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TRUSTEE BOARD OF THE NEW VISTA SOCIETY

v.

ASSESSOR OF AREA 10 - BURNABY-NEW WESTMINSTER

Supreme Court of British Columbia (A902519) Vancouver Registry

Before the HONOURABLE MR. JUSTICE ROWAN

Vancouver, October 1, 1990

Dale Stewart for the Appellant
G. E. McDannold for the Respondent

Reasons for Judgment (Oral)

November 1, 1990

Although these reasons are pronounced orally, they will be reduced to writing and delivered to the parties and the Assessment Appeal Board.

On June the 21st last, the Assessment Appeal Board heard the appeal of the Trustee Board of the New Vista Society against an assessment made by the Respondent Assessor Area No. 10, Burnaby-New Westminister. In these reasons, I will refer to the Appellant Trustees as the Trustees or the "Trustee Board" and the Respondent as the "Assessor."

The Trustees are the owners of two parcels of land which are the subject of this Stated Case. The parcels are devoted to low income housing for old people. One is at 7216 Mary Street in Burnaby and is called the Winch Tower, and one is at 7210 Mary Street in Burnaby and is called the Vista Tower. The latter property also has three cottages for rental. The Towers contain a multitude of bachelor suites and a much smaller number of one-bedroom suites.

In 1989 the Assessor made significant increases in the assessment of those properties which lead to the proceedings taken before the Assessment Appeal Board.

To save reading the full Stated Case, I will ask the court reporter to attach a copy to these reasons when they are reduced to writing, and you should consider the reasons in light of the findings and questions set out in the Stated Case.

Before I answer the questions let me relate, however, some of the unique aspects of this matter. The owners, the Trustees, are established by Private Act of the British Columbia Legislature entitled "An Act respecting the Trustee Board of the New Vista Society," Chapter 51 of the Statutes of British Columbia, 1953.

The New Vista Society itself was incorporated under the provisions of the Societies Act of British Columbia in December, 1943. Its original constitution, if I can summarize it, dedicates the Society irrevocably to charitable purposes, particularly the care and housing of elderly persons. Its constitution and bylaws may only be altered with the permission of the Minister of Health and with the consent of the Trustees.

Let me return to the statute incorporating the board of Trustees; I should read the significant portions of it. The preamble is most important. It reads as follows:

"WHEREAS The New Vista Society was incorporated on the eighteenth day of December, 1943, under the "Societies Act": And whereas The New Vista Society has petitioned that an Act may be passed creating a Trustee Board of the Society to acquire and hold upon trust all the real property of the Society to the end that such real property shall be devoted perpetually to charitable purposes defined herein: And whereas it is expedient to grant the prayer of the said petition."

Then the statute proceeds to its operative enactments. Section 1 gives a title to the Act. Then section 2 establishes the Board as a corporate entity and gives it a name. Section 3 is important to these reasons and reads;

"3. (3) The Trustee Board of the New Vista Society (herein after called the "Board") shall at all times be entitled to purchase, lease, acquire, have, take, hold, receive, and enjoy all or any property, real or personal, in British Columbia."

A further power is contained in subsection 3 of section 4. That reads;

"4. (3) The Board may sell, dispose of, assign, transfer, or exchange any real property held by it when it deems it necessary to do so in furtherance of the purposes of this Act."

The purposes of the Act are not tightly packaged under one section entitled "purposes." However, the purpose of the Act may be readily inferred from the preamble already quoted. They may be inferred from the sections in the Act itself such as subsection 4 (4).

"4. (4) The objects of the New Vista Society shall be as set out in the declaration of the Society filed on the eighteenth day of December, 1943 under the 'Societies Act,' as amended prior to the day upon which this Act comes into force, and shall not be altered unless the consent in writing of the Board is first filed with the Registrar of Companies."

The objects of the Society itself at that time, and now, are all charitable. Section 10 also assists in constraining the purposes of the Act. Section 10 (1) provides that upon the dissolution of the New Vista Society, the assets shall be held in a trust fund. Subsection two of paragraph 10 reads,

"10 (2) The capital and income of the trust fund created under subsection (1) shall be used in such manner as the Board sees fit for the purpose of alleviating the suffering of or contributing to the care, comfort, and well-being of elderly dependent persons."

The balance of the statute deals with the make up of the Trustee and its Board rules of governance. Even some of those sections colour the statute with charitable intentions and charitable purposes.

Counsel for the Assessment Appeal Board took the position that the sole question of law raised in the Stated Case was question two which is posed as follows;

"Did the Board err in law finding that the Trustee Board of the New Vista Society Act, Stats. B.C. 1953, c. 51, including amendments, was not an impediment to the owners disposing of the property on the open market?"

Some other questions of law are raised. A number of questions are questions of mixed law and fact and the answers may not have an important bearing on future Board deliberations, so I will proceed to deal with question two.

I have quoted the question and the answer is as follows. Strictly speaking, the answer is yes, for the Trustees are constrained in the exercise of their discretion to sell. That constraint is a legally imposed constraint. However, in argument, counsel for the Trustees took the position the Trustees were bound to ensure the land held by the Vista Society (in the words of The Preamble) "shall be devoted perpetually to charitable purposes as defined herein." Counsel took the position that the Societies property must be forever dedicated to charitable use. That position became unpopular with Edward I, more so with Henry VIII, and has not been promoted by law ever since.

More to the point, the dedication of the land perpetually to charitable purposes is only spoken of in the preamble to the Private Statute. It is not given effect in the operative portions of the Private Act. Nor are the charitable purposes adequately defined in the statute to constitute a restraint on the alienation of the land which attaches to the land. The restraint lacks clarity and, in my respectful view, the land is not bound. The Trustees, however, may only dispose of the land so the objects and purposes of the Society are promoted.

I cannot, however, leave this question without observing it is related to what to my mind is a fundamental oversight made by the Assessment Appeal Board. It would seem from the reasons which are made part of the case that the Assessor and the Board failed to take into account the use of land which is the provision to elderly people of low rental accommodation; the Board and the Assessor failed to take into account the real constraints upon the Trustees in disposing of the land.

It is a mistake to always equate "actual value" as those words are used in the Assessment Act with the concept of "fair market value." Often the two are the same. But they are not always the same. It is a truism that many properties do not have a market and no market exists for those properties.

There are a number of court decisions in which the words "actual value" are equated with fair market value but many of those cases are under legislation different from our Assessment Act. That equivalence may well have been correct in those cases. However, they are not in this case.

I am told by counsel in this case that the Assessor reached his conclusions by the use of the Income Approach, and in doing so used rents in his calculations, "economic rents" which are charged by viable commercial enterprises in the Lower Mainland. And it may be the Assessor did address this problem but it's not clear in the material before me that he did. It appears to be clear that the Board of Assessors did not make allowance or give past consideration for present and future use of the land. Paragraph 11 of the Stated Case relates the following finding.

"11. (1) The Board held that there was no legal impediment prohibiting New Vista Society from selling the subject property on the open market and the mortgage could be discharged at any time to allow sale of the property or to permit an owner to increase rents to market levels, and it should be valued in the same manner as any other commercial apartment building."

In my respectful view the Board has disregarded some relevant portions of section 26 (3) of the Assessment Act. The Assessment Act does not give a great deal of help in defining the actual value but I will quote it. "Actual value is defined in section 26 (1) of the Assessment Act as;

"26. (1) 'actual value' means the actual value that land and improvements would have had on July 1 had they and all other land and improvements been on July 1 in the physical condition that they are in on September 30 and had their permitted use been on July 1 the same as on September 30."

That dictates when land value will be calculated. Subparagraph (2) of section 26 reads;

"26 (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."

Subsection 3 reads,

"26 (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."

In my respectful view, the Board has disregarded some of the provisions of section 26 (3). It has disregarded "present use" and has disregarded the unique situation under which these properties are held. That situation should be considered among the circumstances affecting the value of the land and improvements. Those may be matters which are difficult to measure but they are matters that should be addressed and call for consideration in the assessment of the properties.

Having answered Question 2, I will endeavour to answer the questions of law that are posed. Some of the answers may not be critical in view of the answer to question number two. Questions 1 and Question 3 in the Stated Case are questions of mixed law and fact, not questions of law.

Question 4 (a) is posed as follows;

"Did the Board err in law in determining: (a) that documents and testimony presented on the issue of disposition of the property constituted a finding of 'no document evidence'?"

The answer to that is, yes, there were some documents. The question seems unimportant unless it reflects an undue reverence for the written word. 4 (b) is posed;

"Did the Board err in law in determining: (b) that documents and testimony presented on the issue of retiring the mortgage constituted 'no documented evidence'?"

The answer is no. A copy of the mortgage was not entered in evidence as an exhibit. Presumably that mortgage contained terms that the parties may have been familiar with, but it wasn't tendered in evidence and an outsider would not be familiar with the terms.

4 (c) was;

"Did the Board err in law in determining: that documents and testimony related to capitalization rate inconsistencies between Burnaby and Vancouver constituted 'no market evidence' of higher Burnaby capitalization rates applicable to the property in question?"

If that question means "was there evidence" the answer is "yes." If the question means something else, it will have to be rephrased.

Question 5 is a question unnecessary to answer in light of the answer to Question 2.

Question 6;

"Did the Board err in law in accepting the opinion of the Society Administrator as to the absence of legal impediments to a possible sale of the properties?"

To the extent that the administrator was expressing an opinion on law, the Board erred; however, the administrator's answer could be used to draw factual inferences.

And, seven;

"Did the Board err in law in that its findings of fact were unreasonable on the evidence before it, or so egregious that such findings of fact amounted to an error in law."

The answer to this question is unnecessary in light of the answer to Question 2 and in any event the question is a question of mixed law and fact.

Now, I think I have dealt with the questions that are raised. Is there anything else that counsel want to discuss at this time?

MR. McDANNOLD; No, my lord.

THE COURT: Those answers will be reduced to writing, a copy of the Stated Case will be attached and will be supplied to the Assessment Appeal Board.

MR. McDANNOLD; Thank you.

STATED CASE

THIS CASE STATED by the Board, pursuant to section 74 (2) of the Assessment Act, at the requirement of Trustee Board of the New Vista Society, seeks the opinion of the Supreme Court on the questions of law set out below in respect to which the following are the material facts:

1. The New Vista Society was created in December 1943. The Trustee Board of the New Vista Society was created by an Act of the British Columbia Legislature in March 1953 to acquire and hold real property of the Society to be devoted perpetually to charitable purposes.
2. In October 1953, the Trustee Board of the New Vista Society Act was amended to add section 4 (3) which now reads in part: Section 4 (3)

A transfer of property under subsection (2) shall be subject to any mortgage or charge created by the Society on the property transferred prior to the transfer . . .

The old section 4 (3) was renumbered as section 4 (4) and reads:

Section 4 (4)

"The Board may sell, dispose of, assign, transfer, or exchange any real property held by it when it deems it necessary so to do in furtherance of the purposes of this Act."

3. The Appellant, New Vista Society, appealed the valuation placed on two high-rise apartment blocks for the 1989 Supplementary Roll.

4. This property was mortgaged to Central Mortgage and Housing Corporation, with restrictive conditions regarding rental rates being promised by the Society.

5. The suites in these towers known as the "Winch Tower" and the "Vista Tower" as well as those in the three contiguous cottages at the same address, are rented at rents well below those being obtained by the owners of other high-rise apartment blocks.

6. The appraisers for both New Vista Society and the Assessor relied upon the "Income Approach" to value this land and these buildings.

7. The Appellant argued that the legislation and the mortgage created a legal restriction on the sale of the properties, and that the market value of this property was, therefore, affected.

8. The Assessor took the position that the legislation which created the Society was a Private Act and does not restrict New Vista Society from acquiring or disposing of the subject property, and that it could be marketed in the same manner as any other apartment building.

9. The appraiser for New Vista Society, after examining sales of "West End" Vancouver high-rise apartments, and the apparent difference in capitalization rates between West End low rise apartments and Burnaby low rise apartments, concluded that the correct capitalization rate to be employed in the use of the "Income Approach" to value should be 7.25%.

10. The appraiser for the Assessor used market derived "economic" rents, expenses and capitalization rate. After examining the sales of eight high-rise buildings, (five being in "West End" Vancouver, two in neighbouring New Westminster, and one on West 12th Avenue in Vancouver) he concluded that the correct capitalization rate to be relied upon in this instance was 6.5%.

11. The Board held that there was no legal impediment prohibiting New Vista Society from selling the subject property on the open market and the mortgage could be discharged at any time to allow the sale of the property or to permit an owner to increase rents to market levels, and it should be valued in the same manner as any other commercial apartment building.

12. The Board concluded that the value as determined by the Assessor was best supported and ordered him to amend the 1989 Supplementary Roll for Folio No. 10-41-301-7137-7210-0000, to reflect the following actual values, viz:

Land	\$4,112,350
Improvements	\$1,867,650
Total	\$5,980,000

The value of Folio No. 10-41-301-7137-7216-0000 was confirmed at \$4,827,250.

13. A copy of the decision of the Board dated the 26th day of July, 1990, is attached hereto and marked Schedule "A". (Schedule A not attached see 1990 A.A.B. Decisions blue book.)

THE QUESTIONS on which the Board is required to ask for the opinion of the Supreme Court are:

1. Did the Board err in law in interpreting documentary evidence in deciding that the mortgages registered against the property, namely, the mortgages registered in favour of C.M.H.C. dated January 22, 1971 and August 12, 1976 read in conjunction with the initial mortgage document Number G83490 registered in the New Westminster Land Title Office could be retired at any time in their entirety in order to permit the sale of the property in question?

2. Did the Board err in law in finding that the Trustee Board of the New Vista Society Act, Stats. B.C. 1953, c. 51, including amendments, was not an impediment to the owners disposing of the property on the open market?
3. Did the Board err in law in inferring that there were no legal impediments to a possible sale of the property in question?
4. Did the Board err in law in determining:
 - (a) that documents and testimony presented on the issue of disposition of the property constituted a finding of "no documented evidence"?
 - (b) that documents and testimony presented on the issue of retiring the mortgage constituted "no documented evidence"?
 - (c) that documents and testimony related to capitalization rate inconsistencies between Burnaby and Vancouver constituted "no market evidence" of higher Burnaby capitalization rates applicable to the properties in question?
5. Did the Board err in law in applying an improper standard of proof on the issues of disposition of the property, release of the mortgage and existence of variations in capitalization rate?
6. Did the Board err in law in accepting the opinion of the Society Administrator as to the absence of legal impediments to a possible sale of the properties?
7. Did the Board err in law in that its findings of fact were unreasonable on the evidence before it, or so egregious that such findings of fact amounted to an error in law.