The following version is for informational purposes only

TAMARACK PROPERTIES LTD. ET AL
(Cal Investments Ltd.)

v.

ASSESSOR OF AREA 22 - EAST KOOTENAY

Supreme Court of British Columbia (A800327)

Before: MR. JUSTICE H.C. McKAY

Vancouver, April 25, 1980

J.R. Lakes for the Appellant
P.W. Klassen for the Respondent

Reasons for Judgment July 9, 1980

This is an appeal by way of Stated Case from a decision of the Assessment Appeal Board. The stated case reads as follows:

The facts are as follows:

1. The Appellant owns a shopping centre in Cranbrook, British Columbia called the Tamarack Mall Shopping Centre located on the east side of Cranbrook Street on a site consisting of 29.42 acres. The buildings cover an area of 306,000 square feet or about 24% of the site area. The whole property is the subject of a Land Use Contract which outlines the permitted uses of the land which is restricted to those uses normally compatible with a modem shopping centre and makes a provision for some future but limited expansion of the buildings on the site.

2. The assessment on the Appellant's land and improvements was $5,705,000 for the land: $10,109,000 for the buildings and $423,850 for the machinery. This assessment represented a 59.96% increase over the 1978 actual value totals. The basis of the 1979 assessment was made by a combination of a cost approach to value the improvements and an income approach to determine a capitalized estimated market value and a resulting land residual value.

3. The Appellant appealed on the ground that all of the 1979 assessments were too high. The Appellant called Mr. N. Lonsdale, a local qualified appraiser who submitted a report which is Exhibit 2 and his opinion that the underlying land value for the Appellant's property would not be higher than $60,000.00 per acre for the raw land. The Appellant also submitted the appraisal of A.T. Ray Jones which submitted that the valuation of the Appellant's land should be $2,280,000 and the improvements $10,505,000 which is Exhibit 1 and is attached to this Stated Case as Schedule "B". The only issue before the Board concerning machinery and equipment was concerned with electronic cash registers. This is not in issue in this Stated Case. The Respondent submitted the evidence of Warren Harrison, which is Exhibit 4 and is attached as Schedule "C" to this Stated Case. The Assessment Appeal Board accepted the projected gross income and vacancy allowance from Mr. Jones' appraisal (Schedule "B") and the rental equivalent of existing tenants improvements from Mr. Harrison's submission (Schedule "C"). The Board

then applied a reasonable expense allowance of 11% with the result that the amended assessment was in the amount of $4,161,000 for land; $10,109,000 for improvements and $423,850 for machinery and equipment. The decision of the Board is attached as Schedule "A" to this Stated Case.

4. The Appellant's submission for a land assessment of $2,280,000 was based on the evidence of Mr. Lonsdale and the addition of $ 17,500 per acre for site preparation costs. The basis for the assessment of $5,705,000 for the land value was on the calculation of a land residual as set out in Schedule "C". The amended assessment of $4,161 ,000 on the land as determined by the Assessment Appeal Board is also based on a calculation of a residual land value on an income approach as set out on Pages 5 and 6 of Schedule "A" . The "rental equivalent of existing tenants improvements" applied by the Board in making its amended assessment is the rental equivalent of the finish installed by the tenants after leasing space in the "shell" of the building.

5. In Mr. Jones' appraisal (Schedule "B") he also gave evidence that there was economic obsolescence present due to the rather remote location of the Appellant's land and improvements in an area where there was still much vacant land and that this mall was a premature development, with a considerable waiting period before attaining its full revenue potential. The Board made no finding on the evidence of obsolescence.

6. The Appellant requires that the case be stated and signed to this Honourable Court on the following questions of law:

(1) Is the assessment of the Appellant's land as determined by the Assessment Appeal Board invalid as being assessment to owner?

(2) Did the Assessment Appeal Board err in law by failing to reduce the residual land value by the value of tenants' improvements?

(3) Did the Assessment Appeal Board err in law by not giving sufficient weight to the evidence as to economic obsolescence?

Pursuant to Section 67 of the *Assessment Act* aforesaid, the Assessment Appeal Board submits this Stated Case and humbly requests the opinion of this Honourable Court on the questions of law.

The third question, referring as it does to the sufficiency of the weight given by the Board to the evidence of economic obsolescence. does not pose a question of law. It is only on questions of law that an appeal lies to this court.

Much of Mr. Lakes' written submission is directed to the question of whether the assessment of the subject property bears a fair and just relation to the value at which similar land and improvements are assessed in Cranbrook. None of the questions posed raise that point of law and the appellant must be confined to the grounds raised by the Stated Case. In any event there is no validity to the complaint. The report of the assessor (Schedule "B") compares the assessment of the Tamarack Mall to the Cranbrook Mall, the only other shopping mall in Cranbrook. The comparison shows that the two shopping malls have received even handed treatment.

The Board found that the land assessment of $5,705,000.00 was too high. That being so the members were duty bound to consider all of the evidence and arrive at their own decision as to what the actual value of the land was. They rejected the comparative sales approach and gave reasons for so doing. The vacant land sales used by Mr. Lonsdale and relied on by Mr. Jones, the appellant's appraiser, were not comparable. It was for the Board members to make that determination. The Board then determined that the land residual process would be appropriate.

The land residual method of determining actual value of land is an acceptable and recognized method. I quote from pages 5 and 6 of the Board's decision:

> From the evidence presented, both written and verbal, and in the absence of reliable vacant land sale' s evidence for comparably sized parcels, the Board has reconstructed the land residual process as follows:

From X.1. Page 21

Projected Gross Income	$1,484,899
Less Vacancy Allowance (6.25% approx.)	$92,762
Effective Gross Income	$1,391,137

From x.4. Page 7

Rental Equivalent of Existing Tenant's Improvements	$132,121
Adjusted Warranted Gross Income	$1,523,258
Deduct Reasonable Expense Allowance 11%	$167,558
Estimated Warranted Net Income	$1,355,700
Capitalized at 9.5% (rounded) =	$14,270,500
Less Building Value by Cost page 5 of Ex. 4	$10,109,000
Residual Value to Land	$4,161,000

What the Board has done is to determine the total value of the lands and improvements by using the income approach, which is a capitalizing of the net market rents on the basis of a market derived, and agreed upon, capitalization rate. The Board then determined the value of the buildings using the cost approach and deducted that value from the total value to arrive at the actual value of land. I can find no fault with the approach taken. Once the Board determined, as it was entitled to do, that the comparative sales approach was inappropriate then the land residual process was the only realistic approach to the problem. The figures which the Board used were taken in part from the evidence of the appellant's appraiser and in part from the evidence of the assessor. Counsel for the appellant objects to the Board picking and choosing figures in that manner. He says that because the Board rejected some of the Assessor's evidence it was in error in accepting other parts. It is trite law that a fact finding tribunal is entitled to accept part of the evidence of a witness and to reject another part. I quote from the reasons of Toy, J. in *Riverside Heights Shopping Centre (Capic Ltd.)* v. *District of Surrey*, British Columbia Stated Cases-Case No. 80:

> 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.

What did the Board do in the selection process? The effective gross income and vacancy allowance for the shell of the building was taken from the evidence of Mr. Jones, the appellant's appraiser. Mr. Jones made no allowance for the rental value of tenant improvements and so the

Board took this figure from the evidence of Mr. Harrison, the assessor. The Board then deducted what it called a "reasonable" allowance of 11%. I am unable to determine just how the board arrived at the figure of 11% but I note it falls between the expenses allowed by Mr. Harrison in the amount of $155,925.00 and those allowed by Mr. Jones in the amount of $176,700.00. The Board then capitalized the annual net rental income derived from the shopping centre at 9.5%-being a rate derived from the market on the sale of shopping centres in British Columbia. I gather there was agreement as to the rate by Mr. Jones and Mr. Harrison. From this total the Board then subtracted the depreciated replacement cost as determined by Mr. Harrison-this left a residual land value of $4,161,000.00.

Dealing then with the specific questions.

> (1) Is the assessment of the appellant's land as determined by the Assessment Appeal Board invalid as being assessment to owner?

It is the position of appellant's counsel, if I understand him correctly, that the income approach to determine the value of land and improvements resulted in a subjective value to the owner. I refer to the judgment of Hutcheon, J. (as he then was) in a recent decision relating to a shopping centre-*Kelfor Holdings Ltd.* v. *Assessor of Area No. 26 (Prince George)*, British Columbia Stated Cases, Case No. 130. I quote from that decision:

> Question 2: "*Did the Board err in accepting the residual value referred to in Paragraph 6 as the land value*?"
>
> Paragraph 6 reads as follows:
>
> "6. Hugh Stanhope gave evidence and filed a Brief which is annexed as Schedule C. In Schedule C the income approach is used to calculate an effective gross income of $2,316,986 which includes a sum of $129,700 described as an estimated rental equivalent of tenants improvements from which the estimate of landlords expenses of $208,529 is deducted to calculate the 'net income estimates' of $2,108,457. This 'net income estimates' is then capitalized at 9 1/2% to arrive at a figure of $22,194,000 from which the improvements value of $14,848,000 (which value was for the improvements including tenants improvements) is subtracted to establish a land residual value of $7,346,000. Schedule C also establishes a value of $14,848,000 for the building by an express reference to the cost approach using the Marshall & Swift Manual found on Page 10 of Schedule C. The land residual value is determined by subtracting the improvements value from the estimated market value set out on Page 15 of Schedule C".
>
> The applicant could only succeed on this point if it could be shown that the income approach used by Mr. Stanhope resulted in a subjective value to this owner.
>
> It was agreed by both experts who gave evidence that there were no sales of shopping centres of comparable size and quality upon which to base a value. Mr. Simpson, the expert called by Kelfor Holdings, used the original cost of land in 1973 factored up at 10 per cent per annum to arrive at a land value of $3,800,000.
>
> Mr. Lakes submitted that the approach by Mr. Simpson was the only valid approach because the residual value given to the land by subtracting the replacement value of the improvements from the estimated market value of the project on an income approach involved the opinions of Mr. Stanhope in estimating economic rents and operating expenses. As I understood him, Mr. Lakes said that the use of opinions in this way brought about a result which was a subjective value to this particular owner.
>
> Since Mr. Stanhope used, not the actual rents or the actual operating expenses, but an estimate of economic rents and his estimate of proper operating expenses, I do not

> understand how it can be said that the resulting value is the subjective value to the particular owner. There may be an argument to be made if an appraiser had used, for example, actual operating expenses which, because of the particular efficiency of the owner were lower than normal. Then it could be said that the increase to the net income would be reflected in the residual value to land and thus produce a higher value to the land of that owner. But the opinions about economic rents and on operating expenses no more lead to a subjective value to the owner than does the opinion that the proper rate to capitalize the yearly net income was 9 1/2 per cent.
>
> The answer to the second question is that the Board did not err by accepting the residual value referred to in Paragraph 6 of the Amended Stated Case as the land value.

It appears to me that the reasoning of Mr. Justice Hutcheon has full application here. There were no sales of shopping centres of comparable size, quality and location upon which to base a value. The sales of land put forward by the appellant's appraiser were found to be of no assistance to the Board. The rents used were projected rents based on market evidence and not actual rents. The expenses were not actual expenses but rather a reasonable allowance for expenses. Mr. Lakes attempted to distinguish the case at bar from the Kelfor decision. He points out that the Board, in that case, upheld the decision of the Court of Revision and that Mr. Justice Hutcheon states that the work of the Board was at an end when it was satisfied that the values found by the Court of Revision were not too high. I cannot see how that difference affects the reasoning. He says that in the Kelfor case there was no evidence of sales whereas here there was. The evidence of sales put forward in this case was found to be of no value because the sales were not comparable. Where then is the difference in the two situations?

The value determined by the Board on the facts found by the Board would be a value for "any" owner of the shopping centre. The first question is answered in the negative.

> 2. Did the Assessment Appeal Board err in law by failing to reduce the residual land value by the value of tenants' improvements?

The precise method used by the Board was expressly approved by Mr. Justice Hutcheon in the Kelfor case. The second question is answered in the negative.

As I have already stated the third question does not pose a question of law.

The appeal is dismissed with costs to be paid by the appellant to the respondent.