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CBR CEMENT CANADA LIMITED

v.

ASSESSOR OF AREA 01 – CAPITAL & CITY OF COLWOOD

Supreme Court of British Columbia (A980594) Vancouver Registry

Before the HONOURABLE MADAM JUSTICE BENNETT

Vancouver, September 30, 1998

John W. Elwick & Alan M. Ross for the Appellant
John E.D. Savage for the Respondent
Grant Anderson for the City of Colwood

Reasons for Judgment October 8, 1998

BACKGROUND

This is an appeal of the decision by the Assessment Appeal Board (the "Board") CBR Cement Canada Ltd., the Appellant, the owner of a gravel pit in Colwood, B.C. This pit has been operating since 1919 and consists of 600 acres. The issue before the Board was the appropriate classification of the property. The property is comprised of 16 folios. Fourteen of these folios were the subject of an appeal to the Court of Revision by the City of Colwood (the "City"). At the Court of Revision the fourteen folios had been classified, wholly or partially, as Class 1 Residential. Before the Board, the City argued that these folios should have been classified as either Class 6, "Business and Other", or Class 5, "Light Industry".

In the hearing before the Board, the Assessor appeared as Respondent and sought to uphold the decision of the Court of Revision. In the current appeal, the Assessor is seeking to uphold the decision of the Board. The Appellant was permitted to intervene before the Board as the owner of the property.

On January 14, 1998, the Board found that 4 of the 14 folios were properly classified as Residential. A single folio was found to be properly classified as 25% Industrial and 75% Residential. The remaining nine folios were classified as Class 5, "Light Industry".

The Board reversed the Court of Revision that had upheld the Assessor's finding that certain portions of the Appellant's property were to be classified as Residential property.

The Appellant only appeals the Board's decision in relation to five of the folios. They are:

Lot B - 04734.020 which was found by the Court of Revision to be 83% Residential and 17% Light Industry

Lot D - 04734.040 which was found by the Court of Revision to be 94% Residential and 6% Light Industry

Lot E - 04734.050 which was found by the Court of Revision to be 60% Residential and 40% Light Industry

Lot F - 04734.060 which was found by the Court of Revision to be 75% Residential and 25% Light Industry,

and

Lot J - 04734.100 which was found by the Court of Revision to be 100% Residential.

Of the three classifications in issue, I am told that Residential property has the lowest tax rate, Class 5 property "Light Industry" has the highest tax rate and Class 6 - "Business and Other" is in between.

Before the Board, the City's primary position was that the property should be classified as Class 6 - "Business and Other" or, alternatively, as Class 5, "Light Industry". The Appellant in this hearing, is not seeking to uphold the decision of the Court of Revision, that the property, be classified as part Residential. The Appellant agrees that the property does not meet the classification for Residential property. The Appellant only appeals the portion of the decision that found that the five folios are Class 5: "Light Industry". The Appellant submits that the folios should be classified as Class 6: "Business and Other".

The five folios at issue are all zoned either Rural 1 (A1) or Rural Residential (AR1) under the City of Colwood Zoning Bylaw No. 151.

The following two questions come before me as a Stated Case pursuant to s. 63(3) of the *Assessment Act*, R.S.B.C. 1996 Chapter 20.

> 1. Did the Board err in law in finding that those properties comprised of Folios 04734.020, 04734.040, 04734.050, 04734.060, 04734.100 (collectively the "lands"), although primarily vacant and of no further use to the gravel operations of the Appellant, were lands which had a present use pursuant to section 1(c) of the Prescribed Classes of Property Regulations - B.C. Reg. 438/81 (the "Regulations")?
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> 4. Did the Board err in law in holding that the Lands, zoned as Rural (A1) or AR1, should be classified as light industry (Class 5) when it found that the Lands were specifically zoned for business or commercial purposes and concluded that they were currently being "held" for those purposes?

The other four questions stated were abandoned at the outset of the hearing.

JURISDICTION OF APPELLATE REVIEW

The Court of Appeal recently reviewed the scope of review by this Court of a decision of the Assessment Appeal Board in *Gemex Developments* v. *Assessor of Area 12 - Coquitlam* (30 September 1998) Vancouver Registry CA022158 (B.C.C.A.) Newbury J.A., speaking for the Court said at p. 7-8:

> 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 ... 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.

In *Gemex*, the Court also affirmed that the Assessment Appeal Board does not review the decisions of the Court of Revision. It holds a hearing *de novo*, and is entitled to make findings of fact apart from any made by the Court of Revision. The Court of Revision does not issue reasons for its decisions.

While I was provided with the Exhibits from the hearing before the Board and its reasons for decision, I was not provided with transcripts of any of the oral evidence. Counsel were content that I rely on the reasons for decision.

The Classifications in question are as follows:

Class 1 - residential

> 1. Class 1 property shall include only:
>
> (a) land or improvements, or both, used for residential purposes, including single family residences, duplexes, multi-family residences, apartments, condominiums, manufactured homes, nursing homes, rest homes, summer and seasonal dwellings, bunkhouses, cookhouses and ancillary improvements compatible with and used in conjunction with any of the above, but not including
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> (i) hotels or motels other than the portion of the hotel or motel building occupied by the owner or manager as his or her residence,
>
> (c) land having no present use and which is neither specifically zoned nor held for business, commercial, forestry or industrial purposes;

Class 5 - light industry

5. Class 5 property shall include only land or improvements, or both, used or held for the purpose of extracting, processing, manufacturing or transporting of products, and for the storage of these products as an ancillary to or in conjunction with such extraction, processing, manufacture or transportation, but does not include those lands or improvements, or both,

(a) included in class 2 or 4,

(a.1) used or held for the purposes of, or for purposes ancillary to, the business of transportation by railway,

(b) used principally as an outlet for the sale of a finished product to a purchaser for purposes of his own consumption or use and not for resale in either the form in which it was purchased or any other form, and

(c) used for extracting, processing, manufacturing or storage of food, non-alcoholic beverages or water.

Class 6 - business and other

6. Class 6 property shall include all land and improvements not included in Classes 1 to 5 and 7 to 9.

Split classification

10. Where a property falls into 2 or more prescribed classes, the assessor shall determine the share of the actual value of the property attributable to each class and assess the property according to the proportion each share constitutes of the total actual value.

FINDINGS OF FACT OF THE BOARD

It is difficult to ascertain precisely what critical findings of fact were made by the Board. For example, the Board refers to all 600 acres owned by the Appellant as the Producers Pit, (the "Pit"). The Board states, at p. 2, that the majority of the "Pit" is used for a gravel extraction operation. It states that other portions are vacant, having formerly been used for extraction purposes, but, the inference is, and I have been told, are now mined out. The Board found that a small portion of the site is treed and has never been used for gravel extraction purposes. The mine will be completely mined out in 5 - 15 years. There is both a reclamation plan and a plan to develop the lands as a residential community when the gravel is exhausted.

In its decision, the Board said that "There is no dispute that much of the land is vacant". Yet earlier, the Board found that the majority of the Pit is used for a gravel extraction operation. The Board went on to find that the land, although vacant and no longer actively mined, is still being used. This conclusion was reached on two basis. One, because it was used in the past as a mine and second, because there was waste stored on the land. The reasons do not state what kind of waste or where it was stored. As indicated, I do not have evidence on this point, nor was I directed to any exhibits that contained that information. Further, the Board held that the lands could not be considered "unused" until they were reclaimed. The process of reclamation is long and expensive.

Further, the Board refused to distinguish between folios that were vacant and mined out and folios that continued to operate. The Board held that the land was an "active integrated mine".

However, the Board also held that some of the folios were properly classified by the Court of Revision as Residential. I do not understand on what basis the Board was prepared to isolate some of the property and not others.

The property was zoned for business or commercial purposes. However, the Board found, at p. 12, that the property was held for mining or industrial purposes. The issue is further confused where the Board stated that "the Board is unable to conclude that the property is currently "held" for anything other than business or commercial purposes.

It may be that the Board was focussing on the aspect of whether the Residential classification was correct, and not considering what the alternative classifications required. However, in my view these inconsistent findings present difficulties when attempting to sort out whether the Board correctly applied the law.

1) The first question turns on whether the Board correctly applied the definition of "use" to the property. A sub-issue is whether the Board correctly considered all of the folios of land as an integrated industry.

In my view, finding that the folios were "used" because they, in the past were mined, is inconsistent with the authorities. [See *Fletcher Challenge Canada Limited* v. *Assessor of Area 01 - Saanich/Capital* (1992) Stated Case 334].

In the *Fletcher Challenge* case, the Court held that a sawmill that was no longer used as a sawmill, and slated for destruction was properly classified as Class 6, "Business and Other".

In my view, the Board failed to look at the whole picture before it made its finding with respect to use.

Further, the fact that the properties had not yet been reclaimed does not mean that the properties were still being used for mining. The Board's statement that reclamation was a condition precedent to a finding that the property was no longer used as a mine is, in my view, an error of law.

Further, in my opinion it was wrong in law to find that the folios were to be considered as a single parcel. First, there is the inconsistent approach, as the Board in its ultimate decision was prepared to separate some folios out, but not others for no discernible reason. Secondly, all the folios were subject to individual assessments. The folios each had individual assessment roll numbers and individual property assessment tax notices. The use that is made of any land may be determined by the use of the surrounding property, depending on the circumstances. The Board did not look at the various folios in the context of what the actual use was of each folio. It relied on past use and use of the surrounding property. It is clear that some of the property is being mined. However, that which is left vacant must also be examined for use in the circumstances of this case. The Assessment Board must take into account the use of each folio when making its assessment. In my opinion, this was required and the Board erred in law when it did not take this step.

2) Did the Board err in finding that the property was held for a purpose that would bring it within Class 5?

The vacant land was, according to the Board, being used to store waste. The waste would either be disposed of or used in the reclamation process. There was no evidence that I was pointed to that the waste was a "product". The property was mined out. It could no longer be used or held for the "purpose of extracting, processing, manufacturing or transporting of products".

The zoning excludes the property from being classified as Residential (See 1(c) *supra*, at p. 6). Zoning is a factor, but is not conclusive when deciding between Class 5 and Class 6.

I was directed to two decisions, *Newcastle City Council* v. *Royal Newcastle Hospital* [1959] A.C. 248 and *Re Assessment Commissioner of British Columbia and McMinn* (1981), 120 D.L.R. (3d) 382 (B.C.S.C.) affirmed on appeal, (1982), 133 D.L.R. 709 (B.C.C.A.). Both of these decisions find that property that is being held for a future use that is consistent with the current use of the surrounding property is held for the same purpose. That is not the case here. Here, there is no further use. The property is being held for reclamation and the eventual development of residential property. While it is arguable that the Assessor was right, and the property falls under Class 1, the Appellant was content to press only for a Class 6 classification, which I add was what the Respondent, City, had sought in the first place.

I find that the Board's finding on the purpose for which the property was held is wholly unsupported by any evidentiary foundation. Alternatively, the Board's view of the facts could not reasonably be entertained.

CONCLUSION

The answer to question one is yes.

The answer to question four is yes.

The Appellant is awarded its costs for this application on Scale Three.