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(sub nom. Bayview Summit Development Ltd. v. Ontario (Regional Assessment Commissioner, Region No. 14)) 36 O.M.B.R. 161, (sub nom. Bayview Summit Development Ltd. v. Regional Assessment Commissioner, Region No. 14) 107 O.A.C. 302, 77 A.C.W.S. (3d) 240

Bayview Summit Development Ltd. v. Ontario (Assessment Review Board)

Bayview Summit Development Limited, Appellant and The Regional Assessment Commissioner, Region No. 14, and The Town of Markham, Respondents

Ontario Court of Justice (General Division) [Divisional Court]

Southey, Chilcott, Pardu JJ.

Heard: February 2, 1998
Judgment: February 2, 1998
Docket: 197/94

Proceedings: reversing (March 17, 1994), Doc. A 9200088 (O.M.B.); refused leave to appeal (April 20,1998), Doc. No. CA M22006 (Ont. C.A.)

Counsel: *Richard R. Minster* for the Appellant.
Louie M. Pilla for the Respondents.

Subject: Public; Property; Tax — Miscellaneous

Municipal law

Municipal law --- Municipal tax assessment — Valuation — Method of assessment — Market value — General

Owner of two rental townhouse complexes unsuccessfully appealed to municipal board, assessment based on assessment role"frozen" in 1967 when complexes were built — Owner's appeal of board's decision allowed — Board erred in law by holding that assessment role was frozen in 1967 and refusing to consider current market values in testing equity of assessment — Assessment Act, R.S.O. 1990, c. A.31, s. 60(1).

Municipal tax assessment — Valuation — Method of assessment — Miscellaneous issues

Owner of two rental townhouse complexes unsuccessfully appealed to municipal board,

assessment based on assessment role"frozen" in 1967 when complexes were built — Owner's appeal of board's decision allowed — Board erred in law by requiring owner to use same methodology as assessor to demonstrate inequity of assessment under s. 60(1) of Assessment Act — Assessment Act, R.S.O. 1990, c. A.31, s. 60(1).

Cases considered by *Southey J.*:

Horton CBI Ltd. v. Regional Assessment Commissioner, Region 18 (1986), 53 O.R. (2d) 701, 19 O.M.B.R. 174, 13 O.A.C. 318, 32 M.P.L.R. 36 (Ont. Div. Ct.) — considered

Massey Combines Corp., Re (1994), (sub nom. *Massey Combines Corp. (Receiver of) v. Ontario Regional Assessment Commissioner, Region No. 20)* 31 O.M.B.R. 1, (sub nom. *Peat Marwick Ltd. (Receiver) v. Regional Assessment Commissioner, Region No. 20)* 74 O.A.C. 309 (Ont. Div. Ct.) — considered

Peel Condominium Corp. No. 57 v. Ontario Regional Assessment Commissioner, Area No. 15 (1984), 28 R.P.R. 109, 47 O.R. (2d) 466, 26 M.P.L.R. 308, 11 D.L.R. (4th) 627, 5 O.A.C. 358, 16 O.M.B.R. 395 (Ont. Div. Ct.) — referred to

Statutes considered:

Assessment Act, R.S.O. 1990, c. A.31
s. 19(1) — referred to

s. 19(2) — referred to

s. 60(1) — referred to

Appeal by townhouse rental complex owner from decision of Ontario Municipal Board dismissing owner's appeal relating to assessment of complexes.

***Southey J.* (Orally):**

1 This is an appeal by the taxpayer from a decision of the Ontario Municipal Board dismissing an appeal relating to the assessment of two rental townhouse complexes in the Town of Markham. The two complexes had been assessed on the basis of a 1967 assessment per square foot evaluation.

2 Leave to appeal was granted in respect of four questions set out in the Order of Maloney J. of June 27, 1997 and I propose to deal *seriatim* with those four question.

The first question is, did the Board err in law by holding that the assessment role was "frozen" in 1967 and refusing to have regard to current market values in testing the equity of assessment pursuant to s. 60(1) of the *Assessment Act*?

It is a fundamental principle in the assessment law of Ontario that property is to be assessed at a level such that the ratio between the assessment and market value of the property in question is

the same as that in similar property in the vicinity. That result flows from s. 60(1) of the *Assessment Act* when read in conjunction with s. 19(1) and (2) of the *Assessment Act*.

It is also fundamental that assessments are made annually. Although there may be no change from year to year in the amount at which any property is assessed, a taxpayer is entitled to question the assessment of his property in each year. Authority for that proposition will be found in the case of *Massey Combines Corp., Re* (1994), 74 O.A.C. 309 (Ont. Div. Ct.), paragraphs 10 and 16.

[10] Section 18 of the *Assessment Act* requires land to be assessed at its market value. Market value is the amount that might be realized in an open market sale between a willing seller and a willing buyer. The market value of land is best assessed by reference to the price attracted for the land in a sale on the market (*Sun Life Assurance Co. v. Montreal (City)*, [1950] S.C.R. 220, at p. 240). Assessments are annual and where there has been no actual sale in that year the next best evidence should be used.

. . . . .

[16] Assessments are an annual matter and normally the Board should be afforded the opportunity to determine the market value for each year.

Accordingly, the answer to the first question is that the Board erred by holding that the assessment role was frozen in 1967 and by refusing to have regard to current market values in testing the equity of assessment under s. 60(1) of the *Assessment Act*.

The second question is, did the Board err in law by refusing to consider depreciation when applying the replacement cost approach? Although valuation on the basis of replacement cost less depreciation may not be the fairest method in relation to income properties whose value depends primarily on the income earned by the property, if the cost method is used then depreciation must be taken into account in comparing different properties. Obviously, properties that were built in 1967 will have depreciated when it becomes appropriate to value them in 1987, twenty years later, and a property built in 1987 which may result in the same cost figure by applying an assessor's manual will be more valuable than one that was built in 1967. See the reference to *Peel Condominium Corp. No. 57 v. Ontario Regional Assessment Commissioner, Area No. 15* (1984), 26 M.P.L.R. 308 (Ont. Div. Ct.) in the decision of the Divisional Court in *Horton CBI Ltd. v. Regional Assessment Commissioner, Region 18*) (1986), 53 O.R. (2d) 701 (Ont. Div. Ct.) at p. 703:

The court then adopted the following statement [from *Regional Assessment Com'r, Sudbury-Manitoulin Region No. 30 v. Juper Holdings Ltd.*, May 3, 1983, unreported]:

We do not think that all assessments are frozen for all time, in spite of whatever occurs in the market. The base remains the same, of course, but if events alter values, creating inequities among similar properties in the same vicinity, it is open to the board and the assessors to alter the assessments in order to reduce inequities.

The basic issue in this appeal is whether failure to allow chronological depreciation can create an inequity that may be altered by the assessor or on appeal. The respondent submits that the power to alter the roll to remedy inequities is limited to those situations where factual circumstances have occurred, which could not have been anticipated by the Legislature when it enacted the freeze legislation. I do not agree. There is nothing in the legislation that says this, nor is it inherent in the legislation itself. The legislation leaves it to the assessor to determine whether an inequity has resulted. This is a question of fact to be determined in the first instance by the assessor and subsequently by the Ontario Municipal Board. It may be that lack of depreciation of one year may not create an inequity, whereas lack thereof for 18 years may create an inequity. It is not for this court to make such a determination.

The respondent also argued that any alteration of the appellant's property, based on depreciation, would create a shift of assessment from one group of properties to another group of properties. This must inevitably be the result of any successful assessment appeal. It is not sufficient to refuse to allow an appeal where it is obvious that the assessment itself is inequitable.

The answer to the second question then is, yes, the Board did err.

The third question is, did the Board err in law by accepting the 1967 assessment per square foot comparison as satisfying the test of equity under s. 60 (1) of the *Assessment Act*? Any method of valuing income producing properties that fails to take into account the relative values resulting from a comparison of the income producing potential of the properties cannot satisfy the test of equity under s. 60(1). To repeat myself, the relative values of two income producing properties depends upon the income producing capacity of the two properties. To compare them on any other basis say, to use an extreme example, on the basis of the number of bathtubs or the number of doors, might by chance result in an equitable outcome, but the Board erred in law by accepting an assessment per square foot for comparison because it ignores the real basis of relative values of these properties.

The fourth question is, did the Board err in law by requiring that the taxpayer use the same methodology as the assessor to demonstrate an inequity of assessment under s. 60 (1) of the *Assessment Act*? There is no requirement in the *Assessment Act* that the taxpayer should use the same methodology as the assessor to demonstrate an inequity If the assessor, as in this case, uses a methodology that does not throw up accurate comparisons of value, the taxpayer must use a different methodology to show what the relative values of the subject property and similar properties in the vicinity may be. Accordingly, the answer to question 4 is also yes, that the Board did err.

3 The appellant has asked that the assessments in question be fixed by this Court on the basis of the evidence in the record before us, but the assessor is not agreeable to that result and asks that the matter be sent back to the Ontario Municipal Board to determine the correct assessment. If, in light of our decision, there should be no real issue as to relative values, then the assessment of these two properties in the years in question should be a matter that can be agreed upon by the assessor and the taxpayer. If, however, there is still an issue as to relative values, applying the income method, then there must be a hearing to determine what the assessed value of the subject properties should be. We bear in mind that the assessor has not yet had an opportunity to put forward his case on the basis of a rent to assessment ratio.

4 For these reasons, the appeal is allowed and the matter is returned to the Ontario Municipal Board for determination of the assessments by a panel of the Board differently constituted from the one that arrived at the decision under appeal.

5 The appellant is entitled to its costs in this Court and of the application for leave to appeal. We fix those costs in the amount of $4,000.00