RIVERSIDE HEIGHTS SHOPPING CENTRE
(CAPIC LTD.)

v.

DISTRICT OF SURREY

Supreme Court of British Columbia (NO. X6267/74)

Before: MR. JUSTICE S.M. TOY

Vancouver, July 29, 1974

T.G. Pearce for the Appellant
A.K. Thompson for the Respondent

Reasons for Judgment

Both the Assessor and the land owner were dissatisfied with a certain Assessment Appeal Board decision dated the 10th of June, 1974 which varied in part the assessment pertaining to improvements on the owner's lands in the Municipality of Surrey for the year 1974.

The Assessment Appeal Board, firstly, on the 8th of July, 1974, stated a case at the request of the Assessor and, subsequently, on or about the 22nd of July, 1974, stated a second case at the request of the land owner; both of which cases pertained to the same decision of the 10th of June, 1974. The cases as stated by the Assessment Appeal Board purported to be stated pursuant to Section 51 of the *Assessment Equalization Act* then in force. That act was repealed on June 20th, 1974, but the proceedings before me continued under the *Assessment Equalization Act*, R.S.B.C. 1974, Chapter 6. Both stated cases came on for hearing before me in chambers on the 29th of July, 1974 and at the conclusion of argument, judgment was reserved. I regret my failure to deliver my decision within the requisite month, however, by Order of the Lieutenant-Governor-in-Council, the time for determining the stated case and delivering this opinion was extended to November 30th, 1974.

The land owner did not challenge the Assessor's assessments of the two land parcels, but in support of its assessment appeal tendered expert evidence that the "actual value of the improvements" on one of the two parcels was substantially less than the amount valued by the Assessor. For purposes of answering the only question submitted to this Court on the first stated case, dated the 8th of July, 1974, reference need only be made to paragraphs 4 to 9 inclusive of that stated case, which are hereinafter reproduced:

> "4. Mr. Penny told the Board that the purpose of his appraisal was to find the market value of the owner's interest in the shopping centre and he used the income approach.
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> 5. Mr. Penny agreed that he had used the income approach solely and had made no allowance for improvements placed upon the land by the tenants. He appraised the owner's interest in the improvements of the shopping centre as $808,700.00.

6. Martin Ratson, the Appraiser who assessed the Riverside Centre stated that he had appraised the shopping centre on the cost approach, less depreciation. Mr. Ratson's evidence of the value of the improvements on the subject property, including tenant's improvements, was $1,380,680.00.

7. The difference in the actual value of the improvements arrived at by the two Appraisers was as follows:

Surrey Appraiser	$1,380,680.00	improvements
Mr. Penny	$ 808,700.00	improvements
Difference in Actual Value	$ 571,980.00	

8. The Assessment Appeal Board, in their Reasons for Judgment, (Exhibit "A" hereto) assumed that this difference was actually tenant contributions to the physical structure of the improvements and stated:

> "'Assuming this amount was actually tenant contributions to the physical structures of the improvements, this $571,980.00 would have to be amortized by the tenants during the period of their lease, say 10 years at a rate of 9%; or
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> $\frac{571{,}980 \times 251.58}{20000}$ = $7,194.94 per month, or $86,340.00 per annum.'

9. The Board then proceeded to reduce the assessed value of the improvements on Lot 33 from $683,930.00 to $487,150.00 or conversely to increase the assessed value, arrived at as a result of Mr. Penny's appraisal, by the sum of $82,800.00."

Now the question submitted by the Assessment Appeal Board in the first stated cases is in the following words:

> "1. Was there any evidence upon which the Assessment Appeal Board could find the assessed value of the improvements to be an amount other than that assessed by the Municipal Assessor or appraised by Mr. Penny?"

Counsel for the Assessor took the position in the case before me that the Assessment Appeal Board had to accept either the Appraiser's valuation of $1,380,680.00 or the owner's expert's valuation of $808,700.00 and that the Board could not arrive at a third valuation.

I am not convinced that the question posed is a question of law, but rather than at this late date remit the case for amendment, it is my conclusion that the Board had jurisdiction to vary the amount of the Assessor's assessment pursuant to either subsections (a) or (b) of Section 46, subsection 1, R.S.B.C. 1960, Chapter 18, as amended by the *Assessment Equalization Act Amendment Act*, Statutes of British Columbia, 1961, Chapter 3, Section 6, which reads as follows:

> "46 (1) The amount of the assessment of real property appealed against may be varied by the Board where, in the opinion of the Board, either
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> (a) the value at which an individual parcel under consideration is assessed does not bear a fair and just relation to the value at which other land and improvements are assessed in the municipal corporation or rural area in which it is situate; or
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> (b) the assessed values of such land and improvements are in excess of the assessed value as properly determined under section 37."

The Board, in my view, once it concluded that the assessed value of the improvements was in excess of the assessed value as properly determined under section 37, was entitled, if not bound, to look at every bit of evidence tendered. The Board should then weigh all of the vive voce testimony, as well as the documentary evidence submitted, and then accept or reject in whole or in part the various witnesses' testimony and/or opinions and accept in whole or in part the documentary evidence, and finally arrive at its own conclusion on what the "actual value of the improvements" was. It could amount to an error in law to blindly accept one or other of the two differing opinions in the manner submitted by counsel for the Assessor.

Accordingly, I would answer the question posed by the Assessment Appeal Board in the first stated case in the affirmative.

The questions submitted to this Court in the stated case dated July 22nd, 1974 are as follows:

> "1. That the Board erred in not accepting the only evidence before the Board of actual or market value.
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> 2. That the Board erred in accepting evidence of the Assessor as evidence of actual market value when the Board found that he gave no considerations to market value.
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> 3. That the Board erred in refusing to accept the argument of the Appellant that under Section 37(1) of the *Assessment Equalization Act* where the Appellant carried on a commercial undertaking the land and improvements must be valued as property of a going concern.
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> 4. That the Board erred in assuming any value for tenants improvement when the Assessor could give no evidence of same.
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> 5. That the Board erred in not finding that the assessment appealed from was no assessment in law as the assessment was based entirely on cost less depreciation and gave no consideration to market value or to value of the land and improvement to Riverside Heights Shopping Centre Ltd. as a going concern.
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> 6. That the Board erred in not finding that the assessment appealed from was no assessment in law as the assessment was not based on the assessed value of the land and improvements as the property of the commercial undertaking known as Riverside Heights Shopping Centre which is a going concern.
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> 7. That the Board erred in not basing its decision as to the assessed value on the only evidence of market value before the Board, namely, the evidence of Bodge and Penny.
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> 8. That the Board erred in not basing its decision as to assessed value on the only evidence before the Board as to the value of the land and improvements as the property of Riverside Heights Shopping Centre Ltd. being a commercial enterprise carrying on business in the Municipality of Surrey.
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> 9. That the Board was wrong in law in not finding that the assessment made by the Assessor for the year 1974 based on the cost less depreciation as determined by a manual and not by any actual cost was not an assessment at all under the *Assessment Equalization Act*.
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> 10. That the Board should have determined the actual value of the lands and improvements of Riverside Heights Shopping Centre Ltd., a commercial enterprise carrying on business in the Municipality of Surrey as the property of a going concern pursuant to Section 37(1) of the *Assessment Equalization Act*."

The majority of the foregoing questions appear to be, at best, mixed questions of fact and law, and not questions of law which this Court is confined to in rendering its opinions on stated cases, pursuant to Section 51. Counsel for the land owner, during his submissions, suggested that his grounds all be lumped together, and counsel for the Assessor took no objection to that submission, nor the form of the questions.

Questions numbered 1 to 9 I respectfully decline to answer on the basis that they are not questions of law when read in conjunction with the facts found by the Board. With some substantial reservation, I propose to answer the 10th question, restricting my answer and opinion, as I must, to the value of the "improvements" and not the "land and improvements". It was on that basis that the appeal was argued before the Board and before me and I propose to sever the words "land and" rather than remit the case for amendment.

In my view, the question must be answered in the negative, namely, that the Assessment Appeal Board did not determine the actual value of the improvements pursuant to Section 37.

I have read and considered the five-page decision of the Assessment Appeal Board dated the 10th of June, 1974 annexed to both of the stated cases. Once the Assessment Appeal Board was satisfied that the Assessor had excessively assessed the improvements it fell upon the Assessment Appeal Board to ". . . properly determine the actual value. . ." pursuant to Section 37. Sections 37(1) and (2) were then in the following terms:

> "37. (1) The Assessor shall determine the actual value of land and improvements. In determining the actual value, the Assessor may give consideration to present use, location, original cost, cost of replacement, revenue or rental value, and the price that such land and improvements might reasonably be expected to bring if offered for sale in the open market by a solvent owner, and any other circumstances affecting the value; and without limiting the application of the foregoing considerations, where any industry, commercial undertaking, public utility enterprise, or other operation is carried on, the land and improvements so used shall be valued as the property of a going concern.
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> 37. (2) The assessed value of any parcel of land and improvements (including, in particular, new homes) shall be commensurable with that of comparable parcels of land and improvements in the same municipal corporation or rural area, the assessed value of later development bearing a fair and just relation to that of earlier development, notwithstanding any differences between the costs of comparable items."

The pertinent facts (and a statement of some of the evidence) is set out in the second stated case as follows:

> "2. The land and premises is situate at 14815 -108 Avenue, in the Municipality of Surrey, Province aforesaid, and is known as Riverside Heights Shopping Centre. This Centre is comprised of shops which are rented at a gross annual rental of $1.90 per square foot. The Centre has lost stature since being built because of the competition from the newer and more modern shopping centres with one or two major department stores.
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> 3. The Appellant purchased the land and premises in 1969 for $1,050,000.
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> 4. The Appellant agreed with the Assessor as to the assessed value of the land, namely:

1974	Lot 33	$ 345,890.00
1974	Lot 64	$ 42,260.00

> 5. The Assessor, in determining the value of the actual land used the cost approach only as set out in a Government Manual. No consideration was given to the income approach, comparative sales, or market value of the Shopping Centre. The Assessor suggested that

there were certain tenants improvements that had been included in his assessment, but was unable to give any information as to who the tenants were or how much the suggested tenants had spent on the suggested improvements.

6. That the Appraiser found the actual value of the land based on the cost less depreciation was in the sum of $1,380,680.

7. That the market value of the land as found by Mr. Penny was based on the sale and income approach was in the sum of $808,700.

8. That the income approach is the more significant approach to value when appraising an income producing property.

9. That the only evidence before the Board as to the income of the Shopping Centre was that given by the Appellant, the Assessor having given no consideration to the income approach or to market value.

10. That the difference between the actual value of the improvement as determined by the evidence of the Appellant based on the sale and income approach and the Assessor based on the cost less depreciation approach was in the sum of $571,980, as follows:

Assessor's Actual Value	$ 1,380,680.00
Appellant's Actual Value	$ 808,700.00
	$ 571,980.00

11. That the Board increased the market or actual value as determined by the Appellant by $165,600."

In my view, the Assessment Appeal Board properly came to the conclusion that the Assessor had excessively assessed and had failed to consider present use, location, and other circumstances affecting the value when he slavishly followed the manual and assessed on a cost less depreciation formula. The Board in its wisdom seemed to be favourably inclined to an income approach toward valuation, or to use the words of Section 37, ". . . a revenue or rental value. . ." A slavish adoption of the land owner's expert's approach would similarly have been in error, in my view, as the actual rents received by the owner would not have reflected any amount for the actual value that the tenants paid for fixtures or improvements.

I am not able to say whether the formula adopted by the Assessment Appeal Board as described in paragraph 8 of the first stated case is one for which there is any legal precedent. Conversely, I am not prepared to say by adopting that formula that the Assessment Appeal Board have fallen into any error in law that I am entitled to correct.

I am, however, convinced that the Board did err in law in concluding that by subtracting the land owner's expert's opinion of actual value, which was based on a sale and income approach, from the Appraiser's opinion of actual value, which was based on a cost of the building and tenants improvements less depreciation, would result in the actual or capital cost of the tenants improvements. In my opinion, short of a miraculous coincidence, by subtracting Mr. Penny's appraisal of $808,700 from the Appraiser's valuation of $1,380,680, the result would not be the cost of the tenants improvements because such a mathematical exercise is like subtracting apples from oranges.

Had the Assessor valued on the basis of sale and income, as did Mr. Penny, the Appraiser, it would have been logical to assume that the difference between the two would be the cost of the tenants improvements.

In my opinion, in the absence of any evidence of revenue on rental value of the tenants improvements, the Board should have re-examined the only evidence tendered to it by the Assessor and all of the documentary evidence received through him, and then arrive at a decision as to the actual cost, or replacement cost, of those tenants improvements that have been added to the land owner's improvements. To that base figure should be applied such considerations of present use, location, the price of such improvements if offered for sale, and *any* other circumstance affecting the value, as the Board in its wisdom considers appropriate.

In my view, it will depend on what realistic findings the Board can make on the evidence it has before it whether it applies precisely the same formula it did in arriving at its decision of June 10th, 1974. That will be a matter for them to re-consider when approaching the problem again in the light of this opinion.

Accordingly, I remit the case to the Assessment Appeal Board and direct them to vary the Assessor's assessment in accordance with the opinion expressed in this decision. I do not propose to award either appellant costs of these proceedings.