SC 539 571016 BC Ltd et al v AA09 & PAAB

Link to Property Assessment Appeal Board Decision

Link to Property Assessment Appeal Board Amend Order

571016 B.C. LTD. and
TURBO PROPERTIES LTD.

v.

ASSESSOR OF AREA 09 – VANCOUVER SEA TO SKY REGION and
PROPERTY ASSESSMENT APPEAL BOARD

SUPREME COURT OF BRITISH COLUMBIA (S087350) Vancouver Registry

Before the HONOURABLE MADAM JUSTICE ROSS
Date and Place of Hearing: May 6, 2010, Vancouver, B.C.

Doug Clarke for the Appellants
John McLachlan for the Respondents

Automobile Dealership – Highest and Best Use – Cost Approach – Standard of Review

The subject property is a Porsche automobile dealership owned by the Appellant Turbo Properties Ltd. The building is a reinforced concrete two-level commercial building with rooftop parking, purpose built for the sale and service of automobiles. On appeal the Property Assessment Appeal Board ("the Board) found that the property's highest and best use was as developed and that the appropriate valuation method was the cost approach. The Appellants appealed the Board's decision to this Court asking thirteen questions.

HELD: *Appeal Dismissed.*

This Court found that the reasonableness standard of review applied to the majority of the questions of law, with the correctness standard of review applying to questions five and six. The Court said the difference in standards was appropriate as question five referred to statutory interpretation which is reviewable on a correctness standard and question six, in the Court's view, concerned the correct legal test for which the standard is also correctness. The other questions asked whether the Board had acted without evidence or on a view of the facts that could not reasonably be entertained. In the case of such questions the correct standard of review is reasonableness. Through the analysis of the Board's conclusions, the Court was satisfied that the Board assessed the evidence that was provided to them and that the decision reached by the Board was correct with respect to questions five and six and was reasonable with respect to all other questions.

The Board had evidence that the current use of the property was its highest and best use. It is not within the jurisdiction of the Court to substitute its own assessment of the evidence with respect to highest and best use, on an appeal under section 65 of the Assessment Act. *All of the questions of law were answered in the negative and the appeal was dismissed.*

Reasons for Judgment June 7, 2010

[1] This is an appeal by way of Stated Case by the Appellant 571016 B.C. Ltd. and the Appellant Turbo Properties Ltd. (collectively, the "Appellants") from a decision of the Property Assessment Appeal Board of British Columbia (the "Board") dated September 5, 2008 (the "Decision") pursuant to s. 65 of the *Assessment Act,* R.S.B.C. 1996, c. 20 (the *"Act").*

[2] The Board's Decision confirmed the decision of the Property Assessment Review Panel with respect to the valuation for the 2007 assessment and amended the 2008 assessment as follows:

Roll No. 09-39-200-007-638-120-96-0000 - 2008-09-00094 & 2008-09-00131

		FROM	**TO**
Land:	Class 6 – Business and Other	$3,531,000	$3,531,000
Improvements:	Class 6 – Business and Other	$587,000	$2,612,000
	Total Assessed Value:	$4,118,000	$6,143,000

[3] The subject property is the land and buildings located at 1718-3rd Avenue in Vancouver (the "Property"). The site houses a Porsche automobile dealership owned by the Appellant Turbo Properties Ltd. The building is a reinforced concrete two-level commercial building with rooftop parking, purpose built for the sale and service of automobiles.

Section 65 Appeal

[4] 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.

[5] The Court of Appeal in *British Columbia (Assessor of Area No. 27 - Peace River) v. Burlington Resources Canada Ltd.,* 2005 BCCA 72, 37 B.C.L.R. (4th) 151, described at para. 18 the scope of the term "question 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.

2. A misapplication by the Board of an applicable principle of general law.

3. Where the Board acts without any evidence.

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.

[6] The court, in considering categories 3 and 4, is not to trespass on the exclusive province of the Board with respect to findings of fact. In *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 *[Gemex],* Newbury J.A., writing for the court, noted the five categories of questions of law described above and then stated at para. 9:

> ... As Mr. Savage points out in the case at bar, questions as to the sufficiency of evidence or as to which expert opinion should be preferred by the Board in deciding the highest and best use of a given property were questions of fact within the Board's exclusive jurisdiction: see *Comox Provincial Assessor v. Crown Zellerbach Canada Ltd.* (1963), 42 W.W.R. 449 (B.C.C.A.) at 458 and *Caldwell v. Stuart,* [1984] 2 S.C.R. 603 (S.C.C.), at 613.

[7] In *Delsom Estates Ltd. v. British Columbia (Assessor of Area No. 11 - Richmond/Delta),* 2000 BCSC 289, [2000] B.C.T.C. 1050 [*Delsom*], Hood J. provided a helpful clarification of the test at paras. 18 and 19 as follows:

> In the case at Bar in order for the Appellant to succeed on any of the questions stated, it must establish that the Board's view or interpretation of the facts leading to the question could not reasonably be entertained; that is to say, that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word "could".
>
> Henceforth in these Reasons I will refer to the test as being whether there was any evidence before the Board which could support the finding challenged, as defined above. If I say or find that there "was evidence" or "some evidence" before the Board, I will simply be indicating that in my opinion the Appellant has not established error in law as regards the particular point; that is, to say that the Appellant has not established that the Board acted without any evidence or upon a view of the facts which could not reasonably be entertained. I should add perhaps the obvious, that the onus on the Appellant to establish that there was no evidence before the Board which supported a particular finding, is not lightly discharged. If there is some evidence on which the Board could come to that finding, the Court has no jurisdiction to intervene.

The Stated Case

[8] The Stated Case sets out the following material facts:

1. The appeals before the Board were from the decisions of the 2007 and 2008 Property Assessment Review Panels (Review Panels) with respect to property located at 1718 3rd Avenue W, in the City of Vancouver. Both the Assessor (Respondent to this Stated Case) and the Appellants commenced appeals to the Board from the Review Panels' decisions in both years. The issues before the Board were 1) the determination of actual value of the property as of July 1, 2006 and July 1, 2007 in its physical condition as of October 31, 2006 and October 31, 2007, respectively, and 2) whether the property was equitably assessed relative to similar properties in the municipality.

2. The Appellants did not dispute that the assessed land values were at market value and equitable, but submitted the improvement assessments for both years were not equitable in relation to other similar properties in the area and should be reduced to $10,000. The Assessor submitted that although the improvement value on the 2007 roll was in error, the 2007 roll value was equitable and should be confirmed at $4,417,000 (land $2,849,000; improvements $1,568,000), and that the 2008 roll should be increased from $4,118,000 (land $3,351,000; improvements $589,000) to $6,148,000 (land $3,351,000; improvements $2,612,000).

3. The property is a two level commercial building with rooftop parking purpose built for the sales and service of luxury automobiles, namely Porsche. The property comprises an 11,800 square foot lot (100 feet by 118 feet) located on the corner of 3 Avenue and Pine Street in the City of Vancouver. The improvements constructed in 1999 consist of a 2,002 square foot showroom, 1,836 square foot office and parts area, and a 5,482 square foot service area on both the main floor and basement. In addition, there is rooftop parking of 3,210 square feet, with all levels accessed by a car elevator.

4. The site was purchased in 1999 for $1,227,000 and the building was constructed in the same year for $2,407,000.

5. The Board found the property's highest and best use is as developed.

6. The Board accepted that the appropriate valuation method is the cost approach.

7. The Board found the actual value for 2007 was $5,379,000 (land $2,849,000; improvements $2,530,000) and that the actual value for 2008 is $6,143,000 (land $3,531,000; improvements $2,612,000).

8. The Board found the equitable value was lower than the actual value for 2007, and that the Board's findings as to actual value for the 2008 roll were equitable.

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

1. Did the Property Assessment Appeal Board err in law in acting without any evidence or on a view of the evidence that could not be reasonably entertained when it found that the highest and best use of the subject was as developed?

2. Did the Property Assessment Appeal Board err in law in acting without any evidence or on view of the evidence that could not reasonably be entertained when it found that the parties had no dispute that the subject property was in its highest and best use at the use as developed when it was plain from the submissions made and the evidence led by or on behalf of the Appellants that the question as to whether the subject was at its highest and best use was vigorously disputed by the Appellants, was a live issue, and was on the submission of the Appellants a critical issue before the Board?

3. Did the Property Assessment Appeal Board err in law in acting without any evidence or on a view of the evidence that could not reasonably be entertained when it failed to consider the competing evidence and the arguments made by the Appellants in finding that "the subject's highest and best use was as developed", while not making any analysis of the question in accordance with the definition of "highest and best use" as put forward in evidence or at all?

4. Did the Property Assessment Appeal Board err in law in acting without any evidence or on a view of the evidence that could not reasonably be entertained in finding that the comparable assessments cited by the Appellants were not persuasive evidence that the subject had been assessed inequitably as regards other similar properties?

5. Did the Property Assessment Appeal Board err in law in its interpretation or application of the applicable section of the *Assessment Act* in that it failed to enquire and to carry out its duty to ensure that the subject had been assessed at actual value applied in a consistent manner in the municipality?

6. 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 *Toronto v. Ontario Jockey Club* [1934] S.C.R. 223 *[Jockey Club],* as applied in *Western Indoor Tennis v. Assessor of Area 11 - Richmond-Delta* (1981) B.C. Stated Case 148 and *Botham Holdings Ltd. v. Assessor of Area #09* (2008-09-00239)?

7. Did the Property Assessment Appeal Board err in law in acting without any evidence or on a view of the evidence that could not reasonably be entertained in finding that the value of the subject land was driven by the use for an automobile dealership despite the uncontradicted evidence led on behalf of the Appellants was to the effect that the value of the subject land was driven by the "booming" demand in the area for mixed use residential development?

8. Did the Property Assessment Appeal Board err in law in acting without any evidence or on a view of the evidence that could not reasonably be entertained in finding that the subject was at highest

and best use despite the uncontradicted evidence led on behalf of the Appellants that the determination of whether highest and best use had been achieved, the income approach is applied and if the value via the income approach falls below the land value, the existing use is not the highest and best use?

9. Did the Property Assessment Appeal Board err in law in acting without any evidence or on a view of the evidence that could not reasonably be entertained in finding that the determination of actual value was a live issue at the hearing, given that throughout the Appeal Management process, and in all exchange of material and evidence, written and oral, it was the position of both Appellants and Respondent that the issue on appeal was as to equity only?

10. In the light of the error alleged in paragraph 9 above, did the Property Assessment Appeal Board err in law in acting without any evidence or on a view of the evidence that could not reasonably be entertained in attaching some significance (as if a concession by the Appellants) to the finding that the Appellants "takes no issue regarding actual value" - when actual value was just not in issue?

11. Did the Property Assessment Appeal Board err in law in acting without any evidence or on a view of the evidence that could not reasonably be entertained in finding actual value for the improvements on the subject when the question of actual value was expressly not before the Board and the Appellants (as a result) had led no evidence on the question?

12. Did the Property Assessment Appeal Board err in law in acting without any evidence or on a review of the evidence that could not reasonably be entertained in finding that the equity comparables did not support the argument that the subject should be valued by the income approach, when on the uncontradicted evidence of the Appellants the utilization of the income approach was a means of establishing whether or not the subject was at its highest and best use, not a valuation technique?

13. Did the Property Assessment Appeal Board err in law in acting without any evidence or on a view of the evidence that could not reasonably be entertained in acting without any evidence or on a view of the evidence that could not be properly entertained in finding that it was equitable to have assessed all of the competing automobile dealerships at 95% (or more) depreciation and the subject at negligible depreciation?

Standard of Review

[10] The Assessor submits that the standard of review to be applied to the questions posed by the Appellants in the present case is reasonableness, citing *Legends Owners Association. v. Assessor of Area #08,* 2006 BCSC 177, 18 M.P.L.R. (4th) 243, in which Brown J. states at para. 12:

> In the case at bar, the issues include both statutory interpretation and whether the board has acted on a view of the facts that could not reasonably be entertained. Questions with respect to the former, as in *Burlington* [2005 BCCA 72], are reviewable on a correctness standard. With respect to the latter, the standard is different. Where a finding being reviewed is one of pure fact, this factor militates in favour of showing more deference towards the tribunal's decision: *Dr. Q v. College of Physicians and Surgeons of British Columbia,* [2003] 1 S.C.R. 226 at para. 34. On such questions the appropriate standard of review is reasonableness.

[11] In *Vancouver Pile Driving Ltd. v. British Columbia (Assessor of Area #8 - Vancouver Sea to Sky Region),* 2008 BCSC 810 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.

[12] I agree that the standard of review is one of reasonableness with respect to all but questions 5 and 6 posed in the present case. Question 5 refers to statutory interpretation which is reviewable on a correctness standard. Question 6, in my view, concerns the correct legal test for which the standard is correctness.

The Decision

[13] 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 *[Bentall],* and to see if the reasons disclose an error in principle: see *Western Indoor Tennis Ltd. v. Assessor of Area 11 (Richmond Delta)* (1981), 29 B.C.L.R. 265 (S.C.).

[14] The court is restricted to the facts set out in the Stated Case and Decision. The court is not entitled to substitute findings of its own or to weigh the evidence. The court is entitled to refer to the transcript of evidence to determine, where the matter is at issue, whether there is any evidence to support a finding of fact or for the purpose of interpreting or explaining the Stated Case: see *Caldwell v. St. Thomas Aquinas High School,* [1984] 2 S.C.R. 603; *Hennessy v. British Columbia (Assessor of Area No. 01 - Capital)* (1996), 79 B.C.A.C. 275 *[Hennessy];* and *Bentall, supra.*

[15] The two issues before the Board were the actual value of the Property and whether the Property had been assessed equitably. With respect to the issue of actual value of the land, the parties agreed with respect to the value; however, the Appellants submitted that this value was for development purposes. The Assessor submitted that the Property was at the highest and best use relying upon a recent sale for a proposed Ferrari dealership. The Board found that the highest and best use was as developed.

[16] With respect to the value of the improvements, the Assessor submitted that there were no comparable rents to support an income approach or comparable sales to support a direct comparison and that the cost approach was the appropriate valuation method. The Board accepted that the costs approach was the appropriate valuation method concluding:

> [15] In summary, I find that actual value for 2007 is $5,379,000 (land $2,849,000, improvements $2,530,000) and I find that the actual value for 2008 is $6,143,000 (land $3,531,000, improvements $2,612,000).

[17] With respect to equity, the Assessor took the position that with respect to the 2007 roll, the improvement value was probably in error, but it had been prepared on a consistent basis with comparable properties and, therefore, represents equitable value. For the 2008 roll, the Assessor's position was that the revised value represented equitable value. The Assessor stated the following:

> [18] Mr. Redlich's evidence is that the subject is the only full service automobile dealership in existence situated on I-C 1 zoned land in Vancouver's West side that represents a highest and best use. As such, there is no other property from which evidence can be drawn to alter the subject's valuation.

[18] The Appellants position was as follows:

> [19] The Appellant's entire case comprises an equity analysis. His analysis involves relying on rents taken from Property Valuation Summaries (PVS's) of seven properties that have partial or full automotive and/or servicing use. By applying a hypothetical income approach to the subject, he arrives at a value below that of the land value and concludes that for equity purposes, the subject is a redevelopment site.

[19] The Board analyzed the proposed comparables and concluded:

> [21] The seven comparables are not persuasive evidence that the subject should be valued by the income approach for equity purposes. The subject is a modern full automobile dealership built to its highest and best use. Index 1 is essentially retail space and the remaining comparables are not at their highest and best use. Furthermore, the rents that show on the Property Valuation Summaries do not appear to have formed the basis of the roll values or scrutinized for continued accuracy. I accept the Assessor's evidence that there are no comparables for the subject and that only valuations utilized in support of the roll values should form the basis of an equity argument. In the absence of such evidence, and since I am assured that the cost approach is applied in a consistent manner, I accept that the cost approach is the correct method to value the subject for purposes of analyzing equity.
>
> ...
>
> [23] I accept the Assessor's evidence that the subject improvements are costed consistently with comparable properties for both years. The equitable value is lower than actual value for 2007, however, I find that my findings as to actual value for 2008, is equitable.

Position of the Parties

[20] The Appellants took the position, with respect to the questions as a whole, that the Appellants had accepted the valuation of the land as the value for development. It follows, in the Appellants' submission, that the improvements must be given a nominal value since the current use was not the highest and best use. Further, they submitted that the other comparable properties were valued on that basis, that is, land value plus nominal value for improvements; accordingly, equity required that the subject property be given the same treatment.

[21] It was submitted that the Appellants' expert was not cross-examined with respect to the issue of the valuation of the land. The Assessor's expert witness did not contradict the Appellants' expert witness' evidence with respect to the valuation. Accordingly, in the Appellants' submission the Board's finding that the subject was at the highest and best use was a conclusion made in the absence of evidence and constituted an error of law. Further, the Appellants submitted that all of the comparable properties were valued on the basis submitted by the Appellants and accordingly the Board's conclusion with respect to the equity issue was made in the absence of evidence.

[22] The position of the Respondent was that there was evidence before the Board with respect to the land value and highest and best use. The Board accepted that evidence and was entitled to do so. Further, the Board concluded that the comparables put forward by the Appellants were distinguishable. That was a finding of fact made by the Board within its jurisdiction with which the court is not entitled to interfere.

Analysis

> Question 1
>
> Did the Property Assessment Appeal Board err in law in acting without any evidence or on a view of the evidence that could not be reasonably entertained when it found that the highest and best use of the subject was as developed?

[23] The Board concluded that the highest and best use of the Property was as developed. There was evidence before the Board of a land sale in the subject block for a proposed Ferrari dealership in January 2006 that supported the land values. The Board noted that the Assessor took the position that that sale for a similar use supported the conclusion that the subject is developed at its highest and best use. Thus, there was evidence before the Board with respect to the issue of land value and highest and best use.

The Appellants' arguments amount to an invitation for the court to substitute its own assessment of the evidence but the court is not entitled to do so.

[24] The answer to Question 1 is "No".

Question 2

> Did the Property Assessment Appeal Board err in law in acting without any evidence or on view of the evidence that could not reasonably be entertained when it found that the parties had no dispute that the subject property was in its highest and best use at the use as developed when it was plain from the submissions made and the evidence led by or on behalf of the Appellants that the question as to whether the subject was at its highest and best use was vigorously disputed by the Appellants, was a live issue, and was on the submission of the Appellants a critical issue before the Board?

[25] The issues before the Board were the actual value of the Property and whether the assessment was equitable relative to similar properties. The role of this court on a s. 65 appeal is to consider whether, in making its determinations, the Board committed an error of law. With respect to the issue of actual value, it is evident that the Board turned its mind to this issue, considered the evidence and made a finding. There is no suggestion that evidence was overlooked. Further, the Board notes at para. 9 of the Reasons:

> Mr. Parkes, while disagreeing that the subject is developed at its highest and best use for equity purposes, takes no issue regarding actual value.

The Board did not misapprehend the Appellants' position in this regard. Accordingly, the answer to Question 2 is "No".

Question 3

> Did the Property Assessment Appeal Board err in law in acting without any evidence or on a view of the evidence that could not reasonably be entertained when it failed to consider the competing evidence and the arguments made by the Appellants in finding that "the subject's highest and best use was as developed", while not making any analysis of the question in accordance with the definition of "highest and best use" as put forward in evidence or at all?

[26] As noted in Question 1, there was evidence before the Board which supported a finding that the Property's highest and best use was as developed. The Question is, in my view, an attack on the sufficiency of the Board's reasons. However, as Huddart J.A., speaking for the court, noted in *Hennessy* at para. 25:

> As the chambers judge noted in her reasons, the Board did not explain its reasoning with regard to the propriety of the Assessor's reclassification of the land and improvements. However, the Assessment Appeal Board is not required by statute or common law to deal explicitly in reasons with every piece of evidence and every argument put before it and either to accept it or reject it. *Assessor of Area 14 - Surrey-White Rock v. Simpsons-Sears Ltd.* Case 136 B.C.C.A. (CA800608 Vancouver Registry) January 22, 1981. Thus, the failure of the Assessment Appeal Board to state why it agreed with the Assessor's classification is not an error of law that permits the Supreme Court to interpret the regulation and determine whether or not lands and improvements come within a particular class.

The answer to Question 3 is "No".

Question 4

> Did the Property Assessment Appeal Board err in law in acting without any evidence or on a view of the evidence that could not reasonably be entertained in finding that the comparable assessments cited by the Appellants were not persuasive evidence that the subject had been assessed inequitably as regards other similar properties?

[27] The Board considered each of the comparables proposed by the Appellants and concluded at para. 21 that:

> The seven comparables are not persuasive evidence that the subject should be valued by the income approach for equity purposes. The subject is a modern full automobile dealership built to its highest and best use. Index 1 is essentially retail space and the remaining comparables are not at their highest and best use.

[28] In reaching this conclusion the Board was assessing the evidence and making findings of fact, activities that are within its province and entitled to deference by this court. As noted by Macaulay J. in *Allard Contractors Ltd. v. Assessor of Area* 05 - *Port Alberni* (29 October 1999), Vancouver A983461, Stated Case 429 (B.C.S.C.):

> The Board considered this issue. It found that the other gravel pits were located 15 miles away near Bowser and that properties located close to Parksville were more valuable. The Board went on to reject Allard's contention that it was not being assessed consistently with other similar properties in the area. So the Board found expressly that the other gravel pit properties were not comparable and implicitly that they were not similar enough to affect the equitable analysis.
>
> While the other properties were similar in size and zoning to the Allard property, there was evidence that the locations were more remote and that the Assessor did not consider them comparable. As Mr. Savage put it for the Respondent, the Board was faced with conflicting evidence as to whether the other properties were comparable and found the Assessor's evidence to be more thorough and compelling. The Board's findings of fact were not unreasonable.
>
> I accept Mr. Savage's submission that equitable considerations require a consideration of a class of similar properties, but that all properties are not necessarily similar just because they have some shared feature.

[29] The weighing of the evidence is for the Board. It is not for this court to substitute its own assessment of that evidence. The Board's finding cannot be said to be a view that could not be reasonably entertained.

[30] Thus, the answer to Question 4 is "No".

> Question 5
>
> Did the Property Assessment Appeal Board err in law in its interpretation or application of the applicable section of the *Assessment Act* in that it failed to enquire and to carry out its duty to ensure that the subject had been assessed at actual value applied in a consistent manner in the municipality?

[31] The Board's jurisdiction is set out in s. 57 of the *Act.* Section 57(1) of the *Act* provides:

> 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.

[32] This is consistent with what have been described as the two basic principles of valuation to be applied; first, that property is to be assessed at actual value and second, that there be "equity" as

between assessed values of similar lands, see *Assessor of Area 09 - Vancouver v. Bramalea Limited (Trizec Equities Limited)* (14 December 1990), Victoria CAV00992, Stated Case 277 (B.C.C.A.).

[33] In the present case the Board identified the two issues as follows:

> [6] The issues are:
>
> The determination of actual value of the property as of July 1, 2006 and July 1, 2007 in its physical condition as of October 31, 2006 and October 31, 2007, respectively (value).
>
> Whether the property is properly assessed relative to similar properties in the municipality (equity).

[34] It proceeded to analyze the evidence and answer those questions. No error in its interpretation of application of the duty established by the *Act* has been identified.

[35] The answer to Question 5 is "No".

Question 6

> 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 *Toronto v. Ontario Jockey Club* [1934] S.C.R. 223 *[Jockey Club],* as applied in *Western Indoor Tennis v. Assessor of Area 11 - Richmond-Delta* (1981) B.C. Stated Case 148 and *Botham Holdings Ltd. v. Assessor of Area #09* (2008-09-00239)?

[36] The error of law identified in the *Jockey Club* line of cases is for the Board to value the land for redevelopment while valuing the improvements on the basis of the present and incompatible use. This question presupposes that the Board valued the land as if vacant, *i.e.* that the highest and best use was for redevelopment. However, it is clear that this is not the case. The Board concludes at para. 9:

> I, therefore, find that in determining actual value, the subject's highest and best use is as developed.

[37] Accordingly, the Board did not make the error of law described and the answer to Question 6 is "No".

Question 7

> Did the Property Assessment Appeal Board err in law in acting without any evidence or on a view of the evidence that could not reasonably be entertained in finding that the value of the subject land was driven by the use for an automobile dealership despite the uncontradicted evidence led on behalf of the Appellants was to the effect that the value of the subject land was driven by the "booming" demand in the area for mixed use residential development?

[38] There was evidence before the Board of a land sale in the subject block for a proposed Ferrari dealership in January 2006 that supported the land values. The Board noted that the Assessor took the position that that sale for a similar use supported the conclusion that the subject is developed at its highest and best use. The Board accepted this evidence as it was entitled to do.

[39] The answer to Question 7 is "No".

Question 8

> Did the Property Assessment Appeal Board err in law in acting without any evidence or on a view of the evidence that could not reasonably be entertained in finding that the subject was at highest and best use despite the uncontradicted evidence led on behalf of the Appellants that the determination of

whether highest and best use had been achieved, the income approach is applied and if the value via the income approach falls below the land value, the existing use is not the highest and best use?

[40] This question is essentially a restatement of Question 7. Further, the choice between expert opinions with respect to the issue of highest and best use, is within the exclusive province of the Board, see *Gemex.* The answer to Question 8 is "No" for essentially the reasons given with respect to questions 1 and 7.

Question 9

Did the Property Assessment Appeal Board err in law in acting without any evidence or on a view of the evidence that could not reasonably be entertained in finding that the determination of actual value was a live issue at the hearing, given that throughout the Appeal Management process, and in all exchange of material and evidence, written and oral, it was the position of both Appellants and Respondent that the issue on appeal was as to equity only?

[41] In my view, the answer to this question turns on s. 57 of the *Act* which 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. In any event, it is clear that the issue of the actual value of the Property had been put into issue by the Appellants and the Assessor. The Assessor had appealed on the basis that assessed values were too low. The Appellants' position was that the value was too high since the value of the land was correct only if valued as if for redevelopment in which case the improvements needed to be given only a nominal value.

[42] The answer to Question 9 is "No".

Question 10

In the light of the error alleged in paragraph 9 above, did the Property Assessment Appeal Board err in law in acting without any evidence or on a view of the evidence that could not reasonably be entertained in attaching some significance (as if a concession by the Appellants) to the finding that the Appellants "takes no issue regarding actual value" - when actual value was just not in issue?

[43] For the reasons given in relation to Question 9, the answer to Question 10 is "No".

Question 11

Did the Property Assessment Appeal Board err in law in acting without any evidence or on a view of the evidence that could not reasonably be entertained in finding actual value for the improvements on the subject when the question of actual value was expressly not before the Board and the Appellants (as a result) had led no evidence on the question?

[44] For the reasons given in relation to Question 9, the answer to Question 11 is "No".

Question 12

Did the Property Assessment Appeal Board err in law in acting without any evidence or on a review of the evidence that could not reasonably be entertained in finding that the equity comparables did not support the argument that the subject should be valued by the income approach, when on the uncontradicted evidence of the Appellants the utilization of the income approach was a means of establishing whether or not the subject was at its highest and best use, not a valuation technique?

[45] The Board had evidence which supported the finding that the subject use was the highest and best use. The Board analyzed the evidence with respect to the comparables proposed by the Appellants and concluded that they were not comparable for the reasons given. The Appellants' submissions in respect of this question invite the court to substitute its assessment of the evidence for that of the Board's;

however, that is not within the jurisdiction of the court on a s. 65 appeal. As Hood J. noted in *Delsom* at para. 36 with respect to the scope of review by way of Stated Case:

> The scope of review on appeal by way of Stated Case is a very limited one, being confined strictly to questions of law. In performing its tasks the Board, like the Court of Revision and the Assessor before it, of necessity, has a very wide discretion. Like any fact finder, the Board will consider and weigh many factors, and make many lessor or secondary decisions before reaching its final or primary decisions. Almost every decision made by the Board involves some discretionary judgment, and each constitutes a finding of fact. I cite here a few examples taken from decisions of this Court, and all of which are raised or complained of in the case at Bar: the question of the sufficiency and the weight of evidence. The question of whose evidence, and what evidence, is to be preferred or accepted; the choice of appraisal method, or combination of them; the choice of factors to be considered in determining actual value; the determination of what the other circumstances affecting the value of the land and improvements under s. 19(3)(h) might be; the question of what other lands are comparable; and finally, the determination of actual value itself. The Court has no jurisdiction to intervene in the Board's decisions in such matters if there was some evidence before the Board which could support the finding.

[46] The answer to Question 12 is "No".

> Question 13
>
> Did the Property Assessment Appeal Board err in law in acting without any evidence or on a view of the evidence that could not reasonably be entertained in acting without any evidence or on a view of the evidence that could not be properly entertained in finding that it was equitable to have assessed all of the competing automobile dealerships at 95% (or more) depreciation and the subject at negligible depreciation?

[47] The Board assessed the evidence with respect to each of the comparables proposed and reached its conclusion as set out above. This question invites the court to substitute its own assessment of the evidence; however, that is not within the jurisdiction of the court on a s. 65 appeal.

[48] The answer to Question 13 is "No".

Conclusion

[49] The answer to each of the questions is "no". The appeal is dismissed with costs.