SC 531 AA10 v Abolhassan Sherkat & PAAB

Link to Property Assessment Appeal Board Decision

Quick Link to Stated Case #531 (Supplemental Reasons for Judgment)

Quick Link to Stated Case #531 (Application for Leave to Appeal)

Quick Link to Stated Case #531 (BCCA)

ASSESSOR OF AREA 10 – NORTH FRASER REGION

v.

ABOLHASSAN SHERKAT and
PROPERTY ASSESSMENT APPEAL BOARD

SUPREME COURT OF BRITISH COLUMBIA (S092344) Vancouver Registry

Before the HONOURABLE MR. JUSTICE SLADE
Date and Place of Hearing: April 21, 2009, Vancouver, B.C.

G. McDannold for the Appellant
No one appearing for the Respondents

Development Sites – Contamination – Highest and Best Use

This appeal concerns three properties in the lower Twelfth Street area of New Westminster that had been assessed for the 2008 roll at their highest and best use as development sites. The properties are zoned M-1, Light Industrial District, and are used in accordance with that zoning for automobile sales and service.

The Property Assessment Appeal Board ("the Board") significantly reduced the value on each of the three properties. The Assessor appealed the Board's decision to this Court asking the following three questions:

1. *Did the Board err in law by adopting a method of assessment that was wrong in principle with respect to 221 – 12th Street, by concluding a value that is less than the value of the present use?*
2. *Did the Board err in law by adopting a method of assessment that was wrong in principle with respect to 221 – 12th Street, by concluding a highest and best use that was contrary to the definition of highest and best use?*
3. *Did the Board err in law when it concluded there was no evidence of time adjusted sales to support the Assessor's value of $25 per square foot buildable for the subject properties?*

HELD: *Appeal Dismissed.*

In its answers to questions 1 and 2 the Court found that there was no evidence before the Board of sales data, or opinion, that suggested a value for the subject property based on the present use. The Assessor's evidence, and that of the Owner, approached the task as one of determining the value as a holding property for eventual redevelopment. The evidence before the Board did not establish a basis for a finding that the highest and best use was different than that proposed by the Assessor, and found by the Board. The Court answered both questions "no".

In its answer to question 3 the Court stated that the Board attributed value fluctuations between comparables that sold at different times to other factors. Hence, there was no evidence of time adjusted values to apply in reaching a conclusion on the value of the subject properties as of July 1, 2007. The Court also answered this question "no".

Reasons for Judgment June 25, 2009

INTRODUCTION

[1] This is a Stated Case filed by the Property Assessment Appeal Board pursuant to Section 65 of the *Assessment Act*.

[2] The Board conducted a hearing by written submissions on the Respondents' (the "Owner") appeal concerning his 2008 property assessments for three properties in New Westminster.

[3] On February 13, 2009, the Board rendered a written decision and ordered the Assessor to amend the 2008 assessment roll as follows:

Roll No. 10-40-220-05630.000:		
	FROM	**TO**
Land: Class 6 Business and Other	$6,915,000	$5,437,000
Improvements: Class 6 Business and Other	$8,486,000	$6,590,000
Total Assessed Value:	$10,514,000	$8,590,000

Roll No. 10-40-220-05634.000:		
	FROM	**TO**
Land: Class 6 Business and Other	$1,012,000	$853,000
Improvements: Class 6 Business and Other	$16,500	$10,000
Total Assessed Value:	$1,028,500	$863,000

Roll No. 10-40-220-05682.000:		
	FROM	**TO**
Land: Class 6 Business and Other	$1,698,000	$325,000
Improvements: Class 6 Business and Other	$6,700	$10,000
Total Assessed Value:	$1,704,700	$335,000

[4] From that decision, the Assessor has called on the Board to file this Stated Case asking the following three questions:

1. Did the Property Assessment Appeal Board err in law by adopting a method of assessment that was wrong in principle with respect to 221 - 12th Street, by concluding a value that is less than the value of the present use?

2. Did the Property Assessment Appeal Board err in law by adopting a method of assessment that was wrong in principle with respect to 221 - 12th Street, by concluding a highest and best use that was contrary to the definition of highest and best use?

3. Did the Property Assessment Appeal Board err in law when it concluded there was no evidence of time adjusted sales to support the Assessor's value of $25 per square foot buildable for the subject properties?

FACTS

[5] The facts, as set out in the Stated Case, are as follows:

1. The appeal before the Board was from the decision of the 2008 Property Assessment Review Panel with respect to three properties in the lower Twelfth Street area of New Westminster that had been assessed for the 2008 roll on a highest and best use as development sites.

2. The properties are zoned M-1 (Light Industrial District) and are used in accordance with that zoning for automobile sales and service. They are improved with concrete block buildings (1960s) which range in size and, in some cases, have a basement and/or mezzanine level. 240 Twelfth Street, with a site area of 115,259 sq. ft., is improved with a 24,144 sq. ft. building reflecting a site coverage of 18%. 235 Thirteenth Street has a site area of 18,750 sq. ft. and is improved with a 2,001 sq. ft. building with a site coverage of 8%. 221 Twelfth Street is 28,314 sq. ft. and has a small 986 sq. ft. building with a site coverage of 3%.

3. The issue before the Board was the determination of actual value for each property as of July 1, 2007 and the effect on value, if any, of potential contamination.

4. The Assessor valued the sites at the maximum density according to the Lower Twelfth Street Area Plan, dated April 24, 2004. The Official Community Plan (OCP) was amended in October 2004 to include this plan to guide future land use in the area. In assessing the sites, the Assessor did not make any allowance for remediation, but did deduct the cost of conducting an environmental study for each property.

5. The Board accepted that the highest and best use of the properties is for holding until rezoning and redevelopment can occur in accordance with the Lower Twelfth Street Area Plan, with three stipulations: that the plan indicates that the subject properties are intended for residential development with only a limited amount of commercial in the form of home-based businesses along Twelfth Street; that the sites must be rezoned prior to the highest and best use being realized and it is imperative that the market comparables used to estimate actual value also require rezoning; and that the allowable density on which value is to be calculated is an F.S.R. of 1.5 with the potential to bonus it up to 2.5 in return for the provision of public amenities, which presumably come with an associated cost to the developer.

6. The Board accepted the Assessor's approach of finding the total value of the properties based on comparable land sales (some of which have older improvements in place), and applying all but a nominal value of $10,000 to the existing improvements.

7. The Board concluded a value for the subject properties at $47.50 per square foot of site area and calculated actual values as follows:

Property	Site Area (sq. ft.)	Value per sq. ft.	Total Value
240 Twelfth St.	115,259	x $47.50 =	$5,474,803
235 Thirteenth St.	18,750	x $47.50 =	$890,625
221 Twelfth St.	28,314	x $47.50	$1,344,915

8. With respect to 240 Twelfth Street and 235 Thirteenth Street, the Board found there was a reasonable expectation of contamination but found it had no evidence as to the extent of the contamination (if any) or the cost to clean up.

9. With respect to 221 Twelfth Street, the Board found a reasonable purchaser would take the contamination of this site into consideration. The Board found there were three areas that could potentially affect value, namely: the actual cost of remediation; the time to remediate during which the site is not available for redevelopment; and the potential migration of contamination from the extensively contaminated adjacent Gas Works site from which contaminants may or may not continue to migrate to the subject.

10. For 240 Twelfth Street and 235 Thirteenth Street, the Board found that no deduction for contamination was appropriate except the cost to undertake an environmental study. The Board accepted a deduction of $27,000 for each of 240 Twelfth Street and 235 Thirteenth Street.

11. With respect to 221 Twelfth Street, the Board found actual value should be adjusted by the estimated remediation cost of $1,009,000.

[6] The assessed value of 221 Twelfth Street, after the adjustment on account of the estimated remediation cost, is $335,000.

[7] The Assessor presented two reports at the hearing before the Property Assessment Appeal Board:

1. Report entitled "Information in support of the 2008 Assessment of three holding properties in the City of New Westminster, BC, by Pavel Potiaev, R.I.B.C. as of July 1, 2007.

2. Assessors Response to Appellants Submission, Prepared by Dave Kingston, North Fraser Assessment Office.

[8] The Respondent also presented written submissions.

[9] Mr. Potiaev, in section 4 of his report, says:

Highest and best use is defined as...

that reasonably probably and legal use of vacant land or an improved property which is physically possible, appropriately supported, financially feasible, and that results in the highest value.

[10] Under the subheading "4.3 Conclusion of Highest and Best Use", Mr. Potiaev says:

The conclusion on the highest and best use of subject properties involves reviewing the valuation of properties as if vacant site and a valuation of property as improved. The use that results in the highest value estimate over the longest period of time is considered the highest and best use.

The current improvements contribute minimal (sic) to the overall value in excess of the value of the vacant sites. The improvements contribute to the interim holding income and have interim value. I conclude that the highest and best use of subject properties is an interim use as holding for redevelopment sites under the Lower Twelfth Street OCP. The holding time frame is estimated between three to five years.

[11] Mr. Potiaev used the direct comparison approach to estimate the value of the subject properties "as if vacant land." He employed two units of comparison:

1. The sale price per square foot;

2. The sale price per square foot of maximum building area.

[12] In his site value conclusion, he says:

> Utilizing two units of comparison leads to two value conclusions: the indicated value of the subject properties is estimated $70 per square foot of site area and $25 per square foot buildable area. The latter unit of comparison multiplied by subjects' density of 2.5 FSR indicates site value of $62.50 per square foot of site area and supports value per site area basis.
>
> Referring back to my analysis of appropriate units of comparison in Chapter 5 Valuation Approaches, Appropriate Approaches to Value, I stated that typically both units are equally valid for analysis. Purchasers of comparables 2 and 3 in my site analysis were able to negotiate higher densities than anticipated at the time of sale. Considering unique market preferences and development uncertainties confronting developers in New Westminster, I gave more weight to indication of value per square foot of site area.
>
> I estimate the subjects land value as of July 1, 2007 is $68 per square foot of site area or:
>
> Subject 1 - 240 12th St. - $7,837,612 or rounded: $7,838,000
>
> Subject 2 - 235 13th St. - $1,275,000
>
> Subject 3 - 221 12th St. - $1,925,000

[13] The Owner introduced evidence before the Appeal Board that supported a value of $20 per square foot buildable for the 240 12th St. and 235 13th St. properties. The Owner's evidence supported a value of $15 per square foot buildable for the 221 12th St. property. This did not include a deduction for the cost of any required remediation.

[14] The density suggested by the Owner, for each of the three properties, was 2.5 F.S.R.

REASONS OF APPEAL BOARD

[15] At paragraph 7 of the Reasons, the Board says that "Mr. Potiaev, on behalf of the Assessor, indicates that the highest and best use of the properties is "holding interim use"."

[16] At paragraph 10, the Board says that the Owner "does not dispute the future rezoning and redevelopment potential", but, due to the fact that construction to an F.S.R. of 2.5 would require rezoning, it takes the position that "the evaluation should be based on the current zoning not the potential as stated in the City's O.C.P." (at para. 10).

[17] The Reasons set out, at para. 11, the Appraisal Institute of Canada definition of highest and best use "as that use which is physically possible, legally permissible, financially feasible, and maximally productive".

[18] At paragraph 13, the Reasons say, in part,

> "Given is (sic) the sales evidence, I accept that the highest and best use of the properties is for holding until rezoning and redevelopment can occur in accordance with the Lower Twelfth Street Area Plan..."

[19] The Reasons indicate that the Board considered the land sales evidence introduced by both parties. Both parties proffered evidence of sales of comparable properties, adjusted for location, development horizon, and density potential. As noted above, Mr. Protiaev concluded a value per square foot buildable of $25 which, at a F.S.R. of 2.5, produces a value per square foot of site area of $62.50. The Owner proposed a value for two of the properties at $20 per square foot buildable, and, for one of the properties, a value of $15 per square foot buildable.

[20] The task for the Board was to determine actual values as at July 1, 2007. Mr. Potiaev, for the Assessor, relied on his evidence on sales between July 2005 and November 2006. He stated that a time adjustment is needed for each comparable sale, and estimated 10% - 15% as appropriate. It is stated in the Reasons that "he does not show how he has applied this figure to the comparable sales and no time adjusted sales figures are in evidence". (at para. 23). The Appeal Board concluded that a time adjustment is not warranted on the basis of the evidence. It found that the presence of the variables other than time, including locational and site area differences, may explain the variations in price better than market fluctuations. It is stated, further, at para. 30 that the Board could "find no evidence to support a time adjustment".

[21] At para. 31, the Board explains its basis for concluding a value per square foot buildable of $19 per square foot buildable. This, at the maximum F.S.R. of 2.5, yields a value per square foot of site area of $47.50. Particular reliance is put on the Owner's comparable No. 3, a property with similar current zoning, location, development time frame, and future density potential. Comparable No. 3 was the subject of an interim agreement of purchase and sale entered in January 2006, with a closing in July 2006. The value per square foot buildable was calculated at $19.

[22] In the Assessor's response to the Appellant's submissions, the Assessor points to the Owner's index comparables 5 and 6, and says:

> ... Index 5 sold 12 months prior to the valuation date, index 6 sold 6 months after the valuation date. The two sales indicate a rising market at approximately 2.3% per month ($67.52/$47.53 or 42% over 18 months which equates to 2.3% per month). The Appellants evidence indicates time adjusted sale prices for July 1, 2007 per square foot are $60.65 (2.3% x 12 months = + 27.6%) and $58.20 per square foot (6 months x 2.3% = - 13.8%) respectively.

[23] At paragraph 24 of the Reasons, the Appeal Board says:

> I find no evidence that a time adjustment is required from the sales which were negotiated in 2006 to the valuation date July 1, 2007.

This is plainly a reference to comparables proffered by the Owner, and in particular index property No. 3, as noted above at para. 21.

ANALYSIS

Issue No. 1

[24] Issue No. 1 asks this question:

1. Did the Property Assessment Appeal Board err in law by adopting a method of assessment that was wrong in principle with respect to 221 - 12th Street, by concluding a value that is less than the value of the present use?

[25] As I understand this issue, it asks the question whether the Appeal Board erred by concluding a value that is less than the value *based on* the present use.

[26] The answer to this question is "no". This is because there was no evidence before the Appeal Board of sales data, or opinion, that suggested a value for the subject property based on the present use. The Assessor's evidence, and that of the Owner, approached the task as one of determining the value as a holding property for eventual redevelopment.

Issue No. 2

[27] Issue No. 2 asks this question:

2. Did the Property Assessment Appeal Board err in law by adopting a method of assessment that was wrong in principle with respect to 221 - 12th Street, by concluding a highest and best use that was contrary to the definition of highest and best use?

[28] The answer to this question must also be "no". The evidence before the Appeal Board did not establish a basis for a finding that the highest and best use was different than that proposed by the Assessor, and found by the Appeal Board, namely, a holding property for redevelopment.

[29] Issue No. 3 asks this question:

3. Did the Property Assessment Appeal Board err in law when it concluded there was no evidence of time adjusted sales to support the Assessor's value of $25 per square foot buildable for the subject properties?

[30] The answer to this question is also "no". The Appeal Board addressed the Assessor's argument that a time adjustment should be applied to certain of the comparables to yield a "final value of $25 per square foot buildable for the subject properties" (Reasons para. 30). Although the Appeal Board does not discuss the application of time adjustments by reference to all of the comparables, it is clear that the general rejection of a time adjustment was on the basis that the evidence of fluctuating values over time was likely attributable to other variables, including location and site area differences.

[31] The Board rejected the Assessor's argument (set out above in paragraph 22), that there should be a time adjustment for values ascribed to the index properties. The Board attributed value fluctuations between comparables that sold at different times to other factors. Hence, there was no evidence of time adjusted values to apply in reaching a conclusion on the value of the subject properties as of July 1, 2007.

[32] The appeal is dismissed.

The Honourable Mr. Justice H.A. Slade

SC 531 Cont AA10 v. Sherkat, Abolhassan & PAAB (Supplemental Reasons for Judgment)

ASSESSOR OF AREA 10 – NORTH FRASER REGION

v.

ABOLHASSAN SHERKAT and
PROPERTY ASSESSMENT APPEAL BOARD

SUPREME COURT OF BRITISH COLUMBIA (S092344) Vancouver Registry

Before the HONOURABLE MR. JUSTICE SLADE
Date and Place of Hearing: July 8, 2009, Vancouver, B.C.

G. McDannold for the Appellant
No one appearing for the Respondents

Reconsideration of previous decision

The Assessor asked the Court to reconsider its finding of June 25, 2009 that the Property Assessment Appeal Board did not err in law by concluding a highest and best use that was contrary to the definition of highest and best use.

HELD: *Previous decision upheld.*

The Court found that the evidence supported its previous decision and denied the request for reconsideration.

Supplemental Reasons for Judgment October 15, 2009

INTRODUCTION

[1] The Assessor has requested that I reconsider the finding in my June 25, 2009 Reasons [2009 BCSC 846] that the Property Assessment Appeal Board did not, by concluding a highest and best use that was contrary to the definition of highest and best use, err in law. This issue relates to the property at 221 - 12th Avenue.

[2] In those reasons, I said at para. 26

> ... there was no evidence before the Appeal Board of sales data, or opinion, that suggested a value for the subject property based on the present use. The Assessor's evidence, and that of the Owner, approached the task as one of determining the value as a holding property for eventual redevelopment.

And, at para. 28:

> ... The evidence before the Appeal Board did not establish a basis for a finding that the highest and best use was different than that proposed by the Assessor, and found by the Appeal Board, namely, a holding property for redevelopment.

[3] The Assessor refers to the report of Mr. Potiaev, R.I.B.C., in which reference is made, in relation to the subject property, to:

Subject 3

Income Approach	$1,009,000
Direct Comparison Approach	$1,925,000

[4] The Assessor submits that I may have overlooked this and other evidence of a higher value based on the actual use of the property.

DISCUSSION

[5] In proceedings before the Appeal Board, both the owner and the Assessor argued that the highest and best use for this property, and two others under review, was holding for rezoning and redevelopment according to the official community plan.

[6] In proceedings before the Appeal Board, the Assessor relied on a report from Mr. Potiaev. The purpose of this report, as stated in the letter of transmittal to the Appeal Board, was "... to provide evidence in support of the actual values of the properties ...". In a disclaimer on the title page to the report, Mr. Potiaev says that the report "does not meet the Canadian Uniform Standards of Professional Appraisal Practice, and as such is not an appraisal...".

[7] Mr. Potiaev's "Final Value Estimate" of the subject properties is as follows:

Subject 1 - 240 12th St - $7,838,000
Subject 2 - 235 13th St - $1,275,000
Subject 3 - 221 12th St. - $1,925,000

[8] The above estimates are based on an estimated value per square foot of $68.

[9] Mr. Potiaev's report includes a discussion of the "income approach" to determine a value for each of the three subject properties. Using only the owner's statement of income and expenses for each property, he concluded that the income approach resulted in the following "estimates":

Subject 1 - 240 12th St - $1,162,000
Subject 2 - 235 13th St - $353,000
Subject 3 - 221 12th St - $759,000

The $759,000 figure appears to be a typographical or transcription error, as his Table 2, which sets out a mathematical calculation of value based on the rent actually received by the owner, concludes a value of $1,009,000.

[10] Mr. Potiaev did not, however, provide these income approach valuations in support of a conclusion on the valuation method that would reflect the highest and best use for the properties: He says:

> The income approach was included for illustration purposes to support the selection of an appropriate method of valuation and to support the highest and best use analysis conclusion. For these reasons, I have not relied on the Income method of valuation and only relied on the Direct Comparison method in my final value estimates.

[11] Mr. Potiaev did not consider the rent received by the owner from 221 - 12th Avenue as representative of a market or economic rent for the property. He says:

> The market range of economic rents for industrial land is $1.00 to $1.50 per square foot of site area. The subjects' rents are at the high end or exceeding this range.

[12] Mr. Potiaev is saying that, in the absence of market data that evinces the range of rents for comparable properties, he is not advancing his income approach figure as evidence of the value of the subject property.

[13] The evidence of Mr. Potiaev and Mr. Henrey, for the owner, supported the valuation of the property as a holding property for redevelopment. The Appeal Board preferred the evidence of a comparable provided by Mr. Henrey, and concluded a value of $1,344,915. The Board also allowed a deduction for environmental remediation as advanced by the owner. This brought the value down to $335,000, a figure far below the $1,009,000 "estimated" by Mr. Potiaev on the basis of the "income approach". But this is of no consequence, as there was no evidence of what value the income approach, if applied on the basis of market comparables, would have indicated for the property.

[14] In the result, the conclusions set out in my Reasons remain unchanged.

The Honourable Mr. Justice H.A. Slade

SC531 Cont AA10 v. Abolhassan Sherkat & PAAB (Application for Leave to Appeal)

ASSESSOR OF AREA 10 – NORTH FRASER REGION

v.

ABOLHASSAN SHERKAT and
PROPERTY ASSESSMENT APPEAL BOARD

BRITISH COLUMBIA COURT OF APPEAL (CA037652) Victoria Registry

Before the HONOURABLE MADAM JUSTICE HUDDART (in chambers)
Date and Place of Hearing: February 8, 2010, Victoria, B.C.

G. McDannold for the Appellant
No one Appearing for the Respondents

Application for Leave to Appeal – Highest and Best Use

The Assessor applied for Leave to Appeal to this Court from the order of Mr. Justice Slade in the Court below.
HELD: *Appeal Allowed.*
This Court found that leave to appeal should be granted.

Reasons for Judgment (Oral) February 8, 2010

[1] **HUDDART J.A.:** This is an application by the Assessor of Area #10 - North Fraser Region for leave to appeal to this Court from the order of Mr. Justice Slade responding to three questions stated by the Property Assessment Appeal Board under s. 65 of the *Assessment Act.* I have concluded that leave should be granted on this appeal on three questions:

> 1. Did the chambers judge err when he held that the Board had not erred in law by setting a value for 221 - 12th Street which was less than the value of that property in its present use?
>
> 2. Did the chambers judge err when he held that the Board did not err in law when it stated that there was no evidence of time adjusted sales to support the Assessor's value of $25 per square foot buildable for the subject properties?
>
> 3. Did the Chambers Judge err when he held that the Board had not erred in law by setting a value for 221 - 12th Street which was contrary to the principle of highest and best use?

It is so ordered.

The Honourable Madam Justice Huddart

SC 531Cont AA10 v Abolhassan Sherkat and PAAB

ASSESSOR OF AREA 10 – NORTH FRASER REGION
v.
ABOLHASSAN SHERKAT and the
PROPERTY ASSESSMENT APPEAL BOARD

BRITISH COLUMBIA COURT OF APPEAL (CA037652) Vancouver Registry

Before the HONOURABLE MR. JUSTICE DONALD, the HONOURABLE MR. JUSTICE LOW, and the HONOURABLE MADAM JUSTICE NEILSON
Date and Place of Hearing: September 24, 2010, Victoria, B.C.

G. McDannold for the Appellant
No one Appearing for the Respondents

Development Sites – Contamination – Highest and Best Use

Assessor appealed to the Supreme Court of British Columbia the decision of the Property Assessment Appeal Board ("the Board"). The Court decided in the Board's favor and dismissed the appeal. The Assessor then filed another appeal to the Supreme Court of British Columbia asking the Court to reconsider its decision, the Court found that the conclusions set out in its Reasons remained unchanged and dismissed the appeal. The Assessor then filed an Application for Leave to Appeal to the British Columbia Court of Appeal which was granted. The Assessor asks this Court to consider the following three questions:

1. *Did the Board err in law by adopting a method of assessment that was wrong in principle with respect to 221 Twelfth Street, by concluding a value that is less than the value of the present use?*
2. *Did the Board err in law by adopting a method of assessment that was wrong in principle with respect to 221 Twelfth Street, by concluding a highest and best use that was contrary to the definition of highest and best use?*
3. *Did the Board err in law when it concluded there was no evidence of time adjusted sales to support the Assessor's value of $25 per square foot buildable for the subject properties?*

HELD: *Appeal Allowed in Part*

This Court found that the Board was obliged to value the property at its highest and best use. Once remediation costs were deducted from the value of 221 Twelfth Street, the proposition underpinning its assessment for development no longer complied with the principle of the highest and best use in valuation. There was some evidence before the Board to indicate an income approach valuing the property in its present use might provide the highest and best use. An assessment of its strength or the context in which it was presented are matters for the Board to assess. Therefore, this Court answered the first two questions in the affirmative. The valuation of the property was remitted to the Board for further consideration based on these findings.

As regards the third question this Court agreed with the chambers judge that the Board found a time adjustment was not required. That was a finding of fact, and fell within the sole jurisdiction of the Board. In the result, the question of whether there was evidence of time adjusted values became irrelevant. This Court accordingly dismissed the appeal with respect to the third question.

Reasons for Judgment January 21, 2011

Written Reasons by:
The Honourable Madam Justice Neilson

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Madam Justice Neilson:

[1] The Assessor brings this appeal from the order of a Supreme Court judge, pronounced October 15, 2009, arising from a Stated Case submitted to the Court pursuant to s. 65 of the *Assessment Act,* R.S.B.C. 1996, c. 20. The Assessor says the chambers judge erred by answering the three questions raised by the Stated Case in the negative and dismissing the appeal by Stated Case: 2009 BCSC 846, supplemental reasons for judgment: 2009 BCSC 1409.

Background

[2] The Respondent Abolhassan Sherkat appealed the 2008 property assessments for three properties he owned in New Westminster. The Property Assessment Appeal Board conducted a hearing by way of written submissions and, on February 13, 2009, gave a written decision ordering the Assessor to reduce the assessments on each property as follows:

Roll No. 10-40-220-05630.000:		
[240 Twelfth Street]	**FROM**	**TO**
Land: Class 6 Business and Other	$6,915,000	$5,437,000
Improvements: Class 6 Business and Other	$ 68,400	$ 10,000
Total Assessed Value:	$6,783,400	$5,477,000

Roll No. 10-40-220-05634.000:		
[235 Thirteenth Street]	**FROM**	**TO**
Land: Class 6 Business and Other	$1,012,000	$853,000
Improvements: Class 6 Business and Other	$ 16,500	$ 10,000
Total Assessed Value:	$1,028,500	$863,000

Roll No. 10-40-220-05682.000		
[221 Twelfth Street]	**FROM**	**TO**
Land: Class 6 Business and Other	$1,698,000	$325,000
Improvements: Class 6 Business and Other	$ 6,700	$ 10,000
Total Assessed Value:	$1,704,700	$335,000

[3] The Assessor asked the Board to submit a Stated Case to the Supreme Court to answer three questions:

1. Did the Property Assessment Appeal Board err in law by adopting a method of assessment that was wrong in principle with respect to 221 Twelfth Street, by concluding a value that is less than the value of the present use?

2. Did the Property Assessment Appeal Board err in law by adopting a method of assessment that was wrong in principle with respect to 221 Twelfth Street, by concluding a highest and best use that was contrary to the definition of highest and best use?

3. Did the Property Assessment Appeal Board err in law when it concluded there was no evidence of time adjusted sales to support the Assessor's value of $25 per square foot buildable for the subject properties?

[4] Mr. Sherkat did not participate in framing those questions. Neither he nor the Board appeared at the hearing before the Supreme Court or on this appeal.

[5] This is the case stated by the Board:

1. The appeal before the Board was from the decision of the 2008 Property Assessment Review Panel with respect to three properties in the lower Twelfth Street area of New Westminster that had been assessed for the 2008 roll on a highest and best use as development sites.

2. The properties are zoned M-1 (Light Industrial District) and are used in accordance with that zoning for automobile sales and service. They are improved with concrete block buildings (1960s) which range in size and, in some cases, have a basement and/or mezzanine level. 240 Twelfth Street, with a site area of 115,259 sq. ft., is improved with a 24,144 sq. ft. building reflecting a site coverage of 18%. 235 Thirteenth Street has a site area of 18,750 sq. ft. and is improved with a 2,001 sq. ft. building with a site coverage of 8%. 221 Twelfth Street is 28,314 sq. ft. and has a small 986 sq. ft. building with a site coverage of 3%.

3. The issue before the Board was the determination of actual value for each property as of July 1, 2007 and the effect on value, if any, of potential contamination.

4. The Assessor valued the sites at the maximum density according to the Lower Twelfth Street Area Plan, dated April 24, 2004. The Official Community Plan (OCP) was amended in October 2004 to include this plan to guide future land use in the area. In assessing the sites, the Assessor did not make any allowance for remediation, but did deduct the cost of conducting an environmental study for each property.

5. The Board accepted that the highest and best us [*sic*] of the properties is for holding until rezoning and redevelopment can occur in accordance with the Lower Twelfth Street Area Plan, with three stipulations: that the plan indicates that the subject properties are intended for residential development with only a limited amount of commercial in the form of home-based businesses along Twelfth Street; that the sites must be rezoned prior to the highest and best use being realized and it is imperative that the market comparables used to estimate actual value also require rezoning; and that the allowable density on which value is to be calculated is an F.S.R. of 1.5 with the potential to bonus it up to 2.5 in return for the provision of public amenities, which presumably come with an associated cost to the developer.

6. The Board accepted the Assessor's approach of finding the total value of the properties based on comparable land sales (some of which have older improvements in place), and applying all but a nominal value of $10,000 to the existing improvements.

7. The Board concluded a value for the subject properties at $47.50 per square foot of site area and calculated actual values as follows:

Property	Site Area (sq. ft.)	Value per sq. ft.	Total Value
240 Twelfth St.	115,259	x $47.50 =	$5,474,803
235 Thirteenth St.	18,750	x $47.50 =	$890,625
221 Twelfth St.	28,314	x $47.50 =	$1,344,915

8. With respect to 240 Twelfth Street and 235 Thirteenth Street, the Board found there was a reasonable expectation of contamination but found it had no evidence as to the extent of the contamination (if any) or the cost to clean up.

9. With respect to 221 Twelfth Street, the Board found a reasonable purchaser would take the contamination of this site into consideration. The Board found there were three areas that could potentially affect value, namely: the actual cost of remediation; the time to remediate during which the site is not available for redevelopment; and the potential migration of contamination from the extensively contaminated adjacent Gas Works site from which contaminants may or may not continue to migrate to the subject.

10. For 240 Twelfth Street and 235 Thirteenth Street, the Board found that no deduction for contamination was appropriate except the cost to undertake an environmental study. The Board accepted a deduction of $27,000 for each of 240 Twelfth Street and 235 Thirteenth Street.

11. With respect to 221 Twelfth Street, the Board found actual value should be adjusted by the estimated remediation cost of $1,009,000.

...

[6] The chambers judge answered each of the three questions in the negative. The Assessor asked him to reconsider his decision on questions 1 and 2. He did so and issued supplemental reasons stating his answers were unchanged.

Analysis

[7] The Assessor argues the chambers judge erred in law in answering “no” to each question. As well, it says that in reaching his conclusions the chambers judge wrongly exceeded his jurisdiction by weighing and considering the sufficiency of the evidence before the Board.

[8] I therefore begin with the principles that govern the jurisdiction of both this Court and the chambers judge on hearing a Stated Case. This Court affirmed them in these terms in *British Columbia (Assessor of Area #01 - Saanich/Capital) v. Hardt* (1992), 88 D.L.R. (4th) 183 (B.C.C.A.) at 188:

> The general principles for the Court to follow on hearing a Stated Case have been set out in *District of Tumbler Ridge* v. *Assessor of Area 27 - Peace River* (December 2, 1985), Vancouver Registry, No. A851790 (B.C.S.C), at p. 3, where Finch J. said:
>
> > The law seems clear enough, although its application has caused problems in particular cases. I summarize what I apprehend to be the applicable principles. 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.
>
> and in *Re Caldwell and Stuart* (1984), 15 D.L.R. (4th) 1 at pp. 9-10, [1984] 2 S.C.R. 603, 85 C.L.L.C. para. 17,002, where McIntyre J. said:
>
> > From the many cases decided upon this issue, it seems clear that the appellate court may not look beyond the Stated Case in order to make inferences of fact, or to find new facts not in the case, nor to weigh and consider the sufficiency of evidence:
> >
> > ...

> As for the reasons for decision, it seems clear that the law of Canada as well as that of England has always permitted reference to the reasons for decision:

[9] In this case, the record includes the reasons of the Board as well as the written submissions filed by the parties. The Assessor's case was put forward in a report by Mr. Pavel Potiaev. Mr. Sherkat provided a written submission as well as a report from Colliers International. The Assessor responded to that evidence with a report prepared by Mr. Dave Kingston.

[10] The first two questions involve only the property at 221 Twelfth Street. I agree with the Assessor those questions may be taken together to form one allegation: the Board erred in law when, contrary to the principle of highest and best use, it determined the value of the subject property was less than its highest value based on its present use.

[11] The relevant parts of the record show the Board predicated its decision on the widely accepted assessment principle that the properties would be valued at their highest and best use, and properly defined that as "that use which is physically possible, legally permissible, financially feasible, and maximally productive". The Board accepted the view of both the Assessor and Mr. Sherkat that the highest and best use of the three properties was to be held for redevelopment and rezoning. Both parties advocated a direct comparison approach to valuing the properties. Mr. Potiaev's submissions, however, also included an income valuation of $1,009,000 for 221 Twelfth Street (at one point it is also stated to be $759,000 but this appears to be an error). This was based on its present use as a car dealership using the owner's actual income and expense information. Mr. Potiaev's report stated, however, that he included the income valuation for illustration purposes only, and suggested that an income valuation of the three properties as industrial properties did not provide a reliable indication of their value.

[12] The Assessor says the Board erred by accepting the highest and best use for 221 Twelfth Street was as a holding property for future development because, once remediation costs were deducted, its value under that use was lower than its value calculated under an income approach. It says at that point the principle of highest and best use required the Board to consider whether the property's best use was instead its present use as a car dealership, particularly when that use did not require a deduction for remediation. The Assessor says the Board erred in law by failing to do so, and the chambers judge accordingly erred in answering questions 1 and 2 in the negative.

[13] At the initial hearing, the chambers judge answered "no" to the first question because he believed there was no evidence before the Board that suggested a value for this property based on its present use, and both parties had approached valuation on the basis the property was to be valued as a holding property for eventual redevelopment. He answered the second question in the negative because it was his view the evidence before the Board did not establish a basis for finding that the highest and best use was different than that of a holding property for redevelopment.

[14] Following the reconsideration, the chambers judge affirmed his negative answers to the two questions. He acknowledged Mr. Potiaev's report did include a discussion of the income approach to valuing this property based on its present use. He noted, however, Mr. Potiaev included this for illustration purposes only, and did not consider the rent presently received by the owner as representative of the market or economic rent for the property. He concluded Mr. Potiaev had not advanced the income approach as evidence of the value of the subject property, and therefore concluded there was no evidence before the Board as to what value the income approach, if applied on the basis of market comparables, would have indicated for the property.

[15] The chambers judge's comments on the reconsideration accurately summarize Mr. Potiaev's evidence, and understandably raise questions as to whether it was open to the Assessor to alter its position on what was the highest and best use of this property, and about the evidentiary value of Mr. Potiaev's present use valuation. Nevertheless, I must agree with the Assessor that in answering questions 1 and 2 in the negative, the chambers judge exceeded his jurisdiction by weighing and

considering the sufficiency of the evidence on those matters. Such matters fall within the jurisdiction of the Board alone.

[16] The Board was obliged to value the property at its highest and best use. Once remediation costs were deducted from the value of 221 Twelfth Street, the proposition underpinning its assessment for development no longer complied with the principle of the highest and best use in valuation. There was some evidence before the Board to indicate an income approach valuing the property in its present use might provide the highest and best use. An assessment of its strength or the context in which it was presented are matters for the Board to assess.

[17] I would accordingly allow the appeal with respect to the first two questions, substitute affirmative answers to them, and remit the valuation of the property at 221 Twelfth Street to the Board for further consideration.

[18] With respect to the third question, in its decision the Board set out Mr. Potiaev's argument that an upward time adjustment of 10-15% was required, but rejected it:

> [23] Mr. Potiaev relies on sales which have interim dates between July 2005 and November 2006. He states that a time adjustment is needed for each sale, and estimates 10% to 15% as appropriate. He does not show how he has applied this figure to the comparable sales and no time adjusted sales figures are in evidence. His support for his premise that the market is rising, is that the sale prices per square foot buildable of indices #4 and #5 which have interim dates of November 2006, are higher than those of indices #2 and #3, which have interim dates July 2005 and May 2006. I find that the sales do not support his theory as indices #4 and #5 are properties that do not require rezoning and can accommodate mixed use developments. Indices #2 and #3 require rezoning, and in the case of #2 changes to the O.C.P. In addition, there are locational and site area differences. It may be that the difference in price reflects these differences rather than market fluctuations.
>
> [24] Mr. Henrey notes that the market was rising with respect to mid 2005 sales but likewise provides no support. He does not make comments about market changes from 2006 to 2007. I find no evidence that a time adjustment is required from the sales which were negotiated in 2006 to the valuation date July 1, 2007. Mr. Henrey also states in his letter of October 28, 2008, that the market is "currently moving downward". I agree with Mr. Kingston of B.C. Assessment, that this comment relates to the market in the fall of 2008 and does not address the market as at the valuation date of July 1, 2007. Therefore, it is not relevant to the appeal at hand.

[19] At para. 30 of its decision, the Board again stated there was no evidence of time adjusted sales to support a time adjustment.

[20] The Assessor argues the Board was clearly wrong in saying there was no evidence of time adjusted sales as Mr. Kingston's reply report provided such evidence:

> Page 2 of the Colliers letter lists 6 sales indexes, index 5 and 6 are both similar size sites, both have a designated density of 2.5 and both require rezoning, sale 6 is currently used as an automobile sales lot. Index 5 sold 12 months prior to the valuation date, index 6 sold 6 months after the valuation date. The two sales indicate a rising market at approximately 2.3% per month ($67.52/$47.53 or 42% over 18 months which equates to 2.3% per month). The Appellants evidence indicates times adjusted sale prices for July 1, 2007 per square foot are $60.65 (2.3% x 12 months = +27.6%) and $58.20 per square foot (6 months x 2.3% = -13.8%) respectively.

[21] The chambers judge, however, answered the third question in the negative, giving these reasons:

> [30] The answer to this question is also "no". The Appeal Board addressed the Assessor's argument that a time adjustment should be applied to certain of the comparables to yield a "final value of $25 per square foot buildable for the subject properties" (Reasons para. 30). Although the Appeal Board does not discuss the application of time adjustments by reference to all of the comparables, it is clear

> that the general rejection of a time adjustment was on the basis that the evidence of fluctuating values over time was likely attributable to other variables, including location and site area differences.
>
> [31] The Board rejected the Assessor's argument (set out above in paragraph 22), that there should be a time adjustment for values ascribed to the index properties. The Board attributed value fluctuations between comparables that sold at different times to other factors. Hence, there was no evidence of time adjusted values to apply in reaching a conclusion on the value of the subject properties as of July 1, 2007.

[22] I agree with the chambers judge that the Board found a time adjustment was not required. That was a finding of fact, and fell within the sole jurisdiction of the Board. In the result, the question of whether there was evidence of time adjusted values became irrelevant. The Board's finding precluded their usefulness.

[23] The Assessor is correct in saying the Board erroneously stated there was no evidence of time adjusted values. This was an error in fact, however, and this Court may only correct it if it was sufficiently significant to constitute an error of law. A factual error may be an error of law if the Board acted without evidence, or upon a view of the evidence that could not reasonably be entertained, regarding facts that were sufficiently important to the outcome: *Assessor of Area #6, Courtenay v. Quinsam Coal Corporation,* 2002 BCCA 68; *Gemex Developments Corp. v. Coquitlam Assessor, Area No. 12* (1998), 62 B.C.L.R. (3d) 354 (B.C.C.A.).

[24] I am not persuaded the Board's error was sufficiently important to constitute an error of law. As previously described, the presence or absence of time adjusted values would not have affected the Board's decision.

[25] I would accordingly dismiss the appeal with respect to the third question, and affirm the negative answer to it.

Conclusion

[26] I would allow the appeal with respect to questions 1 and 2, answer them in the affirmative, and remit the valuation of the property at 221 Twelfth Street to the Board for further consideration. I would dismiss the appeal with respect to question 3 and affirm the negative answer to that question.

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Mr. Justice Donald"

I AGREE:

"The Honourable Mr. Justice Low"