Assessment Review Board
Commission de révision de
l'évaluation foncière

Ontario

ISSUE DATE: February 20, 2015 **FILE NO.:** DM 2014M8

Moving Party(ies):	Municipal Property Assessment Corporation ("MPAC"), Region 14
Respondent(s):	Christian Schumacher
Respondent(s):	City of Markham
Property Location(s):	25 Centurian Drive
Municipality(ies):	City of Markham
Roll Number(s):	1936-020-132-23200-0000
Appeal Number(s):	2029662, 2336949, 2679943 and 2911965
Taxation Year(s):	2009, 2010, 2011 and 2012
Hearing Event No.:	571130
Legislative Authority:	Section 40 of the *Assessment Act*, R.S.O. 1990, c. A.31, as amended
Heard:	November 24, 2014 in Markham, Ontario

APPEARANCES:

Parties	**Counsel[+]/Representative**
MPAC	D. Mitchell[+]
C. Schumacher	L. Bumstead

DISPOSITION OF THE BOARD DELIVERED BY JOSEPH M. WYGER

INTRODUCTION

[1] MPAC brought a motion pursuant to Rules 141 to 146 of the Assessment Review Board's ("Board's") *Rules of Practice and Procedure* ("Rules") to review a decision of the Board released on November 20, 2013 as WR 120736. The request was for the

Board to vary the decision to fix the value of the subject property at $8,179,000, which was the current value determined by the Board in that decision. In the alternative, it requests an Order for a re-hearing before a different panel of the Board.

[2] The grounds for the motion were that the Board erred in law in reducing the current value to an assessed value of $6,763,000 under the equity reference pursuant to s. 44.(3)(b) of the *Assessment Act* ("Act") by averaging the assessed values per square foot ("psf.") of similar properties in the vicinity.

DISPOSITION OF MOTION

[3] The motion is dismissed. The moving party failed to demonstrate that the member made an error of law or fact, such that different result would have been likely. In accordance with the standard of review, the moving party was unable to show that the decision was not one of several reasonable, acceptable, intelligible outcomes that are defensible having regard for the facts and the law.

REASONS FOR DISPOSITION OF MOTION

Facts

[4] The subject property is a small office building in the City of Markham, that was valued by MPAC using the income approach. In the decision under review, the member analyzed the evidence, reviewed leases, determined an adjusted annual rental income, accepted and applied the Appellant's expert's cost and cap rate factors to arrive at a current value of $8,179,000.

[5] The member then made reference to the assessments of similar properties in the vicinity as mandated by s. 44.(3)(b). He narrowed the list for various reasons to eight properties he deemed similar to the subject property, then accepted the expert witness's method of comparing them on a value psf. of structure basis. The member calculated

both the median and average values psf., applied them to the subject structure size, and settled on the resulting midpoint value of $6,763,000 as the equitable value.

[6] In his conclusion, the member qualified his current value finding with the observation that it was based on very slim market rental data and no sales evidence. Therefore, "more weight is appropriately attributable to the result determined by my reference to the assessments of similar lands in the vicinity than to the evidence respecting current value that lacks market-based data."

Legislation

[7] Rule 145 states:

> **145 Grounds for Review**
>
> (1) The Board may consider reviewing its decision if the grounds for the request raise a convincing and compelling case that the Board:
> (a) acted outside its jurisdiction;
> (b) violated the rules of natural justice or procedural fairness, including allegations of bias;
> (c) made an error of law or fact such that the Board would likely have reached a different decision;
> (d) should consider new evidence, which was not available at the time of the hearing, but that is credible and could have affected the result; or
> (e) heard false or misleading evidence from a party or witness, which was discovered only after the hearing and could have affected the result.

[8] Section 44.(3) of the Act states:

> **44.(3) Same, 2009 and subsequent years.** – For 2009 and subsequent taxation years, in determining the value at which any land shall be assessed, the Board shall,
> (a) determine the current value of the land; and
> (b) have reference to the value at which similar lands in the vicinity are assessed and adjust the assessment of the land to make it equitable with that of similar lands in the vicinity if such an adjustment would result in a reduction of the assessment of the land.

MPAC's Position

[9] Don Mitchell, counsel for MPAC, advanced the position that the member should not have reduced the current value in the manner he did. He argued that the Board can only reduce a value if it is necessary to achieve an equitable result, and that can only occur when the Board can determine that similar properties are assessed at a value below their current values. Mr. Mitchell maintained that the member could not make such a determination on the evidence before it, as the only reasonable inference to draw would be that the assessments of those similar properties "were assessed at a 100% level of their current values". Mr. Mitchell contended that to reduce the current value as the member did, places it's assessed value at a lower percentage of its current value than those similar properties, thus creating inequity compared to them.

Appellant's Position

[10] The Appellant Christian Schumacher was represented by his agent Lorne Bumstead, who supported the member's decision on the basis that it was an acceptance of his expert witness's in-depth equity analysis. He asserted that his expert Peter Ward reduced the properties to enough similarity to permit a one to one comparison by value psf., much like nearly identical houses whose assessments should vary only in proportion to the size of their structures. Mr. Bumstead submitted that the member placed weight on the only expert evidence before him, and that this value psf. method was not challenged by MPAC at the hearing, because of the level of similarity of the comparable properties used.

Analysis

Smith vs. MPAC Reg. 9 DM94066

[11] The basis for Mr. Mitchell's submissions rests on MPAC's primary argument that inequity can only be discerned when assessed values are directly compared to current

values, and not by any other means. He cited the case of *MPAC v. Smith et. al* (22 October 2010), (Ont. A.R.B.) [unreported] which is filed as DM94066, where Member Brownlee, in a four page decision, overturned a decision of another panel for calculating an equity adjustment on the basis of assessed values psf., without sales information. He stated that "comparing assessed value per square foot...does not determine whether properties are inequitably assessed" because the Board has "no jurisdiction to alter the assessment of the subject property..." where there is "no evidence that any of the six comparable properties were assessed at anything other than their correct current value." This declaration was made by the reviewing member unsupported by any analysis, precedent or reasoning to support it.

[12] Mr. Bumstead relied on the example of five identical houses with assessments at $300,000 and a subject property assessment at $400,000. I agree with him that, in the absence of a good reason for this difference, there is "no need to address any additional relative value" because the inequity is evident without any market evidence at all. If one accepts Mr. Mitchell's submission, the Board would be barred from even considering this evidence of relative assessed values because they are unaccompanied by sales.

Empire Realty Co.

[13] Mr. Mitchell contends that for any equity adjustment, it is essential that the Board determine that the similar real properties are assessed at a value below their appropriate current values. His materials state that such a comparison "is often made based on an assessment to sale ratio ("ASR") in which the sale represents the true current value of each of the similar properties." In fact, MPAC maintains that this comparison must be made not just often, but exclusively based only on available ASR's. That is the direction that the assessing authority infers from *Smith, supra*. The problem with this position is the fact that it restricts the Board to referencing only the assessments of similar properties that have been sold. MPAC would have the Board read into s. 44.(3)(b) as follows: "have reference to the value at which similar lands in

the vicinity which have recently been sold, are assessed..." I conclude that the Board has no jurisdiction to make that amendment to the legislation.

[14] In support of his proposition, Mr. Mitchell presented the leading case of *Empire Realty Co. Ltd. and Assessment Commissioner for Metropolitan Ontario et al.*, [1968] O.J. No.1164 ("*Empire Realty*") where the Court of Appeal hypothesized that even an assessment at actual value (current value) would be inequitable "if all similar lands in the vicinity were assessed at some percentage of actual value substantially less than one hundred". The case is put forward to support the suggestion that only the assessments of similar lands which have sold can be used in order to provide an ASR as a test to consider those percentages.

[15] In the *Empire Realty* decision, the Court decided that gross rents to assessed value ratios were insufficient evidence. The statement of the Court regarding the inequity of similar lands being assessed at ASR's substantially below one, is one of general equitable principle, with which this Board agrees completely. A representative sample of ASRs of reasonably similar properties well below 100%, is clearly the best evidence for showing inequity in assessment.

[16] However neither the Court nor the statute directs that an ASR is the only evidence or method, exclusive of all others. In the *Empire Realty* decision, the Court of Appeal also stated that "There are undoubtedly many methods, the use of any of which would enable an assessor to produce an assessment roll which would bespeak equity..." The Court of Appeal appears to leave open many methods that an assessor, or a Board member in his shoes, can do equity. Section 44.(3)(b) does not direct how the reference to assessments of similar lands is to be carried out, nor does it restrict the evidence by allowing only the small subset of sold properties to be considered. I accept Mr. Bumstead's submission that there is no ASR requirement in s. 44.(3)(b) and that nothing in the *Empire Realty* decision prohibits the Board from employing other methods of finding inequity where the evidence warrants it. It is no error of law to do so.

Bayview Summit

[17] On that last point on methods, it is instructive to note from *Bayview Summit Development Ltd v. Ontario (Regional Assessment Commissioner, Region No. 14), [1998] O. J. 410:* "There is no requirement in the Act that the taxpayer should use the same methodology as the assessor to demonstrate inequity." I would extrapolate that from the taxpayer to this Board as well. Mr. Mitchell did not put forward the case for that unhelpful citation, but it is there nonetheless. He proffered it in support of the proposition that a value psf. comparison of an income property, for the purpose of determining equity is contrary to law. The Court in Bayview considered whether the OMB erred by accepting the 1967 assessment psf. comparison as satisfying the then current equity test under s. 60 of the Act. The Court concluded: "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)." It reasoned that the OMB "erred in law by accepting an assessment per square foot for the comparison because it ignores the real basis of relative values of these properties."

[18] I note that this was only one of four errors the Divisional Court concluded the OMB made, in overturning that Board's decision.

[19] In Mr. Bumstead's materials, he indicates that he was the primary witness in the Bayview case, and confirmed that the Regional Assessment Commissioner was doing the comparison to all rental townhouses on an arbitrary rate psf. basis, irrespective of any income data such as rents, vacancy, expense or cap rates. Mr. Bumstead distinguished Mr. Ward's psf. analysis as including all of those income considerations. I accept his argument that Mr. Ward's taking account of the income-producing potential and not ignoring the real basis of relative values, meets the qualifier that the Court placed on its proscription of using value psf.

Income Multiplier

[20] Mr. Mitchell's argued that fair market rent is variable and therefore so should the current values psf. of similar properties be different. He demonstrated by way of a gross multiplier that using the member's current value psf. divided by the FMR of the gross rent he used, results in a gross income multiplier ("GIM") of 10.59. When the same exercise is performed using the member's equitable value psf., the GIM is 8.75. He explained that the equitable multiplier means that $1.00 of income equates to only $8.75 of current value, while it should equate to $10.59 of current value. At the lower value, the subject is assessed at only 82% of its correct current value while the similar properties could be assessed at 100% of their current values thus creating an inequity. He maintains that there is no evidence that those similar properties are assessed at anything other than 100% of their current values, thereby circling back to his contention that there is a positive obligation on the equity seeker to find only similar properties that have sold to disprove that proposition.

[21] Mr. Bumstead countered that the FMR is MPAC's number and that it was within the member's purview to accept Mr. Ward's analysis that the rents and allowances were the same for his very similar properties, thus legitimizing a one to one comparison on value psf.

Value per Square Foot

[22] I agree in principle with Mr. Mitchell's argument and the *Bayview decision* that in most cases of income-producing properties, it is unwise to use the median or average of assessed values psf. of similar properties to change a correct current value derived from a market based income approach. This is largely true because it would be difficult to draw an inference that the correct current value needs an equity adjustment based on such a calculation. I consider that such an approach is not really determining that the correct current value is inequitable relative to other assessments, as much as it is simply placing the assessed value into the middle of the pack. However, the word

"equitable' is not defined in the Act, and other interpretations of what is or is not "equitable" can differ and do not necessarily meet the high standard for error of law.

[23] For example, a quick review of Mr. Ward's charts of comparable assessments shows the subject returned assessment at $172.49 psf., while two superior properties are assessed at $152.43 and $159.45 respectively. No sales or rents are required to draw a reasonable inference that this scenario may be inequitable, and that the middle of the pack is likely more equitable than the value as returned.

[24] In the case before me, it is clear that the member was not enamoured of the market evidence. In his analysis of the market rental data such as it is, the member despairs that "there is no specific rental/lease rate data among comparable properties that were contracted near the January 1, 2008 valuation date. Nor is there any sale evidence whatsoever in a time frame near that date." He goes on about the "challenge" in establishing current value being "exacerbated" by the "available evidence" that "lacks market-based data", and almost reluctantly settles on a current value determination of $8,179,000. The member concluded that in this particular matter, more weight should be attributed to a reference to the assessments of similar lands as constituting "the best basis to determine the subject property's assessment."

[25] Mr. Bumstead contended that the member appropriately preferred the evidence of the only expert witness's full analysis of 17 similar properties, whereby Mr. Ward did an analysis that permits a one-to-one comparison based on value per square foot. This is clearly what the member meant in paragraph 55: "I consider Mr. Ward's approach of comparing assessments on a psf. of building basis to be most appropriate in the circumstances. Practitioners in valuation frequently utilize this approach, and neither of the other parties raised any issue in that regard."

Equity or Current Value?

[26] Practitioners in valuation utilize the value psf. approach, but is an equity reference really a valuation approach, since the result is not the correct current value?

The issue created by the member was in his accepting this method as constituting the best basis to determine the subject assessment in this matter "...in accord with the equity test in s. 44.(3)(b) of the Act." Mr. Mitchell characterized it as the member doing another valuation exercise and calling it equity. Mr. Bumstead agreed it may have been preferable had it not been called an equity analysis, however Mr. Ward's evidence on the assessments psf. was titled Equity Analysis, and was used to corroborate his own psf. current value finding. It is clear from his conclusion that the member was not satisfied with his own current value determination and considered the value psf. method a better way to get to a final assessed value.

[27] If it was an error of fact or law to perform this exercise as an equity reference, the question then arises whether the member would likely have reached the different decision of concluding that the unsatisfactory $8.179 million result was the correct current value. I suspect not. I conclude that had the member not performed the exercise under the guise of an equity analysis, he would have used the assessments as proxies for market values, as Mr. Mitchell agreed is a reasonable inference, and preferred the value psf. analysis to arrive at the same $6.736 M figure as being the correct current value. The motion for review would fail on that basis alone, that the decision on the final assessed value would not have been different.

Standard of Review

[28] MPAC's motion must be dismissed as it does not meet the threshold of demonstrating that the member's decision was not one of several reasonable, intelligible, acceptable outcomes that are justifiable in light of the facts and the law. The law does not prohibit the Board in the tools it can employ in determining equity, or forbid any reference to assessments that are not connected to sales. The focus should be on whether there is any error in the exercise of those tools and whether an equity adjustment is based on sufficient evidence to result in a reasonable, intelligible outcome. For this purpose I reviewed the evidence of Mr. Ward provided in the motion materials, using as a check the preferred tool (in the absence of ASRs) for equity, being

a consideration of the subject value relative to all of the assessed values ranked on a scale of superior to inferior properties.

[29] In reviewing the values psf. of Mr. Ward's 13 properties, I note the following:

A. The returned assessed value psf. of $172 psf. is well above the range of superior properties from $137 to $159 psf., which could give rise to a reasonable inference that it may be inequitable; changing the assessment into or below that range could be a reasonable outcome of an equity reference.

B. The member-determined current value based on $8.179 M is $142 psf. and is within the range of superior properties, but above the range of similar properties from $95 to $123; reducing the assessment to below the range of superior properties would seem a reasonable outcome of an equity reference.

C. The member-determined equitable value based on $6.763 M is $118 psf. and is near the top of the range of similar property values from $95 to $123 psf., and well above three inferior properties assessed in the range from $95 to $107 psf. This is also a reasonable, intelligible outcome if one accepts the Board's suggestion that comparing assessments on a superior/inferior scale of ranges can be useful as a measure of what is equitable or not. Had the member's method resulted in reducing the assessment into or below the level of inferior properties, that could be an error by causing an inequity and would presumably not be an acceptable, reasonable or intelligible outcome.

[30] I find that the member's method of employing the simple mid-point between the median and average value of 8 of the 13 properties that he considered most similar, resulted in the final value residing within an appropriate range on the scale of superior/inferior properties, and therefore an acceptable, reasonable outcome.

Raising Issues Not Raised at Hearing

[31] Mr. Bumstead complained that MPAC had no problem with Mr. Ward using values psf. in an equity analysis prior to or during the hearing of this matter. There was no challenge or objection or submission from the assessor or MPAC counsel or the municipal representative in the pre-hearing process or during the hearing itself that the use of that tool was an error of law. Mr. Bumstead submitted that MPAC ought not to be allowed to question the approach for the first time only after the release of the decision.

[32] While his argument has some merit, this Board has no authority to restrict the assessing authority from raising any issue, or from regurgitating discredited legal arguments on a motion for review.

CONCLUSION

[33] The Board states unreservedley, that it is not an error of law to use non-ASR methods to consider equity under s. 44.(3)(b). The member's method of calculating the equity adjustment, while not ideal, results in a value that can be characterized as a reasonable, intelligible outcome defensible in light of the facts and the law. In the alternative, I am convinced that if the member restricted all of his valuation analyses to the current value side, he would have come up with the same final assessed value, and not a different decision. The motion is dismissed.

"Joseph M. Wyger"

JOSEPH M. WYGER
MEMBER