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SC 526 Patterson, Jeri Lynn v. AA15 et al

[Link to Property Assessment Appeal Board Decision](#)

JERI LYNN PATTERSON

v.

**ASSESSOR OF AREA 15 – FRASER VALLEY
THE DISTRICT OF KENT and
PROPERTY ASSESSMENT APPEAL BOARD**

SUPREME COURT OF BRITISH COLUMBIA (S090261) Vancouver Registry

Before the HONOURABLE MADAM JUSTICE SATANOVE

Date and Place of Hearing: February 11 and 12, 2009, Vancouver, BC

Jeri Lynn Patterson appearing on her own behalf
Guy McDannold for the Respondent, Assessor of Area 15 – Fraser Valley
Christopher S. Murdy for the Respondent, The District of Kent
Veronica L. Jackson for the Respondent, Property Assessment Appeal Board

Contamination by Fish Farm – Questions of Law – "Other Circumstances"

The Appellant appealed her assessment to PARP, who lowered her assessed value to \$250,000 from \$428,000 based on her position on the contamination of a watercourse on her property by a neighbouring fish farm. The assessment was appealed to the Property Assessment Appeal Board ("the Board") by both the District of Kent and the Assessor. Based on the evidence presented, the Board found that the assessed value of the property was \$425,000. The Appellant appealed that decision to this Court asking 17 questions ([see Appendix](#)).

HELD: Appeal Dismissed.

This Court found that only questions 3, 4, 10, 11 and 12 were questions of law. This Court found that the Appellant did not have any specific evidence showing an impact on the actual value of her property as a result of contamination by the fish farm. This Court agreed with the Board in choosing to give weight to the evidence of direct comparable sales, and in particular to the April 2007 arm's length sale of a property that was very near the Appellant's property with the same zoning and the same watercourse running through it. This Court found that the Board did not make any error in law in reaching the decision that it did.

Reasons for Judgment

February 24, 2009

[1] Ms. Patterson brings an appeal to this Court from a decision of the Property Assessment Appeal Board ("PAAB") that set aside a decision of the Review Panel that had reduced the valuation of her property by the Assessor from \$428,000.00 to \$250,000.00. The net result is that Ms. Patterson's property has now been valued by PAAB at \$425,000.00 for property tax purposes for the year 2008. Ms. Patterson appeals primarily on the basis of contamination by a nearby fish farm of the watercourse that runs through her property, and the resulting impact of the *Riparian Areas Regulation*, B.C. Reg. 376/2004, under the *Fish Protection Act*, S.B.C. 1997, c. 21 [Ms. Patterson mistakenly refers to this as

the *Fisheries Act* throughout her submissions] and the *Sanitary Regulations*, B.C. Reg. 142/59, under the *Health Act*, R.S.B.C. 1996, c. 178.

[2] It is important to clarify at the outset that section 64 of the *Assessment Act*, R.S.B.C. 1996, c. 20, requires an appeal to the Court to proceed by way of Stated Case and to be heard, determined by the Court and decided in writing, within two months. The material facts of the Stated Case are drafted by PAAB but the questions sought to be answered by the Court are drafted by the Appellant. The questions must be strictly limited to questions of law alone, not questions of fact or mixed fact and law. Our Courts have declared questions of law to include where PAAB has misinterpreted or misapplied legislation, misapplied principles of general law, or acted without any evidence or upon a view of the facts which could not be reasonably entertained. The standard of review for these questions is correctness. (*Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam)* (1998), 112 B.C.A.C. 176, 62 B.C.L.R. (3d) 354; *British Columbia (Assessor of Area No. 27 - Peace River) v. Burlington Resources Canada Ltd.*, 2005 BCCA 72, 37 B.C.L.R. (4th) 151; and *Richland Estates Ltd. v. Assessor of Area No. 24 - Cariboo*, 2002 BCSC 403).

[3] For ease of reference, I have attached the entire list of Ms. Patterson's questions as an Appendix to these Reasons for Judgment. Ms. Patterson was unrepresented by Counsel so it is understandable that some of her questions are not appropriate to be answered on a Stated Case. For example, questions 1, 9, 14 and 17 are all questions of fact, or mixed fact and law, and are not within the scope of this appeal. I therefore decline to answer them.

[4] Other questions, such as questions 2(b) - (h) attribute certain conclusions by the Board that were not reached by it. The Appellant complains that PAAB did reach these conclusions, but without any evidence. However, I cannot find such conclusions within the body of the PAAB decision. Specifically, there are no findings of fact by PAAB that the water on the subject property was not contaminated on July 1, 2007; or that the tests conducted by the Fraser Health Authority were conducted in compliance with Provincial and Federal standards for testing drinking water; or that the tests conducted by Fraser Health Authority included tests for known contaminants in fish farm wastes; or that the subject property has a legal well; or that the property referred to as sale No. 1 had a legal well or access to potable water; or that the well water of the sale No. 1 property was tested and found safe for human consumption; or that the watercourse of Ms. Patterson's property was for seasonal farm land drainage.

[5] The only conclusion made by PAAB, which is conceded by all parties to be erroneous, is the one referred to in question 2(i) that there were three wells on the property, when in fact there was only one. The conclusion referred to in question 2(a), that there were two dog kennels on the property, was referred to in the appraisal of Glen Neufeldt and it is not up to me to weigh the sufficiency or accuracy of this evidence.

[6] Questions 6, 8 and 15 are all related to complaints by Ms. Patterson regarding the process or results of the Review Panel hearing. However, Ms. Patterson conceded before me that the hearing before PAAB was a hearing *de novo* pursuant to s. 57 of the *Assessment Act*, and that any questions relating to the Review Panel are irrelevant on this appeal.

[7] Question 5 deals with the probable remediation costs to address the contamination of the watercourse and adjacent soils. The Appellant is correct when she says there is no reference in the PAAB decision to remediation costs. However, I cannot say that PAAB was in error for not considering this because:

- a. PAAB concluded that there was no evidence to indicate an economic impact or impediment to sale arising from the contamination of the watercourse. As a result of this conclusion, remediation is not relevant.
- b. Even if remediation were a relevant consideration, the Appellant conceded that there was no evidence before PAAB of the actual costs of any such remediation. Thus PAAB had nothing to consider in this regard.

[8] Question 13 asks whether PAAB erred in law by failing to consider that only legal improvements and uses can be considered when considering the actual market value for the property. On the face of it, this question appears to be a question of law. However, paragraph 14 of the PAAB decision states that "... the existing improvements constitute, as all parties concede, legal (albeit non-conforming) uses of the property". The agreement between the parties as to the status of the property is a finding of fact made by PAAB and as such, the question is not appropriate for a Stated Case.

[9] Questions 7 and 16 raise questions of procedural fairness and relate to the same incident. Apparently, the Assessor filed a Reply in the form of an Argument, Position and Summation; Expert Report and Equity Argument. Ms. Patterson says she received the cover letter referring to the arguments and the expert report, but the only referenced document she received was the Expert Report. She also says that the District of Kent submitted a DVD to PAAB, and she was not provided with a copy. As these items were all referred to in the adjudicator's list of relevant evidence to the Stated Case, they should have been delivered to her.

[10] The Appellant submits that she was prejudiced as a result of receiving these items only after the decision was rendered by PAAB. Yet to this day the Appellant has never bothered to obtain a hard copy of the Assessor's document nor to play the DVD. She says she no longer has a computer to print off the electronic version of the document, nor a DVD player to view the disk. She cannot establish any prejudice to her other than recalling that there was a discussion about grandfathering of improvements on her property, which she says is inaccurate. However, this issue of grandfathering was addressed by her in her submissions both before PAAB and before this Court. She has had the opportunity to make her views known on this point, but once again, PAAB decided the question of grandfathering as a question of mixed fact and law, and it would not be appropriate for me to interfere.

[11] Questions 3, 4, 10, 11 and 12 all ask whether PAAB considered or properly applied the impact of certain facts and legislation which the Appellant says are applicable to ascertaining the actual value of the property. I have saved answering these questions until the end because, in my opinion, they go to the heart of this Stated Case and the Appellant's argument.

[12] The Appellant argues that s. 19(3)(h) of the *Assessment Act* requires PAAB to consider, in determining actual value, any other circumstances affecting the value of the land and improvements. She submits that in the case of her property, the other circumstances include:

1. the property is within the Agriculture Land Reserve;
2. the property is subject to the *Fish Protection Act*, *Riparian Areas Regulation*, *Streamside Best Management Practices* and Ministry of Health *Sanitary Regulations*;
3. the property is within the thirty mile Riparian Area;
4. the property is bisected from the southeast corner to the northwest corner by a drainage ditch that contains waste water from the fish farm. The property is flooded by this contaminated water from time to time;
5. the water flowing through the property is unfit for human consumption;
6. the well on the property is within a hundred feet of the contaminated ditch with contaminates which is in breach of s. 42 of the *Health Act*;
7. the Ministry of Health *Sanitary Regulations* have no grandfathering provision.

[13] However, PAAB clearly took all these factors into account as is illustrated by the following key paragraphs of the PAAB decision:

[8] Ms. Patterson asserts that the fish farm operation is not in compliance with various federal, provincial and municipal environmental legislation and regulations. Ms. Patterson, in her September 26th submission, made the following specific allegations regarding her property's water quality:

"The house and kennel remain on bottled water advisory. The Ministry of Environment, Fraser Health Authority, and BC Centre first instructed me in November and December 2006 for disease control and health care providers to avoid all use of the water. Since that time the Ministry of Health has advised that the old established well does not meet Provincial Health Sanitation Regulation requirements, and as such cannot be utilized for personal consumption."

"Qualified veterinarians instructed me to use bottled water for all domestic animals on the property."

"The subject property has no legal conforming well. According to Provincial, and Federal Regulations is there NO site for la legal well on the Subject Property." [sic]

"The subject property does not have a well that complies with Section 42 of the Ministry of Health - Sanitation Regulation."

[9] The District of Kent (and, by inference, also the Assessor) says that there is no clear evidence that Ms. Patterson's well water is contaminated. Ms. Patterson, of course, takes the opposite view.

[10] The material before me shows that on September 3rd, 2008, an order nisi of foreclosure was issued and that the first mortgagee has conduct of sale. I am not aware if the property has been sold (which might provide some clearer evidence about market value). I also understand that Ms. Patterson commenced a B.C. Supreme Court action against the upstream fish farm operator on December 22nd, 2006 (and, on November 8th, 2007, another action against a company that was also alleged to be involved in the fish farm operation) and a separate action against the District of Kent on June 26th, 2007. In each action Ms. Patterson claim damages arising from the activities of the upstream fish farm operation. These actions have not yet been tried in court and thus no affirmative findings of fact have been made regarding the "water quality" issue.

[11] My review of the voluminous material submitted indicates that while the water flowing in the watercourse is not fit for human consumption (and, it must be noted, it is not intended to be utilized for human consumption), there is no *evidence* (to be contrasted with mere assertions) that I have seen which clearly indicates that Ms. Patterson's residential well water is contaminated. That being the case, I am not prepared to proceed on the assumption that there is no potable water available to the property. I would have thought that it would have been a relatively simple matter to have the water flowing through the house taps to be tested, and a report submitted for the Board's consideration, however, as noted above, I have not seen any such report in the material before me.

[12] Ms. Patterson also says that various legislative and regulatory rules relating to the watercourse on her property adversely affect market value: "The subject property is now located on a watercourse that is subjected to the *Fisheries Act*, Riparian Area Regulations, Streamside BMP's and Riparian Critical Habitat restrictions. The Socioeconomic impact of these restrictions is significant, and recognized." (Ms. Patterson's submission, page 13)

[13] Ms. Patterson says that the improvements on site constitute "legal non-conforming" uses and thus, for example, if the home were to be substantially destroyed, it could not be rebuilt without satisfying the existing regulatory scheme (the current improvements do not meet the required setbacks from the watercourse and, accordingly, could not likely be rebuilt if destroyed). The Assessor acknowledges that the lot is a "legal non-conforming lot" but argues that since the existing improvements have been "grand-parented" there is no immediate negative impact. Further, the Assessor says that Ms. Patterson has not shown how this particular issue actually affects the fair market value of the property.

[14] While I recognize that the various legislative and regulatory rules affecting the watercourse can affect market value, there is simply no evidence before me to indicate the precise nature of the economic impact. These various rules do not create an impediment to a sale of the property as it now stands since the existing improvements constitute, as all parties concede, legal (albeit non-conforming) uses of the property. Further, as will be seen below, I consider the most comparable sale to be a property that is bounded by the same watercourse and thus also affected by the same rules and regulations. To the extent that the rules and regulations governing the watercourse do adversely affect market value, this consideration would seemingly have been capitalized into the market price paid for the other property also affected by the watercourse. (underline emphasis added)

[14] The flaw in Ms. Patterson's argument both before the Board and before me is that she cannot point to any specific evidence showing an impact on the actual value of her property as a result of the "other circumstances". Logic would dictate that the property might be worth more, or sell easier, without the regulatory restrictions and limitations imposed on future improvements on the property. That does not mean that the actual value of the property assessed by PAAB according to its mandate was incorrectly determined. PAAB chose to give weight to the evidence of direct comparable sales, and in particular to the April 2007 arm's length sale of a property that was very near the Appellant's property with the same zoning and the same contaminated watercourse running through it. Ms. Patterson argued that the contaminated water issue was not disclosed to the buyer of this other property, but PAAB could not make this finding of fact based on the material before it.

[15] As I stated at the outset, it is not the function of this Court to interfere with findings of fact of the PAAB adjudicator, nor to interfere with the role of PAAB to determine actual value of a property.

[16] In summary, answering the questions of law only, and applying the standard of correctness, I cannot say that PAAB made any error in law in reaching the decision it did. The appeal is dismissed with costs.

"The Honourable Madam Justice Satonove"

APPENDIX

- Question #1: Did the PAAB Adjudicator err in law by misconstruing the relevance of the documents submitted by the Respondent Ms. Patterson as to the market value of the subject property?
- Question #2: Did the PAAB Adjudicator err in law by concluding, without any or adequate factual foundation to support the finding, that:
- (a) The subject property had two dog kennels?
 - (b) The water on the subject property was not contaminated on July 1, 2007?
 - (c) The tests conducted by Fraser Health Authority were conducted in compliance with Provincial, and Federal standards for testing drinking water?
 - (d) The test conducted by Fraser Health Authority included tests for known contaminants in fish farm waste?
 - (e) The subject property has a legal well?
 - (f) The property located at 6357 Lougheed Highway, Agassiz, B.C. (referenced to as "Sale #1") had a legal well or that it had access to potable water?
 - (g) The well water on the property referred to as Sale #1 was tested, and found to be safe for human consumption?

(h) That the watercourse of the subject property was for seasonal farm land drainage?

(i) The subject property had 3 wells or that it had access to potable water?

Question #3: Did the PAAB Adjudicator err in law by failing to consider that the whole of the subject property is within both the Streamside Protection and Enhancement Area (SPEA) and subject to the *Riparian Area Regulations* implemented pursuant to the *Fisheries Act*?

Question #4: Did the PAAB Adjudicator err in law by failing to consider the impact of the contamination of the watercourse bisecting the subject property when determining the value of the subject property?

Question #5: Did the PAAB Adjudicator err in law by failing to consider the probable remediation costs to address the contamination of the watercourse and adjacent soils in reaching a conclusion as to the value of the subject property?

Question #6: Did the PAAB Adjudicator breach the rules of procedural fairness by considering, in reaching his decision, facts, documents and materials provided by BC Assessment that were rebutted by Ms. Patterson or by failing to consider evidence submitted by Ms. Patterson, specifically as it relates to the Property Assessment Review Panel?

Question #7: Did the PAAB Adjudicator breach the rules of procedural fairness by considering, in reaching his decision, alleged facts, documents and materials that were not provided to Ms. Patterson and that Ms. Patterson did not have an opportunity to respond to or rebut?

Question #8: Did the PAAB Adjudicator err in law by misconstruing the nature of the appeal by finding that the ground for the appeal to the Property Assessment Review Panel and the basis for the resulting decision was the subject property's water quality?

Question #9: Did the PAAB Adjudicator err in law by misunderstanding or misapprehending the complexity, expense, and time sensitivity of water testing in the context of known proximity to industrial or commercial water pollutants?

Question #10: Did the PAAB Adjudicator err in law by failing to distinguish, for the purposes of considering the impact of the *Riparian Area Regulations*, between improvements installed or constructed on the subject property before and after March 31, 2005?

Question #11: Did the PAAB Adjudicator err in law by assuming and concluding that the use, improvements and development of the subject property are legal non-conforming in relation to the *Riparian Area Regulations* and Section 42 of the *Sanitary Regulations* enacted under the *Health Act*?

Question #12: Did the PAAB Adjudicator err in law by concluding that the existing well and the septic field on the subject property were grand-parented or otherwise protected from the effect of Section 42 of the *Sanitary Regulations* enacted under the *Health Act*?

Question #13: Did the PAAB Adjudicator err in law by failing to consider that only "legal" improvements and uses can be considered when considering the actual market value for the subject property?

Question #14: Did the PAAB Adjudicator err in law by failing to disregard Sale #1 for the purposes of determining the fair market value of the subject property, despite evidence of the 'non-disclosure' of latent defects by the vendor or realtor in that sale?

- Question #15: Did the PAAB Adjudicator err in law by misconstruing the nature and basis for the 2008 Property Assessment Review Panel decision in respect of the subject property?
- Question #16: Did the PAAB Adjudicator exceed his jurisdiction and thereby fall into legal error by considering facts, documents and materials not provided by Ms. Patterson?
- Question #17: Did the PAAB Adjudicator err in law by accepting the BC Assessment Appraisal Report conclusion of Glen Neufeldt even though the Report on its face specifically excludes consideration of the impact on value caused by the presence of hazardous substances?