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ASSESSOR OF AREA 19 – KELOWNA

v.

DANIEL BAUMAN
EDITH E. BAUMAN and
PROPERTY ASSESSMENT APPEAL BOARD

SUPREME COURT OF BRITISH COLUMBIA (78807) Kelowna Registry

Before the HONOURABLE MR. JUSTICE BUTLER (in chambers)
Date and Place of Hearing: October 3, 2008, Kelowna, BC

G. McDannold for the Appellant
No one appeared for the Respondent

Reasons for Judgment October 3, 2008

[1] **THE COURT:** This is a Stated Case by the Property Assessment Appeal Board, pursuant to s. 65 of the *Assessment Act* at the requirement of the Assessor. The property in question is the Owls Nest Resort located at 8411 Evans Road on Kalamalka Lake, and is described in the Stated Case as a tourist accommodation operation consisting of a four-unit motel, a campground and RV park, and a small marina. Also on the property are an owner/manager residence and seven manufactured home bays which are occupied year round.

[2] On March 12, 2008, the Board rendered a written decision confirming the decision of the 2007 Property Assessment Review Panel, both as to classification and assessed value of the property. This appeal relates solely to the question of classification of the land. The Board upheld the split classification of approximately 50% residential use and 50% commercial use. This was based on an agreement reached between the Assessor and the property owner in 2005. It is of significance to this appeal that the agreement regarding classification of the property was reached prior to the amendment on December 9, 2005 to B.C. Regulation 438/81 whereby camping was added to the Class 8 recreational/non-profit organization classification. The Assessor has maintained that in light of the addition of camping to the recreational/non-profit classification, a significant portion of the land should be classified as falling within a Class 8 use.

[3] The following two questions are asked on this Stated Case:

1. Did the Board err in law by misapplying the prescribed classes of property regulation, B.C. Reg. 438/81. when it failed to classify that portion of the subject property used for camping and marina use as Class 8 recreational property?

2. Did the Board err in law by making a decision which cannot reasonably be entertained when it failed to classify that portion of the subject property used for camping and marina use as Class 8 recreational property?

THE LAW

[4] Pursuant to s. 65(1) of the *Assessment Act*, appeals to this court are limited to questions of law. Questions of law have been defined to include: (1) a misinterpretation or misapplication by the board of a section of the act; and (2) where the board acts on a view of the facts that could not reasonably be entertained: *Gemex Developments Corp.* v. *Assessor of Area 12 - Coquitlam*, 1998 BCCA Stated Case No. 386.

[5] The standard of review on a Stated Case is the standard of correctness. While the court must accept findings of fact made by the Board, the Board cannot act arbitrarily with respect to classification of property. In this context, acting arbitrarily means a decision made at its discretion in the absence of specific evidence and based on opinion or preference. If a Board acts arbitrarily, the decision is made without regard for the statutory provisions and so cannot stand: *Pacific Logging Co. Ltd.* v. *Assessor for the Province of British Columbia*, 1974 BCSC Stated Case No. 99 at page 419.

[6] It is settled in British Columbia that classification of property must be based upon its actual use: *Jericho Tennis Club* v. *Assessor of Area 09 – Vancouver*, 1991 BCCA Stated Case No. 307.

[7] The reasons of the Board on the classification issue that are relevant to this appeal are set out at paragraphs 38 to 41 of its decision, and I quote those portions of the decision:

> If there were some factual dispute concerning what was on the property or the nature of the activities carried on there, I might have been persuaded that I could make an adverse inference against the property owners and find in favour of the assessor on some factual issue by reason of the owner's lack of cooperation. However, I am not able, only by reason that the property owners have not been cooperative, to determine that the reclassification of the property proposed by the assessor should be implemented.
>
> If I am to overturn the decision at PARP, I must have persuasive evidence on which to do so. Clearly, a portion of the property, the area given over to camping, should now be accorded Class 8. Mr. Walters' report does not explain what prompted the redistribution of the Class 6 and Class 1 areas, the criteria by which the various areas were assigned one use or another, or how the measurements that resulted in the changes sought by the assessor were carried out.
>
> Absent such evidence, I am not persuaded I should disturb the findings of the Property Assessment Review Panel. Although it will be necessary, for the future, to allocate a portion of the property to Class 8, I am not able, on the evidence before me, to do that.
>
> **Question 1:** Did the Board err in law by misapplying the prescribed classes of property regulation B.C. Reg. 438/81 when it failed to classify that portion of the subject property used for camping and marina use as Class 8 recreational property?

[8] The amendment to the classification regulations in December 2005 added camping as a use to the Class 8 recreational/non-profit organization classification. As decided by the B.C. Court of Appeal in *Jericho Tennis club*, the classification of a property pursuant to the regulation is to be based on the actual use of a property. Here, the Board found as a fact that a portion of the property was "given over to camping". It concluded that the portion used for camping should be accorded Class 8 classification. In spite of making that finding of fact and concluding that those portions of the property should be classified as Class 8 in recognition of the camping use, the Board failed to do that. This is a clear misapplication of the regulations, as a result of which the answer to the first question is yes.

[9] While it is likely unnecessary for this decision, I should note that there are three evident errors in the Board's reasoning. First, the reasons state that the Board needed persuasive evidence to overturn the decision of the Property Assessment Review Panel. This is incorrect. The appeal to the Board from the Panel is a hearing *de novo*. The Board's statement as to the test that needed to be met on appeal is thus incorrect.

[10] Second, the Board found that the Assessor did not explain what prompted the redistribution of the Class 1 residential and Class 6 business or commercial areas into the three classifications of 1, 6, and 8. There is no basis for the Board's statement. The redistribution into Classes 1, 6 and 8 was prompted by the amendment to the Class 8 regulation. The Assessor was required by the amended regulation to perform the redistribution.

[11] Third, the Board suggests that the Assessor did not explain the criteria by which the various areas of the property were assigned to the three classes. Once again, this is incorrect. There was clear and uncontradicted evidence from the Assessor as to how the areas were assigned to the three classes of use.

> **Question 2:** Did the Board err in law by making a decision which cannot reasonably be entertained when it failed to classify that portion of the subject property used for camping and marina use as Class 8 recreational property?

[12] Given the answer I have arrived at on Question 1, it is not necessary to consider Question 2. However, I would also answer this question in the affirmative.

[13] The Board clearly acted contrary to the evidence before it and the agreement of both the Assessor and the owner that a portion of the property should be classified as Class 8 to recognize the camping use. By proceeding contrary to the uncontradicted evidence before it and contrary to the agreement of the parties and the finding of fact regarding camping use made by the Board itself, the Board's decision cannot reasonably be entertained. The Board's failure to follow the only evidence before it regarding camping use was arbitrary in the sense described in the *Pacific Logging* case and cannot be reasonably entertained. Accordingly, the answer to Question 2 is also yes.

[14] There will be no order as to costs.

The Honourable Mr. Justice Butler