

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE EXPROPRIATION ACT

- and -

IN THE MATTER OF AN APPLICATION by **HAROLD F. MORASH** to determine compensation to be paid by the **WEST HANTS REGIONAL MUNICIPALITY** (formerly the Town of Windsor) for the expropriation of land located in West Hants Regional Municipality, Nova Scotia and identified as PID No. 45055480

BEFORE: Richard J. Melanson, LL. B., Member

APPLICANT: **HAROLD F. MORASH**
Robert H. Pineo, Counsel

RESPONDENT: **WEST HANTS REGIONAL MUNICIPALITY**
John T. Shanks, Counsel

HEARING DATE: November 7, 2022

DECISION DATE: February 7, 2023

DECISION: The claimant is entitled to compensation of \$133,750 for the market value of the land. The claimant is also entitled to \$5,350 for disturbance damages. The Board reserves its jurisdiction to address interests and costs.

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I INTRODUCTION

[1] On October 19, 2011, the Town of Windsor expropriated lands located between Highway 101 and the St. Croix River. The subject property is identified as Block GM-1 and PID 45055480 (Property). The Property is in an area known as the Tregothic Marsh. This is a tract of dykeland and upland, bordering the St. Croix and Avon Rivers. The lands were expropriated for the construction of a wastewater treatment facility.

[2] The claimant, Harold Morash, acquired the Property from his father through a Will that was only probated after the expropriation. The respondent, Town of Windsor, amalgamated with the Municipality of the District of West Hants effective April 1, 2020. The successor municipality is known as the West Hants Regional Municipality (West Hants).

[3] The claimant asserted he is entitled to the following compensation under the *Expropriation Act*, R.S.N.S., 1989, c 156:

- a) \$211,000 for the value of the lands taken by West Hants;
- b) \$20,000 for Disturbance Damages (Business Loss).

[4] In a Supplemental Pre-Hearing Brief dated October 11, 2022, Robert Pineo, counsel for the claimant, submitted that, based on an updated appraisal, the market value of the lands taken was \$315,000 at the time of the expropriation. In his final oral submissions, Mr. Pineo advised that, as the evidence has not established the underlying assumptions in the revised appraisal report, the claimant was reverting to the original claim of a market value of \$212,000.

[5] In the claimant's Supplemental Pre-Hearing Brief, Mr. Pineo submitted that the business loss claim should be set at \$112,000, based on 11 years of lost hay harvest. Mr. Pineo appeared to acknowledge in his oral submissions that the evidence had not

established a loss of \$112,000, but that there should be some disturbance award for the alleged loss.

[6] John Shanks, counsel for West Hants, submitted that the market value of the Property, at the time of the expropriation, was \$121,000. Mr. Shanks submitted there was no evidence to establish the claimant had suffered any business loss related to haying operations.

[7] The Board has reviewed the evidence, including the expert appraisal evidence, and concludes that the market value of the Property at the time of the expropriation was \$133,750. The Board further concludes that a small disturbance award related to haying operations is warranted and sets this figure at \$5,350.

II ISSUES

[8] There are only two issues the Board must decide:

- 1. What was the market value of the Property at the time of the expropriation?**
- 2. Has the claimant established an entitlement to a disturbance award for business loss?**

III EVIDENCE

[9] Mr. Pineo called only one witness on behalf of the claimant. Jeff McLean, B.Sc., AACI, a Senior Consultant with Altus Group, was qualified, in accordance with his pre-filed qualification statement, without objection:

...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.

[10] Mr. McLean prepared a report dated October 18, 2016, wherein he provided an opinion on the market value of the Property as of October 19, 2011, the date of expropriation. In arriving at his conclusion, Mr. McLean discussed the concept of “highest and best use,” which he defined 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 value¹.

The definition applies specifically to the highest and best use of the land. It is to be recognized that in cases where a site has existing improvements on it, the highest and best use may very well be determined to be different from the existing use. The existing use will continue until such time as the value of the land vacant for its Highest and Best Use exceeds the total value of the property in its existing use.

[Exhibit M-5(a), p.23]

[11] Mr. McLean then provided his opinion on the “highest and best use” of the Property. He said:

The subject is located in the Town of Windsor between Highway 101 and the St. Croix River. The land had good visibility from Highway 101. The parcel was 37 acres in size with an irregular configuration. The topography was mixed with a raised area and low-lying areas towards the river. The land was not serviced but there were municipal services located a short distance away. The development rights in place were agriculturally related and there were Environmental Constraints under the Towns Land Use By Law. There could have been the possibility of re-zoning the land and removing the restrictions but the outcome would have been uncertain. The trend in the neighborhood had been for redevelopment of agricultural uses for commercial as evidenced by the development of the lands at Exit 5A with a gas station. In 2011, Sobeys acquired a large parcel to the south for future development in an area designated as Environmental Constraints. Overall, the market for commercial and industrial lands was modest with few new projects underway. Land with exposure to the highway located close to exits is often acquired by service related industries such as farm equipment and maintenance or auto dealerships. The highest and best use of the lands was agricultural in the near term with future development potential.

[Exhibit M-5(a), p.24]

[12] Mr. McLean applied the Direct Comparison Approach to arrive at a market value for the lands. This involves comparing the Property “...with recent sales of other lands that have similar characteristics in terms of location and use potential.” Mr. McLean prepared a chart showing what, in his opinion, were sales which could be used as a

benchmark for marshland and surrounding areas. Mr. McLean produced another chart of lands with a mixture of agricultural uses and future development potential.

[13] Mr. McLean analyzed the selected properties and compared them with the Property. His final opinion on the market value of the Property was:

Based upon the foregoing indices and a qualitative analysis of comparable lots, I have considered the subject in two components. The first is the marsh section which fronted onto the St. Croix River. The area has been calculated based on GIS measurements. Sales of 100% marshland ranged from \$150 to \$250 per acre. [In] conclusion, \$250 per acre is supportable given the location near the highway and town.

Secondly, I have looked at the remaining lands. There were constraints in place related to the use of the land; however, it could have been possible to re-zone the land and remove or mitigate the constraints. The land had limited access and development would have likely been well into the future. Given the development of the lands at Exit 5A there was support in the neighbourhood for a transition from agricultural to commercial uses. A parcel of land at Exit 5A (PID 45055456) was a former agricultural site located in the Tregothic Marsh area which was re-zoned and subsequently sold for over \$50,000 per acre in 2012. The elevation of the parcel based on Google Earth sampling ranged from 14 to 23 feet compared to 16 to over 30 feet for the useable area of the subject. The land was then resold to Sobeys for a much higher price.

Sales of agricultural lands with future development potential exhibited a very large range - in the preceding table sale prices ranged from \$3,156 per acre to \$14,113 per acre. The price is influenced by location, site works, servicing and development timing. Lands which have more imminent development potential are generally priced higher.

The Town of Windsor purchased Index 4 for \$30,000 or \$3,300 per acre adjusted for the marshland component. This would have been considered a lower parameter given the exposure and poor lot configuration. An upper parameter would have been a 2014 listing of a parcel at 159 Colonial Road. The land was originally listed for \$179,000 for 8.13 acres with 300' of waterfront. The price was reduced four times and in August of 2016 reduced to \$89,900 or \$11,057 per acre. The listing agent indicated there had been very little interest in the property.

Indices 13, 11 and 9 indicate a range of \$10,527 to \$7,143 per acre and are considered to provide the best benchmarks in value. More weight has been given to Indices 9 and 11 and as such I have concluded at a rate per acre in the mid to lower half of the reduced-price range of \$8,000 per acre.

[Exhibit M-5(a), p.35-36]

[14] Based on the foregoing, Mr. McLean concluded that the market value of the Property on the effective date was \$211,000. This was based on 11 acres of salt marsh at \$250 per acre and 26 acres of useable land at \$8,000, with rounding factored into those amounts.

[15] Mr. McLean filed a supplemental report dated August 5, 2022, which, at the request of counsel, assumed the Property had a commercial zoning with a permitted commercial use at the time of expropriation. Mr. Pineo acknowledged in his closing submission that this underlying assumption had not been established by the evidence. The Board agrees with this position. The Board has made no use of the market value analysis in this supplemental report.

[16] Mr. Shanks called two witnesses on behalf of the respondent. Tom Richard is West Hants' Director of Public Works. At the time of the expropriation, Mr. Richard was the Operations Manager, Water and Wastewater, for the Town of Windsor. He was familiar with the Property, which was expropriated so a wastewater treatment facility could be built on it. Mr. Richard testified about the access roads leading to the Property, owned by the Province of Nova Scotia. He also addressed the types of existing development at the points nearest to the Property. Mr. Richard was the only witness who gave direct evidence about the claimant's haying operations. Lee Weatherby, FRICS, AACI, appeared virtually and was qualified, without objection, in accordance with his pre-filed qualification statement:

...as an expert able to provide opinion evidence on all aspects of real estate valuation, appraisal, and the determination of compensation for expropriation including the areas of property valuation, injurious affection, and disturbance damages in accordance with the standards adopted by the Appraisal Institute of Canada.

[Exhibit M-6]

[17] Mr. Weatherby prepared a report dated October 5, 2017, providing his opinion on the value of the Property on October 19, 2011, which appeared at Tab 14 of the Joint Exhibit Book (Exhibit M-8). At the time, Mr. Weatherby was Vice-President, Counselling Division, with Turner Drake & Partners Ltd. This report updated a prior Master Valuation Report dated September 17, 2010, which valued the Property as of

September 5, 2010. This prior report pre-dated the expropriation and had been used as a basis for establishing an acquisition price as the expropriation process unfolded.

[18] The key differences between Mr. Weatherby's original report and the update related to the size of the Property, along with some new sales comparables. Based on the information available to Mr. Weatherby in 2010, he had determined the Property consisted of 20.5 acres. A subsequent survey plan showed a 37-acre lot with a different configuration along the shoreline. Mr. Weatherby divided the Property into three components for the purposes of his analysis. He described 11 acres as tidal marsh, 20 acres as designated marshland under the *Agricultural Marshland Conservation Act*, and six acres as an upland island outside the designated marshland boundary.

[19] In the original report, Mr. Weatherby had only divided the Property into designated marshland and the upland island. The acreage of the designated marshland increased based on the survey. The tidal marsh is described as the land between the dyke which runs along the Property and the ordinary high water mark of the St. Croix River. This was a completely new area considered by Mr. Weatherby in the updated report.

[20] Like Mr. McLean, Mr. Weatherby used the Direct Comparison Approach in his analysis. In arriving at a highest and best use, he again divided the Property into three components. Because the tidal marsh flooded regularly, Mr. Weatherby thought its "... most likely uses are passive recreational, conservation or similar low-density use...". In his opinion, the highest and best use of the designated marshland was agricultural, as currently used. The upland island, while zoned agricultural, was not part of the designated marshland. Mr. Weatherby pointed out the restrictions related to the zoning, its proximity

to Highway 101, and its small land base. However, in Mr. Weatherby's view, the more stable soil conditions and visibility from the highway could give rise to uses other than the hayfield use at the time of expropriation. He said the highest and best use could include agricultural structures, telecommunications towers, and accessory buildings.

[21] Mr. Weatherby had prepared a Land Sales Schedule in his original report which is reproduced below:

LAND SALES SCHEDULE

No.	Location Vendor/Purchaser	Date of Sale	Sale Price	Area (acres)	Sale Price/acre		Comments
					At date of sale	Adj. to date of valuation	
1.	Lot 29, Highway 358 Hillaton Kings County (PID #55019038) Clyde Countway to N.S. Farm Loan Board	March 2007	\$ 22,000	14.0	\$ 1,571	1,879	Dyked land located on Nicholson Dyke, bordered by Habitant River. Road frontage. Currently in hay. Zoned Environmental Open Space.
2.	Avonport Marsh Oak Island Road Avonport Kings County (PID #55333140 and others) Sponagle to Haliburton Farms Ltd.	Feb. 2010	± \$ 91,000	45.6	\$ 2,000	2,000	Dyked marshland. Total of 9 parcels, mostly contiguous, bordered by the Avon River. Located at the end of Oak Island Road. Zoned Environmental Open Space. Purchaser owns adjacent lands.
3.	Highway 236 Scotch Village Hants County (PID #45361334 and 45167251) Sweetapple to Valley Paediatrics Inc.	Sept. 2010	\$ 72,000	30.8	\$ 2,338	2,338	Dyked marshland along Highway 236 with extensive road frontage. Bordered by the Avon River. Zoned Agricultural (Dykelands).

4.	Woodville Road Greenhill Hants County (PID #45023926) Maple Lane Farms Ltd. to Jensen.	Aug. 2008	\$ 27,000	19.62	\$ 1,376	1,518	Farmland (not marshland) along Woodville Road. Rear 1/3 is wooded. Minimal road frontage for access. Zoned Agricultural.
5.	Gibson Road Sheffield Mills Kings County (PID #55044432) Riverbrook Farms Ltd. to Peter John Porskamp.	April 2006	\$ 97,500	45.0	\$ 2,167	2,661	Farmland (not marshland) along Highway 221 with extensive road frontage. Zoned Agricultural.
6.	Wentworth Road/Highway 101 Windsor Hants County (PID #45055456) Maxner to 3102673 NS Ltd.	June 2005	\$250,000	17.25	\$ 14,493	14,493	Located at Exit 5A. Designated marshland, subsequently released by a variance. Road frontage subsequently subdivided and sold for commercial use (Petro Canada and Subway).
7.	Underwood Road Garlands Crossing Hants County (PID #45190493) Burgess to Brison Developments Ltd.	June 2010	\$225,000	21.61	\$ 10,412	10,412	Bought by adjoining owner to expand its residential subdivision. Access from both sides. Zoned Residential. Sewer and water services in adjacent street.

LAND SALES SCHEDULE

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No.	Location Vendor/Purchaser	Date of Sale	Sale Price	Area (acres)	Sale Price/acre		Comments
					At date of sale	Adj. to date of valuation	
8.	Hwy 101/Hwy #1 Civic #1933 Falmouth Hants County (PID #45026697) Owner: Mclsaac	Current Asking Price	\$179,000	17.00	\$ 10,529	10,529	Bisected by rail line. Parcel next to Hwy 101 at exit 7 zoned Agricultural. Parcel along Hwy #1 zoned Residential.
9.	Hwy 101 Hantsport Hants County (PID #45060357) Owner: Marsh	Current Asking Price	\$149,900	18.00	\$ 8,328	8,328	Access by right-of-way off Bog Road. Lies between Hwy 101 and Half Way River, close to exit 8. Zoned General Resource.

[Exhibit M-7, pp. 22-2]

[22] Mr. Weatherby updated the Land Sales Schedule in his new report. Again, the Board has reproduced it for ease of reference:

LAND SALES SCHEDULE

No.	Location Vendor/Purchaser	Date of Sale	Sale Price/acre				Comments
			Sale Price	Area (acres)	At date of sale	Adj. to date of valuation	
1.	Adjoining the subject Lot No.4, Highway 101 Windsor, Hants County (PID #45055449) Troy Burgess and Kimberley Frank to Town of Windsor	Oct. 2011	\$ 30,000	17.5	\$ 1,714	\$ 1,714	Total
			\$ 2,250	9.0	\$ 250	\$ 250	Tidal marsh (outside the dyke)
			\$ 27,750	8.5	\$ 3,265	\$ 3,265	Designated marshland (inside the dyke)
						Marshland acquired by the Town as part of the waste water treatment project.	
						Zoned Agriculture and entirely within the Environmental Constraints Area.	
2.	Adjoining the subject Highway 101 Windsor, Hants County (PID #45055472) Jason and Sarah Frank to Town of Windsor	Mar. 2011	\$ 20,000	2.0	\$ 10,000	\$ 10,000	Marshland acquired by the Town as part of the waste water treatment project.
							Zoned Agriculture and entirely within the Environmental Constraints Area.
3.	Avondale Rd Mantua, Hants County (PID #'s 45196417, 45194768) Raymond Porter to Glenn and Heather Mosher	Oct. 2014	\$ 100,000	60.3	\$ 1,658	\$ 1,658	Total
			\$ 2,750	11.0	\$ 250	\$ 250	Tidal marsh (outside the dyke)
			\$ 97,250	49.3	\$ 1,973	\$ 1,973	Marshland, farmland and wooded land (inside the dyke)
						Approx. 30 acres is dyked marshland. Remainder is farmland and some forested land. Runs beside the St. Croix River (also referred to as Meander River). Minimal road frontage with driveway access.	
						Zoned Agricultural AR-2.	

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LAND SALES SCHEDULE

No.	Location Vendor/Purchaser	Date of Sale	Sale Price/acre				Comments
			Sale Price	Area (acres)	At date of sale	Adj. to date of valuation	
4.	7179 Highway 14 Brooklyn, Hants County (PID #45281987) John Stanley to Cosman & Whidden Honey Ltd.	Oct. 2013	\$ 165,000	48.0	\$ 3,439	\$ 3,439	Total
			\$ 1,250	5.0	\$ 250	\$ 250	Tidal marsh (outside the dyke)
			\$ 163,750	43.0	\$ 3,808	\$ 3,808	Marshland and farmland.
						Approx. 16 acres is dyked marshland. Remainder is farmland. Runs beside the St. Croix River and River Herbert. Substantial public road frontage.	
						Zoned Agricultural AR-2.	
5.	13474 Highway 1 Lockhartville, Kings County (PID #55227680) Nigel and Frances Thornley to Muhammad Khan and Hina Mohsin	Nov. 2011	\$ 185,000	58.6	\$ 3,157	\$ 3,157	Farmland located beside the Ben Jackson interchange on Hwy. #101. Road frontage is swampy with limited potential for subdivision. Included a barn and driveway.
						Zoned partly Recreational Open Space Zone.	
6a.	Gibson Road Sheffield Mills, Kings County (PID #55044432) Riverbrook Farms Ltd. to Peter John Porskamp.	April 2006	\$ 97,500	51.0	\$ 1,912	---	Index #5 in our original report (with land area corrected from 45 acres to 51 acres based on GIS calculation).
6b.	Peter John Porskamp to The Fruit & May 2012 Vegetable Cart Inc.		\$ 185,000	51.0	\$ 3,627	\$ 3,627	Farmland (not marshland) along Highway #221 with extensive road frontage. Zoned Agricultural.

LAND SALES SCHEDULE

No.	Location Vendor/Purchaser	Date of Sale	Sale Price	Area (acres)	Sale Price/acre		Comments
					At date of sale	Adj. to date of valuation	
7a.	Hwy. #101/Hwy. #1, Civic #1933 Falmouth, Hants County (PID #'s 45026697, 45388261, 45388246, 45388238) Owner: Estate of Lorne Charles Smith (represented by Vernon Molsaac)	Asking Price in 2010	\$ 179,000	16.9	\$ 10,592	---	Active listing in 2010. Index #8 in our original report (with land area corrected from 17 acres to 16.9 acres).
7b.	Hwy. #101/Hwy. #1, Civic #1933 Falmouth, Hants County (PID #'s 45026697, 45388261, 45388246, 45388238) Estate of Lorne Charles Smith to NSTIR	Jan. 2012	\$ 177,900	16.9	\$ 10,527	\$ 10,527	Bisected by rail line. Parcel next to Hwy. #101 at exit 7 zoned Agricultural. Parcel along Hwy. #1 zoned Residential.
8a.	Wentworth Road/Highway 101 Windsor Hants County (PID #45055456) Maxner to 3102673 NS Ltd.	June 2005	\$ 250,000	17.25	\$ 14,493	\$ 14,493	Index #6 in our original report. Located at Exit 5A. Designated marshland, subsequently released by a variance. Road frontage subsequently subdivided and sold for commercial use (Petro Canada and Subway). Rezoned Highway Commercial after this sale.
8b.	3102673 NS Ltd to Somerled Property No.1 Inc. and 3257664 NS Ltd	Jan. 2012	\$ 700,000	13.89	\$ 50,396	\$ 50,396	Re-sale of the rear land component from index #8a. Zoned Wentworth Road Commercial (WR-C)
8c.	Somerled Property No.1 Inc. and 3257664 NS Ltd to Sobeys Capital Inc. as general partner for Sobeys Developments Limited Partnership	Dec. 2012	\$5,322,500	13.89	\$383,189	\$383,189	Re-sale of index #8b

[Exhibit M-8, pp. 193-195]

[23] After analyzing the various properties in the Land Sales Chart, in his updated report, Mr. Weatherby came to his final opinion on the market value of the Property at the time of expropriation:

Index #7b (\$10,527/acre)

This was included as index #8 in our original report as an active listing. It sold in 2012 for very close to the asking price and the resultant price per acre remains virtually unchanged on the Land Sales Schedule. As noted in our original report, this property had been listed for sale for many years, originally at a price of \$525,000 in 2005. It was eventually reduced to an asking price of \$179,000 in 2010, a price we considered to be "more realistic" when discussing it in our original report, and which the eventual sale in 2012 confirmed.

Index #8a/b/c

This was included as index #6 in our original report as a 2005 sale. That purchaser was responsible for getting the land released from the protected marshland designation and having it rezoned for commercial use. The road frontage portions were then sold and developed with a gas station (Petro Canada) and two freestanding restaurants (Subway and A&W). The rear land portion is the subject of the two most recent sales, indices #8b and 8c, and this land is now owned by Sobeys.

The two most recent sale prices are vastly higher than the original price and reflect the maturing commercial potential of the property. The original 2005 sale price was not given any weight in our original report because of its commercial potential even at that time, and these more recent – and much higher – sale prices are given no weight in this Update Report for the same reason. The land is not representative of the subject's potential use. These sales are included simply to bring the original Land Sales Schedule up to date.

CONCLUSION

As with the original valuation, we have assigned different values to the various components, this time adding the tidal marsh component (11 acres) at a nominal rate of \$250/acre, reflecting its very limited use. That rate matches our analysis of those indices on the Land Sales Schedule which have similar components (indices #s 1, 3 and 4).

The designated (dyked) marshland component (20 acres) was previously valued at \$2,500/acre. We have increased that to \$3,500/acre based on the more recent sales data. Index #1 in particular, being the Town's acquisition of neighbouring land, supports a value above \$3,000 and other sales data supports a value between \$3,100 and \$3,800 for marsh/farmland, with only index #3 showing a price closer to \$2,000/acre. Despite the relatively short time period between the original report and this update report, the increased land rate is justified.

Index #2 at \$10,000/acre is a clear outlier and not representative of land prices for this class of land. That sale has already been explained and dismissed as an indicator of market value for the subject.

The higher rate of \$8,000/acre assigned to the Upland Island (6 acres) in our original report is still appropriate with no new data to support a different rate.

VALUATION

Tidal marsh (outside the dyke)	11.0 acres @ \$ 250/acre	\$ 2,750
Designated marshland (inside the dyke)	20.0 acres @ \$3,500/acre	\$ 70,000
Upland Island	6.0 acres @ \$8,000/acre	\$ 48,000
Total Indicated Value	37.0 acres	\$120,750
<u>Rounded to</u>		<u>\$121,000</u>

[Exhibit M-8, p. 191]

IV ANALYSIS AND FINDINGS

[24] The general principles applied for compensation in expropriation matters have been discussed by the Board on many occasions. *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] S.C.J. No.6, at para. 20, provides guidance:

The expropriation of property is one of the ultimate exercises of governmental authority. To take all or a part of a person's property constitutes a severe loss and a very significant interference with a citizen's private rights. It follows that the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected.

[25] *Dell* went on to say that as a remedial statute, it must be broadly and liberally construed to achieve the purpose of the legislation, which is to fully compensate the impacted landowner. These general principles have not been supplanted by, and in the Board's view, are consistent with, the more recent cases setting out the so-called "modern rule" of statutory interpretation. The foregoing principles do not alter the fact that the burden of proof remains on the claimant to establish, on the balance of probabilities, the amount of the loss.

[26] In this case, the first issue in dispute is the market value of the Property at the time of expropriation. Section 27(2) of the *Act* establishes how that value is determined:

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.

[27] A further consideration that arises when considering market value is the extent the valuation can consider potential future changes to the current use of the Property. The following principles, gleaned from *Jovin Enterprises Ltd. (Re)* 2017 NSUARB 64, paras 11 to 120; *Yarmouth(Town) v. Gateway Importers and Exporters Ltd.*, 2011 NSCA 17, para. 10; and Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed. (Markham, ON: Carswell), 1992, at pages 140-141:

- The Board is not restricted to considering the current zoning and must consider the highest and best use of a property.
- Where the highest and best use of a property is different from the current use, such a different use must be reasonably probable.
- The highest and best use forming the basis for a market value appraisal cannot be speculative or overly optimistic.
- The fact a property lies on the fringe of another type of zoning is a factor the Board can consider when assessing the amount a reasonably prudent purchaser would pay for the property.
- The prospect of obtaining required changes to legal constraints, and the degree to which that prospect exists, are questions of fact.
- Depending on the facts of the case, the foregoing may be too remote to impact valuation.

[28] A portion of the Property, consisting of 11 acres, is located on the St. Croix River side of the Tregothic Dyke which protects the Property. It is essentially tidal marshland which floods with every high tide. It is unsuitable for either agricultural or

development purposes. Both Mr. McLean and Mr. Weatherby say the market value of this portion of the Property is \$250 per acre. The Board accepts that the highest and best use for this portion of the Property is for passive recreational or conservation purposes. The Board has reviewed the comparable sales discussed by the two experts. The Board agrees they form a reasonable basis for establishing the market value at the time of the expropriation. The Board therefore finds the claimant is entitled to the sum of \$2750 for the 11 acres of tidal marshland on the river side of the dyke.

[29] The remaining portion of the Property consists of 26 acres. Mr. McLean indicates the highest and best use of this entire acreage is "...agricultural in the near term with future development potential." It is Mr. Weatherby's opinion that the highest and best use of a portion of the remaining acreage is its current agricultural use. This is because of the restrictions on development on 20 acres based on the current agricultural zoning and the lands being designated marshland. Mr. Weatherby also discussed issues with access and unstable soil conditions which, in his opinion, made development improbable. That said, Mr. Weatherby acknowledges that six acres of upland, outside the designated area, has potential for future development. He described the highest and best use as including "... agricultural structures, telecommunications towers and accessory buildings."

[30] Both experts agree that at least a portion of the Property has a potential for future development, despite its agricultural zoning. Mr. Weatherby's analysis of market value focused on the uses of nearby properties when discussing potential development. Mr. McLean's selected comparable sales were primarily related to agricultural lands with more general potential for commercial development. Interestingly, they reached the same

conclusion of \$8000 per acre as the reasonable market value for the portion of the Property with a potential for future development. The Board finds that Mr. Weatherby's evidence establishes that six acres of upland is outside the marshland designation. The Board agrees with the expert opinions and finds that it is reasonably probable that the 6-acre upland portion of the Property could be used for future development. This is based on it being located outside the marshland designation; near the highway (albeit this could potentially limit the footprint of any structure); visible from the highway; and, near lands which have been commercially developed through rezoning in the vicinity of Exit 5A on Highway 101. This portion of the Property is therefore not subject to all the constraints discussed later for the remaining 20 acres.

[31] The opinion evidence establishes that whether one considers the highest and best use to be potential future commercial development, or for agricultural or communications structures, the market value would be the same. The Board therefore finds that the six upland acres of the Property had a market value of \$8000 per acre at the time of expropriation for a total value of \$48,000.

[32] The opinion evidence on market value is significantly different for the remaining 20 acres of the Property. Mr. McLean says the highest and best use for this portion of the Property is the same as the upland area. Mr. Weatherby says because of the number of constraints, the highest and best use for this portion of the Property is its existing agricultural use.

[33] The *Agricultural Marshland Conservation Act* applies to the portion of the Property where the valuation is in dispute. This legislation requires a permit of variance from the provincial Marshland Administrator before any development can take place. In

a letter dated May 21, 2013, in response to a renewal request related to a variance for the wastewater treatment plant which originated the need for this expropriation, the Marshland Administrator at the time advised the Town of Windsor as follows:

The intention of the *Agricultural Marshland Conservation Act* is to preserve the valuable land assess for agricultural production. However, the Act does provide for variances for projects which are considered to be in the public interest. Facing the rise of environmental pressures, the continued development of non-agricultural infrastructure on these vulnerable flood plains must be thoroughly scrutinized. In the future, it is anticipated that these developments will not be permitted without considerable liability assumed by the proponents.

[Exhibit M-8, p.70]

[34] There are also restrictions imposed by West Hants through its zoning and municipal planning strategy. Aside from the need to amend the agricultural zoning, there are environmental constraints which would require an environmental study for any development with a building larger than 800 square feet.

[35] Finally, the Tregothic Marsh Body is a body made up of property owners owning "...tidal lands along the Avon and St. Croix Rivers and their tributaries, protected from the sea by the Tregothic Dykes." Based on what the Board has gleaned from the Marsh Body's by-laws, it appears its primary role is to provide protection of the land from the sea and supervise drainage within the Tregothic Marsh.

[36] The evidence further establishes that the Property currently has no municipal services and is accessed by private roads which belong to the Province of Nova Scotia. As well, there are railway tracks on the Property which could hinder development. Finally, the Board is satisfied that because of the low-lying nature of the land, there are soil stability issues which would have to be addressed before development could take place.

[37] Based on all the foregoing, the Board finds that any future development beyond the current agricultural use is speculative at best. The Board has not placed a

strong emphasis on the access issues, given they would apply equally to the development of the six-acre upland area. As well, the Board recognizes, as pointed out by Mr. McLean, that there has been significant commercial development at Exit 5A, which lands are also in the Tregothic Marsh area. These properties are also discussed in Mr. Weatherby's report. The evidence indicates the purchaser of these lands was responsible for obtaining the required variances and zoning amendments. These were obtained when the land was subdivided. That said, the Board was provided with no evidence as to the process followed or the rationales for approving the eventual development.

[38] Absent any real plans for development at the time of the expropriation, or even preliminary discussions with the Province or the municipality about potential development, there is no evidence that an owner could have met the requirements of the Marshland Administrator or West Hants to develop the Property. While Mr. Richard acknowledged that, depending on the benefits associated with a particular proposal, rezoning was theoretically possible, he was not providing any opinion as to whether it was reasonably probable, nor was he qualified to give such an opinion.

[39] In the end, there is simply insufficient evidence to establish that all the required approvals, variances, municipal services and construction limitations could be overcome to make commercial development, or even residential development, a reasonable probability on the Property. The Board therefore accepts that based on the evidence before it, the current agricultural use is the highest and best use for the remaining 20-acre portion of the Property.

[40] While accepting Mr. Weatherby's opinion on highest and best use, the Board has some difficulty with Mr. Weatherby's opinion on the market value of this portion

of the Property. It is Mr. Weatherby's opinion that Indices #1, 4, 5 and 6b in the updated report are realistic benchmarks for the market value of the Property. They range from \$3,157 per acre to \$3,808 per acre. Mr. Weatherby chose a market value of \$3,500 which is close to the mid-point of these values. This value is also close to the purchase price paid by the Town of Windsor (\$3,265) for an adjacent lot acquired through negotiation with the landowner for the same water treatment project.

[41] The Board's concern arises from the fact Mr. Weatherby completely discounted another adjacent property (Index 2) where the municipality negotiated a purchase price of \$10,000 per acre. The Board understands this is an outlier involving a small lot where there was an original misapprehension about its size which led to a higher appraised value than was warranted. However, the lot size was known when the Town of Windsor proceeded with the purchase. The focus was on the total global price rather than the price per acre determined by the independent appraisal obtained from Turner Drake.

[42] The Board agrees that \$10,000 per acre does not represent a reasonable assessment of the market value of the Property, especially since the market value for the portion suitable for development has been established at \$8000. Aside from the somewhat unusual circumstances of the negotiation, small lots may well sell at a higher price per acre than larger ones.

[43] That said, the Board is of the opinion that a negotiated sale of an adjacent lot with the very municipality contesting the market value of the Property should not be completely and summarily discounted. It tends to show that, even in the designated

marshland of the agricultural zone, a property which has visibility from the highway, and a good location close to a town, might well have some uses that go beyond a hay field.

[44] In the Board's opinion, by far the greatest weight should be attributed to the market value determined by Mr. Weatherby. This is because Mr. Weatherby has found a number of comparable properties which lend support to his valuation. Assigning a weight of 90% to the market value determined by Mr. Weatherby and 10% to the negotiated purchase price for Index 2 would be appropriate in the circumstances. This would adequately adjust for the total discounting of Index 2.

[45] Applying the above weighting would result in a price per acre of \$4,150. While not the reason for arriving at the figure, it is close to, but below, the average value of what the Board considers are the five most comparable properties, which includes Index 2. It is also slightly above the value obtained if the Board were to apply the same 90/10 weight to Indices 1 and 2, which are the two sales closest to the Property.

[46] The Board therefore finds that the Property had a market value of \$4,150 per acre at the time of expropriation. This results in a market value of \$83,000 for the 20 acres within the designated marshland area on the highway side of the Tregothic Dyke. The total market value of the Property is therefore set at \$133,500.

[47] The issue of any loss associated with the claimant's alleged haying operations was complicated by the fact the claimant called no witness to testify about the nature or value of the haying operation. Mr. Pineo explained the claimant's circumstances and his decision not to appear at the hearing. A decision was made to proceed in any event.

[48] The Board has evidence from Mr. Richard. He personally observed Mr. Morash conduct haying operations on the Property. He said Mr. Morash did not hay every year but did so most years. He further said that the majority of the time the hay was left to rot in the field. This clearly indicates that some time Mr. Morash did not leave the hay to rot. The foregoing is insufficient to establish the extent of Mr. Morash's haying endeavours. It has not been established that Mr. Morash was in the business of selling hay. It certainly does not justify a business loss claim for 11 years' worth of haying operations.

[49] In fact, a complete loss of a haymaking business would have not been valued by the Board in this way in any event. The loss for the complete destruction of a business is usually the value of the business at that time (which can be calculated in a number of ways, depending on the circumstances), and not loss of income for 11 years into the future. The value of the haymaking business at the expropriation was not established during the hearing. In fact, the only reference to any value attributable to the haying operations is found in the claimant's Supplemental Pre-Hearing Brief dated October 11, 2022, where Mr. Pineo described what he anticipated Mr. Morash would testify to about the number of bales of hay, and the value per bale, the Property had generated in the past. No such evidence was provided at the hearing.

[50] Faced with these circumstances, Mr. Pineo submitted there was evidence Mr. Morash was a farmer, that he hayed the land, and at least some of the time made use of the hay. As the hay had some value to Mr. Morash, Mr. Pineo said the claimant was entitled to disturbance damages pursuant to s. 27(3)(b)(ii) of the *Act*, based on a percentage of the market value of the Property, because the loss could not be practically

estimated or determined. Mr. Shanks said there was no evidence upon which the Board could base an award for such a loss associated with haying.

[51] Section 27(3) of the *Act* states:

27(3) Where the owner of land expropriated was in occupation of the land at the time the expropriation document was deposited in the registry of deeds and, as a result of the expropriation, it has been necessary for him to give up occupation of the land, the value of the land expropriated is the greater of

(a) the market value thereof determined as set forth in subsection (2); and

(b) the aggregate of

(i) the market value thereof determined on the basis that the use to which the land expropriated was being put at the time of its taking was its highest and best use, and

(ii) the costs, expenses and losses arising out of or incidental to the owner's disturbance including moving to other premises but if such cannot practically be estimated or determined, there may be allowed in lieu thereof a percentage, not exceeding fifteen, of the market value determined as set forth in subclause (i),

plus the value to the owner of any element of special economic advantage to him arising out of or incidental to his occupation of the land, to the extent that no other provision is made by this clause for the inclusion thereof in determining the value of the land expropriated.

[52] Disturbance damages are a form of economic loss not otherwise captured in the market value of a property or in a business loss valuation. The Board has determined in the past it must be grounded in a dislocation or a potential dislocation caused by the expropriation. It is not necessary that an actual relocation take place. In this case, haying was made impossible by the expropriation.

[53] Mr. Morash is elderly, frail, and in poor health. As Mr. Pineo did not request an adjournment, the Board infers this state of affairs is not likely to change. Given the history of the proceeding to date, the Board infers Mr. Morash would have testified if he had been able to do so. As hay was not always left in the field to rot every year, it had some value to Mr. Morash, beyond the market value of the Property. The Board is

satisfied Mr. Morash suffered some economic loss when his occupation of the property was disturbed.

[54] There is a difference between a difficulty in calculating a loss and a loss that is incapable of calculation [see: *Atlantic Mining NS Corp. (D.D.V. Gold Limited) v. Oakley*, 2019 NSCA 14, at para.55]. In the unique circumstances of this case, the person who had knowledge about how the hay was used, and therefore the extent of the loss, could not testify. The Board is satisfied the loss cannot be practically determined or estimated. It is appropriate to apply a percentage to the market value of the Property pursuant to s.27(3)(b)(ii) of the *Act*.

[55] The *Act* gives no guidance on what factors to consider when making an award under s.27(3)(b)(ii). The amount must be reasonable in all the circumstances of the case. Given the evidence of the sporadic nature of the hay harvest, that percentage, and any resulting value, must necessarily be low in this case. The Board has therefore applied a 4% factor to the market value of the Property, set at \$133,750 in this proceeding. This results in an award of \$5,350 for disturbance damages for the loss of ability to harvest hay. There is no interest payable on disturbance damages.

[56] A claimant is generally entitled to interest from the date of expropriation, on any amount outstanding in relation to the market value of the Property, at the rate of 6% per annum, pursuant to s. 53(1) of the *Act*. This is subject to delay considerations pursuant to ss. 53(2) and (4) of the *Act*. In this matter, the claimant requested that the Board retain jurisdiction to determine interest, which Mr. Pineo indicated would be based on the difference, if any, between the Board's award, and the statutory offer which had

been paid. The Board agrees it will retain its jurisdiction to determine the amount of interest payable on the market value award, in the event the parties cannot agree.

[57] Section 52 of the *Act* provides for the payment of "...reasonable costs necessarily incurred by the owner for the purpose of asserting a claim for compensation." Consistent with its past practice, the Board will retain its jurisdiction to determine the amount of costs and disbursements, if any, payable by West Hants in this matter.

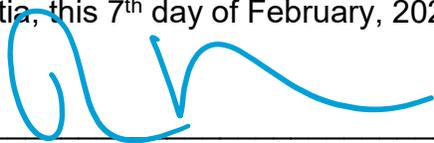
[58] The Board expects the parties to work diligently, as soon as possible, to see if consensus can be reached on the amount of interest, and costs and disbursements, payable in this matter. If the parties cannot agree, the parties should return to the Board requesting a determination in a reasonable time period.

V CONCLUSION

[59] The Board determined the market value of the Property at the time of the expropriation was \$133,750. The Board further determined the claimant was entitled to \$5,350 for disturbance damages. The Board reserves jurisdiction to determine the amount of interest, and costs and disbursements, payable under the *Expropriation Act*.

[60] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 7th day of February, 2023.



Richard J. Melanson