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KENNETH McNAMES

v.

ASSESSOR OF AREA 11 - RICHMOND/DELTA

Supreme Court of British Columbia (A960992) Vancouver Registry

Before the HONOURABLE MR. JUSTICE DROST

Vancouver, April 9, 1996

Appellant appeared in Person
Guy Holeksa for the Respondent

Reasons for Judgment July 8, 1996

This is a Stated Case submitted by the Assessment Appeal Board of British Columbia pursuant to s. 74(2) of the *Assessment Act*, R.S.B.C. 1979, c. 21.

It relates to the decision of the Assessment Appeal Board, issued on February 9, 1996, following an appeal by the Appellant that the market value of his property as at July 1, 1994 was $646,000, or approximately $4,740 per front foot.

The Background Facts

Mr. McNames' property is known as 598 Tsawwassen Beach Road, Delta, B.C. It is a residential lot, situate on the waterfront at Tsawwassen Beach, measuring 136.3 feet in width by 408.7 feet in depth. The front, or westerly, portion of the lot (approximately 136.3 feet by 115 to 130 feet) forms a level building site, while the remaining portion consists of a bank sloping steeply upwards towards the east. The property is subject to a restrictive covenant registered under s. 215 of the *Land Title Act* which, according to the Appellant, restricts any future development of the sloping portion of the property, including any upgrading of the existing access road.

The property was unimproved as at the assessment date. The initial assessed value of the land from which Mr. McNames appealed was $677,000, or approximately $4,978 per front foot.

Mr. McNames' appeal was based primarily upon a comparison of the assessed value of his land with that of the two immediately adjacent properties: 610 Tsawwassen Beach Road, which lies immediately to the north of the subject property and has a frontage of 159.9 feet; and 575 Tsawwassen Beach Road, which lies immediately to the south and has a frontage of 138 feet.

Mr. McNames testified that those two lots suffer from the same topographical limitation as his, having approximately the same usable depth of 115 to 130 feet, but his is the only one of the three that is subject to the s. 215 *Land Title Act* restrictive covenant.

Mr. McNames gave evidence that the assessed value of the land at 610 Tsawwassen Beach Road was $702,000, or approximately $4,415 per front foot, while that of 575 Tsawwassen Beach Road was $671,000, or approximately $4,862 per front foot.

According to Mr. McNames, both of his immediate neighbours have better driveway access to their properties than he does. He said that his road has a 28% grade, and that he was told by the engineer who surveyed his land that it could not be classified as a driveway, only as an access road for building vehicles and equipment. To improve his road he would have to put in curves, which he is unable to do because of the s. 215 covenant.

The Respondent filed an appraisal report prepared by Mr. Rhory Moore, a qualified appraiser with the British Columbia Assessment Authority. For the purpose of determining the market value of the property, Mr. Moore compared it with five other residential properties along Tsawwassen Beach Road which had sold between May 3, 1993 and July 3, 1994. Based on that comparative approach, Mr. Moore concluded that the market value of the subject property as at July 1, 1994 was $680,000, or approximately $5,000 per front foot.

The Board's Decision

On September 25, 1995, the Board heard evidence and submissions from the Appellant and on behalf of the Respondent. On February 9, 1996, it delivered a written decision in which it is stated that:

The Assessment Appeal Board is required to determine whether or not land or improvements, or both, are assessed at actual value. "Actual value" is defined in Section 26(1) of the *Assessment Act* as: "the market value of the fee simple interest in land and improvements". The date for determining actual value for the 1995 Roll is July 1, 1994, with the proviso that the property is to be valued as if it were in the physical condition that it is on October 31, 1994 and that the permitted use of the property is the same as on October 31, 1994.

The Board has considered the evidence and submissions of both parties and finds the market evidence of the Respondent to be the most persuasive as to the determination of actual value.

The Board has considered the concerns raised by the Appellant, however, regarding difficult road access, private road maintenance costs and the *Land Title Act*, Section 215 covenant. The Respondent did not adjust for these factors in his estimate of actual value although they do not affect the comparables. The Board is satisfied that some adjustments should be made and considers 5% against the Respondent's estimate of market value appropriate.

The Board finds that the market value of the subject property as of July 1, 1994 to be $646,000 or approximately $4,740 per front foot. This front foot rate is more consistent with the assessments presented by the Appellant.

In arriving at that conclusion, the Board observed that Mr. Moore's appraisal was based upon a direct sales comparison approach, and stated that:

Greatest weight was given to Sale No. 1 at 610 Tsawwassen, a May 1993 sale at $1,120,000 located adjacent to the subject to the north with an adjusted sale price of $825,000 or $5,161 per front foot. This sale had similar location, road access, level of servicing and site size to the subject.

With respect to that property, I note the difference between the "adjusted sale price" of the land (actually $825,200) and its assessed value of $702,000. The difference between the front foot values derived from those two figures is significant. The assessed value of $702,000 works out to approximately $4,415 per front foot whereas, based on the adjusted sale price of $825,200, the value is $5,161 per front foot.

Under cross-examination by Mr. McNames, Mr. Moore pointed out that, for the purpose of his appraisal report, he had adjusted the sale prices of the five comparable properties to reflect what he considered to be the value of the improvements thereon, and had thus ascertained an "adjusted sale price", whereas Mr. McNames was basing his submissions on the assessed values of the lots on either side of the subject property.

I do not consider the fact that different approaches were taken is material to the questions that have been submitted to this court. Moreover, from my reading of the transcript, I am satisfied that the Board was cognizant of the difference.

The Questions Submitted for the Opinion of this Court

The Board has submitted one question on behalf of the Appellant, namely:

Did the Board err in law by not taking into account the error, by the Assessor, regarding the lack of a storm sewer to this site?

It is common ground that Mr. Moore's appraisal report contains an error, in that it shows that the Appellant's property is serviced by a storm sewer whereas it is not.

The presence or absence of a storm sewer, as distinct from a sanitary sewer, is obviously only one of the many factors that have a bearing upon the market value of the property. There was no evidence as to whether any of the other properties referred to were serviced by a storm sewer and Mr. McNames did not cross-examine Mr. Moore on this point when he testified before the Board on September 25, 1995. Thus, Mr. Moore had no opportunity to state his opinion as to what, if any, impact the lack of a storm sewer would have upon his opinion as to the actual value of the property.

Moreover, this question raises an issue as to the extent to which this court has jurisdiction to correct a factual finding by the Board, which may be based in part on inaccurate evidence, but is not an error of law.

In this respect, I adopt the following statements of law which appear at pages 319 and 327 of *Wade's Administrative Law (6th Edition)*:

Findings of fact are the domain where a deciding authority or tribunal can fairly expect to be master in its own house. Provided only that the facts are not collateral or jurisdictional, the findings will generally be exempt from review by the courts, which will in any case respect the decision of the body that saw and heard the witnesses or took evidence directly. Just as the courts look jealously on decisions by other bodies on matters of law, so they look indulgently on their decisions on matters of fact.

(p. 319)

Where some tribunal or authority has power to decide questions of fact, and no power to reopen its own decisions, its decision cannot be reviewed by the High Court merely on the ground that fresh evidence, which might alter the decision, has since been discovered. This is because the decision is within jurisdiction and there is no basis on which the court can intervene.

(p. 327)

In other words, the Board has the right to be wrong. This court has no jurisdiction to review a decision of the Board based upon a mistake of fact. It can review the Board's decision only on the basis of an error of law.

In my opinion, the lack of a storm sewer could only be a minor factor and one that would have little, if any, effect on Mr. Moore's opinion and the Board's finding as to the market value of the property.

Accordingly, my answer to the Appellant's question is "No".

Four additional questions were submitted by the Board on behalf of the Respondent. They are:

1. Did the Assessment Appeal Board err in law or act arbitrarily in concluding that an adjustment to value should be made regarding difficult road access, private road maintenance costs and the *Land Title Act*, Section 215 covenant?

2. Did the Assessment Appeal Board err in law in concluding an adjustment for the *Land Title Act*, Section 215 covenant without investigating the details of that covenant and how it may or may not effect the subject property value?

3. Did the Assessment Appeal Board err in law in finding that difficult road access, private road maintenance costs and the *Land Title Act*, Section 215 covenant did not affect comparables?

4. Did the Assessment Appeal Board err in law in holding that the Respondent did not adjust for difficult road access, private road maintenance costs and the *Land Title Act*, Section 215 covenant in his estimate of actual value?

All of those questions focus on the effect that difficult road access, road maintenance costs and the Section 215 covenant may have had upon the Board's decision to reduce the Respondent's estimate of market value by 5%. In my view, they can all be conveniently answered together.

First, I note that the transcript of the September 25, 1995 hearing shows that Mr. Tasaka, counsel for the Respondent, and Mr. Simpson, one of the Board members, questioned Mr. McNames about access to the site as follows:

Cross-Examination by Mr. Tasaka

Q. Just one question with regards to you mentioned the access road.

A. Yes.

Q. And that there was some difficulty in improving that access road.

A. Yes, I can't turn it into a -- like the neighbours have as -- it's at a grade of 28 percent and the geotech engineer that did the survey of the land, he said he couldn't classify it as a driveway; the best he could classify it as was an access for building vehicles, equipment.

Q. The access road is the same access road for your immediate neighbours?

A. No.

Q. Is that correct?

A. No.

Q. It's not?

A. The immediate neighbours have driveways down. You could call this a driveway but the -- for insurance purposes and what not the engineer said he can't classify it as a driveway because it's so steep. It's straight up and down. There's no curves. Now, to improve it I have to put a few -- I have to put a few corners in it and I can't touch the bank, when both my parents needed medical attention they had to use the neighbour's driveway to get the ambulance down.

MR. TASAKA: Okay, thank you, I have no further questions.

CHAIRPERSON: All right. Thank you.

MR. SIMPSON: How do you access the site now if you're building on it, sir?

A. I have a four-wheel drive truck that I use to get down and the trucks can get up and down as long as it's not raining or wet in any way. It's not -- you can't use it when it's wet, the heavy equipment vehicles.

MR. SIMPSON: You can't put a curve and you say the road just has to be absolutely straight down.

A. Yeah, I can't change it from that.

MR. SIMPSON: I see.

A. Without -- well, the cost now with this 215 *Land Title Act* it really -- well, it just would be too expensive.

CHAIRPERSON: Were the neighbours' driveways put in before the covenant was put on the land?

A. I'm the only one covered by it --

CHAIRPERSON: Oh.

A. -- because they built before Delta decided to make people sign this 215 if they wanted to build.

When Mr. Moore testified, he responded to questions put to him by Mr. Simpson as follows:

MR. SIMPSON: But the access to [610 Tsawwassen Beach Road] is superior than (sic) that of the subject?

A. Well, the comparable does have a driveway to it. The driveway issue was brought to my attention on Thursday when I was speaking with Mr. McNames. As far as the road access to the properties would be similar. The comparable would have a driveway down to the house level.

MR. SIMPSON: Can you quantify that feature, if you wish?

A. Be very difficult to do from the market place. One way might be if we understood the costs involved in constructing what would qualify as a driveway but I don't have that information at present.

MR. SIMPSON: How long would the driveway be, sir, on sale number 1, just out of curiosity?

A. Perhaps about a hundred feet. That's an estimate.

MR. SIMPSON: It's very steep?

A. It's quite steep. It would not be as steep as Mr. McNames.

MR. SIMPSON: But there's no car access or vehicle -- vehicular access to this house on the subject property? You can't -- unless it's a four-by-four?

A. Well, you can't -- well, it's a very steep driveway. You could -- I think in dry weather you could get a car down there but as Mr. McNames said in inclement weather it might be difficult to get up but if you were to come along the access road and look at this feature you would likely call it a driveway, notwithstanding that the engineer did not call it such. It for all appearances is a driveway but it is -- and it is paved, however it is very steep, reportedly a 28 percent grade.

Next, I note that, after the Appellant had given his evidence in chief, he was asked by Mr. Leong, one of the Board members, whether he had a copy of s. 215 covenant with him. The Chairperson responded: "It's okay. We have it in the office."

Later, in reply to questions put to him by Mr. Leong, Mr. Moore testified as follows:

MR. LEONG: Mr. Moore, we heard testimony from the appellant regarding restrictions for a section 215 *Land Title Act* --

A. Right.

MR. LEONG: -- covenant which if I can recall under section 215 is site specific to that one property, you can design the restrictions specific for that one property. Did you take that into account in your assessment?

A. Well, consideration was only given -- not specifically but consideration was only given to the existence of the level building site and no additional value was really put into the extra depth of the bank. In the original assessment there was some premium for depth. In arriving at this conclusion I just looked at roughly the 115 to 130 feet of level buildable site as being the most important criteria. For examples, sales number 2 and 5 are 156 and 135 feet in depth. They don't have the great extra depth that the subject, as well as sales 1 and 4, would indicate. But no premium was given for that extra depth in this appraisal.

The document containing the Section 215 covenant was not produced. However, there was no evidence to suggest that the general description of its contents given by Mr. McNames (and apparently concurred with by Mr. Moore and accepted by the Board) was inaccurate. More importantly, the Respondent adduced no evidence to dispute Mr. McNames' assertion that his was the only lot affected by such a covenant.

Nor was any evidence adduced by the Respondent to contradict that of Mr. McNames concerning the difficulties of access to his property. The most that can be said is that the evidence

establishes that access to the other properties used by Mr. Moore as comparables varied, but was generally better than the access to the subject property.

Finally, the answers given by Mr. Moore to the questions posed by Mr. Simpson and Mr. Leong show, in my view, that his appraisal report, upon which the Respondent's assessment was based, did not take account of those factors.

In my opinion, the Board's decision to make an adjustment to the value of the property in order to reflect the difficult road access, private road maintenance costs and the effect of the s. 215 covenant was consistent with the evidence and entirely reasonable.

Accordingly, my answers to the questions submitted by the Respondent as follows:

1. No.

2. No.

3. No.

4. No.