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GEMEX DEVELOPMENTS CORP.

v.

ASSESSOR OF AREA 12 - COQUITLAM

British Columbia Court of Appeal (CA022158) Vancouver Registry

Before the HONOURABLE MR. JUSTICE GOLDIE, the HONORABLE
MADAM JUSTICE PROWSE, and the HONOURABLE MADAM JUSTICE NEWBURY

Vancouver, September 9 and 10, 1998

T.L. Spraggs for the Appellant
J.E.D. Savage for the Respondent

Reasons for Judgment September 30, 1998

Reasons for Judgment of the Honourable Madam Justice Newbury:

The Appellant Gemex Developments Corp. ("Gemex") is the owner of a 20-acre parcel of vacant land in the City of Coquitlam. In 1993, a Court of Revision assessed the value of the property as at July 1, 1992, at $1,709,000. In accordance with its usual practice, the court did not give reasons. In September 1995, the Assessment Appeal Board (the "Board") affirmed the assessment on appeal after eight days of hearing.

Mr. Spraggs, who represented Gemex throughout, advised us that at the hearing before the Board, he took the position that the highest and best use of the property would be as a high-rise apartment development and that a large house which Gemex was then planning to erect on the site was being specially designed and would be specially constructed to serve as a "clubhouse" for such future development. At the time, the property was zoned only "RS-2", which allowed for residential lots of not less than one acre in size. The Board found, however, that the highest and best use of a large portion ("Parcel D") of the property would be for subdivision into "RS-3" lots as contemplated by Coquitlam's Official Community Plan. RS-3 zoning would allow residential lots of 6,000 square feet each. The Board accepted the opinion of Mr. McInnis, an assessor who had prepared an expert report for the Assessment Authority and who was called as a witness by Gemex. He opined that if the necessary approvals were sought, it was probable Parcel D could be rezoned as RS-3 and subdivided into at least 18 lots worth $1,314,000 on the market. He valued the three remaining parcels, known as Parcels A, B and C, and a 'remainder' at a total of $399,000.

In adopting Mr. McInnis's valuation, the Board rejected Mr. Spragg's argument that "it is improper to give an appraisal on the basis of future subdivision." After reviewing various definitions of highest and best use, the Board concluded:

In this case, the Respondent Assessor has valued the subject property based on a determination that its highest and best use is for redevelopment into an 18 lot subdivision including dedication of some park and green space which would require rezoning to RS-3 in accordance with the Official Community Plan. The Board was very fortunate to have the evidence of members of the City of Coquitlam Planning Department which assisted in addressing the question of the likelihood of

rezoning and the probability of an 18 lot subdivision. The Board has carefully reviewed this evidence and concludes that as of July 1, 1992 there was a greater than 50% possibility that the subject property could be rezoned to RS-3 in accordance with the Official Community Plan and that a subdivision plan creating at least 18 residential lots would have been approved. . . .

This property is the last remaining parcel of its size in this area. It is surrounded by subdivisions. It has been designated in the Official Community Plan for RS-3 subdivision. It has many unique characteristics, but according to the evidence of the City witnesses, none of them presents problems which cannot be overcome or presents a bar to its rezoning and subdivision. The plan which is put forward by the Assessment Authority depicting a potential subdivision into 18 lots takes into consideration the setback requirements of the Ministry of the Environment with respect to the Hockaday Creek and Coquitlam River and the dedication of green space. Mr. Spraggs submitted that the Board should rely on the *Caisse Populaire* case, [(January 25, 1985) Vancouver C833702 (B.C.S.C.); (October 20, 1986) Vancouver CA003521 (B.C.C.A.)] for the proposition that it is improper to give an appraisal on the basis of future subdivision. With respect, the Board does not concur that is the point of the case.

In late 1995, Gemex requested the Board to submit a Stated Case for the opinion of the Supreme Court of British Columbia pursuant to s. 74 of the *Assessment Act*, R.S.B.C. 1979, c. 21 (the "*Act*"). Some 21 questions were posed, all of which began with the usual wording "Did the Assessment Appeal Board err in law in . . . ." The Chambers judge in the court below answered each of the questions in the negative - i.e., adversely to Gemex - and noted that most if not all of them were questions of fact rather than law. The appeal was therefore dismissed. On August 21, 1996, Gemex obtained leave from a justice of this court to appeal the Chambers judge's answers to 19 of the 21 questions in the Stated Case. Seventeen grounds of appeal were stated in Gemex's notice of appeal, many of them substantially overlapping.

In its factum filed in this court, Gemex advanced five alleged errors of law on the part of the Chambers judge. I paraphrase them as follows:

> 1. that the Court erred in law in accepting that the Board had valued the property as of July 1, 1992;
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> 2. that the Court erred in law in rejecting Gemex's evidence because it did not raise a question of law;
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> 3. that the Court erred in law in not viewing certain videotape evidence proffered by Gemex;
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> 4. that the Court erred in law in "not giving weight or credence to the uncontroverted and undisputed evidence" that was before the Board and its effect upon the value of the property being assessed; and
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> 5. that the Court erred in law in not considering or in misinterpreting or misapplying the evidence available to the Board and its reasons for judgment in determining the highest and best use of the subject property.

In connection with the third ground, Mr. Spraggs also brought a motion to adduce fresh evidence in the form of the videotape the Board had declined to view. We acceded to Mr. Savage's objection that that evidence would have made no difference to the result, since the deliberations of the Coquitlam City Council in 1995 could have no relevance to the value of the subject property in 1992. For the same reason, I would not accede to the third stated ground of appeal.

This leaves four stated grounds, which for the most part turned out to bear little relationship to Mr. Spraggs's oral submissions before us. Many of these amounted to re-argument of the factual evidence before the Board and will be dealt with briefly below. Some questions of legal principle, however, did emerge in the course of oral argument, which I would restate as follows:

> 1. Did the Board err in adopting Mr. McInnis's view of the highest and best use (i.e. subdivision into residential lots) of the property when that use was inconsistent with the use to which the property was being put, or was planned to be put; by Gemex on the valuation date?
>
> 2. Did the Board's valuation of the property on the basis of rezoning probable in the future, cause it to err either by using a valuation date other than July 1, 1992 or more generally by arriving at a value other than the likely cash sale price that a willing purchaser would pay to a willing vendor on July 1, 1992?
>
> 3. Did the Board err in misapprehending certain evidence of a previous valuation of the property, or by applying an erroneous approach to that evidence?

But there is a more general subject to which I must advert before turning to these questions - the nature of an appeal from the Court of Revision to the Board, and the nature of an appeal on Stated Case from the Board to the Supreme Court. In his Reasons for Judgment, the Chambers judge in the court below stated several times that the Board had "simply dismissed the appeal" from the Court of Revision. In connection with question 5 of the Stated Case, for example - namely, whether the Board had erred in law in using "comparables that resulted from subject to condition sales instead of using comparables resulting from no subject condition sales" - the Chambers judge stated:

> The answer is no. The question is illogical - the Board simply dismissed the appeal. The Board did not revalue the subject property itself. [para. 16]

With respect, the Board did not "simply dismiss the appeal". Under s. 69 of the *Act*, it had all the powers of the Court of Revision. It was entitled to consider, and did consider, evidence that had not been before the Court of Revision (which as earlier noted does not issue reasons) and its hearing constituted a hearing *de novo*: see the judgments of this court in *Shell Canada Resources Ltd.* v. *Assessor of Area 22 - East Kootenay* (1987) Stated Case 232 at 1334-1; *Trizec Equities Ltd.* v. *Assessor of Area 10 - Burnaby* (1980) Stated Case 122; and *British Columbia (Assessment Commissioner)* v. *Westar Timber* (B.C.S.C., Vancouver Registry A882823, dated April 18, 1989). The Board ultimately agreed with the value arrived at by the Court of Revision but could have decided on a figure higher or lower than the previous assessment. To this extent, the comments of the Chambers judge in the case at bar may have been misleading.

The Chambers judge was correct, however, in emphasizing that the scope of review on an appeal from an assessment by way of Stated Case is strictly limited to questions of law. The meaning of that phrase was defined by Ryan J. (as she then was) in *Assessor of Area 26 - Prince George* v. *Cal Investments* (1992) Stated Case 335 (B.C.S.C.) as follows:

> For questions of the *Act* a "question of law" has been defined as follows:
>
> 1. A misinterpretation or misapplication by the Board of a section of the *Act*.
>
> 2. A misapplication by the Board of an applicable principle of general law.
>
> 3. Where the Board acts without any evidence.

4. Where the Board acts on a view of the facts which could not reasonably be entertained. . . .

5. Where the method of assessment adopted by the Board is wrong in principle. [at 1969 - 70]

This definition was quoted with apparent approval by this court on appeal at 1984-8 of Stated Case 335. As Mr. Savage points out in the case at bar, questions as to the sufficiency of evidence or as to which expert opinion should be preferred by the Board in deciding the highest and best use of a given property were questions of fact within the Board's exclusive jurisdiction: see *Provincial Assessors of Comox, Cowichan and Nanaimo* v. *Crown Zellerbach Canada Limited* (1963) 42 W.W.R. 449 (B.C.C.A.) at 458 and *Re Caldwell and Stuart* [1984] 2 S.C.R. 603 at 613. Thus it is clear the Chambers judge was correct in declining to interfere with various findings of fact, which need not be recounted here, made by the Board on the evidence before it.

I turn then to the three questions of law stated above.

Highest and Best Use v. Present Use

Many of Mr. Spraggs's 21 stated questions, and much of his factum, were taken up directly or indirectly with the notion that the market value of the property for assessment purposes should be determined only with reference to the present use of the property and not some possible future or contingent use. This position runs contrary not only to Gemex's own submissions regarding future high-rise development, but also to most of the definitions of "actual" or "market" value that have been advanced by courts and learned authors in recent years. British Columbia courts on many occasions have held that provided a possible future use is not "speculative", it may be considered in determining value and that if an owner's present use is not consonant with a use that would affect the market price, the latter will govern: see, e.g., *Lefeaux* v. *Corporation of the District of West Vancouver* (1962) Stated Case 33 (B.C.S.C.); *Jericho Tennis Club* v. *Assessor of Area 09 - Vancouver* (1991) Stated Case 307 (B.C.S.C.); *Assessor of Area 10 - Burnaby/New Westminster* v. *Sears Canada Inc.* (1992) Stated Case 332 (B.C.S.C.); and *Petro Canada Inc. (Gulf Canada Ltd.)* v. *Assessor of Area 12 - Coquitlam* (1991) 61 B.C.L.R. (2d) 86 (B.C.C.A.), a decision of Proudfoot J.A. in Chambers.

In his oral argument, Mr. Spraggs seemed to accept that where a possible future use is not speculative but probable, it may be considered in assessing value; however, he contended that it was nevertheless error for the Board to postulate the value of the subject property on the likelihood that it could be rezoned to RS-3 when its "ultimate" highest and best use would be high-rise development over the much longer term. If I understand his submission correctly, it was that (a) the house being planned by Gemex for the property was inconsistent with residential subdivision; (b) residential subdivision was inconsistent with high-rise development; and (c) therefore the property *could* not be valued as a future residential subdivision. Mr. Spraggs sought to call in aid a decision of McEachern C.J.S.C. (as he then was) in *Western Indoor Tennis Ltd.* v. *Assessor of Area 11* (1981) 29 B.C.L.R. 265. That case stands only for the proposition that it is erroneous to assess the value of land by comparison with vacant properties and then to value improvements on the property "conventionally". It does not stand for the proposition that where the present use of the property is consistent with, or preserves, the ultimate potential best use, the property must be valued on the basis of that use, however far away it may be. In this regard, I note that Mr. Spraggs did not refer us to any evidence that Gemex's property was likely to be rezoned for high-rise development at any time in the foreseeable future.

Mr. Spraggs acknowledged that he had made the argument regarding high-rise development before the Board, but it was not dealt specifically in the Board's reasons. As is evident from the excerpt quoted at para. 3 above, the Board concluded that the subdivision of Parcel D into 18 or

more residential lots zoned RS-3 was the highest and best use of the property and that the market value as at July 1, 1992 "would reflect that potential". Implicit in this conclusion, I suggest, is a finding that the development of the subject property for high-rise use was so far away as to be speculative and would not have been a material factor in the mind of a potential purchaser on July 1, 1992. In my view, this was a conclusion of fact which the Board was entitled to reach on the evidence, and no error of law has been shown.

Sales "subject to" Conditions

Similar difficulties arise with respect to the second point of law. Again whilst acknowledging that the Assessor was properly concerned with "the present value of the future potential" (see *Lefeaux*, *supra*, at 151), Mr. Spraggs relied heavily on the words "cash transaction" in the following definition of "actual value" offered by this court in *Vancouver Assessor, Area 9* v. *Bramalea Ltd.* (1990) 52 B.C.L.R. (2d) 218:

> . . . "actual value" means the price which property would fetch if sold in the market on the statutory valuation date in a *cash transaction* between informed parties both free from duress and influenced neither by speculative considerations nor by any "special value" which the property might have to a particular purchaser, which it would not otherwise have. "Actual value" lies somewhere in the middle of the range within which such parties would settle, neither "unduly high" nor "unduly low" . . . . [at 222; emphasis added]

Mr. Spraggs contends that this definition precludes the Assessor's considering the price the property would fetch on the open market in a sale which was made "subject to" rezoning (to RS-3 in this case). He notes the following excerpt from the cross-examination of Mr. McInnis, whose evidence was accepted fully by the Board:

> Q And what would happen to that sale if in fact they didn't receive rezoning?
>
> A It wouldn't be purchased.
>
> Q So the transaction wouldn't be complete.
>
> A Not based on my valuation report.
>
> Q That's right. So it wouldn't be a sale that was completed as of the time it was initially entered into then, would it?
>
> A That's correct.
>
> Q Correct?
>
> A Yes.
>
> Q And the basis of your report is based upon a subject to sale as of the 1st of July, 1992 with completion some months or a period of time thereafter, is that correct?
>
> A Yes.
>
> Q And that's because the person who buys it know that if he can get it subdivided it increases its value greatly.

A No. The price he's paying he's saying that he can get it subdivided.

Q And if he can't get it subdivided he doesn't want it. He wouldn't pay that price.

A Well, maybe want it but not for this price.

Q That's right. It'd be a much lower price.

A Yes.

Q Do you know how much lower it would be?

A No, I don't.

In the Appellant's submission, this testimony amounted to an acknowledgement by Mr. McInnis that he had not assessed the property as of July 1, 1992.

In my view, this submission overlooks the market realities that must be factored into the "Direct Comparison Approach", which was the valuation approach preferred by Mr. McInnis (although it was not the only approach explored in his report). Under the comparison approach, sales of comparable properties in the area are examined as a basis of estimating the market value of the subject property. The market must be assumed to include purchasers who would recognize the potential use of the property for residential lots and who would be willing to pay more because of that potential. The fact that such a purchaser might make his offer conditional on obtaining rezoning within a reasonable period of time, and might therefore elect not to proceed if rezoning did not occur within that period, does not negate the fact that if rezoning does occur, the purchaser must complete at the stated price. This was clearly the case with respect to the comparable sales described by Mr. McInnis in his report. These were real purchase prices paid by real purchasers to real vendors around the time of the valuation date. The transactions were all in respect of properties that required rezoning to RS-3 before subdivision could occur. It was clearly open to the Board to find that it was more probable than not that Gemex's property could be rezoned in the same way contemplated by the purchasers of those properties. In my view, the Board has not been shown to be in error either in adopting an approach that considered "subject to" sales or in valuing the property as at a date other than July 1, 1992.

Method of Valuation

A third legal argument advanced by Mr. Spraggs was that the Board had misapprehended certain evidence. The argument seems to have arisen from a misunderstanding concerning a one-page "valuation summary" sent in February 1993 by the Assessor's office to Gemex in response to Mr. Spraggs's request for information concerning the basis of the assessment at $1,709,000. The summary purported to show an "actual value" of $2,043,000 based on the application of the "Development Approach" to *35* lots having a "gross potential value" of $4,170,000. On a per lot basis, the document showed estimated gross values of $118,000 for each of 27 lots and $123,000 for each of the remaining eight lots. From the gross value, various development costs and other amounts were deducted to reach the $2,043,000 figure. Mr. Spraggs assumed that since the assessed value ($1,700,000) had come out at a figure that was 83 percent of $2,043,000, the Assessor must have applied an assessment/sales ratio of 83 percent.

When Mr. McInnis prepared his report of March 28, 1994, however, it was based on the application of the "Direct Sales Comparison" approach and the subdivision of Parcel D into *18* lots at $73,000 each. This number of lots was a conservative estimate in light of Mr. Spraggs's evidence in connection with the previous year's assessment, when he (on behalf of Gemex) had

testified he hoped to obtain "35 or 40" lots from the property. As well, the other three parcels and remainder were valued at a total of $399,000. Through a series of convoluted steps, Mr. Spraggs argues that the Direct Sales Comparison approach was "the same" as the Development or income approach, which was also used by Mr. McInnis (though not preferred by him) to reach a value of $1,600,000. Applying a ratio of 83 percent to that figure, Mr. Spraggs argues that the value should come out to $1,325,662, a figure obviously lower than that finally reached by the Board.

Again with respect, this argument cannot succeed. For one thing, it is based on the premise that the Development and Direct Sales Comparison approaches to valuation are "the same" - an obvious absurdity based on a strained reading of a couple of answers given by Mr. McInnis in his oral testimony. More to the point, there is no indication anywhere in Mr. McInnis's report or in the Board's reasons that an assessment/sales ratio was ever applied to reach the value of $1,700,000. Rather, Mr. McInnis reached that figure on a straight application of the Direct Sales Comparison approach. He preferred that method over the Development approach, which yielded a figure only $100,000 less than the Direct Sales Comparison method. No percentages or ratios were applied by Mr. McInnis or by the Board in arriving at the final $1,700,000 figure.

In summary, the "1993 Valuation Summary" that showed a value of $2,043,000 would appear to have been a piece of misinformation which may have come from Mr. McInnis's office, but which he did not prepare and on which neither he nor the Board proceeded in assessing the property in 1992. No legal error has been shown.

Specific Allegations

The balance of Mr. Spraggs's submissions concerned the following specific points which he said had been disregarded or misapprehended by the Board:

1. *Number of lots:* As indicated above, Mr. McInnis's report was based on the subdivision of Parcel D into 18 residential lots. Among the exhibits, however, is a map of the subject property which shows a large house, which was in the planning stage at the time of the assessment, to be built on what would be four of the subdivided lots. On this basis, Mr. Spraggs suggested that Mr. McInnis should have based his assessment on 14 rather than 18 lots.

   This argument flies in the face of the principle, discussed earlier in these reasons, that the valuation is based not on the actual use to which the property is being put or is planned to be put by a particular owner, but on the highest and best use of the property. The Board accepted, and it was entitled to accept, that the highest and best use of Parcel D would be to subdivide it into 18 lots. No error of law has been shown in this regard.

2. *"Wasted" servicing costs*: Mr. Spraggs referred to the fact that because of their location, shape and size, some of the proposed lots would be more expensive to service. When questioned about this by Mr. Spraggs, Mr. McInnis agreed and said that the $23,000 per lot figure he had deducted in respect of development cost was an average. Mr. Spraggs invited us to read this testimony as an "admission" that additional costs should have been deducted. I find no merit in this submission.

3. *Deferral period:* The Board heard evidence both from Mr. McInnis and another expert, Mr. Buchanan, concerning the time likely to be required to carry out a subdivision of the kind contemplated by Mr. McInnis's report. Mr. McInnis testified that the subdivision was likely to be completed within six or nine months, but he allowed for 12 months and discounted the assessed value accordingly. Mr. Buchanan testified that if it was necessary to enter into a land exchange with the Crown, it might take two years; but at

the end of the day, the Board evidently felt such a transaction was unlikely to be necessary. Again, the appropriate deferral period was a question of fact for the Board and it accepted, and was entitled to accept, Mr. McInnis's opinion of the appropriate adjustment. No error arises in this regard.

4. *David Road Connector:* Mr. Spraggs argued at length that a very large deduction from the assessed value of the property should have been made to reflect the possibility (in his submission, probability) that a "connector" road would eventually be built across the Coquitlam River on the subject property, which would materially and adversely affect the overall value of the property. In Mr. Spragg's submission, the "only evidence" was that such a connector was very likely and the Board had disregarded that evidence and thereby fallen into error.

In response, Mr. Savage referred us to the testimony of various witnesses that would support the Board's conclusion that even if it was built, the connector was likely to have little impact on the value of the property. Clearly, this was another judgment the Board was entitled to make and no error has been shown.

Other points were raised by Mr. Spraggs, but it must be said that they were restatements of the foregoing issues, or of clearly factual matters that the Board was entitled to deal with as it did. In these circumstances, I would dismiss the appeal.

The Respondent should in my view have its costs of the appeal as well as its costs in connection with the fresh evidence motion brought unsuccessfully by Gemex.

The Honourable Madam Justice Newbury

I AGREE:

The Honourable Mr. Justice Goldie

I AGREE:

The Honourable Madam Justice Prowse