**Tribunals Ontario** | **Tribunaux décisionnels Ontario**

Assessment Review Board | Commission de révision de l'évaluation foncière



**ISSUE DATE**: October 20, 2021 **FILE NO.:** WR 168843

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| Assessed Person(s): | Canadian Tire Corporation Limited; Tri-Metro Investments Inc. |
| Appellant(s): | Canadian Tire Corporation Limited; City of Toronto Revenue Services |
| Respondent(s): | Municipal Property Assessment Corporation Region 09 |
| Respondent(s): | City of Toronto |
| Property Location(s): | 2681 Danforth Avenue |
| Municipality(ies): | City of Toronto |
| Roll Number(s): | 1904-096-320-00410-0000 and 1904-096-320-00600-0000 |
| Appeal Number(s): | 3214659, 3297597, 3352972, 3398640, 3238933, 3293808, 3352112, 3398639, 3441513 and 3440944 |
| Taxation Year(s): | 2017, 2018, 2019, 2020 and 2021 |
| Hearing Event No.: | 736176 |
| Legislative Authority: | Section 40 of the *Assessment Act*, R.S.O. 1990, c. A.31 |

**APPEARANCES:**

| **Parties** | **Counsel** |
|---|---|
| Canadian Tire Corporation Limited | Kathleen Poole and Lauren Lackie |
| Municipal Property Assessment Corporation | Melissa VanBerkum |
| City of Toronto | Angus MacKay |

**HEARD:** February 16 to 18, 2021 by video conference
**ADJUDICATOR(S):** Joanne Laws, Member and Carly Stringer, Member

## DECISION

**OVERVIEW**

[1] The properties under appeal are two separate parcels of land developed as a single Canadian Tire large-format retail store located at 2681 Danforth Avenue in the City of Toronto (the “Subject Properties”).

[2] Canadian Tire Corporation Limited (the “Appellant”) owns one parcel, roll number 1904-096-320-00410-0000 (“00410”). The other, roll number 1904-096-320-00600-0000 (“00600”) is owned by Tri-Metro Investments Inc. (“Tri-Metro”). Tri-Metro leases its parcel to the Appellant.

[3] The Appellant has appealed the assessments of the Subject Properties for the 2017 to 2021 taxation years, based on a valuation date of January 1, 2016. Tri-Metro is not a party to the appeals.

[4] The Municipal Property Assessment Corporation (“MPAC”) and the City of Toronto (the “City”) are respondents in these proceedings.

[5] The primary issue in this appeal proceeding is the current value of the Subject Properties on the January 1, 2016 valuation date for the 2017 to 2021 taxation years.

[6] The current value of the Subject Properties turns on the proper method for assessing the value of those lands; and the proper method for assessing the value of lands turns on the Highest and Best Use (“HABU”) of the Subject Properties on the state and condition date for each taxation year under appeal.

[7] MPAC and the City submit that the HABU of the Subject Properties is high-rise mixed-use development. The Appellant submits the HABU is the current use as a large format retail store.

[8] In this case, the Assessment Review Board (the “Board”) must first determine the HABU of the Subject Properties for each taxation year under appeal. Then, the Board must decide what is the correct current value assessment (“CVA”) of the Subject Properties for the January 1, 2016 valuation date, in light of that HABU, for each taxation year under appeal. Finally, the Board must have regard to whether this CVA is equitable with the assessments of similar properties in the vicinity.

**Result**

[9] For the reasons that follow, the Board finds:

a. The HABU of the Subject Properties is the current use.

b. For the January 1, 2016 valuation date, the correct current values are as follows:

   i. $6,280,000, rounded, in the commercial tax class for roll number 1904-096-320-00410-0000, and

   ii. $4,470,000, rounded, in the commercial tax class for roll number 1904-096-320-00600-0000.

c. No equitable adjustment is required by s. 44(3)(b) of the *Assessment Act* (“Act”).

[10] The Board has carefully reviewed and considered all of the evidence, submissions, and case law presented by the parties. In this decision, the Board will only reference those items most germane to its analysis.

## PRELIMINARY ISSUE

[11] At the commencement of the hearing, the City advised that it was withdrawing its appeals seeking a higher assessment. Those appeal numbers are: 3368779, 3368778, 3402202 and 3402203.

## ANALYSIS

### Description of the Subject Properties

[12] The Subject Properties are two separate parcels of land located in the former Borough of East York. At the hearing, there was some dispute regarding the correct lot sizes of the two parcels comprising the Subject Properties. MPAC's Land Parcelization Unit used Autocard measurements of the registered instruments and confirmed land areas of 2.87 acres for 00410 and 1.42 acres for 00600, for a total acreage of 4.29 for the Subject Properties. The Appellant's expert used Geowarehouse, an online registry system, and determined the 00410 lot to be 2.88 acres and the 00600 lot to be 1.39 acres, for a total acreage of 4.27. The parties were not able to provide a satisfactory explanation for the difference in measurement. The parties agreed that the Board may use the land areas stated by MPAC, being 2.87 acres for 00410 and 1.42 acres for 00600, for a total acreage of 4.29 for the Subject Properties.

[13] The Subject Properties are improved by a 78,356 square foot single-storey big box Canadian Tire store. Canadian Tire has successfully operated on the site for more than 45 years, with the current building constructed in 2000.

[14] It is worth noting that the Canadian Tire building on the Subject Properties actually touches on three properties – the Subject Properties, as well as a third abutting property known as 2575 Danforth Avenue (roll number 1904-096-320-00200-0000, also known as the "Jacob's Tent Lot"). The Jacob's Tent Lot is 0.78 acres in size, and 1,897

square feet of the 78,356 square foot Canadian Tire store is located on the Jacob's Tent Lot. Neither the Jacob's Tent Lot, nor the portion of the Canadian Tire store located on Jacob's Tent Lot, form part of the Subject Appeals.



**Issues for the Hearing**

[15] At issue in this proceeding is:

1. What is the HABU of the Subject Properties?

2. What is the current value of the Subject Properties?

3. Is an equitable adjustment required pursuant to s. 44(3)(b) of the Act?

**Applicable Law**

Legislative Scheme

*Current Value*

[16] Section 44(3)(a) of the Act requires the Board to "determine the current value of the land." Section 19(1) of the Act states that "the assessment of land shall be based on its current value" and s. 1 of the Act defines current value as "the amount of money the fee simple, if unencumbered, would realize if sold at arm's length by a willing seller to a willing buyer." This means that the Board must determine what the Subject Properties would have sold for on the valuation day.

[17] Valuation days are set out in s. 19.2 of the Act. January 1, 2016 is the day as of which land shall be valued for the 2017 to 2020 taxation years. Section 48.6 of O. Reg.

282/98 extended this valuation day to the 2021 taxation year.

*State and Condition Date*

[18] As confirmed by the Board in *Non-Profit Seniors Housing of Kenor v Municipal Property Assessment Corporation, Region 32*, 2015 CanLII 58800 at paragraph 9, "[t]he law in Ontario is well established that the state and condition of a property on the roll return date determines how that property is assessed for the following taxation year." The roll return date is defined in s. 36(2) of the Act as "not later than the second Tuesday following December 1 in the year in which the assessment is made." This is also referred to as a taxation year's "state and condition date": *Claireville Holdings Limited v Municipal Property Assessment Corporation, Region 9,* 2021 CanLII 26729 (ON ARB) ("*Claireville Holdings")* at paragraph 17.

*Highest and Best Use*

[19] As explained by the Board in *General Motors of Canada Co. v. Municipal Property Assessment Corp., Region No. 27*, 2017 CanLII 3664 ("*General Motors*") at paragraph 15, "[a] property is to be valued at what the market would view as the most productive use of the land because that is how it is most likely to transact." This is the valuation principle known as highest and best use. It is the HABU of a property on the state and condition date that indicates the best approach to value that property for a given taxation year: see *Claireville Holdings, supra* at paragraph 20. As confirmed in *General Motors*, *supra* at paragraph 15 citing *Toronto Airways Ltd. v. Municipal Property Assessment Corp.,* Region 14 2014 CarswellOnt 15057, [2014] O.A.R.B.D. No. 500 ("*Toronto Airways")* at paragraph 37, "[a] highest and best use assessment is appropriate for each taxation year because the highest and best use of a property will change over time."

[20] Accordingly, the assessor is tasked with determining, on an annual basis and at the state and condition date, the HABU of the land. Then, the assessor must establish the correct current value of the property, on an annual basis, “by reference to the valuation of land of similar HABU on the legislated valuation date”: *Claireville Holdings, supra* at paragraph 21.



The HABU Test

[21] To establish the HABU of land, “it must be determined which uses are legally permissible or possible, physically possible and financially feasible and from those potential uses determine which is the most productive use of the land”: see *Toronto Airways, supra* at paragraph 31.

[22] The Board has taken the view, as confirmed in *General Motors, supra* at paragraph 18 that “the use a property is put to at any given time is presumed to be its highest and best use. Parties seeking to prove a different highest and best use will require compelling evidence of how another legally permissible, physically possible, and financially feasible use is more productive than the current use.” This presumption is “based on the entirely reasonable assumption that [the current use] already meets the tests of being physically possible, legally permissible, and financially feasible”: see *Toronto (City) Revenue Services and Municipal Property Assessment Corp., Region 09,* 2017 CanLII 80039 (ON ARB) at paragraph 63.

*Legally Permissible*

[23] The first prong of the HABU analysis is a determination of legal permissibility. If the legally permissible prong of the test is not satisfied by a particular use, the HABU analysis for that particular use is discontinued: see for instance *Toronto Airways*, *supra* at paragraph 41.

[24] Legal permissibility considers the fact that certain restrictions like zoning, building codes, and environmental regulations may preclude certain potential uses. However, if there is a reasonable probability that zoning or other such restrictions could be changed, that also factors into the legal permissibility analysis.

[25] In *Farlinger Developments Ltd and Borough of East York,* (1976), 9 O.R. (2d) 553, the Ontario Court of Appeal confirmed that establishing the legal permissibility prong of the HABU test "must be based on something more than a possibility of rezoning. There must be a probability or a reasonable expectation that such rezoning will take place. It is not enough that the lands have the capability of rezoning." In *Toronto Airways*, *supra* at paragraph 39, the Board confirmed that there is a temporal element to the analysis of the probability of rezoning: "Anything outside of a reasonable redevelopment horizon is speculative in nature and cannot represent a probable use of the land."

*Physically Possible*

[26] As noted in *The Appraisal of Real Estate, Third Canadian Edition* at 12.6, "the test of physical possibility addresses the physical characteristics associated with the site that might affect its highest and best use."

*Financially Feasible*

[27] Financial feasibility determines profitability of the proposed use. *The Appraisal of Real Estate* states that "[a]s long as a potential use has value commensurate with its cost and conforms to the first two tests, the use is financially feasible."

*Maximally Productive*

[28] Once the other prongs of the test are satisfied, the use that produces the highest

value is considered maximally productive.

**Issue 1 – What is the Highest and Best Use of the Subject Properties?**

Findings on Issue 1

[29] All parties agree that the Subject Properties should be valued based on their HABU.

*Current Use*

[30] The Appellant submits that there is a presumption that the HABU is the current use as a large format retail store, and MPAC has failed to rebut this presumption.

[31] In addition to it being the presumption, submits the Appellant, its expert, Charles Johnstone, has concluded that the current use is legally permissible, physically possible, financially feasible and maximally productive.

[32] Neither MPAC nor the City dispute that the Subject Property's current use is legally permissible, physically possible, and financially feasible. Accordingly, the Board must determine whether MPAC's proposed use is legally permissible, physically possible, and financially feasible. If it is, the Board must then consider whether the current use or MPAC's proposed HABU is maximally productive. The use that is maximally productive will be the HABU.

[33] The Board will first consider MPAC's proposed HABU. MPAC submits that the Board should prefer its expert, Blake Brown's, evidence and find that the HABU as of January 1, 2016 is development lands, specifically high-rise mixed-use development with a minimum floor space index of 3.0. A floor space index is the ratio of the total floor area of a building to the area of the property site.

[34] The City agrees with MPAC's position that the HABU is as a redevelopment site for a mixed-use development.

*Development Lands - Physically Possible*

[35] The Appellant did not dispute that MPAC's HABU is physically possible on the Subject Properties. The Subject Properties are two lots totaling 4.29 acres with frontage on Danforth Avenue and Guest Avenue. The evidence established the sites are level and fully serviced with no known physical attributes that would prevent development. The Board accepts that MPAC's proposed HABU of high-rise mixed-use development is physically possible and this prong of the test is satisfied.

*Development Lands - Legally Permissible*

[36] The Appellant submits that the current use is the only legally permissible use. The Appellant further submits that for the Board to find a HABU which goes beyond the as-of-right zoning, there must be significant non-speculative site-specific evidence of a probable rezoning, which does not exist in this case. The Appellant further submits that MPAC has not met the evidentiary standard for the legal permissibility, stating that MPAC's expert has not relied on a planning study, has ignored the site-specific zoning, and has speculated regarding future use of the Subject Properties.

[37] MPAC submits that the legal permissibility prong of the analysis requires a determination of the reasonable probability of rezoning as of the valuation date. MPAC submits that the evidence establishes that as of January 1, 2016, it was reasonably probable that the Subject Properties would be rezoned for a high-rise mixed-use development.

[38] The City's view is that a rezoning of the Subject Properties for a mixed-use development was reasonably probable as of January 1, 2016.

[39] The City's witness, George Pantazis, is a senior planner with the City's Planning Division and is the planner for the area of the City that includes the Subject Properties. He provided evidence regarding the planning policies and land use designations applicable to the Subject Properties from January 1, 2016 to the present.

[40] Mr. Pantazis confirmed that site-specific zoning bylaws 248-2000 and 249-2000 apply to the Subject Properties. These bylaws permit the building of a retail store (the current Canadian Tire store) and associated automobile service and repair uses.

[41] Accordingly, the Board finds that the actual zoning of the Subject Properties as of the valuation date precluded the HABU proposed by MPAC. Therefore, to satisfy the legally permissible prong of the analysis, MPAC must show there was a reasonable probability of a rezoning to allow for high rise mixed-use development within a reasonable timeframe of the valuation date.

[42] MPAC's expert, Mr. Brown, confirmed his view that as of January 1, 2016, there was a reasonable probability that the Subject Properties would be rezoned for a mixed-use development. In providing this opinion, Mr. Brown relied on the following:

a. The Subject Properties are on an Avenue and in a Mixed-Use Area, which are areas designated for growth and intensification in Ontario's Provincial Policy Statement (2014), the Growth Plan for the Greater Golden Horseshoe, and the City's Official Plan.

b. The Avenue and Mid-Rise Building Guidelines adopted by the City in July 2010 identifies the Subject Properties as an appropriate location for intensification with mid-rise buildings.

c. There were several development proposals in the vicinity of the Subject Properties. Four properties near the Subject Properties sold within a relevant

timeframe to the 2016 base year. Each property owner filed a zoning amendment application after the sale seeking approvals for mid-rise development. Three of the proposals have resulted in amendments to zoning bylaws and one application, filed in December 2017, remains under review. The median FSI of those applications is 4.66.

d. The Danforth Avenue Planning Study was initiated by the City of Toronto in 2014 in response to development pressures along Danforth Avenue and near the Danforth Go Station; and

e. Current market activity and development trends in Downtown Toronto which demonstrate that the “as of right” zoning no longer reflects the potential development of a property and does not correspond with more recent planning policy and guidelines which relate to this site passed before January 1, 2016. Over the past 15 years, the vast majority of new developments in Toronto have requested development allowances exceeding the performance standards set out in the zoning bylaw.

[43] In addition to Mr. Brown’s evidence, Mr. Pantazis stated that the current use of the Subject Properties as a big-box retail store does not comply with the vision for intensification and growth in accordance with Ontario’s Provincial Policy Statement (2014), the Growth Plan 2006, and the City’s Official Plan. Mr. Pantazis testified that the site-specific zoning bylaws applicable to the Subject Properties are a “product of their time, which is back in 2000.” He called the bylaws “archaic,” stating they are inconsistent with the Official Plan designation of 2681 Danforth Avenue as a Mixed-Use area. Mr. Pantazis confirmed he is reviewing several development applications for high-rise buildings in close proximity to the Subject Properties.

[44] Based on this evidence, the Board accepts that the Subject Properties are in an area earmarked for intensification and development.

[45] However, there must be more than just development potential for the Board to be satisfied that a rezoning is reasonably probable. In this case, the evidence shows that as of the state and condition date for each and every taxation year under appeal, the Subject Properties were zoned for specific retail and associated automobile service and repair uses. Although Mr. Pantazis described the existing site-specific zoning as "archaic," he confirmed that this zoning will continue to apply to the Subject Properties until a site-specific zoning by-law amendment application is submitted, reviewed, and approved by the City. Mr. Brown's evidence was that large sites such as the Subject Property "will typically go through a rezoning amendment application before being developed": page 27. He confirmed that the amendment application process "often involves community meetings and the negotiation of building heights, densities and setbacks with municipal planners and or politicians." Mr. Brown stated that "prudent buyers and sellers would anticipate that a by-law rezoning could be completed within three to five years." The Appellant's expert Mr. Johnstone confirmed in his Reply report a three to five year timeframe applies to approval of zoning amendment applications, from the onset of the development planning process. There was no evidence specific to the Subject Properties regarding how long it would take for any application, once submitted, to be reviewed and approved by the City. Most notably, there was no evidence before the Board of a site-specific zoning by-law amendment application for the Subject Properties in or around the relevant timeframe. The Board notes that, as of the hearing date, there were still no applications to amend the site-specific zoning-bylaw, over five years after the valuation date. If Mr. Brown and Mr. Johnstone are correct that it would take three to five years following receipt of an application to complete a rezoning, the Board does not accept that is a reasonable timeframe for a rezoning for the purposes of the legal permissibility prong of the HABU analysis. Overall, the evidence before the Board does not support a finding that the Subject Properties would be reasonably and probably rezoned within a reasonable timeframe.

[46] The Board has reviewed the authorities provided by the parties and notes as follows:

a. In *Toronto Airways,* the Board confirmed the HABU was the existing airport use. Notwithstanding a redevelopment application for the lands, the Board confirmed that as of the state and condition date, the land was being used as an airport and the land was zoned for airport use. The Board noted at paragraph 38 that the fact that nearly three years passed between the making of the development application and a decision on that application "demonstrates the inherent uncertainty of the zoning process."

b. In *McNally v City of Etobicoke*, 2015 CanLII 30373*,* the property at issue was part of a proposal seeking an increase in density for the site to allow a high-density condominium development to proceed. MPAC's expert relied on that site proposal, as well as a report recommending approval of applications for zoning bylaw amendments for two separate but abutting sites, in arguing the HABU was high-density condominium development. Even in the face of a site proposal and a report recommending approval of zoning amendments for abutting sites, the Board was not satisfied a rezoning was reasonably probable for the subject property. The Board confirmed at paragraph 45 that "there remains a great deal of uncertainty on how the redevelopment will proceed, and so the requirement of being legally permissible cannot yet be said to be reasonably probable."

c. In *Claireville Holdings*, *supra*, the Board found that rezoning was probable. In that case, there was evidence before the Board that a development application had been filed, as well as evidence confirming City council's anticipated support for a rezoning.

[47] On the whole of the evidence, the Board is not satisfied that a zoning change was probable within a reasonable timeframe. The Board concludes that the probability of a rezoning on the redevelopment horizon remains speculative. The Subject Properties were zoned with site-specific zoning allowing Canadian Tire's operations. The lands were being used as a Canadian Tire store. Canadian Tire had renewed its land lease on

the Tri-Metro lot to 2025. The zoning did not permit high density development, and such development would only be permitted if a zoning change were granted. The City was not considering a zoning change. The evidence was the City would not contemplate a zoning change without a development application before it. There was no such development application during the relevant timeframe. Although there was evidence regarding bylaw amending applications being allowed for other developments in the vicinity of the Subject Properties, and Mr. Brown testified that the majority of developments in downtown Toronto are being rezoned after purchase, the Board finds this is insufficient evidence respecting the probability of a rezoning for the Subject Properties, or the specific timeline associated with such a bylaw change. The best evidence of that timeframe was provided by Mr. Brown and Mr. Johnstone, who both suggested a three to five-year period for rezoning following an application. To be legally permissible, rezoning needs to be probable within a reasonable timeframe. In the Board's view, and in the circumstances of this case, a three to five year timeframe following an application – when there is no evidence of an application either filed or pending, nor evidence of Council's support for a rezoning – is simply too speculative.

[48] For these reasons, the Board finds that MPAC's proposed use has not satisfied the legal permissibility prong of the Highest and Best Use analysis.

*Financially Feasible*

[49] The Appellant further submits that MPAC has not met the evidentiary standard for the financial feasibility of its proposed HABU. The Appellant submits that MPAC does not rely on a financial feasibility study specific to the Subject Properties to support its position.

[50] MPAC submits that its financial feasibility analysis can be found throughout its expert's report, and the Board must have regard for the totality of that report. MPAC submits that the evidence as a whole demonstrates that there was market demand for

mixed-use high rise development, that this type of development was profitable and market participants were buying land with a view to redevelopment in line with the City's Official Plan policies in place as of January 1, 2016. MPAC submits it has satisfied the financial feasibility prong of the analysis.

[51] MPAC's expert Mr. Brown testified that, in conducting his analysis for financial feasibility, he looked at sales – what buyers and sellers are doing. His report provides that after reviewing the existing real estate market and new development proposals in the immediate vicinity, "it is clear that a high-rise mixed-use development would be financially feasible at this location": p. 29. Mr. Brown conducted a basic pro forma analysis of the construction costs associated with development. He then considered sales of condominium units and determined the rate per square foot that new units were selling for around the base date. With this information, he determined the profit associated with a developer moving forward with a high-rise multi-residential project, confirming sufficient profit to make it financially feasible. Mr. Brown confirmed that although hard and soft cost estimates may vary, "it is clear from the sheer volume of new condominiums built and sold in Toronto every year for the past decade that this development form is financially feasible throughout the city": p. 31. He referenced that in the Toronto East neighbourhood, in which the Subject Properties are located, the median number of sold units per development was 98%, which he stated clearly demonstrates market demand: "[t]he many successful condominium developments in near proximity to the Property indicate to me a high degree of probable success for a potential redevelopment of this site": p. 31.

[52] The *Assessment Act* does not mandate a particular type of evidence the Board must consider. In *McNally, supra* at paragraph 38, the Board confirmed, citing The Appraisal of Real Estate, Third Canadian Edition, that market analyses must be done to assess the criteria of Highest and Best Use, including a fundamental demand analysis, an inferred analysis, a market study and a marketability study. Although not an exhaustive list of the evidence the Board can consider, these types of studies prove useful evidence in establishing financial feasibility.

[53] MPAC submits that Mr. Brown conducted a market and marketability study and undertook an inferred demand analysis to determine the supply and market demand as of the valuation date. MPAC submits that an inferred demand and fundamental demand analysis are two different ways to perform a market and marketability analysis, and that an inferred demand analysis is well suited to a retrospective valuation like Mr. Brown's expert report. Mr. Brown has noted the significant growth in the City, the general economic demand and specific demand for residential units and has reviewed the activities of market participants.

[54] The Appellant submits that the Board should follow its decision in *Claireville Holdings, supra.* In that case, the Board expressly rejected Mr. Brown's reliance on "successful condominium developments in near proximity" as proof of financial feasibility.

[55] The Board has considered the totality of Mr. Brown's evidence. Within his report, he conducted a pro forma analysis of construction costs for a condominium development and compared that to the profits associated with sales. He determined there would be sufficient developers' profit to move forward with a high-rise multi-residential project at the Subject Properties. He considered the number of new condominiums brought to market between September 2014 and September 2019 in the Toronto East neighbourhood, noting the median number of sold units per development as 98%. He stated this clearly demonstrates market demand. Mr. Brown noted: "[t]he many successful condominium developments in near proximity to the [Subject Properties] indicate to me a high degree of probable success for a potential redevelopment at this site": p. 31.

[56] The Board is not satisfied, on the whole of Mr. Brown's evidence, of the financial feasibility of MPAC's proposed HABU as of the state and condition date for each taxation year under appeal. Namely, based on Mr. Brown's evidence, the Board is not able to determine at which stage the continued construction of high-rise condominium buildings in proximity of the Subject Properties will exceed demand. To put it simply, at

some point, supply of condominium buildings will creep up on demand, potentially depressing prices and affecting the calculation of whether the construction of new high-rise condominium buildings is financially feasible. In the absence of such evidence, the Board is not prepared to find that MPAC's HABU was financially feasible on the state and condition date for each taxation year in issue. The Board finds that MPAC has failed to satisfy the financial feasibility prong of the analysis. MPAC failed to provide sufficient evidence regarding forecasted demand for and supply of competitive high-rise developments in proximity of the Subject Properties. Without an adequate analysis of residual demand, the Board is not satisfied that MPAC's proposed HABU is necessarily financially feasible.



[57] The Board has found that MPAC's evidence has failed to satisfy the legal permissibility and financial feasibility prongs of the HABU analysis. As MPAC has not satisfied either prong, it is not necessary to consider the fourth prong of the HABU test, being maximum productivity.

[58] As such, the Subject Properties will be valued based on the HABU proposed by the Appellant, as the existing large-format retail store.

**Issue 2 – What is the correct current value of the land?**

[59] Having determined the HABU is the current use as a large-format retail store, the Board must now determine the current value of the land based on that current use.

Findings on Issue 2

[60] The Appellant submits that, using the cost approach, the correct current value of the Subject Properties for the 2017 to 2021 taxation years, as of the January 1, 2016 valuation date, is $10,695,000. The Appellant submits it is appropriate for the percentage value reduction to be applied consistently with the apportionment of the

assessment as between the two lots comprising the Subject Properties, with 00400 being $3,539,400 and 00600 being $7,155,600.

[61] MPAC submits that, using the direct sales comparison approach, the correct current value of the Subject Properties for the relevant taxation years, as of the January 1, 2016 valuation date, is $28,029,000.

[62] Pursuant to s. 40(17) of the Act, the onus is on MPAC to prove the correct current value of the Subject Properties.

[63] The Board has considered the evidence of current value provided by both Mr. Brown on behalf of MPAC and Mr. Johnstone on behalf of the Appellant. The Board will consider Mr. Brown's evidence first.

*MPAC's Evidence*

[64] Mr. Brown, relying on the HABU of development lands, determined that the sale comparison approach is the most appropriate valuation methodology to value the Subject Properties. He conducted a sales analysis of 13 properties that he determined to be similar to the Subject Properties. He derived a rate of $50 per square foot buildable by taking the sale price of those properties and dividing it by the total permissible/probable building area. He testified this calculation determines the rate at which a purchaser is willing to pay for each square foot that can be built.

[65] Mr. Brown did not present any valuation evidence supporting an alternative position in the event the Board determined the HABU is the current use. Mr. Brown chose the valuation methodology that best applies when the HABU is development lands. Further, the properties relied on by Mr. Brown in his comparable sales analysis all have a different HABU than the Subject Properties and were chosen in part on the basis of their "similar development potential and market demand." The market value depends

on the present or anticipated use of a property, which is why the HABU must be determined as a first step in the valuation analysis. Based on the Board's finding that the HABU is the current use, the Board finds that Mr. Brown's suggested redevelopment sales are not comparable, and ultimately should not be relied upon in the Board's determination of the Subject Properties' current value.

*Appellant's Evidence*

[66] The Appellant's evidence of value was provided by Charles Johnstone.

[67] As a preliminary matter, the Appellant sought to qualify Mr. Johnstone as an assessor and accredited appraiser to provide an opinion respecting large format retail stores and development lands. MPAC objected to Mr. Johnstone's qualification as an expert assessor on the basis that he has never appeared as an assessor in the province of Ontario; there is no evidence that he has ever returned an assessment or that having returned an assessment has been called as an expert; or arrived at a tax classification of a property. The Board carefully considered Mr. Johnstone's education, experience and training, which included extensive experience giving opinions on values and performing reviews of assessments across the country. The Board was satisfied that Mr. Johnstone has a combination of education, experience and training in assessment to be qualified to provide opinion evidence on assessment, and as an accredited appraiser for large format retail stores and development lands. The Board confirmed that any issue with the lack of experience in performing assessment in the province of Ontario, as raised by MPAC, would go to weight.

[68] Mr. Johnstone chose the cost approach as the appropriate valuation methodology based on the HABU of the Subject Properties being the current use as a large format ("big box") retail store.

[69] Mr. Johnstone provided evidence in his expert report that the sum total current

value of the Subject Properties is $12,121,000. He testified at the hearing that this calculation of value in his expert report included the Jacob's Tent Lot. There is no dispute among the parties that an adjustment to remove Jacob's Tent Lot is required. Mr. Johnstone testified that if 0.78 acres of the Jacob's Tent Lot and 1,897 square feet of the portion of the Canadian Tire building on the Jacob's Tent Lot were removed from his analysis, that would result in a revised rounded current value of $10,695,000 for the Subject Properties. Under cross-examination, Mr. Johnstone confirmed that this works out to a revised rounded value of $6,288,000 for 00410 and $4,406,000 for 00600. In light of his use of the cost approach valuation methodology, Mr. Johnstone testified that he apportioned the revised land value based on a land area of 2.88 acres for 00410, and 1.39 acres for 00600. It is worth noting that Mr. Johnstone's land areas were marginally different than those accepted by the Board – he provided his apportionment based on a 4.27 total acreage rather than 4.29 total acreage accepted by the Board. He allocated the building costs based on 30,400 square feet on 00410 and 46,059 square feet on 00600. The following chart summarizes Mr. Johnstone's data.



| Comp | Land Type | Municipality | Address | Area (A) | Zoning | Sale Date | Sale Price | Sale Price $/Acre | Time Adj. $ / Acre | Size Adj. $ / Acre | KM From Subject |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 16 | Commercial | Scarborough | 41 Lebovic Ave | 3.512 | ME | Oct-10 | $4,500,000 | $1,281,321 | $2,100,513 | $1,645,009 | 3.9 |
| 18 | Commercial | Scarborough | 43 Upton Rd | 6.364 | E1.0 | Feb-10 | $2,000,000 | $314,268 | $540,541 | $631,573 | 3.7 |
| 19 | Commercial | East York | 195 Wicksteed Ave | 7.572 | M2 | Mar-09 | $5,250,000 | $693,344 | $1,266,508 | $1,663,419 | 5.0 |
| 22 | Commercial | East York | 195-209 Wicksteed Ave | 9.173 | E1.0 | Apr-13 | $7,500,000 | $817,617 | $1,089,611 | $1,628,270 | 5.0 |

[70] With respect to determining the land value component of the cost approach, Mr. Johnstone applied the direct comparison approach. In his expert report, he identified four vacant commercial lots properties as the "most comparable" for determining the land value. He excluded 43 Upton Road "due to its unusually low land rate, significantly larger assembly size, and superior developments." Based on the median and mean of the remaining three properties, he concluded that the land rate is $1,645,000 per acre.

[71] With respect to Building Cost New, Mr. Johnstone determined a rate of $93.50

per square foot. He applied a 53% depreciation (3.33% straight line depreciation with a building age of 2001). Mr. Johnstone calculated yardworks at a rate of $155,000 per acre, less 50% depreciation.

*Land Value*

[72] Mr. Brown challenged Mr. Johnstone's "most comparable" sales in several ways, including:

a. They sold between March 2009 and April 2013. Sales that occur several years away from the base date are not reliable as the principal determination of value.

b. They are not located near "major transit" and are considered inferior locations with lower land values; and

c. The properties have Official Plan designations as Employment lands which is more prohibitive than the Subject Properties' Mixed-Use designation, thereby limiting development and use.

[73] MPAC did not provide the Board with evidence supporting land value based on a HABU of current use. The Board has found that MPAC did not provide sufficient evidence to prove the correctness of its proposed current value. Accordingly, the Board is left with Mr. Johnstone's evidence and must determine whether it is capable of proving that the Appellant's proposed current value is more likely than not.

[74] The Board accepts that the sales presented by Mr. Johnstone are not ideal comparable properties for the reasons outlined by Mr. Brown. However, the evidence is clear that Mr. Johnstone was not able to find any sales of land sold for the purposes of big box retail development in close proximity to the Subject Properties and close to the

January 1, 2016 valuation date. This is a unique property, and Mr. Johnstone cannot provide evidence of sales that do not exist. The Board must make its determination on the basis of the best evidence before it. Accordingly, the Board accepts Mr. Johnstone's evidence of land value which included adjustments for sale values and site areas noted in the chart. Although the properties relied on by Mr. Johnstone are not entirely comparable, the Board finds they are sufficiently comparable for the purposes of proving that the Appellant's proposed current value is more likely than not. The properties relied on by Mr. Johnstone are sufficiently close to the Subject Properties; they are located in the direct vicinity of other retailers and commercial developments; and the sale prices have been time adjusted to address the size and distance from the base year. MPAC did not provide sufficient evidence to support the quantum of any adjustment to account for any differences between the Appellant's comparable properties and the Subject Properties with respect to proximity to public transportation and zoning differences.

[75] Accordingly, the Board accepts Mr. Johnstone's land rate of $1,645,000 per acre. Applying this to the 2.87 acres of 00410, the Board finds a land value of $4,721,150. Applying this to the 1.42 acres of 00600 lot, the Board finds a land value of $2,335,900.

*Improvements*

[76] In submissions, MPAC took issue with Mr. Johnstone's valuation of the improvements. MPAC submits that Mr. Johnstone did not build his own Replacement Cost New ("RCN") of the improvements, but instead relied on a Memorandum of Understanding between MPAC and the Appellant relating to RCN values for the 2012 CVA, factored back to the 2008 CVA. MPAC further submits that Mr. Johnstone did not provide adequate evidence as to how he apportioned the improvement values between the two lots based on his new value. In addition, the City argued that the Board should not rely on the MOU because the City had not taken an active role in the negotiations that led to its terms.

[77] The Board does not accept MPAC's submissions challenging Mr. Johnstone's valuation of improvements. Although Mr. Johnstone does rely on the MOU to some extent, his report outlines the process that went into determining the rates. Most importantly, in Mr. Brown's expert report at page 34, he states that he does not take issue with Mr. Johnstone's cost analysis of the improvements and accepts it as accurate. MPAC has not otherwise provided its own evidence of cost values for the improvements. Accordingly, the Board accepts Mr. Johnstone's evidence valuing the building at $93.50 per square foot with 53% depreciation and yardworks at $155,000 per square acre with 50% depreciation, as follows:



**Building**

| Property | Building Square Footage | Building Cost New Rate Per Square Foot | Building Cost New | Less 53% depreciation |
|---|---|---|---|---|
| 00410 | 30,400 square feet building | $93.50 | $2,842,400 | $1,335,928 |
| 00600 | 46,059 square feet | $93.50 | $4,306,517 | $2,024,063 |

**Yardworks**

| Property | Acreage | Replacement Cost New Rate Per Acre | Replacement Cost New | Less 50% Depreciation |
|---|---|---|---|---|
| 00410 | 2.87 | $155,000 | $444,850 | $222,425 |
| 00600 | 1.42 | $155,000 | $220,100 | $110,050 |

[78] The Board therefore determines the following amounts associated with

improvements to the Subject Properties:

a. 00410 $1,558,353

b. 00600 $2,134,113

[79] Therefore, using the Cost Approach to value, the Board finds that the current value of the Subject Properties is $10,749,516, being $10,750,000 (rounded), allocated between the two lots comprising the Subject Properties as follows:

a. 00410 $6,279,503

b. 00600 $4,470,013

**Issue 3 – Should a reduction in the current value be made to make it equitable with the assessments of similar lands in the vicinity?**

[80] Section 44(3)(b) of the Act requires that the Board have reference to the assessments of similar lands in the vicinity of the Subject Properties and, if there is evidence of an inequity, lower the correct current value to an incorrect, but equitable, assessment.

Findings on Issue 3

[81] MPAC's position is that no equity adjustment is required to Mr. Brown's proposed current value. MPAC has not stated a position on equitable assessment in relation to Mr. Johnstone's proposed current value.

[82] The Appellant has not made submissions or produced evidence relating to

equitable assessment.

[83] As the parties have not made submissions or provided evidence relating to s. 44(3)(b), the Board finds there is not a sufficient basis to make a further adjustment pursuant to s. 44(3)(b) of the Act.

**CONCLUSION**

[84] The Subject Properties housed an operating Canadian Tire store on the state and condition dates for the 2017 to 2021 taxation years. The Board finds that neither MPAC nor the City have satisfied the legal permissibility and financial feasibility prongs of the HABU analysis relating to their proposed use. The Board finds that the highest and best use of the Subject Properties is its current use. The Board finds that the current value is $10,750,000 (rounded), allocated between the two lots comprising the Subject Properties as follows:

a. Roll number 1904-096-320-00410-0000 $6,279,503

b. Roll number 1904-096-320-00600-0000 $4,470,013

[85] The Board does not have a sufficient basis to make an adjustment pursuant to s. 44(3)(b) of the Act.

**ORDER**

[86] The Board orders that for the 2017 to 2021 taxation years:

i. The returned assessments for roll number 1904 096 320 00410 0000 shall be reduced to $6,280,000, rounded, in the commercial tax class; and

ii. The returned assessments roll number 1904 096 320 00600 shall be reduced to $4,470,000, rounded, in the commercial tax class.

*"Joanne Laws"*

JOANNE LAWS
MEMBER

*"Carly Stringer"*

CARLY STRINGER
MEMBER