A REVIEW OF THE subdivision development method PART II

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Highest and best use

While the courts have cited countless reasons for rejecting the SDM as a means of estimating land value, the primary reasons for rejection can be found in the conclusion that subdivision is not the highest and best use and the necessary foundational requirements have not been satisfied.

When describing highest and best use, the courts consistently maintain that the contemplated use must not be speculative or too remote in time, and that there be demand for that use. Often, the word *immediate* or *imminent* is used in describing highest and best use. *Black's Law Dictionary Centennial Edition (1891-1991)* provides the following definitions:

Immediate – Present; at once; without delay; not deferred by any interval of time. In this sense, the word, without any very precise signification, denotes that action is or must be taken either instantly or without any considerable loss of time.

Imminent – Near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening.

Both *immediate* and *imminent* relate to the *ripeness* and *demand* of the land for subdivision at the time of condemnation or expropriation. *Ripeness* of land for subdivision means that the landowner and the municipality have executed a subdivision or development agreement that indicates the maximum number of permitted lots and the obligations, financial and otherwise, of the developer, inferring that construction financing has been arranged and servicing contracts are in place. Signing of the subdivision agreement, which must be backed by a letter of credit or other form of security adequate to cover the cost of infrastructure improvements, is a clear expression that the developer is committed to development of the land as a subdivision.

Provided there are no unforeseen impediments on or off the land to the development of the land in question, construction of the subdivision can legally commence following execution of a subdivision or development agreement. Unless a subdivision exists on the ground, inclusive of infrastructure improvements, many courts, in construing the issue of *ripeness*, argue that sales of individual lots is hypothetical, and in the absence of signed servicing contracts, budgeted infrastructure costs are too uncertain to warrant use of the Subdivision Development Method. Further, evidence of sufficient and effective *demand* for new housing consistent with the type proposed (a proxy for finished lots) is the last and most critical foundational hurdle that must be overcome for the courts to accept the SDM as an appropriate valuation model. As aptly noted by the court in *D & D Construction Ltd. v. Consor Builders Ltd.,*[i]

> [a]ll the 'development' in the world is of little benefit if the [proposed] lots cannot be sold. That comes down to market factors… Market conditions are essentially the economists' twin pets of demand and supply.

The collective requirements of *ripeness* and effective *demand* are articulated in the expropriation case of *Shindle v. Yorkton, City Of*[ii] involving 160 acres, by way of reference to the following two cases:

In Hulmann, the property that was already zoned for single and semi-detached housing developments, was expropriated in October, 1970. Sanitary sewers and other services were then available and there was a strong demand for semi-detached housing. In 1969, the claimant had prepared a draft plan of the subdivision. This plan was submitted to the municipal authorities but was not approved for the reason that the land was going to be expropriated. The board adopted the position of

the appraiser… "that the property was in such an intermediate process, having been ripe for development since June, 1969, about one and one-half years prior to the expropriation," at which time a plan had been filed, services were available…and there was a rising market for semi-detached lots- and concluded that the development approach to value was clearly the appropriate one.[iii]

In Harris, 60 acres of farmland was expropriated on 10 November, 1971, of which 17.2 acres had already been sold to Kenman in 1970, under an agreement for sale. In the summer of 1971, Kenman applied to the Nova Scotia Water Resources Commission and the Department of Public Health for 60 'hookups' for modern sewer services. The application was approved 12 days after the property was expropriated. A plan prepared on 10 December, 1970, and revised on 26 July, 1971, showed the 63 lots (3 were added) in the area. MacKeigan, C.J.N.S., at p. 247, stated:

The Plan had no official approval and was merely lines on a piece of paper, except for the Kenman area. It is common ground that the plan of the Kenman area, as first drawn and again as revised, had received unofficial 'preliminary approval' of officials of the Halifax County Town Planning Board and that it should be treated as if it had actually received formal tentative approval at the time of expropriation. By that time, survey stakes had been placed marking streets and at least some lots in the Kenman area; engineering specifications had been prepared for installation of roads, water and sewer (although no physical work had been done); quotations had been received for sewer pipe and other supplies; and, as noted, 'hookup' approvals were secured a few days after expropriation."

In Harris, the learned arbitrator, from whose award the appeal was taken to the Appeal Division of the Nova Scotia Supreme Court, found that the Kenman "lots were ripe for development" and applied the development method in arriving at their value. This finding was not disturbed on appeal.[iv]

The Saskatchewan District Court ruled that *Shindle's* 160-acre tract was not 'ripe' for development, rejecting the development method which indicated a value of $578,251, instead awarding compensation of $192,000 (excluding disturbance damages) based on the comparative (or market data) method of land valuation, while commenting as follows:

…[D]espite the thrust of the residential development in the direction of the subject land, I find, on the evidence, nothing to indicate that development of it was imminent. I find, too, that there is ample evidence of reasonably like sales within a reasonable date of the expropriation. For these reasons, I am reluctant to accept the development method in determining the market value of the subject land, and prefer to adopt the comparative approach, and here more so because the subject property was not reasonably ripe for development. *Eddy v. Minister of Transportation and communication* (1974) 7 LC.R. 120; *POW Investments Ltd. v. Nova Scotia* (1973) 5 L.C.R. 57, (1975) 2 S.C.R. 86.

Shindle appealed the judgement of the lower court to the Saskatchewan Court of Appeal,[v] arguing in part that,

[t]he learned trial judge erred in holding that the subject property was not ripe for development and thereby erred in not taking this into consideration when valuating the subject property [and that]

the comparable sales method was unreliable because there were insufficient reasonably-like sales within a reasonable time of the expropriation of the subject property and in this case the development method of valuating the subject property was preferable.

In dismissing the appeal and affirming the trial judge's ruling, the Saskatchewan Appeals Court made the following observations:

Whether land is 'ripe for development' or whether development of it is 'imminent' are questions of fact and of degree, and the learned trial judge not having overlooked or misapprehended some material evidence of fact, his findings should not be disturbed by this court.

As counsel for the city pointed out, the subject land was located outside the city limits and was zoned for agricultural use and was not annexed within the city limits until January 1978. The subject property at the time of expropriation [November 15, 1976] was being used for agricultural purposes. The appellants had no development plan of their own for establishing the subdivision. Mr. Ervin Shindle [Planner] said their plan to develop a subdivision "did not get off the ground" and Mr. Staseson advised Mr. and Mrs. Shindle to defer development until about 1978. No roads or services had been extended into the land and there was no storm sewer. The time for development was not ripe because many lots remained unsold in Heritage Heights which adjoins the subject land in the north east part of the city and which the city itself was developing. Lots also remained unsold in Silver Heights subdivision being developed by the appellants on the south side of the city.

In an appeal to the British Columbia Supreme Court of an arbitration award involving *Vancouver School District No. 39* and *Royal Oak Holdings Ltd.*[vi], the meaning of 'immediate' in a rent renewal clause had implications for determining highest and best use and market value of a site. The relevant valuation clause of the lease reads in part as follows:

…SAID LANDS would be valued…if vacant and ready for immediate development to their highest and best lawful use by a person or persons ready, willing and able to purchase and develop the SAID LANDS for that immediate use…

As authority that the words 'forthwith' and 'immediately' have the same meaning, the arbitration panel referred to *The Accident Insurance Company of North America v. Young,* [1891] 20 S.C.R. 289, which had quoted from *Queen v. Justices of Berkshire,* 4 Q.B.D. 469, that,

forthwith and **immediately** "are stronger than the expression 'within a reasonable time', and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case."

This interpretation was found to be consistent with the *Oxford English Dictionary, Second Edition, Vol. VII*, definition of *immediate*:

Immediate --"Of time: Present or next adjacent" and "occur-

ring, accomplished, or taking effect without delay or lapse of time; done at once; instant."

On the basis of the interpretation of the meaning of 'immediate' in the context of highest and best use, the arbitration panel concluded that,

[t]he phrase '…immediate use' distinguishes it from uses that are not immediate.

The C-3A zoning of the site provided for an outright approval use, which is a legal entitlement, and a conditional approval use, which involves the exercise of discretion by the city's Development Permit Board.

The 'as of right' zoning permitted immediate development of the site with a broad range of retail uses to a maximum density floor space ratio (FSR) of 1.0, with issuance of a development permit within seven to 12 weeks. On this basis, the indicated value of the property was $6,000,000. Alternatively, the 'conditional approval use' would allow quite a comprehensive range of other uses, notably for manufacturing and residential, to a maximum density of 3.0 FSR with issuance of a development permit taking at least 60 months, with any development subject to public notification. On the basis of conditional approval use at an FSR of 3.0, the indicated value of the property was $11,000,000.

The arbitration panel ruled that the outright entitlement to development at an FSR of 1.0 was more consistent with the highest and best use of the site as implied by the valuation clause in the ground lease, and fixed the market value of the site at $6,000,000.

Conclusion

Regardless of the method applied to the valuation of land, it must be relevant, reliable and properly applied as a measure of market value. Courts prefer the SCA (direct comparison approach) over the SDM as a means of estimating land value. Courts will, however, entertain the SDM, provided subdivision is the highest and best use, and development is 'imminent' or 'immediate,' but only if *all* of the foundational requirements of the SDM are satisfied, and the SCA (direct comparison approach) is not a viable option. Accordingly, under the best of circumstances, the SDM should be sparingly used in the valuation of land with subdivision potential in condemnation and expropriation proceedings. An SCA should always be prepared, even when reliance must be placed on transactional data from outside of the general area in which the condemned property is located.

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ULI-the Urban Land Institute, *Residential Development Handbook.* 2d ed. Washington, D.C., 1990.

Endnotes

i *D & D Construction Ltd. v. Consor Builders Ltd.* [1985] A.J. No. 151 (Q.L.) (Queen's Bench).

i *Shindle v. Yorkton, City Of* [1979] S.J. No. 525 (Q.L.).

iii *Hulmann v. Durham Board of Education* (1974), 7 L.C.R. 152.

iv *Harris et al. v. Minister of Lands and Forests* (1975), 10 L.C.R. 243.

v *Shindle v. Yorkton (City)* [1982] S.J. No. 670 No. 7181 (Q.L.).

vi *Vancouver School District No. 39 v. Royal Oak Holdings Ltd.* [1999] B.C.J. No. 1308 (Q.L.). Application by the School Board for leave to appeal the arbitration panel's award was denied by the British Columbia Supreme Court.

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