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THE ARBUTUS CLUB

v.

ASSESSOR OF AREA 9 - VANCOUVER

Supreme Court of British Columbia (A800302)

Before: MR. JUSTICE J.C. BOUCK

Vancouver, September 9, 1980

B.I. Cohen for the Appellant
R.B. Hutchison for the Respondent

Reasons for Judgment September 9, 1980

Nature of Application

The appellant brings these proceedings by way of a Stated Case from the decision of the Assessment Appeal Board (the Board) pronounced 27 December 1979. Authority for this procedure is to be found in Part 8 of the *Assessment Act*, R.S.B.C. 1979, chapter 21. sections 74-75.

Facts

While the material is extensive, it seems appropriate to recite its entire content for ease of reference.

> "THIS CASE STATED by the Assessment Appeal Board aforesaid, humbly sheweth that the appeal in which The Arbutus Club was the Appellant and the Assessor of Area 09-Vancouver was a respondent was heard at Vancouver, Province of British Columbia, on the 19th day of September, 1979 and on the 21st day of November, 1979, in the presence of Bruce I. Cohen, counsel for the said appellant and R. B. Hutchison, counsel for the said respondent.
>
> The facts are as follows:
>
> 1. The Arbutus Club (hereinafter referred to as the Club) is a society incorporated September 15, 1960 under the *Societies Act* of British Columbia. The objects of the Club are, briefly, to conduct and manage a sports and social club and to advance the welfare and general interests of the citizens of the City of Vancouver and districts from which membership is to be drawn and to be strictly non-sectarian, non-political and non-racial.
>
> 2. The Club is a family sports and social club. Of the 4,950 people on the membership rolls as at September 19, 1979, 2,528 were under the age of 26. The programs offered also reflect the family nature of the Club, e.g., junior tennis, junior badminton, and swimming lessons for all ages.

3. When The Arbutus Club was originally designed and built in the early 1960's there was little foresight used as to the problems that might arise in the 1970's and as a result the Club is now experiencing many inefficiencies, and obsolescence is playing a major role.

4. The Club has several areas of waste space, and some areas experiencing overcrowding. Because of locations, however, the Club is unable to utilize the waste space. The Club's prime area of waste space is the Shaughnessy viewing lounge. This is the area on the same level as the cafeteria which lies between the skating rink and the curling rink. The room contains approximately a half dozen benches facing each rink for people to sit and view the activity in the skating and curling rinks. This is rarely used for skating viewing however, as there are also benches in the corridor running the length of the rink which provide a much better view of the activities. The prime use of this large room, therefore, is to provide viewing for the few people who may wish to watch the curling which takes place from October to April each year, and because of its location, it cannot be converted to any better use.

5. The Strathcona viewing lounge, located directly above the Shaughnessy lounge, has similar problems of wasted space due to the location. This room, however, has an advantage in that a bar is located in this room. A sliding partition has recently been installed in the room to try to eliminate the "barn like atmosphere" on a night when there are only a handful of members and attendants. This partition, which closes off the back two-thirds of the room is only open normally on a Saturday night. The room is mainly empty during the summer months as the curling rink is in darkness, and there are no outside windows. so there is very little for one to sit and watch.

6. The other area of waste space is the main corridor which is considerably wider than is required by the building code, and because of the existence of supporting walls it would be impossible to alter.

7. There is not nearly enough room for existing members in the change rooms and locker areas. Because of this the Club is forced to limit membership to its current level. In addition, there is always a waiting list for lockers in all areas and there is no available space for additional lockers. The hockey dressing rooms are far too small and there are no shower facilities in two of the dressing rooms.

8. The curling rink is only in use for 8 months of the year. During summer months, May through September, the ice must be taken out to lessen the threat of permafrost. The Club has regular tests done to ensure that the Club is not running the risk of heaving from permafrost. In order to permanently remedy this situation, the Club would have to expend in excess of $100,000 to install a hot-brine system embedded in a concrete floor.

9. The gym was constructed to provide for basketball and badminton, however, no provision was made for viewing. As a result, the gym is often standing vacant, or is being used for other activities which do not require the dimensions, size and height that the gym has to offer.

10. The most serious problem encountered is energy waste. When the Club was built, use of energy was not considered a problem, so no thought was given to conservation. The Club is not insulated, and there is a considerable area of plate glass windows which result in heat loss. If the Club were being built today these problems would be remedied. For example, a considerable amount of heat is produced from the compressors in the process of ice-making, and this heat must be exhausted. This heat could well be utilized in the pool area - at present the Club requires a boiler and many overhead heaters to maintain the pool, 250,000 gallons of water, at 84° and the surrounding air at a similar temperature. The warm air must be vented outside as it is laden with moisture and chlorine and cannot be recycled.

11. At the hearing before the Board Mr. G. Oikawa, Appraiser, filed his report as an exhibit and gave evidence on behalf of the appellant as follows:

6.1 *Method of Valuation*

In view of the conclusions arrived at in the preceding Highest and Best Use section, it is our opinion that the market value of the subject property must necessarily be predicated upon residential land values within the surrounding area, giving consideration to total cost of development including developer's profit.

While it is recognized that the Highest and Best Use of the land as if vacant is for residential use, the presence of substantial improvements on this site cannot be ignored. As indicated earlier, these comprise extensive recreational and social club facilities which have been expanded and fairly well maintained since construction. Therefore, while the land as if vacant has a readily definable Highest and Best Use, consideration must be given to the timing involved in actually being able to put it to that use. Specifically, the Theory of Consistent Use must be considered-this theory affirms that when improved land is in a state of transition to another Highest and Best Use, it cannot be appraised with one use allocated to the land and another to the building or other improvements. Accordingly, our valuation has attempted to reconcile the existing Highest and Best Use of the property, as improved with the Highest and Best Use of the land as if vacant. This involves striking a realistic balance between the land value in its existing use, giving consideration to its potential residential use, and the current value of the existing improvements, giving consideration to all forms of depreciation inherent in the property.

The depreciation estimate incorporates the following types of loss in value:

- physical: normal wear and tear through passage of time

- functional obsolescence arising from:

(a) increasing land value, wherein the net income generated from the operation of the improvements decreases relative to the value of the underlying land.

(b) decreased acceptance of existing facilities due to changing sporting trends.

(c) changing demographics, principally lowered rates of family formation and lower family size. This has resulted in under utilization of several facilities in the subject property.

(d) outmoded design elements of the complex-most importantly the lack of a *"hot brine" system embedded in concrete in the curling rink, and the lack of insulation throughout the building.*

In conclusion, the above methodology is considered realistic in view of the factors mentioned, and in our opinion is an accurate representation of how the market value of the subject property would be arrived at between a willing seller and a willing buyer.

6.2 *Land Value as if Vacant and Unimproved*

In valuing the subject land, consideration has been given to market evidence relating to properties which could be considered directly comparable, mainly in terms of location and zoning. Based upon our research, no truly comparable sales information is available with which to estimate market value by Direct Market Comparison, as there are few sites of the size and development potential of the subject in the area. In view of the lack of market evidence, we have considered the market in other land transactions with different zonings; however, sales evidence here is also extremely limited and requires large adjustments. In conclusion, valuation by the Market Approach is considered inapplicable.

The Assessor's actual value estimate of the subject land as if vacant and unimproved is $1,496,800, which reflects $225,422 per acre, or $5.17 per square foot. This has apparently been arrived at through a Subdivision Residual valuation methodology which involves the hypothetical subdivision of the property into single family lots. Given the specific locational features of the subject property, the ready market for residential building lots in the area, and the availability of services to the subject to facilitate subdivision, we would concur with the Assessor's methodology and estimate of value for the subject land. *were it vacant and in fact zoned for such use*.

However, the subject property is improved with substantial improvements which, together with the land as an integrated property, would realize value in excess of the $1,496,800 attributed to the land only. We believe that, in consideration of the recognized Theory of Consistent Use, it is in effect 'double recovery' and 'over valuation' to simply add land value predicated upon immediate subdivisibility to the current value of the improvements.

Additionally, the time factor involved in actually rezoning the property to residential use leads us to conclude that, while the 'free and clear' land value cannot be ignored, it should be reduced to reflect the current and expected continued use of the existing improvements. This would ensure that the valuation arrived at for the property as a whole is the sum of values for land and improvements which are estimated on the basis of compatible usage.

Accordingly, a 5-year deferral of the land value estimate of $1,496,800, at a 9% discount rate is considered to result in a reasonable estimate of value for the land, given its existing use. The estimated value by this approach is calculated as:

$1,496,800 x .649931 = $972,817

(discount factor 9%, 5 years).

This value reflects $146,509 per acre or $3.36 per square foot of land, both of which are considered supportable values given the existing use of the subject property.

12. With respect to the method of valuation for the improvements Mr. Oikawa gave the following evidence:

6.3 *Improvements*

In order to estimate the cost to replace the subject improvements, (including tennis courts, roof top parking area, light poles, fencing, etc.) we contacted Universal Appraisal Company Limited who have been providing The Arbutus Club with insurance valuation for several years. Their 1979 replacement cost

estimate is $4,467,213 excluding machinery and special equipment, for the subject improvements. Based upon our knowledge of local building costs and review of such reliable costing guides as the Marshall Swift Valuation Guide, we believe that Universal's estimate is realistic and it has therefore been incorporated in our valuation.

The valuation is as follows:

Replacement Cost of Improvements			$4,467,213
Depreciation			
a) Physical Deterioration			
Effective Age	14 years		
Estimated Remaining Economic Life	20 years		
Depreciation – 14/34 =	41.2%		
Then $4,467,213 x 41.2%		$1,840,492	
b) Functional Obsolescence			
(i) *Curable*			
Install hot brine system in concrete in Curling Rink – estimated	$100,000		
Install Insulation, etc.	$100,000	$200,000	
(ii) *Incurable Functional Obsolescence*			
Estimated at 20% of replacement cost			
$4,467,213 x 20%		$893,433	
Total Depreciation			$2,933,935
Depreciated Replacement Cost			$1,533,278

13. The Arbutus Club appealed the 1979 assessment to the Court of Revision which confirmed the assessment and on appeal to the Assessment Appeal Board, the Board, after taking a view of the subject land and improvements, considering the evidence and reserving their decision, held:

The land area comprises 6.64 acres and the actual value of $1,496,800 is accepted by Mr. Oikawa as a base for establishing the value. Mr. Oikawa advances the theory that the highest and best use of the land as residential must be deferred due to the substantial improvements on the land. To the actual value, a 5-year deferral was applied at a rate of 9% to yield the value of $972,817. The deferral of value has not been substantiated by sufficient factual data that the Board may reasonably determine the validity of the deferral rate and period. It is also inconsistent to value land for assessment purposes at values in use rather than the highest and best use. The deferral of land value, in effect, depreciates the land from its highest and best use when, in fact, any depreciation should be allocated to the improvements which will ultimately reach a low value and eventually permit their destruction and use of the land at its optimum use. The Assessor has relied upon a development method of valuation to reflect the raw acreage value of the property in the absence of specific market sales comparable to the subject lands. The Board finds the land value to be reasonable on the basis of the evidence before it, and the land value portion of the appeal is dismissed.

Turning now to the improvements, both parties agreed during the hearing that the reproduction cost of the facility was $4,500,000 and the issue at hand is the application of accrued depreciation. The Assessor has applied an all inclusive rate of 42% to arrive at the depreciated (actual) value of the improvements of $2,595,800. It was stated that this all inclusive rate included both physical

deterioration and functional obsolescence. However, the specific treatment of functional obsolescence was not specifically enumerated by the respondent appraiser and the measurement was based on judgment derived from inspections of the facilities.

Mr. Oikawa, on the other hand, applied a rate of 41.2% for physical deterioration and $200,000 for functional obsolescence curable, with a further 20% of reproduction cost for functional obsolescence incurable, arriving at a depreciated value of $1,533,278. Utilizing a reproduction cost of $4,500,000, the total physical deterioration and functional obsolescence curable (41.2% of $4,500,000 plus $200,000) of $2,054,000 or 45.6%, is substantially the same as the total rate applied by the Assessor.

The Board has considered the evidence of the appellant's witnesses as to the lack of good design and is of the opinion that the facility does, in fact, have some measure of functional obsolescence incurable. The opinion of Mr. Oikawa, of 20% of reproduction cost, is not, in fact, substantiated by a quantitative measurement of such obsolescence. The Board recognizes functional obsolescence as a valid and normal form of depreciation, however. this must be quantified. It is suggested that if an equivalent replacement model of the facility is costed by an expert in the design and construction of such facilities, the Board would be more receptive to the application of a loss in value due to functional obsolescence incurable, and no weight has been given the opinion evidence submitted by the appellant.

14. The appellant herein, The Arbutus Club, being dissatisfied with the decision of the Assessment Appeal Board has, therefore, requested the Assessment Appeal Board to submit the following questions for the opinion of the Supreme Court as to whether the Assessment Appeal Board came to a correct determination and decision on a question of law, and if not, this Honourable Court is respectfully requested to reverse or amend the Assessment Appeal Board determinations or remit the matter to the Assessment Appeal Board with the opinion of this Honourable Court.

15. Wherefore the following questions are humbly submitted for the opinion of this Honourable Court:

1. Did the Board err when it found that the land value was reasonable on the basis of the evidence before it?

2. Did the Board err when it found that the deferral of land value had not been substantiated by sufficient factual data that the Board could reasonably have determined the validity of the deferral rate and period?

3. Did the Board err when it found that it is inconsistent to value land for assessment purposes at values in use rather than the highest and best use?

4. Did the Board err when it found that the Assessor relied upon a proper method of valuation to determine the actual value of land and improvements?

5. Did the Board err when it failed to determine the deferral rate with respect to the actual value of land?

6. Did the Board err when it found as a fact that the improvement did have functional obsolescence incurable but gave no weight to the opinion evidence as to the measurement of such obsolescence submitted by the appellant's witness and dismissed the factor of functional obsolescence incurable?

7. Did the Board err when if (sic) failed to accept or give any weight to the opinion evidence relating to the measurement of functional obsolescence incurable submitted by the appellant's witness?

8. Did the Board err when it failed to make a deduction or allowance for functional obsolescence incurable?

At the hearing before this Honourable Court the appellant herein will refer to the transcript of the proceedings before the Board, the exhibits as filed and the decision of the Board.

Dated at Maple Ridge, in the Province of British Columbia, this '7th' day of 'February', 1980.

ASSESSMENT APPEAL BOARD

'Signature illegible'
Chairman"

Issues

What has really turned out to be the complaint of the appellant appears to be as follows:

1. The land occupied by the appellant is zoned recreational. Because the Board assessed the land as if it were zoned residential, no assessment or only a nominal assessment of $1 should be allocated to the improvements. It was an error in principle for the Board to assess the improvements at $2,054,000.

2. Alternatively, if the improvements can be assessed although the land was valued as if it had a different use (i.e., residential and not recreational) the Board erred in principle when it failed to take into account a deduction by way of an appropriate deferral rate with respect to the improvements.

3. Upon examining the improvements, there was evidence of "functional obsolescence curable" and "functional obsolescence incurable". That is to say, certain parts of the building operated inefficiently because of defects in the original design, although these could be corrected. Other parts were incapable of modification. The Board recognized the concept of "functional obsolescence incurable", heard evidence concerning it, but failed to make any reduction by refusing to give any weight to the evidence. The appellant says this amounts to disregarding evidence and is an error in principle.

Law

Procedural Aspects

At the time of the hearing there was some discussion as to the nature of the appeal process by way of Stated Case as prescribed by section 74 and section 75 of the *Assessment Act*.

A Stated Case appeal by one of the parties is solely a creature of statute. The *Criminal Code* of Canada allows for appeals by way of Stated Case from a Summary Conviction Court - Part 24, section 761-770. Similar legislation exists in the Provincial *Offence Act*, R.S.B.C. 1979, chapter 305 (sections 105-113). In civil matters, there are many enactments giving parties to a proceeding before a tribunal the right to appeal by way of Stated Case. Besides the *Assessment Act*, they include such diverse statutes as the *Petroleum and Natural Gas Act*, R.S.B.C. 1979, chapter 323, section 24, the *Human Rights Code*, R.S.B.C. 1979, chapter 186, section 18 - to

mention only a few. None seem to contain any discussion of the forms an appellant should adopt in pursuing his appeal.

Consequently, when a statute fails to describe the forms and what should be in them, resort must be had to the common law. Because the common law did not use the Stated Case as a method of appeal by one of the parties to a proceeding, but rather as a way for a lower court or tribunal to receive the advice and opinion on a point of law from a Superior Court, these old common law forms must be viewed with care. They were intended for a different purpose. *Celebrity Enterprises Ltd.* v. *Attorney-General of B.C.* (1976) 4 W. W. R. 502.

Apart from what is in the statute itself relating to procedure, I think it reasonably clear the following steps should be taken:

(1) The Stated Case should set out the facts as found by the tribunal and not the evidence. *Re Celebrity Enterprises Ltd.* supra, at page 514.

(2) The grounds of appeal mentioned in the notice requesting the tribunal to state a case should be included in the case itself. These may either be recited at the beginning of the Statement of Facts or following their recitation. It is important to have these in mind because an appeal by way of Stated Case may be taken on only one point and so not all of the facts need be canvassed or disclosed.

(3) The case as then stated should be signed by all the members of the tribunal against whom the appeal is taken. *Westmore* v. *Paine* (1891), 1 Q.B. 482 at 484.

(4) Next comes the questions for the opinion of the court. These should be the sole prerogative of the appellant. He is the one who is appealing the decision and not the tribunal. Where the tribunal authors the questions and they do not raise the fundamental issues, then theoretically they must be remitted back for amendment before they can be answered. But where they are authored by the appellant, they can be amended at the hearing without much trouble.

(5) Where a Stated Case includes the reasons for judgment of the tribunal, (as in the present instance) then it seems they should be accepted on the basis that it was a fact the tribunal delivered those reasons. The procedure by way of a Stated Case is a bit different from that of an ordinary appeal where part of the process is designed to investigate the reasoning process of a trial judge or a Court of Appeal. On a Stated Case appeal, it seems to be more or less irrelevant whether or not the tribunal's reasons contain a legal error. What must be determined is whether the conclusion arrived at by the tribunal was justified in law given the facts it found and so stated.

Since other authorities have discussed these inconsistencies, I do not believe this is merely an academic exercise. For example in *R.* v. *Kidd* (1974) 21 C.C.C. (2d) 492 (Ont. H.C.) Lacourciere J. as he then was, commented upon the impropriety of including in the record the reasons for judgment of the lower court. That was an appeal taken under part 24 of the *Criminal Code* (Summary Conviction provisions). However, he did say the reasons could be looked at "for a proper understanding of the alleged error of law". This was followed by Hughes, J. (Ont. H.C.) in *R.* v. *Parker Car Wash Systems Ltd.* (1977) 35 C.C.C. (2d) 37 at 41-42.

Again in *Vancouver Sun* v. *Gay Alliance Toward Equality* (1977) 77 D.L.R. (3d) 487, an appeal by way of Stated Case was under consideration. It had been launched in accordance with the *Human Rights Code of British Columbia*, 1973 (B.C.) (2nd Sess.), chapter 119. That statute provided a procedure for appeal by way of Stated Case to the Supreme Court of British Columbia as mentioned in the *Summary Convictions Act* (now *Offence Act*). Following a decision of this Court, an appeal was taken to the Court of British Columbia Court of Appeal. At page 487 Robertson J. A. after comparing the *Summary Convictions Act* to similar sections relating to Summary Conviction appeals by way of Stated Case in the *Criminal Code* of Canada said:

> "I think therefore that I may not look at the board's reasons or the evidence that was before it."

On the other hand in *British Columbia Forest Products Limited* v. *Foster and Ruff* (1980) 2 W.W.R. 289, a slightly different conclusion is reached. This was also an appeal by way of Stated Case brought to this court in accordance with the *Human Rights Code of British Columbia* 1973 (B.C.) (2nd Sess.), chapter 119. In the course of interpreting the judgment of the Court of Appeal in *Re Vancouver Sun* v. *Gay Alliance Toward Equality*, supra, McEachern C.J.S.C. said this at page 294:

> ". . . In other words, Branca J.A., with whom Robertson J.A. concurred, held that the court has jurisdiction to review a board's reasoning, and, if it finds the reasoning defective, then a question of law is raised. The majority decisions in the Supreme Court of Canada in the *Gay Alliance* case do not deal with this question, so I believe the proper course for me to follow is to accept the board's factual findings as conclusive but to examine its reasoning and determine whether the conclusions of the board disclose any faulty reasoning which can be regarded as an error in law or jurisdiction."

For the reasons given, I am not so sure an error in law in the tribunal's reasons is a ground for allowing an appeal. If it arrived at the right answer, although it did so unreasonably it would seem the appeal should be dismissed.

Apart from a specific statutory direction, a Stated Case Appeal only compels an administrative agency to set out its findings of fact. Reasons are not required. It seems to me the Legislature devised this method because there are many tribunals who reach conclusions after hearing evidence but do not have the time or perhaps the training to prepare a set of reasons with respect to their decision. Many boards are composed of laymen with varying degrees of expertise in writing. Some do a model job; others may not be so inclined. But an absence of reasons is no ground for allowing the appeal short of a statutory direction.

Consequently, it does not really matter whether the tribunal reasons properly in arriving at its decision. All that counts is whether or not it gets the right answer. Of course, where reasons are available, they may indicate why the Board decided the way it did, but it seems to me with respect, that so long as the solution is the right one, the reasoning of the tribunal is more or less irrelevant.

No objection was taken by the respondent to any procedural errors. What prompts these remarks is the confusion that appears to exist in a number of cases as to the method of stating a case. Being a creature of statute, each piece of legislation tends to set out different rules as to how a case should be stated. What may be an appropriate method in one act may be inappropriate in another. Still there are certain ground rules that seem applicable in almost every instance. Section 74 of the *Assessment Act*, R.S.B.C. 1979, chapter 21, details how and when a case may be stated. It reads:

> "74. (1) At any stage of the proceedings before it, the board, on its own initiative or at the request of one or more of the persons affected by the appeal, may submit, in the form of a stated case for the opinion of the Supreme Court, a question of law arising in the appeal, and shall suspend the proceedings and reserve its decision until the opinion of the final court of appeal has been given and then the board shall decide the appeal in accordance with the opinion.
>
> (2) A person affected by a decision of the board on appeal, including a municipal corporation on the resolution of its council, the Minister of Finance, the commissioner or an assessor acting with the consent of the commissioner, may require the board to submit a case for the opinion of the Supreme Court on a question of law only by

(a) delivering to the board, within 21 days after his receipt of the decision, a written request to state a case, and

(b) delivering, within 21 days after his receipt of the decision, to all persons affected by the decision, a written notice of his request to the board to state a case to the Supreme Court.

(3) The board shall, within 21 days after receiving the notice under subsection (2), submit the case in writing to the Supreme Court.

(4) The costs of and incidental to a stated case shall be at the discretion of the Supreme Court.

(5) Where a case is stated, the secretary of the board shall promptly file the case, together with a certified copy of the evidence dealing with the question of law taken during the appeal, in the Supreme Court Registry, and it shall be brought on for hearing before the judge in Chambers within one month from the date on which the stated case is filed.

(6) The court shall hear and determine the question and within 2 months give its opinion and cause it to be remitted to the board, but the court may send a case back to the board for amendment, in which event the board shall amend and return the case accordingly for the opinion of the court.

(7) An appeal lies from the determination of the Supreme Court to the Court of Appeal on any point of law raised or determined on the hearing of the appeal by the judge.

(8) Notice of appeal to the Court of Appeal shall be given within 21 days from the day on which the Supreme Court makes available the reasons for judgment.

(9) The appeal shall be determined and judgment given by the Court of Appeal if it is then sitting, or, if it is not, at the next sitting of the Court of Appeal following the pronouncement of the judgment appealed from, and for which notice of appeal can be given under the Act or rules governing appeals to the Court of Appeal; otherwise the judgment of the Supreme Court shall stand.

(10) The rules respecting appeals from the determination of a judge of the Supreme Court to the Court of Appeal apply to appeals to the Court of Appeal under this section.

1974-6-67; 1977-30-35."

As can be seen, the procedure in this matter requires the appellant to deliver to the Board and all persons affected by the Board's decision, a written request to state a case within 21 days after receipt of its decision (section 67 (2) (a) (b)). This request should state the grounds for the demand; i.e., "the Board erred when it concluded . . . etc." Within 21 days after receipt of the request the Board must submit the case in writing to this court (section 67 (2a)). In practice a copy should also go to the appellant and the respondent.

Sections (4) (5) appear to be in applicable in a case of this nature. They only seem to apply when a "question of law" is raised "during the appeal" to the board. Here the questions of law are raised "after . . . receipt of the decision" of the Board.

From all of the above it appears to me there are several procedural errors.

1. Paragraphs 11 and 12 in particular, are statements of evidence instead of findings of fact.

2. It is the function of the Board to:

(a) specify the grounds upon which it was requested to state the case.

(b) Set out its finding of fact as they relate to those grounds.

(c) Sign the case.

The grounds are absent. Perhaps because they were not included in the request mentioned in section 67 (2) (a). Because the questions are the prerogative of the appellant, the case ought to have been signed by the Board immediately following paragraph 14.

3. All three Board members should sign since it is the findings of fact of all of them which form the basis for the appeal.

4. Because the questions are for the appellant to frame, they ought to have been signed by it or its counsel and not by the Board.

These matters have been discussed solely for the purpose of trying to get some uniformity in the way a Stated Case appeal should be pursued. They are not intended as any criticism of counsel who presented their arguments on the substance of the appeal in their usual helpful and persuasive ways.

1. *The Zoning Issue*

At this time, it seems appropriate to set out in a summary way the nature of the assessment provisions in this Province as described in Part 3 of the *Assessment Act*. The rules as to the correct method of assessing property are found in section 26 of that part. The relevant portions read:

> "26. (1) The assessor shall determine the actual value of land and improvements.
>
> (2) In determining the actual value under subsection (1), the assessor may give consideration to the present use, location, original cost, cost of replacement, revenue or rental value, the price that the land and improvements might be reasonably expected to bring if offered for sale in the open market by a solvent owner, and any other circumstances affecting the value, and the actual value of the land and the improvements so determined shall be set down separately in the columns of the assessment roll, and the assessment shall be the sum of those values.
>
> (11) Where it is necessary to determine separate assessed values of land and improvements, the assessed values shall be determined so that they are in the same proportion to the total assessed value as the actual values of the land and improvements bear to the total actual value."

From this it can be seen that what an assessor must do is ascertain the market value of the land and improvements as a parcel, then allocate separate values to the land and to the improvements. Each must then add up to the total amount first mentioned. Actual value does not mean value to the owner, but rather the present value taking into account the appropriate use of the land: *Re Lefeaux* (1962) 37 D.L.R. (2d) 235 (Hutcheson, J., B.C.S.C.).

As found by the Board, the appellant is a society operating a sports and social club here in the City of Vancouver. Located in the Dunbar area, it is more or less surrounded by single family homes. However, the club's land is not zoned residential but recreational. Because the market for entities of this nature is almost non-existent, no useful information was available on sales of similar property in other locations. Therefore, the assessor found the land area of 6.64 acres had

a value of $1,496,800 based upon its highest and best use as a parcel available for subdivision into single residential lots. He then determined the improvements had a depreciated actual value of $2,595,800. These opinions were accepted by the Board. The appellant says the Board erred in principle when it did so.

Mr. Cohen argued that since the land was assessed on the basis of use other than that for which it is presently zoned, i.e., residential v. recreational, then to be consistent the improvements must be ignored unless they can be accommodated to the new use. Because any developer would have to destroy the improvements before subdividing the parcel into residential lots, the assessment for these improvements should only be their salvage value and not the figure of $2,595,800.

Support for this contention comes from the Supreme Court of Canada in *The Corporation of the City of Toronto* v. *Ontario Jockey Club* (1934) S.C.R. 223. In that instance, the owner used the land in question as a race course upon which it managed race meetings. Under similar legislation, the City assessed the land on the basis of its potential as a subdivision ($622,630). It also assessed the value of the buildings ($202,500). These assessments were appealed to the Ontario Railway and Municipal Board which placed the assessment of the lands used for race track purposes at $565,308 and the buildings at $200,000. On appeal to the Supreme Court of Canada, it was held at page 227:

> “ . . . the Board, therefore, having arrived at its valuation of these lands on the basis of a subdivision, which involved the destruction of all the buildings before the land could be used and disposed of in lots as a subdivision, the buildings added nothing to that potential value of the property beyond their value for the purpose of being wrecked and removed. . . .
>
> It is manifestly improper to value the land for the purpose of a subdivision, which would involve the destruction of the buildings, and then value the buildings on the basis of their being used for the purposes of a race track. If the buildings were to be valued on that basis, the land would have to be valued on that basis also."

See also *Saint John Harbour Bridge Authority* v. *J. M. Driscoll Limited* (1968) S.C.R. 633 at 641-642 (an expropriation case).

Based upon these authorities, it seems clear the Board committed an error in law when it accepted the assessor's valuation of the improvements after determining the land should be valued as if it were zoned residential.

In fairness, Mr. Cohen brought to my attention these cases were not cited to the Board at the time of the original hearing.

Issues 2 and 3.

For convenience, I will repeat the last two issues mentioned above. They are:

> 2. Alternatively, if the improvements can be assessed although the land was valued as if it had a different use (i.e., residential and not recreational) the Board erred in principle when it failed to take into account a deduction by way of an appropriate deferral rate with respect to the improvements.
>
> 3. Upon examining the improvements, there was evidence of "functional obsolescence curable" and "functional obsolescence incurable". That is to say, certain parts of the building operated inefficiently because of defects in the original design, although these could be corrected. Other parts were incapable of modification. The Board recognized the concept of "functional obsolescence incurable", heard evidence concerning it, but failed

to make any reduction by refusing to give any weight to the evidence. The appellant says this amounts to disregarding evidence and is an error in principle.

Both relate to valuing the improvements at something other than their salvage value. In this regard, the appellant relied heavily on the words of the Supreme Court of Canada in *Sun Life Assurance Co. of Canada* v. *The City of Montreal* (1950) S.C.R. 220.

As a consequence of these reasons, the Board may conclude the improvements have no value other than what they can attract after being torn down. In that event, the issue of a deferral rate and any deduction for functional obsolescence incurable will be academic. At this time, I do not think it wise to second guess the findings of the Board. Instead, the case will be remitted back to the Board with a copy of these reasons.

Procedurally, the case should be sent back to the Board for amendment and then resubmitted for determination. No particular objection was taken at the hearing with respect to the procedural matters and I, therefore, propose to remit the case in accordance with section 74 (6) of the *Assessment Act* rather than return it for amendment. As this point was not argued, Counsel may set it down for hearing should they be unable to agree. Otherwise, it will go back to the Board for determination. Costs follow the event.

MEMORANDUM

TO: MR. M. DREWS
SUPREME COURT REGISTRAR

FROM: MR. JUSTICE BOUCK

DATE: SEPTEMBER 19, 1980

RE: THE ARBUTUS CLUB v. THE ASSESSOR OF AREA NO. 09 -
VANCOUVER, Vancouver Registry No. A800302

1. Reasons for Judgment in this matter were handed down on 9 September, 1980. At that time I mentioned the necessity of having all the members of the Board sign the findings of fact as part of the Stated Case. In that regard, I was following a decision of mine: *Re Celebritv Enterprises Ltd.* (1976) 4 W.W.R. 502.

2. After delivering judgment, Counsel brought to my attention the decision of Fulton, J. in *Saanich* v. *Racquet Club of Victoria Holdings Ltd.* (1978) 6 B.C.L.R. 149. He concluded it was sufficient for the case to be signed by the chairman of the Board and declined to follow my reasoning in *Celebrity Enterprises Ltd.*

3. Apparently the Board faces a dilemma because of these conflicting judgments and has asked me to either expand upon what I have already said or reconsider my judgment in the light of the comments of my colleague, Fulton, J.

4. *Sheridan* v. *Willmott* (1911) 11 N.S.W.S.R. 494 is another authority which might be helpful to the parties. However, I think it inappropriate for me to say anything more at this time. It is better the issue be resolved by the Court of Appeal. Would you please see that a copy of this memo goes to counsel.

Counsel for the appellant: Bruce I. Cohen
Counsel for the respondent: R. B. Hutchison