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**GEMEX DEVELOPMENTS CORPORATION**

**v.**

**ASSESSOR OF AREA 12 - TRICITIES/NORTH EAST FRASER VALLEY**

Supreme Court of British Columbia (A953638) Vancouver Registry

Before the HONOURABLE MR. JUSTICE STEWART (in chambers)

Vancouver, June 28, 1996

T. Spraggs, Esq. for the Appellant
J. Savage, Esq. & D. Jasinski, Esq. for the Respondent

**Reasons for Judgment (Oral)** June 28, 1996

What has been submitted to the court by the Assessment Appeal Board pursuant to section 74 of the *Assessment Act*, R.S.B.C. chapter 21, is date stamped November 1st, 1995, and is in the *form* of a Stated Case. As will appear later, it is clear to me that the 21 "questions" formulated by counsel for the Appellant were crafted without regard to the fact that what section 74(1) is about - and is *only* about - is the obtaining of this court's opinion on a "question of law arising in the appeal," and "the appeal" there referred to is the appeal before the Assessment Appeal Board.

One need only read the 21 questions the applicable law forced the Assessment Appeal Board to submit to the court to see what I am talking about. I will not repeat those questions here. I will take them as read for now. Not all of the 21 questions are bad, on the face of it. Question 1, for example, poses "a question of law arising on the appeal." That is obvious. But the majority of the questions are bad on the face of it and are not saved by the presence at the outset of each question of the formula, "Did the Assessment Appeal Board err in law." I will be more specific about all of this later in these reasons for judgment.

The legislature has the power to make use of the device of having an inferior tribunal submit - in the form of a Stated Case - a question of law to this court with a view to obtaining the court's opinion. That is obvious. In all contexts that I am aware of the vehicle created by the legislature and labelled "Stated Case" is - absent legislation to the contrary - inherently limited in nature and totally unlike an ordinary appeal on the record such as the plenary appeal from an order of this court or a judge of this court to the Court of Appeal created by the *Court of Appeal Act*.

That the case law that surrounds section 74 of the *Assessment Act* (and its like in other provincial statutes) has kept the device created by, amongst other things, section 74(1) of the *Assessment Act* within the narrow confines referred to above is obvious from the case law given to me by counsel: *Caldwell* v. *Attorney General of B.C.* 1984 2 S.C.R. 603 at 613-615 and *Crown Zellerbach Canada Limited* v. *Assessment District of Comox et al.* (B.C.C.A. April 29, 1963) 1963 Stated Cases, case 36, at pages 167-168 and 173-174. I will not repeat here what is said there. I will take it as read.

At the opening of this appeal on June 25, 1996, I raised the issue of the difference between the thing contemplated by section 74(1) of the *Assessment Act* and the appeal as presented by counsel for the Appellant not just in the 21 questions drafted by counsel for the Appellant, but in

the Appellant's written submission. The *Caldwell* case, supra, and the *Crown Zellerbach* case, supra, were, eventually, given to me. The problem remained. It still does.

Counsel for the Appellant then made a submission which consumed two days and in my opinion was aimed at a finder of fact and only rarely touched on the only kind of issue this court can entertain in a proceeding such as this, i.e. "a question of law."

The legislature demands in s. 74(6) that the court "hear and determine the question" and "give its opinion and cause it to be remitted to the Board." I will do that. But as 90 per cent of the submission of counsel for the Appellant was utterly irrelevant to my task, I will deal with only what the law leaves to me, and nothing else.

Lest it be thought that what I have just said is hindsight I make it clear that at different times during the submission of counsel for the Appellant, and in different ways, I attempted to have counsel make a submission that focused on the question of just which of the 21 questions actually stated a question of law within the meaning of section 74(1), and the relevant case law, and the underpinning for a submission that in connection with any such question of law the Assessment Appeal Board had, to use the language of the Stated Case itself, "erred in law." I failed utterly.

What follows is based on the content of the Stated Case (dated October 31, 1995 and date stamped November 1, 1995), the reasons for judgment of the Assessment Appeal Board (dated September 21, 1995) and - to the limited extent I am permitted in law to consider it - the transcript of the evidence "taken during the appeal" (Section 74(5)) before the Assessment Appeal Board including the exhibits placed in evidence before that Board as brought to my attention by counsel. (As to the limited use that may be made by me of the transcript of the evidence placed before the Assessment Appeal Board, see the two cases referred to above, i.e. *Caldwell* v. *The Attorney General of B.C.* and *Crown Zellerbach Canada Limited* v. *Assessment District 7 Comox, et al*.)

The statement of material facts submitted to the court by the Assessment Appeal Board is succinct. It reads as follows:

> 1. The appeal before the Board was from the decision of the 1993 Court of Revision which placed the following value on the Roll:
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> | | |
> |---|---|
> | Land | $1,709,000 |
> | Improvements | nil |
> | Total | $1,709,000 |
>
> 2. The subject property is vacant land in Coquitlam. The total area encompassed by its boundaries is 20.53 acres. The property is traversed by both the Coquitlam River and Hockaday Creek and the actual land are (sic) minus creek and river bed is approximately 16.80 acres.
>
> 3. The property is zoned RS-2 (Single Family Residential) which allows for a minimum lot size of one acre. The Official Community Plan (OCP) adopted in 1987 and updated in 1992, designates the subject property for RS-3 zoning (Single Family Residential) allowing for a minimum lot size of 555 square metres (6,000 square feet). A BC Hydro right-of-way crosses the property from west to east.

4. The subject site is described as a unique piece of property and is one of the only undeveloped sites of its size in Coquitlam.

5. The issue before the Board was the determination of actual value involving the question of whether the property had been valued on the basis of its highest and best use.

6. The Board found 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. The Board found that the highest and best use of the subject property as of July 1, 1992 would be for subdivision to RS-3 lots in accordance with the Official Community Plan.

7. The Board found that the evidence of the appraiser Brent McInnis provided the best evidence of actual (market) value for the subject property as of July 1, 1992.

8. The Board dismissed the appeal and confirmed the decision of the Court of Revision.

9. Attached hereto as Schedule "A" is a copy of the Board's decision dated September 21, 1995.

The questions which the Board was required by law to submit to this court were crafted by counsel for the Appellant. I will state each question and determine each question and in that way "give my opinion" within the meaning of section 74(6) of the *Assessment Act*.

Question #1 reads as follows:

1. Did the Assessment Appeal Board err in law in basing the land assessment value upon a zoning different from that for which the property was zoned?

The answer is no. The law is crystal clear and is against the Appellant. *Petro Canada Inc.* v. *Assessor of Area 12 - Coquitlam* 61 B.C.L.R. (2d) 86 (B.C.S.C. 1991), Leave to Appeal refused by Madam Justice Proudfoot, December 19, 1991.

Question #2 reads as follows:

2. Did the Assessment Appeal Board err in law by not considering the findings of fact made by the previous Assessment Appeal Board in respect to the same property, wherein the Assessment Appeal Board, in its valuation for the years 1991 and 1992 arrived at a value of $34,500 per lot for a 40 lot subdivision and, therefore, by extrapolation, if there were 18 lots in this subdivision the value would be $621,000?

The answer is no. The rebuttable presumption in law is that the Assessment Appeal Board "considered" all that was placed before it including a transcript of the previous (valuation date July 1, 1990) proceeding. Nothing on the face of the record, including the content of the Board's reasons for judgment (September 21, 1995), demonstrates that the Board ignored anything.

Question #3 reads as follows:

3. Did the Assessment Appeal Board err in law by coming to a decision and a valuation based upon a need for rezoning and a consideration of the Official Community

> Plan without allowing the Appellant to introduce in evidence publicly broadcast video tape information of Council discussing the subject property and their views in respect to the Official Community Plan and the assessed value of the property?

The answer is no. This question was dealt with at the appropriate point on the second day of the hearing before me (i.e. June 26, 1996). The ruling was - and is - that taking into account the limits in law on an appeal by Stated Case and the effect of section 55(2) of the *Assessment Act*, the device created by section 74 of the *Assessment Act* does not admit of an attack on a ruling as to the admissibility of evidence made by the tribunal below except - perhaps - in that rare situation - not present in this case - where the ruling by the tribunal below amounts to a breach of natural justice: *Crown Forest Industries Limited* v. *Assessor of Area 6* B.C.S.C. A843031, September 11, 1985, page 35, reversed in part as to the result on appeal but not with respect to this narrow point, 10 B.C.L.R. (2d) 145 at 169 (B.C.C.A. 1987).

Question #4 is as follows:

> 4. Did the Assessment Appeal Board err in law in not properly providing for a proper discount for the time of delay of subdivision of the property if in fact the property could be subdivided?

The answer is no. The Assessment Appeal Board dismissed the Appellant's appeal. It did nothing more than that. The question is, in the circumstances, illogical. In the alternative the extent to which the evidence accepted by the Assessment Appeal Board touched on any such "discount" and the effect of that evidence is simply grist for the trier of facts's mill and does not throw up a question of law: *Lordina Limited* v. *Assessor of Area 9 - Vancouver* 1980 B.C. Stated Case 133 page 785 at 787 (B.C.S.C. 1980).

Question #5 is as follows:

> 5. Did the Assessment Appeal Board err in law in using comparables that resulted from subject to condition sales instead of using comparables resulting from no subject condition sales?

The answer is no. The question is illogical - the Board simply dismissed the appeal. The Board did not revalue the subject property itself. Moreover the nature of "comparables" used by a witness such as Mr. McInnis, (Exhibit 21) is but one of a multitude of things to be taken into account by the trier of fact in assessing the whole of the evidence at the end of the day and no question of law within the meaning of Section 74(1) is thrown up for consideration by me.

Question #6 is as follows:

> 6. Did the Assessment Appeal Board err in law in not providing comparable market values for properties of a comparable size and zoning?

The answer is no. The Assessment Appeal Board simply dismissed the appeal. Furthermore the Assessment Appeal Board is the finder of fact - it does not "provide" anything by way of evidence; the parties to the appeal do that.

Question #7 reads as follows:

> 7. Did the Assessment Appeal Board err in law in not valuing the property as what is referred to as an "Estate" lot?

The answer is no. Valuation for purposes of assessment is to be based on "the actual value of land and improvements." That means "market value." Market value reflects the highest and best potential use for which the land is suitable. The Assessment Appeal Board made a finding of fact that the "highest and best use" was other than that suggested in question #7. The Assessment Appeal Board acted within its jurisdiction and made a finding of fact after considering conflicting evidence. Question #7 throws up no question of law. If authority be needed for that basic point it can be found at: *Cal Investment Limited* v. *Assessor of Prince George* (1992) B.C. Stated Case 335 at 1984-10 (B.C. Court of Appeal 1994).

Question #8 reads as follows:

> 8. Did the Assessment Appeal Board err in law in not valuing the property upon the value that could be achieved in accordance with its existing zoning of one (1) acre minimum lots?

The answer is no. An adverse finding of fact based on conflicting evidence does not give rise to a question of law.

Question #9 reads as follows:

> 9. Did the Assessment Appeal Board err in law in not considering the value of the property as of the date of the 1st day of July 1992 on the same basis as is referred to as a Court Order Sale?

The answer is no. The law is that actual value is synonymous with market value. (*Assessment Commissioner of York* v. *Office Specialty Limited* 1975 S.C.R. 677). Against that legal background question #9 throws up no question of law and is, in fact, a positive invitation to this court to err in law. (*Provincial Assessors of Comox, Cowichan and Nanaimo* v. *Crown Zellerbach Canada Ltd.* 42 W.W.R. 449 at 455-456).

Question #10 reads as follows:

> 10. Did the Assessment Appeal Board err in law in not giving weight to the evidence of the expert witnesses and, in particular, Mr. Arthur Boyd, M.A.I.B.C. and Mr. Thomas Spraggs, P. Eng.?

The answer is no. To read question #10 is to know that it does not state a question of law. Issues as to the credibility of witnesses and the reliability of a witness's evidence and the weight, if any, to be given to the evidence of a witness falls within the heading "finding of fact" according to the relevant authorities: *Yuel L. Huie* v. *Assessor of Area 10 - Burnaby/New Westminster* 1993 B.C. Stated Cases 349 at p. 2092.

Question #11 reads as follows:

> 11. Did the Assessment Appeal Board err in law in not considering all of the evidence of the Municipal officials and, in particular, the following:
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> a) Uniqueness of the property;
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> b) The time difficulties in subdividing;
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> c) The problems with a Crown grant exchange and the delay occasioned therewith;

d) The cost and effect upon the subject property of the David Pathan connector and the David Pathan bridge over the Coquitlam River;

e) The impact upon the property, and its value in respect to those lands that would have to be dedicated as park if the property were to be subdivided;

f) The evidence that in order for the property to be subdivided it would require rezoning, which is a political process;

g) The BC Hydro right-of-way; and

h) Other related and relevant facts.

The answer is no. As is consistent with the law as stated by the Supreme Court of Canada and the Court of Appeal in other contexts (both criminal and civil), the case law that surrounds the *Assessment Act* makes it clear that absent the contrary being demonstrated from what appears on the face of the record this court must assume that the Assessment Appeal Board considered all of the evidence that was placed before it. (*Simpson-Sears Limited* v. *Assessor Area of Surrey-White Rock* 1980 Stated Cases, case 136 at 802-4 and 802-5, B.C.C.A. 1981). Here, in this particular case, because counsel for the Appellant did not cut his cloth to fit the limits imposed by the law on my jurisdiction the submission of counsel for the Appellant did not focus on the correct issue. I say, having considered all that was placed before me and especially the Board's reasons for judgment and the Stated Case, that there is nothing on the face of the record that even hints at the failure to consider evidence postulated in question #11. Quite the contrary. What appears on the face of the reasons for judgment of the Assessment Appeal Board simply reinforces the effect of the presumption in law referred to above. See for example the Board's reasons for judgment at p. 3, line 4 and p. 4, line 14-24. Those are only examples.

Question #12 reads as follows:

12. Did the Assessment Appeal Board err in law by not considering the evidence of Mr. Paul Kundarewich, A.A.C.I. and, in particular, the following:

a) His evidence in respect to the highest and best use of the property;

b) His evidence in respect to the value as an "Estate" lot;

c) His evidence in respect to the value if subdivided into the present zoning of one (1) acre lots;

d) His evidence in respect to an increase in the value of the land between the previous assessed value and the current value;

e) His evidence in respect to the details involving subdivision and cost; and

(sic) g) Other related and relevant facts.

The answer is no. The Assessment Appeal Board - which is, after all, the finder of fact - dealt with Mr. Kundarewich at page 12 of the Board's reasons for judgment.

Question #13 reads as follows:

13. Did the Assessment Appeal Board err in law in basing the assessment upon a use that they knew was not going to happen in the future because they were aware that the property would be used in the future as a single family lot?

The answer is no. In law the Assessment Appeal Board had to focus on the actual (market) value as at July 1, 1992. As a matter of law that decision did not turn on the owner's plans for the property: *Lefeaux* v. *Corporation of the District of West Vancouver* (B.C.S.C.) 1962 B.C. Stated Case 33 at 151.

Question #14 reads as follows:

14. Did the Assessment Appeal Board err in law in stating that there could be an 18 lot subdivision when it was clear from the evidence of the experts involved, as well as the Municipal officials, that such a subdivision would not be able to take place in the future because of the creation of a large single family house over several of the lots?

The answer is no. The significant date is July 1, 1992 and the decision as to the highest and best use was not tied to the owner's intentions for the property: *Jericho Tennis Club* v. *Assessor of Area 9 - Vancouver* 1991 B.C. Stated Case 307. The finding of fact made by the Board and set out at paragraph 6 of the Stated Case was available on the evidence placed before the trier of fact. That being so the answer to question #14 must be, and is, no.

Question #15 reads as follows:

15. Did the Assessment Appeal Board err in law in not considering all of the appraisals produced by the Respondents in valuing this property and, in particular, the actual appraisals that were used for the original assessed value?

The answer is no. Repetition has its limits. The short point is that the Appellant has not demonstrated that the Assessment Appeal Board failed to consider any of the evidence placed before it.

Question #16 reads as follows:

16. Did the Assessment Appeal Board err in law in not allowing for corrections to the appraisal that they have relied upon, when the author of that appraisal, one Mr. McInnis, conceded that the following items were likely subject to review and adjustment:

a) The interest rates used in the appraisal;

b) The number of lots used in the appraisal;

c) The special difficulties in respect to achieving the lot layout;

d) An increase in the cost of construction of the subdivision because of additional unused road frontage;

e) An increase in the cost of construction of the subdivision because of regrading costs;

f) An adjustment because certain lots designated as areas could not be created;

g) An adjustment because of the need to dedicate a large portion of the property as park land;

h) An adjustment in respect to the cost, construction and the design of the David Pathan road and the David Pathan bridge;

i) An adjustment for thrown away costs; and

j) An adjustment for other obvious issues raised in the evidence of Mr. McInnis which were supported by the other witnesses.

The answer is no. Even if one improves the question by remembering that all the Assessment Appeal Board did was dismiss an appeal and in the course of doing so decide, after considering conflicting evidence, that Mr. McInnis' report (Exhibit 21) "provided a reliable estimate of the market value of the subject property as of July 1st, 1992" a plain reading of the question simply brings home that it states something other than a question of law: *Lordina Limited* v. *Assessor of Area 9 - Vancouver* 1980 Stated Cases, case 133, page 787.

Question #17 reads as follows:

17. Did the Assessment Appeal Board err in law in not considering the present and most likely highest and best use of the property?

The answer is no. The law is to the effect that the Board focused on the right question, i.e. the highest and best use of the subject property. That issue of fact was resolved against the Appellant. In the result question #17 does not throw up a question of law.

Question #18 reads as follows:

18. Did the Assessment Appeal Board, in accepting the report of the appraisal of Mr. McInnis, err in law in considering his credentials, as opposed to those of the other experts and, in particular, Mr. Kundarewich, A.A.C.I. Mr. Boyd, M.A.I.B.C. and Mr. Spraggs, P. Eng.?

The answer is no. Deciding what evidence to accept and what evidence to reject is for the trier of fact. The "credentials" of various witnesses is just a subset.

Question #19 reads as follows:

19. Did the Assessment Appeal Board err in law basing their valuation upon a speculative future event, which only increased the value of the land, when it was clear that other properties in the Municipality, such as; commercial buildings and apartment blocks, were not being assessed to their highest use through devices such as; Strata Titling?

The answer is no. The Assessment Appeal Board made a finding of fact (Stated Case paragraph 6) open to it on the evidence. In the result the bottom drops out from under question #19 as the question is divorced from the reality of the Stated Case (*Ross* v. *Assessor of Area 9*, February 12, 1993 B.C.S.C. A923539, paragraphs 10 and 11).

Question #20 reads as follows:

20. Did the Assessment Appeal Board err in law in not considering the property assessment prior to the 1991 assessment when the property was assessed as one (1) parcel with a value of $93,000?

The answer is no. Actual value as at July 1st, 1992 was at issue.

Question #21 reads as follows:

21. Did the Assessment Appeal Board err in law in assessing the property on its total enclosed area of 20.5 acres instead of the net area of 16.8 acres?

The answer is no. What was at issue was the actual (market) value of the "subject property" as of July 1st, 1992. The *boundaries* of that property were never in doubt. What number should be applied to a description of the "useable" acreage was always in issue and admitted of an answer on which reasonable people could differ. That the Board was aware of all of this is obvious: Stated Case paragraph 2; Reasons for Judgment (September 21, 1995), page 2.

Each of the 21 questions submitted to me has been disposed of adversely to the Appellant. The appeal is obviously dismissed. I have as required by law "heard and determined" the questions and given my opinion as above with respect to each question. I have decided to follow what was done in *Ross* v. *Assessor of Area 9*, supra, and state that the "remitting" required by s. 74(6) of the *Assessment Act* will be completed by having counsel for the Respondent to this appeal obtain a copy of these reasons for judgment as filed in the Registry. Counsel will forward the reasons for judgment to the Board. The reasons are obviously oral reasons for judgment and it will be up to counsel to order a transcript of these reasons and have the draft transcript submitted to me for correction and eventual filing in the Registry. As a matter of fact I will at this point simply ask the reporter to see that I am provided with a draft transcript as soon as possible. The point is that there is a time limitation that I must obey and therefore I need to have this draft transcript as soon as possible. Counsel will send a copy of his letter to the Board enclosing a copy of the reasons for judgment as filed in the Registry to me and to counsel for the Appellant.

I turn to the question of costs and simply say that on the face of it costs should simply follow the event. Counsel may now speak to costs if they wish.

Is there any submission with respect to costs or is it simply costs follow the event?

MR. SPRAGGS: I have no position, my lord.

THE COURT: Okay.

MR. JASINSKI: My lord, my instructions are to seek costs on level scale 4 in this matter. Obviously I was not present for the hearing and so I cannot say much more than that and I would rely on the court to make its own determination with respect to the position of the validity of costs on scale 4 which they should just follow the normal scale.

THE COURT: Okay, thank you. I don't need to hear from you, Mr. Spraggs.

Ruling:

It is common ground that costs should follow the event. The only wrinkle is that counsel for the successful Respondent has asked for costs on scale 4.

Now, counsel who is here today on behalf of the Respondent has been thrown into the breach and he is not familiar with the case. He simply has instructions to ask for costs on scale 4 and it was left at that.

It was a bald question of costs on scale 4 and counsel said something to the effect that it was then left up to me in the light of proceedings on the appeal to decide whether it should be scale 4. I simply say that I am confronted with a bald request. There may be a reason to raise it to scale 4 but I do not know of any such reason.

Obviously I am sitting and thinking right now. This seems to be an ordinary proceeding of its kind in this court. There were more questions than usual but I see no reason to raise it to scale 4. I will simply say that the presumption that it is scale 3 remains in place and that is that.

Okay, we will adjourn now.