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ASSESSOR OF AREA 9 - VANCOUVER

v.

QUEENS PLATE DEVELOPMENT LTD. and HEARTHSIDE MANOR LTD.

Supreme Court of British Columbia (A863176) Vancouver Registry

Before: MR. JUSTICE LEGG

Vancouver, February 19 and 20, 1987

Peter W. Klassen and Blair T. MacDonell for the Appellant
David L. Vaughan, Q.C. and R.J. Richardson for the Respondents

Reasons for Judgment March 10, 1987

The Assessment Appeal Board has stated a case at the request of the Assessor which seeks the opinion of this Court on 12 questions of law. The appeal before the Board was concerned with the assessment of strata title units owned by the Taxpayers. The units owned by each Taxpayer were contained in a single complex owned by that particular Taxpayer. All units in each complex were rented. The Board concluded that the strata lots should be valued as components of the rental strata complexes in which they existed. The Board rejected the assessor's valuation of the individual strata lots based upon their market value as individual lots, if sold. Hence this appeal.

The material facts stated by the Board in the Stated Case are as follows:

> "1. The properties which were the subject matter of an appeal to the Assessment Appeal Board are two strata title complexes, the registered owners of which are Hearthside Manor Ltd. and Queens Plate Developments Ltd. The strata complexes are buildings made up of 75 and 66 strata lots respectively. They are located in West End Vancouver, British Columbia. Each of the strata lots is a residential unit in a building and has been rented since the completion of construction. There is no legal restriction preventing the owner from selling the individual units.
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> 2. Each of the strata lots in each of the complexes is a subdivided lot, the boundaries of which are defined by reference to the floor, wall and ceiling of each residential unit. The land on which the strata complex is erected is not subdivided and is common property.
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> 3. The assessor, for assessment purposes, valued the individual strata lots on the basis of their market value as individual units if sold. To determine this value, the assessor used the comparable sales approach. That method of valuation entails comparing the property to be valued, namely each individual strata lot, with similar properties that have sold at or near the valuation date. In some instances these similar properties were owner-occupied, in others they were rented. The sale price of comparable properties is then assigned to the property to be valued as its actual or market value.
>
> 4. The subject properties and the properties used by the assessor as comparable all are residential strata title apartment units. The Board concluded that there is no necessary distinction in terms of physical characteristics between the subject properties and strata

units in the same area which sold individually. The principal difference between the subject properties and the properties used by the assessor as comparables is that the subject properties are rented and are in buildings in which all the other units are rented, and the properties used as comparables by the assessor are individually-owned and are in buildings in which the other units predominantly are occupied by their owners.

5. Mr. Peter Austin, a qualified appraiser, testified on behalf of the owners of the subject complexes. He valued the strata lots as components of an entire rental building rather than as individual strata lots. His method of valuation was the income approach - i.e., capitalization of the net rental income of all of the strata lots in the complex. After having in this manner determined a global value for the entire complex, he allocated the global value among each of the strata lots in the complex. The capitalization rate used in the income approach was a capitalization rate derived from the sale of entire strata complexes sold en bloc where all of the strata lots were owned by one owner. This method of valuation applies only to rented stratified complexes.

6. Sales of individual strata lots and sales of entire strata complexes occurred frequently in the market which existed at or near the valuation date. The Board concluded that suites ordinarily command a higher price when sold individually than when sold as components of rental buildings.

7. The Board concluded that the strata lots in the subject strata complexes should not be valued as if they would be marketed individually. The Board further concluded that the subject strata lots should be valued as components of the rental strata complexes in which they exist.

8. The Board based its conclusion in paragraph 7 on the fact that sales of a number of rental strata complexes wherein all of the strata lots were owned by one owner demonstrated a price per strata lot for the subject strata lots which was demonstrably lower than the assessed values which the assessor had determined by valuing the individual unit on the comparable sales approach.

9. The Board found that the difference in selling price between units sold individually and units sold en bloc as part of a rental complex resulted from the fact that the units which were sold en bloc were surrounded by units in the same complex which were rented and that, in the area in which the subject units were located, this factor diminished their value. In coming to this conclusion, the Board gave consideration to the evidence of Mr. Smyth, the evidence of Mr. Austin, and to the whole of the evidence.

Although the Board annexed its reasons as part of the Stated Case, I do not repeat all of those reasons. In the course of this judgment however I shall refer to parts of those reasons where necessary.

The questions on which the Board asks for the opinion of this Court are:

1. Did the Assessment Appeal Board, in holding that the subject strata lots 'should be valued as components of the complex in which they exist' fail to determine the actual value of each individual strata lot, and thereby err in law?

2. Did the Assessment Appeal Board err in law when it failed to find that the *Assessment Act* required the assessor and the Assessment Appeal Board to determine the actual value of the individual strata lots?

3. Did the Assessment Appeal Board err in law when it failed to find that Section 63 of the *Condominium Act* required the assessor and the Assessment Appeal Board to determine the actual value of the individual strata lots?

4. Having found as it did that strata lots sold individually command a higher price than if sold as components of a rental building, did the Assessment Appeal Board err in law when it valued the subject strata lots on the basis of their value as components of a rental building?

5. Did the Assessment Appeal Board err in law when it failed to conclude that the subject strata lots 'should be valued as if they would be marketed individually'?

6. Was there any evidence before the Assessment Appeal Board on which it could conclude as it did that the fact that the individual strata lots are surrounded by other strata lots in the complex which are rented diminished their value as strata lots to be marketed individually?

7. In determining the actual value of the subject strata lots, did the Assessment Appeal Board err in law by taking into account the fact that the owner had rented the subject strata lots, when such use by the owner resulted in a reduction in the value of the individual strata lots?

8. In valuing the individual strata lots in the manner in which it did, did the Assessment Appeal Board value the strata lots on the basis of value to owner, and thereby err?

9. Was there any evidence before the Assessment Appeal Board which allowed it to conclude that in valuing the individual strata lots 'as components of the complexes in which they exist' that they had determined the 'actual value' of the individual strata lots?

10. Did the Assessment Appeal Board err in law in finding that evidence of the sale of strata lots as 'part of a bulk sale or sale of an entire complex' was evidence of the actual value of the individual strata lots?

11. Did the Assessment Appeal Board err in law in failing to value the subject strata lots so that their assessed value would have a just and fair relationship to the assessed value of similar land and improvements in the municipality?

12. Did the Assessment Appeal Board err in law in failing to consider the assessed value of similar lands and improvements in the municipality?"

Whether the questions are questions of law: preliminary objection

Counsel for the Taxpayers submitted that questions 1-5 inclusive, 7 and 8, and 10-12 inclusive were not questions of "law only" but were questions of fact or mixed fact and law and that this Court had no jurisdiction to consider them. Counsel submitted that the questions were concerned with the method of valuation adopted by the Board and that as the method used in making an assessment was a question of fact or mixed fact and law, this Court could not consider them on this appeal.

In these reasons I shall state an opinion in answer to those questions which I conclude are questions of law. With regard to any questions which I conclude are questions of fact or of mixed fact and law I shall so state and explain my reasons.

Question 1

This question is a question of fact. The question contains a quotation from the first sentence of a paragraph of the Board's reasons. It is important to quote not only the complete paragraph but the full context of the Board's reasons which contain this quotation in considering whether the question is a question of fact or of law.

The Board stated at page 9 of its reasons:

> "What is particularly significant to the Board is that it has been demonstrated that sales of entire stratified rental buildings occur in the market. That is not to say that sales of individual units do not occur, both in predominately rented buildings and in homeowner strata buildings. The evidence indicates, however, that there are a sufficient number of the former type of sale, that they must be seen as a component of the market.
>
> Even though there is no essential physical difference between the subject properties and comparable individual properties traded in the market, the Board is unable to conclude that they should be valued as if they would be marketed individually.
>
> The difference between the subject properties and those traded individually in the West End is that it is an element of the state and condition of the subjects that at the date of assessment they are surrounded by suites that are rented. The Board is confident that the fact that the suites are rented is a consideration of state and condition within the meaning ascribed to those words in the decision of Bouck J. in *Trizec Equities Ltd.* v. *Assessor of Area 9 - Vancouver*, Stated Case 196 in the Manual of Stated Cases. Considering the evidence as a whole, the Board accepts that the fact that these suites are surrounded by neighbors that are rented diminishes their value as suites to be marketed individually. That being the case they would be less able to compete for price in the marketplace than suites in buildings predominantly occupied by homeowners. The difference in state and condition between the subject properties and those trading as individual units in buildings occupied primarily by homeowners makes the subject properties more comparable to, those trading as components of rental buildings. The Board finds support for this proposition in the fact that there is ample evidence of sales by solvent owners of comparable strata units as components of entire buildings at prices per unit demonstrably lower than the assessed values in the subjects. A purchaser may be motivated by any number of factors in purchasing a property but a vendor's motivation, generally speaking, is to obtain the highest price within a reasonable time. That object in the case of strata units in rental buildings appears often to have been achieved by the sale of the entire building.
>
> Having found that the subject would not fetch the prices that other physically comparable suites have achieved, it would be an exercise in conjecture to attempt to establish a discounting factor to be applied that would yield a value at which the subjects might sell individually.
>
> The Board concludes that the subject properties should be valued as components of the complexes in which they exist. This conclusion is drawn from the evidence of particular market conditions pertaining to the subject properties at the date of valuation and is not a general proposition. Other market conditions could be envisaged that would indicate that a ready sale could be had for rented strata title properties as individual units and in that circumstance the evidence of individual sales might be the most relevant."

Those reasons show that the Board reached a conclusion of fact based upon the Board's view of the evidence when it stated that the subject properties should be valued "as components of the complexes in which they exist". If there was some evidence to support that conclusion, or, alternatively, if this was a view of the facts that could be reasonably entertained by the Board, the Board's conclusion was not one of law but one of fact. When I come to deal with Questions 6 and 9 I shall consider whether there was no evidence upon which the Board could reach that conclusion. The question of whether there was no evidence is obviously a question of law. But Question 1 as phrased does not raise the issue of whether the Board's determination of actual value was erroneous in law, - whether, for example the assessment was contrary to the *Assessment Act*. Rather, it raises the question of whether the Board was correct in concluding

that the strata lots should be valued as components of the complex in which they exist in determining their actual value. This approach was part of the method used by the Board in determining actual value. The question is one of fact, not law.

In reaching that conclusion I have applied the principles discussed in the decision of the Court of Appeal in *City of Vancouver* v. *The Corporation of the Township of Richmond* (Stated Case 14 p. 56) and the reasons of Mr. Justice Sheppard at p. 58. I have referred also to *Regina* v. *Penticton Sawmills Limited* (1954), 1 W.W.R. (N.S.) 351 at 353 (B.C.C.A.), and to *Crown Zellerbach Canada Limited et al* v. *Provincial Assessors of Comox, et al* (1963), 42 W.W.R. 449 at p. 451, Case 36, Stated Case 157. In that latter case, at p. 176 of the Stated Cases Mr. Justice Sheppard said:

> ... The statutory duty of the Assessor is to find the 'actual value' of the taxable property, but section 37 permits him to use several different methods and to consider many different elements in finding actual value. I do not think that the use of any specifically mentioned method of finding actual value, or the inclusion or exclusion of any enumerated element, provided there is evidence to support the reasoning, can be said to raise a question of law appealable to the Courts on a stated case, for those matters lie in the judgment of the Assessor and the Assessment Equalization Board (*Reg.* v. *Penticton Sawmills Ltd.* (1953) 11 W.W.R. (N.S.) 351 at pages 353,356)."

That reasoning applies to Question 1 in the case at bar. I conclude that there is no jurisdiction in this Court to answer that question.

Questions 2 and 3

Question 2 raises the issue of whether the method used by the Board was contrary to the provisions of the *Assessment Act*, R.S.B.C. 1979 c. 21. That question is a question of law. I refer in support of that conclusion to the decision in *Pacific Logging Company Limited* v. *The Assessor for the Province of British Columbia* (1977) 2 S.C.R. 623 in which the Supreme Court of Canada adopted the dissenting reasons of Mr. Justice McIntyre of the Court of Appeal. He had held that where the Assessor used an arbitrary method of determining actual value and had therefore failed to assess the land in accordance with s. 37 (1) of the *Assessment Equalization Act* R.S.B.C. 1960 c. 18, the Assessor had erred in law. I read Question 2 to raise a similar issue.

Further, Question 3 raises a question of law when it seeks to have this Court determine whether the Board erred in failing to find that s. 63 of the *Condominium Act* required the Assessor to determine the actual value of the individual lots.

I turn therefore to the reasons of the Board in considering whether the Board erred in law with respect to the issues raised by these questions.

At page 2 of those reasons the Board set out its understanding of the respective contentions of the appellant taxpayers and the respondent assessor as follows:

> "The appellant contends that each parcel or unit, notwithstanding that it has a separate legal title, is a component of a rental apartment building and that the value for each must be extrapolated from a total value achieved by the income approach to valuation. According to the appellant, the income approach requires that the assessor apply a capitalization rate, a measure of expected return on investment derived from an analysis of sale prices of similar entire buildings in relation to the net incomes achieved by those buildings, to the actual or reconstructed income of the entire strata complexes of which the subjects are a part.
> The respondent contends that the requirements of the *Assessment Act* and the *Condominium Act* can only be satisfied if each individual unit is valued by the comparative sales method. That method requires the assessor to derive a value for the

> subjects from comparisons with selling prices of similar individual units traded in the market."

The Board then examined the evidence of Mr. Austin, an expert called by the appellant taxpayers. At page 4 it stated that it was unable to conclude that the physical characteristics of the subject properties were so different from units sold individually as to distinguish them as a separate class and then stated:

> "Having concluded that there is no necessary distinction in terms of physical characteristics between the subject properties, and strata units sold individually, the Board is unable to agree with the assessor that the subject properties must necessarily be valued on a comparative sales basis and that this requirement is dictated by Section 63 of the *Condominium Act*.
>
> Section 63 provides:
>
> > 'For the purposes of assessment and taxation, each strata lot, together with the share of its owner in the common property, common facilities and other taxable assets, shall be deemed to be a separate parcel of land and improvements.'
>
> This section requires nothing more than that the separate and distinct existence of each strata parcel be recognized for purposes of assessment. It gives no direction whatsoever to the Assessor as to how each parcel is to be valued, and most certainly can not be interpreted as requiring the Assessor to value the subject properties on a comparative sales approach or by any particular approach."

I agree with the Board's reasoning that s. 63 of the *Condominium Act* gives no direction to the Assessor on how each parcel should be valued.

The Board then stated at p. 7:

> "Accordingly, the Board being satisfied that neither the physical characteristics of the subject properties or the incidence of ownership place them in a category distinct from other strata units, all the ways in which residential strata units customarily trade in the market must be taken into account. The basic question to be decided is; giving full consideration to the state and condition of the subject properties and the nature of the market at the date of assessment, what is the actual value of the subject properties? The assessor is not entitled to ignore transactions in which strata units are sold as components of entire buildings, nor is the appellant entitled to ignore sales of individual strata units in asserting an actual value for the subjects. If either or both types of transactions occur in significant numbers in the marketplace they must be taken into account.
>
> It is clear from the evidence that both types of transactions occur with frequency and that the prices commanded by similar units vary according to whether they trade as components of a rental building or as individual suites. The Board accepts in this connection the evidence of the Assessor concerning buildings in Vancouver that sold in their entirety and subsequently were resold as individual suites. Some of the examples have limited relevance, involving much smaller buildings than the subject or buildings that were the subject of the convoluted financial arrangements of a well known financier, however, in the main, this evidence demonstrates that suites command a higher price when sold individually than as components of a rental building.
>
> In addition, Mr. Austin conceded that if he were engaged as an appraiser to conclude a value for a single suite within a rental building, the value he arrived at might be higher than the value he would ascribe to that suite as a component of a rental building."

The Board then stated on page 8:

> "Conversely, the Board has reviewed in detail Mr. Austin's evidence regarding two strata apartment towers located near Central Park in Burnaby. Notwithstanding that there were certain discrepancies in Mr. Austin's evidence in this connection, the Board accepts that there was a significant difference between the sale prices obtained for suites in the building largely occupied by tenants and the building which had from the outset been marketed to homeowners. The differences between Mr. Austin's evidence and that of Mr. Lee with regard to comparisons of quality and location between these two buildings lead the Board to conclude that they must be quite similar in quality and location and that the disparity between the prices obtained for the units in the building in which there were tenants and that occupied by homeowners was attributable to a preference among buyers for suites in the building occupied by homeowners. The board does not accept however that a percentage differential can be drawn from this situation and applied generally in the market, there being a number of variables that could have contributed to this difference; nor is the Board able to say with certainty that the same market condition prevails in the West End of Vancouver."

The Board then stated on p. 9 of its reasons for judgment the passages which appear at pages 6-7 (pages 1294, 1295) of this judgment.

The Board then concluded that the subject properties should be valued as the components of the complexes in which they existed. Its conclusion was drawn from the evidence of particular market conditions pertaining to the subject properties at the date of valuation and was "not a general proposition". It observed that other market conditions could be envisaged that would indicate that a ready sale could be had for rented strata title properties as individual units and in those circumstances the evidence of individual sales might be the most relevant.

It stated:

> "The Board accepts that purchasers of entire buildings containing strata units ordinarily intend to continue to rent those units and that the primary concern of those purchasers is the return on investment that the entire building will generate. That being so, the most meaningful measure of the value of such a building to a prospective purchaser is the income approach. The Board does not find fault with Mr. Austin's calculations based on that approach. There is no principle of assessment that precludes the Assessor from extrapolating a value for each unit from a total value concluded on the income approach for the entire complex. This practice is endorsed by Mr. Justice Fulton in *Assessment Commissioner* v. *James R. Houston*, Case 126 in the Manual of Stated Cases, and Fulton J's finding in that connection was not disturbed by the Court of Appeal."

In my opinion the Board did not commit any error of law in reaching those conclusions.

But counsel for the Assessor submitted that by valuing the strata lots as components of the rental strata complexes in which they existed the Board failed to value each strata lot as if it was marketed individually and that this was contrary to s. 26 (2) and (3) of the *Assessment Act*. He submitted that section 2 (1), section 4, and section 5 (1) (2) of that Act, when read with s. 26, required the Board to determine actual value of the lands and improvements of each individual parcel. Counsel submitted that by accepting the approach taken by Mr. Austin of calculating the value of all of the strata lots in the same complex and then apportioning that total value among the individual lots, the Board failed to determine the actual value of each lot.

Section 2 (I) requires the Assessor to set down on the property roll each property liable to assessment. Section 4 allows the Assessor to treat a building or other improvement which extends over more than one parcel of land as one parcel and assess accordingly and section 5

permits notice of assessment to be given and for several parcels of land to be covered by the same notice.

Section 26 (2) and (3) read:

> "(2) The assessor shall determine the actual value of land and improvements and shall enter the actual value of the land and improvements in the assessment roll.
> (3) In determining actual value, the assessor may give consideration to present use, location, original cost, replacement cost, revenue or rental value, market value of the land and improvements and comparable land and improvements, economic and functional obsolescence and any other circumstance affecting the value of the land and improvements."

These subsections do not require the Board to base actual value of the individual lots on the sale price of individual units. It was open to the Board to determine the actual value of the individual strata lots in the manner described in the Board's reasons quoted on page 13 of this judgment.

In support of his argument counsel for the Assessor referred to the decision of the Court of Appeal in *Crown Zellerbach Canada Limited*, (Stated Case 36, p. 157 at p. 180) in which Mr. Justice Davey of the Court of Appeal rejected an argument that the taxpayer's timberlands should be valued at a discounted price based upon a wholesale or regional discount because the timberlands could not be sold en bloc at stumpage prices commanded by relatively small blocks of timber.

Counsel for the Assessor submitted that there was a parallel between the wholesale discount or regional discount concepts rejected by Mr. Justice Davey and the valuation by Mr. Austin accepted by the Board in the case at bar when all of the rented strata lots within a single complex owned by a single owner were valued "en bloc" and the value apportioned to the individual lots.

The facts in *Crown Zellerbach* are distinguishable. In the case at bar there was evidence given by Mr. Austin of sales of complexes in which all strata units were owned by a single owner and were rented. In the opinion of the Board this evidence showed that such complexes were sold at a lower price than would be obtained if the units of the same physical type were owned by different individuals and offered for sale. The wholesale discount concept in the *Crown Zellerbach* case was a theoretical concept based upon the present value of future revenue or future carrying charges. It is implicit in Mr. Justice Davey's reasons that neither the wholesale discount nor the regional discount had any relation to actual value based upon current market prices. In the case at bar the Board had evidence to support its conclusions if it chose to accept Mr. Austin's evidence on this point.

Accordingly it is my conclusion that the Assessment Appeal Board did not err by failing to find that the *Assessment Act* required the Assessor and the Board to determine the actual value of the individual strata lots. The Board did determine the actual value of the individual strata lots by accepting the evidence of Mr. Austin and by determining the value of the entire complexes using the income approach and then extrapolating a value for each lot in order to determine the actual value of each lot. This was not an error of law. The answer to Question 2 is "no".

The answer to Question 3 is also "no". As I have already indicated I agree with the reasons of the Board when it concluded that s. 63 of the *Condominium Act* required nothing more than the separate and distinct existence of each strata parcel to be recognized for the purposes of assessment. The section gave no direction to the Assessor or the Board on how each parcel was to be valued. The section cannot be interpreted as requiring the Assessor to value the subject properties on a comparative sales approach or on any particular approach.

Question 4

In my opinion this question is a question of fact or mixed fact and law and therefore outside the jurisdiction of this Court to answer.

It should be noted that the Board's conclusions in paragraph 6 of the Stated Case was that "suites *ordinarily* command a higher price when sold individually than when sold as components of rental buildings". The wording of Question 4 omits the word "ordinarily". The conclusion stated in paragraph 6 of the Stated Case is supported by evidence. For the same reason that I expressed with regard to Question 1, I conclude that this question seeks the opinion of the Court on whether the finding of fact was erroneous. If there was evidence to support this conclusion or finding of fact of the Board, the question is within the jurisdiction of this Court to answer. If I am incorrect in this conclusion, I nevertheless consider that to the extent that it is a question of law it should be answered "no" for the same reasons that I have given in answering questions 2 and 3.

Question 5

This Question seeks the opinion of the Court on whether the Board was wrong to conclude that the lots should be valued as if they were marketed individually. The error asserted by counsel for the Assessor is the same as the error submitted with regard to Questions 2 and 3. I have concluded that this Question is a question of fact and need not be answered. But if I am incorrect in that conclusion I answer this question "no" for the same reasons that I have given in response to Questions 2 and 3.

Questions 6 and 9

These questions raise issues of law as to whether there was any evidence before the Board on which it could conclude "the fact that the individual strata lots are surrounded by other strata lots in the complex which are rented diminish their value as strata lots to be marketed individually", (see Question 6) and whether there was any evidence which allowed the Board to conclude that in valuing the individual strata lots "as components of the complexes in which they exist", that the Board had determined the actual value of the individual lots (Question 9).

I have read the transcript of evidence of the proceedings before the Board conducted on May 14th to 16th inclusive and particularly the evidence of Mr. Austin. I am satisfied that there was some evidence upon which the Board could reach the conclusion of fact stated in Question 6.

The evidence of Mr. Austin was as follows:

> At pages 67-69:
>
> "Q Yes. Now then, if he does, the reason that he doesn't sell off one unit is because of holding costs. Is that correct?
> A No, the reason that he may not get a higher price is because all the other units are in the building, are rented and he might not sell it. In which case, because all the units are rented, the market circumstances are such that there aren't that many purchasers who want to go into a building that is rented. And why don't they want to go into the building that's rented? Because if you run around rental buildings and I've been in enough of them in town, generally the quality, the upkeep, the type of people, the noise, the control is an environment that I as an owner occupier would not wish to live in. And that's why I say maybe he wouldn't get that price. And I say -
> Q Mr. Austin, do you know whether or not he'd get that price?
> A No.
> Q Do you have any evidence as to whether or not he'd get that price?
> A Yes.
> Q What is your evidence, Mr. Austin?
> A There is a building called Parkside Manor in Burnaby. The prices in that building which is a new building in comparison to Park Avenue Towers, a new building that was also

sold at the same time has a differential on average of something in the region of 30% to 35%. And this is a new building, Parkside Manor, which was not-well, it was new so it was sold in its first year. It had not had the opportunity to deteriorate. It was concrete and under those circumstances if, any differential on the subject may have to be even higher than that.

* * * * *

At page 104:

Q Now, as I understand this exhibit, the purpose of it was to demonstrate that purchases in a tenanted building, first purchases in a tenanted building result in a lower price. Isn't that the purpose of Exhibit 3? Or do I misapprehend?
A That's correct.
Q Now, tell me then why would the first sale, 1206 which is to an investor, be influenced on the same basis as the other three which are owner occupied?
A It's a sale of a unit in a rented building. If it's on the market an investor will pay more than a home owner. As obviously you're suggesting that that's the case or as much as. Does it make a difference? I mean, that's a colliqual (sic) question. I mean, I don't think it makes a difference. It's a sale of a unit that is placed on the market that is in a rental building, a primarily rental building, sorry. I think primary is very important.

* * * * *

At page 109:

Q And when I say this building, for the purpose of the record, Parkside Manor, is to an investor who doesn't reside there. Why would it make a difference to him that it's a rental building? All of the reasons you gave yesterday seem to me applied to owner occupier.
A Mr. Klassen, what this schedule is trying to show is that the values or prices of units in rental buildings when put on the market sell for less than if it is an owner occupied building. That's what I'm trying to show you. And here is the evidence. I don't see what difference that makes.

* * * * *

At page 232:

Q Well, let me put it to you another way, why in your view are these units not, these complexes not being sold as individual units?
A Because there was no market for these units. There are not enough sales, as we've shown, for the sale of these properties, number one. Number two, if the first unit, the second unit, or whatever unit is sold, you're impeded with the presence of the rental arrangement. Now, if an owner goes in and says, heh, I'm going to sell all my units, then the consequences or the restriction, if that's the word to use, - no, that's not the right word, detriment to the building namely its rental capacity, is not in existence. So, if you have a building and we're saying, ask all the tenants to leave, we're going to do the building up, turn it into a condominium that can be sold in the market and sell it. There's nothing to stop somebody doing that except the economics of doing so.

* * * * *

At page 303:

Q Now, the proposition that this is proof of again is to establish that purchasers buying in primarily a rental building will pay less than purchasers buying in an owner occupied building. Is that a fair summary of the proposition?
A I think the correct way of what I'm trying to say is that the values of a unit sold in a rental building is less than the values that are obtained, the price that is obtained in a building that is primarily owner occupied, all other factors being equal.

* * * * *

At page 307:

Q All right. I agree with that last statement. What fact do you base your opinion on that in a building predominantly tenanted that there would be a lesser price? Or lesser value?
A Schedule 3 which I have in front of you.
Q That's the fact base in your opinion.
A Plus the fact that I have talked to several realtors who have all told me that this exists.
Q With reference to this building.
A With reference to any buildings."

Similarly, with regard to Question 9, I find that there was some evidence before the Board which allowed it to conclude that in valuing the individual strata lots "as components of the complexes in which they exist" that the Board had determined the "actual value" of the individual strata lots.

There is some evidence in Exhibit 1, the report submitted by Mr. Austin, to support the conclusion of the Board that the income approach to value enabled the Board to determine the actual value of the individual strata lots. (See pp. 11-13 of the Exhibit.) Then there is the following evidence at pp. 52-53:

Q Mr. Austin, would you answer my question? My question is, what would you do - and you haven't answered my question - what would you do in order to determine which was the best use for Queens Plate, either to rent it or sell it? What would you do? Forget the other facts. Tell me what you would do to come to your conclusions.
A How would I value Queens Plate is what you're saying.
Q Yes.
A Would I value it as a condominium or would I value it as an apartment?
Q What exercise would you go through to determine which way you would do it?
A I would initially determine whether the units could be sold or - well, that's the first factor. Could the units be sold? If there was no market for the units and if I put them on the market, it would take me an extremely long time to sell which would mean that I would incur excessive holding costs or other such factors, assuming that this was either a vacant building or a new building. I would firstly determine the economics of selling those units. And also whether it could be sold, what are the characteristics of the building? Is it something that a purchaser is going to want to buy? And if I concluded that this was not the case, then I would have to value it as an income producing property. And the more sales that take place of rental buildings, the more it is easy to come to the conclusion that this is the market for these projects. Now, if there hadn't been any sales, Mr. Klassen, I would agree 100% with you that this wasn't the right thing. There was nobody who would go and buy these buildings, and it wasn't the economic position to do so. But these sales are staring us in the face. . .

* * * * *

Q All right. Now, under those circumstances, don't you consider the highest and best use of the unity, that is the improvement and the land?
A Yeah, I would do that, yeah. I mean, you asked me that question before. How would I determine how I was going to value the building.

> Q Yes.
> A Right. It's going to take me 15 years to sell my building because there's no demand. If it takes me 3 years to sell my building, a holding cost is going to eat up any profit I might make. And I mean, it doesn't take very much to show that 12% of the holding cost over 2 years is 24%. Which brings you back down to the fact that the economics of the building. See, I, you asked me this question and I go to the market and I say, what is the market doing? And I can only say again, and I repeated this earlier, that no, I have not specifically valued each one of these units, but I have looked at the market and I have said, here is 1279 Nicola. They tried to sell it but they couldn't so they rented it and sold it. Here is 1717 - sorry, here is 1718 Nelson. Sold as a rental apartment. They didn't sell it as condos. If it had been the highest and best use which is what you want to get at, of those individual units, those purchasers would have sold those buildings individually."

I also refer to the passage from Mr. Austin's evidence already mentioned at p. 232 of the transcript.

Counsel for the Assessor referred to some parts of Mr. Austin's evidence and submitted that the values arrived at by Mr. Austin were simply a function of the wholesale nature of the bulk sale, that the reason properties were not sold individually was because individual sales would not give the owner a return on his cost of acquisition, marketing costs, or a profit, and that on a bulk sale a vendor would sell for less because he did not have to pay marketing or holding costs. Counsel pointed to evidence that evaluation based upon the income approach used by Mr. Austin resulted in a value that was less than the market sales approach. Mr. Austin's method produced individual values by proportioning according to values placed on the individual units by the Assessment Authority. He had not made an appraisal of each individual unit to determine its market value as an individual unit.

Counsel's argument and references are not an answer to the finding that I have earlier made that there was some evidence to support the board's conclusions. It is not open to this Court to substitute its findings of fact for those of the Board on an appeal of this kind. The views of the facts expressed by the Board in the Stated Case and in its reasons were those which could reasonably be entertained by the Board. (See *Edwards* vs. *Bairstow*, [1956] A.C. 14 (H.L.) at p. 29 per Lord Simonds and per Lord Radcliffe at pp. 34-35 and applied by Southin, J. (S.C.B.C.) in *Crown Forest Industries Limited* v. *Assessor of Area #06 - Courtenay* (Stated Case 210 pp. 1179 at p. 1191 (reversed on other grounds).) Questions 6 and 9 must therefore be answered "yes".

Question 10

This Question is really another way of asking Question 9. For reasons already stated in answer to Question 9 I have concluded that there was some evidence from the sale of strata lots as part of a bulk sale or sale of an entire complex upon which the Board could conclude that this was evidence of the actual value of the individual strata lots. This evidence was given by Mr. Austin and is quoted from p. 307 of the transcript already noted on p. 20 of these reasons. This Question must therefore be answered "no".

Questions 7 and 8

Each of these Questions raises the issue of whether the Board erred by taking into account that the owners had rented the subject strata lots and had valued the strata lots on the basis of "value to owner" and had thereby erred in law.

I do not agree with counsel for the Taxpayer's contention that Questions 7 and 8 are concerned with the Board's method of valuation and are therefore questions of fact or mixed fact and law. Rather, the Questions raise the issue of whether the Board has calculated the assessment based upon the value to the particular owner of the property resulting from the particular owner's plans of realization or from some restriction in the particular owner's title, peculiar to the particular

owner. It is well recognized that "value to owner" is not a proper basis for assessment unless authorized by the *Assessment Act*. Where "value to owner" is not so authorized, it is wrong in law to base an assessment upon the value to the particular owner of the property. This principle is enunciated in *Crown Zellerbach Canada Limited* v. *Assessment Districts of Comox et al*, Stated Case 36, p. 157 per Wilson, J.A. (B.C.C.A.) at p. 171 and per Sheppard, J.A. at p. 185. It is also the principle point in the decision in *Desautels* v. *Coquitlam*, Stated Case 18 (B.C.S.C.) per Verchere, J. at pp. 72-77.

It is clear from paragraphs 7 and 8 of the Stated Case that the Board considered "the sales of a number of rental strata complexes wherein *all* of the strata lots were owned by one owner demonstrated a price per strata lot for the subject lots was demonstrably lower than the values which the Assessor had determined by valuing the individual unit on the comparable sales approach". Counsel submitted that this method of valuation adopted by the Board applied only to strata lots in rented stratified complexes and on the reasoning in the *Crown Zellerbach* v. *Assessment Districts of Comox. et al*, Stated Case 36 at p. 157 and p. 170 the assessment was based upon special value to the present owner and that this was not a proper basis for assessment under s. 26 of the *Assessment Act*.

At page 170 of that case Wilson, J.A. (later C.J.S.C.B.C.) referred to s. 37 of the *Assessment Equalization Act* (which was the section equivalent to s. 26 (2) and (3) of the *Assessment Act*) and stated:

> "Section 37 has been considered by the Courts of British Columbia in various cases. In no case has it been interpreted as permitting the consideration of value to a particular owner, as distinguished from any owner. I first refer to the decision of this Court in the appeals of Shell Oil and Standard Oil (1962) 38 W.W.R. 675. There a property had appurtenant to it a licence which created a special value. It was held by the Court that this was a value, not just to a present owner, but to any owner, and therefore acceptable. The values here sought to be attributed to the property are not those of any owner, since another owner might use the property for quite different purposes, say, as a long-term investment, or as a property for quick realization by sales of small tracts."

The evidence of Mr. Austin shows that he was referring to the value on the market to *any* owner of a building in which all the units were rented. This is particularly clear from the evidence quoted from p. 307 of the transcript (see p. 20 of these reasons) in which he responded to counsel's suggestion that his opinion applied to "the particular building" by stating that it applied to "any buildings". Moreover, his report Exhibit 1, makes clear that his valuation approach applied to any complex in which all units were rented and were owned by one owner. His report describes these complexes as "a category of real estate. . . called 'a stratified rental apartment' ". The focus here is on value resulting from ownership of rented strata lots *generally*, not to a special restriction which was peculiar to the particular owner. The Board showed that it viewed the value as value to *any owner* of a complex consisting of rented units when it stated at p. 9 of his reasons:

> "What is particularly significant to the Board is that it has been demonstrated that sales of entire stratified rental buildings occur in the market. That is not to say that sales of individual units do not occur, both in predominantly rented buildings and in homeowners strata buildings. The evidence indicates, however, that there are a sufficient number of the former type of sale, that they must be seen as a component of the market."

Counsel for the Assessor submitted that the reason the owner did not sell the strata lots individually was his own choice and submitted that the owner's position was no different from that of the owner in *Desautel's* case (supra) and in *Consolidated Shelter Corp. Ltd.* v. *Rural Municipality of Fort Garry* 49 D.L.R. (2d) 565.

In *Desautel's* case Mr. Justice Verchere held that restrictions voluntarily entered into with the Director under the *Veteran's Land Act* under an agreement that the owner could not sell the land

for a period of 10 years was not a restriction which the Assessor was required to consider as limiting the value of the owner's land.

At page 76-77 Mr. Justice Verchere stated:

> ". . . It seems to me, as counsel for the Corporation suggests, that if the appellant cannot be more heavily assessed because of the peculiar value to him of this land which he is to get at less than cost to the Director by virtue of his agreement with the Director, he should not be allowed to assert that the value of the land is lessened to him because he must not sell it for 10 years to make this gain. It should be borne in mind that the Assessor is required to assess the land and not the owner, and it would therefore seem to me that the Assessor should take into account only those restrictions which would bind and affect a prudent purchaser. This opinion is, I think, within the meaning of the finding of the court of Appeal in *CN.R.* v. *City of Vancouver*, where the lands in question were restricted in their use to railway terminal purposes only."

The *Consolidated Shelter's* case was a similar case.

In the case at bar the limitation placed upon the value by reason of all the suites being rented is not a restriction placed there by the owner's agreement. According to the evidence of Mr. Austin it is a restriction placed there by the economics of the marketplace. This is apparent from the transcript at pp. 67-69, p. 109 and p. 232 quoted above. The Board accepted that evidence and stated the facts found in paras. 6, 7 and 8 of the Stated Case.

Accordingly I am unable to find that the Board erred in law. Questions 7 and 8 must be answered "no".

Questions 11 and 12

Both these Questions raise questions of law based upon the alleged failure of the Board to value the strata lots at a value which bears a fair and just relation to the value at which similar lots and improvements were assessed in the Municipality.

Section 69 (1) (e) of the *Assessment Act* authorizes the Board to determine:

> "(e) Whether or not the value at which an individual parcel under consideration is assessed bears a fair and just relation to the value at which similar land and improvements are assessed in the municipality or rural area in which it is situated."

In the Stated Case the Board found as some of the facts stated in paragraph 4 of the Stated Case:

> ". . . The principal difference between the subject properties and the properties used by the assessor as comparables is that the subject properties are rented and are in buildings in which all the other units are rented, and the properties used as comparables by the assessor are individually-owned and are in buildings in which the other units predominantly are occupied by their owners."

It also found in paragraph 9 of the Stated Case as follows:

> "The Board found that the difference in selling price between units sold individually and units sold en bloc as part of a rental complex resulted from the fact that the units which were sold en bloc were surrounded by units in the same complex which were rented and that, in the area in which the subject units were located, this factor diminished their value. In coming to this conclusion, the Board gave consideration to the evidence of Mr. Smyth, the evidence of Mr. Austin, and to the whole of the evidence."

In its reasons for judgment the Board stated at p. 9 of those reasons that even though there was no essential difference between the subject properties and comparable individual properties traded in the market, the Board was unable to conclude that they should be valued as if they would be marketed individually.

The Board considered that the difference between the subject properties and those traded individually in the West End was that it was an element of the state and condition of the subject properties that at the date of assessment they were surrounded by suites that were rented. The Board was confident that the fact that the suites were rented was a consideration of their state and condition within the meaning ascribed to those words in the decision of Mr. Justice Bouck in *Trizec Equities Ltd.* v. *Assessor of Area 9 - Vancouver*, Stated Case 196. After considering the evidence as a whole the Board accepted that the fact that these suites were surrounded by neighbours that were rented diminished their value as suites to be marketed individually. Therefore, they would be less able to compete for price in the marketplace than suites in buildings predominantly occupied by homeowners.

The Board then concluded that the subject properties should be valued as the components of the complexes in which they existed.

Counsel for the Assessor argued that the Board adopted a method of valuation which could not be applied to all residential stratified units and had therefore failed to value the strata lots at a value which bore a fair and just relation to the value at which similar land and improvements were assessed in the municipality and that this was contrary to s. 69 (1) (e) and 44 (4) of the *Assessment Act*.

The Assessor relied on the decision in *Oxford Development Group Ltd.* v. *Assessor of Area 2 - Capital* (1981), 21 B.C.L.R. 263, Case 134 of the Stated Cases p. 791.

In that case the Board accepted the capitalized income approach to actual value but failed to consider evidence of the assessed actual values (on a square foot basis) of other buildings in downtown Victoria of similar construction to the 13-storey office building under appeal. Mr. Justice McKenzie held that the Board was not entitled to ignore the evidence of the assessed value of properties similar to the subject and that the Assessment Appeal Board erred in law in so doing.

He said at p. 796 of the Stated Case:

> "In my view, s. 62 (e) is meaningless unless it is invoked in an appropriate case. The assessor is obliged to find actual value. In testing the accuracy of his determination in any given case the Court of Revision is obliged to 'adjudicate. . . so that the assessments shall be fair and equitable' and it would be impossible to do so until it gave consideration to evidence tendered on comparable assessments. The Board in its turn cannot pass over such evidence in an appropriate case where there is, as here, doubt over the accuracy of the assessment. It is for the Board to decide on its relevance, comparability and weight but it cannot ignore the evidence."

He then remitted the case to the Board for its consideration of the evidence to determine whether or not the assessment on the building under consideration bore a fair and just relation to the assessed values of similar buildings.

I am unable to find that the Board ignored values of individual strata lots or chose not to consider the assessed value of individual strata lots upon which the Assessor based his assessment. On the contrary the Stated Case indicates that the Board considered the Assessor's evidence and the properties used as comparables by the Assessor. Details of its consideration are given in paragraphs 3 and 4 of the Stated Case.

Paragraphs 6, 7, 8 and 9 of the Stated Case set out the facts upon which the Board based its valuation. The Board stated in its reasons that in coming to its conclusions the Board gave consideration to the evidence of Mr. Smyth (of a survey in North Vancouver), the evidence of Mr. Austin and to the whole of the evidence. Further in a part of its reasons to which I have referred the Board stated:

> "Even though there is essential physical difference between the subject properties and comparable individual properties traded in the market, the Board is unable to conclude that they should be valued as if they could be marketed individually. . ."

The Board then noted that there was a difference between the subject properties and those traded individually.

These passages show that the Board did not ignore the evidence of assessed values of properties similar to the subject.

I find the approach taken by the Board was one that complies with the principle enunciated in *Simpsons-Sears Limited* v. *Assessment Area of Surrey-White Rock*, Stated Case 136 p. 802 by the Court of Appeal in which the Court of Appeal emphasized that the Board's primary task was to determine actual value.

In that case the question before the Court was whether the Assessment Appeal Board erred in law by confirming the assessment on Simpsons-Sears' land at a higher "actual value" than similar land adjoining Simpsons-Sears' land. The Assessment Appeal Board had stated that it would have been appropriate for adjoining properties to be assessed at the same value for land as the *Simpsons-Sears* land but that the Board was primarily required to assess the land under appeal on the basis of its actual value. The Board had concluded on the basis of evidence before it what the actual value was. If there was error it lay in an under-assessment of the two adjoining properties.

The Court decided that the Board was not in error to use the assessed actual value of the land of similar properties in different ownership to arrive at the figure for the assessed actual value of the land under appeal.

At p. 802-4 Mr. Justice Lambert emphasized that the prime requirement must be kept in mind and the determination made of actual value of the land precisely in question.

My reading of the reasons for judgment of the Board and the Stated Case in the case at bar persuades me that the Board did reach an assessed value on the subject properties which bore a just and fair relationship to the assessed value of similar lands and improvements in the municipality after giving those assessed values of similar lands proper consideration.

Accordingly questions 11 and 12 must be answered "no".

Summary

Questions 2, 3, 7, 8, 10, 11 and 12 are answered "no". Questions 6 and 9 are answered "yes".

Questions 1, 4 and 5 are questions of fact and not within the jurisdiction of this Court to answer. Alternatively, if Questions 4 and 5 are questions of law, they must be answered "no".