When is *subdivision* the highest and best use?

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Subdivision development overview

Subdivision development involves the transformation of raw land into finished lots or blocks made ready for building construction. Planning statutes enforced by local municipalities and regional governments regulate the process of subdividing land. Where population increases are anticipated, and demand for new housing increases, lands on the urban fringe are brought into production as serviced residential subdivisions, provided adequate supporting services and facilities are available or made available by developers.[1] Subdivision is a dynamic and complicated process involving disciplines such as planning, development and marketing that require the coordination of a skillful developer.

When raw acreage is subdivided for residential use, the density that can be achieved depends upon the amount of developable land, and on the type and mix of housing the finished lots or blocks are intended to accommodate. Parks, buffer strips, conservation land, streets and road widenings that form part of a subdivision are conveyed or dedicated to the appropriate governmental agencies upon physical completion of the subdivision.

Preparing raw land for housing construction requires developers to incur significant up-front capital expenditures to design a concept plan based on detailed engineering studies, grade the land, survey and stake the lots, provide for flood control, arrange for sewer, water and utility services, and install roads, pipes, and other infrastructure. They also may be required to upgrade external roads, and provide external linkages to existing streets and sewer, storm and water lines. These initial on-site and off-site infrastructure improvements are costly, especially for developers of large projects, and interest charges must be carried before revenue is generated from finished lot sales.

Developers also incur indirect growth-related costs such as lot levies, development charges, impact fees, education charges, payment in lieu of parkland dedications, and may be required to contribute to community facilities and make provision for an affordable housing component within a proposed subdivision. Growth-related costs continue to increase, adding to the financial requirements of the subdivision process. Successful subdivision development is predicated upon:

- strong demand for new housing;
- ability to respond quickly to transform raw land into serviced, permit-ready residential lots;
- containment of development costs (direct and indirect) within budget;
- short development cycle for obtaining

planning and subdivision approvals and permits, and completing infrastructure ground work; and
- selling serviced, permit-ready lots to house builders in a timely fashion.

Prudent developers holding large tracts take a phased approach to subdivision and restrict lot production to meet quantifiable short-term new housing demand. Developers normally subdivide only that portion of a tract they are certain of completing and marketing in a short time. A development phase should be an absorbable entity geared to the market, with consideration given to minimizing the front-end costs of infrastructure and utility extensions.

A considerable amount of developer due diligence and co-ordination is usually involved prior to actually acquiring a tract for potential residential subdivision development. Typically, land available for sale on the urban fringe is brought to the attention of a developer. At this initial stage, the developer performs a preliminary investigation of the tract, the new housing market, how the tract might be developed and at what cost, and the expected time required in obtaining all necessary subdivision approvals and permits.

If the developer's preliminary findings are favourable and an Option Agreement can be negotiated, sharing the development risk with the owner of the tract, for an acceptable period and cost,[2] the developer will initiate the following important tasks before the date on which the option expires, when the decision to acquire the land must be made:
- Determine the location and capacity of existing services (i.e., water lines, and sanitary and storm trunks), and identify any off-site easement requirements, and 1-foot reserves that would impede access and connection to off-site services.[3]
- Audit the tract for any evidence of environmental contamination, and potential off-site sources of environmental concern in proximity to the tract, and other potentially detrimental externalities.
- Study the tract to determine the quantity of land physically capable of being developed, and how much of the surface area needs excavating and grading, and at what cost, which is a function of the topography, drainage characteristics, soil condition, and subsurface characteristics. (External infrastructure costs must also be considered.)

- Study the new housing market, both supply and demand, to ascertain the type and number of finished lots that should be brought into production on the tract within the foreseeable future, and determine whether the tract should be subdivided in its entirety or in phases.
- Obtain tenders from contractors, engineers, planners and landscape architects, based on the anticipated concept plan (subdivision). The concept plan may undergo several iterations to meet market demand, and before public agency approvals can be obtained (school board, city departments, planning commission, municipal council, regional government, etc.).
- Arrange loan commitments to acquire the tract and fund construction of the potential subdivision, which are likely to be contingent on subdivision approval, fixed-price contracts from sub-contractors protecting against cost overruns, and a satisfactory appraisal, which should include a market study of the new housing market.
- Compare projected lot revenues from sell-out to the total cost of development (direct and indirect) to ascertain the financial feasibility of subdivision, and decide whether the tract can be profitably developed at the option price, and provide the expected level or rate of developer's profit.

The decision to close on the tract will ultimately depend on the developer's perception of the new housing market and whether current lot prices can sustain the total cost of development, including provision for developer's profit, over the anticipated absorption period (sell-out).

Depending on the size and cost of the tract, and the prevailing market conditions, financial backer(s) may require builder commitments for an adequate number of conditional presales of finished lots before funding on the purchase of the tract and/or providing construction financing. However, conditional presales of finished lots are not a substitute for an independent market study of the new housing market, which a prudent lender will request.

Typically, under an agreement to purchase lots in a proposed plan of subdivision, upon execution of the agreement, the purchaser (builder) only pays a deposit to the vendor (developer), with further deposits required upon completion of various stages within the subdivision process. The deposits are credited or applied to the purchase price of the lots on closing or completion of the agreement. The vendor (developer) holds the deposits pending completion of the agreement, which is usually subject to one or more of the following conditions:

(i) registration of a plan of subdivision satisfying the *Planning Act* or other appropriate legislative authority before a specified date;
(ii) zoning of lots for the construction of single-family dwellings;
(iii) completion of permit servicing requirements before a specified date;
(iv) lots will not be materially changed in size and/or location by the vendor (developer), unless the purchaser (builder) accepts the changes.

The lot sale agreement usually provides that if certain of the aforementioned conditions are not satisfied, then the agreement is null and void and the vendor (developer) is required to return to the purchaser (builder) all deposit monies paid under the agreement. Conditional lot sales may not materialize as consummated deals for a host of unforeseen reasons.[4]

A developer's failure to act prudently in acquiring land for use as a potential residential subdivision can have devastating consequences, as illustrated by the following example:

An experienced developer entered into an Agreement of Purchase and Sale on December 21, 1988 for 93 acres in the Town of Whitby, a suburban area of Durham Region within the Toronto Region, which he intended to develop with residential uses. The agreed upon price of $5.5 million ($1,590,000 cash and a 5-year VTB mortgage for the balance), equivalent to $59,140 per acre, was negotiated in an overheated market. The agreement was conditional until February 28, 1989 upon the purchaser conducting soil tests to ensure the land was free of hazardous materials and in acceptable condition for development. No environmental soil tests were ever undertaken by the purchaser, who waived the condition on February 28, 1989, and subsequently closed the deal on April 27, 1989.

By the summer of 1990, the developer began to realize there were problems with the land and the adjoining property, a wrecking yard that was being used as a waste dumpsite. Through the media, the developer learned of the environmental controversy surrounding the adjoining property. Over 200,000 tires were stored there, and because of a disaster experienced elsewhere in Ontario with a major tire fire, the Ministry of Environment became alarmed and insisted steps be taken to comply with new and more stringent legislation to prevent a similar occurrence. Ministry documents relating to the wrecking yard from 1990 on, showed there were fire code violations, reports on the storage of large numbers of tires, and an application to transfer PCBs to be stored on the land.

In the spring of 1991, as the purchased tract was being readied for development by clearing trees, it became evident that bush had been cleared and fill placed on the property. Car parts, batteries and tires were found along the property line. Planning consultants hired to assist with the redesignation and rezoning of the property concluded that the Town of Whitby would not look favourably on a residential use as long as the problems with the adjacent property existed. During these investigations, it also came to light that some of the subject lands were considered environmentally sensitive as part of a ground water recharge area, which would require preparation of an environmental impact study at the owner's expense. By September 1991, the developer was having difficulty meeting the financial obligations under the terms of the mortgage, and new payment terms were negotiated with the former property owners.

The new Durham Region Official Plan designated the area as 'Employment Area,' which permitted only commercial or industrial use. Use of the subject property for residential purposes (or even industrial purposes) would be dependent on a full cleanup of the adjacent wrecking yard and waste disposal dump. In 1997, a consultant was retained to review the new Town of Whitby Official Plan, which had been approved in 1995. He concluded that a full environmental investigation would have to be undertaken on both the 93 acres and the adjacent property to determine the impact of pollutants on the soil, the extent of contamination, and the type of 'clean-up' to be undertaken.

After an onerous eight-year struggle, overcoming the obstacles of achieving a residential subdivision proved insurmountable. The developer abandoned the project and defaulted on the existing mortgage. At trial, judgement was granted in favour of the mortgagee, and the developer was ordered to pay $3.91 million, the balance due on the mortgage, plus interest as set out in the mortgage.[5]

This case is illustrative of the potential delays and risks involved in the subdivision process, and why prudent developers simply refuse to purchase land unconditionally, preferring to have all of the necessary planning and development approvals and permits in place to permit residential subdivision.

That hurdles and delays occasioned by the subdivision approvals process should be expected was noted by the court in *British Columbia v. Granite Developments Ltd.*,[6] by way of reference to *Briarfield Acres Development Ltd. et al. v. Ministry of Transportation and Communications* (1981), 22 L.C.R. 215:

…[T]he main thrust of the claimant's argument for compensation is based on the alleged delay in being able to process their subdivision lands. There is no doubt that the claimants were in the business, that they had the know-how, and that they purchased the lands for the purpose of subdivision.

The Board has to agree with the respondent's contention, however, that there is no inherent right in a landowner to subdivide his lands at will or in his own time or on his own conditions. There are so many independent agencies that have a hand in the planning process that, under the most ideal circumstances, the subdivision process is a complicated one. There is no reason to recite the potential problems here as they are well known.

Highest and best use analysis

When appraising improved property, the highest and best use is often self-evident. However, unimproved land presents unique challenges, especially land on the urban fringe in a greenfield environment. Land that is being assessed for residential subdivision potential involves costly and time-consuming research. Physical and legal constraints are often not readily apparent, and can impact the timing and cost of development, two critical components of financial feasibility. An understanding of the subdivision process and planning requirements in the jurisdiction in which the land is located, and an awareness of the community's attitude toward development are also important components of highest and best use analysis.

A developer's pre-acquisition due diligence as to the subdivision potential of a track can be likened to the investigations that an appraiser must undertake to ascertain the utility and market value of land,[7] the value of which is directly related to its highest and best use. Highest and best use 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 the highest value.[8]

Often, the four criteria of highest and best use are considered sequentially. However, it makes no difference to the outcome of the assessment of the land whether legal permissibility or physical possibility is addressed first, provided these two tests are applied before the remaining tests of financial feasibility and maximum productivity. A use may be financially feasible, but irrelevant if the contemplated use is legally prohibited or physically impossible. Highest and best use selection is a process of elimination, starting from the widest range of possible uses and concluding with a short list of most probable uses.

Physically possible – Physical limitations, natural and manmade, have

an impact on legally permissible uses, including the scale or density of development that can be accommodated on the land. Characteristics such as parcel size, configuration, topography and soil conditions, in combination with the availability of, and access to, services such as water, sewerage, storm water drainage, hydro, gas, telephone, cable television and roads determine which legal uses can be accommodated on the land. Capacity, as opposed to availability, of services might not be adequate to support some of the legally permissible uses.[9] The expected timing and nature of future services should be ascertained from the capital budgets of local and regional governments.

Legally permissible – This involves a review of permitted and designated uses under the prevailing land use controls (i.e., zoning code, Official Plan/Master Plan, Secondary Plan, etc.). Other planning and development controls of governmental agencies may have to be investigated if there is a presence of wetlands, conservation lands, watercourses, tree stands, endangered habitat, etc., on or near the land. A use that is not legally permissible may be considered where there is sufficient precedent to support a change in use through rezoning, and if further analysis concludes that such a use represents the highest and use of the land.[10] Any provincial or state and federal legislative acts pertaining to temporary and permanent development freezes, regulatory compliance with environmental laws, preservation of agricultural and open space lands, etc., that supersede local land use controls must be considered. Also, the presence of soil contamination, both on and off the land, may effectively eliminate some legally permissible uses.

Some uses permissible under the prevailing land use controls may be precluded or postponed by restrictive covenants, easements (i.e., gas pipelines, and hydro transmission lines), and leases registered against title to the land. Other uses may be delayed by the amount of time required to achieve compliance with environmental legislation. Connections to, or extension of, off-site infrastructure might require entering into time-consuming and costly private easement and cost-sharing agreements with neighbouring property owners. Where the land in question has draft or preliminary plan approval, a subdivision agreement must be executed within a specified time-

frame, which varies from municipality to municipality. Failure of the property owner to carry out the conditions of draft plan approval within the specified timeframe will invalidate draft plan approval.

Financially feasible – The short list of uses found to be legally permissible and physically possible are then assessed as to their contributory value to the land, and only those that generate a positive land value are considered financially feasible. Development costs (direct and indirect) and revenue projections are time sensitive, with the former preceding the latter in any project, and must be accounted for in determining the financial feasibility of a particular use by way of present value calculations (i.e., the time-value of money). Uses that require regulatory compliance and governmental oversight under acts such as the *Environmental Protection Act* tend to delay development thus adding to direct development costs to meet regulatory requirements and indirect costs to the extent that longer development times increase holding costs.

Maximally productive – From the list of legally permissible and physically possible uses expected to generate a positive residual land value, the most probable and practical use or uses that are shown to likely generate the greatest net return to the land (highest present land value), supported by appropriate linkages and externalities, are deemed to represent the highest and best use of the land. If a use is not immediately achievable, then an interim use is indicated, which may or may not be a continuation of the existing use.

Ascertaining which uses are likely to generate a positive land value is dependent upon market analysis (market study) of market support (demand), timing (absorption rates), and market participants (probable users and buyers) for each use. Market analysis makes it possible to identify the effective demand for and competitive supply of a particular use in a specific location at a specific time in recognition of the fixed locational attributes of the property and its spatial linkages.[11] When residential use is legally permissible, accommodation of such a use depends upon the availability of transportation, fire and police protection, schools, libraries, places of worship, parks, community and cultural centres, etc. Large tracts suitable for residential subdivision may require developers to include provision for some services, or pay growth-related charges to have the services provided by the municipality or region. Legally permissible residential use may not be practical if a tract is in proximity to potential sources of excessive noise pollution such as airports, railroads and expressways, to environmental hazards such as toxic waste sites and nuclear plants, and to other non-complementary land uses such as abattoirs, smelters, gravel pits, garbage dumps, correctional institutions, sewage treatment plants, etc.

While planning history and ownership and purchaser profiling are part of highest and best use analysis, because of their importance in assessing the subdivision potential of lands on the urban fringe, a separate overview has been provided.

Planning history – As the potential of land on the urban fringe in a natural state is not readily discernable from its general appearance, discussions should be held with the appropriate planning authorities to determine:

- What, if any, planning reports and land use studies of the area encompassing the subject property have been undertaken or are proposed. (If the subject property is under review as a subdivision application, all property-specific planning reports and potential land use restrictions must be considered.)
- How often the Official Plan/Master Plan is reviewed and updated by the municipality to keep pace with changing community needs and desires. (Many

municipalities review their long-term land use plans every five or 10 years.)
- Whether over the past few years there have been any applications (inactive or pending) for rezoning, Official Plan/ Master Plan amendment, etc., pertaining to the subject property and the encompassing lands.
- The development and growth management policies of the municipality are the merits of subdivision judged on a property by property basis (i.e., spot development, leapfrogging) or is a comprehensive approach applied so that development occurs in an orderly, efficient and sequential pattern in concert with adjoining lands (i.e., Block Development Concept).
- Whether the municipality and regional government provide off-site servicing or if infrastructure improvements are by way of private cost-sharing servicing agreements and the sole responsibility and expense of the affected property owners (i.e., consensus of all affected property owners may be necessary for subdivision development to proceed).

Ownership and purchaser profiling – A title search of the subject property and the encompassing lands is an important and useful investigative exercise, which can reveal the following:
- The level of sales activity, the frequency with which properties are traded, individually and collectively, and the established price patterns over time (also critical for valuation purposes).
- The motivations behind the transactions can often be discerned from mortgage documents registered against the properties searched (Acquisitions intended for future development will usually include provision for discharging the mortgage, partially or fully, depending on the anticipated timing of future events such as rezoning, draft plan approval, subdivision approval, etc.)
- The identities of the property owners – whether users, absentee individual owners, absentee corporate entities (Corporate name searches are essential to disclosing the principals behind each corporate veil and linking related corporate entities, and the stated objectives of each corporate charter.)
- The extent of property ownership being either diverse or in the hands of a few controlling interests, and the geographical pattern of ownership being either random or concentrated in a specific location or locations.

Large tracts on the urban fringe involve unique challenges to the analysis of highest and best use. Often, these lands lack adequate infrastructure servicing and are not zoned to permit urban uses, and they may or may not be actively farmed. When or whether lands on the urban fringe will be brought into production as subdivisions is difficult to ascertain. Trading in these lands is often speculative with prices subject to considerable variability based on the whims of the buyers and sellers. [12]

Speculation is its own highest and best use where the sole purpose of trading in land is for 'buying and selling,' for speculation in this sense it is not akin to an analysis of land uses which are considered remote or speculative.[13] A significant aspect of a speculative market is that, *a given property may pass through the hands of a series of speculators on its journey from farm land to subdivision. Especially when the 'ripening' period is a long one, speculators will be tempted to sell and take profits. As long as the land is not ready for development by a final user, the buyer most likely will have to be another speculator.*[14]

Speculation interferes with the orderly development of land for productive urban use. In some jurisdictions, where land prices have undergone rapid escalation, governments have been known to temporarily impose punitive tax measures on speculator-purchasers as a means of curbing speculation in land. On occasion, governments have imposed a tax on non-resident purchasers of undeveloped land.

Determining highest and best use of a tract with precision (type, scale and density) may not be possible, but a Master Plan or Official Plan might point to a general land use category such as residential. However, land that is not immediately available for development will have an interim use.[15] A large tract may have an interim use as a farm or pastureland, or simply remain idle as a speculative holding.

Land on the urban fringe with subdivision potential is generally subjected to onerous and comprehensive planning and development controls (subdivision regulations) that are time-consuming and costly to achieve, and go far beyond the typical land use provisions associated with zoning, which regulate uses, densities, bulk and height.

Subdivision regulations are concerned primarily with the layout and standards for lot-by-lot development, accomplished through plat or subdivision approval. Subdivision regulations are judged against a long-term comprehensive land use document such as an Official Plan or Master Plan that is subject to periodic review and amendment.

A developer is not permitted to make any improvements on the raw land or divide the land until the planning commission and/or municipal council has approved the proposed subdivision and the developer has entered into a subdivision or development agreement with the approving authority, backed by a performance bond or letter of credit to cover the cost of infrastructure improvements.

A developer that concludes a tract is suitable for subdivision will have a concept plan prepared and circulated to numerous governmental agencies for review and comment, and hearings will be held for public reaction and input. Several iterations of the developer's concept plan may be required to satisfy governmental and citizen concerns, and studies addressing such issues as planning, engineering, noise, traffic, environment, conservation, etc. may be demanded from the developer.

The voices and actions of public interest groups such as ratepayers' associations, conservationists, environmentalists, etc. have significant influence over the stewardship and use of land. Such groups often gain favour with media and political leaders sometimes to the point of effecting slow-growth or no growth policies in their communities.

Where there are objections to a specific development, development delays and costly hearings are not uncommon. Sometimes, when there are only one or two objectors to a specific development, cash settlement offers may result in the withdrawal of the complaints and avoidance of a costly development delay. Knowledge of the community and an understanding of its history, including attitudes towards population growth and development are essential to the determination of highest and best use.[16]

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 words immediate or imminent are 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 land for potential subdivision. Ripe means that the landowner and the municipality are in a position to execute a subdivision 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 a 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. Nonetheless, there must be evidence of sufficient and effective demand for new housing consistent with the type proposed (a proxy for finished lots) before concluding that subdivision is the highest and best use, as aptly noted in *D & D Construction Ltd. v. Consor Builders Ltd.*,[17]

[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.

Conclusion

A comprehensive highest and best use analysis is critical to the assessment of raw land when considering the economic viability of subdivision development, as the subdivision approvals process is time-consuming, costly, and the outcome unpredictable. While each aspect of highest and best use analysis must be thoroughly addressed, a ready market for new housing units (a proxy for finished lots) driven by anticipated population growth or a shift in population is a prerequisite of subdivision development.

Assessing the potential of raw land on the urban fringe for subdivision development requires a comprehensive understanding of the subdivision approvals process, locally and regionally, and knowledge of the community's attitude toward development and population growth. Physical and legal constraints, pertaining to the parcel being appraised and abutting lands, that are likely to delay and impede subdivision development must be investigated, and sources of supply and demand for new housing identified and quantified, with anticipated lot revenue and lot absorption being reasonably certain. Financing costly subdivision development requires that capital (debt and equity) be readily available and affordable.

Highest and best use is an economic concept, and as all market-driven development is time-sensitive, a bona fide developer has no use for land that cannot be immediately subdivided, and "it is extremely rare for buyers to accept more than minimal risk when the contemplated use of a property involves a legal condition (e.g., rezoning) or a physical condition (e.g., availability of adequate sewage disposal)."[18] Land that is found not to be ripe and immediately available for subdivision development will default to an interim use.

End notes

[1] *Golden v. Planning Bd. of Ramapo,* 285 N.E.2d 291, 334 N.Y.S.2d 138, 30 N.Y.2d 359 (N.Y. 1972), *app. dismissed,* 409 U.S. 1003 (1972). Special permits were required under the zoning ordinance prior to subdivision approval. The purpose of the ordinance was to phase residential development into the town's ability under its capital budget to provide for sanitary sewers or approved substitutes, drainage facilities, improved public parks or recreation facilities, public schools, state, county and town roads, and firehouses over a period of 18 years. A developer could start earlier by providing the facilities at its own expense. Objecting to the town's denial for a special permit and considering the zoning ordinance unconstitutional, two landowners took the town to court. The appeals court ruled that the town was properly authorized to adopt the zoning ordinance against premature development and that the ordinance was constitutional. In its reasons, the court stated that the town could direct the growth of population and determine the lines along which development should proceed, even though development may be diverted from its natural course. The court also noted that "where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for 'phased growth'."

[2] The option price will typically exceed the market value of the tract in its existing raw state, but, if the prospective developer-purchaser is successful in achieving its land use objective (subdivision), the vendor will reap some of the enhancement in value from the land being put to a higher and better use.

[3] Comparable land sales with subdivision potential in the City of Brampton, Ontario were investigated. In one transaction, the developer paid a significant premium of about 65%-70% above market to acquire a 10-acre parcel that separated his 72.89-acre draft plan approved subdivision from access and connection to external services available in the subdivision lying immediately south of the 10-acre parcel. In another instance, the purchaser of a 7.5-acre assembled 'infill' parcel failed to uncover a private 1-foot reserve that precluded access and connection to external services for which $50,000 had to be set aside to remove the 1-foot reserve.

[4] In *835039 Ontario Inc. (Country Glen) v. Fram Development Corp.,* [1994] O.J. No. 1725 DRS 94-14276, the developer had to return the house builder's *(Country Glen)* deposit of $672,000 for the conditional purchase of 113 townhouse lots in the Town of Newcastle, as the developer

was unable to complete servicing by a specified date. Because of a series of unforeseen obstacles, including environmental issues, off-site easement requirements, cost sharing agreements, cost overruns, a rapidly declining real estate market, collapsing house prices, etc., the subdivision never materialized, and the developer lost $14,938,000 in potential lot sales (conditional on being serviced and permit-ready) negotiated in June and September of 1989, following acquisition of the raw tract in May 1989. As a result of the loss of the conditional presales of lots, the bank cancelled the developer's credit facility.

[5] *801438 Ontario Inc. v. Badurina* [2000] O.J. No. 3178 No. 93-CQ-41294.

[6] *British Columbia v. Granite Developments Ltd.* [1987] B.C.J. No. 1900 (B.C.C.A.).

[7] In a property acquisition or investment transaction, due diligence is the standard investigation of contractual terms and property and market characteristics prior to closing the transaction. In appraisal, due diligence is the expectation of adequate research into factors that can affect the utility and value of a property. *The Dictionary of Real Estate Appraisal,* 4th ed. (Chicago: Appraisal Institute), 89.

[8] Appraisal Institute, *The Appraisal of Real Estate,* 12th ed. (Chicago: Appraisal Institute), 305-308.

[9] *Syvan Developments Ltd. v. 806628 Ontario Inc.* [1991] O.J. No. 1792 (Q.L.) (Gen. Div.) involved the sale between two experienced developers of 46.628 acres proposed for subdivision in the Town of Newcastle. The plaintiffs purchased the land in 1988 and applied for an increase in density above that provided by the Official Plan. When public opposition was met, the plaintiffs decided to sell the lands to *806628 Ontario Inc.* In Jan-89 or Feb-89, the prospective purchaser was advised by the plaintiff that, if application for increased density was abandoned, the purchaser would have no problem getting approval for the proposed plan of subdivision. On 6-Mar-89, the prospective purchaser agreed to conditionally purchase the lands subject to an engineer's report of the soil being satisfactory for residential purposes, verification of the property being adequately zoned and that adequate services be available for the proposed residential development. On 18-Mar-89, the purchaser confirmed that the conditions had been complied with and that the agreement was then valid and binding on both parties. In Jan-91, the municipality advised the purchaser that there was no sewage capacity to service its proposed plan of subdivision. The sewage allocation process permitted 'leap frogging' ahead of earlier applications still in draft by having a subdivision agreement executed. By delaying its application for subdivision approval because it hoped to obtain a higher density, the defendant chose to run the risk that the capacity would all be allocated to other subdivisions. The defendant defaulted on its mortgage and failed to have the transaction rescinded, claiming "that immediate development was crucial to its decision to buy the lands…[and] [h]ad it known that the land could not be developed immediately it would not have purchased it because it did not plan to have to hold the land for some time until it could be developed." [Appeal dismissed (Ont. C.A.) 1992, O.J. No. 83]

[10] According to the *Canadian Uniform Standards of Professional Appraisal Practice (CUSPAP), 2004 Ed.*, of the Appraisal Institute of Canada (AIC), an estimate of value based on a non-permissible use that would require rezoning to be achieved constitutes a "hypothetical condition" and "extraordinary assumption", which must be disclosed by the appraiser. *Claim Prevention Bulletin CP-18* issued Nov-97 by the AIC states, in part, "[w]hen a valuation is being completed on the assumption of a change in zoning, this factor should be clearly identified throughout the report, particularly at points where a value estimate is being stated, as well as any points where the zoning is being stated or discussed. Further, to ensure adherence to *[C]USPAP*, any such assumptions are required to be both reasonable and probable."

[11] Stephen F. Fanning, Terry V. Grissom, and Thomas D. Pearson, *Market Analysis for Valuation Appraisals* (Chicago: Appraisal Institute, 1994), 7, 351-354.

[12] *Speculator* is "one who speculates, i.e., one who buys a commodity such as real estate expecting to sell it at a higher price." *The Dictionary of Real Estate Appraisal,* 4th ed. (Appraisal Institute, 2002), 272.

[13] North, Lincoln W., *The Concept of Highest and Best Use* (Winnipeg: Appraisal Institute of Canada, 1980).

[14] Jack E. Adams and Bruce Lindeman, Speculation in Undeveloped Land, *The Appraisal Journal* (April 1979): 218-226.

[15] *Interim Use* is "[t]he temporary use to which a site or improved property is put until it is ready to be put to its future highest and best use." *The Dictionary of Real Estate Appraisal,* 4th ed. (Chicago: Appraisal Institute), 149.

[16] William H. Crouch, A Prospective Look at Highest and Best Use, *The Appraisal Journal* (April 1966): 166-176.

[17] *D & D Construction Ltd. v. Consor Builders Ltd.,* [1985] A.J. No. 151.

[18] David C. Lennhoff and Richard L. Parli, A Higher and Better Definition, *The Appraisal Journal* (Winter 2004): 45-49.

References

Boyken, James H., *Land Valuation Adjustment Procedures and Assignments,* Chicago: Appraisal Institute, 2001.

Brueggeman, William B., Jeffrey D. Fisher, and Leo D. Stone, *Real Estate Finance.* 8th ed. Homewood, Ill.: Richard D. Irwin, 1989.

Davis, W. D. R, Urban Appraisals, November 1959 (Appraisal Classics an anthology of the professional journal of the international Society of Residential Appraisers 1935-1960): 516-521.

Duvall, Richard O. and David S. Black, The Development Approach to Valuation in Eminent

Domain Litigation: Capitalizing on Potential Use, *The Appraisal Journal* (July 2000): 351-359.

Johnson, David E., *Residential Land Development Practices,* Second Edition, Reston, Va.: American Society of Civil Engineers, 2002.

Joyce, R. Michael, Smart Growth: Practical or P.R.?, *Real Estate Issues* (Spring 2001): 39-42.

Lovell, Douglas D., and Robert S. Martin, *Subdivision* Analysis, Chicago: Appraisal Institute, 1995.

Miller, Steven E., Land Value in a Collapsing Market, *The Appraisal Journal* (January 1994): 146-149.

Sando, Laurence, Transitional Use Valuations, *The Appraisal Journal* (April 1973): 222-233.

Sussna, Stephen, and Jack Kirchhoff, The Problem of Premature Subdivision, *The Appraisal Journal* (October 1971): 592-601.

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