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SC 532 B.E.S. Investments Ltd. v. AA10 & PAAB

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

B.E.S. INVESTMENTS LTD.

v.

**ASSESSOR OF AREA 10 – NORTH FRASER REGION
and PROPERTY ASSESSMENT APPEAL BOARD**

SUPREME COURT OF BRITISH COLUMBIA (S094069) Vancouver Registry

Before the HONOURABLE MR. JUSTICE LEASK

Date and Place of Hearing: January 5, 2010, Vancouver, B.C.

J.E. Bethell for the Appellant

G.P. Holeksa for the Respondent, Assessor of Area 10 – North Fraser Region

Highest and Best Use - Long Term Holding Property Pending Redevelopment

The Appellant owns a commercial property in the City of Burnaby. The property is currently zoned C-4 Service Commercial District. The building on the property is used as a service garage and is rented out to Craftsman Collision and Enterprise Rent-A-Car.

The issue before the Property Assessment Appeal Board ("the Board") was the determination of actual value for the 2008 assessment roll. The Appellant submitted that it was not appropriate to value this property based on its potential for redevelopment but that it should be valued using its potential for income as the means of establishing the property's value.

The Board found that the highest and best use for the property was as a long term holding property pending redevelopment. The Board found the comparison approach was the appropriate approach to be used to establish the value of the property. The Appellant appealed that decision to this Court.

HELD: Appeal Dismissed.

This Court found that 1) the standard of review to be applied to the Board's decision is reasonableness, and 2) the conclusion reached by the Board was reasonable and correct.

Reasons for Judgment (Oral)

January 5, 2010

[1] THE COURT: This is an appeal by way of Stated Case from a decision of the Property Assessment Appeal Board of British Columbia. The proper reference to this appeal is *B.E.S. Investments v. Area #10* (2009PAABBC20090014). And in the Stated Case, the facts are recited commencing on page 2 and the numbered paragraphs are 1 through 9:

1. The appeal before the Board was from the 2008 decision of the Property Assessment Review Panel with respect to commercial property located at 5906 Imperial Street in the City of Burnaby (the Property). The issue before the Board was the determination of actual value for the 2008 assessment roll.

2. The Property is a level rectangular shaped parcel located one block off Kingsway Avenue, with frontages on Imperial Street, MacPherson Avenue, and Lane Street. It comprises approximately 24,112 square feet.
3. A one storey wood frame building of 6,041 square feet is located on the Property. The building is used as a service garage and is rented out to Craftsman Collision and Enterprise Rent-A-Car.
4. An existing lease on the Property runs from November 1, 2000 until October 31, 2010, with rights to renew for two 5 year periods, i.e. until October 2020. The owner may terminate the lease as of November 2017.
5. The Property is divided by a 10 foot wide sewer easement which runs from Lane Street to Imperial Street, approximately 55 feet from the eastern lot line.
6. The Property is currently zoned C-4 Service Commercial District which allows an FSR of 1.0. The Official Community Plan (OCP) shows the property as C-9a Urban Village Commercial District with a maximum FSR of 2.2 when underground parking is provided. The latter zoning permits commercial and retail uses with residential dwellings on the upper levels.
7. The Board found that the highest and best use for the Property is as a long term holding property pending redevelopment. The Board found the comparison approach was the appropriate approach to be used to establish the value of the Property.
8. The Board determined the actual value based on \$99.58 per square foot, applied to 24,112 square feet, at \$2,405,600 was within a reasonable range of actual value.
9. The Board confirmed the decision of the 2008 Property Assessment Review Panel as follows:

Roll No. 10-41-301-3100-5609-0000:

Land:	Class 6 - Business and other	\$2,391,000
Improvements:	Class 6 - Business and other	\$14,600
Total Assessed Value:		\$2,405,600

[2] And there are five questions of law to be determined by the Supreme Court. I am going to read the question, give my answer, and then give my reasons for coming to the answer.

[3] The first question is: Did the Assessment Appeal Board err at law in determining that the highest and best use of the property was as a long-term holding property pending development? My answer is no.

[4] Question number 2: Did the Assessment Appeal Board err in law in holding that the property could be redeveloped under both current C-4 zoning and proposed C-9a rezoning under the existing official community plan and that the highest and best use for the property was as a long-term holding property pending redevelopment? My answer to that question is no.

[5] Question 3: Did the Assessment Appeal Board err at law in failing to consider evidence that the Assessor's comparative properties did not require assembly or alteration of easements for redevelopment? My answer to that question is no.

[6] Question number 4: Did the Assessment Appeal Board err in law in failing to discount the value of the property on the basis of the requirement for assembly, the existence of a lease, the timeframe for economic redevelopment and the existing easement? And my answer to that question is no.

[7] Question number 5: Did the Assessment Appeal Board err in law evaluating the property on the basis of being a long-term holding property rather than on an income basis? And my answer to that question is no.

[8] Now, I think it is important to stress what the parties agree about and what the parties disagree about. The parties agree in the words of the judgment appealed from at para. 20:

Both parties state that they view the property as a holding property pending redevelopment.

Where they differ is that Mr. Bethell, who has made every argument that could possibly be made in favour of the Appellant, has submitted forcefully that the difficulties in redeveloping the subject property in this case are such that no reasonable person can say when redevelopment will take place, and indeed one of the experts retained by the property owner put forward the proposition that it could be at least 35 years or more before redevelopment would take place.

[9] The City of Burnaby, in writing to the property owner, stated, concerning their hoped-for consolidation and redevelopment, which is outlined in the official community plan, that it might never be possible for that to take place. Based on that, Mr. Bethell, on behalf of the property owner, submits that it is not appropriate to value this property based on its potential for redevelopment because nobody knows when that potential could be exercised, and if it is very far into the future or potentially never, then clearly, in his submission, that is an illogical valuation method to employ. And for that reason the property owner, in the hearing below, and consistently, has said the way that this property should be valued is by looking at the income that is being earned from it, applying a proper multiplier to that income and making the value depend on that.

[10] The position of the Assessor at the hearing below, the decision arrived at by the Property Assessment Appeal Board, and the position of counsel for the Assessor before me are all the same, and that position is that because there is a potential for redevelopment and because in the marketplace for real property people will pay a premium for such potential, this property should be assessed based on what a *bona fide* purchaser for value would pay for the property taking into account its redevelopment value.

[11] The Assessor provided to the panel below seven comparables, of which emphasis was placed on two, and, in the hearing of this appeal, emphasis has been placed primarily on one of those two because it has many comparable features to the property in question. That comparable was called comparable number 4 in the hearing below. It is in fact 5708 Kingsway and is best understood by looking at a diagram which is attached to page 3 of tab 5 of the Appellant's submissions. That diagram shows the subject property, the adjoining property owned by the same property owner, that is 5609 Imperial and 5621 Imperial, and then 5708 Kingsway and its adjoining property, 5679 Imperial, and also 5640 Kingsway, all of which in the official community plan of Burnaby the city would like to see consolidated, closing off a street called Lane Street.

[12] Now, everyone acknowledges that that consolidation and that idea cannot be implemented in the immediate future. At a minimum, the owner of 5609 Imperial, the subject property, will not have free access to redeveloping or consolidating 5609 till 2017, when the current lessee's right to remain there will end and the landowner could take back the property.

[13] In my view, the analysis that the Property Assessment Appeal Board did at para. 21 of its judgment is a good summation of the reasoning, and I am going to read that now:

The highest and best use is normally the use which provides the greatest residual land value over the longest term. The highest and best value of the property as improved would be the value that

increases the value of the property the most over time. I accept that demolition of the existing building on the subject Property is not imminent and that the current use is likely to continue until redevelopment occurs. The income earned by the building, however, can no longer be considered as the key determinant of value but rather the underlying land's development potential is what is more likely to establish its value for a purchaser. The highest value reflects the highest and best use as long as it is probable that the property would sell for the same price that other sites with development potential are selling for. I am satisfied it is probable that this property would sell based on its development potential, rather than its current income generating capacity.

And he follows that with a one-sentence paragraph, para. 22:

I find that the highest and best use for the Property is as a long term holding property pending redevelopment.

[14] The tribunal went on to consider the two different valuation methods proposed, the income method and the comparable method. Paragraph 35 sums up what the tribunal found:

The adjusted value per square foot of \$99.58 established by the Assessor falls at the low end of the range of values identified by the 7 comparables, and does not appear out of line with the 2 comparables which are given the most weight. Based on the evidence provided and my conclusion with respect to the preferred valuation approach, I accept the value based on \$99.58 sq. ft. which, applied to an area of 24,112 sq. ft., is \$2,401,073 (rounded). I find that PARP's conclusion of \$2,405,600 is within a reasonable range of actual value.

And he accepts that value.

[15] Now, in terms of the standard that I must apply in reviewing this decision, I believe the standard to be applied is a reasonableness standard, and I am satisfied that the process of reasoning and the conclusion reached by the Property Assessment Appeal Board was reasonable within the meaning of that term as used in the appropriate authorities.

[16] I think it is useful if I add this comment. The only other possible standard that could be applied is the standard of correctness. From my analysis of the submissions made here and the supporting material that has been provided to the court, I believe that the Property Assessment Appeal Board's decision was also correct and if that was the standard that needed to be applied, it would again result in an upholding of the decision.

[17] Subject to counsel indicating I have ignored something I need to talk about, I regard those as the reasons for decision.

[18] Are costs an issue?

[19] MR. HOLEKSA: Well, costs follow the event, My Lord.

[20] THE COURT: Scale B?

[21] MR. HOLEKSA: Yes.

[22] THE COURT: I think the Assessor is entitled to his costs at scale B of this hearing. I must say that I think the material prepared by both counsel was so well done and so careful that I felt when I came into court that I had a good understanding of this problem, and I appreciated Mr. Bethell's submissions, but both counsel are to be commended for their excellent material. Thank you.