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BERNARD LOTZKAR

v.

ASSESSOR OF AREA 11 - RICHMOND/DELTA

Supreme Court of British Columbia (A921037) Vancouver Registry

Before the HONOURABLE THE CHIEF JUSTICE

Vancouver, May 21, 1992

John R. Lakes for the Appellant
John H. Shevchuk for the Respondent

Reasons for Judgment June 9, 1992

The Assessment Appeal Board has stated a case for the opinion of this Court. A copy of the Stated Case (without the decision attached to it as Schedule A) is appended to these reasons. (Note - Stated Case not attached)

The issue arises from the fact that the land is subject to the restrictions imposed by "FREMP" (the Fraser River Estuary Management Programme). The restrictions on use created by that programme are, in a general way, not unlike those created by municipal requirements in respect of zoning and development. But for those properties to which they apply, they appear to create an onerous burden. At the valuation date (July 1, 1990), no permission for use had been granted but, on July 17, 1990, permission was granted subject to a list of conditions, including the approval being valid for only one year from the date of the letter.

The first of the three questions posed by the Board is whether it was arbitrary and unreasonable for it to use the "Direct Sales Comparison Approach" to determine actual value despite the restrictions on the subject property. The restrictions referred to are those created by FREMP. I see no error in law in the Board's acceptance of the Direct Sales Comparison Approach and do not see how the existence of restrictions could, by itself, affect the validity of the approach.

The second and third questions appear to raise one issue. It arises from the facts stated in paragraph 8 of the Stated Case from which it appears that the comparison properties used to arrive at a value for the 1.25 acre portion were not subject to those restrictions. Although the matter of FREMP restrictions was not a major element in Mr. Lotzkar's argument before the Board, it does appear from the transcript at pp. 55-60 that he made the point that FREMP created onerous restrictions to which the comparison properties were not subject. I see nothing in the appraisal evidence or in the reasons of the Board to indicate that either the appraiser in his evidence or the Board in its decision gave any regard to this matter.

I should make clear that I have approached the issue somewhat differently from the Appellant's argument. The basic premise of that argument was that, at July 1, 1990, no use whatever could be made of the land and that the assessment had to be made without regard to the permission granted on July 17, 1990. I agree with Mr. Shevchuk that the definition of "actual value" in the Act requires the assessment to be made on the basis that the permitted use on September 30 is to be applied to an assessment as of July 1. But it does not follow that, after permission was granted

on July 17, FREMP ceased to be a factor. The permission was subject to conditions which continued to restrict use of the land and thus would continue to be a factor in the assessment of actual value.

The authority relied upon by the Appellant is primarily the Bramalea case referred to in the Board's question 3, which found it to be error in law to apply a capitalization rate of 9.5 per cent to Bramalea's property instead of the 12 per cent rate applied to other hotels in the area. The Board did not in its decision explain how the difference in rates could be justified and did not appear to consider the question of "equity", i.e. the requirement of the Act that the assessment be equitable as amongst taxpayers. While the issue here is not one of equity under that section the general line of reasoning in Bramalea nevertheless supports the position of the Appellant. On the face of it, the existence of the FREMP restrictions appears to be a highly relevant factor to any process of comparison. Yet neither the appraiser nor the Board, which accepted the appraiser's evidence without modification on the basis that it was the "only evidence", appears to have paid any attention to the matter of the impact of the restriction on value. The error in law is closely analogous to that stated in this way in the concluding paragraph of the reasons of Taylor, J.A. for the Court in Bramalea at pp. 233-234:

> There was nothing said by counsel for the assessor before us which would, in my view, suggest that so great a difference in capitalization rates could be justified. Since the board nowhere deals with the matter in its reasons, I must agree with the trial judge that the question of equity does not appear to have been considered by the board. If the board accepted the view of the law advanced for the assessor it would have concluded that there was no need for it to consider the matter. In all the circumstances, fairness to the taxpayer requires, in my view, that the decision be remitted to the board for reconsideration.

What I see as clearly analogous is that nothing said by counsel for the Assessor before me would suggest that ignoring so material a factor as the FREMP restrictions in the process of comparison could be justified. I therefore answer questions 2 and 3 in the affirmative and, with respect to the 1.25 acre parcel, remit the decision to the Board for reconsideration.