SC 535 Madison Development Corporation et al v. AA10 & PAAB

Link to Property Assessment Appeal Board Decision

MADISON DEVELOPMENT CORPORATION
ALTA GROUP ENTERPRISES CORP.

v.

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

SUPREME COURT OF BRITISH COLUMBIA (S091693) Vancouver Registry

Before the HONOURABLE MADAM JUSTICE ROSS (in chambers)
Date and Place of Hearing: November 19, 2009, Vancouver, B.C.

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

Highest and Best Use – Re-development

The issue under appeal is the value for the 2004, 2005 and 2006 assessment rolls of five commercial/service-industrial properties that have been assembled for redevelopment. It was common ground that the current use of the properties is not the highest and best use. But the parties disagreed on the correct valuation method for real estate in this circumstance.

The Appellants appealed the decision of the Board to this Court asking the following four questions:

1. *Did the Board misapply a principle of general law by, having valued the land as if vacant, going on to value the improvements thereon conventionally – i.e. by the cost approach to value, and thereby ignore or misapply the principle enunciated in* City of Toronto *v.* Ontario Jockey Club*, [1934] S.C.R. 223 [*Jockey Club*] as applied in* Western Indoor Tennis Ltd. *v.* Assessor of Area 11, Richmond-Delta *(1981), 29 B.C.L.R. 265 (S.C.) [*Western Indoor Tennis*] and* Botham Holdings Ltd. *v.* Assessor of Area #09*, 2008 PAABBC 20072560 [*Botham*]?*
2. *Did the Board misapply a principle of general law in declining to apply the principles enunciated in* Jockey Club *as applied in* Western Indoor Tennis *and* Botham *in placing a nominal value on the improvements on the subject, together with the agreed-upon land value?*
3. *Did the Board err in law in valuing the improvements conventionally while confirming the agreed-upon land value?*
4. *Did the Board err in law in valuing the land as if for redevelopment and the improvements as in the existing use?*

HELD: *Appeal Dismissed.*

The Court found that as the questions are about legal principles and not about the application of these principles to the facts of this case, the standard of review is correctness. This Court answered each of the four questions "no", finding that the Board was correct in adopting a different approach, namely, to value the properties via direct comparison to transition-type sales data and determine the total actual values from this data, then splitting the values between land and improvements.

The Act *stipulates that the Board must consider the total assessed value of both land and improvements even if the issue that has been put forth is for land value only. This Court found that there was no error in law.*

Reasons for Judgment (Oral) January 18, 2010

[1] **THE COURT:**

Introduction

[2] This is an appeal by way of Stated Case by Madison Development Corporation and Alta Group Enterprises Corp. (the "Appellants") from a decision, 2008 PAABBC 20082299, dated January 23rd, 2009 (the "Decision"), of the Property Assessment Appeal Board (the "Board") pursuant to s. 65 of the *Assessment Act,* R.S.B.C. 1996, c. 20 (the "*Act*").

[3] The Board's Decision confirmed a decision of the Property Assessment Review Panel with respect to the valuation for 2004, 2005 and 2006 assessment rolls of five properties owned by the Appellants at or near the southwest corner of the intersection of the Lougheed Highway and Willingdon Avenue in Burnaby (the "Properties").

[4] The Properties are described as commercial/service-industrial properties that have been assembled for redevelopment. It was common ground that the current uses of the properties are not the highest and best uses.

Section 65 Appeal

[5] Section 65(1) of the *Act* provides:

> Subject to subsection (2), a person affected by a decision of the board on appeal, including a local government, a taxing treaty first nation, the government or the assessment authority, may require the board to refer the decision to the Supreme Court for appeal on a question of law alone in the form of a stated case.

[6] The Court of Appeal in *Peace River Assessor, Area No.* 27 *v. Burlington Resources Canada Ltd.,* 2005 BCCA 72, 37 B.C.L.R. 4th 151 (C.A.), described at para. 18 the scope of questions of law for the purposes of an appeal pursuant to the *Act* as follows:

> 1. A misinterpretation or misapplication by the Board of a section of the Act.
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> 2. A misapplication by the Board of an applicable principle of general law.
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> 3. Where the Board acts without any evidence.
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> 4. Where the Board acts on a view of the facts which could not reasonably be entertained.
>
> 5. Where the method of assessment adopted by the Board is wrong in principle.

Stated Case

[7] The material facts upon which the case is stated include:

> 3. The Properties are located in the Brentwood Town Centre district of the City of Burnaby. The major nearby development is the Brentwood Shopping Centre. There is a SkyTrain station next to the shopping centre.
>
> 4. Madison has assembled the properties and a sixth site at 4408 Sumas Street. Madison plans to redevelop the assembled parcel, together with the abutting lane, with a phased residential-commercial project totaling 1,411,693 square feet (SF). The redevelopment parcel has an area of 6.06 acres, net of land dedications. Re-zoning from the current C-3/C-4 and M-1/P-8 to a

comprehensive development zone will be required. Madison first made application for this re-zoning in 2006 and, again in 2008.

5. The issue before the Board was the determination of actual value for the Properties as of July 1, 2003, July 1, 2004, and July 1, 2005.

6. The parties agreed the current uses for the Properties are not the highest and best uses.

7. The Board found the total actual values of the properties as determined by the Property Assessment Review Panels were correct.

8. The Board found it did not have sufficient evidence to determine if the apportionment between land value and the improvement value was correct.

9. The Board found it had the necessary evidence to support the total values and the decisions of the Review Panels.

10. The Board confirmed the decisions of the 2004, 2005 and 2006 Property Assessment Review Panels.

[8] The Stated Case contains four questions of law drafted by the Appellants as follows:

1. Did the Property Assessment Appeal Board misapply a principle of general law by, having valued the land as if vacant, going on to value the improvements thereon conventionally - i.e. by the cost approach to value, and thereby ignore or misapply the principle enunciated in *City of Toronto v. Ontario Jockey Club,* [1934] S.C.R. 223 [*Jockey Club*] as applied in *Western Indoor Tennis Ltd. v. Assessor of Area 11, Richmond-Delta* (1981), 29 B.C.L.R. 265 (S.C.) [*Western Indoor Tennis*] and *Botham Holdings Ltd. v. Assessor of Area #09,* 2008 PAABBC 20072560 [*Botham*]*?*

2. Did the Property Assessment Appeal Board misapply a principle of general law in declining to apply the principles enunciated in *Jockey Club* as applied in *Western Indoor Tennis* and *Botham* in placing a nominal value on the improvements on the subject, together with the agreed-upon land value?

3. Did the Property Assessment Appeal Board err in law in valuing the improvements conventionally while confirming the agreed-upon land value?

4. Did the Property Assessment Appeal Board err in law in valuing the land as if for redevelopment and the improvements as in the existing use?

Standard of Review

[9] The position of the Appellants is that the standard of review is correctness. The Assessor submits that the standard is reasonableness because the questions are not questions of pure law but mixed law and fact and the questions are not important to the general jurisprudence, citing *Vancouver Pile Driving Ltd. v. Assessor of Area #08 - Vancouver Sea to Sky Region,* 2008 BCSC 810 [*Vancouver Pile Driving*].

[10] In the *Vancouver Pile Driving* decision, at para. 44 Smith J. quoted the definition for questions of law, fact and mixed law and fact as follows, citing *Canada (Director of Investigation and Research) v. Southam Inc.,* [1997] 1 S.C.R. 748 at 766-67 as follows:

... Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

[11] I have concluded that the questions stated refer to principles of general law. It is the case that the questions, or at least some of them, make assumptions of fact which may or may not be correct. However, the questions themselves are questions about legal principles, not about the application of those legal principles to the facts of the case. Accordingly, I find that the standard of review is correctness.

Positions of the Parties

[12] The Appellants did not direct their submissions to the questions stated but rather made a global submission that merges the questions. The Appellants submitted in general that the error of law in the present case is that the Board took a land value agreed upon by the parties and added to it a value for improvements determined conventionally, i.e., by the depreciated cost method, and submits that this is the exact error identified in the *Jockey Club* line of cases.

[13] The Respondent took the position with respect to Question 1 that the question does not accurately state a principle of law; that it states or implies it is an error to value land as vacant and improvements conventionally. In the submission of the Respondent, there are two errors in the statement. First, there is no legal principle that one cannot value land as vacant and value improvements conventionally. Indeed, this is the correct approach that is applied in millions of appraisals where not valued for a different highest and best use. Second, it is uncertain what is meant by valuing improvements conventionally. One could guess, but there should be no reason for the Respondent or the court to have to guess in the hearing of a Stated Case when the Appellant could quite simply have stated the question with precision and without ambiguity.

[14] The Respondent submits that these deficiencies in question are fatal to Question 1 and that it should not be answered or should be answered “no”.

[15] With respect to Question 2, the Respondent submitted that the question does not accurately state the facts which provided the foundation for the Board’s decision or the Board’s process of reasoning in the decision. It does not accurately state the facts which provided the foundation for the Board’s decision because it stated that there was an agreed-upon land value, which in fact was not the case. The Appellants and Assessor did not, the Respondent submits, agree to a value for land. The entire case was argued on the basis of the overall value of the property, including both land and improvements.

[16] In the Respondent’s submission, Question 2 also inaccurately states the basis of the Board’s decision when it states that the Board erred in declining to apply the principles in *Jockey Club.* At no point, the Respondent submits, did the Board state that it declined to apply those principles. Rather, the Board found a different method of making a decision, which did not require it to determine value based on some separate land and improvement values. In that method of decision-making there was no necessity of considering the application of *Jockey Club.*

[17] With respect to Question 3, the Respondent submitted that Question 3 does not accurately state the facts at the foundation of the Board’s decision and does not clearly describe an issue. First, the submissions with respect to Question 2 are repeated with respect to the notion that there was an agreed-upon land value, and so it is submitted the foundation of the question is incorrect. Second, as stated with respect to Question 1, the term “conventionally,” in the Respondent’s submission, does not have a clear and precise meaning.

[18] The Respondents accepted that Question 4 stated a proper question that did not misstate the facts and submitted that it appeared to represent the issue which the Appellants seek to raise. The Respondents’ position with respect to Question 4 is that the Board did not make the error alleged by the Appellants because the Board followed an entirely different decision-making process that was appropriate to the case, that the Appellants’ interpretation of *Jockey Club* is incorrect, and finally that as a result of appraisal tolerance, the Board decision should be upheld even if the Board erred in other parts of its decision.

The Decision

[19] With respect to the decision, the court is entitled to refer to the Board's reasons for purposes of interpreting or explaining the Stated Case: see *Bentall Retail Services v. Assessor of Area #09 - Vancouver,* 2006 BCSC 424, and to see if the reasons disclose an error in principle: see *Western Indoor Tennis.*

[20] The Board framed the issues in its Decision as follows:

> [5] The general issue is what are the actual values of the properties at July 1, 2003, July 1, 2004 and July 1, 2005, the valuation dates for the 2004, 2005 and 2006 assessment rolls.
>
> [6] The Assessor submits that the Appellant challenges only the improvement value with each of the properties, while the Appellant states as follows; "These appeals were initiated to review overall values..." The Assessor also provides evidence and submissions on the total values of the properties. The Appellant originally appealed the total assessment with each of the properties.
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> [7] Based on the information before me, I consider these appeals to involve the total values of each of the properties and that the dispute over the total assessed values is the central issue to these appeals. Particularly in light of the direction given to the Board by section 57(1)(b) of the *Assessment Act* that provides that "...when considering whether land or improvements are assessed at actual value (the Board) must consider the total assessed value of the land and improvements together."
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> [8] On the question of the total actual values of the properties at the applicable valuation dates, the parties disagree on the basic methodology for valuing properties that are in transition from a current use to their highest and best use. The parties are, however, in agreement that the current uses for the properties are not the highest and best uses, but, the parties disagree on the correct valuation method for real estate in this circumstance. The parties rely on a mix of market data, assessment data plus previous Board and court decisions in their arguments.
>
> [9] The valuation dispute then evolves into the relative values for the land and improvements of each of the properties. Also, disputed is the correct valuation method for transition, or interim use, improvements.

[21] The Reasons describe the approach taken by the Appellants as follows:

> [10] Mr. John Parkes prepared the submissions for the Appellant. Mr. Parkes' basic premise is to argue the actual value for each of the properties by questioning the land and improvements component values separately. Mr. Parkes contends that the actual values are excessive because the improvements values in each case are too high while the land values are correct.
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> [11] In his written submission Mr. Parkes states as follows:
>
> > "Accordingly, it is the calculation of the nominal value for the improvements that is in question in this hearing"
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> [12] Mr. Parkes then cites previous Board decisions, *Truonghin Enterprises Ltd. v. Assessor of Area #09* (1997 PAABBC 199724165), *Botham Holdings Ltd. v. Assessor of Area #09* (2008 PAABC 20072560), *Hanover Properties Ltd. v. Assessor of Area* #08 (1997 PAABBC 199717971), and *Broadway Properties Ltd. v. Assessor of Area #09* (2005 PAABBC 20050029), in support of his argument that a transition property should be valued at the full highest and best use of land value and a nominal amount should be added for the existing improvements. In this regard, Mr. Parkes cites appraisal theory involving the principle of consistent use, which requires the land and improvements components of real estate be valued by the same method. Mr. Parkes

> says that it is incorrect to value land at the market rate and then to value the transition improvements on the basis of depreciated cost.
>
> ...
>
> [15] In summary, Mr. Parkes' evidence is that the highest and best use for the properties is redevelopment over the short term. Mr. Parkes submits that the land values for the properties are supported by the land assessments for the four sites he introduces. He then submits that the improvements values should be reduced to the nominal level of $10,000. Mr. Parkes relies on the Board decision in *Botham Holdings, supra.,* as well as other Board decisions as the basis for the improvements value at $10,000.

[22] The Assessor took a different approach, described as follows in the reasons:

> [16] Mr. Derek R. Holloway prepared the written submission for the Assessor. Mr. Holloway's basic premise is that the total actual value assessments for the properties are correct and that under the terms of the *Assessment Act*, he must split the total assessments for each roll year between land and improvements.
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> [17] Mr. Holloway sets out his valuations in his written submission. He relies on the direct comparison approach for each of the properties' total actual values. With that method, he researches sales of commercial and industrial zoned parcels, in comparable locations to the properties. These sales are grouped in three time periods relevant to the three assessment years in question. Some of these sold parcels are vacant while others have transition class improvements. With each sale, Mr. Holloway divides the selling price by the lot area to calculate the selling rate. In the case of the parcels with transition improvements, the calculated selling rate includes the value, if any, for those improvements, as determined by the market.
>
> [18] In summary, Mr. Holloway's evidence is that the highest and best use for the properties is redevelopment over the short to intermediate term. Mr. Holloway has valued the properties through direct comparison to transition type sales data and determined the total actual values from this data. He then splits those total values between land and improvements for each of the properties.

[23] The Board preferred the evidence and method of the Assessor, noting that the approach adopted by the Assessor closely mirrored how the market treats transition real estate. In the Reasons, the Board sets out the parties' position with respect to issues involving transition or interim use of improvements at paras. 24 to 26:

> [24] The parties disagree over several sub-issues involving transition, or interim use, improvements and the correct method to value same. The major points of disagreement here revolve around the time frame of the interim use, the correct method to calculate the value for interim use improvements and the interpretation of the cited court and Board cases.
>
> [25] In summary, Mr. Parkes argues that the improvements on the five properties have an effective life of five months and contribute only nominal value, which he contends should be set at $10,000 each. The Assessor argues that these improvements have an effective life of two years and contribute values based on income that support the actual assessed values at the three years in question.
>
> [26] None of these arguments impact the central issue of the total actual values for the properties because, as I concluded, Mr. Holloway's market evidence supports the total actual values for the five properties at the appeal dates in question.

It notes what it considers that an Assessor should do with respect to valuation of suspected interim use properties at paras. 35 and 36:

> [35] Rather, what the Assessor should do is first consider valuing suspected interim use properties under the existing use by the appropriate methodology (the income and direct comparison approaches) then to compare that value to the land value under the highest and best use. If the value of the existing use development is less than the highest and best use land value, the existing improvements do not contribute and have no value.
>
> [36] In the instance where the highest and best use for the land may not be realized for an interim period, the existing improvements notionally could contribute and have value. With an income producing development, the building residual method would be used to measure that value. With that method, the market based income stream would be apportioned, first to the portion required to support the highest and best use land value, and then to the residual income attributable to the improvements. The present worth of that residual income stream, then would define the improvement value. Some consideration would also be given to a deferral, or reduction, of the land value to account for the length of the selected interim use period. Also, an allowance for building demolition costs would be made. The required inputs would include gross market derived income data, land and improved property return rates, demolition costs, and market derived transition use time frame analysis.

[24] The conclusion of the Board are set out at paras. 23, 37 and 38 of the reasons:

> [23] Mr. Parkes chooses to argue the total actual values by questioning the improvements values in isolation of the land values. Mr. Parkes provides no direct market evidence to prove his point that the total actual values are excessive. He relies solely on a very limited set of land assessments to back up his contention that the assessed land values are correct. He then argues that the improvements values are too high and, by inference, that the total values are excessive. I find Mr. Parkes' evidence to be relatively weak in support of his arguments on actual values. If Mr. Parkes were to submit market land sales in support of his argument that the properties' land assessments for the appeal years are correct, I could be more persuaded by his argument on total value. I cannot give a set of assessed land rates involving only four sites the same credibility as the market sales data provided by Mr. Holloway.
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> ...
>
> [37] With this decision, I do not have the necessary market evidence of land values from either party to determine if the apportioned land values at the 2004, 2005 and 2006 valuation dates are correct or off the mark. I only have market evidence on total values, which I find to be credible and supportive of the total assessments with the properties. In the absence of the necessary market data, I have no evidence to analyze the apportioned land assessments before me. Since, I lack the evidence to analyze the apportioned land values, I cannot analyze the apportioned improvements values, although I disagree with the methodology relied upon by the Assessor to determine those improvements values. I have the necessary evidence to support the total values and the decisions of the Review Panels, and nothing more.
>
> [38] I find no evidence that the properties are assessed incorrectly or unfairly and I find that the actual values of the properties as of the applicable valuation dates are in the range of the values confirmed by the Property Assessment Review Panel.

Discussion

[25] I turn then to the analysis of the questions. As noted in the Court of Appeal decision in *Broadway Properties Ltd. v. Vancouver (Assessor of Area #09),* 2007 BCCA 298, the court's jurisdiction is derived from the *Act* and circumscribed by the statute. Mr. Justice Lowry, speaking for the court, stated at para. 8:

> The basis of an appeal from a decision of the Board is circumscribed by the statute. It is confined to a question of law alone. There is no provision under which the court can consider a question

> that has not been stated or, for that matter, to alter and then answer a question that has been stated. Counsel on this appeal, who did not frame the question, asks us to consider its wording generously. But on what he says I consider that would require our answering a different question than what has been posed in the Stated Case.

By this I take the Court of Appeal to be reinforcing the principle that the court must direct itself to the questions as stated by the parties. Accordingly, I will address the questions in turn.

Question 1

[26] With respect to Question 1, I conclude that the answer to the first question is "no". The fundamental difficulty is that, contrary to the assumption on which the question rests, the Board did not value the land as if vacant and the improvements by the cost approach to value. Rather, it is clear from the Stated Case and the Reasons that the Board adopted a different approach, namely, to value the properties via direct comparison to transition-type sales data and determine the total actual values from this data, then splitting the values between land and improvements.

Question 2

[27] With respect to Question 2, I conclude that the answer to the second question is "no". First, the question assumes that there was an agreed-upon land value. However, there was no such agreed-upon value, and further, the issue on appeal was the total value of the property. The Appellants submit that there was in fact an agreement with respect to the value of the land. First, the Appellants note that the *Act* contemplates an appeal with respect to either or both land and improvements. The Appellants note further that the Assessor to some extent vouches for the correctness of the roll. Here, the Assessor did not appeal and did not assert that the land values in the roll were incorrect.

[28] The Appellants submit that in such circumstances the Assessor cannot be heard to say that the land value is incorrect. The difficulty with this submission, in my view, is that it is not consistent with the legislation. While the *Act* does contemplate appeals with respect to the valuation of land or improvements, s. 57 provides that:

> 57 (1) In an appeal under this Part, the board
>
> (a) may reopen the whole question of the property's assessment to ensure accuracy and that assessments are at actual value applied in a consistent manner in the municipality, treaty lands of the taxing treaty first nation or other rural area, and
>
> (b) when considering whether land or improvements are assessed at actual value, must consider the total assessed value of the land and improvements together.

[29] In my view, it is clear from the Stated Case that the issue is the actual value of land and improvements and that in considering this issue, the *Act* stipulates that the Board must consider the total assessed value of both land and improvements, whether or not either or both of the parties has put the question of land value at issue. Second, in my view, the Board did not decline to follow the principles in the *Jockey Club* line of cases; rather, it took the different approach.

Question 3

[30] The answer to Question 3, in my view, is "no" for essentially the reasons given with respect to Question 2. The Board did not value the improvements conventionally. There was no agreed-upon land value. The Board's approach was based upon the total value of land to the improvements.

Question 4

[31] With respect to Question 4, I first consider what is the principle of general law that emerges from the case law. In *Jockey Club* at 225, the court started from the following general proposition:

> The actual value is to be determined by the evidence and not only the present use of land and benefits derived therefrom by the owner, but all the potentialities are to be taken into consideration.

In that case the highest actual value that could be given to the land was on the basis of its potential value as a subdivision which involved the destruction of all the buildings. The court noted at 227 that the buildings added nothing to the value of property beyond their value for the purpose of being wrecked and removed and concluded that in those circumstances it would be "manifestly improper to value the land for the purpose of a subdivision, which would involve the destruction of the buildings, and then value the buildings on the basis of their being used for the purposes of a racetrack." The court thus concluded that "[i]f the buildings were to be valued on that basis, the land would have to be valued on that basis also." In the result, the improvements were valued at $5,000, being their value for wreckage purposes.

[32] In *Re Tyandaga Golf & Country Club and Town of Burlington,* [1970] 2 O.R. 612 (C.A.), the court concluded that it was wrong in principle where the highest and best use was a value of the raw land for development for the improvements to be then valued as if undisturbed.

[33] *Arbutus Club v. Assessor of Area #09 – Vancouver* (1980), 24 B.C.L.R. 301 (S.C.), was a decision to the same effect. The court concluded that it was an error of principle to value improvements on the basis of current use when the land was being valued on the basis of use other than that for which it was presently zoned.

[34] *Western Indoor Tennis* was another decision to the same effect. Chief Justice McEachern concluded that it was an error in principle to determine land values on the basis that the land was vacant and to value improvements conventionally, that is, on the basis that the land was not vacant.

[35] *Broadway Properties Ltd. v. Assessor of Area #9,* an unreported decision of the British Columbia Supreme Court on September 20, 2005, concerned the concept of interim use by which income-producing improvements on interim property can be valued. Kelleher J. noted that it is not an error in principle to apply a concept of interim use in the valuation of properties for which the present current use is not the highest and best use.

[36] In my view, the Board did not value the land as if for redevelopment and the improvements as in the existing use in the case at bar. This is implicit in paras. 6 to 9 of the Stated Case. Rather, the Board took a different approach, looking at total value.

[37] The Reasons are consistent with the facts set out in the Stated Case and provide additional clarification with respect to the material facts. In my view, the reasons are consistent with the conclusion that the Board did not make the error identified in Question 4. Accordingly, the answer to Question 4 is no.

[38] In the result, the answers to the four questions are "no" in each case. There was no error of law. The appeal is dismissed with costs.