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WOSK'S LTD. & WHISTLER MOUNTAIN HOLDINGS LTD.

v.

ASSESSOR OF AREA 16 - CHILLIWACK

Supreme Court of B.C. (A873153) Vancouver Registry

Before MR. JUSTICE TOY

Vancouver, July 25, 1988

Christopher M. Considine Respondent
Ross Ellison for the Appellant

Reasons for Judgment July 25, 1988

The Assessment Appeal Board has stated a case at the request of the Assessor which seeks the opinion of this court on four questions of law.

I must at the outset acknowledge my indebtedness to both counsel for so promptly reassuring me that I had jurisdiction to write a judgment on the interesting issue raised in this appeal.

Although there are four questions posed, the central issue is whether the Assessment Appeal Board was lawfully entitled to direct the Assessor in the manner in which it did to reduce his assessment which was based on a recent sale of a comparable lot by discounting the Assessor's original assessments to reflect the market conditions for the 296 residential lots, the assessments for which were under appeal. All of the lots are totally serviced residential lots which are located within the Village of Harrison Hot Springs and are owned by Wosk's Ltd. and Whistler Mountain Holdings Ltd. who are associated companies and for purposes of this appeal I will refer hereafter to as "Wosk's" which is for all practical purposes one owner.

The material facts are to be found in paragraphs 3 to 11 inclusive of the Stated Case, which I hereinafter set out:

> "3. The appellants took no issue with the assessment on the acreage parcels or the waterlot, and concentrated on challenging the values placed on the residential lots.
>
> 4. The residential lots were developed over a number of years. A number of lots were developed in 1947 and 1977 with the balance being developed in 1982. The lots has been in the planning stage prior to 1982. As developed lots, each property is serviced with water, sewer, electrical services, curbs and gutters and storm sewers. There are also paved roadways and thirteen foot grass boulevards throughout the development.

5. Only one comparable vacant lot, which was adjacent to the residential development, had been sold in 1986. No effort has ever been made, by the appellants, to market any of the appealed properties because there was no indication of the potential market for the lots.

6. The population of Harrison Hot Springs is approximately 600 persons, residing in 233 lots.

7. The assessor based his values for each of the residential lots on the 1986 sale of the vacant lot adjacent to the residential development and the residual land calculations from three 1986 improved sales.

8. The assessor's valuation relies on the notion that each of the residential lots could have been offered in the market, in the year of valuation, at its assessed value and have found a buyer.

9. The absorption rate for residential lots in Harrison Hot Springs in recent years has been three or four lots per year.

10. The proposition that each of the lots was capable of being sold relies on a certain element of equilibrium between supply and demand, that is absent in this instance.

11. The Board accepted the approach taken by the appellants and allowed for an element of deferment to account for the fact that it will take a considerable length of time for the lots to be absorbed in the market."

(Underlining for emphasis mine.)

The Board in its decision of August 12th, 1987, recognized that the Village of Harrison Hot Springs has a relatively stable population and that there were other residential subdivisions in the area of the lots in question on this appeal. In preferring the appraisal tendered by Wosk's to the Assessors evaluation of the lots, the Assessment Appeal Board discounted the Assessors assessment, being of the opinion that it would take twenty years to sell all of the lots, ie., roughly fifteen lots per year, and the Board utilized a capitalization rate of 11 per cent in calculating the discount which was to be distributed among the 296 lots in the same ratio as individual lots' assessments as assessed by the Assessor bore to one another. Happily for me, it is not necessary to consider the calculations in detail as counsel for the Assessor took the position, as was done before the Assessment Appeal Board, that the granting of any discount was wrong in principle and an error in law.

I will deal with the four questions in the sequence in which they were posed.

1. DID THE ASSESSMENT APPEAL BOARD ERR IN LAW BY FAILING TO GIVE CONSIDERATION TO WHETHER OR NOT THE VALUES TO WHICH THE SUBJECT PROPERTIES WERE ASSESSED BEAR A FAIR AND JUST RELATION TO THE VALUES AT WHICH SIMILAR PROPERTIES ARE ASSESSED IN THE

MUNICIPALITY.

Here counsel for the Assessor submitted that in determining "actual value", which is what the statute requires to be determined, that the Assessment Appeal Board was under an obligation to consider the assessment of similar properties to ensure that the assessment on the Wosk's lots were fair and just in relation to other residential lots in the Village of Harrison Hot Springs.

However, as counsel for Wosk's argued, that issue was not one that was raised by the Assessor in evidence or in the argument before the Assessment Appeal Board. The issue fought out, and to which the Assessment Appeal Board directed its attention, was whether a discount should be applied to valuations of the 296 lots where there was evidence of a market producing only three or four purchasers per year. The authorities relied on satisfy me that having failed to raise this issue before the Assessment Appeal Board that precludes me from giving effect to any such argument. (See Lordina and Privest Properties Ltd. v. Area Assessor No. 9 - Vancouver (1980) 133 Stated Case, p. 785 - Supreme Court Action No. A790073 pronounced 14 March 1980, Assessment Commissioner v. Woodward's Stores Limited et al. (1982) 167 Stated Case 931 - Supreme Court Action No. A820211 pronounced 28 May 1982, and MacMillan Bloedel Limited v. Assessor or Area No. 4 - Nanaimo-Cowichan (1986) 220 Stated Case 1251 - Supreme Court Action No. A 852872 pronounced 26 May 1986.

Under the circumstances I decline to answer questions No. 1.

2. DID THE ASSESSMENT APPEAL BOARD ERR IN LAW IN CONSIDERING THE FACT THAT ALL THE SUBJECT PROPERTIES WERE OWNED BY TWO RELATED COMPANIES?

Counsel for the Assessor here submits that the Assessment Appeal Board has assessed the properties at a lower value because Wosk's owns all the lots, the assessments for which are under appeal, and that it is Wosk's decision not to have marketed any of the lots. If that be so, the reasoning of our Court of Appeal in Crown Zellerbach Canada Limited et al. v. Assessment Districts of Comox et al. (1963) 36 State case 157 should be applied which precludes the concept of assessing on the basis of the value to a particular owner. That case also stands for the proposition that discounting under such circumstances is an error of law.

Counsel for Wosk's argument is that the Crown Zellerbach case is distinguishable in that there was a market for Crown Zellerbach's forestry holding which they, as owners, were not disposed to enter and sell, but chose to hold their properties for disposition at some future time and for which they sought a discount.

I am in substantial agreement with counsel for Wosk's submission that the Assessment Appeal Board was faced with a very unusual problem. I would have said unique, however, that is not so as this type of problem has arisen before, though the matter has not yet been dealt with at a level above the Assessment Appeal Board.

A reading of the material facts, and the Assessment Appeal Board's reasons has convinced me that the Assessment Appeal Board has not relied on the one owner's decision not to sell lots immediately, but rather has focused on the unusual situation of a small, stable village of 600 people living in 233 homes where there has been a historical demand of only three to four lots per year against a supply of 296 lots owned by Wosk's and other residential lots available in other subdivisions, the aggregate number of which was not disclosed in the stated case.

The Assessment Appeal board was obliged to direct that the assessment be the "actual value" of each individual lot. Whether the 296 lots were owned by one, two, ten or two hundred and ninety six individual owners was a material fact for the Board to consider as a greater number of owners may have had the effect of flooding the market and driving the market price of lots down. However, I have concluded that the Assessment Appeal Board did not fall into the trap of granting a discount to Wosk's because it had decided not to sell any lots up until the present time and was therefore deliberately deferring revenue.

The cold hard facts are that Wosk's subdivided and partially developed some acreage and had ended up with almost a hundred times the number of lots that are required to satisfy the present annual demand for residential lots. Even if the company had decided to enter the market and sell,

only a small percentage of their lots could have been sold in any one year with the present demand being what it is. In my judgment, the low absorption rate of lots would have to be faced by one or even 296 individual lot owners.

3. DID THE ASSESSMENT APPEAL BOARD ERR IN LAW IN DETERMINING THE ACTUAL VALUE OF THE SUBJECT PROPERTIES BY DISCOUNTING THE VALUE OF ALL THE LOTS COMBINED?

Counsel for the Assessor's submission here starts from the fundamental proposition that the Assessment Appeal Board was not lawfully entitled to value all the lots and discount the sale of those lots over the next twenty years.

The statute and the cases are clear that assessment of the 296 lots must be dealt with on an individual basis to determine their "actual value", which should reflect each such lot's individual characteristics and peculiarities. "En bloc" assessments are illegal in the absence of a statutory provision authorizing the assessment of more than one lot at a time, and there is no appropriate saving provision in the Assessment Act comparable to s. 4 which does authorize the assessment of more than one lot where buildings or improvements extend over more than one lot.

The theme running through counsel for the Assessors submission is that the Assessment Appeal Board was not entitled to apply a discount at all; that the proper approach to determine each lot's "actual value" was to examine the known comparable sales and then make appropriate adjustments up or down based on each individual lot's peculiarities and characteristics compared to the sale prices of the relied upon comparable.

The Assessment Appeal Board, when it purported to correct the Assessor's assessment, was under an obligation to value each lot and determine that lot's "actual value". The factors to be considered are set out in s. 26 (3) which I reproduce:

"(3) In determining actual value, the assessor may, except where this Act has a different requirement, 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 circumstances affecting the value of the land and improvements."

Now it seems to me that counsel for the Assessor's submission is that the Assessor and the Assessment Appeal Board should restrict their considerations to "location" and "market value of the land and improvements and comparable land and improvements". But surely the authorities additionally should consider the other factors and give appropriate weight to them and, in this particular instance, those may include:

(l) present use;

(2) revenue or rental value; and

(3) any other circumstances affecting the value of the land and improvements.

On an individual basis, each lot was not being used for any purpose. Each lot was not producing revenue or rental income and, finally, each of the 296 lots, plus an unknown number of other lots in the Village of Harrison Hot Springs, were theoretically in the market to absorb only three or four prospective purchasers.

It further seems to me that Wosk's and the owners of the other residential lots in the Village of Harrison Hot Springs are all faced with the same gloomy prospect for several if not many years to come unless and until some substantial development change occurs in or close to the Village of Harrison Hot Springs, such that the demand for residential lots increases.

As I interpret what the Assessment Appeal Board has done is to start from the valuation arrived at by the Assessor which does allow for the pluses and minuses attributable to the 296 lots individual characteristics as compared to the comparable for the few sales that did take place. Then, in recognition of the known facts that there were at least 296 lots available to service a demand of three or four prospective purchasers per year, the Assessment Appeal Board has decided that a discount be allowed based on a notional selling rate of fifteen lots per year and a capitalization rate of 11 per cent, which, if the 296 lots were individually owned, would be spreading the aggregate discount pro rata amongst the lots in the same proportion as the Assessor's original valuation bore to the comparable that he relied on.

In my judgment, the Assessment Appeal Board's first step in their approach to this difficult problem has preserved the integrity of the individual assessment concept by starting in each lot's assessment of its actual value at the point where the Assessor did by giving effect to the factor of comparable sales and the recognition of the individual characteristics of each of the 296 lots. The second step in the Assessment Appeal Board's reasoning is a recognition of the fundamental proposition that under present conditions these 296 lots cannot be absorbed in a one or two year period, nor for many, many years after that. I do not view the discounting methodology to be an "en bloc" assessment, but rather a practical way to distribute the recognized diminution of the present value of the lots equitably between each of the 296 lots, as if each lot were owned by 296 individual owners. Today it is impossible to predict which of the 296 lots would sell in the first, second, or twentieth years. To distribute the reduction in value in the method adopted has not been demonstrated to me to be wrong in principle or law. I am prepared to go one step further and say, in the absence of another preferable methodology, the approach taken has been both reasonable and practical, even though the pay out period of twenty years utilized by the Assessment Appeal Board in their calculation is substantially shorter than the present absorption rate of three to four lots per year presently would indicate.

Counsel for Wosk's in argument relied upon two earlier Assessment Appeal Board rulings; namely, Block Bros. Construction Ltd. v. Assessor of Area No. 03-Nanaimo-Cowichan Valley pronounced 24 April 1984 and Canoe Pass Village Ltd. v. Assessor of Area No. 11 - Richmond-Delta pronounced 25 November 1986. As in the case at bar, both decisions adopted the fundamental economic principle of applying a discount to recognize the time value of money where there is evidence of a substantial excess of supply over demand for residential lots. I am in agreement with the reasons and conclusions arrived at in those two earlier decisions.

4. DID THE ASSESSMENT APPEAL BOARD ERR IN LAW IN FINDING THE ACTUAL VALUE OF THE SUBJECT PROPERTIES IN TOTAL AND APPORTIONING THAT VALUE TO EACH OF THE SUBJECT PROPERTIES IN THE SAME RATIO AS THE ASSESSED VALUE OF EACH BEARS TO THE TOTAL OF THE ASSESSED VALUES OF THE SUBJECT PROPERTIES?

Here counsel for the Assessor, in addition to relying on the "en bloc" argument submitted that the Assessment Appeal Board in authorizing a formula to be applied to many lots was arbitrary as opposed to determining the value of the lots individually. Support for that proposition can be found in a judgment of my Chief Justice Genstar Limited v. District of Mission (1981) 150 Stated Case 877, which judgment was upheld by our Court of Appeal. In that case neither the Assessor, whose assessment had been substantially increased, nor the Assessment Appeal Board, had considered individual lot characteristics and the Chief Justice's direction to the Assessment Appeal Board was to reconsider the respective lots' assessments individually, rather than applying a formula which he described as arbitrary.

In the case at bar there was no evidence, and I cannot conceive of what kind of evidence either party could have called, that would have assisted the Assessment Appeal Board in determining what order the 296 lots would sell, such that the body could otherwise distribute the diminution in value between the 296 lots. The description here of the use of the formula as arbitrary, in my judgment, is not arbitrary in a capricious sense. The application of the formula visits on each lot an equal share of the burden and benefit of the formula which, in view of the lack of any alternative, I consider to be reasonable and practical, if not Solomonian in its wisdom.

For the foregoing reasons, I therefore decline to answer question No. 1 and answer questions nos. 2, 3 and 4 in the negative and accordingly dismiss the appeal with costs.