SC 528 Mandarino, Marilyn v AA19 and PAAB

Link to Property Assessment Appeal Board Decision

MARILYN MANDARINO

v.

ASSESSOR OF AREA 19 – KELOWNA and
PROPERTY ASSESSMENT APPEAL BOARD

SUPREME COURT OF BRITISH COLUMBIA (77688) Kelowna Registry

Before the HONOURABLE MR. JUSTICE ROGERS
Date and Place of Hearing: October 29, 2008 and April 8, 2009, Kelowna, B.C.

K.J. Ihas for the Appellant
G. McDannold for the Respondent

Farm – Development for Residential Purposes – Split Classification

The property is owned by the Appellant and comprises approximately 40 acres. For the past number of years the Appellant has tried to have the whole of her property classified as farmland but has been unsuccessful. The Property Assessment Appeal Board ("the Board") concluded that the highest and best use of the land as a whole was development for residential purposes. The net effect of the Board's decision was to increase the assessed value of the land by approximately one-half million dollars. The Appellant appealed the Board's decision asking whether:

1. *The Board failed to apply and adequately consider Section 4(3.1) of the* Standards for the Classification of Land as a Farm Regulation*, B.C. Reg. 411/95;*
2. *The Board made a decision with respect to the ability to develop those lands not utilized as farm, which was unreasonable in view of the evidence;*
3. *The Board adopted a method of assessment that is wrong in principle in assessing portions of the lands in question as farm and as residential.*

HELD: Appeal Dismissed in Part.

The Court held the Board committed no error of law when it decided that the highest and best use of the Appellant's land was its current use while holding it for residential development. The Appellant did not assert to the Board that the farm operation on part of her land obviated any use higher than farming on the rest of the land. Therefore, the Board did not err by not considering an issue that the Appellant could have raised but did not. This court answered the first question, no.

The Appellant acknowledged that the second question posed in the Stated Case was not a question of law and withdrew the question from consideration.

The third question amounted to asking whether the Board's decision was right or wrong. The question did not cite a particular principle of law that the Board is said to have contravened. The third question required clarification and this court remitted it back to the Board for that purpose.

Reasons for Judgment April 28, 2009

Introduction

[1] In this appeal of a decision of the Property Assessment Appeal Board, the Appellant argues that the Board erred by fixing the value of the whole parcel based on residential development, which was the highest and best use to which the whole of the land could be put, and then reducing that number by the value of that portion of the land that was being used for a lower use, viz: farming. The Appellant argues that the Board ought to have considered whether farming on part of the land would have had an effect on the development value of the balance of the land. That is to say: would farming part of the parcel make development of the rest of the parcel less attractive and thus render the rest of the parcel less valuable?

History of the Parcel

[2] The property in issue is owned by the Appellant. It comprises approximately 40 acres. Some of the property is level, other parts are on a slope, and some parts are really quite steep and rocky.

[3] For the past number of years, the Appellant has tried to have the whole of the property classified as farmland. She has been unsuccessful. In 2003, she applied to have the whole parcel classified as farmland. The Assessor refused and she appealed. The Property Assessment Review Panel (PARP) held that 20 acres were farmland and the remaining 20 acres were residential.

[4] In 2005, the Appellant tried again. The matter went to appeal again, and this time the PARP held that 21 acres should have farm classification. The remainder of the property was classified as residential.

[5] In 2006, the Appellant tried again to have the whole of the property classified as farmland. The Assessor declined. The Assessor sought to have the property valued on a "per residential unit potential" basis. The Appellant launched the current appeal of the Board's decision concerning the 2006 assessment.

Decision on Appeal

[6] The chart below describes the assessment of the land before and after the Board's decision under review.

		Pre-Board	**Post-Board**
Class 1 Residential	Land	$932,000	$1,457,000
	Improvements	65,400	65,400
Class 9 Farm	Land	2,625	2,352
	Improvements	Nil	Nil
	TOTAL	$1,000,025	$1,524,752

[7] The net effect of the Board's 2006 decision was to increase the assessed value of the land by approximately one-half million dollars. This, presumably, increased the Appellant's tax burden and provided motivation for her appeal of the decision.

[8] The Board came to its conclusion after receiving and reviewing a variety of materials from the Assessor and the Appellant. The Assessor's materials included a thorough property appraisal of the parcel in question, certain statistics relating to farming and agriculture in the Okanagan area, data relating to the development of other parcels in the area, and information concerning the assessed value of properties in the area. The Appellant's materials included, among other things, photographs of the land in question, written submissions as to the use to which she put the land, and a neighbourhood plan. As a general proposition, the Board found the Assessor's materials more helpful than the Appellant's materials.

[9] The Board held that based on the Appellant's demonstrated use of the land, only 10 acres could be classified as farmland for the purposes of the *Assessment Act*, R.S.B.C. 1996, c. 20. The Board assessed the value of the farmland at $2,352.

[10] The Board concluded that the highest and best use of the land as a whole was development for residential purposes. The Board accepted the evidence adduced by the Assessor concerning zoning changes in the general area, and concluded that it was reasonable to value the property on the basis that its highest and best use was its current use while holding it for residential redevelopment. The Board concluded that redevelopment of the whole property would comprise 27 acres for multi-family use, 10 acres for single family use and that, due to their extreme topography, the remaining three acres were not useable.

[11] The Board concluded that based on that development pattern, the actual value of the property was $4,780,000. The Board reduced that figure to take into account the fact that that value was out of step with the assessments of surrounding properties. The Board characterized this reduction as an accommodation to equity. The reduced figure upon which the Board settled was $1,943,000.

[12] Finally, the Board came back to the fact that 10 acres of the parcel was actually being used for farm purposes and, accordingly, reduced the parcel's assessed value by 25 percent. When the value of the farmland and the improvements (which were not under discussion in the appeal) were added in, the Board arrived at a total assessed value for the Appellant's land of $1,524,752.

The Appeal

[13] Section 65 of the *Assessment Act* prescribes the process for appeals of property assessments. The appeal is presented to this court as a Stated Case. The Appellant poses the questions to be determined on the appeal. In this appeal, the questions are whether:

1. The Board failed to apply and adequately consider Section 4(3.1) of the *Standards for the Classification of Land as a Farm Regulation*, B.C. Reg. 411/95;

2. The Board made a decision with respect to the ability to develop those lands not utilized as farm, which was unreasonable in view of the evidence;

3. The Board adopted a method of assessment that is wrong in principle in assessing portions of the lands in question as farm and as residential.

Standard of Review

[14] The questions posed in the Stated Case are questions of law: s. 65(1) *Assessment Act*, R.S.B.C. 1996, c. 20; *Gemex Developments Corp.* v. *British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (C.A.).

[15] The standard of review on a question of law is correctness.

[16] The Appellant acknowledged that the second question posed in the Stated Case was not a question of law. She therefore withdrew that question from consideration.

Discussion

Question No. 1

[17] The Appellant says that the Board erred by not assessing the land's residential development value in light of the Appellant's use of part of that land for farming. She says, in essence, that the Board was obliged to account for the farming use and to consider whether the farming use had an impact on the

land's potential for residential development. She says that by failing to consider that question the Board made a reversible error of law.

[18] In support of this proposition, the Appellant points to s. 10 of the *Prescribed Classes of Property Regulation*, B.C. Reg. 438/81, which says:

> **10** Where a property falls into 2 or more prescribed classes, the assessor shall determine the share of the actual value of the property attributable to each class and assess the property according to the proportion each share constitutes of the total actual value.

and to s. 4(3.1) of the *Standards for the Classification of Land as a Farm Regulation*, B.C. Reg. 411/95, which says:

> **4** (1) Unless this regulation provides otherwise, the assessor must classify as farm all or part of a parcel of land used for
>
> (a) primary agricultural production,
>
> (b) a farmer's dwelling, or
>
> (c) the training and boarding of horses when operated in conjunction with horse rearing.
>
> (2) Land will only be classed as farm where part of a parcel or parcels of land are
>
> (a) necessary to the farm, and
>
> (b) predominantly used for primary agricultural production.
>
> (3) Despite subsections (1) and (2), where land is part of a farm that lies within an agricultural land reserve designated under the *Agricultural Land Commission Act* and has no present use, the assessor must classify that land as a farm if
>
> (a) it is part of a parcel, a portion of which is used for primary agricultural production, and the portion used for the primary agricultural production makes a reasonable contribution to the farm operation
>
> (b) the owner certifies on the prescribed form that the land is being held for the purpose of primary agricultural production, and
>
> (c) the parcel being used for primary agricultural production meets the other requirements of this regulation.
>
> (3.1) Despite subsections (1), (2) and (3), the assessor must classify land as farm if
>
> (a) the land has no present use,
>
> (b) the land has a highest and best use that is a use not better than that of a farm,
>
> (c) the land is part of a parcel, a portion of which is used for primary agricultural production, and the portion used for the primary agricultural production makes a reasonable contribution to the farm operation, and
>
> (d) the portion being used for primary agricultural production meets the other requirements of this regulation.

[19] The essence of the Appellant's argument is that the Board's error lies in not having turned its mind to the application of s. 4(3.1) and, more particularly, to whether the Appellant's use of part of the land for farming purposes rendered the rest of the land unsuitable for any use other than farming. Basically, the Appellant's position is that because the language of s. 4(3.1) is mandatory (the Assessor *must* classify land as farm...), the Regulation requires the Board to negate farm use for fallow land before it can go on to consider whether that fallow land can be classified for any other use.

[20] The flaw in the Appellant's argument is that, when she was before the Board, she did address the use and classification of the portion of the parcel that the Appellant was not actively farming. The Board referenced the Appellant's argument at para. 27 of its decision:

> [27] The Owner says that much of the property could not be developed for residential purposes due to topography (slope and rock outcropping) and environmental issues (important flora and fauna that are to be preserved).

[21] The Appellant therefore put to the Board her belief that much of her land was not suitable for residential development. It may be that the Appellant did not, in the course of making her argument before the Board, assert that her use of some of the land for farming rendered the rest of the land unsuitable for any higher purpose, and it may be that she now regrets not having done so. Be that as it may, bringing the issue up in the context of this appeal is an invitation to speculate that if she had asserted the argument and had adduced some evidence on the point, then the Board might have come to some different conclusion. As such, the Appellant's position amounts to not much more than an application to send the matter back to the Board for rehearing on some new but entirely unexplained evidence. Leaving aside any procedural impediments to success, that argument cannot succeed for the simple reason that the Appellant has adduced no evidence in this appeal that could justify it. More specifically, the Appellant has not described what, exactly, she proposes to say or show to the Board that could convince it that farming part of the land made the rest of the land suitable for no higher use than farming.

[22] As an aside, I speculate that the Appellant's position on Question No. 1 arises out of a misapprehension of on whom the onus of proving the s. 4(3.1) criteria lies. The Appellant may believe that it is for the Assessor to show that each of the criteria noted in s. 4(3.1)(a) to (d) exist. However, convention suggests that it is for the party who asserts a proposition to prove that it applies. In the present case, it was the Appellant who wished to establish that farming on part of her parcel left the rest of the parcel with no higher use than farming. The onus was, therefore, on her to show that her assertion was true. For reasons unknown, she concentrated her argument in other areas.

[23] In my view, the Board committed no error of law when it decided that the highest and best use of the Appellant's land was its current use while holding it for residential development. The Appellant decided not to assert that the farm operation on part of her land obviated any use higher than farming on the rest of the land. The Board did not err by not considering an issue that the Appellant could have raised but did not. The answer to the first question is, therefore, no.

Question No. 3

[24] In the course of submissions, the Appellant acknowledged that this question was so broad as to amount to asking whether the Board's decision was right or wrong. The Appellant recognized that this was not, really, a question of law and sought the court's direction to refer the question back to the Board for revision on the Stated Case. The revised wording the Appellant proposed was this:

> 3. Did the Board make an error in principle and misinterpret Section 10 of the *Prescribed Classes of Property Regulation* B.C. Reg. 438/81 by failing to consider the actual value of the geographic area of the non-farm classified portion of the parcel, and instead considering on the actual value of the entire parcel and then reducing that value by 25%?

[25] The Appellant argues that the court can ask the Board to revise the Stated Case and relies on s. 65(7) of the *Assessment Act*.

> (7) The court may send the stated case back to the board for amendment and the board must promptly amend and return the stated case for the opinion of the court.

[26] The Respondent does not contest the court's authority to send the matter back to the Board for revision but says that there are limits on the scope of that revision. The Respondent says, firstly, that the court has no authority to direct that the Board make any particular changes to the question and, secondly, that the revised question cannot raise an issue that was not considered by the Board in the first instance.

[27] The Respondent's position on the first point is clearly correct. The scope of the court's discretion in remitting a matter to the Board for revision was settled by Sinclair Prowse J. in the matter of *British Columbia (Assessor of Area No. 12 – TriCities/Northeast Fraser Valley)* v. *Great Northern & Pacific Health Care Enterprises Inc.*, 2000 BCSC 1216. She wrote:

> [7] Upon considering the submissions of counsel on this issue, I have concluded that I do not have the jurisdiction to amend the questions of law. That jurisdiction lies with the Board, see: s. 65(7) of the *Assessment Act* ...

[28] In *Great Northern*, Sinclair Prowse J. held that the questions set out in the Stated Case were broad and general. They asked if the Board's decision was right, and for an opinion on the application of certain case law without putting forward a particular proposition of law for application in that particular case. As such, Sinclair Prowse J. concluded that the questions did not pose specific questions of law. She ordered that the Stated Case go back to the Board for clarification of the questions.

[29] To repeat, the Stated Case's third question is this:

> 3. The Board adopted a method of assessment that is wrong in principle in assessing portions of the lands in question as farm and as residential.

[30] In my opinion, the third question posed in this appeal amounts to asking whether the Board's decision was right or wrong. The question does not cite a particular principle of law that the Board is said to have contravened. Without clarification, the parties cannot know what issue to argue about. Given the court's limited discretion under s. 65(7), it is moot for the Appellant to suggest that the question be posed in some different way. It is for the Board to decide how the question may be clarified. It is likewise moot for the Respondent to argue here that the question cannot be posed as the Appellant proposes. It is for the Board to decide how and to what extent the question should be clarified.

Conclusion

[31] The answer to the first question on the Stated Case is no. The second question has been withdrawn. The third question requires clarification and will be remitted to the Board for that purpose.

The Honourable Mr. Justice Rogers