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ASSESSOR OF AREA 21 - NELSON/TRAIL

v.

MARIAN I. and GLEN V. JONES

Supreme Court of British Columbia (7351) Nelson Registry

Before the HONOURABLE MR. JUSTICE McEWAN

Nelson, September 28, 1998

R.B.E. Hallsor for the Appellant
B. Suffredine, Q.C. for the Respondent

Reasons for Judgment October 23, 1998

This is an appeal, by way of Stated Case, of a decision of the Assessment Appeal Board. It is brought at the instance of the Assessor of Area 21 - Nelson/Trail, pursuant to s. 63(3) of the *Assessment Act*.

At issue is the proper classification, for tax assessment purposes, of a 23 acre parcel of land located in the Nelson Rural Area. It is not part of the Agricultural Land Reserve. In 1992 the Respondents filed a farm development plan under which some 5 acres of land were to be planted with 500 apple trees. It was estimated that it would take five years for this orchard to meet the gross annual income requirements for classification as farmland. Land so classified is taxed at a lower rate than residential property.

A "developing farm" may be taxed as a farm if the conditions set out in s. 8 of *B.C. Regulation 411/95* are met. The relevant portions of that section are:

> (1) Despite section 5(1), (2) and (3), the assessor must classify land not yet in production as a developing farm if the assessor is satisfied the land is being developed as a farm and the application form referred to in section 3 shows that on or before October 31 the following conditions will be met:
>
> (a) in the case of products produced from primarily agricultural production that
>
> (ii) require 1 to 6 years to establish after planting before harvesting occurs, there is a sufficient area prepared and planted to meet the requirements of this regulation when harvesting occurs, and
>
> (2) The owner or lessee must submit with the application form for approval by the assessor a development plan and site diagram which includes location and details of the crop to be planted, area, date of planting, expected yield, selling price and date of harvest.

The Assessor initially rejected the Respondents' 1992 application for farm classification. It was approved after an appeal to the Assessment Appeal Board.

On December 4, 1995 the Assessor inspected the property and discovered that there were only 150 trees planted. The Respondent, Glen V. Jones, explained that animals had interfered, and that the property would have to be fenced. The Assessor agreed at that time not to rescind the farm classification if the orchard was replanted and fenced by October 31, 1996.

When he inspected the property on November 14, 1996, the Assessor found that the fence had not been completed and that no more trees had been planted. The Assessor determined at that point that the 1992 farm development plan had not been followed and reclassified the property "Residential" for the 1997 taxation year.

The authority under which the Assessor purported to act is s. 11 of the *Regulations*:

> **11.** The assessor must declassify all or part of a parcel of land as a farm if one or more of the following occurs on or before October 31:
>
> > (g) the owner or lessee does not follow a development plan approved by the assessor under section 8;

The Respondent appealed the Assessor's decision to the Assessment Appeal Board. The Board reversed the Assessor's decision, concluding its reasons as follows:

> In this appeal a five year development plan was ... filed in May, 1992. Mr. Jones has until 1997 to meet the terms and conditions of the plan. Accordingly, the Board finds the removal of the Farm Classification is premature.
>
> Support for this finding is found in *May McLoughlin* v. *Assessor of Area 06 - Courtenay* Stated Case 375 (B.C.S.C.) Question 1 of the Stated Case was: "The evidence having established the facts required by s. 7(2) of the Regulation, was the Assessment Appeal Board wrong in failing to direct the Assessor to classify the land as farm?"
>
> Mr. Justice Cohen stated at page 2273
>
> > In my opinion, the Board had evidence before it which, under section 7(2), required it to direct the Assessor to classify the Appellant's land as a farm.
> >
> > The Board had evidence that the Appellant applied to the Assessor under section 7 to have the land classified as a farm and that the Appellant submitted a plan establishing that the Appellant is developing a farm that will meet the standards specified in section 3(1), as required by section 7(2)(a)...
> >
> > There is no issue that the Assessor received the Appellant's application in time and therefore the condition in section 7(2)(b) has been met.
> >
> > As to the condition in section 7(2)(c), in addition to Mr. Warner's evidence, the Board had evidence before it that the Assessor was satisfied that the land is being developed as a farm because

> he was prepared to classify the land as a farm for the 1994 assessment year, subject to the Appellant reaching the necessary requirements in 1995. The Assessor changed his mind only after the Appellant rejected his condition. I think that the Appellant is correct in arguing that there is no jurisdiction in the Assessor to exercise the discretion under section 7(2)(c) to deny the Appellant farm classification on the group that "the Appellant had had since 1974 to meet the required statutory threshold and has been unable to do so". There is no prohibition in section 7 against the Appellant making a fresh application for farm classification after the classification has been removed by the Assessor. Therefore, if the Appellant's application satisfied the conditions in section 7(2), which I think it clearly did, it was incumbent upon the Assessor, and in turn the Board, to classify the Appellant's land as a farm ...

The Board finds on the evidence this appeal is analogous to the above case and concurs with findings of Mr. Justice Cohen.

Although extensive submissions were made by Mr. Collins on behalf of the Respondent, the Board finds that it need not address those submissions given the above finding.

The Board ordered the Assessor to reclassify the property as "Class 9 - Farm" for 1997.

The Questions stated by the Board are:

1. Did the Assessment Appeal Board err in law in determining that once a development plan is in place, the Assessor may not declassify the land as a farm where the owner does not follow the approved development plan?

2. Did the Board err in law in determining that it need not consider the evidence and submissions of the Assessor?

3. Did the Board err in law in determining that once a development plan is in place, the Assessor may not declassify the land as farm where there is insufficient farm development under the plan for the property to be able to meet the requirements of farm property by the time of the plan's expiration?

4. Did the Board err in law in its interpretation of B.C. Regulation 411/95, *Standards for the Classification of Farm Land* in classifying the subject property as Class 9 - Farm?

This court, in giving its opinion "on a question of law alone" (s. 63(3)), must find that the Board has:

(a) misinterpreted or misapplied a section of the *Act*;

(b) misapplied an applicable principle of general law; or

(c) acted against the evidence or on a view of the facts which could not reasonably have been entertained,

before it should intervene (see *Kebet Holdings Ltd.* v. *Assessor of Area 12 - Coquitlam* (1987) 13 B.C.L.R. (2d) 274 @ 251).

Having reviewed the transcript and the reasons given by the Board in light of this test, I have concluded that the Board made a significant error in law in coming to its conclusion.

It is evident, first of all, that the import of certain historical evidence given by the Assessor was misunderstood. That evidence was summarized in the Reasons in the following terms:

> Mr. Greg Munch was qualified to give expert evidence for the Respondent.
>
> In oral testimony he gave the Board a historical background of the farm classification for this property as follows:
>
> - Appellant granted farm class since 1979 as an emerging and developing farm
>
> - Reviewed in 1980, development plan not followed
>
> - 1982 another farm classification application approved by the Court of Revision as an emerging and developing farm, this plan was not followed
>
> - 1987 another farm classification application was approved by the Assessor as an emerging and developing farm
>
> - 1991 farm classification reviewed, development plan was not followed, therefore, the property was reclassified as residential
>
> - On December 4, 1995 Messrs. Munch and Collins inspected the property. They discovered only 150 fruit trees left in the orchard. As a result of the inspection, Mr. Jones agreed to replant and fence the orchard in 1996 and have it completed by October 31, 1996 to maintain his farm classification
>
> - Another inspection of the property was conducted on November 14, 1996, after the state and condition dated of October 31, 1996. They found 300-350 fruit trees still in pots and the fencing had not been completed
>
> - Since the farm development plan was not followed the Assessor removed the farm classification from the property and reclassified it residential for the 1997 Roll year.
>
> Mr. Munch stated this property has been classed as a farm for 13 of the last 16 years and has only met the gross income requirements under the Farm Standards Regulation in one year.

Later in the Reasons, the Board quoted its own earlier decision, concerning the Respondents' 1987 Farm classification:

> "The Farm Classification was granted in October, 1987 based on a five year plan. The fact that there was a previous development plan, and the development period is now nine years, is irrelevant. The Appellant has until October, 1992 to meet the minimum standards and terms of the development plan ... The removal of Farm Classification is, therefore, considered by the Board to be premature."
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> [Reasons, p. 9]

The Board then considered *McLoughlin* v. *Assessor of Area 06 - Courtenay* [1995] B.C.J. 2621, December 15, 1995 Vancouver Registry No. A952151 (Cohen, J.) B.C.S.C., in light of that history.

A review of *McLoughlin* shows it to be about something quite different than what is presently before the Court. In *McLoughlin*, an *application* for a developing farm classification was rejected because the Assessor found, on the basis of past performance, that the plan lacked credibility. He did so in the face of expert evidence that the plan that had been submitted was viable. The Assessor also purported to impose conditions beyond those contained in the Statute. The court found that, upon filing a farm development plan that satisfied the statutory conditions, it was "incumbent on the Assessor, and in turn the Board, to classify an applicant's land as a farm". *McLoughlin* stands for the proposition that an application must be considered on its merits at the time it is made, not on the basis of past history, or subject to conditions imposed by the Assessor beyond those contained in the statute.

Despite a certain similarity to the present case in terms of the background facts, *McLoughlin* is only about the criteria to be applied on an *application*, and has nothing to do with section 11 or declassification. It does not stand as authority for the proposition, clearly articulated by the Board, that once a farm plan is approved the land retains its "developing farm" classification until the end of the term of the plan, regardless of the applicant's progress in implementing the plan.

It is in this regard, that I think the Board misconstrued the significance of the "historical" evidence. The Board certainly appreciated that such evidence has no bearing on an applicant who presents a plan in compliance with the requirements of the *Act*. But here, there was clear evidence that the Respondent was impossibly behind in the implementation of the existing plan. The Respondent did not, in essence, dispute this, but suggested that wildlife had destroyed his crop and rendered compliance impossible. It was in this context that the Assessor's review of the long history in the matter, and of the need for a fence based on experience, was relevant. A fence was included in the development plan. The Assessor was not dealing with a new application in light of unexpected difficulties, but with clear evidence that the Respondent had not followed his own plan respecting foreseeable hazards.

McLoughlin is therefore not an apt analogy. It was about the proper considerations on a new or "fresh" application, not about the ongoing requirement to follow a plan once it is approved. The Board's interpretation of the law would render s. 11(g) meaningless, and would make the simple filing of a viable plan, without any effort to make it work, the sole criteria for classification as a "developing farm" for the length of the approved term. This is quite at odds with the scheme of the *Regulations*.

Accordingly, I would answer the first question in the affirmative. The Board clearly erred in law in determining that once a development plan is in place the Assessor may not declassify the land as a farm when the owner does not follow the approved development plan.

I would answer the second question in the affirmative. The evidence and submissions of the Assessor were germane to the proper issue before it, which was whether grounds existed for the

Assessor to make the determination he did under s. 11(g). In my opinion it was clearly established that he did.

I would answer the third question in the affirmative. Clearly the Board erred in law in determining that once a development plan is in place, the Assessor may not declassify the land as farm where there is insufficient farm development under the plan for the property to be able to meet the requirements of farm property by the time of the plan's expiration.

I would answer the fourth question in the affirmative. The Board erred in law in its interpretation of *B.C. Regulation 411/95* in failing to uphold the Assessor's declassification, and in continuing the classification as "Class 9 - Farm".