SC 482A Broadway Properties Ltd et al v. AA09

Link to Property Assessment Appeal Board Decision

**Quick Link to Stated Case #482ACont**

**BROADWAY PROPERTIES LTD.**
**BOTHAM HOLDINGS LTD.**
**ROBCO PROPERTIES LTD.**
**2000 HOLDINGS LTD.**
**RONALD S. ROADBURG and**
**REFRIGERATIVE SUPPLY LIMITED**
**v.**
**ASSESSOR OF AREA 09 - VANCOUVER**

SUPREME COURT OF BRITISH COLUMBIA (L042658) Vancouver Registry

Before the HONOURABLE MR. JUSTICE KELLEHER (in chambers)

Date and Place of Hearing: September 20, 2005, Vancouver, BC

J.C. Fiddick for the Appellants
G.P. Holeksa for the Respondent

***Concept of "interim use" and "highest and best use"***

*The Assessor of Area 09 – Vancouver assessed ten commercial properties owned by the Appellants located on the west side of Vancouver. The value of the land was not in dispute, only the value of improvements. The position of the Appellants was that the value of the improvements in each case should be zero. The Property Assessment Appeal Board ("the Board") found in favor of the Assessor. The Appellants appealed that decision to this Court by asking the following three questions:*

1. *Did the Board err in law by acting upon a view of the facts which could not reasonably be entertained when it failed to value the properties in a manner consistent with previous decisions?*
2. *Did the Board err in law by acting upon a view of the facts which could not reasonably be entertained when it found that the highest and best use for the properties was an interim use?*
3. *Did the Board err in law and did it offend generally accepted appraisal principles when it found that the highest and best use for the properties was an interim use?*

*HELD: Appeal Dismissed.*
*This Court found that the Appellant's argument that the concept of interim use should be reserved for unusual circumstances, is not a principle which can be applied in this case. Consequently the value of the improvements under interim use must be considered as part of the assessed value of the property. Income producing improvements on interim property do have value. This Court answered each of the three questions "no".*

**Reasons for Judgment (Oral)** September 20, 2005

[1] THE COURT: These proceedings are pursuant to s. 65 of the *Assessment Act*, R.S.B.C. 1996, c. 20. The Appellants are appealing by way of a Stated Case from a decision of the Property Assessment Appeal Board. Section 65(1) of the *Act* reads:

> 65 (1) Subject to subsection (2), a person affected by a decision of the board on appeal, including a local government, the government, the commissioner or an assessor acting with the consent of the commissioner, may require the board to refer the decision to the Supreme Court for appeal on a question of law alone in the form of a stated case.

[2] The Assessor of Area 09 (Vancouver) assessed ten commercial properties owned by the Appellants located on the west side of Vancouver. The Appellants took the matter to the Property Assessment Review Panel. That panel confirmed the decision of the Assessor. The Appellants then appealed the determination to the Property Assessment Appeal Board. It is the decision of this latter Board which is the subject of this appeal.

[3] The Appellant put forward five questions for the Board to present in the Stated Case. In response to a preliminary objection, I held on September 15 that two of those questions were not properly before me as permissible questions under s. 65. They raised issues of natural justice and relied on facts outside the Stated Case. The three remaining questions are:

> 2. Did the Board err in law by acting upon a view of the facts which could not reasonably be entertained when it failed to value the properties in a manner consistent with previous decisions?
>
> 3. Did the Board err in law by acting upon a view of the facts which could not reasonably be entertained when it found that the highest and best use for the properties was an interim use?
>
> 4. Did the Board err in law and did it offend generally accepted appraisal principles when it found that the highest and best use for the properties was an interim use?

[4] The questions are drafted in an argumentative manner. Both questions (2) and (3) contain conclusions which are in dispute. Nonetheless, I can discern the basis of the Appellants' objection and will proceed to consider the questions.

[5] The value of the land is agreed in each case. What is in dispute is the value of improvements. The position of the Appellants is that the value of the improvements in each case is zero.

[6] It is agreed that these properties have improvements in place which create some income for the owners. The properties are sites for redevelopment at some future time.

[7] There are two concepts used in assessment which are relevant here. The first is the concept of "highest and best use". The aim in assessment is to determine market value. Highest and best use is determined by the market, not by the intentions of the property owner. The concept was explained in the decision of the Assessment Appeal Board in *Hanover Properties Ltd.* v. *Assessor of Area No. 8 – North Shore/Squamish Valley* (March 14, 1997), Property Assessment Appeal Board Decision No. 17971:

> The highest and best use, therefore, is not necessarily the use to which a particular owner would put a property, but the use to which the market generally would put it. The value which the market places on a particular piece of property will reflect its highest and best use, and it is that value that the Board is required to find. A finding that the highest and best use of a property is for redevelopment does not mean that the property will in fact be redeveloped within any particular time frame. It is the use among legally permissible, physically possible, and economically feasible options that commands the highest value for the property in the market. The owners of the subject property may choose to continue its use as rental apartments for the foreseeable future for personal reasons including pride of ownership or financial security, and that is their choice. But the market evidence before the Board shows that such a use is not the highest and best use as that term is understood in appraisal theory, and it is the value indicated by the highest and best use that the Board must place on the Roll for assessment purposes.

[8] Second is the concept of "interim use". This concept is based on the principle that although development will occur in the future, existing buildings may produce income which exceeds operating expenses in the meantime. This use in the period before redevelopment takes place is called "interim use."

[9] The application of the concept of interim use was the central issue before the Board in the decision under appeal.

[10] The position of the Assessor was that outmoded improvements may create increments of value over the value of vacant land. During transition from one use to a new use, old improvements may make a property worth more than the vacant land.

[11] The property owners agreed that the improvements in place create income for their owners. However, they argued before the Board that the concept of interim use is limited to special circumstances where there are abnormal or unusual conditions which could impede development.

[12] The Board agreed with the Assessor. It cited *Appraisal of Real Estate, (Canadian Edition)*, a publication of the Appraisal Institute of Canada which referred to interim uses as the highest and best uses which are likely to change in a relatively short time.

[13] That text contains an explanation of the application of the concept:

> An interim use may or may not contribute to the value of the site or improved property. Farming vacant land does not contribute to the site's value unless the income produced exceeds a typical return for similar vacant land that is not used for agricultural purposes. ...
>
> Interim uses such as farming operations, parking lots and golf courses may be contributory uses. In comparing a subject property with other property, differences in their interim uses must be taken into account even though their future highest and best uses are identical. For example, consider two sites that are expected to be economically ready for high-rise office building construction in about five years. One property has a commercial interim use that produces $40,000 more net operating income per year than the other property which has a parking lot as its interim use. The site with the commercial interim use might be worth $150,000 more than the other site ($40,000 for five years discounted at 10.5 percent with a factor of 3.743).

[14] The parties in this case agree that the standard for establishing an error of law is that described in *Crown Forest Industries Ltd.* v. *Assessor of Area 6 – Courtenay* (1985), B.C. Stated Case 210, [1985] B.C.J. No. 163 (S.C.) (QL) where Madam Justice Southin stated at 1191:

> Under the British Columbia statute, this Court has no power to substitute its opinion on questions of fact for those of the Board.
>
> So long as the Assessment Appeal Board which must, in deciding appeals to it, apply the Act does not:
>
> 1. misinterpret or misapply the section – see *Pacific Logging Co. Ltd.* v. *The Assessor* (1977), 2 S.C.R. 623 adopting the dissenting judgment of McIntyre, J.A. in the Court of Appeal 12th November, 1976 (unreported);
>
> 2. misapply any applicable principle of general law; or
>
> 3. act without any evidence or upon a view of the facts which could not reasonably be entertained.
>
> this Court has no power to intervene.

[15] The parties also agree the Court has power to intervene where the Board uses an appraisal method that is wrong in principle: *Lornex Mining Ltd.* v. *British Columbia (Assessor of Area No. 23 – Kamloops)*, [1987] B.C.J. No. 2555 (S.C.).

[16] I turn to the questions.

> 2. Did the Board err in law by acting upon a view of the facts that could not reasonably be entertained when it failed to value the properties in a manner consistent with its previous decisions?

[17] The Appellants argue that the Board ignored its own decision in *Hanover Properties.* The Appellants also submit that the decision is inconsistent with a decision of this Court in the *Arbutus Club* v. *Assessor of Area 09 – Vancouver* (1980), 24 B.C.L.R. 301 (S.C.) and that the decision is inconsistent with the recent decision of the Board in *Broadway Properties Ltd. et al* v. *Assessor of Area 09 – Vancouver*, 2005 PAABBC 20050029.

[18] The reasoning in the *Arbutus Club* does not assist the Appellants. In that case the Board found that the Assessment Appeal Board committed an error of law when it accepted a valuation of improvement from the Assessor after determining that the land should be valued as if it were zoned residential. The land was, in fact, zoned recreational.

[19] I turn to the previous decisions of the Property Assessment Appeal Board. This Board is an administrative tribunal. There is no principle of *stare decisis.* Although tribunals strive for consistency, there is no rule of law requiring a decision to be consistent with all previous decisions.

[20] In any event, inconsistency has not been shown here. In *Hanover Properties*, the appeal concerned an apartment building in West Vancouver. The parties were within 4% of agreeing on the total value of the property, but the Assessor argued that the improvements were worth zero and the Appellants argued that most of the value should be in the improvements. The Board decided that 100% of the value should be attributed to the land. Although no value was assigned to the improvements, there was no mention of interim use. The Assessor did not put forward a case for interim use; the concept is not mentioned.

[21] The recent decision of the Board concerning *Broadway Properties* concerns several industrial buildings located in the Mount Pleasant area of Vancouver. The issues in that case were, first, the capitalization rate applicable to the net operating income for each property, and, second, the actual value of each property. The Board in that case reached this conclusion in respect of one of the properties:

> As the parties have agreed to land value, the corresponding reduction would apply to improvements alone and would result in a negative improvement value. When the value by the income approach is less than the value of the land as vacant, the highest and best use is not the current use. Under the circumstances, I find total assessed value to be equal to the agreed upon land value.

[22] That is the conclusion the Appellants seek in the present case, but the decision has not been shown to me to be inconsistent with the decision under appeal.

[23] The remarks quoted were in respect of only one of the 13 properties under appeal in that decision. Again, there was no argument in that case regarding interim use. There was no discussion of the principle of interim use.

> 3. Did the Board err in law by acting upon a view of the facts which could not reasonably be entertained when it found that the highest and best use for the properties was an interim use?
>
> 4. Did the Board err in law and did it offend generally accepted appraisal principles when it found the highest and best use for the properties was an interim use?

[24] It is useful to consider these questions together. Both of these grounds attack the decision of the Board that the highest and best use of the properties was an interim use.

[25] That was the very issue before the Board. The decision sets out the positions of the parties and refers to texts respecting real estate appraisal and two published articles concerning the relationship between highest and best use and interim uses. The Board concluded at para. 48:

> I find from the articles the value of the improvements under interim use must be considered as part of good appraisal practices. The method of evaluating the value seems to be dependent on the suitability of the individual property and the analysis undertaken by the expert appraiser. However, I find the concept is clear, income producing improvements on interim property do have value.
> [26] The Appellants' argument both before the Board and in this court is that the concept of interim use is reserved for unusual circumstances and is not a principle which can be applied in the present case. However, there is no support for this proposition either in the previous decisions or in the textbooks to which I was referred.

[27] The answers to the three questions are "no" in each case. There is no error of law. The appeal is dismissed with costs.

SC 482ACont Broadway Properties Ltd et al v AA09

**BROADWAY PROPERTIES LTD.**
**BOTHAM HOLDINGS LTD.**
**ROBCO PROPERTIES LTD.**
**2000 HOLDINGS LTD.**
**RONALD S. ROADBURG and**
**REFRIGERATIVE SUPPLY LIMITED**
**v.**
**ASSESSOR OF AREA 09 - VANCOUVER**

BRITISH COLUMBIA COURT OF APPEAL (CA033525) Vancouver Registry

Before the HONOURABLE MR. JUSTICE SMITH, the HONOURABLE MR. JUSTICE THACKRAY, and the HONOURABLE MR. JUSTICE LOWRY

Date and Place of Hearing: May 14, 2007, Vancouver, BC

D. Clarke for the Appellant
G. Holeksa for the Respondent

***Question of law – Applicable Principle of General Law***

*The Assessor of Area 09 – Vancouver assessed ten commercial properties owned by the Appellants located on the west side of Vancouver. The value of the land was not in dispute, only the value of improvements. The position of the Appellants was that the value of the improvements in each case should be zero. The Property Assessment Appeal Board ("the Board") found in favor of the Assessor. The Appellants appealed that decision to the BC Supreme Court asking three questions. The BC Supreme Court found in favor of the Assessor. Leave was granted for an appeal on one of the three questions which the Supreme Court judge answered in the negative:*

2. *Did the Board err in law by acting upon a view of the facts which could not reasonably be entertained when it failed to value the properties in a manner consistent with previous decisions?*

***HELD:*** *Appeal Dismissed.*

*This Court found that the Appellants sought to change not only the question on which leave to appeal was granted but the Stated Case itself. The contention was that the Board erred in misapplying what they said is an applicable principle of general law rather than acting without any evidence or acting on a view of the facts that could not be reasonably entertained.*

*This Court found that the basis of an appeal from a decision of the Board is circumscribed by the statute. It is confined to a question of law alone. There is no provision under which the court can consider a question that has not been stated or, for that matter, to alter and then answer a question that has been stated. This Court therefore dismissed the appeal.*

**Reasons for Judgment (Oral)** May 14, 2007

[1] LOWRY, J.A.: This is an appeal from the order of Mr. Justice Kelleher dismissing an appeal by way of a Stated Case on questions of law alone from the Property Assessment Appeal Board with respect to the assessed value of ten properties owned by the Appellants. Leave has been granted for an appeal on one of the questions which the judge answered in the negative:

> 2. Did the Board err in law by acting upon a view of the facts which could not reasonably be entertained when it failed to value the properties in a manner consistent with previous decisions?

[2] The subject properties comprise a site for redevelopment in the future. The value of the land is agreed. The dispute between the Appellants and the Assessor is whether what are income earning but outmoded improvements (buildings) enhance the market value of the properties. The Assessor valued the properties on the basis of the "interim use" concept based on the principle that, although property may at some time be redeveloped, existing improvements enhance the market value where net revenue exceeds operating expenses such that the market value is then greater than the value the land would have if it was vacant. The Appellants maintain that the revenue is less than what the ultimate cost of removing the improvements will be and say the concept of "interim use" has no application. Some evidence was adduced before the Board on both sides of the issue and the Board accepted the approach taken by the Assessor as had the Property Assessment Review Panel from which the Appellants had appealed to the Board.

[3] The judge recognized, and it is agreed, that the standard for establishing an error of law was as stated in *Crown Forest Industries Ltd.* v. *Assessor of Area 6 - Courtenay*, [1985] B.C.J. No. 163 (S.C.). There it was said that the court has no power to intervene in respect of a decision of the Board so long as in deciding an appeal the Board does not:

> 1. misinterpret or misapply the [legislation] ...;
>
> 2. misapply any applicable principle of general law; or
>
> 3. act without any evidence or upon a view of the facts which could not reasonably be entertained.

In addressing the second of the questions stated, the judge rejected the contention that the Board's decision was inconsistent with its earlier decisions and answered "No".

[4] Based on their factum, the Appellants say now:

> 15. So the error of the Board was to ignore the evidence of Mr. Parkes (for the Appellants), however weak it was, that the income and costs associated with the obsolete improvements cancelled each other out. The other error was to accept the evidence of the Assessor that not all of the properties could be developed at once, when the real issue was as stated by Mr. Parkes what the price that each property alone would fetch on assessment day from "a willing vendor to a willing purchaser".
>
> 16. The learned Chambers judge did not have before him a question alleging the forgoing error. ...

The Appellants then state the question to be addressed on this appeal as follows:

> 17. Did the learned Chambers Judge misdirect himself and err in law in misinterpreting authorities and in failing to follow the legal principle that where land is valued as if vacant the Assessor must not value the improvements "conventionally".

They then argue:

> 20. The Board had evidence - expert evidence - from which it could choose one or the other version, the Appellants', or [the Appraiser's], depending upon the Board's decision to select among various techniques of estimating actual value. On this basis the Board's decision would be unassailable. The problem is that the question is not a question of appraisal theory, but a question of law. The law was not cited to the Board. A glimpse of the law was cited to the Court below.
>
> 21. The legal principle has been enunciated repeatedly and on high authority and was not put to the judge below.
>
> 22. In the result the Board and the court below have fallen into error of law - not the error of acting without evidence, but a pure error of law, the legal error described in point 2 of the *Crown Forest* case.

[5] It appears to me that what the Appellants seek to do is change not only the question on which leave to appeal to this Court has been granted but the Stated Case itself. Their contention now is that the Board erred in misapplying what they say is an applicable principle of general law rather than acting without any evidence or acting on a view of the facts that could not be reasonably entertained. They seek to contend the court can intervene because the Board offended the second of the three considerations stated in *Crown Forest* rather than the third, although they state the nature of the order they seek as follows:

> 30. The Appellants seek an order that question #2 from the Stated Case herein be answered "yes".

[6] I consider that once it is accepted, as it is, that the Board did not act upon a view of the facts which could not reasonably be entertained, the second question of the Stated Case must be answered "No", which is the answer the judge gave. It follows he did not err and the appeal must be dismissed. It is not open to this Court to consider a question that the Board did not state and in respect of which no leave to appeal has been granted.

[7] The court derives its jurisdiction to review a decision of the Board from the *Assessment Act*, R.S.B.C. 1996, c. 21 which provides:

> 65(1) Subject to subsection (2), a person affected by a decision of the board on appeal, ... may require the board to refer the decision to the Supreme Court for appeal on a question of law alone in the form of a stated case.
>
> (2) Within 21 days after receiving the decision referred to in subsection (1), the person must deliver to the board a written request to refer the decision to the Supreme Court, and include in the request the question of law to be referred.

[8] The basis of an appeal from a decision of the Board is circumscribed by the statute. It is confined to a question of law alone. There is no provision under which the court can consider a question that has not been stated or, for that matter, to alter and then answer a question that has been stated. Counsel on this appeal, who did not frame the question, asks us to consider its wording generously. But on what he says I consider that would require our answering a different question than what has been posed in the Stated Case.

[9] I would dismiss the appeal.

[10] SMITH, J.A.: I agree.

[11] THACKRAY, J.A.: I agree.

[12] SMITH, J.A.: The appeal is dismissed.

The Honourable Mr. Justice Lowry