SC 529 Allard Contractors Ltd v AA04 & PAAB

Link to Property Assessment Appeal Board Decision

ALLARD CONTRACTORS LTD.

v.

ASSESSOR OF AREA 04 – CENTRAL VANCOUVER ISLAND and PROPERTY ASSESSMENT APPEAL BOARD

SUPREME COURT OF BRITISH COLUMBIA (S090676) Vancouver Registry

Before the HONOURABLE MR. JUSTICE SEWELL
Date and Place of Hearing: May 12, 2009, Vancouver, B.C.

Charles F. Willms & Michelle Booker for the Appellant
David Houston for the Respondent

"held for" – B.C. Reg. 438/81 – Classification of unused land

This appeal is about the proper classification of three unused properties with "residential" zoning in the Nanaimo Regional District owned by Allard Contractors Ltd. ("Allard"). The properties are legally described as Lot 1, Lot 2 and Lot 3, Block 1438, Nanoose District (the "Property"). Allard treats the three properties as a single property of approximately 80 acres. For the 2008 assessment roll, the Assessor applied a split classification of Class 5 – light industry and Class 1 – residential to Lots 1 and 2, and a single classification of Class 5 to Lot 3. The 2008 Property Assessment Review Panel confirmed these classifications. The issue before the Property Assessment Appeal Board (the "Board") was the determination of the correct classification of the Property in accordance with the Prescribed Classes of Property Regulation*, B.C. Reg. 438/81 (the "Regulation"). The Board concluded that the Property should be classified as Class 6 – business and other. This Court was asked the following questions:*

Question 1: Did the Board err in law when it determined that with respect to the land and improvements which are the subject of this appeal (the "Property") it was not necessary for the Board to find that the Property was held for business, commercial, or industrial purposes law (sic) in its interpretation or application of section 1(c) of the Prescribed Classes of Property Regulation*, B.C. Reg. 438/81 as amended?*

Question 2: Did the Board err in law in concluding that, notwithstanding that Allard did not intend to develop the Property itself for any of the purposes listed in section 1(c) of the Regulation, marketing the Property for sale with the clear intention of attracting potential purchasers interested in developing the Property for any of the purposes in section 1(c) excluded the Property from section 1(c)?

Question 3: Not answered as it does not raise a question of law.

Question 4: Not answered as it does not raise a question of law.

***HELD:** Appeal Allowed.*

This Court found that section 1(c) requires the Board to determine the owner's intention. In so doing however, it must proceed on the basis of the objective evidence, that is the surrounding circumstances and how the owner has conducted itself. The critical question in determining whether section 1(c) of the Regulation applies to unused land, which is zoned for residential use continues to be the purpose for which the owner holds the Property on the relevant date. In this Court's view that question was answered

by the Board when it found that Allard had no intention to develop the Property for any purpose. This means that the Property was not held for any of the purposes set out in section 1(c) of the Regulation. This Court answered questions 1 and 2 "yes".

Reasons for Judgment June 1, 2009

INTRODUCTION

[1] This is an appeal by way of Stated Case from a decision of the Property Assessment Appeal Board (the "Board") dated December 18th, 2008. The appeal concerns the proper classification for 2008 assessment purposes of three properties in the Nanaimo Regional District ("NRD") owned by the Appellant Allard Contractors Ltd. ("Allard"). The properties are legally described as Lot 1, Lot 2 and Lot 3, Block 1438, Nanoose District (the "Property"). Each lot has an area of 26.17 acres, although Allard essentially treats them as a single property of approximately 80 acres. For the 2008 roll, the Assessor applied a split classification (Class 5 - Light Industry and Class 1 - Residential) to Lots 1 and 2, and a single classification (Class 5 - Light Industry) to Lot 3. The 2008 Property Assessment Review Panel (the "Review Panel") confirmed these classifications.

[2] The appeals before the Board were from the decisions of the Review Panel. The issue before the Board was the determination of the correct classification of the Property in accordance with the (*Prescribed Classes of Property Regulation*), B.C. Reg. 438/81 (the "Regulation") a regulation made pursuant to the *Assessment Act*, R.S.B.C. 1996, c. 20 (the "Act").

[3] The Board concluded that the Property should be classified as "Class 6 - business and other" pursuant to the Regulation.

[4] The questions set out in the Stated Case are:

1) Did the Property Assessment Appeal Board ("Board") err in law when it determined that with respect to the land and improvements which are the subject of this appeal (the "Property") it was not necessary for the Board to find that the Property was held for business, commercial, or industrial purposes law (sic) in its interpretation or application of section 1(c) of the Prescribed Classes of Property Regulation, B.C. Reg. 438/81 as amended (the "Regulation")?

2) Did the Board err in law in concluding that, notwithstanding that Allard did not intend to develop the Property itself for any of the purposes listed in section 1(c) of the Regulation, marketing the Property for sale with the clear intention of attracting potential purchasers interested in developing the Property for any of the purposes in s. 1(c) excluded the Property from s. 1(c)?

3) Did the Board misinterpret and misapply *Appia Developments Ltd.* v. *Area 10* ((2002) PAABBC 20027164) and therefore err in law in its interpretation or application of section 1(c) of the Regulation?

4) In the alternative to (3), was *Appia Developments Ltd.* v. *Area 10* ((2002) PAABBC 20027164) correct in law?

[5] For a number of years gravel pit operations were conducted on the property. A gravel pit operation is a "mine" as defined in the *Mines Act*, RSBC 1996, c. 293. The property is the subject of a mining permit under the *Mines Act* issued September 16, 1992 and amended January 28 and February 23, 1993 ("Mine Permit"). The Mine Permit in its original form approved development of a gravel pit to the west of Romney Creek, and the 1993 amendments approved development of a second pit east of Romney Creek. The east pit partially covers all three Lots, and the west pit partially covers Lots 1 and 2. In these reasons, the two gravel pits on the Property are referred to collectively as the "Allard Pit".

[6] The Mining Permit sets out conditions for protection and reclamation of the surface of the land and watercourses affected by the mine ("Reclamation Conditions"). As required by the Mining Permit, Allard

deposited security in the amount of $10,000 ("Security"), to be held by the Ministry of Energy, Mines and Petroleum Resources ("MEMPR") until completion of the Reclamation Conditions.

[7] Under a royalty agreement with Allard, Colin Springford of Quality S & G Ltd. ("Springford"), who owned a gravel pit directly across Fairdowne Road from the Property, operated the Allard Pit from 1992 to 2003. During the period that he operated the Allard Pit, Springford engaged in all mining activities authorized under the Mining Permit, including crushing, screening and washing. No gravel extraction has occurred on the Property since Springford ceased operating the Allard Pit in October 2003. Allard has not completed the Reclamation Conditions and MEMPR continues to hold the Security.

[8] The Board found that as of October 31, 2007 the Allard Pit was not an active operating mine, but the Mining Permit would remain active (or valid) until all reclamation conditions were completed. The Board found the Allard Pit has been inactive since at least early 2004.

[9] The Board found that as of October 31, 2007 there was no activity being carried on at the Property. No gravel extraction has occurred on the Property since Springford ceased operations. Since the Property was under "care and maintenance", no mining activity could be carried on without first notifying MEMPR, which would determine whether an updated mine plan and increased bond would be required. The Board found there was no evidence of any other type of activity being carried on.

[10] The Board found that the Property had "no present use" at October 31, 2007 and that as of that date the Property was not specifically zoned for business, commercial or industrial purposes.

[11] The Board found it more probable than not that the area of the Property subject to the Mine permit is not mined out.

[12] On October 26, 2007 Allard listed the property for sale.

[13] At October 31, 2007, Allard did not intend to develop the Property itself for any of the purposes listed in section 1(c) of the Classification Regulation, but marketed the Property with the clear intention of attracting potential purchasers interested in the Property's development potential for any of those purposes. The Board found that rezoning for commercial or business use is, more probably than not, a hurdle on the path to potential develop (sic) and not a barrier. Rezoning is not necessary to extract and remove gravel from the Property. Although rezoning for some processing activities may not have been possible under the Official Community Plan (OCP) in effect at October 31, 2007, there was available information at that time of a pending change in the OCP that would make rezoning for this use possible.

[14] The Board found that more than one type of future development for the Property was possible, and that it was equally probable that Allard held the Property for business, commercial, industrial or residential development purposes.

[15] The Board found the Property failed to meet the criterion in section 1(c) of the Regulation and did not meet the criteria for classification as Class 5 – Light Industry.

[16] The Board found the Property must be classified as Class 6 – Business and Other and ordered the Assessor to amend the 2008 assessment roll to classify the Property as Class 6 – Business and Other.

[17] This appeal is brought pursuant to section 65(1) of the Act, which permits any person affected by a decision of the Board to require the Board to refer the decision to the Supreme Court for appeal in the form of a Stated Case. The applicable legal principles for an appeal by way of Stated Case are as follows:

> 4. ...The questions should be questions of law only. The questions should be framed by, and are the sole responsibility of the appellant. Statements of fact are within the exclusive province of the Board. On appeal, the Court must accept the findings of fact made by the Board, and not substitute its own. The Board should not express opinions, or put forward arguments. The Court may not look beyond the stated case to make inferences of fact, nor find new facts, nor weigh and consider the sufficiency

of the evidence. The Court may refer to the Board's reasons. The Court may also refer to the transcript of evidence, but only for the purposes of interpreting or explaining the stated case. (at para. 4).

Tumbler Ridge (District) v. *British Columbia (Assessor of Area No. 27 - Peace River)*, [1985] B.C.J. No. 810 (Q.L.) (Finch J. as he then was)).

[18] In *Gemex Developments Corp.* v. *Coquitlam Assessor, Area No. 12* (1998) 62 B.C.L.R. (3d) 354 (C.A.), at para. 9, the Court approved the following definition of a "question of law" for the purpose of the Act from the decision of *British Columbia (Assessor of Area No. 26 – Prince George)* v. *Cal Investments Ltd.*, [1993] B.C.J. (Q.L.) No. 93 (B.C.S.C.):

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].

[19] This appeal is concerned only with ground 1 above.

[20] Both counsel made submissions about whether the questions set out in the Stated Case actually did raise issues of law. In particular, Mr. Houston submitted that Questions 3 and 4 did not raise any issue of law. I do not think that Questions 3 and 4 add anything to the issues before me. It is my view that Questions 1 and 2 do raise the issue of the proper construction of section 1(c) of the Regulation and do therefore raise issues of law.

[21] I have concluded that the critical issue before me is raised in Question 2 although I would have phrased it somewhat differently. I do not think that the Board found that marketing the Property for sale with the intention of attracting purchasers interested in developing the Property for any of the purposes set out in section 1(c) in and of itself excluded the Property from being classified as class 1 pursuant to section 1(c). It seems clear that the marketing was only one factor the Board took into account. That said, I do think that Question 2 does raise the critical issue of the proper interpretation of section 1(c) and in particular the meaning of the phrase "held for" in that section.

[22] Pursuant to section 19(14) of the Act, the Property is to be classified for assessment purposes. Section 19(14) reads as follows:

S.19(14) The Lieutenant Governor in Council must prescribe classes of property for the purpose of administering property taxes and must define the types or uses of land or improvements, or both, to be included in each property class.

[23] The Regulation establishes nine classes of property for assessment purposes. The relevant portions of sections 1 and 6 provide:

Class 1 – Residential

1. Class 1 property shall include only:

(c) land having no present use and which is neither specifically zoned nor held for business, commercial, forestry or industrial purposes;

...

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.

[24] In its decision the Board found that the Property was zoned residential and not specifically zoned for business, commercial or industrial purposes. The Board also found that, on October 31, 2007, the Property had no present use.

[25] The Appellant submits that the only issue before me is whether, on a proper construction of the Regulation, the fact that Allard marketed the Property for sale for numerous possible future purposes meant that the Property was not entitled to residential classification. I have already indicated that the decision of the Board cannot be so narrowly construed. In my view the Board based its decision on its conclusion that it was as likely as any other outcome that the Property would be used for business, commercial or industrial purposes. Because those uses were as likely as any other the Board could not determine that the Property was not held for business, commercial or industrial purposes. Thus it was not just that those uses were possible but also that they were as probable as any other use that led the Board to decide that the Property did not meet the requirements to fall within section 1(c) of the Regulation.

[26] The Assessor submits the Appellant can only succeed if it can demonstrate that the finding of the Board that the Property was held for a purpose listed in section 1(c) was made either without evidence or upon a view of the evidence that could not reasonably be entertained.

[27] In his submissions counsel for the Assessor relies on the fact that the Property was under a permit for gravel extraction, and submits that the permit takes precedence over the zoning and that the Board was well within its jurisdiction to find that the Property was held for a purpose listed in section 1(c).

[28] The difficulty with that submission is that section 1(c) of the Regulation is specifically directed to the uses of land and the extraction of minerals is not a use of land. The mere existence of a permit to extract minerals without more does not permit the carrying out of ancillary mining activities. Therefore the existence of the Permit does not address the issues raised in section 1(c).

[29] The Appellant and the Assessor are in agreement that the task of the Court on a Stated Case was correctly stated by Madam Justice L. Smith in *Vancouver Pile Driving Ltd.* v. *British Columbia (Assessor of Area No. 8 – Vancouver Sea to Sky Region)*, 2008 BCSC 810 at paras. 78 and 79 as follows:

> **78** With respect to the substantive grounds of appeal in the Stated Case, it is common ground among the parties that the standard of review with respect to the interpretation of s. 19(5) and (6) of the *Assessment Act* is correctness. I find that correctness is the appropriate standard in the light of the nature of the question and the relative expertise of the Board and the Court.
>
> **79** I find that with respect to the interpretation of the lease and the land use management plan, the Board is entitled to deference, given its expertise, and the standard of review is reasonableness. With respect to other issues attacking the Board's findings, the Appellant is required to show either that there was no evidence to support those findings or that the Board took a view of the facts that could not reasonably be entertained.

[30] The essential question therefore is whether the Board correctly interpreted the Regulation. If the Board made no error in its construction of the Regulation this Court can intervene only if the Appellant demonstrates that there was no evidence to support the Board's finding of fact or the Board took a view of the facts that could not reasonably be entertained.

[31] As I understand it, Allard's submission is that the Board misconstrued the Regulation in finding that the mere possibility that the Property might be used for business, commercial, forestry or industrial purposes meant that it could not be said that the Property was not held for business, commercial, forestry

or industrial purposes. I have phrased the issue in this way because the section of the Regulation in issue puts the proposition negatively, that is, it states that Class 1 shall include only land having no present use and which is neither specifically zoned nor held for business, commercial, forestry or industrial purposes.

[32] Mr. Willms submitted that the adverb "specifically" found in section 1(c) modifies both the verb "zoned" and the verb "held". He submits that section 1(c) should be read as follows "land having no present use and which is neither specifically zoned nor specifically held for business, commercial, forestry or industrial purposes". I understand his submission to be that this is the correct grammatical construction of section 1(c) and the one which gives effect to the intent of the Regulation, which is to base the classification of land on the uses to which the land is put or intended to be put. Mr. Willms says that the effect of the Board's decision is to read section 1(c) as follows "land having no present use and which is neither specifically zoned nor possibly held for business, commercial, forestry or industrial purposes".

[33] The Property is zoned for residential purposes. Allard, its current owner, has no intention of using it for any purpose and is seeking to sell it. In its advertising for the Property, Allard describes the Property as a potential site for future development.

[34] In paragraph 62 of the Board's decision, the Board states as follows:

> [62] In *Appia Developments Ltd.* v. *Area 10*, *supra*, this Board observed that it was possible to reach a conclusion from the evidence that a property fails to meet the criteria in section 1(c) of the Classification Regulation because it is held for more than one purpose. Looking objectively at the evidence of the circumstances surrounding Mr. Allard's intention for the Property at October 31, 2007, *I conclude that more than one type of future development of the Property was possible, and that it was equally probable that Allard held the Property for industrial, business, commercial or residential development purposes.* (emphasis added)

[35] I take two things from this paragraph. The first is that the Board concluded that more than one type of development of the Property was possible even though the existing zoning did not permit business, commercial or industrial uses. The second is that the Board concluded that it was equally probable that the Property would be developed for industrial, business, commercial or residential development purposes and that it was, therefore, impossible to say that the Property was not being held for industrial, business or commercial purposes.

[36] In my opinion the critical question on this appeal is whether the fact that it was as probable as any other outcome that this Property would be used for business, commercial or industrial purposes permitted the Board to conclude that it could not say that the Property was not held for any of those purposes.

[37] At paragraph 61 of its decision the Board found as a fact that Mr. Allard did not intend to develop the Property himself for any of the purposes listed in s. 1(c) but he marketed the Property with the clear intention of attracting potential purchasers interested in the Property's development potential for any of those purposes. Although the reference in paragraph 61 is to Mr. Allard, I take it that the Board accepts that Mr. Allard's intention in this matter is the same as the intention of the Appellant, Allard.

[38] The Board concluded that on a proper construction of the Regulation and the basis of the facts as found by it and recited above it could not conclude that the Property was not held for business, commercial or industrial purposes. Mr. Willms argues that the Board erred in law in so doing. He argues that the verb "held for" necessarily requires the Board to determine the intent of the owner of the Property in question. It is the intent of that owner, objectively determined, which must govern the question. Mr. Willms submits that the fact that some future owner may intend to hold the Property for business, commercial or industrial purposes does not mean that as of the relevant date the present owner was holding the Property for any of those purposes.

[39] It is common ground that the relevant date for determination of the purpose for which the Property is held is October 31, 2007.

[40] As recited above, the Board made an express finding that Allard did not intend to develop the Property for any of the purposes listed in section 1(c) of the Regulation. It seems to me that this finding of the Board satisfies the requirement of section 1(c) if the operative intention is that of the owner on the relevant date. To my mind the words "held for" necessarily imports an element of intention on the part of the owner. I do not see how it logically follows that it can be said that the use to which some subsequent owner intends to put the Property can be imported retroactively into the intention of the owner on the relevant date.

[41] A number of cases were referred to in the course of argument. None of these cases deals with the express issue before me.

[42] Both counsel referred to *Bosa Development Corp.* v. *British Columbia (Assessor of Area No. 12 - Coquitlam)*, 30 B.C.L.R. (3d) 263, (BCCA) (*Bosa*). In that case the property in question was subject to a zoning which permitted commercial uses. However, the property was also subject to a restrictive covenant in favour of the municipality establishing the purposes for which all areas within the property were to be used, with some 70% of the property being designated as residential.

[43] The issue in *Bosa* was whether the area designated for residential use should have led to an equivalent proportion of the property being classified as Class 1, residential, rather than as Class 6, business and other. The majority of the Court held that the plain meaning of section 1(c) was that if land was zoned to permit a business, commercial or industrial purpose it did not meet the conditions necessary to be classified within Class 1. In the majorities' view any restrictive covenant made by the owner which had the effect of limiting the uses to which the owner could put its property was not relevant to the question of whether the property was specifically zoned for business, commercial or industrial purposes.

[44] Mr. Justice Lambert, in dissent, was of the view that as the land was under development for residential purposes it was being "used for residential purposes" within the proper meaning of section 1(a) of the Regulation.

[45] In the course of delivering his dissenting judgment, Mr. Justice Lambert stated as follows:

> Property is held for a purpose when there is an intention to dedicate it to that purpose in the future. In contrast, property is used for a purpose when it is committed to that purpose by a binding commitment.

The above passage was quoted by the Assessment Appeal Board in the *Appia Developments Ltd.* decision referred to questions 3 and 4 in the Stated Case.

[46] In this case, the Board appears to have asked itself this question: On the evidence before us, are we able to conclude that the Property is not held for business, commercial or industrial purposes?

[47] The Board quite correctly, in my view, decided that the answer to that question must be determined objectively, that is, on the basis of all of the objective evidence before it. However, in my view, the Board equated the fact that it was as probable as not that the Property would at some point in the future be used for those purposes with the fact that the Property was held for that purpose on the relevant date. In my opinion, in so doing, the Board erred.

[48] After a careful review of the Board's decision, I have concluded that it did not address its mind to the question of the actual purpose for which the Property was being held as at October 31, 2007. Instead, the Board addressed its mind to the question of what uses the Property may be put to in the future. The Board recognized that one possible future use was residential. However, the Board went on to say that because it could not say that residential use in the future was any more likely than any other use and, in particular, any more likely than business, commercial or industrial use, it could not determine that Allard did not hold the Property for business, commercial or industrial use.

[49] In reaching its decision, the Board relied heavily on the advertising and listing for the Property prepared by or on behalf of Allard. The Board concluded as a result of that advertising that Allard was holding out to prospective purchasers the possibility that the Property could be developed for one of the purposes set out in section 1(c). To my mind, it was an error for the Board to equate that fact with Allard itself holding the Property for any of those purposes.

[50] In the course of delivering its decision, the Board referred to the *Appia* decision. However, *Appia* is distinguishable. Firstly, in *Appia*, it was quite clear that it was the present owner that intended to develop the property. In addition, in *Appia*, although the property was zoned for single family residential, it was designated for high density commercial and mixed used by the Brentwood Town Centre Development plan adopted by Burnaby council in June 1996. Most importantly, in *Appia* (at para. 35) the Board found as a fact that as of October 31, 2000 the owner was willing to develop the property for commercial purposes given the then existing circumstances.

[51] In this case the Board made an express finding that the Appellant had no intention to develop the Property for any specific purpose and in fact was actively attempting to sell it. The evidence of marketing does not support the conclusion that on Oct 31, 2007 the owner held the Property for any of the possible uses to which a subsequent owner might put it.

[52] I think that the Board failed to address the requirements of section 1(c), which was to determine the purpose for which the owner held the Property as of October 31, 2007. In my view the Board did recognize that as of that date, the owner did not hold the Property for any of the purposes set out in section 1(c). The Board failed to acknowledge that an owner may have no particular purpose for land and may well have decided that it should sell the land and leave it up to the purchaser to decide the use to which the land should ultimately be put. The fact that some type of future use is as probable as any other does not mean that the land is held for the purpose of that future use.

[53] In his submissions Mr. Houston, counsel for the Assessor, submitted that the Board was well within its jurisdiction in finding that the land was held for a purpose listed in section 1(c). In fact the Board made no such finding. As indicated above, the finding of the Board was that it could not find that the Property was <u>not</u> held for any of those purposes.

[54] Mr. Houston also submitted that the intention of the owner is irrelevant because it is the objective test which is applied in the circumstances. In so doing I think he confused the question to be decided with the manner in which it is to be decided. I think that section 1(c) does require the Board to determine the owner's intention. In so doing however it must proceed on the basis of the objective evidence, that is the surrounding circumstances and how the owner has conducted itself. However, the critical question on this issue continues to be what is the purpose for which the owner holds the Property on the relevant date. In my view that question was answered by the Board when it found that Allard had no intention to develop the Property for any purpose. I think that this meant that the Property was not held for any of the purposes set out in section 1(c) of the Regulation.

[55] Accordingly I would answer the questions set out in the Stated Case as follows:

Question 1: Yes

Question 2: Yes

Questions 3 and 4: Not answered as they do not raise a question of law.

"The Honourable Mr. Justice Sewell"