KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 193**

Date: **2025 11 13**
Docket: QBG-PA-00227-2020
Judicial Centre: Prince Albert

BETWEEN:

TOWN OF BIRCH HILLS

APPLICANT

- and -

HOWARD RAY GETZ & 101053489 SASKATCHEWAN LTD.

RESPONDENTS

Counsel:

Curtis P. Clavelle — for the applicant
Neil C. Raas — for the respondents

JUDGMENT — TURCOTTE J.
November 13, 2025

Introduction

[1] On November 1, 2018, the Town of Birch Hills [Town] passed an expropriation bylaw and deposited a plan pursuant to ss. 3 and 4 of *The Municipal*

Expropriation Act, RSS 1978, c M-27 [*MEA*], to take 44.68 acres of land from Howard Ray Getz and 1.21 acres of land owned by 101053489 Saskatchewan Ltd. [expropriated land]. 101053489 Saskatchewan Ltd. [489 Sask. Ltd.] is a privately held corporation controlled by Mr. Getz through which he carries on an intensive grain farming operation in the Rural Municipality of Birch Hills. For ease of reference in this decision, I refer to Mr. Getz and 489 Saskatchewan Ltd. cumulatively as the Respondents. The deposit of the plan initiated the process for expropriation of the land and gave the Respondents the right to obtain compensation for the taking. The Town and the Respondents ask the Court to determine the amount the Respondents should be paid for the expropriated land.

[2] The Town says the Respondents should be paid $97,000. It relies on an appraisal of the estimated value of the expropriated land dated August 17, 2020 [Appraisal Report] (Exhibit P1, Tab 9), prepared by Kimberly Maber, an accredited professional appraiser of the Appraisal Institute of Canada. Ms. Maber testified as an expert during the hearing before me. For its part, the Respondents say they should be paid a minimum of $187,500, based on the terms and conditions under an accepted offer to purchase between the parties dated May 31, 2018 [Agreement for Sale] (Exhibit R2). The Respondents did not put forward a separate appraisal of the value of the expropriated land.

[3] For the reasons that follow, I determine the value of the expropriated land to be $187,500 and is the amount the Town must pay to the Respondents, prorated between Mr. Getz and 489 Sask. Ltd. as a function of the total acres of land expropriated from the Respondents respectively.

Background Facts

[4] The expropriated land is located on the NE-21-46-24-W2 [NE-21] and the SE-21-46-24-W2 [SE-21]. NE-21 was Mr. Getz's home quarter section of land. Prior to being owned by him, it was his parents' home quarter which they had acquired in the early 1960s. Mr. Getz's home and farmyard out of which he operates his intensive grain farm are situated in the northwest corner of NE-21, directly adjacent to the northeast boundary of the Town of Birch Hills. 489 Sask. Ltd. owned SE-21. Both quarter sections of land were farmed by Mr. Getz in addition to another 13 quarter sections of land situated near the Town of Birch Hills, including some land contiguous with the NE-21 and SE-21.

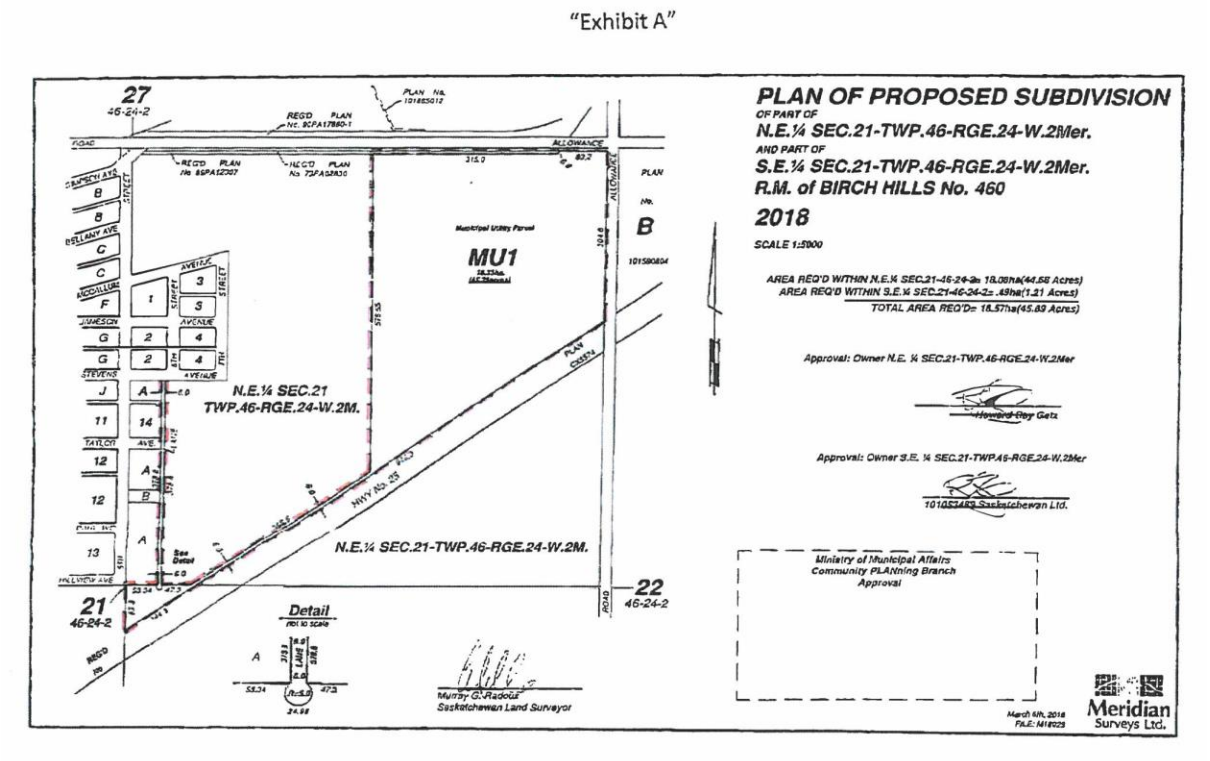
[5] NE-21 and SE-21 are not homogenous as they are separated by Highway 25 which runs through the northwest corner of SE-21 and the southeast quadrant of NE-21. Prior to the expropriation, Mr. Getz had easy access to SE-21 from NE-21 across Highway 25 from approaches built up on either side of the highway.

[6] Ms. Roseanne Roy, the Chief Administrative Officer for the Town testified on behalf of the Town. She stated the Town required the expropriated land for the purposes of drainage, storm sewer management, and to create an alley behind the Town's residential properties abutting NE-21 along the Town's eastern boundary.

[7] The Town began negotiating with Mr. Getz in or about 2010 when the Mayor contacted him seeking to acquire the land by agreement with an initial offer made in the range of $3,500 to $3,700 per acre. Mr. Getz indicated he would want $4,500 per acre. Those negotiations continued sporadically between the parties over the next seven years, including after intervening municipal elections, concluding with the Agreement for Sale in May 2018. Under the terms of the Agreement for Sale, the parties agreed to a purchase price of $187,500 for the land identified on the Plan of Proposed

Subdivision, which was appended as Appendix ‘A’ to the Agreement for Sale. The same Plan of Proposed Subdivision was attached as Exhibit “A” to the plan deposited by the Town on November 1, 2018 (Exhibit P1, Tab 3). The following image of the Plan of Proposed Subdivision illustrates the portions taken by the Town from NE-21 and SE-21, which are delineated by red broken lines.

“Exhibit A”



[8] The Agreement for Sale provided for payment on or before the possession date of September 1, 2018, with adjustments for all taxes and amortized local improvements to be made as of that date, but subject to a condition as follows:

> In the event that the possession date is moved forward or extended by consent of both the Purchaser and the Vendor, the Vendor will be responsible for the taxes and any amortised improvements up to the new possession date and the Purchaser shall pay them after that date.
>
> (underlining in original)

[9] The Agreement for Sale included the following additional conditions:

> 1. Upon the Purchaser seeking approval from Municipal Affairs – Community Planning for subdivision of the said parcel by the possession date.
>
> 2. The Purchaser agrees that in the event that they construct the back alley on the property, the Purchaser will remove any top soil from the construction of back alley and provide the top soil to the Vendor. The Town will only be responsible for the removal and placement of the top soil and will not spread the topsoil for the Vendor.
>
> 3. The Town agrees to construct a berm to allow for the removal of a ditch block which is currently located on the property.
>
> 4. The west boundary of the property line for the back alley will be located as is outlined on the Plan of Proposed Subdivision completed on February 8, 2011.
>
> 5. The Town will be responsible for all surveying and subdivisions fees.
>
> 6. The Vendor shall be able to farm the said land which is not being utilized by the Purchaser for the duration of the time which he owns the remaining source quarter sections. (SE Sec 21 Twp 46 Rge 24 W2, and NE Sec 21 Twp 46 Rge 24 W2)

[10] Mr. Getz testified that the condition with respect to the construction of an alley was to stop the homeowners in the Town whose properties abutted on NE-21 from driving in Mr. Getz's field to access the rear of their properties. If the alley was constructed, any topsoil removed was to be made available for Mr. Getz's use to fill in low spots on his land.

[11] On or about September 4, 2018, Christina Getz, Mr. Getz's spouse, attended at the Town Office to inquire as to the payment owing under the Agreement for Sale given that the possession date had passed with no payment having been received. No further communication was received by the Getzes from the Town, until

a letter faxed from the Town's lawyer to the Respondent's lawyer on October 9, 2018 (Exhibit P1, Tab 8) advising as follows:

> I have been advised by my clients that Mr. Getz no longer wishes to proceed with the sale of land to the Town of Birch Hills. I assume that Mr. Getz's position is based on the fact that the possession date had passed on September 1, 2018. My client has applied for approval of the subdivision and this process has taken longer than originally anticipated, however my client still wishes to proceed with the sale. Please advise if your client would be agreeable to an extension to allow the sale to proceed as intended.
>
> As you are aware my client was originally proceeding with expropriating the said land. In the event that we do not have an amicable agreement for an extension within 10 days, my clients will be proceeding with expropriation. If the Town proceeds to expropriate the Town will not be paying Mr. Getz the amount originally agreed to purchase the land. The Town will be following the procedures contained within the legislation which will value the land based on its current fair market value. Mr. Getz will also not benefit from the conditions agreed to in the offer to purchase.

[12] On October 10, 2018, Mrs. Getz sent an email to Tara Gariepy, the Town's then Chief Administrative Officer, advising as follows:

> This contract was up on September 1 2018. Since there has been no kind of communication with you since September 4 2018 when Chris came to see you We consider this contract with the town of Birch Hills expired.
>
> Please contact Ray after harvest and we may be willing to renegotiate.

[13] It was not clear on the evidence whether the Getzes were given a copy of the Town's lawyer's letter prior to sending their email communication to Ms. Gariepy on October 10, 2018. Regardless, the Town did not follow up with the Respondents, other than by letter dated December 18, 2018 (Exhibit P1, Tab 6) providing formal notice of the Town's intent to expropriate the land under the *MEA* which included notice

of the Respondents' right to seek compensation [Notice to Expropriate]. The Notice to Expropriate was made pursuant to the resolution of Town Council of November 1, 2018 and the plan deposited by the Town on November 28, 2018.

[14] After the expropriation, it was anticipated that Mr. Getz would no longer have access across NE-21 to SE-21 due to the proposed sewer water corridor on the taken land on NE-21 running parallel with Highway 25. As at the date of the hearing, that work had not been done, such that his access across Highway 25 seemed to continue unimpeded. However, after the land had been expropriated Mr. Getz had not been allowed to continue to farm any portion of the land not being utilized by the Town. The Town farmed that land. Moreover, the Respondents could no longer compel the Town to build a berm or to provide them with any topsoil taken to build the alley.

[15] Further, although the Town subsequently obtained subdivision approval on June 24, 2019 (Exhibit P1, Tab 4) to be able to continue its expropriation proceedings and ultimately obtained title to the expropriated land on August 16, 2019 (Exhibit P1, Tab 5), the Town has not paid the Respondents for the land and no money has been paid into court by the Town. Ms. Roy testified that the Town has been farming the expropriated land and using any proceeds from farming to support municipal facilities.

Issues

[16] The sole issue is the amount of compensation to be paid to the Respondents for the land expropriated by the Town.

[17] After the Notice to Expropriate was received, there were several delays in the parties moving this matter to the eventual hearing before me after the order made by Scherman J. on April 6, 2021 directing that a hearing be held. Those delays do not bear on the substantive decision to be made relative to determining the amount to be

paid as compensation by the Town to the Respondents for the value of the expropriated land. However, in their written submissions the parties have raised collateral issues as to whether interest should be payable by the Town to the Respondents on the amount to be paid in compensation from the date of expropriation and on the issue of costs. The Town has asked to have the issues of interest payable, and costs, reserved to be spoken to after my decision herein has been rendered, as it says an amount for compensation was tendered by the Town to the Respondents pursuant to s. 10 of the *MEA*. The Town did not disclose particulars of the tender during the hearing.

Legal Principles

[18] Sections 3, 4, 7, 9 and 10 of the *MEA* are relevant to the issues arising out of the factual summary above:

> **Expropriation bylaw**
>
> **3**(1) If the council desires to acquire land for any purpose authorized by the appropriate municipal Act, and cannot acquire the land by agreement with the owner, the council may pass a bylaw to expropriate the land in the name and on behalf of the municipality.
>
> (2) The bylaw shall specify the land and state the purpose for which it is required.
>
> **Deposit of plan**
>
> **4** The council shall cause to be deposited with the clerk or secretary treasurer a plan of the land to be taken, specifications showing the work, if any, to be done thereon and the names of the owners thereof according to the last revised assessment roll and the records of the Land Titles Registry.
>
> **…**
>
> **Compensation determined by judge, failing agreement**
>
> **7**(1) Where the amount of compensation is not agreed upon and the claim has not been barred under subsection (2) of section 5, the compensation shall, subject to section 8, be determined by a judge, upon application to him by either party.

> (2) Upon such application the judge shall appoint a time and place for a hearing, and notice thereof shall be given by the applicant to the other party at such time and in such manner as the judge directs.
>
> (3) Either party may, with leave of a judge of the Court of Appeal, appeal to the Court of Appeal from the decision of a judge.
>
> …
>
> **Basis of award**
>
> **9** In estimating the amount to which the claimant is entitled, the judge or the arbitrators shall consider and find:
>
> (a) the value of the land and all improvements thereon as of the date of the deposit of the plan under section 4; and
>
> (b) the damage, if any, to the remaining land of the claimant;
>
> and from the amount so found the judge or the arbitrators shall deduct any increased value to the remaining land of the claimant by virtue of work done or to be done on the land taken.
>
> **Tender**
>
> **10**(1) The council may tender to a person claiming compensation such amount as it considers proper compensation for the land taken or injuriously affected.
>
> (2) If the amount so tendered is not accepted by the claimant and if the amount of compensation determined by the judge or arbitrators, as the case may be, is not greater than the amount so tendered, the costs of proceedings before the judge or arbitrators shall be awarded to the municipality and set off against any amount awarded against it; otherwise the division of costs shall be in the discretion of the judge or arbitrators.

[19] The Court is to determine the amount to which the Respondents are entitled through the "value to owner lens" as indicated in *Diggon-Hibben Ltd. v R*, [1949] SCR 712 at 715 [*Diggon-Hibben*]. This approach was reiterated by the Court of Appeal in the oft-cited decision of *Luzny v Craik (Town)*, 2013 SKCA 94 at paras 10-11, 423 Sask R 116 [*Luzny*]:

10 To assess the merits of the appellant's second ground of appeal, it is helpful to briefly set out the basis for the determination of the value of expropriated land. Saskatchewan continues to use the "value to the owner" basis, as opposed to the statutory criteria adopted by other provinces, for awarding compensation in expropriation cases. This means the determination of compensation is left largely to the judgment of a judge, or arbitrator, as the case may be. In this respect, it is settled law in Saskatchewan that the principles which guide that decision under s. 9 of *The Municipal Expropriation Act* are the same principles as apply to any other expropriation (see: *Serviss v. Flett's Springs (Rural Municipality No. 429)* (1960), 26 D.L.R. (2d) 633 (Sask. C.A.)). In other words, the judge or arbitrator is to determine the value of the land to the owner as the land existed at the date of the expropriation and the value must include all the advantages the land possesses, both present and future. The following passage from *Diggon-Hibben Ltd. v. The King*, [1949] S.C.R. 712, at p. 715, is often quoted in explanation of the primary principle at play: "The owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it."

11 It is common sense that market value is the main component of expropriation compensation (see: *Shamon v. Biggar (Rural Municipality No. 347)*, 2003 SKQB 155, [2004] 7 W.W.R. 342). Market value is usually determined, at least in part, by looking to the highest and best use of the land which has been expropriated from an owner, as was done by the respondent's expert assessor in this case. However, what the "value to owner" principle suggests is that an owner may adduce evidence in addition to evidence of market value with a view to establishing that expropriated land had an enhanced value to the owner. For example, a "special value" may attach to land where the owner was in fact putting the expropriated land to some use to which it was especially suited and which is of economic value to the owner, but which did not enhance the market value of the land in the eyes of a third party (see: Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed. (Toronto: Carswell Thomson Professional Publishing, 1992) at pp. 113-117). Similarly, provided there is sufficient evidentiary basis for it, a judge may recognize an owner as having experienced damage for which compensation may flow, under the head of "special adaptability" or "potential value", by reason of a

> foregone potential future use of land which has been expropriated (see: Todd, at pp. 122-125); nevertheless, the court accepting such a proposition would take care to calculate only the present value of the unrealised possibility (see: *Haskey v. Wadena (Town)* (1982), 18 Sask. R. 215). (emphasis added)

[20] Justice Mitchell in *Mount Hope No. 279 (Rural Municipality) v Chamberlin*, 2021 SKQB 114 at paras 16-21 [*Chamberlin*], summarized the principles emerging from *Diggon-Hibben*, *Luzny* and his review of leading cases, as to the determination of the value of expropriated land under the *MEA* as follows:

> 16 From this extended passage, certain fundamental principles emerge. First, the quantum of any such compensation is to be ascertained through what is commonly referred to as the "value to owner lens". See, for example: *Rural Municipality of Sherwood, No. 159 v Delarue*, 2018 SKQB 257 at para 21 [*Delarue*]; *Shamon v Biggar (Rural Municipality No. 347)*, 2003 SKQB 155 at para 15, 234 Sask R 49; *Golden Lantern Hotel Ltd. v Regina (City)* (1991), 96 Sask R 66 at para 12 (QL) (Sask QB) [*Golden Lantern Hotel*]; *Kjersem v Roche Percee (Village)* (15 March 1991) Regina, QB 134/1990 (Sask QB) [*Kjersem*] at 2; and *Ilnicki v Buckland (Municipality)* (1982), 19 Sask R 99 at paras 12-13 (QL) (Sask QB).
>
> 17 Second, "market-place value" is the principal component for determining appropriate expropriation compensation. This determination focuses on the highest and best use of the land, namely "the use that would bring about the highest economic value on the open market". See: *A.C.G. Investments Co. v Regina (City)* (1984), 35 Sask R 140 at para 7 (QL) (Sask QB) quoting *Farlinger Development Ltd. v East York* (1973), 5 LCR 95 at 127 (Ont LCB) and *Colhoun v Rural Municipality of Lumsden, No. 189*, 2014 SKQB 321 at paras 29-32, 458 Sask R 84 [*Colhoun*].
>
> 18 In *Colhoun*, for example, Barrington-Foote J. (as he then was) at para. 32, endorsed the following definition of "highest and best use" found in *The Appraisal of Canadian Real Estate, Third Canadian Edition* at 12.1:
>
> > [32] ...
> >
> > Highest and best used may be defined as follows:

> The reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, and financially feasible and that results in its highest and best used.

This definition was also accepted by Leurer J.A. (*ex officio*) in *Delarue* at para 30.

19 Third, the value of the expropriated land to the owner is generally accepted to be "the greater of (a) the market value of the bare land for the highest and best use, or (b) the market value of the bare land for the use for which it is being used, plus the amount that the value is improved by the business, buildings and fixtures plus loss caused by business disturbance". See*: Golden Lantern Hotel* at para 13, quoting *Saskatoon (City of) v Smith-Roles Ltd*., [1978] 2 SCR 1121 at 1128.

20 Fourth, the owner of the land being expropriated may adduce evidence to demonstrate to a judge or an arbitrator that it has enhanced or special value to him or her. Typically, this will require evidence from a qualified independent appraiser or expert. See, for example: *Luzny* at para 11 and *Delarue* at para 22.

21 Fifth, the onus is on the owner to present sufficient evidence which would demonstrate any enhanced or special value which they are claiming in addition to the assessed market value.

Analysis

[21] As noted, the Town relied on Ms. Maber's appraisal of value to argue the Court should determine the value of the expropriated land at $97,000, based on its highest and best use as agricultural lands. She made this determination despite knowing that the Town required the expropriated land as part of its development plan for storm sewer management and to create an alley along a portion of the northeast boundary of the Town to prevent the Town's property owners from driving on Mr. Getz's land to access the rear of their properties. Further, she described the expropriated land at page 24 of the Appraisal Report as:

> …unique [parcels] given that they were immediately adjacent to the Town of Birch Hills and identified on the Official Community Plan map as being potential future residential and/or highway commercial areas. The subject sites were agriculturally sized parcels and there was limited immediate demand for subdivision development on this parcel at the effective date. …

[22] Ms. Maber based her estimate of value for the expropriated land on two variants of the direct comparison approach: the "before and after method", which values the expropriated land before and after the taking, with the difference between the two values being the value of the taking; and the "across the fence method", which values the expropriated land based on an estimate of unit values for the taking based on the market value of typical lands in the vicinity or adjacent to the partial taking, which have similar characteristics to the expropriated land.

[23] To obtain appropriate comparable agricultural lands, Ms. Maber assessed land transactions for 2017 and 2018 in the R.M. of Birch Hills based on information from the Farm Land Security Board and the Multiple Listing Service, which she assumed were all arm's length transactions, and were cross-checked with the land titles system. Ms. Maber acknowledged that the NE-21 was Mr. Getz's home quarter. However, she did not speak to Mr. Getz about any special qualities of the land. Further, she attributed no additional value to the parcel of NE-21 taken by expropriation, as she noted the yard site in the northwest portion of NE-21 still had farmland abutting it to the northeast after the taking. She accepted that Mr. Getz's access across NE-21 to SE-21 and the land farmed by him through 489 Sask Ltd. contiguous with SE-21 was affected by the expropriation. However, she did not factor in any value for the same, as she surmised Mr. Getz would continue to have access to that land by travelling on municipal roadways.

[24] Ms. Maber noted the expropriated land was "high-quality agricultural lands with few comparable sales within the R.M. of Birch Hills." Therefore, she looked

to comparable sales of agricultural land outside of the R.M. of Birch Hills, including sales in the R.M. of Buckland, north of Prince Albert, one sale of multiple parcels of land adjacent to the City of Melfort, sales in the R.M. of Flett's Springs, a sale adjacent to the Town of Shellbrook, sales of parcels of land located within the Town of Nipawin and a sale outside of the Town of Kindersley. In assessing the comparable sales or "indexed properties" to the expropriated land, Ms. Maber made determinations as to the superior or inferior quality of the agricultural land to eventually arrive at a per acre value of $2,100 for the NE-21 taken parcel and $2,500 for the SE-21 taken parcel. In doing so, Ms. Maber noted the potential longer term development potential of some of the comparable properties adjacent to a town or city. However, with no immediate plans for development of the same, each of those indexed properties were assessed by her as agricultural lands and not for their future potential development.

[25] Ms. Maber's approach may be completely appropriate if the intended use of the taken land by the Town was agricultural and there was no way for the Respondents to have realized on the unique value of their land situated adjacent to the Town having regard for the Town's need to acquire that land for its sewer water management and to give access to its property owners abutting NE-21 to the rear of their properties through the creation of an alley. But there had been.

[26] Ms. Maber was unaware of the prior Agreement for Sale which was the result of seven years of on-and-off negotiations between the parties. In preparing the Appraisal Report, Ms. Maber acknowledged she was not advised as to the tenor of those negotiations. She was not given an opportunity to question the parties as to how they had arrived at a value of $187,500, exclusive of GST, but inclusive of the Town's obligation to construct an alley, make any topsoil removed to construct the alley available to Mr. Getz, construct a berm and permit the Respondents to continue to farm the land not utilized by the Town. No evidence was led by the parties to quantify any

incidental value the Respondents could derive from these latter obligations. As noted above, Ms. Roy acknowledged the Town has been farming the expropriated land and using any proceeds derived therefrom to support its municipal facilities. She did not testify as to how much revenue the Town has generated from farming the land.

[27] Ms. Maber did state under cross-examination that had she been made aware of the Agreement for Sale prior to completing the Appraisal Report, she would have questioned the parties as to how they arrived at the stated purchase price, which she said was not supported by her research comparing the expropriated land to the other agricultural land. She was not prepared to otherwise speculate on the meaningfulness of the value agreed upon between the parties under the Agreement for Sale. Nevertheless, I note the definition of "Market Value" from the Appraisal Institute of Canada stated in her appraisal report at pages 10-11 as follows:

> **4.2 DEFINITION: MARKET VALUE**
>
> Market value is defined by the Appraisal Institute of Canada as follows:
>
> The most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress (see The Appraisal of Real Estate, Third Canadian Edition, Appraisal Institute of Canada; Larry Dybvig, Editor; Sauder School of Business, University of British Columbia, at 2.8).
>
> The viewpoint of the Appraisal Institute of Canada expands the definition as follows:
>
> Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:
>
> 1. Buyer and seller are typically motivated;

2. Both parties are well informed or well advised, and acting in what they consider their best interests;

3. A reasonable time is allowed for exposure in the open market;

4. Payment is made in terms of cash in Canadian dollars or in terms of financial arrangement comparable thereto; and

5. The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale (ibid. at 2.10).

[28] It is uncontroverted on the evidence that the Town and the Respondents negotiated over a period of seven years, each acting prudently, knowledgeably and for their own self-interest, without duress, to arrive at an agreement through which the Town could acquire the land from the Respondents at a value of $187,500, along with the incidental benefits flowing to the Respondents to be able to continue to farm the land not being utilized by the Town and to obtain the topsoil from the construction of the alley.

[29] The Town submits that agreement should have no bearing on the Court's determination of the value of the compensation to be paid to the Respondents for the expropriated land. The Town argues in part at paras. 28 and 30 of its Brief of Law, without citing any authority for the proposition, that the Court is required to assess the value of the expropriated land based on "…market value. The value of the land is not to be based on a defunct agreement between two parties who had no expertise in valuing land. … trying to get a deal done to avoid the expropriation process." The Town further argues that since the Respondents were not prepared to grant an extension of time to allow it to fulfill "its condition relating to subdivision approval" that the Respondents chose to terminate the agreement. As such the Town suggests the Respondents cannot seek compensation based on the benefits they could have enjoyed under the Agreement for Sale. The Town contends that since the Respondents did not seek specific

performance of the Agreement for Sale and given that the limitation period for such an action has passed, they are without a remedy, other than to seek compensation under the *MEA*.

[30] Although the latter point on seeking specific performance may be valid, it makes no sense to me having regard for s.3 of the *MEA*, and the legal principles cited in the jurisprudence above, how the "value to owner lens" to the valuation analysis can ignore a prior agreement for sale between the owner and the expropriating municipality for the taken land. No authority was cited to support the proposition that an expropriating municipality can avoid paying the agreed upon value for the taken land under a prior agreement for sale between the parties in circumstances such as this. That such authorities do not exist is not surprising, given the wording of s.3 of the *MEA* which contemplates expropriation proceedings by a municipality only where it is unable to acquire the land by agreement with the owner. Here, the Town had an agreement with the Respondents for obtaining the land. The Town takes umbrage with any suggestion by the Respondents of a lack of good faith on its part in completing the transaction on its terms. Rather, it blames the Respondents for failing to provide it with an extension of time under the Agreement for Sale, even though there was no evidence of such an extension being sought until after September 1, 2018.

[31] Contrary to the submissions of counsel for the Town, the Agreement for Sale was not subject to a condition precedent requiring the Town to obtain subdivision approval in advance of completing the sale, such that without that approval the Agreement for Sale was "defunct". Rather, the condition under the Agreement for Sale, as set out above, was that the Town would seek approval from Municipal Affairs – Community Planning for subdivision of the land by the possession date. That condition was not a true condition precedent, as it did not hinge in any way on the uncertain decision or action of a third party or on any other external event or development: *Turney*

v Zhilka, [1959] SCR 578; *Barnett v Harrison*, [1976] 2 SCR 531; and *Wenkoff v Wenkoff Estate*, 2021 SKCA 5, 63 ETR (4th) 177. The fulfillment of the condition depended only on the Town submitting its application for subdivision approval by the possession date, not that subdivision approval be granted by possession date. If the latter condition was intended, clearer language in the Agreement for Sale should have been used.

[32] No explanation was provided by the Town to the Respondents as to why there was a delay in paying the purchase price by the possession date under the Agreement for Sale. The letter sent to the Respondents' lawyer on October 9, 2018 (Exhibit P1, Tab 8) by the Town's lawyer advised: "My client has applied for approval of the subdivision and this process has taken longer than originally anticipated, however my client still wishes to proceed with the sale." The letter goes on to threaten that if the sale did not proceed, the Town would expropriate the land "based on its current fair market value" without the Respondents benefiting from the other conditions agreed to under the Agreement for Sale. The Town's position in the letter was that the "current fair market value" of the land would be other than the value agreed upon under the Agreement for Sale.

[33] Even though the Respondents advised the Town on October 10, 2018 that they considered the contract with the Town to be expired due to the Town's failure to complete the agreement on its terms, they also indicated they may be willing to re-negotiate "after harvest" (Exhibit P1, Tab 8). The Town did not subsequently seek to re-negotiate with the Respondents. Instead, it began expropriation proceedings against the Respondents. As noted above, the Town did tender an amount for compensation to the Respondents, the particulars of which were not disclosed during the hearing.

[34] The above findings interpreting the Agreement for Sale, including whether there was a failure to complete the Agreement for Sale on its terms or a failure

to extend the terms of the Agreement for Sale, are not made as being decisive of the issue of the compensation to be paid by the Town to the Respondents. They are not. However, in the overall analysis of the evidence, including what weight I should give to the Appraisal Report, I find the parties' prior negotiations are relevant to the issue of compensation to be paid through the expropriation proceeding. I will explain.

[35] In their respective briefs of law, each party has cited a case where this Court has determined the compensation to be paid to an owner of land that has been expropriated taking into consideration prior dealings involving the taken land.

[36] The Respondents rely on *Mini-Mansion Construction Co. Ltd. v City of Saskatoon* (1983), 28 Sask R 61 (QB), where offers had been exchanged between the parties for the subject property prior to the taking by the City. The City had made two prior offers to purchase the property from the owner at $480,000. The owner had countered each offer, with the last counteroffer of $522,000 made four months before the taking. Justice Maher considered the opinions of value estimated by the parties' respective appraisers, the City's appraisal of $450,000 and the owner's appraisal of $568,000, each of which was based on the "cost or market value approach" having regard for comparable properties that had recently been sold, with adjustments made by each appraiser having regard for their respective assessments of the subject property to the comparable properties. In his overall analysis of the evidence, Justice Maher considered the opinions of both appraisers but ultimately determined the value of the taken property at $505,125 which he held logically fell somewhere between the range of values ($480,000 versus $522,000) proffered by the parties in their last round of negotiations, despite the parties being unable to conclude an agreement for the City to acquire the land from the owner at an agreed price.

[37] For its part, the Town cites *Kjersem v Roche Percee (Village)* (1991), 92 Sask R 196 (QB), a decision of Justice Matheson, in which he had to determine the

compensation to be paid by the Village for a parcel of pasture land expropriated from the applicant after the Village had drilled a water well in error on the applicant's land as part of its central water collection and distribution system. The Village tendered evidence of value through a qualified land appraiser who relied on comparable sales of pasture land sold for primary use as pasture land to estimate the value of the parcel taken at $137.50 per acre. The applicant did not tender evidence of value through a qualified land appraiser. The applicant tendered his own evidence as to the value of the taken land, including that it had an enhanced value due to gravel deposits and considering comparable sales of pasture land purchased near the City of Estevan, located approximately 20 kilometres southeast of the Village, which land was used for the installation of a power station, grain storage facilities and by the City for expansion purposes.

[38] Justice Matheson rejected the applicant's evidence, finding that the gravel deposits were not of commercial grade or quantities and that the comparable sales put forward by him could not be seriously or credibly considered as "comparable sales". However, Justice Matheson noted that the parcel of taken land was from a quarter section of land owned by the applicant over which Estevan Coal Corporation possessed a coal lease. Justice Matheson noted that Estevan Coal Corporation had recently concluded the purchase of pasture land near the taken parcel from a third party for $325 per acre, which included a monetary value for "unplanned sale" and for "disruption allowance". Further, Estevan Coal Corporation had offered the applicant $338 per acre for the quarter section of land comprising the taken parcel. That offer had been rejected by the applicant, but negotiations were continuing or would continue. Having regard for all the evidence, Justice Matheson determined the value of the taken parcel at $325 per acre.

[39] Each of these cases support the proposition that the Court can have regard for evidence of negotiations between the parties, including offers made between them, regardless of whether the parties had been able to reach an agreement for the municipality to acquire the land from the owner at an agreed price, leading up to expropriation proceedings. Such evidence is not determinative of the issue but is to be weighed by the Court with all the other evidence to determine the amount to be paid by the municipality to the owner in compensation for the taken land.

[40] Regardless of the position taken by the Town in this proceeding, it fails to recognize that it had reached an agreement with the Respondents to acquire the land for its intended local infrastructure purposes, not for agricultural purposes, at a negotiated agreed upon value with the owner. Ms. Maber was not provided with that information prior to completing the Appraisal Report and she was therefore unable to assess within the context of her appraisal the value agreed to by the parties under the Agreement for Sale, other than to state the value was not supported by her research of comparable agricultural lands. In these circumstances, I attribute less weight to the estimate of value determined by Ms. Maber in the Appraisal Report.

[41] As Justice Leurer J.A. (*ex officio,* as he then was) held in *Rural Municipality of Sherwood, No. 159 v Delarue*, 2018 SKQB 257 at paras 28 and 29:

> [28] The notion of highest and best use embodies the idea that the present use, including zoning, of a property may not maximize its value. The Canadian Uniform Standards of Professional Appraisal Practice [CUSPAP] prescribes standards of practice for members of the Appraisal Institute of Canada. CUSPAP recognizes the possibility of changes in zoning or redevelopment, stating as follows in s. 7.11.2:
>
> > In the context of properties where the highest and best use is for land use change (e.g. rezoning or redevelopment), the Member must reasonably support the imminence or probability of the land use change.

> [29] It is common, and appropriate, for the court to consider not just present, but also possible future uses to which a property may be put.

[42] It was uncontroverted that the Respondents' taken land, situated adjacent to the Town, was the land uniquely identified by the Town for the development of its sewer water management project. The Town was motivated to obtain the land and pursued an agreement with the Respondents for the purchase of the same over seven years. The Town was not looking to acquire agricultural or other lands otherwise. This latter inference is confirmed by the condition under the Agreement for Sale permitting the Respondents to farm the land not being utilized by the Town for the duration of the time which they owned the remaining source quarter sections.

[43] The Agreement for Sale was silent as to any rent or other remuneration to be paid by the Respondents to the Town for the right to continue to farm the land or to obtain topsoil from the construction of the alley. Neither party testified as to whether these formed part of the monetary value to the Respondents for an unplanned sale or a disruption allowance, nor what value otherwise might be attributable to the purchase price for those conditions which benefitted the Respondents. Ms. Maber was not asked to consider those additional conditions as part of her appraisal of value.

[44] Other than NE-21 being Mr. Getz's home quarter, there was no evidence of the expropriated land having enhanced or special value to the Respondents. Indeed, Mr. Getz described the taken parcel from SE-21 as largely wasted land due to its irregular shape and inability to manoeuvre farming equipment on the same.

[45] Finally, other than the disruption to Mr. Getz accessing SE-21 from NE-21 across Highway 25, there was no evidence of damage or loss to the remaining land of the Respondents after the expropriation.

Conclusion

[46] Having regard for the totality of the evidence, I determine the compensation to which the Respondents are entitled is $187,500. The Town shall pay this amount to the Respondents, prorated between Mr. Getz and 489 Sask. Ltd. as a function of the total acres of land expropriated from the Respondents respectively.

[47] The issue of costs and any interest to be paid by the Town on the sum to be paid to the Respondents as compensation for the expropriated land may be spoken to. Counsel shall contact the local registrar within 30 days of this Judgment to coordinate a conference call with me to set a date for the same.

J.
F.N. TURCOTTE