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MANHATTAN HOLDINGS LTD. & HANOVER PROPERTIES LTD.

v.

ASSESSOR OF AREA 08 - NORTH SHORE/SQUAMISH VALLEY

Supreme Court Of British Columbia (A923538) Vancouver Registry

Before the HONOURABLE MR. JUSTICE BRAIDWOOD (in chambers)

Vancouver, January 27, 1993

R.J. Wilinofsky for the Appellants
John E.D. Savage & K.E. Geiger for the Respondent

Reasons for Judgment (Oral) January 27, 1993

THE COURT: This is an appeal by way of a Stated Case pursuant to s. 74(1) of the Assessment Act R.S.B.C. 1979 c. 21.

The subject of the appeal are two properties referred to as "Folio A" and "Folio B". Folio A is property zoned RM-1 located at 2222 Bellevue Avenue, West Vancouver. This property is leased by the Appellant under a 99 year head lease with approximately 72 years remaining under the terms of this lease. The rent paid to the Appellant landlord for the property is $23,100 per year. It is a 15-storey, 101 rental unit reinforced concrete building which has one level of basement parking and a 4-storey steel and concrete parking garage plus surface parking situated on the land.

The second property referred to as Folio B is located at 2190 Bellevue Avenue, West Vancouver and is zoned RM-2 and is near Folio A. This building is a 62-rental unit apartment complex constructed in 1964 of reinforced concrete with 62 surface level parking stalls.

The first point taken by the Appellant is the selection by the Board of the capitalization rate of 5.75 for the property referred to as Folio A and described as "waterfront property". The allegation is that this selection is unsupported by the evidence and was an erroneous determination. There was evidence called by way of expert opinion evidence supported by various comparables that this was the correct capitalization rate.

I am of the opinion that the determination of which properties are comparable is a proper determination for the Board and not the subject of an appeal. It is a question of fact, not a question of law. See British Columbia Forest Products Ltd. v. The Corporation of the District of Maple Ridge (1957), B.C.S.C. 009 at page 32.

The Appellant also argued that the Board erred in principle in failing to consider the circumstance that the owner granted a long-term lease for the underlying land. Accordingly, the market value of the land should reflect and be based on the value of the lease.

I am of the opinion that this is an erroneous approach to evaluation. Although it is necessary to determine separately the value of the land and the value of the building, yet to assume the value

of the land is equivalent to the value yielded by the contractual lease is only to assess and determine the value of a partial interest in the land.

It is the ability of the whole of the property both the improvement and the land to attract rent on which the valuation of the land and buildings must be based. The fact that the interest of the underlying land is divided does not alter the value to be attributed to the whole interest.

It is not the rent actually received that must be considered but rather the rent that the land and building may attract in the market-place. Further, it should not be part of the consideration of value to take into consideration the artificial arrangement of the parties. In the case of London Life Insurance Company v. The Assessor of Area 09, Vancouver Registry No. A872713, at p. 8:

"A leading authority on assessing the market value of rental property is Re A. Merkur & Sons Ltd. and Regional Assessment Commissioner, Region No. 14 et al, [1978] 17 O.R. (2d) 339. At page 347 of the decision Steele, J. discusses the proper components to be considered when using the income method as follows:

`As previously stated, I am of the opinion that the proper rental to be used is not the actual rent received, but the full rental value of the property in the year in question, including tenants' improvements. Evidence to this effect was not fully introduced before the Board. Obviously this figure must be a matter of opinion based on the numerous factors that relate to the property. Comparison should be made to rental values of similar properties, but they should not be slavishly followed in shopping centre cases because there may be numerous market forces that are peculiar to each individual centre. Proper vacancy and other allowances should be made. The actual percentage rents should be considered as a major factor in determining the peculiarity of the centre and as one factor in arriving at a proper full current rent.

Perhaps the most difficult component is the capitalization rate. This will be a matter of opinion and may vary depending on whether the rents are fixed or based on a percentage of sales. Comparisons within the market-place, with any necessary adjustments being made to sales that have not reflected full rental values, should be considered, as well as the risks inherent in the centre whose assessment is being considered. It should be borne in mind that most sales will reflect the value of the income stream to the vendor and not the full value of the entire property required under the Assessment Act. However, there may be no better way of determining the capitalization rate for the full assessable value than by using the capitalization rate that the market applies to the income stream.'"

With reference to the point that part of the consideration of value to be taken into consideration is not the peculiar arrangement of the parties see also the City of Vancouver v. The Corporation of the Township of Richmond found in (1958) No. X585/58, a decision of Mr. Justice Brown. He writes in part at page 54 as follows:

"I should hesitate to disagree with the learned Chairman in principle if both lands and improvements were involved, although I was very impressed with the submission on behalf of Richmond that going concern meant an entity from a physical rather than an accountancy standpoint. But, as I have indicated, I cannot convince myself that as applied to land alone it involves taking a specific income into account where the land, owing to an abnormal use, produces much more or much less than its neighbouring parcels. Consequently I should not cut its assessment by any percentage because it does not, under present circumstances, produce a return. It hardly seems reasonable that a neighbouring municipality or a private person, for that matter, should be able to depress the value for assessment purposes of hundreds of acres in Richmond by making an uneconomic use of the land."

Of course that principle does not apply exactly to the case here but the underlying considerations do. See also Consolidated Shelter Corp. Ltd. v. Rural Municipality of Fort Garry. A decision in 1965 by the Manitoba Court of Appeal found in [1965] 49 D.L.R. (2d) 565, particularly at 567.

I was also informed by counsel that this point was not argued before the learned Appeal Board and further, the proposition was not supported by the evidence called on behalf of the owners.

The next point taken by the Appellant concerned the fact that not only is the owner entitled to have the property valued on the basis of its market value but also the property must be equitably dealt with. That is to say, was it treated on the same basis as other like properties? I am of the opinion that the evidence supports the proposition that it was treated in an equitable manner. The sole issue before the Appeal Board was this issue. Opinion evidence was called to indicate the property called "Folio A" was treated with a cap rate of 5.75 per cent in a manner that was similar to other comparable properties and, likewise, the property referred to as "Folio B" was treated in a similar manner to properties that were comparable to it. And, as indicated above, the selection of the appropriate comparables is a question of fact and not a question of law.

The last point had to do with whether or not there should have been a 10 per cent reduction in the overall assessment in the properties. It is apparent that there was no evidence to support such contention. All properties were valued without such a reduction and based on their comparability to like properties.

Accordingly then, the questions will be answered in the negative. That is to say, that no error was made.

Now, is there anything further?

MS. GEIGER: I've been asked to raise the issue of costs and I would assume that costs will follow the event.

THE COURT: Any problem with that?

MR. WILINOFSKY: It's hard for me to make argument against costs following the event, my lord.

THE COURT: All right. That will be the order.