

# A review of the subdivision development method (Part I)

By Tony Sevelka, AACI, P. App

## Introduction

One of the most controversial areas of appraisal theory relates to the use and application of the subdivision development method (SDM) as a means of estimating market value of undeveloped land. Failure to appreciate under what circumstances to apply the SDM, how to properly assess the types and levels of risk associated with the subdivision process in the context of highest and best use, and the provision for developer's profit are the most problematic aspects of the method.

Often, the SDM has been viewed with skepticism. Lack of consistency in the application of the SDM and the many names assigned to the method have failed to produce a unified body of valuation theory. The many names given to the method has caused a great deal of confusion and misunderstanding. A review of Canadian and American case law uncovered the following list of names used to characterize the SDM:

- anticipated use method
- cost development method
- developer's residual approach
- development approach
- development cost or contractor's approach
- development method
- development value approach
- land development method
- lot method
- residual approach

- subdivision approach
  - subdivision method
  - subdivision residual approach
- Often, land value estimates emanating from the SDM are significantly higher than those correspondingly derived from the sales comparison approach (SCA) (direct comparison approach). Not surprisingly, the courts have shown a preference for the SCA. In theory, if both the SDM and the SCA are applied correctly, the value estimates should be similar. It is the divergence in value that has challenged the reliability and relevance of the SDM, especially in the area of expropriation and condemnation.

## Overview of the SDM

The steps involved in the execution of the SDM are listed as follows:<sup>1</sup>

- accurately determine the highest and best use of the land,
- create or affirm a supportable subdivision development plan,
- determine the timing and cost for approval and development (including mitigation needs and costs of obtaining development entitlements),
- forecast a realistic pricing schedule over time,
- forecast accurately the lot absorption rate and price mix (including properly supported projections of community or market growth over the absorption period),
- estimate accurately the staging or phasing of land development and related expenses,
- forecast marketing and related holding expenses over the absorption period,
- estimate the annual real estate taxes,
- include overhead and an entrepreneurial [developer's] profit allowance in the discount rate and/or line item allocation for entrepreneurial [developer's] profit, and
- estimate the appropriate discount rate consistent with the selection of the line item allocation for entrepreneurial [developer's] profit.

The SDM, in addition to being very complex, time-consuming and costly to prepare, when used on its own without an abundance of reliable market data, can be the least accurate raw land valuation technique.<sup>2</sup>

Many reasons have been advanced as to why the SDM fails to qualify as an acceptable valuation model in estimating the market value of raw land:

- There is no consensus within the appraisal or development community as to how the valuation model should be executed,<sup>3</sup> or whether the model has any application in the valuation of raw land.
- There is no consensus between



the appraisal and development communities as to how developer's (entrepreneurial) profit should be computed.<sup>4</sup>

- The numerous steps, including absorption estimates, in the valuation model are susceptible to an unacceptable margin of error that can lead to an unreliable indication of value.
- The appraisal of raw land as if subdivided into finished lots is a hypothetical exercise that considers the contributory value of non-existent improvements and the disposition of non-existent lots at retail prices.
- The estimate of value generated by the SDM, when applied as the only approach to value, is not susceptible to verification, as it cannot be measured for its reasonableness by way of comparison to transactional data.
- The valuation model assumes a developer (subdivider) as the prospective-purchaser of the raw tract and construction of a subdivision though a bona fide developer would have no interest in raw land not zoned to permit subdivision. Even if the raw tract were acquired pursuant to rezoning, construction of infrastructure improvements would not likely be commenced until a sufficient number of conditional builder presales of finished lots had been achieved to warrant subdivision construction of the tract in whole or in part.<sup>5</sup>

#### Perspective on market value

Market value is not founded on an 'as if' or 'assumptive' premise. An 'as if' or 'assumptive' premise implies a contingent and prospective value, which is inconsistent with an 'as is' market value at the effective date of appraisal. A dispute arose as to the meaning of 'market value'<sup>6</sup> in *Jabour v. Basatne*, 673 A.2d 201 (D.C. App. 1996) over the valuation of raw land. The appeals court ruled that, [a] reasonable person would assume land to be equivalent to specified cash only in its current ['as is'] condition on the

competitive market, not after costly alterations as yet unmade had turned it from raw land into a 'developable' condition...[and made reference to the trial court's observation that] "the prudent, well informed buyer would know the current condition of the land and pay a reasonable price for the land, not a price that assumed the land to be in a 'different' or 'more developed' condition."

#### Applicability of the SDM

Application of the SDM is most appropriate and useful under the following circumstances:

- It is most relevant when land is not in raw acreage and an actual subdivision of legally marketable individual finished lots exists on the ground pursuant to an executed subdivision or development agreement, and subdivision is the highest and best use.<sup>7</sup>
- It is useful as a means of testing the financial feasibility of acquiring a raw tract at a specified price under conditions of assumed certainty where all of the outcomes of the subdivision process are predicated on the stated cost and revenue inputs and financial goals of the developer.<sup>8</sup>
- It is important for use in loan underwriting of development financing, where it is critical to schedule mortgage advances to correspond to the development phasing of a subdivision and link loan repayment, with partial discharges, to lot sales (absorption), thus ensuring that the lender has adequate security at all times.<sup>9</sup>

In many condemnation and expropriation cases, the SDM has been indiscriminately applied under the wrong circumstances or in the wrong way:

If all of the land that has been appraised by the development approach were actually subdivided, there would be enough subdivision lots on the market to last hundreds of years and little, if any, farm-

land left in the United States [and Canada].<sup>10</sup>

As a tract of land progresses legally and physically from a state of raw acreage to a completed subdivision, with all infrastructure improvements in place and a proven market for new housing (finished lots), the SDM also progresses from non-acceptance to acceptance by the courts. These two extremes of the subdivision process were discussed in *United States v. 147.47 Acres of Land*, 352 F. Supp. 1055, 1060 (M.D. Pa. 1972):<sup>11</sup>

It may well be that even though the highest and best use of a property is for a residential subdivision, if no meaningful steps have been taken in that direction, viz., construction expenses and actual lot sales, then a 'lot method' appraisal or a 'developer's residual' approach [Subdivision Development Method], as it is also known, would be inappropriate. But that is not the situation here. The status of the subdivision and its availability for sale within the reasonably foreseeable future was an actual and real one, certainly not hypothetical, remote or speculative. Someone about to purchase the property on...the date of condemnation, would have to regard it as having a highest and best use as a subdivision and, in determining what purchase price he would be willing to pay, would have to consider all factors, including sales price for individual lots and additional expense of development, in arriving at his decision...This is not a case where a landowner [or appraiser] dreamily contemplates the use to which his property may be put at some undefined future time but rather one where the property is geographically suited for development; is located in a booming developmental area; has been subdivided into lots according to a duly certified map; has been cleared and graded and improved with the creation of a spring-fed lake, the construction of access roads, and the digging of a deep well sufficient to supply water to

150 homes; and where actual sales of lots as identified on the map have taken place, the deeds of which contain building restrictions compatible only with a residential estate development.

And, viewing subdivision as a dynamic process in the context of the weight that the 'lot method' should be given, the Supreme Court of Connecticut in *Leona Robinson, Executrix (Estate of Walter Langer), et al v. Town of Westport*, 14272-222 Conn. 402, 610 A2d 611 [1992], stated:

As the proponent of a hypothetical highest and best use is able to progress along the spectrum from raw land with few or no improvements to, ultimately, a completed subdivision, the weight to be assigned such evidence will be enhanced.

And, as a phased subdivision development, a somewhat similar view was expressed by the Supreme Court of New York in *Investors Collateral Corp. v. State of New York*, [1985] 494 N.Y.S.2d 352, 114 A.D.2d 437:

Claimant was a real estate developer and subdivider and subject tract had been the subject of ongoing and sequential subdivisions in a high growth area. At least one year before the de facto taking...[C]laimant had prepared and obtained from the Town of East Fishkill Planning Board preliminary approval of the subject subdivision. The subdivision was virtually at the end of and a climax to a long ongoing sequence of subdivisions of the property acquired by claimant in 1969. Thus, the subdivision was not merely a plan prepared but never filed...or a subdivision plan filed but not acted upon, and in the context of this case was not conjectural or speculative.

### Admissibility of SDM

An appraiser choosing to rely on the SDM in valuing raw land in an expropriation or condemnation proceeding may encounter significant admissibility challenges. There are a number of different procedures in executing the SDM, and the court could construe this lack of uniformity in methodology as a bar to general acceptance within the appraisal community. Additionally, the appraisal methodology as currently presented by the Appraisal Institute involves 10 steps, if the tract being appraised is raw land

without any supporting infrastructure improvements. Of course, where no actual subdivision exists on the ground, use of the SDM impresses upon the land a hypothetical subdivision of the land into serviced lots. For that reason alone, the court may conclude that the premise of subdivided lots underlying the method of valuation is erroneous and of no relevance in determining the value of the land in the condition that it actually exists at the time of expropriation or condemnation. Further, the SDM creates an illusion of precision, yet makes no provision for the unexpected in a process that is inherently fraught with risk.

Projecting finished lots on an undeveloped tract involves a great deal of uncertainty and speculation as to when (or if) subdivision might occur; the number and type of lots (i.e., townhouse, semi-detached, single family, etc.) likely to be produced; the estimated cost (direct and indirect) and availability of funds to produce those lots; the anticipated pricing and sell-off (absorption) of those lots; and timing of development expenditures and receipt of revenue from lot sales. Also, the developer's profit expectation (as a separate line item or as part of the discount rate) and selection of an appropriate discount rate reflecting the time-value of money and lot absorption risk (not achieving lot sales as scheduled) are difficult to quantify with any degree of certainty. At each step in the valuation process, an assumption or estimate is made for which there is a corresponding margin of error. The margin of error for a particular input in the SDM may be acceptable, but, if the margin of error for *all* of the inputs is viewed collectively, the court may conclude that the overall potential for error renders the valuation model unreliable.

On the admissibility of evidence of proposed or possible subdivision of condemned land, in *State v. Inhabitants of Town of Phillipsburg*<sup>12</sup> the New Jersey appeals court stated:

...[W]here the landowner has tendered evidence of a proposed or possible subdivision, attempting to establish the number or value of individual lots and where the evidence indicates that the developer had not made affirmative efforts before the condemnation to effectuate the development of the subdivision, the evidence has been held to be inadmissible in most of the cases...The courts frequently reason that, since so many factors impinge upon the future value of prospective lots, not the least being the future condition of the market, such evidence is too speculative to be considered, and would tend to permit the trier of fact to surmise the value of the land at an indefinite future date...This violates the general principle that value is to be determined as of the date of the taking...Thus, it can readily be seen that the subdivision of a parcel of land is not merely a matter of drawing lots on a plan with paper streets.

In *City of Harlingen v. Estate of Sharboneau*,<sup>13</sup> Sharboneau's appraiser established that a condemned 9.852-acre tract had the potential to support 44 single-family lots averaging 7,700 square feet each, based on an analysis of three existing subdivisions in the area, summarized below:

Having established the potential lot yield and assuming an absorption period of three years, the appraiser described the valuation process in the following manner:

An adequately sized tract or subdivision is valued by estimating the total gross sales of all the lots. From the amount deductions are made for all absorption period holding costs such as taxes, insurance, management/security/maintenance, entrepreneurial remuneration [developer's profit at 25% of gross lot sales receipts] and financial holding costs. If the property is undeveloped open land, the cost of construction is also deducted in order to derive the estimated value of the property as raw land.

Note: The estimated net income in

Subdivision	Area (ac.)	Total Lots	Avg. Area (sf)	Yield Per Acre
Knightwood Estates I	11.408	61	6,793	5.34
Knightwood Estates II	17.830	79	7,700	4.43
North Pointe	8.809	39	7,147	4.43
Subject	9.852	44	7,700	4.47



each year of the three-year sell-out period was discounted at 10.5% to a present value of \$413,770, from which was deducted the upfront development cost of \$123,150 necessary to complete the subdivision and generate the projected net income from finished lot sales, and to reflect the residual value of \$290,620 attributable to the raw land in its “as is” condition.

Ultimately, the Texas Supreme Court rejected *Sharboneau’s* appraisal evidence of the SDM as not relevant in estimating the market value of a 9.85-acre taking, as it bypassed all of the problems that could occur during an actual development, substituting instead the best possible outcome.<sup>14</sup> In reversing the trial court’s judgement, the Texas Supreme Court observed that the SDM included more than a dozen analytical steps, most involving assumptions and estimates, any one of which could seriously affect the appraisal’s accuracy. This wide margin for error counsels against using...[the appraiser’s subdivision development] approach to value undeveloped land in ordinary circumstances...In addition,...[the appraiser’s] subdivision development analysis made little or no adjustment for the buyer’s risk that the subdivision might fail...[The appraiser] merely assumed that it would take three years to sell all the lots in the hypothetical subdivision. This prediction is insufficient to account for unexpected competition, political opposition to the development, economic stagnation, or other risks that the subdivision could turn out to be a bad investment...[The appraiser’s] subdivision analysis determined only what a developer could hypothetically afford to pay to profitably subdivide the property, not what a developer would pay in the competitive, risk-filled marketplace of the real world. 🍷

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Skolnik, Martin A. and M. Carla Domingo, ‘Supply and Demand Considerations in Residential Subdivision Analysis,’ *The Appraisal Journal*, (January 1994): 57-63.

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

## Endnotes

- 1 Appraisal Institute, *The Appraisal of Real Estate*. 12th ed. (Chicago: Appraisal Institute, 2001), 343.
- 2 Ibid., 342.
- 3 Appraisers usually apply a discounted cash flow (DCF) multi-period spreadsheet valuation analysis, whereas developers often simply rely on a static model in pricing undeveloped land.
- 4 Appraisers and developers either expense developer’s profit as a separate line item or treat developer’s profit as a residual in their proformas.
- 5 Because of the significant risks and upfront development costs of subdivision, actual subdivision construction is not likely to commence until the developer has negotiated an adequate number of conditional lot presales.
- 6 Defined as “The most reasonable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale with the buyer and seller each acting prudently, knowledgeably, and assuming the price is not affected by undue stimuli.”
- 7 William Ted Anglyn, Robert Moreyra, and John C. Putman, ‘Subdivision Analysis – A Profit-Residual Model,’ *The Appraisal Journal*, (January 1988): 45-59. The authors illustrate a procedure for valuing a fully developed and ready to market subdivision, which they refer to as a “sellout property.” The authors concede that their premise of a completed subdivision is “often theoretical (especially when the units are not totally completed until sold)”, but is pertinent to loan underwriting and investment analysis. In response to a rebuttal letter at page 411 of the July 1988 issue of *The Appraisal Journal*, the authors at pages 412-420 discuss entre-

preneurial profit and equity yield requirements, and provide additional printout material in support of their original article. Also see Douglas D. Lovell, ‘Condominium and Subdivision Discounting,’ *The Appraisal Journal*, (October 1983): 524-539. The article focuses on the valuation of ‘for sale’ properties – that is, “as if completed” condominium and subdivision projects.

- 8 J. R. Kimball, Barbara S. Bloomberg, and Steven A. Jones, ‘Subdivision Analysis and Valuation,’ *The Appraisal Journal*, (October 1986): 493-503. Where the value of the land is readily discernable by sales comparison (direct comparison approach), the authors illustrate a procedure of financial feasibility that allows the appraiser and the client to study the performance of a proposed subdivision enterprise.
- 9 Chuck Munson, ‘Lender Residential Subdivision Evaluation Using Discounted Cash Flow Analysis,’ *The Appraisal Journal*, (October 1994): 572-579.
- 10 J. D. Eaton, *Real Estate Valuation In Litigation*, 2nd ed. (Chicago: Appraisal Institute, 1995), 246.
- 11 Ibid., 254-255.
- 12 *State v. Inhabitants of Town of Phillipsburg*, [1990] NJ-QL 521, 573 A.2d 953, 240 N.J. Super. 529.
- 13 *City of Harlingen v. Estate of Sharboneau*, No. 99-1118 (Tex. 05/17/2001), TX-QL 2866. In an unprecedented move, on August 29, 2000, legal counsel on behalf of the Appraisal Institute filed an *Amicus Curiae* or “friend of the court” brief stating that, “[t]he Subdivision Development Analysis or Method is a generally recognized and accepted technique in the appraisal profession used to reliably estimate the fair market value of undeveloped land when subdivision development represents the highest and best use of that land.”
- 14 The court, in discussing the discount rate of 10.5% used by the appraiser, made reference to the Appraisal Institute’s publication on the SDM noting that “[t]he discount rate applied, which is derived from and supported by the market, should reflect the risk involved.” *The Appraisal of Real Estate* 329 (11th ed. 1996). It also made reference to the “many marketplace uncertainties for which the appraisal must account.” Douglas D. Lovell & Robert S. Martin, *Subdivision Analysis* 33-40 (1993). The appraiser’s “discount rate represented only “financial carrying cost for the debt service and return on equity,” with no adjustment for risk. Nowhere else in his analysis did...[the appraiser] account for marketplace uncertainties.”

**NOTE: In part II of this article, appearing in the next issue of *Canadian Appraiser*, the author reviews the subdivision development method from the perspective of highest and best use.**

Tony Sevelka, AACI, P. App is the president of Interval in Mississauga, ON.

# A REVIEW OF THE subdivision development method

## PART II

BY TONY SEVELKA, AACI, P. APP

### 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.*,<sup>1</sup>

[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*<sup>ii</sup> 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.<sup>iii</sup>

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.<sup>iv</sup>

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 L.C.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,<sup>v</sup> 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.*<sup>vi</sup>, 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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## Endnotes

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- 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.

Tony Sevelka, AACI, P. App is the President of InterVal in Mississauga, ON.

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