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ASSESSOR OF AREA 09 - VANCOUVER

v.

JAMES LAU

Supreme Court of British Columbia (A973454) Vancouver Registry

Before the HONOURABLE MR. JUSTICE B.D. MACDONALD (in chambers)

Vancouver, April 22, 1999

G Holeksa for the Appellant
James Lau Appearing on His Own Behalf

Reasons for Judgment (Oral)

April 22, 1999

THE COURT: I am in a position to give my decision now, and since I am not going to be available for some weeks, I think I had better do so, even though it will obviously not be as complete as it would if I were doing it in writing.

This is the hearing of a Stated Case under the *Assessment Act* in respect of the assessment for, I believe, the year 1996 for a property at Broadway and Manitoba Street in the City of Vancouver. Reading from the Stated Case which was filed on December 29, 1997, the property is situated at the northwest corner of Broadway and Manitoba Street in the City of Vancouver, has a frontage of 64 and one-half feet on Broadway, and 76 feet and four inches on Manitoba Street, for a total area of approximately 4,935 square feet. The site is improved with a two-storey wood frame building with basement, constructed in 1956. The main floor contains retail and office space, the second floor contains office space and the basement area is used for storage purposes. There is on-site parking for four cars.

The 1997 Court of Revision determined the actual value of the property to be: land, \$635,000; improvements, \$393,000; for a total of \$1,028,000. That value was substantially reduced by the Assessment Appeal Board on the 14th day of November, 1997, to a total of only \$754,200. In large part that reduction resulted from the combination of two factors: first, the Board accepted the evidence of the owner in respect of actual gross rental income and actual expenses, to arrive at a net operating income substantially below that estimated by the Assessor. It then applied to the net operating income a capitalization rate of seven and a half percent, which was in fact one and a half percent below the rate suggested by the owner, but was derived by the Assessor from his analysis of six comparables. The issue on this appeal or Stated Case is whether or not it was consistent or appropriate for the Board to combine those two factors, namely actual net operating income and a capitalization rate derived from estimated net operating income.

Arising out of that issue, the questions as stated by the Board at the request of the Appellant Assessor for the opinion of this court are:

- (1) Did the Board err in law by not applying the principle of consistency as set out in *Westcoast Transmission Company Limited v. Assessor of Area 09 - Vancouver*, Stated Case 235, and other decisions?

(2) Did the Board err in law by adopting a capitalization rate that was derived from an analysis of sales using the net rental model and applying that capitalization rate to an income stream developed from the gross rental model?

(3) Did the Board err in law by failing to apply the cost approach and the direct sales comparison approach?

Subject to the explanation which follows, my answer to those questions are: Question (1) yes; Question (2) yes; and Question (3) no.

I will deal first with my answer to question (3). I indicated in the course of argument in response to an initial position taken by the Respondent, that I was not prepared to answer question (3) in the affirmative. In my view it is open to the Board to accept one of the three traditional or accepted approaches to valuation, for example, the income approach, if it so chooses. That indeed is what the Board did in this case. The argument advanced by the Appellant would have been foreclosed or could have been foreclosed by a simple statement in the Board's reasons. That sort of difficulty was avoided by the Board in *Sun Life Assurance Company v. Assessor of Area 09 - Vancouver*, a decision of the Assessment Appeal Board in 1994, where the Board took the trouble to say:

The Board recognises that the other approaches to value, particularly the direct sales comparison approach are useful ...

But the Board then went on to agree with both the Appellant and the Respondent that the income approach was the best method to value an office building. In this case the Board simply said:

The Board is in agreement with the parties as to the method of valuation which is the income approach.

While I accept that it would have been helpful for the Board to have expressly rejected the other approaches in this particular case, and while the direct comparison approach using a sales price per square foot might well have alerted the Board to the substantial discrepancy produced by its result as compared with the income approach, and thus to the possibility that the capitalization rates which it applied was perhaps not appropriate, I am not prepared to find that the Board's reliance upon a single approach is an error reviewable by this court. So long as there is evidence which supports the income approach, and particularly where there is "agreement with the parties as to the best method", this court should be reluctant to interfere.

Turning now to my affirmative answer to questions (1) and (2). The Appellant treated those questions as being substantially identical, and as the issue before me was developed, I agree that to be the case. I find no particular way of distinguishing between questions (1) and (2). The issue arising out of both those questions is the one which I stated initially. It is my view, notwithstanding an extremely able argument by Mr. Lau, one which would have done most lawyers proud, that it is not consistent to apply a capitalization rate determined on one basis, to operating income determined on another. I accept and concede that the capitalization rate to be used is a matter for decision by the Board, but it has been demonstrated to me, or at least to my satisfaction, that the use of the capitalization rate developed by the Assessor, the seven and a half percent rate, to a net operating income for the subject property determined in a manner entirely different than that used in respect of the comparables by the Assessor to develop that rate is an error in principle and therefore an error in law, and reviewable.

I am satisfied by the Assessor's argument that the result of the error has been to determine an incorrect value for the subject property, and I accept the Assessor's submission that this case should be returned to the Board with a direction to determine the capitalization rate based upon an approach consistent with that used to determine income for the subject property. The ultimate

choice will be the Board's, but I am satisfied that the result which the Board arrived at in this case was the result of an error of law.

Now, are there any other matters that I should deal with?

COUNSEL: It occurred to me that some of the members who made the decisions might no longer be members of the Board.

THE COURT: I don't know what the Board's procedure is in that regard. Presumably another panel might have to be impanelled and it would be up to that panel as to whether they simply accepted or took into consideration the evidence that had already been tendered to the Board, and as to what further evidence might or might not be necessary. But I don't think it's appropriate for me to circumscribe the scope of the hearing. It would seem to me that some additional evidence might be necessary, but that it would be unnecessary to go over all the ground again. There is no real dispute, it seems to me, on the facts that are available. It is the methodology that's at issue here.

COUNSEL: Very well, my lord. And the one other matter would be costs.

(SUBMISSIONS RE COSTS)

THE COURT: Despite what I have just heard, I cannot refuse to award costs to the successful Appellant here. However, I am going to fix the costs, inclusive of disbursements, at \$1,500 which is substantially less than the costs which could be taxed in this matter in view of the number of appearances. That's the best way I can relieve you. In addition to that, I will give you six months to pay so that you won't be faced with having to find that money tomorrow. You are going to have to find it sometime, in the reasonably near future, but it seems to me that a low award of costs is the best that I can do to respond to the submissions you have made.