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YUEL L. HUIE

v.

ASSESSOR OF AREA 10 - BURNABY/NEW WESTMINSTER

Supreme Court of British Columbia (A932036) Vancouver Registry

Before the HONOURABLE MR. JUSTICE DROSSOS (in chambers)

Vancouver, December 2, 1993

A.J. Lee for the Appellant
J.H. Shevchuk for the Respondent

Reasons for Judgment (Oral) December 2, 1993

THE COURT: The Appellant, Yuel L. Huie, appeals by way of Stated Case the decision of the Assessment Appeal Board classifying as at the critical date of September 30th, 1991, for assessment purposes the Appellant's property located in Burnaby, B.C. as Class 6, Business and Other rather than Class 1, Residential. The Appellant contends that the Board erred in law by classifying his property as Class 6 rather than Class 1.

The case as stated by the Board pursuant to the *Assessment Act* for appeal reads:

STATED CASE:

THIS CASE STATED by the Board pursuant to Section 74 (2) of the *Assessment Act* at the requirement of Yuel L. Huie, 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 Appellant, Yuel L. Huie, is the owner of the property located at 4715 Village Drive, in the District of Burnaby (the property).

2. The sole issue of the appeal is the classification of the property for assessment purposes. The property is classified Class 6, Business and Other. The Appellant maintains that the property should be classified Class 1, Residential.

3. The property is within a Comprehensive Development District. This designation permits a variety of residential and commercial uses. Under this regime a property owner can submit to the Municipal council a Comprehensive Development Plan which, if approved by Council, authorizes the owner to develop the property in accordance with the plan.

4. The Appellant operated a grocery store on the property for several years but business was not good at that location. As a result, two plans were submitted to Burnaby Municipal Council to alter the permitted use of the property.

5. Burnaby Municipal Council approved the first plan which provided for mixed residential and commercial use.

6. Subsequent to approval of the first plan by Burnaby Municipal Council, the owner applied to eliminate the commercial component and construct more residential units. At the date of the hearing this application had not received final approval, however, recommendations for municipal planning staff were supportive of the proposal.

7. At September 30th, 1991, the store was closed and boarded up.

8. In December 1991, on the strength of preliminary indications for municipal planning staff to the effect that a change to an entirely residential use was likely to be approved, the Appellant demolished the building.

9. At the date of the hearing no building permits had been issued for construction of residential dwellings on the site and the property was vacant.

10. Attached hereto and marked Schedule "A" is decision of the Board dated April 23rd, 1993.

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

1. Did the Assessment Appeal Board err in law when it held that the subject property's use was classified as "Class 6, Business and Other" as contemplated in B.C. Regulation, 438/81?

2. By the Assessment Appeal Board not finding that all or a portion of the subject property was used for residential purposes, was that finding unreasonable in relation to the evidence?

3. If a portion of the subject property was used for residential purposes, did the Assessment Appeal Board err in law when it did not apply a split classification approach to the classification of the subject property?

DATED AT MAPLE RIDGE, B.C., this 3rd day of June, 1993.

Charles S. Birkenshaw, Vice Chair,

ASSESSMENT APPEAL BOARD

In answering the three questions posed for decision by the Court, counsel for the parties submit that the essential issue for determination is whether the Board erred in law, in the face of the evidence, on its finding of fact that at the critical date of September 30th, 1991, the subject property was not used in whole or in part for residential purposes.

A determination of this issue would normally give rise to a consideration of four factors, but on an appeal by Stated Case from a decision of the Board, the Court is limited to dealing only with questions of law and cannot deal with questions of fact. Accordingly, the Court can only consider and apply the first two of the following four factors on determining whether to intervene and whether the Board acted:

(1) without any evidence; or

(2) upon a view or interpretation of the facts which could not reasonably be entertained; or

(3) upon the sufficiency of the evidence; or

(4) the weight and credibility of the evidence.

The principles of law applicable to appeals by Stated Case from the Assessment Appeal Board are expressed in *Canadian National Railway Company* v. *Assessor of Area 9 - Vancouver*, (March, 1989, February 1, 1990) B.C.A.C. Stated Cases, No. 273, (B.C.S.C. affirmed by the B.C.C.A.) where a passage in the judgment of Lander J. in the S.C.B.C. which was cited on appeal with approval by the B.C.C.A. reads:

As to the evidentiary issues, this Court has no power to intervene unless the Board is found to have (1) acted without any evidence, or (2) upon a view of the facts which could not reasonably be entertained.... Under the first condition, the Board cannot base its decision on its own opinions, unsupported by evidence. However, only where there is no evidence will an err of law lie; whether there is sufficient evidence is a question of fact and cannot be stated...

The issue of sufficient evidence may be stated as an alleged arbitrary finding...

Challenges which merely question the relative weight accorded to certain evidence by the Board, will not warrant interference by the Court.... Consequently, the extent to which this Court will review evidence to determine whether the conclusions of the Board disclose faulty reasoning is limited to situations where "no evidence" is alleged, or where the Board's interpretation was unreasonable.

In *Crown Forest Industries Ltd.* v. *Assessor of Area 6 - Courtenay*, (Aug. 1985) B.C.A.C. Stated Cases No. 210, (B.C.S.C.), at 1191, Southin J., as she then was, succinctly set out the jurisdiction of the Supreme Court of British Columbia, under the *Assessment Act* R.S.B.C. 1979, c. 21, as follows:

Under the British Columbia statute, this Court has no power to substitute its opinion on questions of fact for those of the board.

So long as the Assessment Appeal Board which must, in deciding appeals to it, apply the *Act* does not:

1. misinterpret or misapply the section...

2. misapply any applicable principles of general law..., or

3. act without any evidence or upon a view of the facts which could not reasonably be entertained,

this Court has no power to intervene.

See also *West Coast Transmission Company, Ltd.* v. *Assessor of Area 9 - Vancouver* (May 1987) B.C.A.C. Stated Cases No. 235 at 1347 - 48, *B.C. Hydro & Power* v. *Assessor of Area No. 5*, Vancouver Registry, No. A892756, December 13th, 1990, (B.C.S.C.) and *Andrews* v. *Assessor of Area 9 - Vancouver*, Vancouver Registry, No. A913408, December 24, 1991 (B.C.S.C.).

It is evident from the authorities that issues of the sufficiency and weight and credibility of evidence are questions of fact whereas issues of no evidence, or whether the view or the interpretation of the evidence as to the facts is unreasonable are matters of law.

From the transcript of the evidence before the Board, it is clear, though sparse, that there was some evidence before the Board as to the use of the property, such that it cannot be said that there was no evidence.

This leaves for resolution by the Court the issue of whether the Board acted on a view or interpretation of the evidence that was unreasonable as distinct from whether the evidence is sufficient. The dividing line between these two categories can be tenuous. It is apparent that the definition of "reasonable" does not require the reviewing judge to necessarily reach the same decision as the Board reached on the same evidence. Nor can it mean that the decision reached by the Board is or was the only possible reasonable interpretation; there may be others. In my opinion, it cannot even mean that the Board's interpretation of the evidence was the most reasonable. On a review of the cases, it is, however, difficult to extrapolate distinct principles on the meaning of unreasonable. Lord Normand's judgment in *Inland Revenue Commission* v. *Fraser* (1942) S.C. 493, at 498, suggests that it may be something which is "inconsistent with the evidence and contradictory of it." Lord Radcliffe cites this phrase with approval in *Edwards* v. *Bairstow* (1956) A.C. 14 at 35 and goes on to hold that the facts found by the commissioners were such that no person acting judicially and properly instructed as to the relevant law could have come to the determination reached.

Madam Justice Southin in *Crown Forest (supra)* at p. 1194, appears to have used something like Lord Normand's definition where she found that if the Board clearly makes a mistake in calculations, i.e. if it is clearly wrong on the evidence, then it can be said to have acted unreasonably. Also, if the Board is unfair to witnesses, misconstrues their answers, and takes these answers out of the context in which they were given, it can be said to have acted unreasonably. Further, at pp. 1179 and 1180, if the "method" employed by the Board to determine the actual value of the subject property was clearly wrong, then it can be said to have been unreasonable on the evidence. In *Edwards* v. *Bairstow (supra)* both Viscount Simonds at pages 29 to 32, and Lord Radcliffe at pages 35 and 36, (the only two judgments of the Court) use the phrase "inference of fact" in place of interpretation. They are then able to hold that the finding of the commissioners was an inference of fact that could be set aside because the commissioners appeared to have acted without any evidence, or on the view of the facts which could not reasonably be entertained.

In determining whether the evidence has been reasonably interpreted, the Court may have regard to the transcript of the evidence that is, the "transcript may be examined to interpret and explain the statement of facts contained in and the question of law raised by the stated case." See *Provincial Assessors of Comox, Cowichan and Nanaimo* v. *Crown Zellerbach* (1963) 42 W.W.R. 449, at 451 per Davey J. (as he then was); cited with approval in *MacMillan Bloedel* v. *Assessment District of Alberni, Cowichan, Comox, Prince Rupert, Gulf Islands, Lillooet, Nanaimo and Vancouver*, (June 1967) B.C.A.C. Stated Cases, No. 53, (B.C.S.C.) at 277.

In the case before the Court, it is arguable that the Board acted unreasonably in making a decision on so little evidence. Nonetheless, it has been held that a Board cannot be faulted for unreasonably not considering something which was not before it, see *Canadian National Railway (supra)* (B.C.S.C.) at p. 1570. Consequently, although I may not necessarily agree with the Board, it cannot be said that given the evidence before it the Board acted unreasonably in finding against Mr. Huie, that is, it is not unreasonable to draw the inference that a boarded up commercial building is, in fact, a boarded up commercial building not in use as a residential living area and constituted a commercial use. Further, the question on the evidence before the Board in coming to its decision of a commercial use of the property, to the exclusion of a residential use, was, in my opinion, one of the sufficiency, and the weight and credibility of the evidence, and consequently a question and finding of fact not open to review by this Court.

The other issue raised by the Appellant, but not seriously pursued on appeal was that the Board erred by not finding a residential use where the Appellant had applied to change the existing By-

law to rezone his property to residential use only and intended to use the lands for residential purposes at a later date. Up to the October 14th, 1992, date of the Assessment Appeal Board hearing, the rezoning application had not been approved nor a development permit for residential use issued. Also, no construction of residential units had commenced. Accordingly, the contention of error on the part of the Board cannot stand in the face of the decisions of *Assessor of Area 10 - Burnaby/New Westminster* v. *Reemark XIII Developments Ltd. and Fairmont Dev. Inc. (Ricelda Holdings)* (1992) B.C.A.C. Stated Cases 329, (B.C.S.C.) and *Bosa Development Corp.* v. *Assessor of Area 09 - Vancouver* (1992) B.C.A.C. Stated Cases 333 (B.C.S.C.). These two decisions held that there must be something more than the issuance of a development permit and an intention to use the property for residential purposes at a later date in order to be classified as residential use. In the present case, that additional step had not been taken and no actual construction had commenced.

In the result, the answer to the three questions posed by the Board are in the negative and the appeal is dismissed with costs.