



Tribunals Ontario

Assessment
Review Board

Tribunaux décisionnels Ontario

Commission de révision de
l'évaluation foncière

ISSUE DATE: March 26, 2021

FILE NO.: WR 167648A

AMENDED DECISION ISSUED ON: March 30, 2021

Assessed Person(s): Claireville Holdings Limited, 2477879 Ontario Inc.,
1579661 Ontario Inc. and Frances Danyliw
Appellant(s): Claireville Holdings Limited, 2477879 Ontario Inc. and
1579661 Ontario Inc.
Respondent(s): Municipal Property Assessment Corporation Region 9
Respondent(s): City of Toronto
Property Location(s): See Schedule A
Municipality(ies): City of Toronto
Roll Number(s): See Schedule A
Appeal Number(s): See Schedule A
Taxation Year(s): See Schedule A
Hearing Event No.: 733880
Legislative Authority: Section 40 of the *Assessment Act*, R.S.O. 1990, c. A.31

APPEARANCES:

Parties

Claireville Holdings Limited,
1579661 Ontario Inc. and
2477879 Ontario Inc.

Municipal Property
Assessment Corporation

City of Toronto

Counsel

Stephen Longo
Alexander Pletsch

Melissa VanBerkum

No one appeared

HEARD:

November 24-25, 2020 by video conference

ADJUDICATOR(S):

Pierre R. Lavigne, Member

AMENDED DECISION

AMENDED DECISION

In accordance with Rule 114 of the Assessment Review Board's Rules of Practice and Procedure, as amended May 2019, related to the correction of minor errors and in accordance with Rule 21.1 of the Statutory Powers and Procedure Act regarding the correction of errors, this Amended Decision is issued to correct error(s) in the Decision adding Alexander Pletsch to the Appearances section on page 1. The amendments have been underlined for ease of reference. There are no other changes in this Amended Decision.

OVERVIEW

[1] Claireville Holdings Limited., 1579661 Ontario Inc. and 2477879 Ontario Inc. (the "Appellants") and the Assessed Frances Danyliw own 5 contiguous assessment parcels on King Street West in downtown Toronto's entertainment district. The Municipal Property Assessment Corporation ("MPAC") has assessed the current value of the parcels, as a land assembly, with a Highest and Best Use value reflecting its development potential as a high-rise development (40 storeys or more). The Appellants contend that MPAC has not rebutted the presumption that the Highest and Best Use is the existing use as income producing commercial 2 and 3-storey buildings.

Background

[2] The Appellants appealed the assessed current values for several taxation years, with 2012 and 2016 valuation dates, pursuant to s. 40 of the *Assessment Act*, R.S.O. 1990, c. A.31 ("Act") on the basis that the assessed values are too high. MPAC has indicated that it is seeking a finding of a correct current value higher than the returned assessments.

[3] The individual subject properties, taxation years under appeal, total original returned assessments, as well as the positions of the Appellants and MPAC at the hearing are summarized in the following table:

Taxation Year	Properties (#)	Assessment	Appellants' Position	MPAC's Position
2014	305-319 KING W (4)	\$20,474,000	\$7,775,000	\$19,870,000
2015	305-319 KING W (4)	\$20,474,000	\$7,775,000	\$19,870,000
2016	305-319 KING W (4)	\$20,474,000	\$7,775,000	\$19,870,000
2017	301-319 KING W (5)	\$29,854,000	\$14,314,000	\$37,525,000
2018	301-319 KING W (5)	\$29,854,000	\$14,314,000	\$37,525,000
2019	301-319 KING W (5)	\$29,854,000	\$14,314,000	\$37,525,000
2020	301-319 KING W (5)	\$29,854,000	\$14,314,000	\$37,525,000
Total		\$180,838,000	\$80,581,000	\$209,710,000

Areas of Agreement

[4] The parties agree that the Assessed, Frances Danyliw, is the common beneficial owner of the corporate Appellants.

[5] The parties agree that, for the purposes of the Highest and Best Use analysis, the subject properties should be valued collectively as a single land assembly.

[6] The parties agree that the Highest and Best Use proposed by MPAC is physically possible on the land assembly and therefore, satisfies the second branch of the Highest and Best Use analysis.

Issues for the Hearing

[7] At issue in this proceeding is:

1. a determination of the current value of the subject properties:
 - a. the Highest and Best Use of the subject properties:
 - i. legal permissibility
 - ii. physical possibility
 - iii. financial feasibility
 - iv. maximum productivity

- b. correct current value of the subject properties based on Highest and Best Use; and
2. whether an equity reduction in the current value should be made.

Result

[8] The respondent MPAC has not, for each taxation year under appeal, rebutted the presumption that the Highest and Best Use of the subject properties are the existing uses as 2 and 3-storey commercial buildings.

[9] For the 2014, 2015 and 2016 taxation years, with a 2012 valuation date, the correct current value of the four properties appealed is, collectively, \$7,775,000.

[10] For the 2017, 2018, 2019 and 2020 taxation years, with a 2016 valuation date, the correct current value of the five properties appealed is, collectively, \$14,314,000.

ANALYSIS

Description of the Subject Properties

[11] The subject properties have constructed upon them individual 2 and 3-storey buildings with no setbacks between them. Each building, or at least the ground floor, is occupied by a tenant restaurateur. The buildings are popularly known by many in Toronto as part of “Restaurant Row.”

[12] The subject properties, ownership, parcel site areas, and gross leasable areas are described in the following table:

Address	Owner	Legal Description	Site Area Square Feet ("sq. ft.")	Gross Leasable Area (sq. ft.)
301 King Street West	2477879 Ontario Inc.	PLAN 537 LOTS 1 & 2	2,642	6,700
305 King Street West	1579661 Ontario Inc.	PLAN 537 LOTS 3 TO 6	5,304	5,808

315 King Street West	Claireville Holdings Ltd.	PLAN 57 PT LOT 17RP63R2638 PART 1	2,629	4,143
317 King Street West	Claireville Holdings Ltd	PLAN 57 PT LOT 16 RP63R2638 PART 2	2,574	6,089
319 King Street West	Danyliw, Frances	PLAN 57 PT LTS 14 & 15RP63R638 PART 4	2,586	4,584
Total			15,735	27,324

The Governing Statutory Scheme

Annual Assessment

[13] Section 36(1) of the Act requires land to be assessed annually. Section 36(2) prescribes that the annual assessment roll be returned to the municipality no later than the second Tuesday following December 1 of that year.

Current Value

[14] Section 14(1) paragraph 5 of the Act prescribes that the assessment corporation, MPAC, indicate its assessment of the current value of the land on the annual assessment roll. Section 19(1) of the Act requires this assessment be based on current value.

Valuation Day

[15] Section 19.2(1) paragraph 3 of the Act requires that the day as of which the current value of land is valued, for the four taxation years from 2013 to 2016, is January 1, 2012. Section 19.2(1) paragraph 4 of the Act requires that the day as of which the current value of land is valued, for the four taxation years from 2017 to 2020, is January 1, 2016.

[16] Pursuant to s. 40(17) of the Act, the onus is on MPAC to prove the correct value of the subject property.

State and Condition Date

[17] Annual assessments are based on the state and condition of the land, on the assessment roll return date, in the December immediately preceding any given taxation year. This is referred to as that taxation year's state and condition date. (See *Simmatis v Municipal Property Assessment Corporation Region 06* 2017 CanLII 39816 (ON ARB) at paragraph 15).

[18] The Assessment Review Board ("Board") agrees with MPAC counsel's submission that the "state and condition" of land includes its development potential.

[19] Whether land has development potential value in excess of the value of its existing use is determined by appraisal methodology applying Highest and Best Use analysis.

[20] The Highest and Best Use of the subject property on the state and condition date indicates the best approach to the valuation for the corresponding taxation year. (See *General Motors of Canada Limited v Municipal Property Assessment Corporation*, Region No. 27, 2017 CanLII 3664 (ON ARB) (paragraphs 10-13) ("*General Motors*").)

[21] The assessor's task is to determine, annually, at the state and condition date, the Highest and Best Use of the land assessed, then establish the correct value of such annual determination by reference to the valuation of land of similar Highest and Best Use on the legislated valuation day.

Timeline

[22] The following summary timeline was established by the evidence.

[23] In May 2012 the Appellants entered into discussions with the Planning Department of the City of Toronto ("City") with respect to a proposed high-rise

redevelopment of 305 to 319 King Street West, four of the properties under appeal.

[24] In April 2013, the Appellants submitted a development application for a 42-storey mixed-use building with a Floor Space Index (“FSI”) of 31.5 with a proposed Gross Floor Area (“GFA”) of 412,720 sq. ft. The FSI is a measure of density. It is the GFA divided by the site area the building will occupy. The City Planning Department opposed the application. It was suggested to Mr. Danyliw that more land area was required for the proposed development in order to reduce the density.

[25] In August 2015 Mr. Danyliw, through a corporation, purchased the adjacent property at 301-303 King Street West.

[26] The Appellants and Mr. Danyliw then filed a substantially revised version of the development application, which now included the land at 301-303 King Street West. The revised development was for a 48-storey residential building with a total GFA of 351,511 sq. ft. The revised development would be composed of 402 residential units and additional non-residential uses. The revised proposed FSI was 22.28.

[27] In late 2017, in the absence of a decision by City Council, the Appellants appealed this non-decision to the Ontario Municipal Board (now the Local Planning Appeal Tribunal (“LPAT”)). A first LPAT pre-hearing was held in 2018.

[28] In December 2019, the Appellants offered to settle the LPAT appeal by making a “with prejudice” settlement offer for a proposed mixed-use development of 50 storeys, a density of FSI 21.68 and a GFA of 341,137 sq. ft.

[29] In February 2020 City Council enacted a resolution supporting, in principle, the development settlement offer, subject to conditions, site plan approval and Heritage Easement Agreements.

[30] As of the date of the hearing of these appeals, in November of 2020, the required

zoning change had not yet been enacted.

Issue 1a) – The Highest and Best Use of the Subject Properties

[31] All parties agree that the land assembly should be valued based on its Highest and Best Use. This maximizes the value of the subject properties. Both parties and their experts relied upon the appraisal methodology described in Ch. 12 “Highest and Best Use Analysis” of The Appraisal of Real Estate, (2nd and 3rd Canadian editions) (“The Appraisal of Real Estate”), co-authored by The Appraisal Institute (U.S.A.) and The Appraisal Institute of Canada, an authoritative text on the appraisal of real estate in Canada. It defines Highest and Best Use as follows:

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, financially feasible, and that results in the highest value.

[32] To satisfy this definition, evidence must be presented that satisfies the requirements of:

- i) legal permissibility;
- ii) physical possibility;
- iii) financial feasibility; and
- iv) maximum productivity.

[33] The existing use of land is presumed to be the Highest and Best Use. A party seeking to prove a different Highest and Best Use must provide “compelling evidence of how another legally permissible, physically possible and financially feasible use is more productive than the current use...” (see paragraph 18 of *General Motors* cited above).

i) Legal Permissibility

[34] The evidence demonstrates that the existing zoning building height maximum

was 30 metres or 10 storeys, with a buildable GFA of 94,894 sq. ft. for the subject properties. The evidence also demonstrates that when individual development projects were proposed to the City, specific zoning requirements for the properties in question would be modified if the City approved of the development.

[35] MPAC's expert report, completed by Mr. Blake Brown ("MPAC's expert"), concludes that an FSI of 21.68 was probably legally permissible on all state and condition dates. To quote from pages 26-27 of his report:

The development proposal for this site is similar in nature to the many other new mixed-use developments in the Entertainment District. The proposal has been revised based on the input from City Planning and a settlement offer has been made by the owner to close the outstanding LPAT appeal. Although the city has not publicly responded to offer, I believe it is likely that a settlement will be reached.

.....

In determining reasonable potential gross floor areas for the years under appeal I am basing my opinion on the December 2019 settlement offer from the owner to the City seeking to settle the outstanding OMB appeal.

For the 2013 through 2015 tax years (prior to the inclusion of 301 King St. W) I am using the same proportionate FSI as provided in the 2019 settlement proposal, as shown in the chart below.

For the 2016 through 2019 tax years (with the inclusion of 301 King St W) I believe the most likely potential gross floor area is that outlined in the 2019 settlement offer regarding the outstanding OMB appeal. The settlement offer proposes a total gross floor area of 341,137 SF.

Base Year	Total Storeys	Commercial Storeys	Residential Storeys	Site Area	Commercial GFA	Residential GFA	Total GFA	Density
2012	50	3	47	13,093	29,130	253,727	283,857	21.68
2016	50	3	47	15,735	35,009	306,128	341,137	21.68

[36] The Appellants took exception to this conclusion of an FSI of 21.68 claiming it was the application of hindsight, derived from the Appellants' 2019 with prejudice offer. However, Mr. Brown testified that he was originally of the opinion that a density of 24 FSI was achievable in 2013. This was supported by a 2013 Ontario Municipal Board ("OMB", predecessor of LPAT) decision approving a development at 323-333 King Street West with an FSI of 22.2, *Toronto (City) Zoning By-law No 438-86 (Re)*, [2013]

O.M.B.D. No 383 (“2013 OMB decision”).

[37] MPAC’s expert also testified that in light of an upward trend in increasing density requests, “between 2012 and 2016 the City put the brakes on the increase in density. Now it is more stable.”

[38] In his January 2020 report, Mr. Brown revised his opinion to conform to the Appellants’ December 2019 offer of an FSI of 21.68. On cross-examination he was asked whether his “entire opinion was based on the Appellants’ 2019 FSI offer.” He responded that his opinion had been “refined” by that number.

[39] It was clear that the principal support for his opinion of a 24 FSI, and refinement to 21.68, was the 2013 OMB approval of the development at 323-333 King Street West. His “refinement” was to agree with and conform to the Appellants’ position as expressed in its “with prejudice” offer to settle for an FSI of 21.68. If his supported opinion was an FSI of 24 then an FSI of 21.68 was even more probable than his original opinion of an FSI of 24. But his “entire opinion” did not rest on the Appellants’ 2019 offer, it was supported by the *2013 OMB decision*. The Board does not agree with the proposition that Mr. Brown’s opinion was derived from hindsight.

Appellants’ Evidence

[40] Mr. David Gibson the (“Appellants’ expert”) testified that so long as MPAC’s proposed use was not legally authorized by the zoning by-law it was not legally permissible, in effect saying that Highest and Best Use value could not accrue short of an actual zoning change.

[41] This is contrary to the part of the definition of Highest and Best Use that refers to the “reasonably probable and legal use.”

[42] In *The Appraisal of Real Estate*, Ch. 12.7 under the heading “Probability of a zoning change” the authors state:

In investigating the reasonable probability of a zoning change, the appraiser must consider trends and the history of zoning requests in the market area as well as documents such as a community's comprehensive or master plan.

.... a zoning change from residential to commercial may be reasonable if other properties in the market area have received a similar zoning change recently or if a community's comprehensive plan designates the property for a use other than its current use. For example, consider a site zoned single-family residential in a transitional neighborhood where the zoning on several similar sites has been changed recently to commercial. Also, the city's comprehensive plan designates the property as lying within a commercial corridor. Both factors may support an appraiser's conclusion that there is a reasonable probability of rezoning the subject site for commercial use.

[43] It was clear from the evidence of MPAC's expert that the City was regularly increasing the zoning height and density on approved development projects. This was in line with the Provincial Policy, the Official Plan and other planning policies.

[44] The courts also have ruled that the legal permissibility branch of the Highest and Best Use test is based on the probability of zoning change. In *Farlinger Developments Ltd and Borough of East York**, (1976), 9 O.R. (2d) 553, the Ontario Court of Appeal stated:

From these authorities it would seem to be established that the Highest and Best Use 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 my opinion probability connotes something higher than a 50% possibility.

[45] Here we also address Mr. Danyliw's evidence that he did not have any intention of developing the property in question, that he wishes to continue with the existing uses as commercial space rented mainly to restaurants. The concept of reasonably probable legally permissible use means that the intentions of the owner of the property to continue the existing use is not determinative. Provided all branches of the Highest and Best Use test are met, the land must be valued at its Highest and Best Use regardless of the owner's intention to develop it more profitably at any given time. The value accrues based on proven Highest and Best Use.

[46] The Board finds that a zoning amendment with a density of 21.68 was a reasonably probable legally permissible use at all state and condition dates based on Mr. Brown's evidence and the 2013 OMB approval of a similar development in the area. MPAC has met the first branch of the Highest and Best Use test.

ii) Physical Possibility

[47] The parties agree that the Highest and Best Use proposed by MPAC is physically possible on the land assembly. Accordingly, the second branch of the Highest and Best Use analysis has been met.

iii) Financial Feasibility

[48] While legal permissibility and physical possibility are conditions precedent to a finding of Highest and Best Use, the heart of the determination is the analysis of financial feasibility, as it determines profitability of the proposed use.

[49] To prove financial feasibility in Highest and Best use analysis, MPAC must provide sufficient evidence to meet the standard of evidence established for such a finding in authoritative texts on appraisal methodology. See *Toronto Airways Ltd. v. Municipal Property Association Corp. Region No. 14*, [2014] O.A.R.B.D. No. 500 ("*Toronto Airways*"), also indexed as *Enterprises Inc. v. Municipal Property Assessment Corporation, Region 14*, 2014 CanLII 104370 (ON ARB), at paragraphs 31-34.

[50] MPAC's evidence of financial feasibility was referred to at page 29 of Mr. Brown's report:

In order to provide a snapshot of financial feasibility, I have consulted the Altus Construction Cost Guide, 2018 and Urbanation's market report for a condominium near the subject site to construct a basic pro forma analysis.

The Altus Cost Guide, 2018 indicates that GTA construction costs (hard costs) for a 40 - 60 storey condominium apartment ranges from \$235-

310/SF. The Downtown Core is indexed at 1.15, adjusting the construction costs upwards to \$270 - \$357/SF, with an average rate of \$313.27

Estimates of soft costs can vary widely. Some sources reviewed indicate soft costs in Toronto are estimated at approximately \$150/SF, while Nial Finnegan, an industry expert, has indicated rates as high as 75% of hard costs (\$235/SF based on the average rate) in the current market. 28
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My estimated rate/SF buildable for the 2016 base year at this location is \$110. This produces a total estimated average project cost of \$702/SF GFA.

Hard cost (\$313) + soft cost (\$235) + land value (\$110) = \$702/SF

[51] After calculating the above land and construction costs at \$702 per sq. ft. of GFA (page 30 of his report) MPAC's expert observed that new condominium units brought to market at 357 King Street West in January 2018 sold for an average of \$943 per sq. ft. After deducting 15% for common areas he concluded the revenue per sq. ft saleable was \$801, leaving "a sufficient developer's profit to move forward with a high-rise multi-residential project at this location."

[52] His report also includes the following:

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. (page 29)

Although hard and soft cost estimates may vary significantly depending on the data source and preference of the individual developer, 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. (page 30)

The many successful condominium developments in near proximity to the Property indicate to me a high degree of probable success for a potential redevelopment on this site. (page 30)

[53] In the Board's view, this evidence is insufficient to discharge MPAC's onus of establishing financial feasibility, for each annual state and condition date, for the following reasons:

a) Insufficient economic evidence of financial feasibility

[54] In *Toronto Airways*, the Board found that the evidence required to establish financial feasibility was that outlined in the appraisal methodology set out in *The Appraisal of Real Estate*: “complete market analyses must be done in order to assess financial feasibility. These include a Fundamental Analysis, an Inferred Analysis, a Market Study and a Marketability Study.” (paragraph 32).

[55] In *Toronto Airways*, the Appellants had, as in the present case, commenced the process that would lead to redevelopment of their property. They had entered into agreements with a developer who had taken an ownership position in the land. The property transfer came to the attention of the assessor, who increased the assessment of current value, based on development potential.

[56] Notwithstanding the actions of the property owner, to seek an increase in legal permissibility to allow for redevelopment, the Board required MPAC, as part of its statutory onus obligations, and in accordance with the appraisal methodology set out in *The Appraisal of Real Estate*, to establish financial feasibility with appropriate narrative economic studies. The mere fact that the Appellant, or owners of nearby properties, seek or obtain redevelopment approval does not establish financial feasibility of the subject property.

[57] The Board in *McNally v Etobicoke (City)*, 2015 CanLII 30373 (ON ARB) at paragraph 38 (“*McNally*”) also held that market analyses were required to prove Highest and Best Use. The Board also rejected, at paragraph 39, the reliance on a third party’s pursuit of development as evidence of Highest and Best Use. See also to the same effect *Toronto (City) v Municipal Property Assessment Corporation, Region No. 09*, 2017 CanLII 81707 (ON ARB) at paragraphs 65-68 (“*Toronto (City)*”).

[58] Other than an analysis of the estimated profitability based on average sale price per sq. ft. of one condominium at 357 King Street West, there is simply the assertion by

MPAC's witness that a mixed-use high-rise development would be financially feasible. The Board was not provided with the analyses required by recognized appraisal methodology that would support such a conclusion for the subject properties.

[59] Particularly notable by its absence was evidence, for that market area, of the forecasted demand for and supply of competitive condominium units and commercial space, over the time frame of the feasibility analysis.

[60] The Board is not able to conclude if or when the continued construction of condominiums, in this market area, will exceed demand, so as to depress prices to the point of making the construction of new condominiums no longer financially feasible.

[61] A demonstration, in hindsight, that average condominium prices have continued to increase is not evidence of financial feasibility on any given state and condition date. It does not take into account varying development and financing costs over time that may affect profitability and financial feasibility.

[62] MPAC's evidence is that "successful condominium developments in near proximity" is evidence that the financial feasibility requirements, of Highest and Best Use analysis, have been satisfied with respect to each state and condition date. Without narrative market and marketability analyses that include an analysis of residual demand the Board is not able to conclude that the subject properties' proposed Highest and Best Use would be financially feasible.

[63] Without the required market and marketability analyses required by recognized appraisal methodology, the evidence presented by MPAC is insufficient to establish financial feasibility of the proposed Highest and Best Use of the subject properties.

b) Methodological error

[64] The parties have relied upon the Highest and Best Use chapter of *The Appraisal of Real Estate*. At page 12.2 (boxed text) one finds the following warning:

...It is critical that a careful Highest and Best Use analysis precede the application of the approaches to value. Otherwise, there is a high likelihood that serious errors will be made in the valuation process.

[65] Highest and Best Use is an element of comparison of properties in the direct comparison approach to value. To quote *The Appraisal of Real Estate*, ch.13 “The Direct Comparison Approach”, page 13.3:

Market Analysis and Highest and Best Use

... an adequately supported determination of the subject property's highest and best use provides the basis for the research and analysis of comparable sales, answering questions such as the following:

Which comparable properties match the highest and best use of the subject property?”

[66] Before one can determine if any sales proposed to be used to determine value are in fact comparable, one must first determine the subject properties' financial feasibility and Highest and Best Use, as an element of comparison. Correct appraisal methodology requires that this determination of Highest and Best Use occur before “the application of the approaches to value.” (*The Appraisal of Real Estate*) and consideration of market sales.

[67] MPAC proposed to use market evidence, as evidence of financial feasibility, in violation of correct appraisal methodology. In doing so it was relying on the judgment of market participants rather than proving financial feasibility by the economic analyses required by correct appraisal methodology.

[68] It may be that these market participants completed their own studies of Highest and Best Use financial feasibility to determine the value of the market sales proposed. It may be that as experienced developers they relied on their experience or instincts. Others may have been speculating that values would go up and they could resell at a profit without ever conducting financial feasibility analyses. Whatever evidence, if any, these market participants may have relied on is not before the Board for consideration.

[69] While buyers and sellers may assume or estimate a Highest and Best Use differing from the existing use, in these appeals MPAC has a statutory onus to prove all the elements of Highest and Best Use. It must present economic analysis evidence as required by the recognized appraisal methodology. It may not rely on the unproven inferred Highest and Best Use conclusions of other market participants. To use sales evidence of purportedly comparable properties, as evidence to satisfy the financial feasibility test of Highest and Best Use, is a methodological error.

[70] The Board therefore agrees with the Appellants' submission that MPAC's expert's Highest and Best Use analysis is not in accordance with appraisal methodology in that he has "worked backward" from a conclusion that is based on evidence of the market, rather than evidence specific to the subject properties.

[71] MPAC's counsel submits that *Loblaw Properties Ltd. v Municipal Property Assessment Corporation, Region No. 9*, 2015 CanLII 72781 (ON ARB) ("*Loblaw Properties*") stands for the proposition that the presumption of the existing use being the Highest and Best Use can be rebutted by facts that show that a property's land value is higher than its current use value.

[72] Both *Loblaw Properties* and *Toronto Airways* were heard at the same time by different panels of the Board. The decision in *Toronto Airways* was issued October 28, 2014 after the last hearing day in *Loblaw Properties*, but before the decision in that matter. The decision in *McNally*, above, to the same effect, was issued on May 29, 2015, also before the November 6, 2015 decision in *Loblaw Properties*.

[73] It is very likely that the *Loblaw Properties* decision was issued without the benefit of the reasons in *Toronto Airways* or *McNally*. No reference is made to *Toronto Airways* or *McNally* in *Loblaw Properties* as one would have expected had Member Tchegus been aware of these decisions, or if the decisions in *Toronto Airways* and *McNally*, had been drawn to the attention of *Loblaw Properties* counsel for further submissions.

[74] The Highest and Best Use conclusion in *Loblaw Properties* also relied upon the same methodological error identified above: inferring Highest and Best Use from market sales, before conducting a proper financial feasibility Highest and Best Use analysis of the subject property (*Loblaw Properties*, paragraphs 137-139).

[75] In *Toronto Airways* the Board adopts the evidentiary methodology of the learned authors of *The Appraisal of Real Estate* which requires full narrative market and marketability economic analysis. This has been followed in *McNally* and *Toronto (City)*. The Board should strive for consistency in its decisions. (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII) at paragraph 129). For these reasons, the Board will follow the *Toronto Airways* test for financial feasibility.

c) The evidence is not referable to each state and condition date.

[76] As stated above, the Board agrees with MPAC's counsel that development potential is an element of a property's state and condition. The fact that appeals for seven taxation years were heard together does not obviate the necessity of evidence to establish financial feasibility for each state and condition date. Such evidence would have been necessary for each individual appeal had they been heard separately. There need not be reports for each year, but the evidence must be such that analytical conclusions can be drawn for each taxation year's state and condition date.

[77] Part of MPAC's evidence for financial feasibility was the pro-forma profitability derived from the 2018 sale price of the condominiums at 357 King Street West. The Board is unable, on the evidence presented, to relate this 2018 achieved sales revenue to any particular state and condition date. Over the time period covered by any feasibility analysis, the supply of and demand for the proposed use, construction costs, financing, time lag from state and condition date to revenue realization, absorption rates and other parameters may change. Depending on these forecasted parameters, financial feasibility may change for each taxation year's state and condition date, or be so marginal as to provide insufficient compelling evidence of financial feasibility.

[78] MPAC, on whose onus it was, did not present sufficient evidence to allow the Board to come to a financial feasibility conclusion for each individual state and condition date. The third branch of the Highest and Best Use test has not been met.

iv) Maximum Productivity

[79] As MPAC has not satisfied the test of financial feasibility, it is not necessary to consider the fourth branch of the Highest and Best Use test: maximum productivity.

[80] In any event, the maximum productivity test is a choice between the profitability of various Proposed Uses found to be financially feasible. As MPAC had only proposed a single Highest and Best Use, there is no choice required to be made among financially feasible proposed uses, to determine which would be maximally productive.

Findings on Issue 1a)

[81] The Board finds that MPAC has not established a 40-plus storey mixed-use commercial/residential building as the proposed Highest and Best Use. Accordingly, the Board finds that the existing uses of the subject properties as 2 and 3-storey commercial uses are their Highest and Best Use. The subject properties will be valued as existing commercial 2 and 3-storey properties.

Issue 1b) - Correct Current Value

[82] The Appellants' expert testified that, using the income approach, the correct current values of the following properties, for each of the 2014, 2015 and 2016 taxation years, valued as of the statutory valuation day of January 1, 2012, were as follows:

Property Address	Value
305 King Street West	\$2,348,000
315 King Street West	\$1,474,000
317 King Street West	\$2,135,000

319 King Street West	\$1,818,000
Total	\$7,775,000

[83] The Appellants' expert also testified that using the income approach, the correct current values of the following properties, for each of the 2017, 2018, 2019 and 2020 taxation years, valued as of the statutory valuation day of January 1, 2016, were as follows:

Property Address	Value
301 King Street West	\$3,186,000
305 King Street West	\$3,388,000
315 King Street West	\$2,106,000
317 King Street West	\$3,061,000
319 King Street West	\$2,573,000
Total	\$14,314,000

[84] MPAC did not present any valuation evidence, based on the income approach, for the existing use as 2 and 3-storey commercial buildings. Under cross-examination, MPAC's expert agreed with the valuations given by the Appellants' expert, if the Board found that the Highest and Best Use as a high-rise residential building was not made out.

Findings on Issue 1b)

[85] Accordingly, the Board finds that the correct current values of the subject properties for the taxation years and valuation days are as testified to by the Appellants' expert above.

Issue 2 - Whether an Equity Reduction in the Current Value Should be Made

[86] No evidence or submissions on the issue of equity were advanced therefore, the Board has no basis upon which to make any equity reduction.

CONCLUSION

[87] The Board finds the correct current values of the subject properties for the taxation years in issue to be as outlined in the “To” column in Attachment 1 of this Decision.

ORDER

[88] The Board orders that the assessments of current value for the following properties, assessment roll numbers and taxation years are reduced from the amounts in the “From” column to the amounts in the “To” column in the table in Attachment 1 to this Decision.

"Pierre R. Lavigne"

PIERRE R. LAVIGNE
MEMBER

ATTACHMENT 1

Address	Roll #	Year	From	To
301 King Street West	1904-062-230-01500-0000	2017	\$5,190,00	\$3,186,000
301 King Street West	1904-062-230-01500-0000	2018	\$5,190,00	\$3,186,000
301 King Street West	1904-062-230-01500-0000	2019	\$5,190,00	\$3,186,000
301 King Street West	1904-062-230-01500-0000	2020	\$5,190,00	\$3,186,000
305 King Street West	1904-062-230-01300-0000	2014	\$8,294,000	\$2,348,000
305 King Street West	1904-062-230-01300-0000	2015	\$8,294,000	\$2,348,000
305 King Street West	1904-062-230-01300-0000	2016	\$8,294,000	\$2,348,000
305 King Street West	1904-062-230-01300-0000	2017	\$10,077,000	\$3,388,000
305 King Street West	1904-062-230-01300-0000	2018	\$10,077,000	\$3,388,000
305 King Street West	1904-062-230-01300-0000	2019	\$10,077,000	\$3,388,000
305 King Street West	1904-062-230-01300-0000	2020	\$10,077,000	\$3,388,000
315 King Street West	1904-062-230-01200-0000	2014	\$4,111,000	\$1,474,000
315 King Street West	1904-062-230-01200-0000	2015	\$4,111,000	\$1,474,000
315 King Street West	1904-062-230-01200-0000	2016	\$4,111,000	\$1,474,000
315 King Street West	1904-062-230-01200-0000	2017	\$4,995,000	\$2,106,000
315 King Street West	1904-062-230-01200-0000	2018	\$4,995,000	\$2,106,000
315 King Street West	1904-062-230-01200-0000	2019	\$4,995,000	\$2,106,000
315 King Street West	1904-062-230-01200-0000	2020	\$4,995,000	\$2,106,000
317 King Street West	1904-062-230-01100-0000	2014	\$4,025,000	\$2,135,000
317 King Street West	1904-062-230-01100-0000	2015	\$4,025,000	\$2,135,000
317 King Street West	1904-062-230-01100-0000	2016	\$4,025,000	\$2,135,000
317 King Street West	1904-062-230-01100-0000	2017	\$4,890,000	\$3,061,000
317 King Street West	1904-062-230-01100-0000	2018	\$4,890,000	\$3,061,000
317 King Street West	1904-062-230-01100-0000	2019	\$4,890,000	\$3,061,000
317 King Street West	1904-062-230-01100-0000	2020	\$4,890,000	\$3,061,000
319 King Street West	1904-062-230-01000-0000	2014	\$4,044,000	\$1,818,000
319 King Street West	1904-062-230-01000-0000	2015	\$4,044,000	\$1,818,000
319 King Street West	1904-062-230-01000-0000	2016	\$4,044,000	\$1,818,000
319 King Street West	1904-062-230-01000-0000	2017	\$4,913,000	\$2,573,000
319 King Street West	1904-062-230-01000-0000	2018	\$4,913,000	\$2,573,000
319 King Street West	1904-062-230-01000-0000	2019	\$4,913,000	\$2,573,000
319 King Street West	1904-062-230-01000-0000	2020	\$4,913,000	\$2,573,000

SCHEDULE A

Appeal No	Roll Number	Property Address	Region	Assessed Person	Unit	Year
3002301	1904 062 230 01000 0000	319 to 0 KING ST W	09	DANYLIW FRANCES		2014
3078815	1904 062 230 01000 0000	319 to 0 KING ST W	09	DANYLIW FRANCES		2015
3146646	1904 062 230 01000 0000	319 to 0 KING ST W	09	DANYLIW FRANCES		2016
3283085	1904 062 230 01000 0000	319 to 0 KING ST W	09	DANYLIW FRANCES		2017
3293842	1904 062 230 01000 0000	319 to 0 KING ST W	09	DANYLIW FRANCES		2018
3352117	1904 062 230 01000 0000	319 to 0 KING ST W	09	DANYLIW FRANCES		2019
3401342	1904 062 230 01000 0000	319 to 0 KING ST W	09	DANYLIW FRANCES		2020
3002300	1904 062 230 01100 0000	317 to 0 KING ST W	09	CLAIREVILLE HOLDINGS L		2014
3074253	1904 062 230 01100 0000	317 to 0 KING ST W	09	CLAIREVILLE HOLDINGS L		2015
3146345	1904 062 230 01100 0000	317 to 0 KING ST W	09	CLAIREVILLE HOLDINGS L		2016
3284566	1904 062 230 01100 0000	317 to 0 KING ST W	09	CLAIREVILLE HOLDINGS L		2017
3297697	1904 062 230 01100 0000	317 to 0 KING ST W	09	CLAIREVILLE HOLDINGS L		2018
3350543	1904 062 230 01100 0000	317 to 0 KING ST W	09	CLAIREVILLE HOLDINGS L		2019
3398826	1904 062 230 01100 0000	317 to 0 KING ST W	09	CLAIREVILLE HOLDINGS L		2020
3002299	1904 062 230 01200 0000	315 to 0 KING ST W	09	CLAIREVILLE HOLDINGS L		2014

SCHEDULE A - Continued

Appeal No	Roll Number	Property Address	Region	Assessed Person	Unit	Year
3075183	1904 062 230 01200 0000	315 to 0 KING ST W	09	CLAIREVILLE HOLDINGS L		2015
3147592	1904 062 230 01200 0000	315 to 0 KING ST W	09	CLAIREVILLE HOLDINGS L		2016
3284565	1904 062 230 01200 0000	315 to 0 KING ST W	09	CLAIREVILLE HOLDINGS L		2017
3296804	1904 062 230 01200 0000	315 to 0 KING ST W	09	CLAIREVILLE HOLDINGS L		2018
3349805	1904 062 230 01200 0000	315 to 0 KING ST W	09	CLAIREVILLE HOLDINGS L		2019
3399319	1904 062 230 01200 0000	315 to 0 KING ST W	09	CLAIREVILLE HOLDINGS L		2020
3002298	1904 062 230 01300 0000	305 to 0 KING ST W	09	1579661 ONTARIO INC		2014
3076188	1904 062 230 01300 0000	305 to 0 KING ST W	09	1579661 ONTARIO INC		2015
3146645	1904 062 230 01300 0000	305 to 0 KING ST W	09	1579661 ONTARIO INC		2016
3284564	1904 062 230 01300 0000	305 to 0 KING ST W	09	1579661 ONTARIO INC		2017
3296790	1904 062 230 01300 0000	305 to 0 KING ST W	09	1579661 ONTARIO INC		2018
3352121	1904 062 230 01300 0000	305 to 0 KING ST W	09	1579661 ONTARIO INC		2019
3399320	1904 062 230 01300 0000	305 to 0 KING ST W	09	1579661 ONTARIO INC		2020
3284563	1904 062 230 01500 0000	301 to 0 KING ST W	09	2477879 ONTARIO INC		2017
3297698	1904 062 230 01500 0000	301 to 0 KING ST W	09	2477879 ONTARIO INC		2018

SCHEDULE A - Continued

Appeal No	Roll Number	Property Address	Region	Assessed Person	Unit	Year
3350544	1904 062 230 01500 0000	301 to 0 KING ST W	09	2477879 ONTARIO INC		2019
3400986	1904 062 230 01500 0000	301 to 0 KING ST W	09	2477879 ONTARIO INC		2020