146	Catholic Episcopal Corporation of Antigonish 2240940 Nova Scotia Limited Closed	07-Jan-11 \$335,000	4.35 189,486	\$77,011 \$ 1.77	\$85,527 \$1.96
7 Victoria Street, Antigonish 01226323, 10036986, & 10106599	Estate of the Late Mary Catherine MacDonald R.K. MacDonald Nursing Home Corporation Closed	31-Jul-08 \$100,000	3.33 145,111	\$120,073 \$ 2.76	\$143,316 \$3.29
8 Hwy No. 337, Mount Cameron 10056521	Silver Glen Enterprises Limited S.F. Smith Developments Ltd. Closed	06-Jul-07 \$2,370,900	94.03 4,095,947	\$25,214 \$ 0.58	\$31,063 \$0.71
9 Church Street, Antigonish 10088383	James Kell Governors of Saint Francis Xavier University Closed	09-Feb-07 \$380,000	3.00 180,680	\$126,667 \$ 2.91	\$187,916 \$3.63
10 161 Church Street, Antigonish 01227628	Macken Farm Ltd. Antigonish Mall Ltd. Closed	15-Feb-05 \$200,000	20.00 871,200	\$10,000 \$ 0.23	\$13,220 \$0.30
11 14 Governor's Lane, Greenwald 01213123	Neil & Diane Kell Gillian McCulloch Closed	01-Sep-00 \$35,000	7.90 344,124	\$4,430 \$ 0.10	\$6,682 \$0.15

[Exhibit J-6, Tab 15, p. 116]

[56] Mr. Hardy adjusted the sales for time at the rate of 3% per annum. For each sale he provided the price per acre and per square foot. The Report gives a summary of each property and his opinion of its comparison to the River property. In his view, properties 5c, 6 and 7 were the most comparable and their summaries read:

Index 5

Index five reflects an assemblage of properties acquired by Riavan Investments Ltd over a number of years. The total assemblage of ±3.46 acres was acquired for an adjusted price of \$793,535 or \$229,058 per acre (\$5.26 psf). These lands abut the northern side of the Wright River near the commercial strip of Main Street and were zoned for Commercial and Industrial use. Index 5a was improved with a commercial warehouse at the time of acquisition which was demolished for the development of an apartment building. Index 5b and 5c had a more challenging configuration and were maintained for commercial use with the lands of 5c being developed with a self-storage facility. These lands were readily available for development and located in a superior location. These lands are considered to reflect retail pricing and as such are superior the subject lands.

Index 6

Index six reflects the sale of the ±3.33 acres of institutionally zoned lands from the Catholic Episcopal Corp of Antigonish to a private investor. The lands require a zoning change prior to their development and reflect an adjusted price of \$85,527 per acre (\$1.96 per sf). We understand that these lands were originally transferred to the church by the MacDonald family to be used for church purposes.

Index 7

Index 7 includes the acquisition of three properties from the Estate of the Late Mary C. MacIsaac. The lands totalled ±3.02 acres and included a bungalow at 60 Victoria Street. Aside from the lot improved with the bungalow the lands totaling ±2.94 acres are located within similar floodway zoning and restricted by the conservation use. That being said the new floodway mapping show the lands to fall within the 1:100 year zone which would place them in the floodway fringe area once adopted. If you consider that the value of the bungalow ranged from \$150,000 to \$200,000 the resultant adjusted value allocation to the remaining lands would reflect a range of ± \$80,000 to 100,000 per acre (±\$1.84 - \$2.30 psf). These lands have since been used for parking expansion at the neighbouring R.K. MacDonald Nursing Home. This index is considered similar to the subject lands.

[ibid, pp. 118-119]

[57] Based on the above, Mr. Hardy opined the market value of the River property is between \$74,201 to \$100,000 per acre.

[58] Taking into consideration the risks in developing the Lands, Mr. Hardy discounted the market value per acre by 20% to 30%. These risk factors include:

planning; master planner; hydrological report; policy changes; 3-5 year time period to complete the planning processes; and engineering, surveying, road and power costs.

[59] Mr. Hardy concluded the market value was \$55,000 per acre:

**Land Value Estimate**

Based upon our foregoing qualitative analysis of the land indices a wide range of \$31,063 per acre to \$229,058 is prevalent. That being said Indices 5c, 6 and 7 are considered to provide the best benchmarks of value reflecting a narrow range of \$74,201 to a potential upper end of \$100,000 per acre (\$1.70 to \$2.30 per square foot). With consideration of all the indices and risk inherent in the subject holding we would anticipate a discount for developers risk of 20% to 30% resulting in a per acre value of roughly \$50,000 to \$60,000 per acre. As such we have concluded on a value of \$55,000 per acre.

[ibid, p. 120]

[60] On cross examination by Mr. Rodgers, Mr. Hardy summarized his opinion that as of the expropriation date, a willing developer, knowing all of the above information and issues affecting the property, would pay this value per acre for the River property, if it is developed together as a large parcel with the Southern property, (Transcript p 83-85).

[61] Furthermore, if the above issues were not present, and the properties were already rezoned, the market value per acre would be 20% to 30% higher.

[62] With 5.3 acres, Mr. Hardy opined the market value of the River property is \$291,500.

[63] For the injurious affection of the Southern property, Mr. Hardy found it was in close proximity to and had a unity of use with the River property. As a result of the expropriation of the River property, the Southern property would lose access to the extensive river frontage, access to the lands from Henry Lane, future development cost efficiencies of the larger site, and continuity with the existing park amenities; and is less desirable abutting a water utility with chain link fences, well heads and pump house.

Comparing the value of the lands before and after the expropriation, Mr. Hardy opined the Southern property had a diminished value of 10%, being \$47,500 as summarized in the chart below:

<b>Diminution of Value to remainder</b>				
Value of Jovin Holdings	\$ 55,000	x	13.92	\$ 765,347
Diminution of Value @	10%			
Value of Holdings After the Taking	\$49,500		8.61	\$ 426,432

<b>Injurious Affection</b>	
Value Before (rounded)	\$ 765,000
Value After	\$ 426,432
Loss In Value	\$ 338,568
Loss In Value (rounded)	\$ 339,000
Less; Value of Lands Taken	\$ 291,500
<b>Injurious Affection</b>	<b>\$ 47,500</b>

[ibid, p. 121]

[64] Furthermore, on cross-examination, Mr. Hardy restated there was a real probability the lands would be rezoned to mid-density residential. He also opined developers will pay more for land that has the potential to be rezoned than properties that have no potential, like sales 10 and 11.

[65] Until the new flood mapping and rezoning is adopted by Council, Mr. Hardy restated the lands may still be developed using the cut and fill policies, similar to the abutting multi-unit apartment built on MacLellan Street, (Transcript, p. 73).

#### **E. Sean Day**

[66] Sean Day testified he wears numerous hats for the Town in addition to being its Director of Planning and Building Services. He acts as the planner, development officer, heritage officer; does some GIS work; acts as backup to his building inspector; and does a variety of other odd jobs. At present, he is heavily involved as the project manager of a number of matters.

[67] Mr. Day testified there are no large parcels of land for development within the Town boundaries.

[68] He stated Town Council is very interested in developing medium density residential. In Mr. Day's opinion, it is needed and, absolutely, would be beneficial to the Town.

[69] Mr. Day testified to and expanded upon the information outlined in his letter including the Flood Damage Reduction Program of the Federal/Provincial governments and its flood map adopted by the Town in 1994. It is this map that remains legally applicable to developments in the Town. Mr. Day further noted he was not with the Town in 1994.

[70] When the flood map was done in 1977, the Jovin Lands were in the Flood Way and could not have permanent structures built on them. As noted in the Planning Documents section of this Decision, buildings constructed before the map was adopted were excluded from the Flood Way policies. Consequently, the multi-unit apartment building constructed from the Jovin property holdings on MacLellan Street, although located in the same Flood Way area as the Lands in this case, is excluded from the Flood Way provisions.

[71] Mr. Day emphasized the 1983 map is old, outdated, and no longer accurately reflects the areas of the Town that flood.

[72] He provided a history to the Board of the flood mapping the Town has undertaken as a result of new technology and scientific information available to the community. Mr. Day testified Council will adopt one new flood map for the whole Town.

Council, in his opinion, will not be concerned with those lands removed from the Flood Way, but rather those that are not in it now, but will be changed to Flood Way.

[73] In 2010, the Town received a grant from the Province. It used Digital Elevation Modelling (“DEM”), as a consequence of LiDAR (light detection and ranging) being available in the area. As its name suggests, this provided highly accurate land elevation data. The initial new flood mapping report was issued in 2011.

[74] Mr. Day testified the Town has done a series of iterations of the flood model. In some cases, it has changed the flood mapping a little and in other cases it has made larger ones. He stated the Town could not afford to do the project all at once, as it is very expensive. The Town has retained flood modelling consultants.

[75] The additional iterations have included waterway cross section survey results, and considerable information collected on the Antigonish Harbour watershed and the various natural and man made storm systems data which contributes to the watershed.

[76] Two additional modelling reports were provided to the Town, one in 2012 and another in 2014. The 2014 map showed similar results to the 2012 map.

[77] As noted in his letter, the 2014 map was received a few weeks before Mr. Day wrote the letter. With the 2014 map being similar to the map of 2012, Mr. Day testified he thought, at the time, that it was likely to be the final version. Therefore, he expected the new flood map would be presented to the public and Council for its adoption in the early part of 2015. As this new mapping showed the bulk of the Jovin properties would only flood on average once in 100 years, they would be in the Fringe area where development is possible. In his view, the Lands would be approved for comprehensive

development including residential development of townhouses and semi-detached dwellings. At the hearing, Mr. Day testified, currently, the default zoning for Conservation lands no longer in the Flood Way would be medium density residential (Transcript 142).

[78] Mr. Day testified that since October 2014, a few events have occurred which have caused him to want to do another 'go around' of the flood mapping to ensure its accuracy before submitting it to Council. These events included the observations of volunteers and their comments, and his recent discussions with the Town's flood modelling consultants.

[79] Mr. Day testified there are interested volunteers in the community who watch for flooding during major rainfalls. One of the reasons for these volunteers is that the 1 in 20 year rainfall data the Town is currently using for its modelling is not specific to the Town of Antigonish. This is because the area no longer has a weather station.

[80] On Thanksgiving 2016, an area on Saint Andrews Street, which Mr. Day states is a fair distance from the Jovin Lands, did not flood as was predicted. This caused Mr. Day to believe there may be some model anomalies. Furthermore, the flood observation volunteers were asked to view the map and also raised possible anomalies.

[81] After receiving the subpoena to attend at the Board hearing, Mr. Day spoke to the Town's consultants to ask why there is such a variation between the 2011 map and the last two flood models of 2012 and 2014. To illustrate these differences, Mr. Day prepared for the Board the Antigonish Flood Model Comparison map of the Jovin Lands area of the Town.

[82] This comparison map shows, in the Board's estimation, that the 2011 model removed approximately 35% of the River property and 15% of the Southern property from

the Flood Way. The similar 2012 and 2014 models both removed approximately 95% of the River property and 75% of the Southern property from the Flood Way.

[83] Mr. Day testified the consultants did not know why there is this difference, but stated the latter maps were not as a result of land elevation data. While testifying, Mr. Day surmised the date the flood occurred when the bridge was being rebuilt may have been included in one model and not the others.

[84] As a result of these subsequent events, Mr. Day stated that as the flood mapping is based on various assumptions, he will want to conduct another review and possibly do some tweaking to achieve a "faithful flood plain mapping model" which he will take to Council (Transcript, p. 106).

[85] Mr. Day stated the Town has been trying to collect more accurate rainfall data specific to Antigonish, and he had money in his current budget (for the 2016/17 fiscal year) to complete that project.

[86] On cross-examination, Mr. Day was pressed about the timing and likelihood that any new flood mapping would be approved by Council, in particular, considering the lack of action by Council, to date, to adopt the mapping. With respect to the delays since October 2014, Mr. Day testified this is mainly due to the costs and limited personnel resources as other matters have taken priority. Mr. Day is currently working only two days per week for the Town. He anticipates this will change in May of 2017 and he will be back working full time.

[87] Mr. Day estimates that to fully complete the flood modeling may cost between \$20,000 and \$30,000. Although he did not have sufficient funds in his budget

for this fiscal year, which the Board understands to end at March 31, 2017, the Town was in the process of exploring available grant monies to complete the work.

[88] Ultimately, Mr. Day expected the flood mapping would be completed and able to advance through the planning process to Council for approval within 1.5 years.

[89] Mr. Day testified Council was committed to completing the flood mapping process it began. It is interested in finding lands for development. His letter notes changes have been made over the decades to reduce flooding in the Town, including diverting the River. Mr. Day opined that when Council is confronted with new flood mapping based on science and new technology that Council will adopt it. When further pressed, Mr. Day testified that he would consider it irresponsible, if not significantly irresponsible, for Council not to accept current and up to date flood mapping.

**F. Michael E. MacInnis**

[90] By agreement, Michael E. MacInnis, was qualified as an expert to offer valuation (expropriation compensation) and consulting services and expertise for individual, undeveloped residential dwelling sites and dwellings containing not more than four self-contained family housing units.

[91] Mr. MacInnis grew up in the Town. After moving away for a few years, he returned and for a while lived on College Street, across from the Lands. Prior to becoming an appraiser, Mr. MacInnis bought a business and has owned rental properties in the area since 1980. He received a real estate license in 1995, took appraiser courses in 1997, and became a member of the Real Estate Appraisers Association in 1999. He has the Canadian Residential Appraiser (CRA) designation, and has done 275 to 375

residential appraisals per year, approximately 40-50% in the Antigonish area, both Town and County.

[92] Mr. MacInnis noted the neighbourhood surrounding the Lands was 75% built up. He testified most of these were single family homes, though there were some apartment units.

[93] Mr. MacInnis testified that upon being approached by the County, he first determined the appraisal was within his expertise. He valued the River property, as of September 9, 2013, as a single residential lot. On cross-examination by Mr. Pineo, he stated that, in his view, the zoning change to residential was probable.

[94] Mr. MacInnis conducted a bank financing type of appraisal for which he billed \$275. It is a two-page standard form.

[95] Mr. MacInnis testified he reviewed the general characteristics of the River property and determined it would house a single residential building on the lot. Using the MLS online sales, he found vacant, single residential lots with significant acreage. After identifying three such properties, Mr. MacInnis adjusted the sale prices for location, site view, lot size, and topography. As the sale properties were not in a Flood Way zone, he considered all three to be superior to the River property. In his opinion, the market value of the River property as a single residential lot was \$24,500.

[96] On further cross-examination, Mr. MacInnis stated he did not view any of the comparable sales prior to submitting his report. This appears to be in keeping with this type of basic financing appraisal report. Mr. MacInnis did view the properties in preparation for his attendance at the hearing before the Board.

[97] The three properties Mr. MacInnis used as comparables were between four and five kilometers away from the River property, in rural areas outside of the Town, with no municipal services or water frontage.

[98] Mr. MacInnis did not conduct any tests to determine the water quality of the comparable sales properties. He stated the MLS statistics would advise whether the property had been foreclosed, but would not identify any other major reasons for selling, such as a divorce or moving. Mr. MacInnis did not consider any properties with water frontage. He did not consider single family lots available in the area of the River property, the inventory assessment of Town lots, nor how much land could be developed in the area. He did not speak to Mr. Day, Jovin, or the owners of the MLS listings.

[99] After receiving Mr. Hardy's Report in approximately May or June 2016, Mr. MacInnis did not revise his report.

[100] On cross examination, Mr. MacInnis acknowledged that nowhere in his report has he considered expropriation principles. Similarly, he did not value the injurious affection of the Southern property.

[101] Mr. MacInnis made other comments to the Board which the Board finds were outside of his expertise concerning the appraisal value of the Lands and, in particular, the River Property. Some of these are referenced below.

### **III ISSUES**

[102] Jovin requested the Board retain jurisdiction to decide interest and costs after the Board determined the other issues in this matter, being:

1. What legal principles apply to determine the market value of the property taken and does the current land zoning prohibit consideration of its highest and best use;
2. What is the property's highest and best use;
3. What is the market value of the River property;
4. What compensation should be set for the Southern lands, if any, for injurious affection; and
5. What value, if any, should be given for business loss?

#### IV LAW

[103] The Board is not a Court. It derives its power and jurisdiction from Statutes. In this matter, the *Nova Scotia Utility and Review Board Act*, S.N.S., 1992 as amended ("*UARB Act*"), and the *Expropriation Act*, R.S.N.S. 1989, c. 156 as amended, are applicable.

[104] Under the *UARB Act*, the Board is able to take into consideration any information it thinks will assist it in deciding the matter before it, (s.19). Specifically, the Board is not restricted to evidence admissible in a court of law. The Board will assign the weight to be given to the information. In *Yarmouth (Town) v. Gateway Importers and Exporters Ltd.*, 2011 N.S.C.A. 17, ("*Gateway Decision*") Bryson, J.A., writing for the unanimous Court, stated:

[19] Section 19 of the *Utility and Review Board Act* gives the Board broad power to receive evidence:

19 The Board may receive in evidence any statement, document, information or matter that, in the opinion of the Board, may assist it to deal with the matter before the Board whether or not the statement, document, information or matter is given or produced under oath or would be admissible as evidence in a court of law. 1992, c. 11, s. 19; revision corrected.

[20] The failure to provide independent confirmation of suspect hearsay is a matter of weight, perhaps to the vanishing point (*R. v. Lavallee*, 1990 CanLII 95 (SCC), [1990] 1 S.C.R. 852, per Sopinka J. at p. 900, referred to by this Court in *Johnson*). The weight of expert evidence is a matter for the Board (*Powell*, supra, para. 23).

[105] The Board decides this case on a balance of probabilities; that is, after considering all of the information before the Board, what is more likely than not.

[106] The Board will not review all of the various legal principles applicable in this expropriation case, as most are not in dispute. However, the parties disagree on the legal principles the Board is to apply in determining the market value of the lands taken under the *Act*. Specifically, the contested issue is does the current zoning of the Lands prohibit consideration of the property's highest and best use under different land zoning?

[107] The County argued the Board cannot take into account changes in rezoning the Lands, citing s.27(2) of the *Act* and *R. v. Tenor* [1985] 1 S.C.R. 533, ("*Tenor*") para. 49. It stated this principle was designed to prevent expropriating bodies from rezoning properties to reduce their market value, but it has also been applied by the Courts to both parties to prevent speculative evaluations. The County argued that, at the time of the expropriation, the River property was zoned Conservation with very limited uses that do not permit any residential development. It further argued that as the current zoning does not permit the residential development, such a development would be illegal and one cannot use an illegal land use as a basis for determining the market value of the Lands. Finally, it stated both appraisers were wrong to have valued the Lands as residential.

[108] Jovin argued the current state of the law enables rezoning uses that are reasonably probable to be used to determine the value of the Lands taken under the *Act*, citing some of the cases and text noted below.

[109] For the reasons set out in this Decision, the Board, in general, concurs with the legal submissions of Jovin.

[110] The Board notes the main concern for the Supreme Court of Canada in the *Tenor* case was to ensure the expropriating body did not rezone the properties in an effort to devalue the lands before expropriation. In this case, the Lands were expropriated by one municipality, the County, while they are located in the Town. Consequently, any rezoning of the Lands is determined by the Town, a separate and distinct municipality from the County that expropriated the Lands.

[111] Pursuant to s.27(2) of the *Act*, the Board is to value the land on the basis of what it would be sold in an open market by a willing seller to a willing buyer on the expropriation date:

27 (2) Subject to this Section, the value of land expropriated is the market value thereof, that is to say, the amount that would have been paid for the land if, at the time of its taking, it had been sold in the open market by a willing seller to a willing buyer.

[112] The Board concurs with Jovin that there is nothing in this subsection that directs the Board to only consider the current zoning of a property in this evaluation.

[113] Furthermore, the Courts have interpreted this language as requiring an analysis of the market value based on the “highest and best use” of the expropriated property, Eric C.E. Todd; *The Law of Expropriation and Compensation in Canada*, second edition, (Carswell: Toronto 1992), p. 134, *Young v. Moncton (City)*, 2002 NBCA 26, para.

23. Todd states:

The statutes impliedly recognize that, notwithstanding the actual use of the subject property at the relevant date, market value may be based on some other “higher and better use”.

[114] The highest and best use is the one that will yield the highest economic return to the owner, *Young*, p. 24; Todd, p. 135.

[115] What constitutes the highest and best use is a question of fact, *Young*, para. 24.

[116] Highest and best use includes an analysis of the properties present potential. In *Young*, the Court stated at para. 23:

Section 38(1) of the **Act** requires that the compensation payable upon expropriation shall be based, in part, on the market value of the land. "Market value" is defined in Section 39(1) as "the amount that would have been paid for the land if it had been sold on the date of expropriation in the open market by a willing seller to a willing buyer". The Act implicitly requires that "market value" be determined on the basis of the present potential of the expropriated property's highest and best use. See E.C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2<sup>nd</sup> ed. (Scarborough, Ont.: Carswell, 1992) at 133. That use, which may be other than the property's use at the time of expropriation, is the cornerstone for whatever compensation is payable under the **Act** and under most, if not all, other Canadian expropriation statutes . . . . [Emphasis added]

[117] Both parties agree the use cannot be speculative nor a mere chance. However, as Jovin argued, rezoning is able to be considered provided it is reasonably probable, *Dieppe (Town) v. Snitch*, [1997] NBJ No 141 (CA), para. 7. Todd states this as follows:

If the highest and best use would have necessitated rezoning "the highest and best use must be based on something more than a possibility of rezoning. There must be a probability or a reasonable expectation that such rezoning will take place. It is not enough that the lands have the capability of rezoning ... probability connotes something higher than a 50% possibility".

For a higher and better use to be taken into account it must be more than a mere "chance"; it must be based on a *reasonable* expectation and in this context "reasonable" is emphasized to eliminate speculative ventures and over-optimistic expectation.

It should be noted that the legal concept of "highest and best use" is an economic one, i.e. "the use that would bring about the highest economic value on an open market." "It is that use of land which may reasonably be expected to produce the greatest net return to the land over a given period of time". Accordingly, the concept of a higher and better use based on a probability or a reasonable expectation of rezoning should not be rejected on the personal views of the public planners who might regard "highest and best use" as a matter of good planning from an aesthetic and public stand-point" ...

[Todd, p. 135]

[118] Jovin also cited the following from Todd, beginning on p. 140:

It has been suggested above that potential value is a type of special adaptability which arises from factors extrinsic to the land itself. A good example of potential value is the possibility, or probability, of a change in zoning of the subject property. Any change in

zoning will usually affect significantly the market value of the property affected. Accordingly, if, for example, the subject property is, at the relevant valuation date, zoned for residential purposes but is located on the fringe of an area zoned for commercial purposes, the prospect of the commercial zone being extended in the future to embrace the subject property is a factor of potential value which a prudent and willing purchaser in the market would take into consideration. Whether such a prospect existed at the date of expropriation and, if so, its degree are both questions of fact, and, in the circumstances of the particular case may be so remote as to be negligible.

Another example of potential value arises in the case of property which is subject to statutory or other restrictions such as rent controls or restrictive covenants. In such cases the willing purchaser on the open market will take into account the possibility of such restrictions being removed in the future and the enhancement in value which such removal may produce.

[Claimant's Reply Submission, para. 15]

[119] Similarly, and most relevant to the Board, is the Nova Scotia Court of Appeal's comments in the *Gateway* Decision, of valuing the potential use when the existing use is not the highest and best use for the property:

[10] The Town's objection that the Gateway appraisal wrongly takes into account "development potential" and describes a "hypothetical" development, misses the point. Highest and best use necessarily involves valuing a potential use when the existing use is not the highest and best use. "Development potential" and "hypothetical development" are implied in a use other than current use. The evidence before the Board favoured an income approach to value a commercial property. Even the Town's appraiser agreed to this much. The following findings of the Board are fatal to the Town's argument here because they show that Gateway's appraisal properly captured the development potential of Gateway's property *when determining market value*: ...

[120] In determining the market value, the Board is to consider all of the facts of this specific case. The Board finds it is to decide that on the expropriation date, what is the highest and best use of the property that a willing buyer, knowing all of the information relating to this property, would pay to a willing seller. If the highest and best use differs from the current use of the lands, the former must be reasonably probable and cannot be a mere chance, speculative, or an overly optimistic possibility. Specifically, the Board finds it is not limited to the current zoning of the Lands in determining its market value under the *Act*, *Gateway* Decision, para. 10.

## **V FINDINGS**

### **A. Highest and Best Use**

[121] In summary, after considering all of the evidence in this case, as outlined below, the Board finds the highest and best use of the Lands is a medium density residential development of both properties with the incorporation of the highway lands.

[122] Due to the dispute between the parties, the Board will address separately the two intertwined components of determining the highest and best use, being: what use of the Lands will generate the highest economic value for Jovin and the reasonable probability of the Lands being used to its highest value.

#### **1. Highest Economic Value**

[123] The Board finds that although Mr. MacInnis completed the appraisal report he believed he was retained to do, it is unhelpful in these proceedings. Mr. MacInnis acknowledged that nowhere in his report does it address expropriation principles (Transcript p. 234).

[124] The Board finds Mr. MacInnis' assessment of this 5.3 acre River property as a single residential lot was the only category within Mr. MacInnis' expertise. He does not have the expertise to value these lands as, for example, a subdivision, medium density residential, or commercial. The Board concurs with Jovin, that the County retained the wrong type of appraiser and, therefore, finds Mr. MacInnis' report and evidence on appraising the properties is to be given no weight.

[125] The Board finds Mr. Hardy has the expertise to consider all types of land uses and developments. He thoroughly reviewed the expropriation principles in

determining the market value of the River property and the value of the Southern property being injuriously affected by the expropriation.

[126] The Board accepts Mr. Hardy's report on the highest and best use of the properties. Specifically, the Board finds that the River property's highest and best use is being developed together with the Southern property. The Board finds that the Jovin properties, both River and Southern, can be developed together as a large parcel because of the common ownership, the right-of-way over the highway lands which permits accessibility between the two properties, and the uncontradicted evidence that the highway lands could be incorporated into any development of both parcels. The probability of this occurring will be dealt with in the next section.

[127] Furthermore, the Board accepts Mr. Hardy's opinion that the medium density residential use generates the highest economic value for Jovin.

[128] The County argued the Board should not accept Mr. Hardy's opinion on the highest and best use because of the owner's inaction. It argued that if these lands were so valuable as medium density residential, why did Jovin not pursue this type of development previously. Furthermore, the fact that Jovin did not seek to develop the Lands as medium density residential undermines Mr. Hardy's entire appraisal and its values. Therefore, the Board should reject Mr. Hardy's opinions, including market values.

[129] The Board concurs with Jovin that this is not the test. The highest and best use is what a willing buyer would pay for the Lands on the expropriation date, not how an owner has used them or thought of using them. The Court of Appeal in the *Gateway* Decision is, once again, instructive to the Board on this principle:

... It does not matter what Gateway did, planned or said. The Act requires that market value be determined. What a willing buyer would pay a willing seller in the circumstances of this case inevitably involved the before and after analysis mandated by s. 27(5). It is the

planned use by the hypothetical willing buyer that matters. Here, that required an income approach to value, based on highest and best use – not Gateway’s existing use. [Emphasis added]

[Gateway Decision, para. 14]

[130] Furthermore, the County’s arguments ignore the facts of this case. Under the lease agreement, Jovin was specifically prohibited from doing anything which could affect the County’s interests in the River property.

## **2. Probability of Development**

[131] Although neither party focused on the potential of development by development agreement pursuant to Policy 4.6.8, the County took it a step further. The Board will review this argument first.

[132] The County in effect argued there is only one avenue for development of the Lands. It argued the River property is currently zoned Conservation and cannot be developed without a change in zoning. Throughout, the County only mentions MPS Policy 4.9. It argued Council must adopt two reports before any development can occur on this Flood Way being: (1) new flood mapping to show that the property is actually in the 1-100 year flood zone, and (2) a flood/storm management plan. The Board finds this is not correct.

[133] The Board finds there are two avenues for developing the Lands: a) by development agreement pursuant to Policy 4.6.8, and b) by adopting new flood mapping and ancillary amendments, including rezoning the Lands. These were addressed by both Mr. Day and Mr. Hardy. The County does not address Policy 4.6.8 or the uncontradicted evidence of Mr. Day and only mentions the development agreement in passing.

[134] The Board will review the two avenues separately.

**a) Town's Interest**

[135] Critical to the Board's finding that there is a reasonable probability that the Lands may be developed to its highest economic value for Jovin, is that the Town, and its Council, are very interested in developing property within the Town as medium density residential.

[136] Antigonish is a small town of limited geographical area consisting of only approximately 5 square kilometres. It is an economic hub for the surrounding area. Mr. Day testified the Town does not have any large areas of undeveloped lands. As outlined above, this is supported by the MPS. In its introductory paragraphs to the 2007 amendment for cut and fill policies, it states that 'development in the Fringe and other marginal lands were largely used up, such that the Town wants to develop the Flood Way.' In addition to the cut and fill policies, the Town also increased the slopes upon which development is permitted from 20% to 33%. Furthermore, the Climate Change Adaption Committee recommended finding ways to further develop the Flood Way.

[137] In addition to the Town expressing its desire to find other lands for development, it also noted, when the MPS was adopted in 1994, that it was important the policies be sufficiently flexible to meet the changing market demands.

[138] The Jovin Lands constitute 14.4 acres located a few blocks from Main Street and less than one (1) kilometre from St. F.X. The Lands would be serviced with Town water and sewer. The property is flat and has 1,240 feet of river frontage. The Lands are accessible from MacLellan and College Streets. The Lands are in a neighbourhood of, and bordered by, residential development consisting mainly of single family homes and a multi-unit apartment building.

[139] Mr. Day stated that, in his opinion, medium density residential development is absolutely beneficial to the Town and very much needed. He also testified that the Town's Council is very interested in medium density residential development.

[140] As the above evidence is uncontradicted, the Board finds the Town is interested in permitting the Lands to be developed as medium density residential.

[141] Due to the sequencing of events and witness order, much of the evidence before the Board centred on the ability of developing the lands to medium density residential through the new flood mapping being undertaken by the Town. The Board will analyze the development agreement avenue first, as it is currently available to a developer.

#### **b) Development Agreement**

[142] In summary, the Board finds it is reasonably probable that the Lands would be developed as medium density residential under the cut and fill development agreement process because:

1. under the MPS Policies 4.6.8 and 4.6.9, this process is currently available;
2. it does not require Council to first adopt new flood mapping;
3. medium density residential is a permitted use;
4. the aquifer restriction would be removed enabling the full Lands to be developed;
5. flood/stormwater management plan is reasonably probable; and
6. development agreement approval is reasonably probable.

The County raises a further issue of whether Mr. Hardy's highest and best use:

7. values the Lands as of the expropriation date.

**(1) Currently Available**

[143] On the expropriation date, properties in the Flood Way, like the Lands, could be developed by a development agreement under the cut and fill MPS policies supported by a flood/stormwater management plan. Policies 4.6.8 and 4.6.9 have existed since 2007.

[144] The opening of Policy 4.6.8 notes Council's intention to remove lands from the Flood Way through the cut and fill policies. The opening of that Policy reads as follows:

P-4.6.8 It shall be the intention of Council to permit removal of lands from the Flood Way through a managed "Cut and Fill" procedure under Development Agreement, subject to the following: ...

[145] This Policy, as Mr. Day testified, has the affect of taking the Lands, including the River property, out of the Flood Way and into the Fringe. For ease of reference, his testimony was:

Our cut-and-fill does but that policy primarily applies to the 1-in-20. So basically, in the 1-in-20 what you would be doing is moving, through development agreement, the line differentiating between the 1-in-20 and the 1-in-100 in such a way that land which was deemed floodway and not developable would then become within the 1-in-100 and could be developed. And so we're actually, through that hydrological modelling process, we'd be moving that line.

[Transcript, December 5, 2016, p. 148]

[146] As Mr. Hardy testified, if the Lands are not rezoned through the new flood mapping, the lands are still able to be developed using these cut and fill policies.

**(2) No Flood Mapping**

[147] Under Policies 4.6.8 and 4.6.9, the MPS does not require Council to first adopt a new flood map for the Town before using the development agreement process.

**(3) Permitted Uses**

[148] The cut and fill policies, in effect, remove the Lands from the Flood Way and they are permitted to be developed as in the Fringe. The Fringe permits medium density residential uses. Its only restrictions are buildings for occupants with mobility issues and uses which could lead to environmental contamination such as storing or manufacturing hazardous materials.

**(4) No Aquifer Restriction**

[149] The parties did not argue that any portion of the Lands are excluded from the development agreement process under Sub-Policy 4.6.8(1), however, neither party focused on this development avenue. In evidence is a map showing a section of the Lands designated as an aquifer protection area. Under policy 4.6.8 (1)(c), properties that contribute to the aquifer recharge area are excluded from the cut and fill policies. For the purpose of this issue, the Board assumes the aquifer protection area and the aquifer recharge area are the same.

[150] At the expiry of the Lease on May 31, 2014, (and before the expropriation date) the County was to remove all improvements on the River property including its wells and infrastructure, unless the parties agreed otherwise. Jovin, therefore, was entitled to have its Lands vacant on the expropriation date. With the wells and infrastructure removed, the Board finds that, under the MPS, no portion of the Lands would be part of the aquifer recharge area. Similarly, no portion of the Lands would be excluded from the MPS cut and fill policies and could be developed. Thus, the Board finds that all of the Lands would be able to be developed by development agreement.

**(5) Flood/Stormwater Management Plan**

[151] As to the flood/stormwater management plan (also "Plan") requirement of cut and fill policies, the County, in effect, argued the Board should not find this avenue of development is reasonably probable because there may not be enough fill on the Lands. It argued Jovin did not file a Plan and, therefore, has not proven there is sufficient fill to develop the Lands.

[152] Jovin argued that other than raising speculation, the County offered no facts to support it. Furthermore, Jovin stated the construction of the multi-unit apartment building, previously developed on the Flood Way, is proof that cut and fill is possible on the Lands.

[153] When Mr. Rodgers asked Mr. Day about the sufficiency of the fill on the Lands, Mr. Day stated he does not have the expertise to answer the question and these issues would be reviewed by the Town's engineer.

[154] Mr. Day testified no one to date has made an application under these cut and fill policies in Antigonish. He did state these policies are similar to those used in other flood-prone municipalities in Nova Scotia, like Truro.

[155] This is the first time any counsel has argued before the Board, or at least this Board Member, that there may not be enough fill on flat land such that an engineer could not design a flood/stormwater management plan for development using cut and fill methodology.

[156] Under the facts and circumstances of this expropriation case, the Board finds it is not necessary for Jovin to provide a completed Plan for the Board to assess the reasonable probability that one could be developed to meet the MPS policies for medium density residential development of the Lands. Rather, the Board will assess this

probability, as it would any other type of future event, by considering all of the evidence before the Board.

[157] The Board finds the cut and fill policies are based on the same SPIF used by other flood-prone municipalities in Nova Scotia. Furthermore, the corresponding MPS cut and fill policies, as Mr. Day testified, are similar to those used in other municipalities, such as Truro.

[158] Although Antigonish may not have any experience with these policies or flood/stormwater management plans, other municipalities do. For example, the Board notes Truro has been assessing these types of Plans and developments for many years. With land surveys, computer modelling, and cut and fill methods, engineers have designed flood/stormwater management plans for developments that meet the SPIF and do not “contribute to upstream or downstream flooding”, see *Re MacCabe*, 2016 NSUARB 219, in particular, paras. 65-82.

[159] The facts before the Board in this case are that the Lands consist of 5.3 and 8.6 acres of generally flat land. In other words, there are no large depressions on the Lands that may significantly impact the fill for development.

[160] Secondly, with the more accurate land elevation technology, as evidenced in the 2011 flood mapping, approximately one-third of the River property and 15% of the Southern property are at a higher elevation than the Flood Way. This shows there is more fill available than anticipated from the flood mapping in 1977.

[161] Depending upon the final results of the 2012 and 2014 mapping, 90% of the River and 75% of the Southern properties may be higher than the Flood Way, once again, demonstrating more fill on the lands than anticipated in 1977.

[162] Third, as Jovin notes, the development of the multi-unit apartment building within the same Flood Way area, is evidence of sufficient fill on the Lands.

[163] Considering all of the above, the Board finds that it is reasonably probable that an engineer could design a flood/stormwater management plan which meets the criteria of the MPS for the development of the Lands as medium density residential.

### **(6) Council Approval**

[164] Although the probability arguments were raised in relation to the next development avenue, the Board will also address these in relation to a development agreement to the extent they are applicable.

[165] The County argued medium density residential development of the Lands is not reasonably probable because of the planning process itself. It emphasized the uncertainty associated with each component. The Board finds that although a development agreement process involves various steps, such as negotiating its contents with the various departments of the Town, in particular, the planning department; approval of the Planning Advisory Committee; and Public Hearing; ultimately, it is Council that will decide whether to approve the development agreement based upon the provisions of its MPS.

[166] Deciding whether the development is reasonably probable is not based upon the various steps of the planning process itself. Rather, it is dependent upon the criteria that will ultimately be used to make the decision about whether the development may proceed. The criterion Council will ultimately use is whether the development reasonably carries out the intent of its MPS. The Board must use the same criteria in assessing reasonable probability.

[167] The Board, in making this analysis, is not prejudging a planning matter, but is merely using the appropriate criteria for assessing the probability of a future event for the purposes of determining the market value of the lands under the *Expropriation Act*. In other words, it is a necessary and ancillary matter the Board must decide to determine the proper compensation in this case.

[168] As noted in the Town's Interest section of this Decision, Mr. Day's uncontradicted evidence is that the Town and its Council desire more lands for development in medium density residential. The Planner would recommend such a development to the Town as he thinks it is very beneficial to the Town and is very much needed in the Town.

[169] The MPS must be read as a whole and given a broad and liberal interpretation. Specifically, the MPS Policies refer to flexibility, the Town running out of lands for development, and its need to seek additional lands for development. In an effort to accomplish this, the Town has increased the slope upon which a structure may be built and approved development by a development agreement process in the Flood Way.

[170] The main component of the development agreement is the flood/stormwater management plan with use of cut and fill methodology. As the Board has found it is reasonably probable a Plan for medium density residential development on the Lands can be achieved, the Board finds a person would reasonably be able to meet the criteria of the MPS for the development agreement. Upon meeting the criteria, the Board finds a development agreement for medium density residential would reasonably carry out the intent of the MPS. Consequently, the Board finds medium density residential development of the Lands by development agreement is reasonably probable.

**(7) Value as of Expropriation Date**

[171] The County, in essence, argued that by valuing the properties at a use that may take three to five years to advance through the planning process, Mr. Hardy has valued the Lands at a future date and not at the date of the expropriation, contrary to the Nova Scotia Court of Appeal case *Re Johnson*, 2005 NSCA 99.

[172] The Board finds this argument confuses and commingles two different issues.

[173] Mr. Hardy assessed what a willing buyer would pay for the Lands on the expropriation date of July 25, 2014, taking into consideration all potential uses of the Land that would generate the highest economic value for the owners and is reasonably probable. As he stated on cross examination, in essence, this considers what buyers would pay for the Lands if, on July 2014, they had all of the above information about the property.

[174] Mr. Hardy considered the property land sales in the area and adjusted them to the expropriation date.

[175] The three to five year time frame to complete the planning process is, firstly, part of the analysis of whether the use is reasonably probable, which is for the Board to decide. It does not, however, mean the Lands are being given an anticipated market value as of the year 2019.

[176] Secondly, the planning process of three to five year duration forms part of the developer's contingency risks which were used to reduce the 2014 market value of the properties by 20%-30%. This is discussed further in the Market Value section below.

[177] The Board finds, therefore, that the market value has been assessed as of the expropriation date.

[178] The Board notes that the County's argument, if accepted, would have the effect of excluding from the market value analysis under the *Expropriation Act*, lands that are in an area the municipality has chosen to be developed by development agreement and not zoning. This could have significant implications as the former becomes more common. The Board finds that interpretation would not achieve the objects and intent of the *Expropriation Act*.

**c) Flood Mapping and Rezoning**

[179] The second avenue by which the Lands may potentially be developed is through Council adopting new flood mapping and congruent rezoning of the lands.

[180] The mapping will remove some, and potentially as high as 75%, of the Lands from the Flood Way to the Fringe. Under the MPS, medium density residential is permitted to be developed in the Fringe. For the same reasons as noted in the Town's Interest section of the Decision, the Board finds it is reasonably probable that any lands removed from the Flood Way to the Fringe, as a result of the new mapping, would be zoned medium density residential. Consequently, this section focuses on the reasonable probability that the Town will adopt new flood mapping of the Lands.

[181] The County's main arguments are that the flood mapping and rezoning of the Lands is not reasonably probable because:

1. Council may not finish the flood mapping;
2. If it is finished, Council may not adopt it;
3. The uncertainty of how much of the Land will be rezoned; and
4. Inaction of the owners.

**(1) Finish Flood Mapping**

[182] In assessing reasonable probability of development on the Lands by flood mapping and rezoning, the County argued the Board would be justified in considering “the complete absence of any actual steps being taken to have this property considered for rezoning or development agreement” [Post Hearing Submissions of the Respondent, para. 15].

The County’s submissions continue:

16. The Town of Antigonish Director of Planning, Mr. Day, was of the opinion that further high density housing would be *very* beneficial to the Town, and that Council would be generally receptive to such further development. This particular property would appear to be well matched to that motivation, as it is in close proximity to the downtown core and other amenities. It is also in a position to be connected to municipal services.
17. Despite all of this, *nothing* has changed with respect to this property, and Council has not considered *any* flood mapping changes and there have not been *any* public meetings on the topic in the two years since Mr. Day wrote to the Claimant indicating that there *may* be changes forthcoming.

[Post Hearing Submission of the Respondent, p. 4]

[183] In summary, Jovin argued that the uncontradicted evidence, in particular of Mr. Day, shows the approval of the new map and rezoning is reasonably probable.

[184] In determining whether it is reasonably probable that Council will complete this process, the Board will look at all the facts in this case. Of particular note, is Mr. Day’s uncontradicted evidence before the Board on all issues he addressed.

[185] As Mr. Day testified, the Board finds Council is very interested in finding land for development and is committed to completing the flood mapping process. The Town is running out of land for development, it is a small community, and it has already taken actions to expand development including permitting it in the Flood Way with the cut and fill policies.

[186] The Board finds the flood map currently in effect for the Town was produced in 1977. The Town has taken steps to reduce flooding in the Town including diverting the River. The flood map is outdated and inaccurate. With new technology and scientific information available to the Town since 1977, it began the process to update its flood mapping.

[187] The Town has hired consultants and to date has done a series of models. Mainly due to more accurate methods for determining land elevations, the 2011 map removed a portion of the properties from the Flood Way. The next two models, 2012 and 2014, removed 95% of the River and 75% of the Southern properties from the 1-20 Flood Way.

[188] Mr. Day stated Council will adopt one flood map for the whole Town. Although the bulk of the Lands may be removed from the Flood Way, lands of others will now be included in the Flood Way. Consequently, Mr. Day and Council want to ensure the map is as accurate as possible.

[189] A few recent events, noted above, have caused Mr. Day to want to do further checks and possibly do "some tweaking" of the information for the modelling and have another "go around" with the consultants to ensure the map is correct.

[190] One of the reasons why this has not been accomplished since his letter of October 2014, is because of personnel resources. Antigonish is a small town and Mr. Day performs many roles. He has only been working two days a week for the Town, but expects to be returning to full-time in May of 2017. Consequently, when other issues come forward, they can take priority.

[191] Secondly, regarding financial resources, the modelling is expensive and may cost between \$20,000 to \$30,000 to complete. He did have sufficient funds in the current budget (finishing in March 31, 2017), to complete the rain data for Antigonish, but not enough to complete all tasks. He was reviewing available grant funding to fully complete the flood mapping.

[192] When further pressed about Council's commitment by Mr. Rogers, he emphasized the map is outdated and inaccurate and the Town has a responsibility to continue with the process and see it to completion.

[193] Most importantly, Mr. Day, who is orchestrating this work for the Town and on its behalf, testified that he expects the flood mapping to be completed and able to advance through the planning process to Council for approval within 1.5 years.

[194] The County offered no evidence to the contrary.

[195] Essentially, the County's argument is that purely from the time that has elapsed, the Board should find the adoption of new map and rezoning is not reasonably probable.

[196] Jovin's Reply Submissions cite *Mcilwaine, et al v Government of Saskatchewan* (2000), 70 LCR 262 (QB), for the proposition that the possibility of rezoning may be remote in time, but still probable. Specifically, Justice Dawson stated:

... In addressing the question of remoteness and speculation, a distinction must be made between remoteness in time and remoteness in possibility. ...

[Claimant's Reply Submission, para. 10]

[197] The Board finds it is unnecessary to comment on the *Mcilwaine* case. Rather, the Board finds "time", like other factors, has to be considered within the context of this specific case after considering all facts and evidence before the Board. For

example, time for a large municipality, like Toronto, may be different than a small town of less than 4,600 people with limited personnel and financial resources.

[198] Specifically, the Board finds that the reason for the delay is not a lack of commitment, but rather is based upon the Town's dedication to get the flood mapping correct and its limited personnel and financial resources to complete the flood mapping at one time. Each of these is being addressed. The Town has continued to undertake initiatives such as completing the rainfall data and is seeking information on grants for the remainder. Mr. Day will have more time to assist in completing the mapping once he returns to his position full-time around May, 2017.

[199] Furthermore, the uncontradicted evidence of Mr. Day is that he anticipated the flood mapping would be completed and before Council for approval within 1.5 years.

[200] Considering all facts in this case and in these circumstances, the Board finds it is reasonably probable that the Town will complete the new flood mapping within 1.5 years or shortly thereafter.

## **(2) Adopt Flood Mapping**

[201] The Board would summarize the County's arguments in this section as being: (1) the uncertainty of the planning process, itself; and (2) Council's decision. The Board's findings above equally apply to this planning process, and therefore, the Board will only address the second argument.

[202] For the second argument, the County pressed Mr. Day on whether Town Council would, ultimately, adopt the new flood mapping and change the zoning when, and if, the former is completed. Mr. Day's responses emphasized Council's interest in finding further lands for development and its ongoing commitment to the new flood

mapping process. He stated that Council, in his opinion, when confronted with a new flood map based on current science and technology, would adopt the new map. When further pressed Mr. Day stated that, in his opinion, Council would be irresponsible, if not significantly irresponsible, not to adopt a scientific flood map to remove lands from the Flood Way when they no longer flood 1-20 years.

[203] When the Board is making an analysis of what is reasonably probable, as above, the Board will use the same criterion Council will use to make its decision. The criteria Council will use in deciding whether to adopt the new flood mapping and rezoning is what action will reasonably carry out the intent of the MPS Policies.

[204] The MPS directs the Town to designate Flood Way lands that flood on average 1-20 years, as Conservation. Conversely, the MPS would require that lands that no longer flood 1-20 years are not to have that designation.

[205] The Board finds Council knows that the present flood map done in 1977 is outdated and no longer accurate. The Town's new flood mapping will be based on more up-to-date technology and scientific information, including LiDAR land elevations, more accurate rain data specific to Antigonish, flood observations, and flood mapping by expert consultants. The Board finds it is reasonably probable that for the portion of the Lands, shown by the new flood mapping, no longer flooding 1-20 years, Council will remove that portion from the Flood Way and rezone it from Conservation, consistent with the MPS.

[206] In effect, the argument of the County suggests that, confronted with new science mapping, Council may act contrary to and inconsistent with its MPS. Such an argument or suggestion is contrary to the Board's analysis of what is reasonably probable

in this circumstance. In other words, the Board, in its analysis, is to assume Council will reasonably carry out its MPS policies.

[207] Furthermore, the Board finds, due to the Town interest noted above, that any lands removed from the Flood Way and Conservation zone would be rezoned medium density residential.

### **(3) Portion Rezoned**

[208] The County's argument relates to how much of the Lands will, ultimately, be removed from the Flood Way and be capable of being rezoned. As noted above, it appears to the Board that the County argues the flood mapping must be adopted by Council before any development can occur on the Lands, even through the cut and fill policies. Consequently, in the County's view, the portion removed from the Flood Way will determine how much of the Lands may be developed and, therefore, affects the reasonable probability of the Lands being developed medium density residential.

[209] The amount of the Lands removed from the Flood Way to the Fringe, through the new flood mapping, does not affect the Board's decision that it is reasonably probable the Lands will be developed as medium residential density.

[210] First, as outlined above, the Board has found the Lands do not require approval of new flood mapping to be developed by development agreement using the cut and fill policies.

[211] Second, the evidence before the Board is that three flood map models have been completed. The 2011 map, using accurate land elevations, removed approximately 35% of the River property and 15% of the total Lands from the Flood Way. The last two models, 2012 and 2014, included additional information and had similar results. They

removed approximately 95% of the River and 75% of the Southern properties to the Fringe. Mr. Day wants to have another 'go around' with the Town's flood modelling consultants to understand, and if necessary, 'tweak' the assumptions used in the modelling to address the differences between the 2011 and the 2012/2014 maps, the areas that do not flood as predicted, and the comments of the volunteer flood observers.

[212] Considering all of the evidence, the Board finds it is more likely than not, that the last two models (2012 and 2014), with similar results, show the areas that will be outside of the 1-20 Flood Way. Consequently, these areas would be rezoned to medium density residential.

[213] At a minimum, the Board finds that the portion of the Lands removed from the Flood Way by the 2011 mapping would be rezoned.

[214] Third, and most importantly, regardless of what portion of the Lands are removed from the Flood Way and rezoned, the Board finds it is reasonably probable that the Lands as a whole will be able to be developed medium density residential through one or a combination of both development avenues: new mapping/rezoning, and/or the cut and fill development agreement policies.

#### **(4) Inaction of the Owners**

[215] Mr. Day also testified that if any developer were to come forward with an application for rezoning of the Lands to remove them from the 1-20 Flood Way, the planning process may occur more quickly. The same, potentially, would also apply to a request for a development agreement.

[216] For the same reasons noted above, the Board rejects the County's arguments regarding the owner's inaction to do either of the above. Specifically, it is not

the test for determining what is the highest and best use, and in particular, whether that use is reasonably probable.

### **3. Conclusion**

[217] The Board finds the highest and best use of the River property is to be developed with the Southern property and incorporating the highway lands. It also finds the highest and best use of the Lands which are reasonably probable is medium density residential.

#### **B. Market Value of the Lands Taken**

[218] The market value of the lands expropriated flows from the Board's decision on what is its highest and best use.

[219] For the reasons explained above, the Board only has the evidence of one appraiser who has the expertise to properly value the Lands using expropriation principles.

[220] Mr. Hardy provided to the Board sales values and analysis to determine the market value a willing buyer would pay for the Lands as a medium density residential development. The sales are in close proximity to the Lands and, in particular, are mainly within the Town. They are adjusted to the expropriation date of July 25, 2014. The Board accepts the range of sales Mr. Hardy stated were most indicative of the market value of the Lands.

[221] For clarification, the Board does not accept that the River property, consisting of 5.3 acres of generally flat lands with 1,240 feet of river frontage, a few blocks

from the downtown and within a kilometer of St. F.X., would be sold at a highest and best use as a single residential property of up to four units for the price of \$24,500.

[222] The Board also accepts Mr. Hardy's opinion that the contingency risks for a developer would decrease the market value of the Lands as of July 25, 2014, from between 20 to 30% of the market value. These risk factors include planning; master planner; flood/stormwater management plan; policy changes; 3-5 year period to complete the planning process; and the engineering, surveyor, road and power costs.

[223] Mr. Day, for the first time at the hearing, raised the issue that calls into question how much of the Lands, and in particular, the River property, will potentially be developed by rezoning versus by the development agreement. Although the Board has found both avenues for development as medium density residential are reasonably probable, the development using a combination of both of these, rezoning and development agreement, exist. Considering this issue and all other facts and circumstances of this case, the Board finds the appropriate risk is a 30% reduction and, therefore, sets the market value at Mr. Hardy's lower appraised value of \$50,000 per acre.

[224] At 5.3 acres, the River property is valued at \$265,000.

[225] To put the evaluation into context, the amount claimed by Jovin is approximately the value of two retail higher end single family lots in the Mount Cameron area, which Mr. MacInnis stated sell for \$140,000 per lot. The Mount Cameron lots near the water do not appear to own the water frontage as would be the case for the River property. The Mount Cameron's values on Mr. Hardy's list (Index sale #8) were for purchase of the raw lands and not as retail lots. Parts of the Mount Cameron area are also in the Flood Way.

[226] At the end of the hearing, and without any reference within his report, Mr. MacInnis stated he thought the train and the location of the trailer park would be a detriment to anyone wanting to develop the Lands. He stated the train track is across the River. The train blows its horn each time it passes College Street. He did not know when during the day this occurred, but thought it happened once each day.

[227] The County argued the Board should further decrease the market value of the Lands based on these two factors. Jovin stated Mr. MacInnis' concerns arose for the first time at the conclusion of the hearing, and that he had to speculate on how often trains were used at the nearest crossings. He did not provide any empirical evidence or any evidence as to his speculations.

[228] The Board notes there is development adjacent to the trailer park, including single family residences and a multi-unit apartment building not far from it.

[229] The Board finds Mr. MacInnis' comments on the impact of both the train and the trailer park on this large property are both outside of his expertise as an appraiser of these lands and is not supported by any empirical or other evidence. Furthermore, in fairness it was not included in his report such that the Appellants could consider it and respond to it. In these circumstances, the Board does not find there is sufficient evidence before it in this case, to further decrease the market value of the Lands based on the train passing or the trailer park.

[230] In conclusion, the Board sets the compensation for the River property at \$265,000.

**C. Business Loss**

[231] With the Board's finding that the highest and best use of the River property is not its existing use, Jovin is not seeking this alternative claim.

**D. Injurious Affection**

[232] The Board finds the Southern property was injuriously affected by the expropriation of the River property. The Board concurs with Mr. Hardy's report and evidence that the Southern property has been affected by:

- (a) the loss of access to extensive river frontage;
- (b) the loss of access from Henry Lane;
- (c) the loss of future development cost efficiencies of the larger site;
- (d) the loss of continuity with the existing park amenities; and
- (e) is less desirable abutting a public utility with chain link fences, well heads, and pump houses.

[233] The Board also finds the value diminution of 10% per acre is conservative considering these losses.

[234] Using Mr. Hardy's analysis below, the Board sets the loss for injurious affection at \$44,000:

Diminution of Value to remainder			
Value of Jovin Holdings	\$ 50,000	X 13.92	\$ 696,000
Diminution of Value @	10%		
Value of Holdings After the Taking	\$45,000	8.61	\$ 387,450

Injurious Affection		
Value Before (rounded)	\$	\$696,000
Value After		<u>\$387,450</u>
Loss In Value		\$308,550
Loss in Value (rounded)		\$309,000
Less; Value of Lands Taken		<u>\$265,000</u>
Injurious Affection		\$ 44,000

**E. Prejudgement interests and costs**

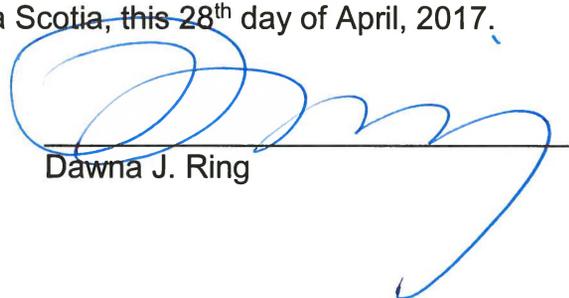
[235] The Board retains jurisdiction to determine interests and costs, if the parties are unable to agree.

**VI CONCLUSION**

[236] The Board sets the market value for the lands taken at \$265,000 and injurious affection of the Southern property at \$44,000 for a total of \$309,000. The Board retains jurisdiction to determine interests and costs, if the parties are unable to agree.

[237] An Order will issue accordingly.

**DATED** at Halifax, Nova Scotia, this 28<sup>th</sup> day of April, 2017.

  
\_\_\_\_\_  
Dawna J. Ring

## APPENDIX "A"

### 4.6 Conservation

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As Amended by By-Law 94-29. November 2007

#### Flooding

The location of Antigonish at the confluence of the Wright's and West rivers, Brierly Brook and at the mouth of Antigonish Harbour, contributes to one of the most serious problems in Antigonish: flooding. Flooding may be caused by heavy rain events, but also, in Antigonish, it may result from ice jamming during melt periods. It is also influenced by tidal surges.

#### Flood Damage Reduction Program

In 1994, the Town adopted the findings of the Canada-Nova Scotia Flood Damage Reduction Program for the Antigonish area. This had the effect of prohibiting development on lands identified as flooding on a 1:20 year basis (the Floodway), and allowing conditional development on lands predicted to flood on a 1:100 year basis (the Floodway Fringe). These provisions, as adopted by Council, applied to all land within the Floodway and Floodway Fringe but excluded those areas which, prior to adoption, had been filled or otherwise developed such that the Flood Damage Reduction Mapping, printed in 1977 and issued in 1983, was no longer current.

#### Statements of Provincial Interest

Shortly after the adoption of the Municipal Government Act (MGA), the Province released five "Statements of Provincial Interest"; these include a statement on flood risk areas. The goal of this statement is, *"To protect public safety and property and to reduce the requirement for flood control works and flood damage restoration in floodplains."* This Statement incorporated the Flood Damage Reduction Mapping.

Municipalities may only adopt land use policy which is consistent with the Statements of Provincial Interest.

**P-4.6.1 It shall be the intention of Council to comply with the Statement of Provincial Interest concerning Flood Risk (hereinafter cited as the SPIF).**

**P-4.6.2 (a) It shall be the intention of Council that lands previously identified as susceptible to flooding once every 20 years in the Canada - Nova Scotia Flood Damage Reduction Program mapping for the Antigonish Area (hereinafter cited as the FDRP) shall be designated as Conservation on the Generalized Future Land Use Map and zoned Floodway (FW).**

**P-4.6.2 (b) It shall be the intention of Council that lands previously identified in the FDRP mapping as susceptible to flooding once every 100 years shall be deemed Floodway Fringe.**

**P-4.6.3 Notwithstanding 4.6.2(a) and 4.6.2(b), It shall be the intention of Council that areas of land which were developed, under development and or filled prior to the adoption of the FDRP mapping in August of 1994 shall be deemed not to fall within the floodway or floodway fringe designations unless modified under this section.**

Floodway Fringe

As has been noted, the SPIF lays out requirements for development within the Floodway Fringe. The Zoning Map, forming part of the Land Use By-law, will identify areas considered to fall within the Floodway Fringe. The Land Use By-Law (hereinafter cited as the LUB) shall provide for development within areas featuring the Floodway Fringe designation subject to floodproofing and flood damage reduction requirements as per the SPIF.

It is a concern that in certain instances, development may cover the bulk of the lot with the result that virtually all flood storage capacity is lost. As this is not desirable, limits on the percentage of a lot which may be covered will be listed.

**P-4.6.4 It shall be the intention of Council that lands identified as Floodway Fringe shall be indicated as such through an overlay on the Zoning map forming part of the LUB. Development on these lands shall be as permitted in the zone however uses shall be limited and additional flood proofing requirements, as outlined in the SPIF, shall be included in the LUB.**

**P-4.6.5 It shall be the intention of Council that limitations be established in the LUB concerning the maximum area which may be filled where development is to occur in the Floodway Fringe.**

Floodway

**P-4.6.6 It shall be the intention of Council that development be restricted within the Floodway, however the following and similar permanent uses may be permitted provided they do not result in a decrease of flood storage, nor an impediment to the flow of flood waters:**

- a. recreation and open space uses;
- b. cropland;
- c. roads, parking areas and service corridors.

**P-4.6.7 It shall further be the intention of Council that certain community oriented temporary uses such as Fairs and Farmer's Markets may be permitted within the Floodway provided they may be easily removed in the event of a flood and are not in place during periods of high flood risk.**

Alteration of Floodway Boundaries

Since 1994, the Town has sufficed with development opportunities presented by Floodway Fringe lands and other, marginal lands. As these are largely used up however, and with recent developments such as the establishment of a "Big Box" power centre on the outskirts of Town, we are led to consider the possibility of altering the Floodway boundary.

The provisions of the SPIF require that planning documents must identify Flood Risk Areas consistent with the FDRP mapping and that no net gain of fill may be permitted within the Floodway. However, a provision exists whereby development may occur in areas identified as floodway provided a hydrotechnical study indicates that the development may be facilitated without increasing flood risk or impairing flood water flow.

It has been determined that a "Cut and Fill" methodology, which will not impair flood water movement or reduce storage, is the most appropriate avenue to remove lands from the Floodway such that they become available for development. The success of such an approach is dependent on sound hydrological analysis based on up-to-date modeling, local knowledge and accurate, detailed surveying. No consideration will be given for development which proposes alteration of the core of fast moving water known as the "flow way". Cuts related to filling must be located in close proximity to be effective. Further, to ensure flood water storage capacity is achieved, cuts cannot retain water over time.

As this development will be occurring in areas which currently provide green-space within the Town, there will be conditions regarding landscaping, and the size and quality of hard surface development.

Areas known to contribute toward aquifer recharge shall not be eligible for this approach. Nor shall areas where flooding due to ice damming is known to be prevalent. Also precluded will be any development intended for low ambulatory users such as hospitals, senior homes, schools etc. or uses which typically feature hazardous materials.

**P-4.6.8** It shall be the intention of Council to permit removal of lands from the Flood Way through a managed “Cut and Fill” procedure under Development Agreement, subject to the following:

1. The following lands shall be excluded from development under this provision:
  - a. Lands which, if developed, will result in impaired flood water movement in the Flow Way or which could be expected to contribute to up, or downstream flooding;
  - b. Lands known to suffer, or contribute to, ice jam related flooding;
  - c. Lands which are held to contribute to aquifer recharge.
2. The following uses shall be excluded from consideration under this section:
  - a. Uses intended for occupants of limited mobility including, but not limited to hospitals, nursing homes, and special care homes;
  - b. Uses which could lead to environmental contamination in the event of a flood which shall include, but not be limited to, those concerned with warehousing or manufacturing hazardous materials.
3. Cut and attendant fill must be located in the same hydrological zone.
4. Cuts must not result in long-term ponding and further, shall provide storage at a similar, or lower level than that of the area being filled.
5. Unless it is demonstrably inappropriate, architecture shall be traditional in nature with detailing and fenestration appropriate to the style.
6. Landscaping shall be so devised as to provide buffers for adjacent uses, shade for parking areas and with energy conservation and environmental protection in mind.
7. HVAC units, solid waste and recycling receptacles and other utilities shall be screened from view either through architectural means or landscaping and shall be located so as not to be prone to flood damage.
8. Parking areas shall be broken up by landscaping, pedestrian facilities etc.; loading areas shall be located & devised so as not to be obtrusive. Site servicing shall be developed and managed so as to minimize negative impacts of storm run-off and to maximize ground water recharge where possible;
9. Site servicing shall be developed and managed so as to minimize negative impacts of storm run-off and to maximize ground water recharge where possible;
10. Consideration of P-8.2.7.

The validity of this process shall be underwritten by professional analysis, supervision and certification. Further, digital mapping of modified topography shall be provided such that flood risk mapping may be suitably updated.

**P-4.6.9** In addition to the requirements of P-8.2.7, submissions under this section must include:

- 1. An hydrological report, prepared by a firm competent in the field, confirming that the various terms herein have been met and including:**
  - a. Existing conditions based on up to date, detailed surveying;**
  - b. Proposed cut and fill contours, building footprint(s) and opening elevations;**
  - c. Revised modeling based on the latest version of HEC-RAS 3.1.X or equivalent. Note however that a correction factor shall be included to account for best estimates of sea level rise and increased flood surge action;**
  - d. Detailed instructions with regard to specific measures required for implementation of this section;**
  - e. Architectural, landscape and site servicing drawings sufficient to demonstrate adherence to the requirements of this section. These shall be approved and stamped by the consulting engineer.**
  - f. Submission of a soil erosion and sedimentation prevention plan;**
  - g. Submission of a remediation plan for ‘cut’ areas, including proposed topsoil depths, planting materials and planting schedule;**
  - h. Confirmation by a registered professional engineer, competent in the field, guaranteeing field review of construction;**
  - i. Any agreement entered under this section shall include a “save harmless” clause waiving the Town from future responsibility related to development under this section.**
- 2. On project completion, the professional(s) responsible for field review of construction shall supply the following:**
  - a. A certificate confirming that the work was carried out in accordance with the agreement.**
  - b. Hard copy and digital mapping indicating the revised Floodway and Floodway Fringe boundaries.**
- 3. Where the complexity of the project merits it as determined by Council, peer review will be required for submissions. Fees related to this shall be paid by the applicant.**

Town Lands & Improvements Within the Floodway

As the Town owns, or manages, considerable lands within areas designated as Floodway and Floodway Fringe, it is incumbent that the Town manage these lands in harmony with the intent of the SPIF wherever Municipal Operations permit.

**P-4.6.10 It shall be the intention of Council to manage the use of Town owned lands in a manner which is respectful of the SPIF.**

Wetlands and Areas of Steep Slopes

Wetlands, long thought to be worthless due to low development potential are, in fact, a great asset to the Town. During periods of heavy rain, wetlands absorb large quantities of water thus reducing flooding and erosion. During dry periods, water filters through the bogs maintaining a high water table. More visibly, wetlands provide maintenance-free wildlife habitat and green space within the Town. The soil conditions in Antigonish generally feature a thin layer of topsoil over a clay substrata. In order that erosion, and problems associated with it, may be reduced, areas with slopes above 33% on average over a distance of 50 feet have been designated conservation.

**P-4.6.11 It shall be the intention of Council that areas with slopes exceeding 33% over 50 feet, and areas identified as wetland areas, shall be designated Conservation on the Generalized Future Land Use Map and zoned Conservation (O2).**

**P-4.6.12 It shall be the intention of Council that lands designated on the Generalized Future Land Use Map as Conservation shall be used for the preservation and conservation of the natural land as open space. The uses permitted by the Land Use Bylaw shall be limited to agricultural and passive recreational areas.**

**P-4.6.13 It shall be the intention of Council to permit development in areas identified on the GFLUM as having slopes between 20% and 33% on average over 50 feet provided that the site is landscaped in accordance with the provisions of the Land Use Bylaw in order to prevent erosion.**

**P-4.6.14 Notwithstanding anything else in this Part, it shall be the intention of Council that where lots are partially designated Conservation, parking may be permitted in the lands designated Conservation provided that the area is not filled or the contours changed significantly and the parking area is constructed so as not to impede the flood water causing increased flooding or drainage problems elsewhere.**

**P-4.6.15 It shall be the intention of Council that where lots are partially designated conservation, the area zoned conservation may be included in the calculation of the lot area.**

**P-4.6.16 It shall be the intention of Council that, notwithstanding the conservation requirements, the Land Use Bylaw shall provide that no building or structure shall be built within fifteen (15) feet of the rim of a watercourse.**

James Street Conservation Area

Over the years, development has made a steady encroachment on the wetlands between James Street and the Trans Canada Highway. This, in combination with drainage works, have left the vast majority of this area dry. It does, however, serve a purpose as a visual buffer against the highway and still provides some wildlife habitat, primarily for birds. In an effort to preserve these functions without stifling commercial enterprise, any new development must include plans to have a minimum of 25% of the lot landscaped or left in a natural state.

**P-4.6.17 It shall be the intention of Council establish the James Street Conservation Area where development will be contingent on providing 25% site coverage in natural and/or enhanced landscaping. This area will be displayed on the Generalized Future Land Use Map and on the Zoning Map as "James Street Conservation".**

Expropriation of Jovin Enterprises Ltd.  
Antigonish, Nova Scotia  
100540

Land Use By-Law – Section 5.26

40

2. The Letter of Undertaking and Certification of Field Review of Construction process shall apply.

- (3) Notwithstanding subsection (1) herein, private parking lots are prohibited from being developed on any area of land which currently features a building which is eligible for Heritage Designation or which has featured such a building within 3 years of the an application date.
- (4) Within the site plan approval area, an application for a development permit shall be accompanied by a plan which:
  - a) shows sufficient detail to address all of the matters identified in Sub-Section 5.25(2);
  - b) is drawn to a specified scale;
  - c) shows adjacent roads, lanes, buildings, known easements, above ground utility features and other items which may be indicated by the Development Officer; and
  - d) indicates maintenance provisions and scheduling.
- (5) Landscaping required under this section shall be suited to the local climate and shall be chosen and planted with winter operation in mind.

5.26 ENVIRONMENTALLY SENSITIVE AREAS

1) FLOODWAY FRINGE

- a) Development permits can be issued for construction of allowable uses in areas displayed as Floodway Fringe on the Zoning Map subject to the following:
  - i. All structures constructed in this area shall be floodproofed in that there shall be no opening into the structure below an elevation equal to 8" (20 cm) above the predicted 1 in 100 year flood elevation at this location.
  - ii. There shall not be any filling in of land in areas displayed as Floodway Fringe with the exception of fill placed to aid in floodproofing - which fill shall extend 5 feet from the structure and therefrom slope back to original grade so as to minimize loss of flood storage capacity;
  - iii. Lands disturbed during this process shall be protected from erosion and sedimentation;
  - iv. Upon project completion, and prior to occupancy, a location certificate shall be submitted confirming building location, extent of fill and minimum opening elevation.
  - v. Placement of fill for purposes of floodproofing, or otherwise, shall not cover more than 1/3rd of the site.
- b) Where lands have been altered such that they are no longer deemed to form part

12

Expropriation of Jovin Enterprises Ltd.  
Antigonish, Nova Scotia  
160540



41

of the Floodway as per policy P-4.6.8 of the MPS, development permits shall be issued in accordance with the terms of the enabling agreement written, and entered, thereunder.

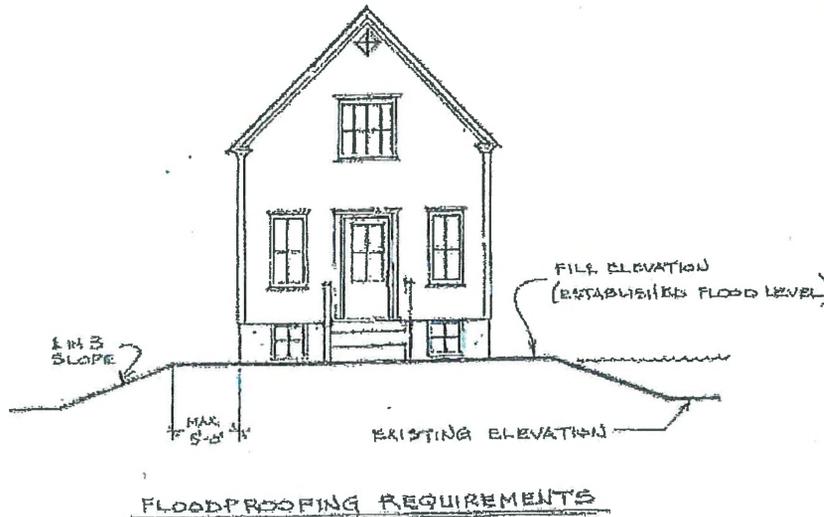
2) STEEP SLOPES

Development permits shall be issued for allowable uses in areas displayed as "Steep Slope" on the Zoning Map provided that, in addition to meeting all other applicable requirements of this Bylaw, the development proposal shall include the provision of terracing for disturbed areas to minimize erosion potential. The terracing shall consist of a series of retaining walls or sloped sodded banks and gently graded grass areas arranged so that no sloped bank exceeds fifteen feet in length.

3) JAMES STREET CONSERVATION AREA

In addition to meeting the applicable C2-J requirements, development in the area displayed as "James Street Conservation" on the Zoning Map shall be required to feature natural and/or enhanced landscaping on 25% of the lot which is to be developed.

4) AQUIFER PROTECTION AREA



Expropriation of Jovin Enterprises Ltd.  
Antigonish, Nova Scotia  
100540

42

In addition to meeting all other applicable Land Use Bylaw requirements, lands located within the area designated "Aquifer Protection Area" as shown on the Zoning Map shall be restricted from the following uses:

- a) Installation or replacement of underground petroleum storage tanks.
- b) Installation or replacement of above ground storage tanks in excess of 200 gallons.
- c) Commercial storage of pesticide or biocide.
- d) Parking or storage of fuel trucks.
- e) Operation of a home occupation involving the application of rust inhibitors or similar petroleum based compounds or finishes.
- f) Commercial storage of paints or other hazardous liquids.

Special Note: Although not governed under regulations concerning Land Use Planning, Provincial regulations feature restrictions on the application of pesticides in water sheds and aquifer recharge areas and therefore should be consulted prior to any such application in the Aquifer Protection Area.

74

Expropriation of Jovin Enterprises Ltd.  
Antigonish, Nova Scotia  
190540



143

89

### **PART 23 CONSERVATION (O2) ZONE**

#### **23.1 O2 ZONE PERMITTED USES**

The following uses shall be permitted in the Conservation (O2) Zone:

- agricultural uses that do not include structures
- public and private parks
- passive recreational activities such as fishing, bird watching and similar ecologically - oriented education activities
- public works associated with flood control
- works associated with water supply development

#### **23.2 SPECIAL REQUIREMENT - YARD AND AREA REQUIREMENTS**

Where Conservation (O2) zones have been created which divide existing developed or undeveloped lots, the area designated Conservation (O2) may be included in fulfilling the lot requirements or any open yard requirements of this Bylaw.

#### **23.3 SPECIAL REQUIREMENT - PARKING**

Where lots are partially designated commercial or residential and partially designated Conservation (O2), parking may be permitted on the lands designated Conservation (O2) provided that the area is not filled or the contours changed and the parking area is constructed so as not to impede the flood waters causing increased flooding or drainage problems elsewhere.

#### **23.4 PROHIBITION - FILL**

Except as otherwise permitted in this By-Law, there shall be no addition of fill on lands zoned Conservation (O2) as a consequence of being located within an area deemed subject to flooding on a 1 in 20 year basis.<sup>16</sup>

#### **23.5 LOT AREA AND FRONTAGE**

The minimum lot area in the Conservation (O2) zone shall be 10,000 square feet for all uses except works associated with water supply development which shall have a minimum lot area of 1,000 square feet. The minimum lot frontage in the Conservation (O2) zone shall be 100 feet for all uses except works associated with water supply development.

<sup>16</sup> 94-49