SC 544 Beach Town House Apartments Ltd v AA09 and PAAB

Link to Property Assessment Appeal Board Decision

**Quick Link to Stated Case #544 (BCCA)**

**BEACH TOWN HOUSE APARTMENTS LTD.**
**v.**
**ASSESSOR OF AREA 09 – VANCOUVER SEA TO SKY REGION and**
**PROPERTY ASSESSMENT APPEAL BOARD**

SUPREME COURT OF BRITISH COLUMBIA (L120003) Vancouver Registry

Before the HONOURABLE MR. JUSTICE VOITH
Date and Place of Hearing: June 12, 2012, Vancouver, B.C.

Jennifer R. Loeb for the Applicant
John A. McLachlan for the Respondents

***Cooperative Housing Complex – Lease – Error in Law***

*The property is a cooperative housing complex owned by Beach Town House Apartments Ltd ("Beach House"). Beach House owns the building and the land on which it is built in fee simple. The individual suites are occupied by shareholders of Beach House pursuant to long term leases granted to the occupiers incidental to the ownership of their shares. All expenses, taxes, mortgage indebtedness, if any, maintenance, and operation of the building are met and paid for by assessments made against the shareholders of Beach House in proportion to their shareholdings.*

*The 2010 and 2011 assessments of the property were $26,963,000 and $27,984,000 respectively. The Assessor valued the property based on the aggregate value of the market sales of the tenants' share-lease agreements. Beach House appealed to the Property Assessment Appeal Board ("the Board") on the basis that the property should be assessed as a single rental apartment building, with similar valuation parameters to those used to assess similar rental apartment properties in the immediate area, which are valued as a single entity using the income approach. The Board found that the Assessor's methodology of valuing the property based on the aggregate fair market value of the share/lease sales was the correct way to value market cooperative apartments and confirmed the decisions of the 2010 and 2011 Property Assessment Review Panels.*

*HELD: Appeal Dismissed.*

*The Applicant asked six questions of this Court which can be summarized into two broad issues to be determined, (1) whether the Assessor erred in its method of valuation for the property, and (2) whether the decision of the Board resulted in an inequitable assessment of the property.*

*In response to the first issue, this Court found that the Board was correct in valuing the property based on the aggregate market value of lease sales in the property itself. This Court based this decision on* Panorama Place *(Stated Case 83).*

*With respect to the second issue, this Court determined that the subject property and the various apartment buildings that the Applicant sought to rely on as comparables for its claim of inequitable assessment were not in fact "similar". This Court referred to* Bramalea *(Stated Case 277) and* 571016 BC

Ltd *(Stated Case 539) where the Courts found that the requirement that assessments be equitable is expressed in relation to "other similar properties". There was evidence before the Board that the property was not "similar" to an apartment building and the property was being used for its highest and best use but the Applicant's comparables had a different highest and best use. This Court found that the Beach House was not valued inequitably in comparison to other similar properties. Based on its findings this Court answered all six questions "no".*

**Reasons for Judgment** July 16, 2012

**Background**

[1] This is an appeal by way of Stated Case, pursuant to s. 65 of the *Assessment Act*, R.S.B.C. 1996, c. 64 (the "Act"), from a decision of the Property Assessment Appeal Board (the "Board") made November 30, 2011.

[2] The appeal before the Board was brought by Beach Town House Apartments Ltd. ("Beach House"), and concerned the 2010 and 2011 Property Assessment Review Panel decisions regarding the subject property. The issue in the appeal, as stated by the Board, was:

> The sole issue in this appeal is whether the methodology employed by the Assessor to determine actual value is correct.

**Jurisdiction of Court**

[3] Section 65(1) of the Act enables a party affected by a decision of the Board to require the Board to refer that decision to the Supreme Court for an appeal on a question of law in the form of a Stated Case. Rule 18-2 of the *Supreme Court Civil Rules* governs the procedure for Stated Cases in the Supreme Court.

[4] The parties agree that the Supreme Court's jurisdiction under s. 65 is limited in scope and that the court ought to intervene only where the Board has committed an "error of law".

[5] In *Crown Forest Industries Ltd. v. British Columbia (Assessor of Area No. 6 - Courtenay)*, [1985] B.C.J. No. 163 (S.C.), Southin J., as she then was, said:

> 29 Under the British Columbia statute, this Court has no power to substitute its opinion on questions of fact for those of the Board.
>
> 30 So long as the Assessment Appeal Board which must, in deciding appeals to it, apply the Act does not:
>
> 1. misinterpret or misapply the section - see *Pacific Logging Co. Ltd. v. The Assessor* [1977] 2 S.C.R. 623 adopting the dissenting judgment of McIntyre, J.A. in the Court of Appeal 12th November, 1976 (unreported);
>
> 2. misapply any applicable principle of general law (a concept relevant only to one of the questions in the stated case), or
>
> 3. act without any evidence or upon a view of the facts which could not reasonably be entertained
>
> this Court has no power to intervene.

[6] What constitutes an error of law, in assessment matters, was further developed in *British Columbia (Assessor of Area No. 26 - Prince George) v. Cal Investments Ltd.*, [1993] B.C.J. No. 93 (S.C.) at para. 18.

[7] The parties agree that a failure by the Board to consider a relevant issue is an error of law: *Westcoast Energy Inc. v. British Columbia (Assessor of Area # 27 - Peace River)*, 2000 BCSC 684 at para. 11. So too is the Board's use of a "method of assessment" that is "wrong in principle": *Lornex Mining Ltd. v. British Columbia (Assessor of Area No. 23 - Kamloops)*, [1987] B.C.J. No. 2555 (S.C.); *Cal Investments Ltd*., at paras. 18 and 20.

[8] It is clear that questions of fact, so long as the Board acted on a view of the facts that can be entertained, are not reviewable. Similarly, questions of mixed fact and law are outside of the court's jurisdiction: *Gemex Developments Corp. v. Coquitlam Assessor, Area No. 12* (1998), 62 B.C.L.R. (3d) 354 at para. 9, 112 B.C.A.C. 176. When questions of mixed fact and law acquire the character of a question of law, is more nuanced. In *Burlington Resources Canada Ltd. v. Peace River (Assessor of Area #27)*, 2005 BCCA 72 at para. 25, Smith J.A., for the court, said:

> [25] Questions that ask whether the facts satisfy the applicable legal tests are questions of mixed fact and law. Thus, the second questions contained in Questions 1 and 2, alleging misapplication of legal principles, are *prima facie* questions of mixed fact and law. However, as Iacobucci J. went on to say in *Southam* ¶ 35-37, in remarks following the passage quoted by the chambers judge, not every application of legal principle to facts will be a question of mixed fact and law. Rather, where the point in question is so general that the decision may have importance in the determination of future cases, the decision will raise a question of law: see *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 ¶36-37; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 ¶ 28.

[9] Finally the parties accept and agree that the standard of review that is relevant to the various issues raised by the Applicant is reasonableness:

*Weyerhauser Company Ltd. v. Assessor of Area No. 04 - Nanaimo Cowichan*, 2010 BCCA 46 at paras. 36-47. The reasonableness standard, in turn, was described in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 46 and 47.

**Issues**

[10] The broad issues to be determined in this Stated Case are: (i) whether the BC Assessment Authority (the "Assessor") erred in its method of valuation for the property owned by Beach House at 1949 Beach Avenue in Vancouver (the "Property"); and (ii) whether the Decision of the Board resulted in an inequitable assessment of the Property.

[11] The Applicant argues that the Board, in rendering the Decision, made various errors in law. Specifically, it argues that the Board's errors fall within one or more of the following categories:

- Misapplication of the applicable principles of general law;
- Adopting methods of assessment that are wrong in principle; and
- Adopting methods of assessment that are not consistent, or equitable, with those applied to other similar properties in the community.

[12] The specific questions of law raised by this Stated Case are:

1) Did the Board err in law by finding that the correct method of assessing the Property is based on the aggregate market value of the share-lease sales and accompanying leases in the Property itself?

2) Did the Board err in law by failing to act in accordance with s. 57(1)(a) of the Act which provides that the Appeal Board must ensure that similar properties within a municipality are assessed in a consistent manner?

3) Did the Board err in law by applying a highest and best use of the Property, based on the special value of the units within the Property to the individual leaseholders, rather than on a fee simple basis, resulting in inequity with similar properties contrary to the principles set by the British Columbia Court of Appeal in *Vancouver Assessor, Area 9 v. Bramalea Ltd.* (1990), 52 B.C.L.R. (2d) 218 (C.A.), 76 D.L.R. (4th) 53?

4) Did the Board err in law by applying a special value for the Property based on the cumulative prices which could be obtained for being a member in the cooperative at the Property despite the fact that the rights of use in the Property are owned by a single company?

5) Did the Board err in law by applying an actual value for the Property based on the tenants' rights only, based on long term leases rather than on a fee simple basis including all interests, as required under the Act?

6) Did the Board err in law by accepting an encumbered value for the Property based on the tenants' long term leases rather than on a fee simple basis as per the principles set by the British Columbia Court of Appeal in *Standard Life Assurance Co. v. British Columbia (Assessor Area No. 01 - Capital)* (1997), 146 D.L.R. (4th) 247, 34 B.C.L.R. (3d) 346?

[13] The Applicant accepts that these various questions can be distilled into two broad groups. Specifically, the Applicant accepts that questions 1, 4, 5, and 6 from the preceding paragraph are interrelated, and that questions 4, 5, and 6 are, in effect, examples of the error that is expressed in question 1. Similarly, the Applicant accepts that questions 2 and 3 overlap to a significant degree. Accordingly, I have focussed on and addressed the two broad issues that are raised in this Stated Case, rather than each question individually.

**Statement of Facts**

[14] For the purpose of this Stated Case the parties have agreed on the following relevant facts, many of which mirror the findings of the Board in its Decision:

(a) The Property is a cooperative housing complex owned by Beach House, a company incorporated in 1951 under the British Columbia *Companies Act*. Beach House owns the building and the land on which it is built in fee simple. Every shareholder of the cooperative owns shares in Beach House and has a lease on his or her suite until expiration of the life of Beach House. The individual suites are occupied by shareholders of Beach House pursuant to long term leases granted to the occupiers incidental to the ownership of their shares.

(b) The 2010 assessment of the Property was $26,963,000, with the land assessed at $11,560,000 and the improvements at $15,403,000. The 2011 assessment of the Property was $27,984,000, with the land assessed at $11,826,000 and the improvements at $16,158,000.

(c) The Property comprises a seven-storey building containing two bachelor units, nine one-bedroom units, 23 two-bedroom units, ten three-bedroom units, and one two-bedroom penthouse suite. The land parcel covers an area of 17,292 square feet.

(d) The Highest and Best Use ("H&BU") of the Property as vacant is for redevelopment with strata condominiums. The H&BU of the Property as improved is its current use as a market cooperative.

(e) The purpose of Beach House is to maintain and operate the building and the real property on a mutual or cooperative basis for the sole use and benefit of its members without any rents, profits, or gains accruing to Beach House. All expenses, taxes, mortgage indebtedness, if any, maintenance, and operation of the building are met and paid for by assessments made against the shareholders of Beach House in proportion to their shareholdings. Its Board of Directors decides annually how much money is needed to operate and maintain the building and applies these charges to the shareholders as a monthly rent.

(f) The Board of Directors designates the unit of shares for each of the apartments, and is empowered to grant to shareholders of record owning the required number of shares leases of apartments, subject to the terms and provisions of the form of lease approved by the Board of Directors and further subject to the provisions contained therein.

(g) Certain requirements apply when selling the individual suites. The shares of Beach House and the accompanying lease cannot be purchased or sold separately. An owner of shares or a lease cannot sell or transfer them without the approval of the Board of Directors. Owners listing suites for sale may not display "for sale" signs and are not permitted to hold open houses for the general public. Potential purchasers (and their spouses or partners) are required to be interviewed by the Board of Directors, and must supply specified letters of reference.

(h) The shares in Beach House giving the right of occupation to a suite are sold through the Real Estate Multiple Listing Services.

(i) Also applicable to all rental apartments in the vicinity are the Strata Title and Cooperative Conversion Guidelines, which effectively prohibit development of a multiple dwelling unit that results in a net loss of rental housing.

[15] The Assessor valued the Property based on the aggregate value of the market sales of the tenants' share-lease agreements. Beach House appealed on the basis that the Property should be assessed as a single rental apartment building, with similar valuation parameters to those used to assess similar rental apartment properties in the immediate area, which are valued as a single entity using the income approach. The issue before the Board was whether the methodology employed by the Assessor to determine actual value was correct.

[16] The Board found that the rental apartment comparables submitted by Beach House were not comparable to the Property for equity purposes, because they had different H&BUs.

[17] The Board found that although purchasers of Beach House share-lease agreements do not buy a partial or whole fee simple interest, they include the rights according to a lease, which is an interest in land and forms part of the tenants' bundle of interests.

[18] The Board found that the Assessor's methodology of valuing the Property based on the aggregate fair market value of the share/lease sales was the correct way to value market cooperative apartments.

[19] The Board confirmed the decisions of the 2010 and 2011 Property Assessment Review Panels as follows:

Roll No. 09-39-200-027-611-108-65-000 - 2010-09-00104

| | | |
|---|---|---|
| Land: | Class 1 - Residential | $11,560,000 |
| Improvements: | Class 1 - Residential | $15,403,000 |
| **Total Assessed Value:** | | **$26,963,000** |

Roll No. 09-39-200-027-611-108-65-000 - 2011-09-00183

| | | |
|---|---|---|
| Land: | Class 1 - Residential | $11,826,000 |
| Improvements: | Class 1 - Residential | $16,158,000 |
| **Total Assessed Value:** | | **$27,984,000** |

[20] Before turning to the details of each party's submissions and the Board's decision, it is useful to distill the positions of the parties. Importantly, each accepts, and the agreed-upon facts establish, that the H&BU of the Property, as improved, is its current use as a market cooperative. Each further accepts that a market cooperative has various unique attributes. Were the Property a building that consisted of rental suites or, alternatively, a strata complex, the issues raised with respect to valuation would not exist.

[21] The Applicant argues that a market cooperative is "similar" to a rental property and that it ought, accordingly, to be valued based on the "income approach" to valuation, which is premised on the idea that the value of such a building is directly related to the income it will generate. The Board, in the Decision, expressed this position in the following terms:

> [17] John Parkes, for Beach House, states the Property has one indefeasible fee simple title, the owner of which has, for all intents and purposes, leased the building in its entirety to the shareholders in perpetuity. The individual shareholders/occupiers of the building do not own any interest in the fee simple. He says that the assessed value, based on the fee, should reflect a building under single ownership and thus be valued for equity purposes as other adjacent apartment buildings by utilizing the income approach to value. He notes that rental cooperatives are also valued in this manner. In contrast, the Property is currently valued in a cumulative manner, by adding the value of each suite based on the value of shareholders interest and the associated long term lease. The result is a significantly higher value than applying the income approach and this, he claims, is a gross inequity.

[22] The Respondent argues, and the Board concluded, that the attributes and character of a market cooperative, where the units of the cooperative can be bought and sold, is more accurately assessed by determining the market value of the individual units and then aggregating those values. The Assessor relied on this "aggregate value of the market value of shares" method to value the Property. This approach is similar to the direct comparison approach used when valuing the individual strata title units in a property. The Board succinctly expressed both the Assessor's position and why the Board preferred that position or approach:

> [18] The Assessor says that since the highest and best use of the Property as improved is as a market cooperative apartment building, its actual value should be determined by analyzing the aggregate value of the market sales of the shares and accompanying leases in the Property itself. He applies a price per square foot to the aggregate unit area of 51,865 square feet, based on the value indicated by share sales. The Assessor says the income approach is not applicable because the highest and best use of the Appellant's apartment comparables is as rental housing, similar to rental cooperatives. When the highest and best use of two properties are different, to value them the same

way would be to compare properties that are not similar, are not in a similar market, are not subject to the same market conditions and are not perceived by the market similarly. He argues that this would run contrary to the principle of equity as outlined in *Hilton v. Assessor Area 14 Surrey (Whiterock)* (2001 PAABBC 20014823), where the Board said "For equity...the assessment of this property ought to be compared with the assessments of similar properties within similar markets, which are subject, as best can be determined, to the same market conditions and perceived by the market as similar and comparable investment opportunities." We agree because, as was pointed out in the Assessor's Highest and Best Use analysis brief (exhibit 1), the highest and best use of the subject is the current use as a market co-operative building whereas the Appellant's comparables have a highest and best use as rental apartment buildings. They are not similar properties and, therefore, cannot be compared for equity purposes.

**The Standard Life Decision**

[23] Questions 1, 4, 5, and 6 are all based on the Applicant's assertion that the valuation method relied on by the Assessor was inconsistent with the Court of Appeal's decision in *Standard Life*, where the court addressed the meaning of "fee simple interest" as used in s. 19 (then s. 26) of the Act. Section 19 provides:

(1) In this section: ..."actual value" means the market value of the fee simple interest in land and improvements;

(2) The assessor must determine the actual value of land and improvements and must enter the actual value of the land and improvements in the assessment roll.

(3) In determining actual value, the assessor except where this Act has a different requirement, give consideration to the following:

(a) Present use;

...

(h) Any other circumstances affecting the value of the land and improvements.

[24] In *Standard Life*, the Board had decided that the actual rent for a portion of the premises, which was well below market rent, was not to be considered in arriving at the assessed value of the land and building. On the stated case the chambers judge disagreed, and concluded that the Board had been wrong in principle in so deciding. The Assessor appealed, and that appeal was allowed. Hollinrake J.A., for the court, said:

[10] I think the real issue in this case is what is meant by the phrase "the fee simple interest in land and improvements" in s. 26 of the *Act*. My conclusion is that the Assessor is correct in submitting that the fee simple interest includes all the interests in the land and buildings and not just the owner's interest. In my opinion, the Assessor here had to consider not just the owner's interest, as I think the judge below did, but also the tenant's interest. That, for practical purposes, leads to the conclusion that the totality of the interests properly considered should, generally speaking, be the equivalent of the owner's unencumbered interest.

...

[13] As I have said, in my opinion, the "fee simple interest" is comprised of the entirety of the interests in the property. This bundle of interests includes both the tenant's and the landlord's interest. Implicit in this is the principle that consideration of actual rental value is, generally

> speaking, not relevant to the valuation of the “fee simple interest”. This is because the actual rental value is relevant only to the owner’s interest in the land and buildings whereas the actual value in the *Act* is the totality of all interests in the land and buildings. The owner’s interest and the tenant’s interest, in principle, should reflect the market or actual value of the land and buildings. It is for this reason that I have concluded that the “fee simple interest” is, again generally speaking, the same as the owner’s unencumbered interest.

[25] The Applicant argues that the Assessor, in simply aggregating the market value of the various units in the Property, has valued the interests of the shareholders/tenants, but has failed to properly value the landlord's interest. The Assessor thus failed to consider the "totality of the interests" that comprise the Property.

[26] There are several difficulties with this submission. First, the submission presupposes that the landlord's interest has value. Counsel for the Applicant, in her oral submissions, accepted that the value of the owner's interest in this case was "almost nothing". She further accepted that there was no evidence before the Board that Beach House had any value in its own right. Thus, the conceptual issue raised by *Standard Life* is, when viewed in pragmatic terms, rendered somewhat artificial.

[27] Second, the ensuing question, if one were to accept the Applicant’s submission, would be what valuation method would properly recognize both the interests of Beach House and of its various shareholders? The Applicant suggested that application of the income approach would achieve this object. The Board addressed this issue squarely in the second half of para. 18 of the Decision, which I, in turn, referred to at para. 22 of these reasons.

[28] The Applicant conceded before the Board, as it did before this court, that the H&BU of the Property is as market cooperative housing. This is important. As both parties agree, identifying the H&BU is a critical step in the assessment process and provides the context for the selection of comparable properties.

[29] Based on the evidence before it, the Board concluded that the H&BU of the Property as a market cooperative was different from a H&BU as a rental apartment building, and that the Applicant's proposed use of the income approach, while relevant to the valuation of rental apartments and to properties with other H&BUs, was not suitable for the Property.

[30] These two conclusions underlie the Applicant’s two principal grounds of appeal: (1) that the Board erred in choosing the valuation method that it did; and (2) that the conclusion of the Board was inequitable and inconsistent with the valuation of "similar properties".

[31] Though these two conclusions give rise to somewhat different issues conceptually, they are also intertwined. The Board was unwilling to use the income approach to valuation, because that approach had relevance to properties that it considered were not properly comparable to the Property. The Board was not concerned that its decision would give rise to inconsistencies or inequity, because, again, the properties the Applicant was looking to as comparables were not, in fact, "similar" or comparable.

[32] The Board had ample evidence before it, in the form of the report of Mr. Ene, to conclude that using the income approach to value the Property would be inappropriate.

[33] I have said, based on the authority of *Cal Investments* and *Lornex Mining*, that using an assessment method that is wrong in principle is an error of law. At the same time, it is generally accepted that the Board’s selection of a particular valuation technique or method is a question of fact for the Board. The interface between these two principles was explained in *Canadian Collieries Resources Ltd. v. Comox Assessment District* (1962), B.C. Stated Case 31 (S.C.) where, at 143, Aitkins J. said:

> The first question in the stated case is: “Was the Board right in law in sustaining an assessment which was determined in the manner used by the Assessor?” This question does not, in my opinion, involve

any question of law unless it can be said, as a matter of law, that the Board, when confronted with the two methods of appraisal which I have described, *must* prefer the appellant's method. I think it can only be said that the Board must prefer and adopt the appellant's method if it can be said, as a matter of law, that in the circumstances of this case they should not consider the Assessor's method as proper evidence of value at all. If, as a matter of law, the Board may consider the method of appraisal used by the Assessor as a proper method for use under the relevant statutory provisions, then which method the Board prefers - that is, which method the Board concludes gives the better result - is a question of fact for the Board and does not involve any question of law.

[emphasis in original]

[34] A similar statement is found in *Cal Investments*, at para. 20, where Ryan J., as she then was, said:

[20] ...the selection or rejection of the appropriate evaluation technique is a question of fact for the Board, provided that there is some evidence to support the selection. The selection of a particular technique will be an error in law if, on generally accepted assessment principles, it is wrong to employ it, or, if the method of assessment was incorrectly applied. Put another way, it might be better to say that it is an error in law if the selection of the method of assessment or its application was so unreasonable that no properly trained Assessor would apply it in such a manner.

[35] In the present case, the Board's rejection of the income approach to valuation was a decision that properly fell within its jurisdiction, was based on a reasonable assessment of the evidence, and was not the product of an error in principle.

[36] Finally, I do not accept that the proper application of the *Standard Life* decision gives rise to the result that the Applicant contends. The Board, in the Decision, referred to and relied on *Panorama Place v. City of Vancouver* (1975), B.C. Stated Case 83 (S.C.). That case was the only case available to the Board, and is the only case available to me, which specifically deals with the valuation of a cooperative apartment building. The appellant in *Panorama*, as in this case, was a corporation that was the registered owner of the land and building that were in issue. The owners of the individual shares in the building, as in this case, were the owners of the common shares in the company.

[37] In *Panorama*, the Assessor had valued the property based on the aggregate of the market value of the sales of shares and leases. The appellant argued that any value in excess of the value of the land and improvements was not assessable.

[38] The court rejected the appellant's submission. In so doing, it noted, at 408, that the applicable legislation:

...charged the assessor with the responsibility of determining "actual value" and the assessor may give consideration, amongst other things to:

(*a*) ". . . present use . . ."

(*b*) ". . . and any other circumstances affecting value"

The court then went on to determine that:

...the "bundle of rights" in addition to the bare land and the physical structure, are the proper subject of assessment within both of those considerations.

[39] The Applicant argues that the decision in *Standard Life* has overtaken *Panorama*, and that if *Panorama* were heard today a different result would ensue. The Board addressed this submission directly over several paragraphs of the Decision. It disagreed with the suggestion that *Standard Life* and

*Panorama* were necessarily inconsistent, it pointed to a series of recent Board decisions that continued to rely on *Panorama*, and it distinguished further authorities relied on by Beach House.

[40] I agree with the Board's comments in this regard. In particular, I accept that *Panorama* and *Standard Life* are not necessarily inconsistent. In *Panorama*, Toy J., at 408, emphasized the importance of identifying and evaluating the full "bundle of rights" in issue. Hollinrake J.A., in *Standard Life*, at para. 13, also emphasized the need to value the "bundle of interests" that make up the fee simple interest in a property.

[41] Further, in *Panorama* the court relied on case law that established the following principles: (1) that the Assessor has to determine the best potential use of the property and value the property on that basis; (2) that it is appropriate to value those rights that run with the land and are a special element of value; and (3) that the proper basis of comparison of properties is to compare the property to properties that enjoy the same advantage or special element of value. Each of these principles was unchallenged before me and is directly relevant to this Stated Case.

[42] In *Assessor Area #06 (Courtenay) v. Crown Isle Development Corp.*, 2008 BCSC 100, the court addressed the application of *Standard Life* to the fractional interests that various tenants in common had in a property. Specifically, individuals were permitted to acquire one-quarter shares, as tenants in common, in a unit. Brown J., at para. 3, described the issue before her as follows:

> ... At Crown Isle, one-quarter shares sell for premium. Those who purchase only a one quarter share pay more per square foot than those who purchase a full unit. The central issue in this appeal is whether the actual value of a unit is the sum of the value of each one-quarter share, as the Assessor asserts, or is the value of the 100% interest, as the Board determined.

[43] Brown J. addressed the relevance of both *Standard Life* and *Assessor of Area #08 - North Shore/Squamish Valley v. Huculak* (1998), B.C. Stated Case 408 (S.C.) - another decision relied on by the Applicant in this case. She said:

> [26] In *Huculak*, the court found that the property was encumbered by a time-share/lease agreement, which reduced the market value of the property. The court said that the Board was required to determine the market value of the unencumbered fee simple interest, without the encumbrance of the timeshare/lease agreement. Although the owners in *Huculak* each held a one-twelfth undivided fee simple interest in the property, the court did not find this manner of holding title to be an encumbrance. It was the time-share/lease agreement and not the fractional interest that was germane to the decision.
>
> [27] In *Standard Life*, the property was encumbered by a long term, below market value lease, which reduced the property's selling value. The Board refused to base the assessed value on the uneconomic rental rates, and used market value rents to arrive at the assessed value. The British Columbia Court of Appeal agreed, saying at p. 252:
>
> > I think the real issue in this case is what is meant by the phrase "the fee simple interest in land and improvements" in s. 26 of the *Act*. My conclusion is that the Assessor is correct in submitting that the fee simple interest includes all the interests in the land and buildings and not just the owner's interest. In my opinion, the Assessor here had to consider not just the owner's interest, [...] but also the tenant's interest. That, for practical purposes, leads to the conclusion that the totality of the interests properly considered should, generally speaking, be the equivalent of the owner's unencumbered interest.
>
> [28] *Standard Life* does not require the Board to ignore value based on fractional interests, rather that the totality of the interests should generally be the equivalent of the owner's unencumbered interest.

> [29] If four people purchase a property as tenants in common, each holding an equal one-quarter share, the purchase price is its market value. Tenancy in common is not an encumbrance, it is a method of holding title. If those purchasing a one-quarter interest will pay $100 per square foot, then, all else being equal, the market value is $100 per square foot.

[44] Based on the foregoing considerations, I consider that the Board was correct in valuing the Property based on the aggregate market value of lease sales in the Property itself. Accordingly, I have answered each of questions 1, 4, 5, and 6 in the Stated Case in the negative.

**Questions 2 and 3**

[45] The Applicant relies on *Bramalea*, in which the court addressed, among other things, the requirement that assessments be equitable among taxpayers. Taylor J.A., for the court, expressed this aspect of the question before the court, at 226:

> ...What, then, should the board do...when adjustment of a particular assessment to what the Board concludes is true "actual value" would render the assessment no longer equitable in relation to those of other similar properties within the municipality?

[46] Importantly, the requirement that assessments be equitable is expressed in relation to "other similar properties". This self evident condition or limitation on the requirement of equitable treatment is repeated throughout *Bramalea* and is central to the court's analysis.

[47] In this case, the Board determined that the Property and the various apartment buildings that the Applicant sought to rely on as comparables for its claim of inequitable treatment were not, in fact, "similar". Specifically, there was evidence before the Board that the Property was not "similar" to a rental apartment building and that the market does not view such properties as "similar". Further, the Board found that the Property was being used for its H&BU, while the Applicant's comparables had a different H&BU. The Applicant did not argue that these conclusions were either unreasonable or otherwise not properly grounded in the evidence before the Board.

[48] In *571016 B.C. Ltd. v. Assessor of Area #9 - Vancouver Sea to Sky Region*, 2010 BCSC 790, Ross J. said:

> [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.

[49] The foregoing comments are directly relevant to this case. Accordingly, the answer to Questions 2 and 3 is "No".

**Conclusion**

[50] The answer to each of the questions posed in the Stated Case is "No". The appeal is dismissed with costs.

SC 544Cont Beach Town House Apartments Ltd v AA09 and PAAB

**BEACH TOWN HOUSE APARTMENTS LTD.**
**v.**
**ASSESSOR OF AREA 09 – VANCOUVER SEA TO SKY REGION and**
**PROPERTY ASSESSMENT APPEAL BOARD**

BRITISH COLUMBIA COURT OF APPEAL (CA040167) Vancouver Registry

Before the HONOURABLE MR. JUSTICE CHIASSON
Date and Place of Hearing: April 9, 2013, Vancouver, B.C.

J.R. Loeb for the Appellant
J.A. McLachlan for the Respondent

***Cooperative Housing Complex – Lease – Error in Law***

*The housing complex is owned by the appellant. The suites in the housing complex are occupied by the appellant's shareholders under long-term leases. The assessor valued the complex based on the aggregate market value of the shares and accompanying leases. The appellant sought to have the complex valued as though there were a single owner because the shareholder/tenants do not have an interest in fee simple, and took the position that the income approach should be used.*

*The parties had agreed that the highest and best use of the property as improved is its current use (i.e., a market cooperative apartment building). The Property Assessment Appeal Board upheld the assessor's approach and the BC Supreme Court dismissed the appeal.*

*On further appeal, the parties agreed that the standard of review was reasonableness, and the Court of Appeal went on to consider two issues:*

*(1) whether the valuation methodology employed by the assessor and endorsed by the Board and the Supreme Court was consistent with Standard Life Assurance Co. v. Assessor of Area 01 – Capital ("Standard Life"); and*
*(2) whether the conclusion that equity does not arise where comparables involve dissimilar properties is consistent with the Court of Appeal's decision in Assessor of Area 09 – Vancouver v. Bramalea.*

*The Court of Appeal reviewed Standard Life and found that the "thrust" of the case was the statement that the fee simple interest is made up of all interests in the property, including the tenants' and the landlord's interests. Justice Frankel concluded that the appellant's shareholders did not just buy and sell shares; they also buy and sell leases, which are interests in land making up all the interests in the complex. Justice Frankel stated, "There is nothing else. There is no income stream to value because the levies paid to the appellant defray the costs of operating and maintaining the building."*

***HELD:*** *Appeal Dismissed.*

*Justice Frankel also found that the Supreme Court had not erred in considering the requirements of equity. The Board upheld the assessor's rejection of rental apartment building comparables on the basis of market evidence. The Chambers Judge appropriately concluded that the Board's acceptance of the evidence required deference.*

**Reasons for Judgment** July 9, 2013

**Introduction**

[1] This appeal considers whether the respondent Assessor applied an erroneous method to determine the value of the appellant's property under the *Assessment Act*, R.S.B.C. 1996, c. 20 [the *Act*].

**Background**

[2] The appellant, Beach Town House Apartments Ltd., owns the land and building of a co-operative housing complex in the West End area of the City of Vancouver, British Columbia (the "Property"). Each of the appellant's shareholders owns the lease of an apartment for the corporate life of the appellant. This means that the complex is a market, as opposed to a rental, co-operative.

[3] The building is seven stories; it has a number of apartments of varying size. The appellant maintains and operates the building for the sole use and benefit of its shareholders. No profit accrues to the appellant. All expenses of the building are paid by assessments levied against the shareholders in proportion to their shareholdings. The Board of Directors of the appellant decides annually how much money is required to operate and maintain the building and collects this from the shareholders as an assessment.

[4] Obligations of the appellant and its shareholders are set out in the leases of the apartments. The appellant describes them in its factum as follows:

> (f) The covenants and agreements of the lessor include the following:
>
> (i) the lessee quietly holds and enjoys the demised premises.

(ii) the lessor will maintain and manage the building as a first class apartment house.

(iii) the lessor will execute repairs as required.

(iv) the lessor will maintain good structural repair.

(v) the lessor will maintain insurance.

(vi) in the event of damage to the building, there will be proportionate spending of insurance proceeds for repair.

(vii) the Leases of the apartments in the building shall contain substantially the same covenants and agreements.

(g) The covenants and agreements of the lessee include the following:

(i) the lessee will pay annual assessments to cover costs of operation and maintenance.

(ii) the lessee agrees that the lessor may provide house rules for the management and control of the building (the "House Rules").

(iii) the Leases are subject to the Articles of Association and to the House Rules.

(iv) the lessee will not use or permit the use of the demised premises for anything other than a private, one family, residence.

(v) the lessee will not assign or transfer his or her shares unless accompanied by assignment of his or her lease and the lessee will not assign or sublet the demised premises except as permitted by the Articles of Association.

[5] Leases and shares cannot be sold separately. There are requirements that apply to selling and purchasing shares and leases.

[6] The Assessor valued the Property based on the aggregate market value of the share-lease agreements. The appellant appealed unsuccessfully to the British Columbia Property Assessment Appeal Board (the "Appeal Board"), contending that the Property should be valued as a property under single ownership because the shareholders do not have an interest in fee simple. It then appealed by way of stated case to the Supreme Court of British Columbia, which upheld the decision of the Appeal Board.

**The Appeal Board Decision**

[7] Before the Appeal Board, the appellant took the position that the income approach to valuation should be used and the Property compared to rental apartment buildings. Rental co-operatives are valued in this way.

[8] The Appeal Board did not accept this position because the highest and best use (sometimes referred to as "H&BU") of the Property as improved, that is, as it is used presently, is as a market co-operative. It

held the comparables advanced by the appellant related to rental apartment properties. They reflect different markets.

[9] The Appeal Board referred to s. 19 of the *Act*, which states as follows:

> (1) In this section:
>
> ...
>
> "actual value" means the market value of the fee simple interest in land and improvements;
>
> ...
>
> (2) The assessor must determine the actual value of land and improvements and must enter the actual value of the land and improvements in the assessment roll.
>
> (3) In determining actual value, the assessor may, except where this Act has a different requirement, give consideration to the following:
>
> (a) present use;
>
> ...
>
> (h) any other circumstances affecting the value of the land and improvements;

[10] In paras. 20−22 of its decision, the Appeal Board referred to jurisprudence that has considered the section: *Panorama Place Ltd. v. Assessment Commissioner for City of Vancouver*, [1975] 4 W.W.R. 543 (B.C.S.C.) and *Standard Life Assurance Co. v. Capital Assessor, Area No. 01* (1997), 34 B.C.L.R. (3d) 346, 146 D.L.R. (4th) 247 (C.A.), and stated as follows:

> [20] In regards to s. 19 we are guided by the decision of *Standard Life Assurance Co. v. BC Assessor Area 01-Capital* (1997) 34 BCLR (3d) 346 where the Court of Appeal reviewed s. 26 (now s. 19) and said that the fee simple interest is comprised of the entirety of interests in the property, including the tenant's and the landlord's interests. The Court called these interests the 'totality of interests' and the "bundle of interests". So, how is the Board to value this 'totality of interests' in these circumstances?
>
> [21] Interestingly, there is a case on point from 1974. The facts in *Panorama Place v. City of Vancouver* (1975), BC Stated Case 83 are virtually identical to the matter before us, except that *Panorama* started as a rental apartment that was converted to a market cooperative, whereas the subject was always a market cooperative with the land being acquired for that purpose. As well, the market leases in *Panorama* were for 199 years, whereas for the Property, they run for the corporate life of the Company. Neither fact distinguishes this appeal from *Panorama.* In *Panaroma,* before 1974, the Assessor determined actual value on the same basis as conventional rental apartment blocks. For 1974, however the basis for determining actual value changed by considering similar cooperative residential market apartments and valuing the aggregate market value of the share-lease units. The Supreme Court of BC held this was appropriate. The Court said after quoting s. 37 of the Act (now s. 19): "In my view, the 'bundle of rights' in addition to the bare land and physical structure, are the proper subject of assessment […]".
>
> [22] Also, the Court concluded on page 409:
>
> > "It is my view that the aggregate price paid by the share-holder-tenants of the appellant company includes a substantial premium over and above the cost of

> the land and physical structure for the rights that these people consider of substantial value. Individually or collectively, these rights can be transferred to future purchasers and they are not values personal to the individual owners that would not form the proper subject for assessment."

[11] The Appeal Board rejected the appellant's contention that *Standard Life* and *Panorama* are incompatible, stating as follows:

> [24] … [W]e find that *Standard Life* is not incompatible with *Panorama.* As the Court said in *Standard Life* at paragraph 10, 'my conclusion is that the Assessor is correct in submitting that the fee simple interest includes all the interests in the land and buildings and not just the owner's interest' and at paragraph 13: '..., in my opinion, the 'fee simple interest' is comprised of the entirety of interests in the property. This bundle of interests includes both the tenant's and the landlord's interest'.

[12] The Appeal Board concluded in paras. 25 and 26:

> [25] Although purchasers of Beach Town shares do not buy a partial or whole fee simple interest, they include the rights according to a lease which is an interest in land and forms part of the tenant's bundle of interests.
>
> [26] Therefore, based on the authorities referred to herein and given the facts, we are of the opinion that the Assessor['s] methodology of valuing the subject based on the aggregate fair market value of the share-lease sales is the correct way to value market cooperative apartments.

**The Reasons of the Chambers Judge**

[13] The judge observed that the matter came to him by way of stated case from the Appeal Board pursuant to s. 65(1) of the *Act*, and that the court's jurisdiction was limited to questions of law. The judge cited authorities for the proposition that a failure of the Appeal Board to consider a relevant issue or its use of a method of assessment that is wrong in principle are questions of law. He then stated in para. 8:

> It is clear that questions of fact, so long as the Board acted on a view of the facts that can be entertained, are not reviewable. Similarly, questions of mixed fact and law are outside of the court's jurisdiction … [Citations omitted.]

The parties agreed that the standard of review is reasonableness in accordance with this Court's decision in *Weyerhaeuser Company Ltd. v. Assessor of Area No. 04 - Nanaimo Cowichan,* 2010 BCCA 46.

[14] In para. 10, the judge identified the two issues before him as: one, whether the Assessor erred in its method of valuation; two, whether the Appeal Board's decision resulted in an inequitable assessment of the Property. In para. 12, he stated the specific questions of law raised by the stated case as:

> 1) Did the Board err in law by finding that the correct method of assessing the Property is based on the aggregate market value of the share-lease sales and accompanying leases in the Property itself?

2) Did the Board err in law by failing to act in accordance with s. 57(1)(a) of the Act which provides that the Appeal Board must ensure that similar properties within a municipality are assessed in a consistent manner?

3) Did the Board err in law by applying a highest and best use of the Property, based on the special value of the units within the Property to the individual leaseholders, rather than on a fee simple basis, resulting in inequity with similar properties contrary to the principles set by the British Columbia Court of Appeal in *Vancouver Assessor, Area 9 v. Bramalea Ltd.* (1990), 52 B.C.L.R. (2d) 218 (C.A.), 76 D.L.R. (4th) 53?

4) Did the Board err in law by applying a special value for the Property based on the cumulative prices which could be obtained for being a member in the cooperative at the Property despite the fact that the rights of use in the Property are owned by a single company?

5) Did the Board err in law by applying an actual value for the Property based on the tenants' rights only, based on long term leases rather than on a fee simple basis including all interests, as required under the Act?

6) Did the Board err in law by accepting an encumbered value for the Property based on the tenants' long term leases rather than on a fee simple basis as per the principles set by the British Columbia Court of Appeal in *Standard Life Assurance Co. v. British Columbia (Assessor Area No. 01 - Capital)* (1997), 146 D.L.R. (4th) 247, 34 B.C.L.R. (3d) 346 [(C.A.)]?

[15] At para. 14, the judge recited the facts agreed to by the parties as follows:

> (a) The Property is a cooperative housing complex owned by Beach House, a company incorporated in 1951 under the British Columbia Companies Act. Beach House owns the building and the land on which it is built in fee simple. Every shareholder of the cooperative owns shares in Beach House and has a lease on his or her suite until expiration of the life of Beach House. The individual suites are occupied by shareholders of Beach House pursuant to long term leases granted to the occupier[s'] incidental to the ownership of their shares.
>
> (b) The 2010 assessment of the Property was $26,963,000, with the land assessed at $ 11,560,000 and the improvements at $15,403,000. The 2011 assessment of the Property was $27,984,000, with the land assessed at $11,826,000 and the improvements at $16,158,000.
>
> (c) The Property comprises a seven-storey building containing two bachelor units, nine one-bedroom units, 23 two-bedroom units, ten three- bedroom units, and one two-bedroom penthouse suite. The land parcel covers an area of 17,292 square feet.
>
> (d) The Highest and Best Use ("H&BU") of the Property as vacant is for redevelopment with strata condominiums. The H&BU of the Property as improved is its current use as a market cooperative.
>
> (e) The purpose of Beach House is to maintain and operate the building and the real property on a mutual or cooperative basis for the sole use and benefit of its members without any rents, profits, or gains accruing to Beach House. All expenses, taxes, mortgage indebtedness, if any, maintenance, and operation of the building are met and paid for by assessments made against the shareholders of Beach House in proportion to their shareholdings. Its Board of Directors decides annually how much money is needed to operate and maintain the building and applies these charges to the shareholders as a monthly rent.

(f) The Board of Directors designates the unit of shares for each of the apartments, and is empowered to grant to shareholders of record owning the required number of shares leases of apartments, subject to the terms and provisions of the form of lease approved by the Board of Directors and further subject to the provisions contained therein.

(g) Certain requirements apply when selling the individual suites. The shares of Beach House and the accompanying lease cannot be purchased or sold separately. An owner of shares or a lease cannot sell or transfer them without the approval of the Board of Directors. Owners listing suites for sale may not display "for sale" signs and are not permitted to hold open houses for the general public. Potential purchasers (and their spouses or partners) are required to be interviewed by the Board of Directors, and must supply specified letters of reference.

(h) The shares in Beach House giving the right of occupation to a suite are sold through the Real Estate Multiple Listing Services.

(i) Also applicable to all rental apartments in the vicinity are the Strata Title and Cooperative Conversion Guidelines, which effectively prohibit development of a multiple dwelling unit that results in a net loss of rental housing.

[16] The judge referred to the positions of the parties in paras. 20−22:

> [20] Before turning to the details of each party's submissions and the Board's decision, it is useful to distill the positions of the parties. Importantly, each accepts, and the agreed-upon facts establish, that the H&BU of the Property, as improved, is its current use as a market cooperative. Each further accepts that a market cooperative has various unique attributes. Were the Property a building that consisted of rental suites or, alternatively, a strata complex, the issues raised with respect to valuation would not exist.
>
> [21] The Applicant argues that a market cooperative is "similar" to a rental property and that it ought, accordingly, to be valued based on the "income approach" to valuation, which is premised on the idea that the value of such a building is directly related to the income it will generate. The Board, in the Decision, expressed this position in the following terms:
>
> > [17] John Parkes, for Beach House, states the Property has one indefeasible fee simple title, the owner of which has, for all intents and purposes, leased the building in its entirety to the shareholders in perpetuity. The individual shareholders/occupiers of the building do not own any interest in the fee simple. He says that the assessed value, based on the fee, should reflect a building under single ownership and thus be valued for equity purposes as other adjacent apartment buildings by utilizing the income approach to value. He notes that rental cooperatives are also valued in this manner. In contrast, the Property is currently valued in a cumulative manner, by adding the value of each suite based on the value of shareholders interest and the associated long term lease. The result is a significantly higher value than applying the income approach and this, he claims, is a gross inequity.
>
> [22] The Respondent argues, and the Board concluded, that the attributes and character of a market cooperative, where the units of the cooperative can be bought and sold, is more accurately assessed by determining the market value of the individual units and then aggregating those values. The Assessor relied on this "aggregate value of the market value of shares" method to value the Property. This approach is similar to the direct comparison approach used when valuing the individual strata title units in a property. The Board succinctly expressed both the Assessor's position and why the Board preferred that position or approach:

> [18] The Assessor says that since the highest and best use of the Property as improved is as a market cooperative apartment building, its actual value should be determined by analyzing the aggregate value of the market sales of the shares and accompanying leases in the Property itself. He applies a price per square foot to the aggregate unit area of 51,865 square feet, based on the value indicated by share sales. The Assessor says the income approach is not applicable because the highest and best use of the Appellant's apartment comparables is as rental housing, similar to rental cooperatives. When the highest and best use of two properties are different, to value them the same way would be to compare properties that are not similar, are not in a similar market, are not subject to the same market conditions and are not perceived by the market similarly. He argues that this would run contrary to the principle of equity as outlined in *Hilton v. Assessor Area 14 Surrey (Whiterock)* (2001 PAABBC 20014823), where the Board said "For equity...the assessment of this property ought to be compared with the assessments of similar properties within similar markets, which are subject, as best can be determined, to the same market conditions and perceived by the market as similar and comparable investment opportunities." We agree because, as was pointed out in the Assessor's Highest and Best Use analysis brief (exhibit 1), the highest and best use of the subject is the current use as a market co-operative building whereas the Appellant's comparables have a highest and best use as rental apartment buildings. They are not similar properties and, therefore, cannot be compared for equity purposes.

[17] He then turned to *Standard Life,* stating at para. 24:

> In *Standard Life*, the Board had decided that the actual rent for a portion of the premises, which was well below market rent, was not to be considered in arriving at the assessed value of the land and building. On the stated case the chambers judge disagreed, and concluded that the Board had been wrong in principle in so deciding. The assessor appealed, and that appeal was allowed. Hollinrake J.A., for the court, said:
>
> > [10] I think the real issue in this case is what is meant by the phrase "the fee simple interest in land and improvements" in s. 26 of the *Act*. My conclusion is that the Assessor is correct in submitting that the fee simple interest includes all the interests in the land and buildings and not just the owner's interest. In my opinion, the assessor here had to consider not just the owner's interest, as I think the judge below did, but also the tenant's interest. That, for practical purposes, leads to the conclusion that the totality of the interests properly considered should, generally speaking, be the equivalent of the owner's unencumbered interest.
> >
> > ...
> >
> > [13] As I have said, in my opinion, the "fee simple interest" is comprised of the entirety of the interests in the property. This bundle of interests includes both the tenant's and the landlord's interest. Implicit in this is the principle that consideration of actual rental value is, generally speaking, not relevant to the valuation of the "fee simple interest". This is because the actual rental value is relevant only to the owner's interest in the land and buildings whereas the actual value in the *Act* is the totality of all interests in the land and buildings. The owner's interest and the tenant's interest, in principle, should reflect the market or actual value of the land and buildings. It is for this reason that I have concluded that the "fee

> simple interest" is, again generally speaking, the same as the owner's unencumbered interest.

[18] The judge returned to the position advanced by the appellant:

> [25] The Applicant argues that the Assessor, in simply aggregating the market value of the various units in the Property, has valued the interests of the shareholders/tenants, but has failed to properly value the landlord's interest. The Assessor thus failed to consider the "totality of the interests" that comprise the Property.
>
> [26] There are several difficulties with this submission. First, the submission presupposes that the landlord's interest has value. Counsel for the Applicant, in her oral submissions, accepted that the value of the owner's interest in this case was "almost nothing". She further accepted that there was no evidence before the Board that Beach House had any value in its own right. Thus, the conceptual issue raised by *Standard Life* is, when viewed in pragmatic terms, rendered somewhat artificial.
>
> [27] Second, the ensuing question, if one were to accept the Applicant's submission, would be what valuation method would properly recognize both the interests of Beach House and of its various shareholders? The Applicant suggested that application of the income approach would achieve this object. The Board addressed this issue squarely in the second half of para. 18 of the Decision, which I, in turn, referred to at para. 22 of these reasons.
>
> [28] The Applicant conceded before the Board, as it did before this court, that the H&BU of the Property is as market cooperative housing. This is important. As both parties agree, identifying the H&BU is a critical step in the assessment process and provides the context for the selection of comparable properties.
>
> [29] Based on the evidence before it, the Board concluded that the H&BU of the Property as a market cooperative was different from a H&BU as a rental apartment building, and that the Applicant's proposed use of the income approach, while relevant to the valuation of rental apartments and to properties with other H&BUs, was not suitable for the Property.
>
> [30] These two conclusions underlie the Applicant's two principal grounds of appeal: (1) that the Board erred in choosing the valuation method that it did; and (2) that the conclusion of the Board was inequitable and inconsistent with the valuation of "similar properties".
>
> [31] Though these two conclusions give rise to somewhat different issues conceptually, they are also intertwined. The Board was unwilling to use the income approach to valuation, because that approach had relevance to properties that it considered were not properly comparable to the Property. The Board was not concerned that its decision would give rise to inconsistencies or inequity, because, again, the properties the Applicant was looking to as comparables were not, in fact, "similar" or comparable.
>
> [32] The Board had ample evidence before it, in the form of the report of Mr. Ene, to conclude that using the income approach to value the Property would be inappropriate.

[19] The judge then referred to the distinction between using an assessment method that is wrong in principle, which is an error of law, and the selection of a valuation technique or method, which is a question of fact as discussed in *Canadian Collieries Resources Ltd. v. Comox Assessment District*

(1962), B.C. Stated Case 31 (S.C.) and *British Columbia (Assessor of Area No. 26 - Prince George) v. Cal Investments Ltd.,* [1993] B.C.J. No. 93 (S.C.). He stated in para. 35:

> In the present case, the Board's rejection of the income approach to valuation was a decision that properly fell within its jurisdiction, was based on a reasonable assessment of the evidence, and was not the product of an error in principle.

[20] The judge agreed with the conclusion of the Appeal Board stating that the decision in *Panorama* and this Court's decision in *Standard Life* "are not necessarily inconsistent" (at para. 40). He concluded in para. 44 that the Appeal Board "was correct in valuing the Property based on the aggregate market value of lease sales in the Property itself." This disposed of questions of law numbers 1, 4, 5 and 6.

[21] Addressing questions 2 and 3, which concerned the requirement that assessments be equitable, the judge referred to *571016 B.C. Ltd. v. Assessor of Area #09 - Vancouver Sea to Sky Region*, 2010 BCSC 790, wherein the Court accepted the proposition from *Allard Contractors Ltd. v. British Columbia (Assessor of Area 05 - Port Alberni)*, [1999] B.C.J. No. 2437 at para. 24 (S.C.), that "equitable considerations require a consideration of a class of similar properties, but…all properties are not necessarily similar just because they have some shared feature." The Court in *571016 B.C. Ltd*. concluded at para. 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.

[22] The judge considered these comments as "directly relevant to this case" and rejected the appellant's position.

**Positions of the Parties**

[23] The appellant contends that the judge misconstrued this Court's decisions in *Standard Life* and *Vancouver Assessor, Area #09 v. Bramalea Ltd.* (1990), 52 B.C.L.R. (2d) 218, 76 D.L.R. (4th) 53 (C.A.) leave to appeal dismissed, [1991] S.C.C.A. No. 52, and erred by characterizing and dealing with comparable properties as a question of fact, rather than as a question of law.

[24] The Assessor asserts that there are two relevant issues on this appeal, which I paraphrase as follows:

1. whether the valuation method endorsed by the Appeal Board and the chambers judge is inconsistent with this Court's decision in *Standard Life*;

2. whether the conclusion that equity does not arise where comparables involve dissimilar properties is consistent with this Court's decision in *Bramalea*.

## Discussion

### Standard of Review

[25] As noted, the parties agree that the standard of review in this case is reasonableness based on this Court's decision in *Weyerhaeuser*, in which Madam Justice Garson undertook an extensive review of the relevant jurisprudence. It is sufficient to observe that the spectrum of deference articulated in *Dunsmuir v. New Brunswick,* 2008 SCC 9, [2008] 1 S.C.R. 190, applies to the decisions at issue in this case. The Appeal Board was construing its home statute and determining whether a method of assessment was equitable, inquiries clearly within its area of expertise.

### Legislation and *Standard Life*

[26] Section 19(2) of the *Assessment Act* requires an assessor to "determine the actual value of land and improvements". "Actual value" is defined as "the market value of the fee simple interest in land and improvements". This Court addressed the phrase "fee simple interests" in *Standard Life*. The judge's quotation from that case bears repeating:

> [10] I think the real issue in this case is what is meant by the phrase 'the fee simple interest in land and improvements' in s. 26 of the *Act*. My conclusion is that the Assessor is correct in submitting that the fee simple interest includes all the interests in the land and buildings and not just the owner's interest. In my opinion, the assessor here had to consider not just the owner's interest, as I think the judge below did, but also the tenant's interest. That, for practical purposes, leads to the conclusion that the totality of the interests properly considered should, generally speaking, be the equivalent of the owner's unencumbered interest.
>
> ...
>
> [13] As I have said, in my opinion, the 'fee simple interest' is comprised of the entirety of the interests in the property. This bundle of interests includes both the tenant's and the landlord's interest. Implicit in this is the principle that consideration of actual rental value is, generally speaking, not relevant to the valuation of the 'fee simple interest'. This is because the actual rental value is relevant only to the owner's interest in the land and buildings whereas the actual value in the *Act* is the totality of all interests in the land and buildings. The owner's interest and the tenant's interest, in principle, should reflect the market or actual value of the land and buildings. It is for this reason that I have concluded that the 'fee simple interest' is, again generally speaking, the same as the owner's unencumbered interest.

[27] The appellant refers to a number of cases supporting its submission that the Assessor did not value its unencumbered interest in the property. I shall comment on those cases below, but, in my view, the appellant places an inappropriate emphasis on the phrase "unencumbered interest".

[28] Mr. Justice Hollinrake in *Standard Life* stated at para. 2 that the issue was whether the Appeal Board "erred in law in not considering a lease in which the actual rent for the premises was well below what

would be the market or economic rent for the space." This Court upheld the Appeal Board's rejection of the contention that an agreed rent could not diminish the actual value of the property for assessment purposes. That was the context for the phrase "unencumbered interest".

[29] In my view, the main thrust of *Standard Life* is found at para. 13, where Hollinrake J.A. stated that "the 'fee simple interest' is comprised of the entirety of the interests in the property. This bundle of interests includes both the tenant's and the landlord's interest." In its factum, the appellant contends:

> 75. The Assessor essentially valued the Property as it would a strata-titled apartment project contrary to the provision of the *Act* and the case law regarding assessments. As in *Munro,* [2009 PAABBC 20090173,] when shares in the Property are bought and sold the purchaser is not buying an interest in land and does not gain an interest in title. The purchaser is simply buying a share in a company with rights of use to the land owned by BTHA under a lease agreement. BTHA has the power to set House Rules and impose other obligations on the lessees in the Property.

[30] In my view, this passage illustrates the error in the appellant's approach. The shareholders do not simply buy and sell shares. They buy and sell leases. A lease is an interest in land. In this case, the term of the leases is the life of the appellant. The leases comprise the entirety of the interests in the Property. There is nothing else. There is no income stream to value because the levies paid to the appellant defray the costs of operating and maintaining the building.

[31] I turn to the cases referred to by the appellant.

[32] In *Bramalea,* the principal focus was on equity: the requirement that similar properties be treated the same. I do not think it assists the appellant on the first issue.

[33] *Assessor of Area 08 - North Shore/Squamish Valley v. Mir Huculak* (1998), B.C. Stated Case 408 (S.C.) involved a consideration whether time-share interests in a property could be used to lower the assessed value of the property, an issue similar to that in *Standard Life*. Mr. Justice Brenner, as he then was, applied *Standard Life* and held it was an error to carry out an evaluation "based on the impaired value of the property".

[34] The appellant relies on additional cases of the Appeal Board to much the same effect. It contends that the circumstances in *Munro v. Assessor Area 15,* 2009 PAABBC 20090173*,* were very similar to the present case. That case involved multiple owners of campsites on a property. The gravamen of the decision is in para. 24:

> [24] … The difficulty with the Assessor's approach is that it is clear that when the memberships in the Association are bought and sold, the purchase money is not buying an interest in land. The purchase price is buying a membership in a society with rights of use to land owned by the society.

That is not the situation in the present case.

[35] In the present case, to obtain the fee simple, a purchaser of the Property would have to purchase all of the leases at fair market value. The income approach does not reflect that value. The purchaser of a rental building would discount the income stream of the rental income to take into account risk: that is, vacancy. No such discount would be appropriate when purchasing the appellant's Property.

[36] The appellant asserts that *Panorama* would have been decided differently in light of this Court's decision in *Standard Life* and that the Appeal Board and the judge erred in relying on it. In my view, the cases are compatible. At 548, the court in *Panorama* valued all of the relevant interests in the property, including a premium paid by tenant-shareholders, because "these rights can be transferred to future purchasers and they are not values personal to the individual owners that would not form the proper subject for assessment".

[37] In my view, the judge did not err in his consideration of the relevant provisions of the *Assessment Act* or of this Court's decision in *Standard Life.*

***Bramalea* and Equity**

[38] The appellant argues the judge erred in concluding that the Appeal Board did not err in upholding the Assessor's rejection of the appellant's comparables: that is, rental apartment buildings.

[39] I previously rejected the notion that the income approach to valuation was appropriate. That, of course, is an approach that could be applicable to valuing any building with an income stream, including a rental apartment building.

[40] In the present case, the Appeal Board had evidence that the market treats rental apartment buildings and market apartment buildings differently. It was on this basis that the Assessor and the Appeal Board rejected the appellant's comparables. The judge refused to accede to the appellant's position on the basis that the Appeal Board's acceptance of the evidence required deference. I agree with that conclusion.

[41] I would not accede to the appellant's contention that the judge erred in considering the requirement of equity in a property tax assessment.

**Comparables**

[42] The appellant conceded that its ground of appeal concerning comparables depended on this Court's determination of its other grounds of appeal. That is, the Appeal Board's decision concerning the choice

of comparables is a question of law only insofar as it is determined that the Appeal Board used a wrong method of assessment. I have rejected that contention.

[43] I would not accede to the appellant's ground of appeal concerning the choice of comparables.

**Conclusion**

[44] I would dismiss this appeal.

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Frankel