



‘Market value’ versus ‘normal value’ in economically depressed times

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We generally understand ‘market value’ to be the price agreed by a willing vendor and willing purchaser, both appropriately informed, and neither acting under duress, and that the price is fixed as at a specified date. Adherence to this understanding of ‘market value’ in depressed economic times can bring about harsh consequences. In economically distressed times, courts and other tribunals charged with fixing real property values have sought ways to ameliorate these consequences. As our societies make their way through the Covid-19 pandemic and its aftermath, we may again see efforts to modify the definition of ‘market value’ or to interpret it in ways that soften the valuation results where adjudicators believe relief is warranted.

During the economic depression of the late 1920s and the 1930s (Depression), courts, administrative tribunals, assessors and property owners subject to expropriation were open to casting the definition of ‘market value’ in broader terms than expressed in the preceding paragraph. In particular, some sought to argue that ‘market value’ should be modified to mean ‘market value in normal times.’

The contest between ‘market value’ adherents and those advocating for ‘market value in normal times’ is explored by James C. Bonbright in *The Valuation of Property – A Treatise on the Appraisal of Property for Different Legal Purposes*¹ published toward the latter part of the Depression.

Bonbright refers to real property tax assessment and eminent domain takings (expropriations) to illustrate the opposing positions. He perhaps foreshadows events to come during the current pandemic, and for a period of time after, as the economy stabilizes:²

The pending business depression has raised the question of deflated prices in a critical form, both with respect to

tax assessments, where the property owners desire a low valuation, and with respect to eminent domain, where they desire a high valuation.

During the Depression, assessors and taxing authorities sought to interpret real property valuation legislation in ways that would maintain assessed real property values in order to preserve the tax base. Bonbright pointed out that, in many American jurisdictions, legislated maximum tax rates prevented offsetting a reduction in real property values by increasing tax rates to cover the drop in revenue. The financial burden for local governments was exacerbated by restrictions on borrowing.

In relation to expropriations, Bonbright noted that, if compensation is received when the market is still depressed, a replacement property is possibly available at the same Depression-level value, so that an expropriated party is not disadvantaged. But he also recognized that, if a dispute over payment lingers until the market recovers, compensation will be based on pre-recovery values and the property owner bears the loss under the ‘market value’ standard. In such cases, Bonbright could understand the desire for a modified approach to the ‘market value’ standard.³

During the Depression, there were parties arguing that the prevailing low market prices should not be the basis for assessment or for compensation paid in expropriations. It was argued that the low market prices were abnormal, and that they would rise again once the Depression passed. Some tribunals agreed and found ways to massage valuation requirements. On the other hand, other tribunals were steadfast in adhering to market value.⁴ Bonbright referred to two court cases to illustrate the opposing positions.⁵ In one case dealing with an expropriation, the court found it would be “manifestly unsound” to accede to the argument that fair market value of land cannot be determined in a period of temporary economic depression and that conditions

pre-depression should govern compensation. In the other case, the court circumvented what many of us would understand 'market value' to be in writing the following:

... the actual value of the land means the fair market value of the land, upon a fair market, upon fair advertisement, and a fair sale **at normal times**. It does not mean any value in times of great inflation in currency, nor does it mean the value in times of great depression. The actual value of the land means a fair market value, a fair market **in normal times**. [Emphasis added.]

Although this decision supporting market value in 'normal times' was affirmed on appeal, many would observe, as Bonbright did, that 'long-run' or 'normal' value cannot be intelligently estimated.⁶

Nonetheless, Bonbright admitted the possibility that, broadly interpreted, 'fair market value' could mean a hypothetical value that could be realized in a 'normal' market.⁷ He speculated that, under the broad interpretation, for example, an assessor "... may ignore even the non-forced sales of abnormal times in favour of such prices as may be supposed to prevail in normal times." Bonbright canvassed the Depression-era cases available to him and then wrote:⁸

... the cases discussed above probably reflect the general attitude of the courts ... One notes an almost universal refusal of the courts to insist on those drastic reductions in assessment that would be called for by the test of current market prices. And one also notes that this refusal is based on either or both of two grounds: (a) that current market prices are too abnormal to reflect 'real values' or 'fair market values,' and (b) that the taxpayer has no grievance unless his property is relatively over-assessed, so as to impose on him an undue share of the tax burden of the community.

Before one jumps to the conclusion that the 'normal value' approach has no place in modern appraisal practice based on 'market value,' reference should be made to the following statement from the British Columbia Court of Appeal in the seminal equity case *Vancouver Assessor, Area No. 9 v. Bramalea Ltd.*⁹ cited by many courts through Canada:

10 ... The courts have held that 'actual value' means the price which property would fetch if sold in the market on the statutory valuation date in a cash transaction between informed parties both free from duress and influenced neither by speculative considerations nor by any 'special value' which the property might have to a particular purchaser, which it would not otherwise have. 'Actual value' lies somewhere in the middle of the range within which such parties would settle, neither 'unduly high' nor 'unduly low.' *Sun Life Assur. Co. of Can. v. Montreal*, [1950] S.C.R. 220, [1950] 2 D.L.R. 785; *Stock Exchange Bldg. Corp. v. Vancouver*, 61 B.C.R. 205, [1945] 2 W.W.R. 248, [1945] 2 D.L.R. 663 [C.A.).



There are a couple of points to note about *Bramalea*. First, it was at a time when the *Assessment Act* RSBC 1996, c. 20, did not specifically define 'actual value' as the market value of the fee simple interest in lands and improvements. However, the prevailing case law at the time did equate 'actual value' and 'market value.' Second, the case was about the position of actual value in relation to equitable assessment, with the latter trumping the former if equitable value was less than actual value. That said, is there a potential opening in the words 'actual value' that lies somewhere in the middle of the range within which such parties would settle, neither 'unduly high' nor 'unduly low'?" Could this form the base for a tribunal to agree to a 'normal value' approach or at least partially head off what is argued to be an extreme low value in a severely depressed economy. Is the possibility all the more real in an environment of no sales thus necessitating valuation through less direct methods?

The road ahead

In March 2020, the International Valuation Standards Council (IVSC) issued a guidance letter entitled *Dealing with Valuation Uncertainty at Times of Market Unrest*, in response to challenges presented by the Covid-19 pandemic. In identifying current market volatility, the authors of the letter wrote that "These times have been made even more interesting in respect of valuation, as valuers are having to value assets, where there are limited to no comparable evidence and all markets are facing an uncertain future." The observation can be made that this is not the first time valuers, including real estate appraisers, have had to deal with a

paucity of market evidence and the future is always uncertain, but these are exceptional times. The challenge is perhaps intensified if the last paragraph of the IVSC letter is to be taken to heart by appraisers. That paragraph states:

Valuers should not apply pre-crisis criteria to their valuations as this approach is based on the potentially erroneous assumption that values will return to their pre-crisis levels and there is no way of predicting that this assumption is in fact correct.

Does this guidance argue in favour of 'market value' or 'market value in normal times?' It is a fair assumption that the pandemic has and will continue to depress real estate values. What the IVSC has identified is the 'valuation uncertainty' for appraisers in deriving opinions of value. One might ask how appraisers will now value real estate with no market evidence and a proscription against applying pre-crisis criteria. What will be the new criteria and from what sources will appraisers draw proxies of value? How will the common standard of 'market value' be tested? Will courts and tribunals work to get around the dictates and consequences of valuation based on market value?

There will be interesting times ahead.

End notes

- ¹ Bonbright, James C., *The Valuation of Property – A Treatise on the Appraisal of Property for Different Legal Purposes* (New York: McGraw-Hill Book Company Inc., 1937)
- ² *ibid.*, p. 418
- ³ *ibid.*, p. 34 and 71
- ⁴ *ibid.*, p. 33
- ⁵ *ibid.*, p. 418
- ⁶ *ibid.*, pp. 33-34
- ⁷ *ibid.*, p. 463
- ⁸ *ibid.*, pp. 464-470
- ⁹ 1990 CarswellBC 287, 76 D.L.R. (4th) 53 (BCCA) at paragraph 10

This article is provided for the purposes of generating discussion and to make practitioners aware of certain challenges presented in the law. It is not to be taken as legal advice. Any questions relating to the matters discussed herein should be put to qualified legal and appraisal practitioners. ▣