

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Weatherill v. British Columbia***,
2009 BCSC 361

Date: 20090317
Docket: 40086
Registry: Vernon

Between:

**Brian Weatherill, Gary Weatherill, Gordon Weatherill
and David Weatherill**

Petitioners

And

**Her Majesty the Queen in Right of the
Province of British Columbia**

Respondent

Before: The Honourable Mr. Justice Blair

Reasons for Judgment

Counsel for the Petitioners

M. Russmann

Counsel for the Respondent

M. Dalmyn

Date and Place of Trial/Hearing:

March 9, 2009
Vernon, B.C.

[1] The petitioners seek an order that their parents' transfer of farming property to them is exempt from the payment of tax under the **Property Transfer Tax Act**, R.S.B.C. 1996, c. 378 (the "**PTTA**").

Background

[2] The petitioners, Brian, Gary, Gordon and David Weatherill, are brothers. On October 19, 2005 their parents, Donald and Doris Weatherill, transferred to them property described as PID 012-377-945, Lot 31A, Plan #320, District Lot 58, ODYD, DD 135508 (the "property"). Mr. and Mrs. Weatherill purchased the 8.81 acre property in 1949 and for the next 55 years they resided on and farmed the property which was also home to their children, the petitioners, as they grew up.

[3] The farming activity included the growing of vegetables, fruit, hay, the raising of cattle, horses, chickens, sheep, and goats, and for 10 years they operated a commercial greenhouse. However, by 1993 Mr. and Mrs. Weatherill found it difficult to cope with some of the physical demands associated with their farm and between 1993 and 2005 they leased 7.63 acres to Pan-O-Ramic Farms Ltd., a farming corporation operated by Rod Palfry, a long-time farmer as well as a neighbour and friend of Mr. and Mrs. Weatherill. Pursuant to the lease arrangement, Mr. Palfry's company paid Mr. Donald Weatherill \$330 a year and used the leased property for pasturing cattle.

[4] By 2005, Mr. and Mrs. Weatherill, then aged 83 and 81 respectively, were unable to continue farming and transferred the property to the four petitioners who claimed an exemption from the **PTTA** on the grounds that the transfer was of a

family farm between related individuals. The respondent asserted that because of the circumstances surrounding the lease of the property the transfer was not of a family farm and the petitioners were precluded from claiming an exemption from the transfer tax assessed at \$7,945.07. The petitioners disagreed with the respondent's decision, but paid the assessment and brought this application for the refund of the tax paid.

[5] The petitioner, Brian Weatherill, a 58-year-old Calgary-based engineer involved in the petroleum industry, deposed that on his retirement he anticipates residing on the property and maintaining it as a farm. In the interim, the petitioners have rented the residence and the farming operation to generate income to hold the property in the family until his retirement. Mr. Donald Weatherill deposed in 2007 that he and his wife were residing in a Vernon townhouse.

The Exemption from the *PTTA*

[6] Section 14 of the ***PTTA*** describes the circumstances under which transferees will be exempted from the payment of the tax where the transfer involves the conveyance of a family farm between related individuals. The purpose of the exemption, as I understand the legislation, acknowledges that family farms often do not generate significant revenue and that the transfer tax would deter the transfer of family farms between family members. Implicit in the exemption is the legislature's conclusion that there is a societal benefit achieved by encouraging that the ownership of a family farm remains within that family over generations.

[7] The following are the portions of s. 14 applicable with respect to this petition:

14 (1) In this section:

"family farm" means farm land that

(a) is used, owned and farmed by one individual or by family members,

...

"family member" means a Canadian citizen or a permanent resident, as defined in the *Immigration and Refugee Protection Act* (Canada), who is

(a) a related individual,

...

"farm land" means land classified under the *Assessment Act* as farm land;

...

"related individual" means a related individual who is a Canadian citizen or a permanent resident as defined in the *Immigration and Refugee Protection Act* (Canada);

...

(3) If a taxable transaction entitles the transferee, on compliance with the *Land Title Act*, to registration in a land title office, that transferee is exempt from the payment of tax if the taxable transaction is a transfer within any of the following descriptions:

(a) a transfer from a transferor who is not a trustee referred to in paragraph (c) or (d), to a transferee who is

(i) a related individual, a sibling or a spouse of a sibling, if the land transferred is a family farm, or ...

[8] The section exempts the transferee from the payment of the transfer tax where the property being transferred to a related individual is a family farm that is used, owned and farmed by one individual or by family members. In the instant case the parties acknowledge that the transferees are sons of the transferors and

that they are related individuals. The parties also acknowledge that the property is classified as farm land pursuant to the **Assessment Act**, RSBC 1996, c. 20, as referred to in s. 14(1).

[9] The respondent refused to grant the transfer tax exemption to the petitioners having concluded that the property did not meet the **PTTA** s.14(1) definition of a family farm as being “used, owned and farmed by either one individual or by family members”. The respondent asserts that the transferor Mr. Donald Weatherill did not farm the property after 1993 and, further, that even if Mr. Weatherill can be considered to have farmed the property after 1993, a majority of the property was leased to and farmed by Pan-O-Ramic Farms Ltd., an unrelated third party.

[10] Neither the **PTTA** nor the **Interpretation Act**, R.S.B.C. 1996, c. 238 defines “farmed” as used in s. 14(1)(a). However, in **Hutchinson v. British Columbia**, 2003 BCSC 503, a case involving the **PTTA** and the interpretation of “permanent resident” Harvey J., in the absence of an interpretation with either the **PTTA** or the **Interpretation Act** held at paras. 13 to 16 that the words should be construed in their ordinary sense.

[11] The verb to farm, or farmed, as it is used in s. 14(1) of the **PTTA**, has the following definitions. *Black’s Law Dictionary*, 8th Ed., defines the verb farm as follows:

1. to cultivate land; to conduct the business of farming.
2. to lease.

[12] Similarly, the *Concise Oxford Dictionary* defines the verb farm as follows:

1. a tr. Use (land) for growing crops, rearing animals, etc. b. intr.
Be a farmer; work on a farm.

[13] The definitions for the verb farm or farmed are both broad and general, suggesting that a wide variety of activities can be included when asked to determine in the circumstances of this case whether Mr. Donald Weatherill can be said to have “farmed” property after 1993.

[14] The respondent concentrates on the fact that Mr. Weatherill leased much of the property to Pan-O-Ramic, permitting the company to use the land to pasture their cattle, grazing on the herbage or grass growing on the property and which had been developed through the 50 years of effort of Mr. and Mrs. Weatherill to clear and cultivate the property.

[15] The respondent’s approach fails to recognize Mr. Donald Weatherill’s continuing involvement in the farming aspect of the property from 1993 to 2005 when he transferred the property to his four sons. Although he and Mrs. Weatherill were unable after 1993 to operate the farm as they had previously, Mr. Weatherill deposed that in the 12-year period ending in 2005 he continued to farm the property, including the portion that was under lease. He described his many activities on the property involved maintaining the fencing and irrigation system, harrowing and mowing the fields, putting up the hay crop, weed control, fertilizer application, daily watering and checking of the cattle, rodent control, rotational grazing of cattle, raising of chickens, maintaining the fruit, vegetable and flower gardens, as well as a myriad of other small jobs necessary to keep the farm operating.

[16] The respondent does not dispute Mr. Weatherill's involvement in the property between 1993 and 2005, but asserts in paragraph 11 of its written submission that this involvement did not amount to farming, and even if Mr. Weatherill can be considered to have farmed the property "a majority of the property was farmed by Pan-O-Ramic Farms Ltd." As noted earlier, the lease provides Pan-O-Ramic the right simply to pasture cattle on the leased lands. The respondent's assertion suggests that Mr. Weatherill's activities were restricted to the 1.18 acres not covered by the lease. I do not read Mr. Donald Weatherill's affidavit as suggesting his activities were restricted to the 1.18 acres, but conclude that they included farming activities on the leased lands.

[17] Contrary to the respondent's assertion that "a majority of the property was farmed" by Pan-O-Ramic, the lease only provides the company with the opportunity to use the 7.63 acres as pasture for its cattle, not for the growing of crops or any other purpose. In spite of not being able to operate the farm as he did prior to 1993, Mr. Weatherill appears to have continued to be responsible for the infrastructure on the property in which the lessee's cattle were pastured. In essence, the lease provided by Mr. Donald Weatherill gave the lessee the opportunity to use the 7.63 acres as pasture so that the lessee's cattle could graze on the grass growing on the leased farm lands due to Mr. Weatherill's continuing farming activities.

[18] The respondent in its submission equates pasturing cattle with farming, but provides no support for that assertion. Even if it could be included within the broader term of farming, it is not an activity that could be carried out in isolation and required

the activities performed by Mr. Weatherill to be successful, including fence maintenance, watering, fertilizing and the other tasks he carried out on the property.

[19] I take no exception to the respondent's broad interpretation of the transfer tax exemptions found in the ***PTTA***. However, in the instant case the evidence leads me to conclude, contrary to the respondent's submission that Mr. Weatherill, until the 2005 transfer of the property to his sons, used, owned and farmed the property and that the farming he carried out included the use of his lands and the grass it contained as pasture for the cattle owned by Pan-O-Ramic.

[20] I find the transfer of the property from Donald and Doris Weatherill to the petitioners to fall within the provisions of s. 14(1) of the ***PTTA*** and, therefore, is exempt from the property transfer tax. I direct that the tax be returned to the petitioners.

[21] The petitioners have been successful and will have their costs at scale B.

"R.M. Blair J."

BLAIR J.

**IN THE MATTER OF THE PROPERTY TRANSFER TAX ACT,
R.S.B.C. 1996, C. 378, AS AMENDED**

- AND -

**IN THE MATTER OF AN ARBITRATION UNDER SECTION 22
OF THE PROPERTY TRANSFER TAX ACT**

BETWEEN:

ONNI DEVELOPMENT (GLEN DRIVE) CORP.

APPELLANT

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE
PROVINCE OF BRITISH COLUMBIA.

RESPONDENT

A W A R D

Background

1. Omni Development (Glen Drive) Corp. (the “Appellant”) has appealed under section 22 of the *Property Transfer Tax Act* (the “Act”) a tax assessment concerning a development site located at 2950 Glen Drive, Coquitlam, B.C. (the “Property”).
2. The Property was previously owned by the City of Coquitlam, and it was sold in an open tender process as a proposed high-density development site. The Appellant’s offer to purchase the Property was accepted by the City on May 30, 2006, the purchase price being \$5,425,000. The transfer of title to the Appellant was registered on March 30, 2007.
3. For the purposes of the Act, the Appellant declared a value of \$5,425,000 for the Property and paid tax on that amount. Her Majesty the Queen in right of the Province of British Columbia (the “Respondent”), acting through the Ministry of Finance, rejected this value and determined that the fair market value of the Property, as of March 30, 2007, was \$12,671,000. This was subsequently reduced by the Respondent to a fair market value of \$9,121,000.
4. The sole question for determination in this arbitration is the following:

What was the fair market value of the subject property (2950 Glen Drive, Coquitlam, B.C.) on March 30, 2007?

“Fair Market Value” is defined in section 1(1) of the Act to mean:

- (a) for a transaction referred to in paragraph (a) (i) of the definition of “taxable transaction”, the amount that would have been paid for the fee simple interest in the land had it been sold at the date of registration of the taxable transaction in the open market by a willing seller to a willing purchaser free of any trust and unencumbered by
 - (i) a mortgage, debenture, trust deed, hypothecation agreement or any other financial instrument, other than a prescribed instrument, that secures the payment of money or the performance of an obligation,
 - (ii) a right to purchase under an agreement for sale,
 - (iii) a judgment for the payment of money,

- (iv) the rights of a lien holder under the *Builders Lien Act*, or
- (v) any other prescribed charge....

5. The parties agreed that I had been properly appointed as arbitrator and had jurisdiction to resolve the dispute between them.

Submissions and evidence of the parties

6. The Appellant provided the following reports and submissions:

- (a) Statement of Claim dated April 22, 2009;
- (b) Appraisal Report of Eric Pan, B.A., AACI, P.App. of Burgess, Cawley, Sullivan & Associates dated September 28, 2009 (the “*BCS Report*”);
- (c) Rebuttal Report of Mr. Pan dated October 13, 2009 (the “*BCS Rebuttal*”);
- (d) Final Submission of BCS Property Taxco Ltd. (the “*Appellant’s Submission*”);
- (e) E-mail dated November 3, 2009 from Mr. Paul Sullivan of Burgess, Cawley, Sullivan and Associates (the “*Sullivan e-mail*”).

7. The Respondent provided the following reports and submissions:

- (a) Respondent’s Statement of Defence dated May 7, 2009;
- (b) Appraisal Report of John Peebles, AACI, P.App, RPF of D.R. Coell & Associates Inc. dated September 28, 2009 (the “*Coell Report*”);
- (c) Consulting Report Rebuttal of Mr. Peebles dated October 9, 2009 (the “*Coell Rebuttal*”);
- (d) Final Submission Valuation of Mr. Peebles dated October 28, 2009 (the “*Respondent’s Submission*”);
- (e) E-mail dated November 6, 2009 from Ms. Hilary Vance of the Ministry of Finance (the “*Vance e-mail*”).

Appellant's position

8. The purpose of the *BCS Report* was "...to determine the retrospective market value of the subject property, as designated for high-density mixed-use redevelopment, as of March 30, 2007." (p.11) To this end, the appraiser used three different approaches to value.
9. The first approach used was the Direct Market Comparison Approach. The appraiser described the Property as having been purchased by the Appellant "...in an open bid tender process for \$21 per sq. ft. buildable" (p.43), the bid having been submitted in December 2005. He commented on its zoning:

Under the designated C-4 zoning bylaw the subject property can be rezoned to a maximum of 3.5 F.A.R. For the first 2.5 F.A.R. of density, an employment generating use must occupy a minimum of 28 percent of the base gross floor area developed. The additional 1.0 F.A.R. can be achieved by either providing 1) 75% residential and 25% commercial use or 2) 50% residential and 50% residential (accessibility) uses.

(p.43)

The appraiser then compared the Property with five others.

10. **Comparable No. 1: 2992 Glen Drive, Coquitlam.** This property was also purchased at a price of \$21 per sq. ft. buildable indicating, in the appraiser's opinion, "...no change in land value from the negotiation time of the subject property during December, 2005 and July, 2006, when this sale was negotiated." (p.43) He considered Comparable No. 1 to be "our strongest comparable" because it is close to the Property and "...the allowable uses are governed by the same C-4 guidelines." Nonetheless, the Property should command a value higher than the \$21 per sq. ft. buildable paid for Comparable No. 1 as it "... is more desirable because it represents a roughly square shaped site with street exposure on three sides of the property." (p.43)
11. **Comparable No. 2: 3004/8 Glen Drive, Coquitlam.** This transaction involved three neighbouring parcels sold together at a price that reflected \$37 per sq. ft. buildable. The purchaser was Cressey Development, also the purchaser of Comparable No. 1, and, according to the appraiser's enquiries, they had paid a premium for the three parcels because of their strategic location. The Development Manager noted to the appraiser "...that the numbers just work for the site, 2992 Glen Drive, which was purchased for \$21 per sq. ft. buildable, but not for the land assembly, 3004-3008 Glen Drive that was purchased for \$37 per sq. ft. buildable." (p.44) The

blended price for Comparable Nos. 1 and 2 was calculated by the appraiser to be \$26 per sq. ft. buildable.

12. **Comparable No. 3: 2962 Glen Drive, Coquitlam.** This 3.09 acre site was purchased in July 2006 by Intergulf Development as a “packaged residential development site.” (p.45) The plans called for approximately 567,000 sq. ft. of buildable, of which 98% would be residential. The purchase price that had been negotiated in December 2005 reportedly reflected a value of \$31 per sq. ft. buildable for this essentially residential density. According to the appraiser, there would need to be two adjustments made to this value: first, an upward adjustment for time and, second, a downward adjustment because “(T)he end value for commercial use is lower than it is for residential use; thus, it has the effect of averaging down the overall land value (on a per sq. ft. buildable basis).”(p.45)
13. **Comparable No. 4: Bosa Assembly, Coquitlam.** This was a two-phase assembly by Bosa Properties. The first purchase was of 3001 and 3005 Glen Drive in November 2004 for a price of \$9 per sq. ft. buildable. The second was of Lots 15, 16, 17 and 18 in December 2007 at a price reflecting \$44 per sq. ft. buildable. According to the appraiser, this land assembly should be viewed as having a “true land cost to the developer” of \$21 per sq. ft. buildable. Although Comparable No. 4 is “...similar to the subject property in terms of zoning and allowable uses” (p.46), the appraiser did caution: “...it is difficult to compare this sale directly to the subject because the two purchases were made approximately three years apart and the market changed significantly between that time.” (p.46)
14. **Comparable No. 5: 2957 Glen Drive & 1185 Pacific Street, Coquitlam.** This site was “pre-loaded with Development Permit in place and approximately 100 parking stalls constructed.” (p.46) The listing sheet noted the value of this infrastructure in place to be approximately \$3.5 million. It also noted that the sale was forced by the vendor’s illness. The appraiser had ascertained from the vendor’s agent that “...the purchase price was not necessarily indicative of market value for high-density land” because of the infrastructure in place and the vendor and buyer knowing one another. The appraiser commented: “The Agent noted that this sale should not be used as a market comparable given the unique circumstances behind this deal.” (p.46) Hence, the price of \$34 per sq. ft. buildable reflected from the purchase price of \$4,800,000 would require significant adjustments, and the appraiser was unsuccessful in reaching the developer to verify the necessary details of the purchase.

15. In his concluding analysis of these five comparables, the appraiser pointed out:
- (a) A higher value than Comparable No. 1 is indicated;
 - (b) Comparable No. 2 "...does not provide for good comparability to the subject." (p.46);
 - (c) Comparable No. 3 is "a dated transaction" (p.47) and "(A)n upward adjustment for time would be offset by the lower value attributed to commercial density." (*ibid.*);
 - (d) Comparable No. 4 comprised parcels purchased in 2003 and 2007, and "(I)t is difficult to relate the blended land cost to the subject property given the rise in overall land values over the four year time frame." (p.47);
 - (e) Comparable No. 5 was "...reportedly a unique situation that was a forced sale according to the Agent involved with this deal. The value reflects \$34 per sq. ft. buildable but the site had plans and infrastructure in place." (p.47)
16. Although the comparables ranged in price from \$21 to \$44 per sq. ft. buildable, the appraiser determined that, since the two highest priced sales formed part of an assembly, "a more narrow range of values between \$21 and \$37 per sq. ft. is relied upon." He concluded from this:
- As of the valuation date, there was strong demand for development land, although the commercial requirement under the C-4 zoning would be a deterrent to most buyers contemplating the purchase of the subject property. This ultimately affects the price of the underlying land and the time adjustment reflected from the time the property was negotiated in December, 2005 up until the property transfer date of March, 2007. A value of \$30.00 per sq. ft. buildable has been adopted...
- (p.47)
- For the indicated 253,470 sq. ft. buildable, this produced a rounded off total of \$7,600,000.
17. The second approach used was "Valuation by time approach". The appraiser was endeavouring to determine the increase in value between the end of 2005 and early 2007 by looking at the MLS Housing Price Index for Coquitlam. According to this Index, a value of 180 was reported for December, 2005 and this had increased to 227 by March, 2007, "indicating growth of 26% over a 15 month time frame translating to approximately 1.73% per month." (p.48)

18. It was the appraiser's opinion that the 1.73% per month figure could not be wholly attributed as "residual" to the land because there would also be higher construction costs being incurred by the developer. He opined a 75% residual to the underlying land, resulting in an average rate of increase of 1.30% per month. This produced the calculation of \$21.40 per sq. ft. buildable x 15 months x 1.30% per month = \$25.57 per sq. ft. buildable x 253,470 = \$6,481,988, rounded off to \$6,480,000.

19. The third approach was described as "Valuation by determining separate buildable land values for residential and commercial densities." (p.50) From his analysis of "actual developer pro-formas for high-rise projects", the appraiser concluded:

For the residential density to be worth \$35.00 per sq. ft. buildable, the project would have to achieve approximately \$485 per sq. ft. for the residential end product ...

For the residential density to be worth \$30 per sq. ft. buildable, the project would have to achieve approximately \$476 per sq. ft. for the residential end product.

(p.50)

20. It was the appraiser's further opinion that the required commercial component of the C-4 zoning would generate "...virtually no developer profit even with the land value at zero." As cited in paragraph 9, *supra*, there were two ways to achieve the additional 1.0 F.A.R. and, given the preference for residential over commercial, the appraiser accordingly developed a value assuming 50% residential and 50% residential accessible. His calculation was as follows:

Residential Density:	166,566 sq. ft. buildable x \$35	=	\$5,829,810
Residential Density (Accessible):	36,210 sq. ft. buildable x \$30	=	\$1,086,300
Commercial Density:	<u>50,694 sq. ft. buildable</u> x \$0	=	\$ <u>0</u>
Total (3.5 F.A.R.):	<u>253,470 sq. ft. buildable</u>		<u>\$ 6,916,110</u>

(p.51)

He rounded off his total to \$6,920,000, equivalent to a blended rate of \$27.30 per sq. ft. buildable.

21. In summary, the appraiser had arrived at the following per sq. ft. buildable values from his three approaches:

- (i) \$30.00;
- (ii) \$25.57;
- (iii) \$27.30.

He concluded:

A value at the upper end of the range at \$7,250,000 or \$28.60 per sq. ft. buildable appears reasonable given the evidence. This places greater reliance on the Direct Comparison Approach. The two latter approaches are supportive to value; however, more subjective with respect to the assumptions made. Nonetheless, the last approach which takes into consideration a simple land residential analysis, underlies the significant downward impact on land value of the commercial density requirement under the C-4 zoning bylaw.

(p.52)

22. The Appellant's value for the purposes of this arbitration was accordingly \$7,250,000 (or \$28.60 per sq. ft. buildable).

Respondent's position

23. Two appraisal methods were employed in the *Coell Report*: the Direct Comparison Approach and the Pro Forma or Land Development Method. The appraiser commented: "Both methods are commonly used by the development community to negotiate the sale and purchase of development land." (p.27)

24. For his Direct Comparison Approach, the appraiser first wished to determine the "changes in price levels between the sale date for each market index and the effective appraisal date." (p.28) In his view, there had been sufficient re-sales of development properties during the "very strong" market of 2005/7 from which he could measure the rate of change. He thereupon analyzed "...15 re-sales of medium to high-density development properties in the suburban Metro Vancouver communities of Coquitlam, Burnaby, Richmond and Surrey." (p.29)

25. It was the appraiser's conclusion that the 15 re-sales "indicate very strong market movement between 2005 and 2006" (p.30), and he particularly relied on the following indices as providing direct evidence of this trend:

Index 2 -	2962 Glen Drive, Coquitlam
Index 5 -	21115 – 21116 78A Avenue, Langley
Index 14 -	9905 King George Highway, Surrey
Index 15 -	2992 Glen Drive, Coquitlam

As evidence "...of sustained increases in price levels for development land in 2006 – 2007", he relied on:

Index 3 -	6655 Kingsway, Burnaby
Index 7 -	"Decorus" land, Burnaby
Index 11 -	5566 – 120 th Street, Surrey
Index 12 -	7175 – 192 nd Street, Surrey

Finally, as "Additional direct evidence of market movement over the broader analysis period 2005 to 2007" (p.31), he referred to:

Index 4 -	530 Dominion Avenue, Port Coquitlam
Index 6 -	20710 Langley Bypass
Index 8 -	5900 Minoru Blvd., Richmond
Index 9 -	13812 – 64 th Avenue, Surrey

26. From the indices, the appraiser determined that "...the average monthly market movement for Metro Vancouver subdivision development properties" (p.32) during the period 2005 to 2006 was in the range of 4.83% to 7.18%. "The overall median monthly increase for 2006 was 6.47%" (*ibid.*), but this would reduce to 5.69% if Index 15, 2992 Glen Drive, Coquitlam, were taken into account. And, for the overall period 2005 to 2007, "the range of indicated average monthly price is 1.82% to 7.58% with a median average monthly increase of 3.97%." (*ibid.*)
27. It was the appraiser's conclusion that he would adopt "a conservative approach to market movement." (p.33) His reason for this was as follows:

It may be argued that some of the market movement for the above sales was the result of re-zoning and development approvals. However, the OCP designation for each of the initial and subsequent re-sales indicated consistent commercial, residential or mixed land-use. In some indexes, a tangible value added component for some properties may have been realized between sale dates with investments in rezoning and/or development approval processes.

(p.32)

As a result, the appraiser said that he was adopting the average monthly increase of 4.5% for January 2005 to December 2005 and 3.0% for January 2006 to March 2007 (but see paragraph 42).

28. For his comparison analysis, the appraiser for the Respondent also examined five sales. As before, these will be addressed in turn.
29. **Index #1: 2962 Glen Drive, Coquitlam.** This is the same property as the BCS appraiser's Comparable No.3. It will be recalled that he had determined the price paid as reflecting a value of \$31 per sq. ft. buildable (paragraph 12, *supra*). The Coell appraiser, however, analyzed it to be \$30.03 per sq. ft. buildable but said that, from this, one would have to deduct the included value of the geotech work, architectural plans and development approvals. According to him, the purchaser had declared this value to be \$1 million or \$1.65 per sq. ft. buildable. Deducting this from the selling price indicated an adjusted price per sq. ft. buildable of \$28.38 (i.e. \$30.03 - \$1.65).
30. **Index #2: 1195 The High Street, Coquitlam.** This was a vacant property sold by the City of Coquitlam to Bosa Development Corp., the adjacent property owner, without a tendering process or public listing. The sale closed in March, 2005 at a price of \$3,855,072, equivalent to \$14.25 per sq. ft. buildable.
31. **Index #3: 2992, 3002, 3004-08 Glen Drive, Coquitlam.** This was a land assembly by Cressey Glen Holdings, and it incorporates the BCS appraiser's Comparable Nos. 1 and 2 plus 3002 Glen Drive. I would compare the two appraisers' findings as follows:
- (i) 2992 Glen Drive
- BCS: \$21 per sq. ft. buildable
Coell: \$21.34 per sq. ft. buildable
- (ii) 3002 Glen Drive
- BCS: "...negotiations between Cressey and the City of Coquitlam ceased in 2008; the deal subsequently collapsed." (p.44, *BCS Report*)

Coell: "While the City accepted a tender from Cressy (*sic*) for 3002 Glen Drive as of the appraisal date, the parties failed to complete the sale during subsequent post-sale negotiations." (p.39, *Coell Report*)

BCS: no figure

Coell: \$36.64 per sq. ft. buildable

(iii) 3004-08 Glen Drive

BCS: \$37 per sq. ft. buildable

Coell: \$36.63 per sq. ft. buildable

BCS's blended rate for the assembly was \$26 per sq. ft. buildable (paragraph 11, *supra*). Coell's blended rate was \$29.65 per sq. ft. buildable, but this included 3002 Glen Drive. Without the inclusion of this collapsed sale, it would have been, by my calculation, \$25.72 per sq. ft. buildable.

32. **Index #4: 1185 Pacific Street and 2957 Glen Drive, Coquitlam.** This was the BCS appraiser's Comparable No. 5. The Coell appraiser did not indicate any of the problems affecting this transaction that had been pointed out by the BCS appraiser (paragraph 14, *supra*). Instead, he mentioned the 2006 air photography that "...indicates site was cleared and preloading at the date of sale but no other development." (p.40) He commented: "This condition is site consistent with the Realnet listing information." (*ibid.*) His consequent calculation of the price per sq. ft. buildable was \$34.61.

33. **Index #5: 3000 Block Burlington Drive, Coquitlam.** This was the BCS appraiser's Comparable No.4 which he had described as part of an assembly (paragraph 13, *supra*). The Coell appraiser termed it "Land banking by Bosa..." (p.43). He noted that the site was adjacent to Bosa's Phases I to III of Westwood Village, but "...has not been identified as a further development phase." His conclusion:

The sale is about 5 months after the effective date of appraisal. When the continued inflation in development land value after March 31, 2007 is considered, this sale still represents a PBF of about **\$38 PBF** when indexed back to the appraisal date.

(p.43)

34. To complete his analysis, the appraiser applied a timing adjustment for each of the five

comparables. For the purpose of comparison, he carried out the same exercise with the purchase price for the Property, indicating an adjusted value of \$35.92 per sq. ft. buildable in March 2007.

35. The appraiser analyzed his five comparables as follows:

- (i) The time adjusted value for Index #1 would be \$39.92, and this would be "likely somewhat higher" (p.46) than for the Property because the required commercial GBA was less;
- (ii) The time adjusted sale price for Index #2 would be \$29.85, and this reflected "a conservative price" due to the lack of exposure to the broader market;
- (iii) The Index #3 assembly involved three different transaction dates so the appraiser adopted the mid-point of December 2006 as the appropriate date for his time adjustment. This resulted in an adjusted sale price for the assembly of \$36.68 per sq. ft. buildable. If only 3004-08 Glen Drive had been considered, being evidence of a property purchased only three months before the subject appraisal date, the value would have been \$36.63 per sq. ft. buildable;
- (iv) Index #4 would have a time adjusted sale price of \$49.60 per sq. ft. buildable but, according to the appraiser, it was likely that this "...reflects the low overall property commercial requirement in relation to a 100% C-4 site." (p.46);
- (v) Index #5 was a sale that closed five months after the subject appraisal date, and therefore required a negative time adjustment. The appraiser calculated the resultant value to be \$38.59 per sq. ft. buildable. He also noted: "Bosa may have paid a slight premium to prevent a competing developer from securing a site adjacent to Westwood Village." (p.47)

36. In his Conclusions (p.47), the appraiser placed most weight on his adjusted Indices #1, 3 and 5. He considered Index #4 to be "...at the high end of the range...a complex transaction with a mix of C-4 and RM6 zoning designations" (p.47), and Index #2 to be "...at the low end of the range...a sale price negotiated without broad market exposure" (*ibid.*). His consequent range was from \$36.68 per sq. ft. buildable to \$39.92.

37. In examining the aforesaid range, the appraiser suggested that the unadjusted December 2006 sale price for 3004-08 Glen Drive of \$36.63 per sq. ft. buildable (paragraph 35 (iii), *supra*) was "good evidence" in support thereof. In addition, the time adjusted sale of the Property at \$35.92 per sq. ft. buildable (paragraph 34, *supra*) "...provides indirect market evidence...for the low end of the value range." (p.47) He accordingly concluded upon a rate "...at the lower end of the value range" of \$37.00 per sq. ft. buildable, resulting in an estimated value of \$9,378,000.
38. The Pro Forma or Development Method is an approach "...based on the premise that the maximum price an investor would pay for land with development potential as its highest and best use is the estimated net proceeds after deducting all costs and profit from the projected gross sales price of the proposed development project." (p.48) The appraiser had conducted what he called "an optimistic and pessimistic analysis" that was based on a range of assumptions.
39. In his "Optimistic Development Scenario", the appraiser concluded upon a residual value per sq. ft. buildable of \$45.82. His "Pessimistic Development Scenario" produced a \$36.20 per sq. ft. buildable value. He then explained:

The key variables impacting each scenario are forecast construction costs (hard costs), the anticipated gross retail value for condo units, and absorption rates.

Since a project of this magnitude would be relatively complex, there are a large number of assumptions associated with a pro forma analysis. Since there is uncertainty and risk with each assumption, the overall risk for the developer is generally greater with large, more complex projects. Hence, the pessimistic pro forma outcome is deemed more representative of the residual value of the subject property as development land.

(p.51)

Hence, placing "most weight on the pessimistic pro forma analysis", the appraiser determined a value of \$36.20 per sq. ft. buildable, equivalent to a total value of \$9,174,000.

40. The result of the two approaches was as follows:

Value through the Direct Comparison Approach: \$9,378,000

Value through the Pro Forma Approach: \$9,174,000

Given the "tolerance or numerical range associated with each assumption" (p.52) relied upon in the Pro Forma Approach, the appraiser concluded that "...the cumulative impact of the assumptions is increased uncertainty associated with a Pro Forma estimate relative to a DCA estimate of value." (*ibid.*) He therefore gave most weight to the Direct Comparison Approach value, opining a final estimate of value of \$9,375,000.

Appellant's rebuttal

41. The first important issue raised in the *BCS Rebuttal* was that of time adjustment. Referring to the Coell appraiser's time adjustment of 4.5% per month between January, 2005 and December, 2005 and 3.0% per month between January, 2006 and March, 2007 (paragraph 27, *supra*), the BCS appraiser analyzed the Coell comparables accordingly and then stated:

It is evident that an average time adjustment of between 4.3% and 4.7% per month has been utilized when it is clearly stated by the Respondent on page 33 that an average time adjustment of 3.0% should be applied between January, 2006 and March, 2007.

(p.2)

42. The aforesaid statement was evidently correct because, in the *Respondent's Submission*, "an administrative error" (p.5) was acknowledged and an amended page 33 provided in consequence, setting forth an average monthly increase from January, 2005 to December, 2006 of 4.5%. I will return to this issue later (see paragraphs 77 to 80).

43. In his review of the Coell appraiser's time adjustment analysis that had involved 15 re-sales (paragraphs 24 and 25, *supra*), the BCS appraiser commented:

We believe that comparing industrial land, service-commercial land, single-family land or townhouse land to concrete high-rise development may lead to a time adjustment conclusion that is not relevant. It does not adequately qualify the type of transaction and its relationship to the subject property.

(p.6)

He noted the comment that "...construction costs, particularly for high-rise concrete developments, continue to escalate during 2007, placing pressures on development land profit" (p.26, *Coell Report*), and suggested from that the need to consider "...the type of development...in determining change in values for a particular development type." (p.6, *BCS Rebuttal*)

44. In consequence, the BCS appraiser looked at re-sale Indices 2, 3, 8, 13 and 14 and 15, the six high-density properties. I will attempt to summarize his critique of each:
- (i) Index 2 – 2962 Glen Drive. Not a relevant time adjustment as it related to "pure residential development";
 - (ii) Index 3 – 6655 Kingsway. An entirely residential project "...which would have had a higher appreciation than projects with a commercial influence such as the subject";
 - (iii) Index 8 – 5900 Minoru Boulevard. The only example of a sale in December, 2005 and re-sale in March, 2007 (the period with which we are concerned). Indicated time adjustment was 2.43% per month, but an argument could be made for downward adjustment "...as the C-6 zoning only requires retail at grade as opposed to the high portion of retail/office required for the subject zoning";
 - (iv) Indices 13 and 14 – 9905 King George Highway. Traded twice between 2005 and 2007 "...with a wide range in land use policy affecting the transaction (*sic*) from hotel to casino to park dedications." These transactions ranged from \$11.00 pba to \$23.00 pba and these lower rates would "...affect time adjustment given the potential for percentage change is greater from a lower starting point";
 - (v) Index 15 – 2992 Glen Drive. Provides "little assistance" given its sale/re-sale period from December, 2003 to October, 2006. First transaction reflected a single-family zoning whereas the re-sale price, some 167% higher, reflected a rezoned site with C-4 guidelines. Again, "the % change would be greater from a lower starting point."
45. From this analysis, the appraiser decided that the monthly rates established by the Coell appraiser "...are not conservative in light of the shortfalls set out in their report and that their conclusion is more of a direct average of a very wide range of indices." (p.7) In his opinion, Index 8, 5900 Minoru Boulevard, was Coell's best comparable and, if you adjusted the Property's sale price by the indicated 2.43% (paragraph 44(iii), *supra*), you "...would conclude a value of \$29.21 per sq. ft. buildable." (*ibid.*)
46. No doubt because of the considerable overlap between his comparables and those of the Coell appraiser, the BCS appraiser did not have too much to say about the latter's five sales

comparables. He restricted his comment to the time adjustment for Index #3 and a general clarification concerning Indices #4 and #5.

47. With respect to the time adjustment for the Coell appraiser's Index #3 (paragraph 31, *supra*), the BCS appraiser pointed out:

The Respondent takes the mid-point of the three transaction dates being December, 2006 and adjusts upwards for time to the valuation date of March, 2007, concluding a time adjusted value of \$36.68 per sq. ft. buildable. However, one sale pertaining to the purchase of 3002 Glen Drive was negotiated approximately four months after the date of valuation. By taking a mid-point date, the Respondent is adjusting upwards for time on a comparable land deal that transacted four months after the date of valuation. This is incorrect because the sale should be adjusted downwards.

(p.5)

In his consequent calculation, the appraiser adjusted each of the three sales individually to the valuation date. The result was a time adjusted blended price per sq. ft. buildable of \$30.13.

48. With respect to Index #4 (paragraph 32, *supra*), the appraiser remarked on the Coell appraiser's having not mentioned the various additional items that would have been included in the sale price and that needed to be deducted to arrive at land value. He particularly referred to "the 100 underground parking stalls" (p.7), and included the pertinent listing sheet as an Appendix.
49. With respect to Index #5 (paragraph 33, *supra*), he re-iterated his own consideration of this transaction (paragraph 13, *supra*) as indicating a blended land rate of \$21.00 per sq. ft. buildable. He stated that this "...has been confirmed in direct conversations with this developer." (p.7)
50. The BCS appraiser prefaced his critique of the Pro Forma Approach with the following comment:

A knowledgeable and experienced developer will purchase a development site based on a land residual analysis. The residual approach is the best test for the financial feasibility of a proposed redevelopment project and ensures that developers do not overpay for a development site. The challenge with the pro forma approach is that it relies on many different assumptions.

(emphasis added)
(p.8)

The Coell appraiser had similarly pointed out the "uncertainty and risk with each assumption"

(paragraph 39, *supra*).

51. It was the intended task of the BCS appraiser to offer "...specific evidence to support alternative conclusions of the inputs." (p.8) He started by considering the Coell appraiser's average selling prices for residential of \$493.06 on a pessimistic scenario and \$505.11 on an optimistic one. From his enquiries with the Vice-President of Bosa Properties, the developer of the nearby Westwood Village, and his own analysis of the sales at the Claremont and Edgemont high-rise developments, he concluded that a rate of \$465.00 per sq. ft. "...ought to have been adopted for the residential strata end product as an 'optimistic' conclusion". (p.12)
52. With an equally detailed analysis, the BCS appraiser challenged the Coell figures of \$28.00 per sq. ft. for office space and \$32.00 for retail space. For the former, he arrived at a rate of \$23.00 "...which if anything, can be considered to be on the aggressive side." (p.13) For the latter, he adopted a rate of \$26.00 per sq. ft.
53. The Coell appraiser had utilized a capitalization rate of 6.0% for the office and retail space. The BCS appraiser, based on the analysis at p.13/14, preferred to adopt 6.5% for the office component and 6.25% for the retail.
54. There followed a detailed residual analysis, based on the Property Development Appraisal Program developed by Interproperty Systems. I see no need to summarize this analysis; it is set out at pages 15 to 18 of the *BCS Rebuttal*. The conclusion was as follows:

The above inputs indicate a land residual value of \$5,230,000 which is approximately what the developer paid for the property in December, 2005. This land value reflects a profit on sale of 15.00% and on costs of 17.65%. This is within an acceptable range.

(p.19)

This was equivalent to a per sq. ft. buildable rate of \$20.63 "...as of Spring 2007" (p.17). This was in marked contrast to the Coell appraiser's figure of \$36.20 per sq. ft. buildable (see paragraph 39, *supra*).

Respondent's rebuttal

55. Following an overall critique of the BCS approach and assumptions (see p. 4/6, *Coell Rebuttal*), the Coell appraiser embarked on a detailed analysis of each of the five BCS comparables. For

each, he reviewed the "Comparable Analysis" at pp.34/42, and then the "Value by Direct Comparison Approach" at pp.43/47. I will consider each comparable in turn.

56. **Comparable No.1: 2992 Glen Drive.** The Coell appraiser questioned the BCS conclusion that this is "...undoubtedly our strongest comparable; as it is within proximity to the subject property and the allowable uses are governed by the same C-4 guidelines." (p.43, *BCS Report*) In his view, the same description could be applied to BCS Comparable Nos. 2 and 4. However, he agreed with the BCS appraiser about Comparable No. 1's "...negative attributes relative to the subject" (p.11, *Coell Rebuttal*), referring to its limited frontage and split configuration. Finally, he pointed out an earlier sale of this comparable that had not been mentioned by BCS: it had sold in December 2003 for \$1,800,000, producing an average monthly market movement between then and fall 2006 of 4.90%. He opined from this: "...this resale is a strong indicator of the overall change in market conditions between 2003 and 2006." (p.8, *ibid.*) Against this, he rejected the BCS appraiser's conclusion that the July 2006 sale of Comparable No.1 indicated no change in value from the December 2005 negotiation date for the Property:

...given the accepted differences between the two properties we question this statement. Use of "paired sales" for evidence of market movement is only appropriate when the two properties are similar in all aspects. This is not (the) case. In fact, this paired sales comparison is illogical if we accept the BCS appraiser assertion that one sale is part of an assembly and one is stand alone property sale.

(p.11)

His summary of Comparable No.1 was this: "...we conclude there are problems with BCS use of this sale in the DCA analysis." (p.11)

57. **Comparable No.2: 3004-3008 Glen Drive.** The Coell appraiser dismissed the contention that Cressey had paid a premium for this property, noting the lack of any source for this statement and concluding "...this information must be considered as an anecdotal statement." (p.12) He thereafter endeavoured to determine what would be the best valuation approach "...to demonstrate whether a market premium was associated with one or more specific components of a land assembly." (*ibid.*) He proceeded by comparing the sale of this property with that of BCS Comparable No.4 (i.e. Lots 15, 16, 17 and 18 for \$44 per sq. ft. buildable in December 2007). Differences between the sales included: the former was zoned C-4, the latter, RS-1; the latter was "considerably smaller"; there was a six month spread between dates of sale. His finding was "...that there is no significant differences in PBF between the two sales after accounting for these

comparability factors." (*ibid.*)

58. A major criticism of the BCS appraiser's approach of a blended price for his Comparable Nos. 1 and 2 was that he "...has adopted a **non-market approach** to account for the perceived market premium associated with land assembly." (p.13) The Coell appraiser viewed this as his having analyzed the transaction as value to owner, not market value. The blended rate may be an accounting "book value" or adjusted capital cost, "but **is not** a recognized market approach." (*ibid.*) The appraiser concluded that "...there is no market support for the appraiser's adjustment of Comparable No.2 for land assembly influence." (p.14)
59. **Comparable No.3: 2962 Glen Drive**. The Coell appraiser agreed with BCS that "...the value PBF of this site is likely higher than an equivalent site with full C-4 requirements." (p.14) However, in a detailed analysis of "...the differential in achievable density for 2962 Glen Drive, based on full C-4 requirements and the actual achievable density given the approved 2007 (as amended) Intergulf DP" (*ibid.*), the appraiser determined a difference of only 6.17%. He furthermore contended that the acknowledged over-supply of office space at the time of the appraisal could be addressed by the developer. In other words, "the comparative advantage of 2962 Glen Drive can be quantified in the reconciliation process, for qualitative or quantitative adjustment purposes." (p.16)
60. The Coell appraiser criticized the omission of "...a full description of the **earlier sale** of the property from Morguard to Concert Properties." (p.16) Since there was "...essentially no change in the property physical and legal attributes between the two sale dates," the re-sale would provide "very useful evidence of market movement." (*ibid.*) In his calculation, this reflected "...an average monthly market increase for development land in Coquitlam Town Centre of **6.42%** between July 2006 and November 2005." (*ibid.*) He did not accept the BCS appraiser's opinion that the upward adjustment for time would be "...more than offset by the fact that the subject property has a high percentage requirement for employment generating uses." (p.45, *BCS Report*) In his view, this was nothing more than a "speculative" suggestion (see p.14, *Coell Rebuttal*).
61. **Comparable No.4: Bosa Assembly**. The Coell appraiser regarded the BCS treatment of this transaction to have been similar to that of its Comparable No.2. That is to say, the BCS appraiser had used a weighted average of this and an earlier (Bosa) purchase to arrive at a blended rate which the Coell appraiser had argued before would represent "value to owner" or "book value",

not market value. He commented:

There is no dispute that Bosa paid **\$44 PBF** for Lots 15-18, rather than \$21 PBF. This property was exposed to the market. The property did not have C-4 zoning at the time of sale and had no DP or any other development approvals. The project was not linked to the 2003 purchase of lands to the south. Furthermore, Bosa was under no undue pressure to purchase the property and was fully informed about the development potential and limitations. Therefore, we must conclude that this sale meets all of the appraisal tests for an open market transaction.

(p.17)

Finally, the Coell appraiser opined that Comparable No.4 and the earlier Bosa purchase were both sufficiently large in size as to be able to support a development project on a stand-alone basis. There was no need to consider this comparable "...in combination with an adjacent property sale." (p.17) And even indexing the earlier sale forward to the date of appraisal might fall afoul of the Appraisal Institute of Canada's stricture that such use of dated sales would be "...inappropriate when more current reliable information, as is the case with Coquitlam Town Centre, is available." (p.18) Comparable No.4, according to the appraiser, indicated a sale price of "**\$44 PBF** as of May-July 2007, the date the sale price was negotiated." (*ibid.*)

62. **Comparable No.5: 2957 Glen Drive & 1185 Pacific Street.** The Coell appraiser rejected the suggestion that, at the time of sale, the site was preloaded and had over 100 parking stalls already constructed. In his opinion, "...no development on the property has occurred since the late 1990s..." (p.9). He included an excerpt from the City Council meeting minutes of July 20, 2007 in which the property sold was described as "the undeveloped portion of the site..." (p.10).

Both appraisers recognized that an upward adjustment for time would be necessary, but the Coell appraiser disagreed that other differences such as the RM6 zoning (i.e. no commercial uses required) would require a downward adjustment. He thought that the BCS appraiser had "...not considered the impact of the site configuration of Comp. 5." (p.18) In his opinion:

This site is much more difficult to develop than the subject given the split zoning, complexity of the required DP, and therefore we would expect a similar or **lower price PBF** relative to the subject, assuming we account for market movement.

(p.18)

63. The Coell appraiser summarized his criticism of the BCS appraiser's analysis of his five

comparables as follows:

- (i) Comparable No.1: "...the reader is provided with no evidence of an adjustment for market movement." (p.19)
- (ii) Comparable No.2: "...the main problem with this sale is the flaw in adjustment for land assembly influence." (*ibid.*)
- (iii) Comparable No.3: "...no appraisal support is provided for the assumption that market movement was **equivalent** to the superior mix of residential and employment generating density relative to the subject." (*ibid.*)
- (iv) Comparable No.4: "If dated sales are used, the appraiser must account for the changes in market conditions. In the BCS report there is no direct analysis of market movement." (*ibid.*)
- (v) Comparable No.5: "We agree with the BCS appraiser that little weight should be placed on Comparable No.5..." (p. 20).

64. It will be recalled that the BCS appraiser had determined a "...range of values between \$21 and \$37 per sq. ft. ..." (paragraph 16, *supra*) from which he had concluded a value of \$30 per sq. ft. buildable. The Coell appraiser questioned this "...gross adjustment of **\$9 PBF**" (p.20), and asserted that no evidence had been provided "...to support this overall adjustment." (*ibid.*) In consequence:

We conclude that the estimate of market value is not credible and the use of a blending technique to establish adjusted sale prices for comparable data without accounting for market movement is not accepted appraisal practice.

(p.20)

65. The Coell appraiser had two principal concerns about the BCS "Valuation by time approach" (paragraphs 17/18, *supra*):

- (i) With regard to the BCS appraiser's opinion of a 75% residual to the underlying land, since there was no evidence to support such a relationship, "the use of a 75% factor to produce a land residual is considered arbitrary." (p.21)

- (ii) With regard to this whole approach, this would only be acceptable appraisal practice "...when more reliable direct information is not available." (*ibid.*) The Coell appraiser cited the Appraisal Institute of Canada's pertinent guidance, concluding "...that the BCS using of a time adjustment to index forward the sale of the subject property is not supportable since available direct market evidence was not considered." (p.22)
66. When it came to the BCS "Valuation by determining separate buildable land values for residential and commercial densities," the Coell appraiser saw this as "...an investment analysis from a developer's perspective rather (than) an independent Pro Forma valuation to determine land value." (p.23) Nonetheless, he did consider the analysis to have been "...valuable since it points out the key difficulty in application of a (*sic*) Pro Forma valuation models: large shifts can occur in final outcomes as a result of small changes in assumptions regarding land pricing, and development costs." (*ibid.*) He particularly disagreed with the BCS appraiser's opinion "...that the commercial space is not financially viable." (p.23 and see paragraph 20, *supra*) In the *Coell Report*, he claimed to have demonstrated that "...this space is viable, assuming it is minimized by substituting accessible residential space to the maximum permitted." (p.23)
67. In the result, the Coell appraiser considered the BCS conclusion of \$27.30 per sq. ft. buildable to have been "...based on a large number of significant cost and value assumptions, only some of which are stated by the appraiser." (p.24) This, in his view, "...does not meet appraisal standards for an independent Pro Forma and hence has limited applicability in this appraisal." (*ibid.*)
68. In his "Overall Conclusion – BCS Appraisal Report," the Coell appraiser presented the following summation:
- ...we have identified a series of fundamental appraisal errors and issues for each of the BCS approaches to value. The cumulative impact of decisions to use dated blended sales, incomplete Pro Forma analysis, and avoid analysis of direct market data for market movement are a series of value estimates which are not well supported and appear below market value.
- (p.24)

Appellant's closing submission

69. The expressed purpose of the *Appellant's Submission* was "...to summarize the evidence in front of the Arbitrator and, secondly, to review the inconsistencies in the Respondent's report." (p.1) In

consequence, the Appellant took the following position:

We would argue that these errors and contradictions within the Respondent's report suggest less weight ought to be given to the Respondent's brief, and a conclusion in line with the Claimant would have been reached had these errors not occurred.

(p.1)

70. The alleged "errors and contradictions" analyzed in the *Appellant's Submission* can be conveniently grouped under four headings:
- (i) Monthly rate of increase in value;
 - (ii) Coell's Index #3;
 - (iii) Coell's Index #4;
 - (iv) Coell's Pro Forma approach

I will consider in turn the Appellant's discussion about each of these issues.

71. Monthly rate of increase in value. The Appellant continued the allegation from the *BCS Rebuttal* that the Respondent had used a 4.5% monthly time adjustment instead of the 3.0% indicated in the *Coell Report* (see paragraph 41, *supra*). If the originally indicated rate of 3.0% were to be used for the period from January 2006 to March 2007, the subject sale price, according to the Appellant, would be adjusted to "...a value of **\$31.03 per sq. ft. buildable** [\$21.40 per sq. ft. buildable x (3.0% per month x 15 months)]." (p.7) It will be recalled that, against this, the Respondent had asserted an "administrative error" on p.33 of the *Coell Report* (see paragraph 42, *supra*) and, as mentioned before (*ibid.*), I will return to this issue later.
72. The Appellant also re-iterated the opinion from the *BCS Rebuttal* that 5900 Minoru Boulevard was "Coell's best comparable" (see paragraph 45, *supra*). With a sale in December 2005 and re-sale in March 2007, "...it reflects the same time frame and the sale and re-sale dates correspond with the negotiation and property transfer date for the subject property..." (p.7). Applying the 37% increase indicated by those transactions to the Property's sale price of \$21.40 per sq. ft. buildable would produce a time adjusted value of \$29.21 per sq. ft. buildable.
73. Coell's Index #3. This was the Cressey Glen Holdings land assembly involving 2992, 3002, 3004-3008 Glen Drive, Coquitlam,. The Appellant criticized the Coell appraiser for having been

"inconsistent" in his analysis, pointing out:

On page 46, the Respondent quotes the following within the second paragraph **"Since the properties were assembled to create one development project, we have treated the sales as a single transaction for analysis purposes."** The Respondent proposes the notion that the price per sq. ft. based on the completed assembly, and not the purchase of each portion of the land assembly, is relevant for determination of value. The Respondent then says on Page 47, "The unadjusted December 2006 Cressey purchase of 3004-3008 Glen Drive at \$36.63 PBF is good evidence in support of the time adjusted range noted above." The fact that he places weighting on the sale of one portion of the assembly is inconsistent with his prior statement that the assembled land price is what should be used for analysis purposes.

(p.4)

The Appellant then cited the Respondent's calculation: "(T)he total assembly price reflects \$14,589,000 or **\$29.65 per sq. ft. buildable.**" (p.7) If the Respondent's originally indicated time adjustment of 3% per month were to be applied to this price, it "...would reflect **\$30.13 per sq. ft. buildable** on a weighted basis." (*ibid.*)

74. Coell's Index #4. This was 1185 Pacific Street and 2957 Glen Drive, also being BCS's Comparable No.5. The Appellant provided a detailed explanation in support of its expert's contention that there were parking stalls already on site at the time of sale. The *BCS Report* had referred to "approximately 100 parking stalls constructed" (see paragraph 14, *supra*), but this was now clarified to show "...there are 87.5 offsite parking stalls...provided for 1185 Pacific Street (Phase 3 or Parc high-rise tower)." (p.2)

To arrive at an adjusted value, the Appellant deducted the value of 73 parking stalls from the purchase price. It did not deduct the value of the 14 stalls on Phases 1 and 2 strata lands "...as in theory, these 14 parking stalls will eventually have to be provided when Phase 4 is developed." (*ibid.*) Its calculation for this purpose was set out on page 3 and indicated an adjusted price per sq. ft. buildable of \$34.46. The Appellant then argued:

The Respondent suggests a conclusion of \$37.00 per sq. ft. buildable some \$12.60 per sq. ft. buildable less than the \$49.60 per sq. ft. buildable he calculates for this sale. Since the sale actually reflects a \$34.46 per sq. ft. buildable not a \$49.60 per sq. ft. buildable his \$12.60 per sq. ft. buildable adjustment would equate to a conclusion of \$21.86 per sq. ft. buildable.

The magnitude of this difference puts into question the reliability of the

Respondent's conclusion.

(p.3)

75. Coell's Pro Forma approach. The Appellant continued the detailed critique of the Coell appraiser's Pro Forma approach that had first been set forth in the *BCS Rebuttal* (pp.8 to 19). At the conclusion of this analysis, the Appellant stated:

The inconsistencies, mathematical errors and lack of supporting evidence in the residual analysis suggests no reliable conclusion can be determined from these calculations. The cumulative impact of these errors can lead to a vastly inflated conclusion of value.

(p.6)

More specifically, the Appellant contended:

...the Respondent provides a pro forma to support their Direct Comparison Approach with absolutely no market evidence to support their conclusions for:

1. Residential strata values.
2. Commercial strata values.
3. Retail rental rates.
4. Office rental rates.
5. Parking rents.
6. Capitalization rates.
7. Provides no cash flows for their assumptions.

(p.7)

Given all of this, the Appellant "...would argue this approach of the Respondent not be relied upon." (p.8)

Respondent's closing submission

76. The *Respondent's Submission* was presented under five headings: (i) Administrative Error; (ii) Market Movement; (iii) Comparability of Market Evidence; (iv) Land Assembly Influence; and (v) Pro Forma-Land Development Approach. I will address each in turn.
77. Administrative Error. At paragraph 42, *supra*, I had referred to the Respondent's acknowledgement of "an administrative error". The explanation that was provided in the *Respondent's Submission* was as follows:

The average monthly % increase in market value for the period January 2005 to December 2005 was **incorrectly** stated as 4.5%. The correct rate, used in our report, should have been stated as 4.5% for the period **January 2005 to December 2006**. This rate is strongly supported by sales evidence on pages 29-32. The average monthly % increase in market value for the period January 2007 to Summer 2007 was correctly stated as 3.0%.

As a result, there is no need to recalculate the appropriate adjustment for market movement in our September 28, 2009 appraisal report.

(p.5)

An amended page 33 was provided as Schedule A, to be substituted for the page 33 that contained the "administrative error."

78. In the *Sullivan e-mail*, the Appellant contended that the "administrative error" created a conflict with evidence set out in the *Coell Report*. Having reviewed that evidence, the Appellant took the position that "This evidence of the respondent does not support the changed time adjustment."

79. In response, the *Vance e-mail* stated:

Mr. Sullivan has chosen to refer to just four of those sales from the original report, which were used to show general market trends. It is clear from the report that, while these properties were quite rightly analyzed as part of the appraisal process, the rate of increase adopted was derived from other, more comparable sales. There is ample evidence to support the rate of increase used in the valuation.

80. There is no doubt in my mind that the Respondent is correct in this. Referring back to the *Coell Report*, I note the reference to "very strong market movement between 2005 and 2006." (p.30) Four indices were provided as "direct evidence of this trend." (*ibid.*) All of those re-sales took place in 2006, the first in "summer 2006", the next "spring 2006", the next "winter 2006" and the last "fall 2006", making it clear that the period being analyzed did not end in December 2005. The Coell appraiser had summarized:

In the period 2005 to 2006, the average monthly market movement for Metro Vancouver suburban development properties was in the range of **4.83% to 7.18%**. The Coquitlam Town Centre re-sales (indexes 2 and 15) indicate an average monthly increase of **6.47%** and **4.90%**. The overall median monthly increase for 2006 was **6.47%** or **5.69%** per month when index 15 is considered.

(p.32)

Nowhere in the *Coell Report* is there a separate analysis for the year 2005 only. The preceding statement, in my view, is all to do with "the period 2005 to 2006", and a conclusion of 4.5% for some of this period and 3% for the rest would make no sense. Hence, I accept the Respondent's position that the Coell appraiser's opinion of monthly increases for market movement adjustment is correctly stated as follows:

January 2005 to December 2006	4.5%
January 2007 to March 2007	3.0%

81. Market Movement. The *Respondent's Submission* made the general observation that: "On page 6 of the BCS Rebuttal Report it is argued that none of the 15 re-sales of development land in Metro Vancouver, with the exception of re-sales 2 and 15, are relevant." (p.5) This was not my understanding of the BCS appraiser's criticism; I thought that he had objected to consideration of any transactions involving other than high-rise development. In consequence, he had examined Coell Indices 2, 3, 8, 13 & 14 and 15.
82. The *Respondent's Submission*, at pp. 6/7, responded to the BCR critique of the aforesaid Indices (see paragraph 44, *supra*) as follows:
- (i) Index 2 – 2962 Glen Drive. Considered to be "...extremely relevant since it (is) immediately adjacent to the subject and constitutes a comprehensive development land re-sale." (p.5) "The BCS appraiser has provided no evidence to support his conclusion regarding re-sale 2. We conclude that the attempt to eliminate this re-sale on the basis on (*sic*) differences in density relative to the subject is based on opinion, not fact, and represents an over analysis of the available data";
 - (ii) Index 3 – 6655 Kingsway. Same argument used by BCS as for Index 2. "There is no evidence provided in the BCS appraisal or rebuttal reports that the pace of market movement was different according to the various distribution of commercial and residential density for development land. Again, we submit that the BCS argument is based on opinion rather than facts";
 - (iii) Index 8 – 5900 Minoru Boulevard. This re-sale involved a proposed hotel, office and residential space. "Our understanding of this sale is that there was no general significant change in the proposed project development between the two sale dates";

- (iv) Indices 13 and 14 – 9905 King George Highway. The BCS appraiser had expressed concern that the lower rates for the first re-sale would affect the time adjustment. "We appreciate the BCS appraiser's point of view and suggest that the most recent re-sale, index 13, representing monthly market movement of 6.4% is the more relevant of the two re-sales";
- (v) Index 15 – 2992 Glen Drive. "We agree that this one re-sale on its own is insufficient proof of market movement."

83. In its Executive Summary, the Respondent summarized its view of the BCS position as follows:

The only direct market evidence of market movement presented by the BCS appraiser is a re-interpretation of DRC evidence in the BCS rebuttal. In our submission, we agree that the re-analysis of DRC evidence is limited and represents over-analysis of the data. We could find no argument in the BCS rebuttal that the MLS trend data provided in the BCS appraisal report is preferable to use of direct market evidence, in this case re-sales of development land, provided in the DRC appraisal report.

(p.2)

84. Comparability of Market Evidence. The Respondent noted the general agreement between the experts about the facts of their overlapping comparables, 2957 Glen Drive being the only exception. Where they disagreed principally was "...in the comparability of the sales to the subject, and the correct treatment of market movement and land assembly potential." (p.7) The Respondent provided a chart summarizing these sales "...to illustrate where there is agreement and disagreement on the nature of comparability to the subject." (*ibid.*)

85. From this chart, the Respondent drew eight conclusions that I will attempt to summarize as follows:

1. The experts agreed on the Property's being "...a superior, corner development site within a specific area of the Town Centre with strong market appeal to developers and potential residential consumers." (p.9)
2. The Coell appraiser included all of the BCS comparables in his report except for "...two very dated sales...used only for the determination of land assembly influence." (*ibid.*) He included two sales "...not considered by the BCS appraiser": the Bosa purchase of 1195 High Street and the Cressy (*sic*) purchase of 3002 Glen Drive.
3. The experts disagreed on the appropriate analysis of the 2957 Glen and 2962 Glen Avenue sales, but they each concluded that these transactions had "limited applicability."

4. Given the preceding conclusion, "the remaining sales evidence for reliance" would include the 2005 Bosa purchase, the August 2007 Bosa purchase and the various Cressey purchases negotiated between October 2006 to July 2007.
 5. The Coell appraiser had concluded that his Index #2, the 2005 sale to Bosa by the City, was inferior to the Property. The BCS appraiser did not analyze this transaction.
 6. Both experts included the various Cressey transactions with both making reference to "...the development issues associated with this property" (p.10), but they had different views on comparability. For example, the BCS appraiser had described 2992 Glen Drive as "our strongest comparable" (paragraph 10, *supra*), but the Respondent reflected the Coell opinion of "Similar" in its chart.
 7. The experts analyzed the August 2007 Bosa purchase quite differently. The Coell appraiser viewed it "...as good evidence of market value as of August 2007" (p.10), but considered the BCS analysis to reflect value to the owner, not market value.
 8. "There are a number of gaps in the BCS report regarding the comparability of various sales indexes to the subject property....gaps in elements of comparison reduce the credibility of the final outcome." (p.10)
86. Land Assembly Influence. The first issue considered by the Respondent was: "Is there an Assembly influence?" (p.10) In the Respondent's opinion, the BCS appraiser had not provided "direct market evidence" to substantiate the existence of this phenomenon. His interviews with the respective developers, according to the Respondent, reflected nothing but "hindsight," not the market conditions prevailing at the time of sale.
87. With respect to the Cressey purchases, it was the Respondent's contention that each individual site "...was large enough to support a mixed-use development at its highest and best use." (p.11) Moreover, Cressey was only proceeding with a DP application for 2992 Glen Drive, "meaning the other two properties are not contributing to this build-out (**no assembly occurring**)."
(*ibid.*) It was the Respondent's resultant conclusion that Cressey's purchase of 3004-3008 and 3002 Glen Drive was motivated by factors other than assembly (e.g. land banking).
88. Similarly, the Respondent regarded the two Bosa purchases, BCS Comparable No.4, as "...additional examples of developer land banking activity." In its opinion, there was "...no indication that Bosa has taken any steps to assemble these properties into one overall parcel." (p.11)
89. The Respondent's second issue was: "How to account for Assembly influence?" (p.11) In other words, if it could be demonstrated that individual lots had been assembled "to create a useable development site," how should an appraiser determine "...the basis for the price paid for each

lot." (*ibid.*) The Respondent re-iterated the earlier Coell opinion that BCS's approach of averaging the capital cost base to the developer for all the properties associated with the assembly was "value to owner", not market value (see paragraph 58, *supra*).

90. In revisiting the Cressey transactions in the *BCS Rebuttal*, the BCS appraiser had calculated "a time adjusted blended price per sq. ft. buildable of \$30.13." (paragraph 47, *supra*) However, this was derived from his understanding that the Coell monthly market increase during this period was 3.0%. I have since accepted the correct figure to be 4.5% (paragraph 80, *supra*). In consequence, the Respondent commented:

When the correct factor is applied, the adjusted PBF is **\$30.50**, rather than \$30.13, using the same BCS methodology. It is critical to contrast this outcome with the adjusted PBF of **\$26.00** in the BCS appraisal report.

(p.12)

91. The Respondent then noted "...that the BCS appraiser does not extend the rebuttal methodology to the treatment of the Bosa purchases ...which, in our view is an inconsistency." (p.12) The Respondent re-analyzed those two purchases "...accounting for market movement," and concluded on "an overall indicated PBF of **\$31.56** PBF rather than \$21 PBF." (*ibid.*) This new figure had been calculated using a monthly rate of 4.9% for market increase in value which, according to the Respondent, was "...directly supported by the re-sale of 2992 Glen Drive..." (*ibid.*).
92. If the Bosa purchases were to be regarded as an assembly, the Respondent took the position that the developer would be left with "a very irregular development site on a high traffic corridor." (p.12) Given the various difficulties attendant upon an assembly development, the Respondent opined that these in total would "...significantly reduce the market appeal of the Bosa properties in relation to the subject." (p.13)
93. The Respondent's conclusion about the two Bosa purchases was that they "...should be considered as separate transactions indicative of very different market conditions in November 2003 and August 2007." (p.13)
94. Applying what it called "the BCS rebuttal methodology" (p.13) to all of the BCS comparables, the Respondent produced a comparison chart which I have distilled as follows:

	<u>Comparable</u>	<u>BCS Final PBF</u>	<u>BCS Rebuttal PBF</u>
1.	2992 Glen Drive	\$26.00	\$30.50
2.	3004-3008 Glen Drive	\$26.00	\$30.50
	3002 Glen Drive	N/A	\$30.50
3.	2962 Glen Drive	\$30.03	\$30.03
4.	Bosa (August 2007)	\$21.00	\$31.56
5.	2957 Glen Drive	\$34.61	\$34.61

The Respondent also referenced the sale price of 3000 Blk Burlington (Pinetree Way) – the Bosa purchase – of \$44.35 per sq. ft. buildable because "...the BCS appraiser refers to the unadjusted sale as forming the higher end of the value range for the subject property." (*ibid.*)

95. It will be recalled that the BCS appraiser had initially postulated a range "...from \$21 to \$44 per sq. ft. buildable" (paragraph 16, *supra*). To make the comparison, the Respondent suggested that, "according to the latest BCS methodology" (p.14), the range should be \$30.50 to \$44.35 per sq. ft. buildable. From this range, it expected "...a PBF for the subject, more consistent with the DRC appraisal estimate of \$37.00 PBF." (*ibid.*) However, the BCS appraiser had in fact narrowed the range of values that he had relied upon to "between \$21 and \$37 per sq. ft..." (paragraph 16, *supra*). I took these figures to represent the adjusted sale price for his Comparable No. 4 (\$21), and the unadjusted sale prices for his Comparable Nos.1 (\$21) and 2 (\$37). Hence, substituting the Respondent's interpretation of the "BCS Rebuttal PBF" would result in a range from \$30.50 to \$37.00 per sq. ft. buildable (but see paragraph 130).

96. Pro Forma – Land Development Approach. The Respondent observed at the outset that the Coell appraiser had "...placed limited weight on the Pro Forma Approach due to the large number of variables and assumptions required." (p.14) It candidly acknowledged "...that there are a probable range of projected values and costs associated with any development project." (*ibid.*) It thereupon pointed out several areas in which it disagreed with the BCS rebuttal analysis (see paragraph 54, *supra*), concluding "...that the Pro Forma analysis introduced in the BCS rebuttal report has weaknesses and is not helpful in establishing the market value of the subject property." (p.15) Both appraisers had "...placed most weight on the Direct Comparison Approach to Value." (p.16)

97. The Respondent's final conclusion was "...that the BCS opinion of the subject value is below

market value for several principle (*sic*) reasons":

1. The inappropriate use of an adjusted cost base method to produce "value to owner" rather than indicators of market value indicator for key sales in the DCA to account for assembly influence.
2. No reliance on direct evidence of strong market movement for development land (re-sales) over the period 2005 to 2007 and beyond.
3. Very limited effort to compare each of the value indicators to the subject property.

(p.16)

Review of approaches to value

98. There is no doubt that "Both appraisers had '...placed most weight on the Direct Comparison Approach to Value.'" (paragraph 96, *supra*) I will review all of that in the next section.
99. With respect to the BCS appraiser's other approaches, the "Valuation by time approach" and "Valuation by determining separate buildable land values for residential and commercial densities", I note his own comment: "The latter two approaches are supportive to value; however, more subjective with respect to the assumptions made." (see paragraph 21, *supra*)
100. At paragraph 65, *supra*, I set forth the Coell appraiser's "...two principal concerns about the BCS 'Valuation by time approach'...". Having carefully considered these criticisms in my own reading of this BCS approach, I have concluded that I should not rely on the "Valuation by time approach".
101. At paragraphs 66 and 67, *supra*, I have set forth my understanding of the Coell appraiser's concerns about the BCS "Valuation by determining separate buildable land values for residential and commercial densities." I particularly note his following comments:

"...large shifts can occur in final outcomes as a result of small changes in assumptions regarding land pricing, and development costs."

(paragraph 66)

...the BCS conclusion...has been "...based on a large number of significant cost and value assumptions, only some of which are stated by the appraiser."

(paragraph 67)

"...that there are a probable range of projected values and costs associated with any development project."

(paragraph 96)

102. Given the Coell appraiser's persuasive critique, as well as the BCS appraiser's candid acknowledgement that the assumptions made for this approach were "more subjective" than for his Direct Market Comparison Approach, I have decided not to rely on this third approach by BCS. I am persuaded that "small changes in assumptions", assumptions that at times appear to be quite subjective, will make a big difference in the value outcome.
103. When it came to the Coell appraiser's own "Pro-Forma – Land Development Approach", he was to some extent hoist with his own petard. But, to his credit, he had clearly recognized the difficulty by pointing out that he had "...placed limited weight on the Pro Forma Approach due to the large number of variables and assumptions required." (see paragraph 96, *supra*) This qualification was reinforced for me by the BCS appraiser's own comment: "The challenge with the pro forma approach is that it relies on many different assumptions." (see paragraph 50, *supra*)
104. I have carefully studied the BCS analysis of the "Pro Forma Approach" at pp. 8/19 of the *BCS Rebuttal*. In my determination, it is a well-argued and impressive critique of the Coell approach. The challenges to the various Coell assumptions are comprehensive and raise various levels of doubt as to the applicability of those assumptions to the Property. I have also reviewed the Appellant's pertinent comments in the *Appellant's Submission* (see paragraph 75, *supra*), noting its conclusion about this Coell approach that "(T)he cumulative impact of these errors can lead to a vastly inflated conclusion of value." In consequence, I have not been left with sufficient confidence to rely on the Coell "Pro-Forma – Land Development Approach."
105. By the same token, I am not prepared to rely on the BCS appraiser's "alternative conclusions of the inputs." (see paragraph 51, *supra*) For the reasons pointed out above, the number of value and cost assumptions required to be made renders the concluding opinion a less than convincing one. I think that the Respondent has addressed this well at pp. 14/15 of the *Respondent's Submission*, and I agree with its conclusion:

...that the Pro Forma analysis introduced in the BCS rebuttal report has weaknesses and is not helpful in establishing the market value of the subject property.

(p.15)

106. Before proceeding to consideration of the approach that I did rely on, I do wish to make it clear that I have no problem in general with the production of a pro forma approach in an appraisal of this nature. My preceding determination is only to do with the specific data produced by both appraisers in this proceeding. Whether this was because of the unusual difficulty of the subject development or for some other reason, I do not know.

Direct Comparison Approach

107. As I observed in paragraph 98, there is no doubt that "Both appraisers had '...placed most weight on the Direct Comparison Approach to Value'." Given the notable overlap of comparable properties selected by the appraisers for this purpose, I have conducted my review somewhat differently than I would normally have done. Instead of considering each appraiser's comparables in turn, I have addressed the individual properties initially in the order of least helpful before proceeding to consider the more important Cressey and Bosa comparables of both appraisers.
108. **1195 High Street, Coquitlam.** This was Coell Index #2. As noted in paragraph 30, *supra*, "(T)his was a vacant property sold by the City of Coquitlam to Bosa Development Corp., the adjacent property owner, without a tendering process or public listing." The time adjusted sale price was calculated to be \$29.85 per sq. ft. buildable and, according to the Coell appraiser, "...this reflected a 'conservative price' due to the lack of exposure to the broader market" (paragraph 35 (ii), *supra*). The Coell appraiser did not rely on this Index in establishing his range of values because it had been "...a sale price negotiated without broad market exposure" (paragraph 36, *supra*). I do not propose to rely on this comparable either.
109. **2957 Glen Drive & 1185 Pacific Street.** This transaction was Coell Index #4 and BCS Comparable No.5. The former reflected a time adjusted sale price of \$49.60 per sq. ft. buildable (see paragraph 35 (iv), *supra*); the latter, \$34.00 "...but the site had plans and infrastructure in place" (paragraph 15 (e), *supra*). It was the position of the BCS appraiser that the property already had parking stalls in place at the time of sale (thereby requiring a deduction from the sale price), but the Coell appraiser had rejected this (see paragraph 62, *supra*). As noted in paragraph 74, *supra*, "(T)he Appellant provided a detailed explanation in support of its expert's contention that there were parking stalls already on site at the time of sale." This was a convincing explanation for me, and I accordingly have accepted the correctness of the BCS appraiser's

position about the parking stalls. However, for other reasons this did not ultimately facilitate reliance on this comparable.

110. The *BCS Report* had pointed out several difficulties with the comparability of this transaction:

"...the purchase price was not necessarily indicative of market value for high-density land' because of the infrastructure in place and the vendor and buyer knowing one another." (paragraph 14, *supra*)

"The Agent noted that this sale should not be used as a market comparable given the unique circumstances behind this deal." (*ibid.*)

"...the price of \$34 per sq. ft. buildable ...would require significant adjustments, and the appraiser was unsuccessful in reaching the developer to verify the necessary details of the purchase." (*ibid.*)

"Comparable No.5 was '...reportedly a unique situation that was a forced sale according to the Agent involved with this deal'...". (paragraph 15(e) *supra*)

111. The *Coell Rebuttal* made the following comments:

"...the BCS appraiser had '...not considered the impact of the site configuration of Comp. 5.'" (paragraph 62, *supra*)

"This site is much more difficult to develop than the subject given the split zoning, complexity of the required DP...." (*ibid.*)

"We agree with the BCS appraiser that little weight should be placed on Comparable No.5 due to differences in zoning between the C-4 subject and split zoned C-4/RM6 Comparable." (p.20, *Coell Rebuttal* and see paragraph 63(v), *supra*)

Although I do not think it is accurate to suggest that the appraisers agreed on why "little weight should be placed on Comparable No.5", there is no doubt that, for their own reasons, they certainly arrived at this same conclusion. So many questions dog this transaction that I will not be relying on it.

112. **2962 Glen Drive**. This transaction was Coell Index #1 and BCS Comparable No.3, and it had been negotiated in December 2005 (see paragraph 12, *supra*) According to the BCS appraiser, the purchase price "...reportedly reflected a value of \$31 per sq. ft. buildable for this essentially residential density." (*ibid.*) He said that this needed to be adjusted upward for time and downward because 2962 Glen Drive was "essentially residential...". The Coell appraiser concurred theoretically, but did not agree with the BCS quantification:

He did not accept the BCS appraiser's opinion that the upward adjustment for time would be "...more than offset by the fact that the subject property has a high percentage requirement for employment generating uses.... In his view, this was nothing more than a "speculative" suggestion....

(paragraph 60, *supra*)

I agree with the Coell appraiser about this. The BCS appraiser had characterized 2962 Glen Drive as "a dated transaction" (see paragraph 15(c), *supra*), and I would therefore have expected to see a much more detailed analysis of market movement before I could accept the time adjusted price. The *Coell Rebuttal* did contain such a detailed analysis, both as to market movement and the effect on value of the lesser commercial requirement for this Comparable. The Coell appraiser determined total market movement to be 38.43%, (see p.8, *Respondent's Submission*), with a time adjusted price of \$39.92 per sq. ft. buildable (see paragraph 35(i), *supra*).

113. In the *Coell Report*, this Index was one of the three upon which the appraiser "placed most weight..." (p.47). However, by the time the Respondent had submitted its Summary of all the evidence, the "Overall Comparability to Subject" was described as "Limited" (p.8, *Respondent's Submission*). It drew the following conclusion:

There is disagreement between the two appraisers on the appropriate analysis of two sales, 2957 Glen and 2962 Glen. However, the DRC and BCS appraisers have concluded that each sale has limited applicability due to differences in zoning and achievable residential-commercial density relative to the subject.

(p.9, *Respondent's Submission*
and see paragraph 85, *supra*)

Given the several key difficulties involved in comparing this transaction with the Property, I accept the above conclusion of the two appraisers which, even if they did not state it explicitly can certainly be inferred from their respective comments. I will not be relying on the 2962 Glen Drive sale.

114. **2992 Glen Drive, 3002 Glen Drive, 3004/8 Glen Drive.** These transactions were all included in Coell Index #3. 2992 Glen Drive was BCS Comparable No. 1; 3004/8 Glen Drive was Comparable No.2; and 3002 Glen Drive was analyzed but not relied upon in the *BCS Rebuttal*. Their respective findings are set forth at paragraph 31, *supra*.

115. The best starting-point for my consideration of these helpful comparables is the chart and description at pp. 38/39 of the *Coell Report*. The reason for treating these transactions as a land assembly was explained by the Coell appraiser as follows:

Index 3 represents three acquisitions by Cressy (*sic*) over an 8 month period to create a land assembly extending from The High Street through to Glen Drive and Pinetree Way. The sale prices for the properties were negotiated in the period October 2006 to June 2007. Since the properties were assembled to create one development project, we have treated the sales as a single transaction for analysis purposes.

(emphasis added)
(p. 46, *Coell Report*)

He also noted a cogent factor: "The price for the small individual lots on Glen Drive may reflect a premium for land assembly." (p.38, *ibid.*) Although the BCS appraiser did analyze 2992 Glen Drive both separately and as a combined transaction with 3004/8 Glen Drive, I am persuaded by the preceding comments from the Coell appraiser that it is the latter viewpoint that would be the more appropriate. In similar vein to his counterpart, the BCS appraiser, in commenting on the 3004/8 Glen Drive purchase, had pointed out: "It is not unusual for a developer to pay a relatively high price for a small site that is required to complete a land assembly." (p. 44, *BCS Report*) Hence, to consolidate properly the prices paid for the components of the assembled site would appear to be a justified approach.

116. Both appraisers noted that the sale of 3002 Glen Drive by the City of Coquitlam to Cressey did not complete (see paragraph 31, *supra*). However, the Coell appraiser included this negotiation in his analysis whereas the BCS appraiser did not. Based on his Comparable Nos. 1 and 2 only, the BCS appraiser arrived at a blended rate of \$26.00 per sq. ft. buildable (*ibid.*). The Coell appraiser's blended rate for all the properties was \$29.65 per sq. ft. buildable but, excluding 3002 Glen Drive, it would have been \$25.72. However, he then adjusted the former figure for market movement, concluding on \$36.68 per sq. ft. buildable (see paragraph 35 (iii), *supra*). The BCS appraiser rejected this calculation (see paragraph 47, *supra*), and re-calculated the sales utilizing a negative rate for market movement for the 3002 Glen Drive price because it was "...negotiated approximately four months after the date of valuation." (*ibid.*) This resulted in a blended price per sq. ft. buildable, time adjusted, of \$30.13. He commented:

Our approach takes into consideration that one large piece of the assembly was purchased after the date of valuation and should be adjusted downwards for time. Secondly, this approach factors in the difference in size/buildable area that each property contributes to the

overall land assembly. Our time adjusted value represents a blended weighted average. It is not unusual for a developer to pay a premium on a per sq. ft. buildable basis for a small site if it creates synergies and economics of scale to the overall land assembly.

(p.5, *BCS Rebuttal*)

Although I took the BCS appraiser's original stance of not including 3002 Glen Drive in his analysis as indicating a rejection of its appropriateness for comparison, his subsequent comments suggested that this was not in fact the case:

For the Direct Comparison Approach, Cressey's land assembly (2992, 3002, 3004-3008 Glen Drive) to the east of the subject property serves as a good indicator of market value as of the date of valuation.... This property offers similar zoning and locational attributes. The individual land parcels were negotiated before and after the date of valuation....

(p.7, *Appellant's Submission*)

Given these comments, I too have accepted the 3002 Glen Drive abortive sale as being part of the Cressey assembly, to be analyzed as a whole.

117. In its concluding review of this BCS analysis, the Respondent stated:

The BCS appraiser indexed the two historic sales forward and the City sale back to the March 2007 appraisal date and determined a weighted average PBF. In our opinion, this methodology is supportable with the exception of the factor selected for market movement.

(emphasis added)

(p. 12, *Respondent's Submission*)

The "exception" was referring to the BCS adoption of a monthly 3.0% rate to reflect market movement when, as has been established (see paragraph 80, *supra*), this should have been 4.5%. Substituting this corrected rate would result in an adjusted per sq. ft. buildable price of \$30.50 (see paragraph 90, *supra*). As shown above, the BCS appraiser would regard this as "...a good indicator of market value as of the date of valuation." On the other hand, the Respondent viewed these properties as inferior:

The next step is to recognize that the site represented by this potential assembly is considerably inferior to the subject given its very irregular configuration, lack of corner influence, and additional assembly related planning costs.

(p.12, *Respondent's Submission*)

But for two remaining issues, I would accordingly conclude that both appraisers, based on just these comparable properties, would not expect the Property to have a value below \$30.50 per sq. ft. buildable.

118. The first issue was the Coell appraiser's criticism of the BCS approach to analyzing its own Comparable Nos. 1 and 2. He suggested that the BCS appraiser "...has adopted a **non-market approach** to account for the perceived market premium associated with land assembly." (see paragraph 58, *supra*) My difficulty with this criticism was that both appraisers, in their original reports, appeared to have carried out a similar exercise. The BCS appraiser had calculated a blended rate of \$26.00 per sq. ft. buildable for his Comparable Nos. 1 and 2 (see paragraph 31, *supra*); the Coell appraiser had determined \$29.65 for those same properties plus 3002 Glen Drive (see p. 45, *Coell Report*). However, the Coell appraiser had immediately adjusted his figure for market movement by taking the mid-point of the three transactions to arrive at \$36.68 per sq. ft. buildable (see paragraph 35(iii), *supra*). As already discussed (see paragraph 116, *supra*), the BCS appraiser disputed this calculation and, in his rebuttal report, provided a revised calculation that, once adjusted for the correct monthly rate of market movement, produced a figure that seemed to be acceptable to both appraisers (see paragraph 117, *supra*). Despite this, the Respondent appeared to be pursuing its criticism:

In our rebuttal report we have argued that it is inappropriate to assume that developers will always pay a higher price PBF for land with assembly potential in relation to "stand-alone" development sites.

(p.11, *Respondent's Submission*)

Given the revised approach of BCS, I did not understand this to any longer be an issue.

Nonetheless, the Respondent continued:

In the case of the Cressy (*sic*) purchases of 2992 Glen Drive, 3004-3008 Glen Drive, and in particular 3002 Glen Drive, we have learned that each site was large enough to support a mixed-use development at its highest and best use. Secondly, Cressy is only proceeding with a DP application for 2992 Glen Drive, meaning the other two properties are not contributing to this build-out (**no assembly occurring**). We must therefore conclude that the Cressy purchase of 3004-3008 and 3002 Glen Drive was motivated by other factors, such as desire to prevent their nearby competitor Bosa from securing these sites, and **land banking** for future projects.

(*ibid.*)

I was puzzled by the Respondent's position that there was no assembly involved because the whole tenor of its own evidence to that point was precisely to do with that – see again, for example, p. 38 of the *Coell Report*. It is a lingering concern of mine that I may not perhaps be comprehending the import of the Respondent's final remarks. Nonetheless, I have to come to a conclusion, and my conclusion remains: that the appraisers have both accepted the rate of \$30.50 per sq. ft. buildable as representing the time adjusted rate for the assembly project.

119. The second issue concerned the applicability of the 4.5% monthly increase for market movement. It will be recalled that the BCS appraiser had been critical of the Coell analysis that resulted in the two rates of 3.0% and 4.5% (see paragraphs 43 to 45, *supra*). Although some legitimate concerns were raised in this critique, I am persuaded that, in the end, it was the Coell appraiser who did the detailed work necessary to establish rates for market movement. By the nature of the exercise, perfection cannot possibly be the standard; there will always be discernible flaws. But, in the absence of any competing evidence from the Appellant, I will go with what I have: a diligent and comprehensive effort by the Coell appraiser to arrive at appropriate rates of increase.
120. I am fortified in the above conclusion by the BCS appraiser's own adoption of the Coell rate of increase. In one of the critical calculations in this proceeding, the BCS re-calculation of the time adjusted value for Coell's Index #3 (see p.5, *BCS Rebuttal*), the BCS appraiser utilized the Coell market movement rate of 3.0% per month without any comment at all. As pointed out by the Respondent:

The BCS appraiser has not conducted any independent research to suggest an appropriate factor for market movement. A monthly average market movement of 3% was adopted based on the September 28, 2009 DRC appraisal report. We have admitted that an administrative error existed in our report and the correct factor for market movement over the period January 2005 to December 2006 was 4.5% per month.

(p. 12, *Respondent's Submission*)

121. In consequence, having resolved the "two remaining issues" to my own satisfaction, I can safely restate the statement in paragraph 117: "...that both appraisers, based on just these comparable properties, would not expect the Property to have a value below \$30.50 per sq. ft. buildable."
122. **Bosa Assembly**. This was BCS's Comparable No.4. It reflected a purchase by Bosa Properties of 3001 and 3005 Glen Drive in November 2004 and of Lots 15, 16, 17 and 18 in December 2007. The earlier sale had taken place at a price of \$9.00 per sq. ft. buildable, and the more

recent one at \$44.00 per sq. ft. buildable. From this, the BCS appraiser opined a "true land cost to the developer" (see paragraph 13, *supra*) of the blended rate of \$21 per sq. ft. buildable.

However, he did candidly acknowledge:

...it is difficult to compare this sale directly to the subject because the two purchases were made approximately three years apart and the market changed significantly between that time.

(p. 46, *BCS Report*)

It is difficult to relate the blended land cost to the subject property given the rise in overall land values over the four year time frame.

(p. 47, *ibid.*)

123. The Coell appraiser had selected Lots 15, 16, 17 and 18 as his Comparable #5 (although himself describing the site as "3000 Block Burlington Drive"). His time adjusted price for this one transaction was \$38.59 per sq. ft. buildable (see paragraph 35 (v), *supra*).
124. The Coell appraiser was critical of BCS's treatment of what its appraiser had referred to as the "Bosa Assembly." He had opined that generating a blended rate from the two transactions reflected "value to owner" or "book value", not market value (see paragraph 61, *supra*). For him, there were two choices for the appraiser:
- ...the PBF for each property should be examined on a stand-alone basis, not as in combination with an adjacent property sale. The alternative would be to index the 2004 Bosa sale forward to the effective appraisal date.
- (p. 17, *Coell Rebuttal*)
125. When it came to considering the usefulness of the 3001 and 3005 Glen Drive sale as a "stand-alone" transaction, the Coell appraiser described significant difficulty. Having noted "the relatively poor market conditions in 2003 and 2004" (p. 17, *Coell Rebuttal*), he pointed out how problematic the adjustment for market movement between the two sales would be "...given the 3-year variance between the sale date and valuation date." He concluded "...the winter 2003 Bosa purchase to have little relevance in establishing the market value of the subject, as of March 30, 2007." (p. 18, *ibid.*)
126. If this transaction were to be taken into account, however, it was the Coell appraiser's view that the two sales would have to be time adjusted separately. The BCS appraiser had carried out this

exercise for the Cressey transactions (see paragraph 116, *supra*), but he did not do so for his Comparable No. 4. The Respondent commented:

We note that the BCS appraiser does not extend the rebuttal methodology to the treatment of the Bosa purchases (BCS indexes 4a and 4b), which in our view is an inconsistency.

(p. 12, *Respondent's Submission*)

The Respondent thereafter re-calculated BCS Comparable No. 4, "...according to prevailing patterns of market movement" (p. 12, *ibid.*), to arrive at an adjusted rate of \$31.56 per sq. ft. buildable. As I understand it, this calculation was identical to that for the Cressey assembly (see paragraph 117, *supra*) except that the monthly rate for market movement had been increased to 4.9% "...since this rate is directly supported by the re-sale of 2992 Glen Drive (DRC market movement index 15)." (*ibid.*)

127. Despite having carried out the aforesaid recalculation, the Coell appraiser was firmly of the opinion that the notion of assembly was inappropriate for these Bosa transactions. The Respondent had pointed out:

At the date of this final submission there is no indication that Bosa has taken any steps to assemble these properties into one overall parcel. In our rebuttal report we have shown that sale 4a, although relatively small, could support a separate mixed-use development at its highest and best use.

(p.11, *Respondent's Submission*)

After its analysis of land assembly issues and implications, the Respondent concluded:

...the properties, if considered as an assembly, represent a very irregular development site on a high traffic corridor. As stated in our appraisal and rebuttal reports, the impact of these physical and location influences significantly reduce the market appeal of the Bosa properties in relation to the subject. Furthermore, development cannot proceed on the assembled lots until the associated interior lanes are secured from the City and plans cancellation is achieved, all at additional costs.... We conclude that the two Bosa purchases should be considered as separate transactions indicative of very different market conditions in November 2003 and August 2007.

(pp. 12/13, *ibid.*)

128. Having carefully considered the preceding views of both appraisers, I am persuaded that the

earlier Bosa transaction is of limited usefulness to the task at hand. I note in particular the remarks of the BCS appraiser cited in paragraph 122, *supra*, and the Coell's appraiser's conclusion in paragraph 125. I will hence rely only on the 2007 Bosa purchase, and I accept the latter's comments thereon:

There is no dispute that Bosa paid **\$44 PBF** for Lots 15-18, rather than \$21 PBF. This property was exposed to the market. The property did not have C-4 zoning at the time of sale and had no DP or any other development approvals. The project was not linked to the 2003 purchase of lands to the south. Furthermore, Bosa was under no undue pressure to purchase the property and was fully informed about its development potential and limitations. Therefore, we must conclude that this sale meets all of the appraisal tests for an open market transaction.

(p. 17, *Coell Rebuttal*)

As stated above, the \$44 per sq. ft. buildable rate would be time adjusted to \$38.59 per sq. ft. (see paragraph 123, *supra*), and I accept this figure.

Analysis of experts' conclusions

129. I will now revisit each appraiser's determination of the per sq. ft. buildable rate, but substituting therein the outcomes of my foregoing discussion.
130. The BCS appraiser had ultimately concluded on a range of values between \$21 and \$37 per sq. ft. buildable (see paragraph 16, *supra*). However, in my determination, this range is more properly established as follows:

<u>Comparable No.</u>	<u>BCS Rate</u>	<u>Revised</u>
1	\$21.00	\$30.50*
2	\$37.00	\$30.50*
4	\$21.00 (blended)	\$38.59**

* See paragraph 121, *supra*

** See paragraph 128, *supra*

131. When confronted with a range from \$21 to \$37, the BCS appraiser had concluded on \$30 per sq. ft. buildable. It is frankly difficult to understand how this conclusion was derived because of the lack of supporting evidence or analysis (see paragraph 64, *supra*). In the absence of such evidence or analysis, I can only infer that the BCS appraiser had taken slightly above the mid-

point of the range to reflect his opinion that the Property was superior to 2992 Glen Drive and the Bosa assembly and inferior to 3004/8 Glen Drive (i.e. \$29 average + \$1.00). If I were to follow suit, I would arrive at a per sq. ft. buildable rate above the average of \$30.50 and \$38.59 which is \$34.55. However, this raises an evident problem that flows directly from the BCS appraiser's omission to have explained the reasoning for his \$30 conclusion. Because, if indeed he had proceeded on the preceding basis of comparability (and this, admittedly, is far from clear), we would now be left with:

Comparable No.1	\$30.50	Inferior to Property
Comparable No.2	\$30.50	Superior to Property
Comparable No.4	\$38.59	Inferior to Property

On the face of it, this appears to be impenetrable. But perhaps it helps to recall that the \$38.59 rate was for Comparable No.4 (a), the 2007 Bosa purchase only. If I were to substitute the adjusted rate for the whole "Bosa assembly", being \$31.56 per sq. ft. buildable (see paragraph 126, *supra*), the comparison ratings would not look quite so odd. Similarly, if I were to substitute the unadjusted sale price for 3004/8 Glen Drive of \$36.63 per sq. ft. buildable, described by the Coell appraiser as "good evidence" (see paragraph 37, *supra*), there would be some logic to the comparisons. Unfortunately for all of this, I would then be faced with having to make what would amount to an original valuation of my own, and without having an evidentiary foundation within the BCS reports sufficient for me to rely upon. And, ultimately, to treat the Cressey purchases separately and the Bosa purchases together would be contrary to my earlier analysis (see paragraphs 113 and 128, *supra*).

132. The Coell appraiser had placed most weight on his adjusted Indices #1, 3 and 5 (see paragraph 36, *supra*) which he had analyzed as follows:

Index #1	2962 Glen Drive	\$39.92*
Index #3	Cressey Assembly	\$36.68**
Index #5	Bosa – 2007	\$38.59***

* See paragraph 35 (i)

** See paragraph 35(iii)

*** See paragraph 35(v)

In arriving at his rate of \$37 per sq. ft. buildable, the Coell appraiser had looked "...at the lower end of the value range" both because of the sale price for 3004-08 Glen Drive of \$36.63 and "...the time adjusted sale of the Property at \$35.92..." (see paragraph 37, *supra*).

133. If I analyze the Coell appraiser's conclusion in similar fashion to that of the BCS appraiser, I would note the distinctly narrower range and draw the following conclusions:

- (i) The Property is inferior to 2962 Glen Drive;
- (ii) The Property is slightly superior to the Cressey assembly (although note that, in paragraph 117, *supra*, he had referred to "this potential assembly" as "considerably inferior");
- (iii) The Property is inferior to the Bosa 2007 purchase.

134. With regard to Coell Index #1, the Respondent had subsequently decided that this sale had "limited applicability" (see paragraph 113, *supra*), and I had said that I would not be relying on it (*ibid.*). This would leave Coell Indices #3 and 5 as most relied on, and I have adjusted these as follows:

	<u>Coell Rate</u>	<u>Revised</u>
Index #3	\$36.68	\$30.50*
Index #5	\$38.59	(no change)

*See paragraph 121, *supra*.

135. Since the Coell appraiser's conclusion was slightly above the rate for the Cressey assembly, the rate for the Property would certainly exceed \$30.50. Although the BCS appraiser had regarded this as "...a good indicator of market value as of the date of valuation" (see paragraph 117, *supra*), I have noted the Coell appraiser's competing view that it was "considerably inferior" (paragraph 133, *supra*). Having reviewed each appraiser's comments on this one issue, I conclude that the Cressey assembly is inferior to the Property, being mainly persuaded by the more detailed analysis within the Coell reports. In addition, I was assisted by the Summary at p.8 of the *Respondent's Submission*.

Nonetheless, if the Coell appraiser had concluded on a figure of \$37 per sq. ft. buildable when he thought his Index #3 was correctly analyzed at \$36.68, the reduction to \$30.50 should have a fairly significant effect.

136. In arriving at my final determination of the Fair Market Value, I rely on the following:

- (i) for the reasons set forth in paragraph 131, *supra*, I am ultimately unable to glean much assistance from the BCS conclusion;
- (ii) the per sq. ft. buildable rate must be below \$37 as this was derived from a range starting at \$36.68 (amended to \$30.50);
- (iii) both appraisers would not expect the Property to have a value below \$30.50 based on the Cressey assembly (see paragraph 121, *supra*);
- (iv) I have concluded that the Cressey assembly is inferior to the Property (see paragraph 135, *supra*) so the rate should be above \$30.50;
- (v) the two additional factors indentified by the Coell appraiser – the 2006 sale price for 3004/8 Glen Drive of \$36.63 per sq. ft. buildable and the time adjusted sale of the Property at \$35.92 – were of some assistance (see paragraph 37, *supra*).

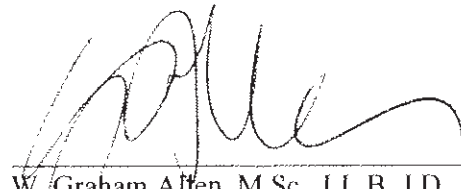
137. Faced with a range from \$21 to \$37, the BCS appraiser determined on \$30 per sq. ft. buildable, slightly above the midpoint. Faced with a range from \$36.68 to \$39.92, the Coell appraiser looked to "the lower end of the value range", concluding on \$37 per sq. ft. buildable. Faced myself with a range from \$30.50 to \$38.59, and taking into account the factors canvassed in the preceding paragraph, I conclude on a rate of \$34.50 per sq. ft. buildable, equivalent to \$8,744,715 for the 253,470 sq. ft. I thus answer the question set forth in paragraph 4, *supra*: the fair market value of the Property on March 30, 2007 was \$8,744,715.

138. I specifically retain jurisdiction to deal with any application/s as to the payment of costs that either party, or both, may subsequently wish to make. Any such application must be made to me within 30 days of the date of publication of this Award.

I so award this 16th day of December, 2009.

- (iv) I have concluded that the Cressey assembly is inferior to the Property (see paragraph 135, *supra*) so the rate should be above \$30.50;
 - (v) the two additional factors identified by the Coell appraiser – the 2006 sale price for 3004/8 Glen Drive of \$36.63 per sq. ft. buildable and the time adjusted sale of the Property at \$35.92 – were of some assistance (see paragraph 37, *supra*).
137. Faced with a range from \$21 to \$37, the BCS appraiser determined on \$30 per sq. ft. buildable, slightly above the midpoint. Faced with a range from \$36.68 to \$39.92, the Coell appraiser looked to "the lower end of the value range", concluding on \$37 per sq. ft. buildable. Faced myself with a range from \$30.50 to \$38.59, and taking into account the factors canvassed in the preceding paragraph, I conclude on a rate of \$34.50 per sq. ft. buildable, equivalent to \$8,744,715 for the 253,470 sq. ft. I thus answer the question set forth in paragraph 4, *supra*: the fair market value of the Property on March 30, 2007 was \$8,744,715.
138. I specifically retain jurisdiction to deal with any application/s as to the payment of costs that either party, or both, may subsequently wish to make. Any such application must be made to me within 30 days of the date of publication of this Award.

I so award this 16th day of December, 2009.



W. Graham Allen, M.Sc., LL.B, J.D., FRICS,
RI(BC), MCI Arb., C.Arb.
Arbitrator

**IN THE MATTER OF THE PROPERTY TRANSFER TAX ACT,
R.S.B.C. 1996, C. 378, AS AMENDED**

-AND-

**IN THE MATTER OF AN ARBITRATION UNDER SECTION 22
OF THE PROPERTY TRANSFER TAX ACT**

BETWEEN:

**SECTOR TECHNOLOGIES LTD.
("SECTOR")**

APPELLANT

AND:

**HER MAJESTY THE QUEEN IN RIGHT OF
THE PROVINCE OF BRITISH COLUMBIA
(THE "MINISTRY")**

RESPONDENT

AWARD

Appointment

1. I was appointed by the British Columbia Arbitration and Mediation Institute to arbitrate the dispute between the parties, pursuant to section 22 of the *Property Transfer Tax Act*.

Introduction

2. Sector appeals from a decision of the Deputy Minister of Finance affirming an assessment on the purchase of a strata lot. The taxes assessed are \$5,600. Sector claims that they should be \$1,874 less.

Facts

3. ^{s22} Sector Technologies Ltd. On May 30, 2005, they entered into a contract of purchase and sale ("CPS") with a developer to purchase a unit in a condominium development which was to be built. The price was \$284,800; but by an Addendum dated January 11, 2008, a storage locker was added to the unit for an

additional \$1,500, bringing the total price to \$286,300. It was always the intention of §22 that the title to the unit would be taken by Sector Technologies Ltd., and this is in fact what happened. However, Sector was not mentioned by name in the CPS. The CPS named §22 “and assignee” as the purchasers. On February 27, 2008, the developer registered the strata plan for the unit in the Land Title Office. §22 executed a written notice of assignment of §22 interest in favour of Sector on May 8, 2008, and title to the property was registered in Sector's name on April 10, 2008 at a declared fair market value of \$286,300.

4. Following a review, the Ministry determined that the fair market value had been incorrectly calculated, and re-assessed the property based on an estimated fair market value of \$380,000. This is the decision that was affirmed by the Deputy Minister. Since taxes under the PTTA are based on fair market value, this meant that the taxes increased by \$1,874.

Issue

5. The issue is: what is the correct method for calculating the fair market value of the property, specifically, is Sector eligible to receive the benefit of the special definition of “fair market value” for a “proposed strata lot”?

The Rules Governing the Issue

The Property Transfer Tax Act

6. Property transfer tax is payable “. . . on application for registration of a taxable transaction at a land title office . . .”: section 2(1).

7. A “taxable transaction” is “a transaction . . . purporting to transfer or grant . . . an estate in fee simple referred to in section 23(2) of the *Land Title Act* . . .”: section 1(1)(a)(i).

8. Section 3(1) specifies the manner in which tax is to be calculated:

- (a) 1% of the first \$200 000 of the fair market value of the taxable transaction, and
- (b) 2% of the remaining fair market value of the taxable transaction.

9. “Fair market value” is defined differently depending on the circumstances of the purchase. There is a general definition for fee simple transfers, modified by a number of exceptions. The general definition is set out in section 1(1): “fair market value” means

- (a) for a transaction referred to in paragraph (a)(i) of the definition of “taxable transaction” [*fee simple*], the amount that would have been paid for the fee simple interest in the land had it been sold at the date of registration of the taxable

transaction in the open market by a willing seller to a willing purchaser free of any trust and unencumbered by . . . [*a list of various types of charges*]

10. To summarize, ordinarily, tax is payable on a transfer of a fee simple interest based on a percentage of the fair market value assessed at the time of the application for registration of the transaction in the Land Title Office.

11. However, the Act contains an exception for strata property units purchased before construction. This is found in section 1.4(2):

(2) Despite the definition of “fair market value” in section 1(1), for a transfer of a proposed strata lot for consideration in a taxable transaction, described in paragraph (a)(i) of the definition in section 1(1) of “taxable transaction”, in which the parties dealt with each other at arm's length in the open market, the fair market value for the purposes of this Act is the total amount of that consideration.

12. If the property is a “proposed strata lot”, the fair market value is the total consideration paid for it, not the fair market value on the date of the application for registration in the Land Title Office. Since there can be a considerable lapse of time between the purchase of a strata unit in a building not yet constructed and the eventual registration of the transfer in the Land Title Office, with attendant changes in market value, this provision allows the purchaser to have some certainty as to the exact amount of tax to be charged. However, the unit must meet the definition of “proposed strata lot”, and this is where the issue in this case arises.

13. Section 1.4(1) defines “proposed strata lot” as:

a strata lot

(a) proposed by an owner developer to be included as part of a strata plan under the *Strata Property Act* when the strata property plan is deposited in the land title office, and

(b) that is the subject of a written instrument executed

(i) after the owner developer proposed the strata lot's inclusion as part of the strata plan, and

(ii) before the deposit of the strata plan in the land title office

under which a person became entitled to a transfer of the strata lot in a form registrable under the *Land Title Act*,

but does not include a bare land strata lot as defined in the *Strata Property Act*.

14. A “written instrument” is defined in section 1.4(1) as
- (a) a written agreement or another written instrument, or
 - (b) a written assignment of a written agreement or of another written instrument.

Analysis

15. The key to the analysis of this case is the requirement that the taxpayer must be a person who became entitled to a transfer of the strata lot pursuant to the written instrument.

16. The Deputy Minister conceded that, if the ultimate transferees had been [§] the property would have met all of the conditions of the definition of a “proposed strata lot” and they would have been entitled to the benefit of the special definition of fair market value. They were the persons named in and entitled under the CPS to a transfer of the strata lot; the CPS was a “written instrument”; and it had been executed before the deposit of the strata plan in the land title office.

17. The Deputy Minister decided the appeal on the ground that the property in this case was not a “proposed strata lot”. The reason given was that Sector, not having been named in the CPS, was not entitled to the transfer of the strata lot under the CPS. Therefore, the special definition of “fair market value” in section 1.4 did not apply, and the general definition did.

18. Sector responds that at all times [§] were acting on behalf of Sector and this was indicated in the CPS by the addition of the phrase “and assignee”. Therefore, their acts should be taken as Sector's, which would make Sector a party to the CPS and therefore a person entitled to the transfer of the strata lot.

19. Therefore, the issue that will determine this appeal is whether Sector was “a person entitled to a transfer of the strata lot” under the CPS.

20. It was always the intention of [§] that Sector would obtain the benefit of the contract. The actions that they took – by adding the words “and assignee” to the parties to the contract, by taking out a mortgage in the name of Sector Technologies Ltd. with themselves as guarantors, and finally by having the transfer registered in the name of the company – are all consistent with this purpose. The fact that they contracted for the storage unit in their own names only is not inconsistent with their intention, since this was simply an incidental aspect of the main CPS. I therefore find that in purchasing the strata lot [§] were acting as agents for Sector.

21. Under the law of agency in contracts, it not necessary for the existence or the name of a principal to be disclosed by an agent in order for the principal to acquire rights

under the contract. The Supreme Court of Canada has ruled:

When a third party contracts with an agent and the contract is not under seal, the principal has the same rights and liabilities under the contract whether he or she was disclosed to the third party and despite the fact that his or her name did not appear on the face of the contract. Therefore, undisclosed principals can sue and be sued in their own name on any simple contracts made on their behalf by agents as long as those agents have acted within the scope of their delegated authority in so doing.

Friedmann Equity Developments Inc., v. Final Note Ltd., [2000] 1 S.C.R. 842, at 854

22. In this case, the contract was a “simple contract” not made under seal and the agents were acting within the scope of their authority. There is also nothing in the CPS which evinces an understanding that they were not acting as agents for a principal.

23. I therefore find that, in the circumstances of this case, Sector was entitled, as an undisclosed principal, to the transfer of the strata lot under the CPS. The conditions of the definition of “proposed strata lot” have all been met. Sector is thus eligible to take the benefit of the special definition of “fair market value” in section 1.4(2) of the Act.

Award

The appeal is allowed and I direct that the property be re-assessed as a “proposed strata lot” pursuant to section 1.4(2) of the *Property Transfer Tax Act* and in accordance with the reasons for this award.

Vancouver, British Columbia

9 June 2010

Glen W. Bell, C.Arb.

