

PROPOSALS FOR

- **CERTIFICATION**
- **ASSUMPTIONS AND LIMITING CONDITIONS**
- **APPRAISAL FORMAT**

DESIGNED TO LIMIT LEGAL LIABILITY

**Prepared for the
Professional Practice Committee,
Appraisal Institute of Canada
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TITLE PAGE

CERTIFICATION

**SUMMARY OF SALIENT FACTS
AND IMPORTANT CONCLUSIONS**

LIMITING CONDITIONS

As discussed

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Number every page, including Appendix, except for Title Page

PURPOSE OF APPRAISAL

(or "Definition of Appraisal Problem" plus in some cases - "Definition of Terms")

Comment

Statements under this heading are critical to the issue of liability. The extent of liability to the purchaser of the report depends on the appraiser's understanding of the use to which the report might be put by him. Liability to third parties depends on whether it was reasonable for those third parties to rely on the report. If this discussion makes the limited purpose of the report clear, it will limit the situations in which third parties might reasonably rely on it.

Case References

Seaway Mortgage Investment Corp. v. First Citizens Financial Corp. et. al., 20 A.C.W.S. 82, where a disclaimer in the report prohibiting use by any other person but the client of the appraisal was found to be ineffective because there was no statement in the report setting out who the report was prepared for or for what purpose it was prepared.

**AREA AND NEIGHBOURHOOD
ANALYSES**

Comment

The appraiser should highlight any unusual aspects of the immediate area and any contrasts between the subject property and adjoining use. Conflicting land uses should be described and special cautions expressed concerning areas in transition. After the final comparables are selected, this section should be reviewed to ensure that full explanation is given, if any comparables are outside the neighbourhood identified. Non-resident appraisers should ensure that they have local professional assistance in developing this discussion.

Case References

Avco Financial Services v. Holstein, 12 C.C.L.T. 36 (S.Q.B.), where an out-of-town appraiser was found negligent for, among other things, failing to consult local and real estate agents and failing to properly assess information given him by the town clerk that there were few sales of houses in the town and that these moved slowly.

DESCRIPTION OF SUBJECT

- (a) property rights appraised (or ownership and legal descriptions;
- (b) buildings and other improvements;
- (c) photographs;
- (d) history of use;
- (e) location, size, area, frontage, topography;
- (f) leases, easements, encumbrances;
- (g) services, assessment and taxes.

Comment

- (a) Any assumptions as to ownership should be specified.
- (b), (c) & (d) It is the failure to disclose the unusual which most often leads to liability. Buildings which are unfinished in any respect, not built to standard specifications, not built professionally, of unusual styles or designed for specific uses are traps for the unwary. The description of such improvements should emphasize these unusual aspects. An inspection of the building which discloses symptoms of structural problems will require further investigation or qualification in the report.
- (e) & (f) It should be clear that the appraiser is not providing a report on title, but only describing the interest that he appraised. The source of the information as to these matters should be disclosed and the disclaimers in the limiting conditions should be repeated.

Case Reference

Raylon Investments Ltd. v. Bear Realty Ltd. et al., 10 A.C.W.S. (2d) 307, (B.C.S.C.), where a report described an unfinished house which had not been built to standard specifications as being in good condition; liability was found; repeated errors of misdescription were made in that report, any one of a number of which would have produced a finding of negligence.

Heimbecker v. Brox, 6 A.C.W.S. 343 (O.H.C.J.), where a lack of care was found in ascertaining the assessment and taxes.

Seaway Mortgage Investments Corp. v. First Citizens Financial Corp. et al., 20 A.C.W.S. 82, where the appraiser gave no warning in his report that the home being valued had obviously been built by non-professionals, which did not conform to normal construction practice; the appraiser was clearly liable for failure to disclose that the finish was not standard and failure to check with the municipal building inspector's department, aside from other misleading aspects of the description of property in the reports.

Cantwell et al. v. Petersen et al., 139 D.L.R. (3d) 466 (B.C.S.C.), where an appraiser was found negligent for failing to inspect a crawl space, which, if inspected, would have revealed dry rot; it was suggested that there were indications of foundation problems that ought to have alerted the appraiser to the need for an inspection of the crawl space.

SCOPE OF INVESTIGATION

Comment

If special attention is not to be paid to drafting this section in each individual case, it would be better to omit it. The danger is that an appraiser will use a standard text list or describe his usual research and fail to note the research he could not do or complete in this case. However, if special instructions from the client or fee arrangements have limited the scope of the investigation, these should be set out in detail here.

Case Reference

McDonalds's Fruit Stores Ltd. v. Combined Appraisers and Consultants Co., 21 A.C.W.S. (2d) 495, where the appraisers had to prove, by oral testimony at trial, their instructions to value the property for sale as one unit, because they apparently failed to set out these special instructions in their report.

LAND USE CONTROLS

- (a) official plan designation;
- (b) zoning;
- (c) other controls.

Comment

Provincial subdivision control must always be considered when more than one lot is to be valued. Special land use controls - provincial freeze orders, parkway belt legislation, conservation authority controls, controls by federal bodies for airports and harbours - are problem areas. The Institute should make every effort to keep members current on developments in the area of special controls. Less experienced members must be particularly diligent in developing their knowledge about such matters. As to municipal controls in the form of zoning and official plan designation, care must be taken to note the status of by-laws affecting these controls and whether they have the appropriate approvals. It is recognized that it is not generally practical to write confirming letters to municipal employees to confirm advice given. However, careful contemporaneous notes should be kept recording the name of the employee, the advice he gave and the date. In the event the advice is in error, there will be a reasonable prospect of a claim over against the municipality.

Case References

Speed and Speed Limited v. Finance America Realty Limited, 1 A.C.W.S. (2d) 196 (N.S.C.A.), where an appraiser who relied on assurances that subdivision approval was imminent was held liable; liability could have been avoided if the appraiser had emphasized in his report that his appraisal only applied if and when approval was obtained.

Esselmount v. Harker Appraisals Ltd., (B.C.S.C.) March 28, 1980, where an appraiser failed to recognize that the property was within a type of provincial freeze order pursuant to the B.C. Agricultural Land Development Act, S.B.C. 1973, c. 33 and the Agricultural Land Commission Act, S.B.C. 1973, c. 46.

HIGHEST AND BEST USE

Comment

This analysis is the most fundamental in every appraisal report. If the highest and best use is not the existing use, extra care is required. The timing of redevelopment must be taken into account and comparables will have to be evaluated more closely to ensure they have not only the same highest and best use, but also the same timing. If there are any special instructions or assumptions concerning highest and best use, these must be reported here.

APPROACH(ES) TO VALUE

(a) Market Comparison Approach

(I) Sales Data Summarized (Market Rent Data)

(ii) Market Trends

And/Or

(b) Income Approach

(I) Gross Income

(ii) Expense Estimate

(iii) Discount or Capitalization Rate

And/Or

(c) Cost Approach

(I) Special Qualifications re Use of
Cost Approach

(ii) Land Value Comparables

(iii) Estimate of Building Costs

(iv) Depreciation and Functional
Obsolescence

Comment

Use of any approach but the market approach requires special qualifications. The income approach should not be used unless properties of the type being valued are bought and sold based in large part on their income. The source of information in income and expense should be disclosed and any special caution as to its reliability that might not be known to the lay person should be set out. Assumptions concerning future income or expenses should be fully disclosed and it should be stated that if the assumptions are proven incorrect, the estimate of value is incorrect. However, in no event should appraisers make any assumptions that he considers doubtful without advising the reader of his view. Rules of thumb or multipliers for gross revenue are not to be used unless supported by market data. The cost approach should be used with the greatest of caution. It should be stated that while usually reliable cost manuals are being used, a quantity survey had not been done. It must be said that the estimates for depreciation are matters of judgment and that the price obtained on the market for the property may vary significantly from the depreciated replacement cost determined on the cost approach.

Case References

Rooks et al. v. Craft et al., 13 A.C.W.S. (2d) 343 (O.H.C.J.), where the failure to disclose a comparable sale and explain why it was not relied upon was an alternative basis for finding of liability against the appraiser.

Raylon Investment Ltd. v. Bear Realty Ltd. et al., 10 A.C.W.S. (2d) 307, (B.C.S.C.), where an appraiser who was held negligent failed to properly explain why he did not rely on sales of adjacent lots.

Heimbecker v. Brox, 6 A.C.W.S. 343 (O.H.C.J.), where an appraiser who was found negligent used undepreciated values for a garage and a pool while the Court found that the depreciated values were 25% of the values used.

Avco Financial Services Canada Limited v. Jakubiec, where an appraiser was found negligent for using 'king of a cost approach' when, although hard to find, one or two comparable sales did exist, 12 A.C.W.S. (2d) 17 (C.J.Q.B.).

VALUE ESTIMATE

APPENDIX

APPRAISER'S QUALIFICATIONS

CERTIFICATION

It is my opinion that as of (month, day, year), the market value of the property identified is ().

I have no interest, present or prospective, in that real property and neither the employment to make this appraisal nor the compensation for it is contingent upon the amount of the evaluation reported.

I certify that, according to the best of my knowledge and belief, the opinion of value contained in this report is correct, subject only

to the assumptions and limiting conditions and that this report has been prepared in conformity with the Code of Ethics, Standards of Professional Conduct and Standards of Professional Practice for the members of The Appraisal Institute of Canada.

Name of Appraiser

Date report signed

SELECT AND/OR MODIFY TO SUIT YOUR PRESENT ASSIGNMENT

Revised: January 1, 1991

CONTINGENT AND LIMITING CONDITIONS

This report has been prepared at the request of (name of client or person to whom the report is addressed) for the purpose of providing an estimate of the market value of the (name or identification of the property) to assist in (resolving the disposition of this property) (obtaining permanent financing) (resolving internal corporate matters) (or whatever function is relevant). It is not reasonable for any person other than (the person) (those) to whom this report is addressed to rely upon this appraisal without first obtaining written authorization from the client and the author of this report. This report has been prepared on the assumption that no other person will rely on it for any other purpose and all liability to all such persons is denied.

This report has been prepared at the request of, and for the exclusive (and confidential) use of, the recipient as named herein and for the specific purpose and function as stated herein. All copyright is reserved to the author and this report is considered confidential by the author and the client. Possession of this report, or a copy thereof, does not carry with it the right to reproduction or publication in any manner, in whole or in part, nor may it be disclosed, quoted from or referred to in any manner, in whole or in part, without the prior written consent and approval of the author as to the purpose, form and content of any such disclosure, quotation or reference. Without limiting the generality of the foregoing, neither all nor any part of the contents of this report shall be disseminated or otherwise conveyed to the public in any manner whatsoever or through any media whatsoever or disclosed, quoted from or referred to in any report, financial statement, prospectus, or offering memorandum of the client, or in any documents filed with any governmental agency without the prior written consent and approval of the author as to the purpose, form and content of such dissemination, disclosure, quotation or reference.

The estimated market value of the real estate which is the object of this appraisal pertains to the value of the (freehold or fee simple) (leasehold) (leased fee) estate in the real property, (based on vacant possession) (subject to the terms and conditions of the existing tenancy as described in this report). The property rights appraised herein exclude mineral rights, if any.

The estimate of value contained in this report is founded upon a thorough and diligent examination and analysis of information gathered and obtained from numerous sources. Certain information has been accepted at face value; especially if there was no reason to doubt its accuracy. Other empirical data required interpretive analysis pursuant to the objective of this appraisal. Certain inquiries were outside the scope of this mandate. For these reasons, the analyses, opinions and conclusions contained in this report are subject to the following assumptions and limiting conditions:

- The property has been valued on the basis that title to the real estate herein appraised is good and marketable.
- The author of this report cannot accept responsibility for legal matters, questions of survey, opinions of title, hidden or unapparent conditions of the property, toxic wastes or contaminated materials, soil or sub-soil conditions, environmental, engineering or other technical matters which might render this property more or less valuable than as stated herein. If it came to our attention as the result of our investigation and analysis that certain problems may exist, a cautionary note has been entered in the body of this report.
- The legal description of the property and the area of the site (was) (were) obtained from (state source). Further, the plans and sketches contained in this report are included solely to aid the recipient in visualizing the location of the property, the configuration and boundaries of the site and the relative position of the improvements on the said lands.

- The property has been valued on the basis that the real estate is free and clear of all value influencing encumbrances, encroachments, restrictions or covenants except as may be noted in this report and that there are no pledges, charges, liens or special assessments outstanding against the property other than as stated and described herein.

- The property has been valued on the basis that there are no outstanding liabilities except as expressly noted herein, pursuant to any agreement with a municipal or other government authority, pursuant to any contract or agreement pertaining to the ownership and operation of the real estate or pursuant to any lease or agreement to lease, which may affect the stated value or saleability of the subject property or any portion thereof.

- The interpretation of the leases and other contractual agreements, pertaining to the operation and ownership of the property, as expressed herein, is solely the opinion of the author and should not be construed as a legal interpretation. Further, the summaries of these contractual agreements, which appear in the Addenda, are presented for the sole purpose of giving the reader an overview of the salient facts thereof.

- The property has been valued on the basis that the real estate complies in all material respects with any restrictive covenants affecting the site and has been built and is occupied and being operated, in all material respects, in full compliance with all requirements of law, including all zoning, land use classification, building, planning, fire and health by-laws, rules, regulations, orders and codes of all federal, provincial, regional and municipal governmental authorities having jurisdiction with respect thereto. (It is recognized there may be work orders or other notices of violation of law outstanding with respect to the real estate and that there may be certain requirements of law preventing occupancy of the real estate as described in this report. However such possible circumstances have not been accounted for in the appraisal process.)

- (This paragraph to be considered for proposed developments only). The property has been valued on the basis that the site is (will be) classified, designated and/or zoned (and that a development permit and building permit has been (will be) obtained from the appropriate authorities) so as to permit the (construction and) operation of the property as described in this report. Further, it is assumed that all other required permissions and authorizations were (will be) granted pursuant to the development of this project.

- Investigations have been undertaken in respect of matters which regulate the use of land. However, no inquiries have been placed with the fire department, the building inspector, the health department or any other government regulatory agency, unless such investigations are expressly represented to have been made in this report. The subject property must comply with such regulations and, if it does not comply, its non-compliance may affect the market value of this property. To be certain of such compliance, further investigations may be necessary.

- (This paragraph to be considered for projects under development). The property has been valued on the basis that, as of the date of this appraisal, all contributions and/or utility installation costs (whether to the boundaries of, beyond or within the site), site servicing, construction or other costs (both direct and indirect), tenant allowances, tenant inducements, leasing commissions, levies, municipal taxes, rates, assessments or other similar charges which may be or become charges against (the site) (the property), or may be or become due to any municipal or other governmental authority (will), to the extent that the same are required to, have been paid in full, (or will have been paid in full on or prior to any advance on the proposed financing except as may be disclosed to, and waived by, the lender in writing prior to any such advance).

- (This paragraph pertains to reports made for financing). The property has been valued on the basis that, prior to any advance of the loan, all municipal and public utility services including, without limitation, sanitary sewers, water, electricity,

telephone and gas shall have been installed, connected and shall be operating satisfactorily and full payment for all of the said services shall have been made, whether or not chargeable against the site or the project by way of local improvement charges payable before or after the date of any advance of the loan.

- The property has been valued on the basis that there is no action, suit, proceeding or investigation pending or threatened against the real estate or affecting the titular owners of the property, at law or in equity or before or by any federal, provincial or municipal department, commission, board, bureau, agency or instrumentality which may adversely influence the value of the real estate herein appraised.
- The property has been valued on the basis that all construction was (will be) carried out in accordance with properly executed plans and specifications; that proper workmanship and supervision was (will be) employed in the building process; that the property was (will be) occupied and in operation within a reasonable period of time following completion of the construction and that the property is being (will be) managed in a manner which is typical for the property being appraised.
- The property has been valued on the basis that all leases, agreements to lease, or other contractual agreements relating to the terms and conditions of the tenants' occupation of space within the subject property are fully enforceable, notwithstanding that such documentation may not be fully executed by the parties thereto as at the date of this appraisal.
- The property has been valued on the basis that all rents referred to in this report are being paid in full and when due and payable under the terms and conditions of the attendant leases, agreements to lease or other contractual agreements. Further, it is assumed that all rents referred to in this report represent the rental arrangements stipulated in the leases, agreements to lease or other contractual agreements pertaining to the tenants' occupancy, to the extent that such rents have not been prepaid, abated,

or inflated to reflect extraordinary circumstances, unless such conditions have been identified and noted in this report.

- The data and statistical information contained herein were gathered from reliable sources and are believed to be correct. However, these data are not guaranteed for accuracy, even though every attempt has been made to verify the authenticity of this information as much as possible.

- (For proposed projects only) The property has been valued on the basis that no social or political reaction to the (proposed) (completion of) development of this (site) (property) will occur between the date of this report and the date of substantial completion and occupancy, which would either delay, modify, postpone or cancel the development as described in this report.

The estimated market value of the property does not necessarily represent the value of the underlying shares, if the asset is so held, as the value of the shares could be affected by other considerations. Further, the estimated market value does not include consideration of any extraordinary financing, rental or income guarantees, special tax considerations or any other atypical benefits which may influence the ordinary market value of the property, unless the effects of such special conditions, and the extent of any special value that may arise therefrom, have been described and measured in this report.

Should title to the real estate presently be held (or changed to a holding) by a partnership, in a joint venture, through a co-tenancy arrangement or by any other form of divisional ownership, the value of any fractional interest associated therewith may be more or less than the percentage of ownership appearing in the contractual agreement pertaining to the structure of such divisional ownership.

In the event of syndication, the aggregate value of the limited partnership interests may be greater than the value of the freehold or fee simple interest (leasehold interest) in the

real estate, by reason of the possible contributory value of non-realty interests or benefits such as provisions for tax shelter, potential for capital appreciation, special investment privileges, particular occupancy and income guarantees, special financing or extraordinary agreements for management services.

The estimated market value of the property referred to herein is predicated upon the condition that it would be sold (on a cash basis to the vendor) (on the basis of cash over the balance of the known financing) (on the basis of cash over the amount of proposed financing) and subject to any contractual agreements and encumbrances as noted in this report (as-is and where-is, without any contingent agreements or caveats). Other financial arrangements, good or cumbersome, may affect the price at which this property might sell in the open market.

Should the author of this report be required to give testimony or appear in court or at any administrative proceeding relating to this appraisal, prior arrangements shall be made therefor, including provisions for additional compensation to permit adequate time for preparation and for any appearances which may be required. However, neither this nor any other of these assumptions and limiting conditions is an attempt to limit the use that might be made of this report should it properly become evidence in a judicial proceeding. In such a case, it is acknowledged that it is the judicial body which will decide the use of this report which best serves the administration of justice.

Because market conditions, including economic, social and political factors, change rapidly and, on occasion, without notice or warning, the estimate of market value expressed herein, as of the effective date of this appraisal, cannot necessarily be relied upon as of any other date without subsequent advice of the author of this report.

The distribution of value between land, buildings and other improvements applies only in regard to the purpose and function of this appraisal, as outlined in the body of this report.

The value expressed herein is in Canadian dollars.

This report is only valid if it bears the original signature(s) of the author(s).

These Contingent and Limiting Conditions shall be read with all changes in number and gender as may be appropriate or required by the context or by the particulars of this mandate.

Note 1: In instances where the appraiser has reason to suspect the presence of certain conditions which might adversely influence the value of the property, an appropriate prefix to pertinent paragraphs might be: "It is reported/recognized there may be a possibility of". A corresponding suffix might also be required, such as: "However, although such possibilities have not been accounted for in the final opinion of value, the recipient of this report should conduct further investigations in this regard, as such conditions and circumstance could constitute an adjustment to the opinion of value contained in this report."

Note 2: Any extraordinary contingent and limiting conditions should also be noted in the Letter of Transmittal, as well as in any appropriate place within the body of the report.

BRICKS WITHOUT STRAW

Those with some knowledge of the Old Testament, whether learned at Sunday School or at the Synagogue, will find resonances in the words "bricks without straw". In the Old Testament story, Pharaoh, in an attempt to frustrate a growing sense of nationhood felt by the descendants of Jacob resident in his land, ordered the Israelites to make bricks without straw. Pharaoh was confident the task was impossible. Somehow the Israelites succeeded.

Today, public bodies are often faced with a similar, and seemingly impossible, task. How to acquire land for public purposes or undertake the construction of public works without the financial resources available a decade ago? Appraisers are often part of the team of experts who come to a dead end with a public works project because financial resources simply aren't available. Given that miracles on a biblical scale are unlikely to be generated at the appraiser's instance, creative thinking is usually the next best option. In this article, I briefly review the fact situations in four recent transactions, which give some indication of how value can be created, land acquired, and public works constructed at a significantly reduced, and in some cases at no, cost. The appraiser who reads this article, knowledgeable as he or she will be about real estate dynamics, will undoubtedly think of other applications for this type of thinking "outside the box" of value.

Example 1

In this instance, the municipality wanted to expand its waterfront park system. The last remaining piece of land to be acquired was in the hands of a developer. The developer was not interested in selling the property for its market value, even if the municipality could raise the funds. The developer's thinking was simple. It wanted to earn the developer's profit, which it would obtain on developing the property and, even under the *Expropriations Act*, the developer's profit would not be forthcoming on the basis of a conveyance to the municipality. Research revealed that there was a reformatory in the municipality that, while once located in a rural area, was now bordered by recent subdivision development. The new

neighbours wanted the reformatory to be moved, and the reformatory school buildings were out-of-date.

The solution was for the municipality to find a piece of surplus industrial land, and to make it available to the reformatory, which obtained funding for rebuilding its residential school. The reformatory property was then deeded to the municipality, which embarked on a cooperative venture with the developer to service and develop it. At the appropriate point in time, through a many-layered transaction, the up zoned and serviced former reformatory lands are to be exchanged for the waterfront lands to be conveyed to the municipality. When all is done, the municipality should have obtained the waterfront lands at a relatively low transaction cost and without any capital cost, and the developer should be in a position to earn its developer's profit in respect of the former reformatory lands.

Examples 2 and 3

Both these examples play on the value brought to lands by public works, in these cases by a subway expansion.

In one case, a subway station was proposed for an intersection occupied on one corner by a large mall. The mall owners saw the advantage of having the subway stop on the mall property, and invited the municipality to locate a station and the attendant large bus terminal on their property. This would result in a significant loss of mall parking. The public body undertaking the subway construction would be required to build commuter parking, land was expensive, and structured parking was also costly. The solution was found in double use of a new parking facility to be constructed by the public body. The new parking facility will be used by subway commuters during commuting hours. During weekends and evenings, particularly during the busy Christmas season, the parking facility will be available for mall patrons. In exchange for access to expanded parking facilities, the mall owners conveyed the land requirements for the subway station and bus terminal at no cost to the municipality.

In another example, the owner of the lands was a developer wanting to construct a condominium development on a site. Once again, the municipality wanted to construct a subway stop. To oversimplify, the owner again chose to provide the municipality with the property requirements at no cost, but reserved to itself the right to build on top of the subway station, and obtained an agreement which will accelerate its progress toward achieving its development on the site.

Both these examples demonstrate how a public authority can capture from a private owner a part of the benefit brought by a public project, while the private owner is also advantaged over and above what he would have been had an agreement with the municipality not been made.

Example 4

In this case (in which a municipality sought to revitalize a portion of the downtown core), a public/private partnership led to a proposal for the development of "stadium" style seating theatres on air rights over a parking garage owned by a university. Aside from an agreement which effectively allowed a sharing of the existing parking garage by the institution and the patrons of the movie theatres, the arrangement also allows for double use of the new theatre infrastructure. This is accomplished through permitting the theatres to be used in the morning, when they would otherwise be dark, for the purpose of student instruction. Through this arrangement, the university expands its teaching capacity without making any new capital investment, and the redevelopment goals of the municipality are advanced.

Obviously these are oversimplified examples, but they are real examples from my practice. Complicated legal documents were necessary to effect the arrangements outlined, but essential to each of these agreements was the conceptual thinking developed by a team of consultants. An essential part of the conceptual thinking is typically appraisal advice. However, once again, the appraisers must think "outside the box", along with the rest of the consulting

team, to achieve, in these non-biblical times, the creation of value in the public domain with less money.

Stephen F. Waqué
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