

SUBLETIES OF Statutory Right-of-Way / Easements And Determination of Compensation – Part II

The program reference for this presentation appears to contemplate discussion of the challenges in the valuation and acquisition of right-of-way for SkyTrain. It can be fairly said that similar challenges exist for all rights-of-way; however, they may more pronounced or compounded in the case of SkyTrain.

As SkyTrain is a form of mass transit, it logically is located in high density urban areas. High-density urban areas in turn, contain the greatest complexity of land uses, densities, competing interests and a high order of land values for the various interests. The valuation and acquisition of rights-of-way for SkyTrain therefore tends to bring into play a greater number of variable in greater variation than say a pipeline or transmission line across farm country.

The existing and new proposed SkyTrain Line both contain a full range of property interests ranging from fee simple to volumetric rights-of-way. All of these can be termed Statutory Rights-of-Way because their creation is Statute permitted. Even the creation and acquisition (transfer) of a fee simple strip of land can be a statutory right-of-way because it does not follow the usual subdivision process not needing approval by the Approving Officer. This is significant in the fact that the statutory authority that is enabled to create these property interests also must have a Scheme or Project which becomes an important element of the valuation process. If property rights are being acquired for road purposes or SkyTrain or Sewer line or high-pressure gas line or perhaps for a sewage lagoon, the quantification of compensation will vary because of the impact on the remainder.

The degree of impact created by a statutory right-of-way will vary dramatically depending on factors such as:

- (a) The number or type of interests being acquired.
- (b) The width and/or overall size of right-of-way in relation to the size of property.
- (c) Current use and zoning for the property.
- (d) Whether property is vacant or improved and relative value contribution of improvements.
- (e) Whether scheme or proposed project is active or passive in respect of use of the property.
- (f) The location of the right-of-way across a property; along a boundary or diagonally?

You may have noted that a volumetric right-of-way was referenced as the opposite end of the spectrum to a fee simple acquisition. I believe that a volumetric right-of-way is the furthest refinement of an easement because not only is there a definition of interest in the language of the document but also a three dimensional definition of the area it applies to. Although a volumetric right-of-way may have attraction in its level of definition, it requires great care in crafting the document and right-of-way plan. All works must be encompassed within the volumetric envelope and future potential uses under, over and around must be fully contemplated.

It deserves restating that to properly understand and value a Statutory Right-of-Way, careful review and analysis of the document is necessary. At times, particular interpretation or an opinion may be required from counsel in order for the appraiser to be able to make a complete valuation. In fact, valuation of this type of interests often requires close collaboration between appraiser and lawyer, whether for interpretation of

case law or document language. Once the document has been fully reviewed and its "operative clauses" identified and understood, the valuation task turns to the Highest and Best use analysis for the impacted property.

The Highest and Best use analysis needs to be very comprehensive and probing because the insights gained through the analysis will need to be applied in multiple ways. It should address questions such as:

- (a) What is the Highest and Best use of property before the taking?
- (b) Do the improvements (if any) contribute to the land value? How much? For how long?
- (c) What aspects of current use are impacted by the Statutory Right-of-Way document (taking)?
- (d) What is the Highest and Best use after the taking?
- (e) Does the scheme or project change the Highest and Best use?
- (f) Is the change (if any) immediate or deferred and if the latter over what timeline?

This type of in-depth Highest & Best use analysis will involve a substantial interrogation and understanding of the Official Community Plan (OCP) and all the related land use by-laws such as zoning, parking, subdivision, etc. The investigation will likely involve discussions with Municipal staff in areas such as Planning and Engineering.

It is necessary to remember that as the SkyTrain is a mass transit system that is the equivalent of a multi-lane highway. In land use terms it is a powerful "community-shaping" tool. The Highest and Best use analysis will be useful and necessary in due course to address such issues as special benefits and general benefits, whether these benefits exist and how they should be applied.

Let's consider for a moment special and general benefits as referenced in Section 40 and 44 of the Expropriation Act, in the context of SkyTrain. The language in Section 44 is interesting in that it says ".....works by the expropriating authority are of special benefit to that owner or to his or her remaining land beyond any general benefit to any other owner.....". The Act appears to include the physical structure as well as the activity or use in the concept of possible benefit; however, special benefit is distinguished as being separate and different from general benefit. A question arises as to whether there can be several special benefits or because the words, "beyond any general benefit to any other owner", a special benefit can occur for only one property and all other are general benefits. In light of the June/99 legislative changes, this issue of benefits becomes much more relevant because general benefits are certainly more discernable and identifiable than pure special benefits. The current rule appears to be that special benefits can be offset against all compensation but general benefits can only be offset against injurious affection, if any.

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It can be fairly said that in the Skytrain context it is the stations, and not the guideway that create benefits for adjacent lands. This is not true in every case as some stations do not or have not been a catalyst for change or redevelopment. There are several positive examples such as Edmonds Station, Joyce Station, Main Street Station, Gateway and Metrotown. On the other hand, locations such as Nanaimo Station, 29th Avenue Station, 22nd Street Station and Broadway Station have seen a little or no change or activity in their vicinity. It appears that SkyTrain stations can be a catalyst for major land changes such as zoning and density but there are certainly other elements that must be present for the change to take place. In areas such as Edmonds Station and Joyce Station, the redevelopment has certainly spread well beyond the adjacent-to-station lands. The Gateway development in Surrey, however, appears to be localized to a limited area around the station, to date.

Although some changes in OCP and rezoning had to take place, the increases in land value between pre-SkyTrain and post-SkyTrain in these positive examples were in the order of 500% and 600%. This was certainly far in excess of any general market increases.

The quantification of benefits in dollar or % terms from market data is a difficult task. Then to separate or isolate special and general benefits and ascertain their special application is no less a daunting task. The legislation says that general benefits shall be offset against injurious affection, therefore it would not be a fair or balanced valuation if benefits were not fairly considered as well.

Stepping back to the base valuation that flows from the H & B use analysis, the various heads of claim or compensation should be discernable at the end of that process. For purposes of the Act and logical final crosschecking of various components of compensation, the compensation for the right-of-way area itself should be kept distinct. The loss in value to the land in the right-of-way area will be a function of property, location and document particulars discussed earlier. Such easement-type takings or charges can result in losses ranging from about 5% to over 95%. I believe the often used 50% "rule of thumb" is an inappropriate crutch that is used to hide a lack of market research and study. A SkyTrain Right-of-Way located within a sideyard setback certainly has a physical presence but can be very unobtrusive to existing or proposed development. This is because the right-of-way allows for uses under the guideway and around the support columns. If this is setback area, such normal uses are landscaping, parking or storage. Therefore, the focus on the loss in value or reduction of utility in the right-of-way area can be reasonably straightforward process. The application of the Bundle of Rights Theory often serves as a useful guide or test of any conclusions.

It is readily apparent that the SkyTrain right-of-way is an "active easement" rather than a "passive easement" such as a pipeline or powerline. There are actual and measurable impacts to consider such as noise, vibration and view impediment. In some cases, these will be readily discernible and require quantification and in some cases, they will be more in the nature of a stigma or perceived stigma, creating a significant impediments to consensual acquisition. Obstruction of visibility from the street is often cited as a damaging element, however, SkyTrain passengers are also consumers who will now be travelling past the "impacted" property in much larger numbers than travel on the road. Therefore, it could be argued that the Skytrain system actually enhances visibility on an overall basis.

In summary, the challenges in valuing and acquiring statutory right-of-way for SkyTrain are many and varied. It's sort of like a road and sort of like a train. It is a train in the air and it's highly visible. It has great power to shape land use, but not in isolation. It presents legal valuation and acquisition challenges that require reliance on many aspects of jurisprudence, urban land economics and valuation principles. The interpretation and application of these elements in a dynamic urban environment will continue to challenge us all and certainly keep things interesting.