CITATION: East of Bay (2003) Development Corp. v MPAC, 2010 ONSC 3337
COURT FILE NO.: CV-09-393807
DATE: 20100608

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: East of Bay (2003) Development Corporation / Applicant

AND:

The City of Toronto and the Municipal Property Assessment Corporation / Respondents

BEFORE: Mr. Justice Edward Belobaba

COUNSEL: Michael S. Steinberg for the Applicant

Donald G. Mitchell for the Respondent

HEARD: May 28, 2010

ENDORSEMENT

[1] East of Bay owns a thirty-one storey apartment building with 293 residential units at Bay and Wellesley in Toronto. Following the registration of the Condominium Plan in 2005, the Owner proceeded to market the units as rental apartments. All of the apartments were leased and occupied by the fall of 2006.

[2] In returning the assessment rolls to the City for the 2007 and 2008 taxation years, the Municipal Property Assessment Corporation ("MPAC") valued each of the units at $30,000 and, as required, sent the 293 Property Assessment Notices to the Owner. The assessments were paid in full. Two years later, in 2008, MPAC issued additional assessment notices for these same units because some of the property had been "omitted" during the original assessment. The Omitted Property Assessment Notices increased the $30,000 assessments in amounts generally ranging from $149,000 to $361,000 for each of the 2007 and 2008 taxation years.

[3] This is an application by the Owner under s. 46(1) of the *Assessment Act*[1] for a declaration that the Omitted Property Assessment Notices for the 2007 and 2008 taxation years are invalid and of no force and effect. The Owner also asks for an order that the City of Toronto refund any property taxes that have been paid pursuant to these notices.

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[1] R.S.O. 1990 c. A.31

[4] The City of Toronto has not filed an appearance and takes no position. The dispute at bar is between the Owner and MPAC and turns on the proper interpretation of s. 33(1) of the *Assessment Act* which provides as follows:

> If any land liable to assessment, has been in whole or in part omitted from the tax roll for the current year or for any part or all of either or both of the next two preceeding years, and no taxes have been levied for the assessment omitted, the assessor shall make any assessment necessary to rectify the omission and the clerk of the municipality upon notification thereof shall enter the assessment on the tax roll and the taxes that would have been payable if the assessment had not been omitted shall be levied and collected.

[5] This is not the usual case where MPAC has inadvertently omitted part of a land parcel or unknowingly failed to include a recent building expansion in the course of preparing the annual property assessment. The case law is clear that s. 33(1) is readily available in situations where the assessing authority was unaware of the omission of land at the time of the delivery of the assessment roll. MPAC is entitled to "rectify the omission" by issuing an Omitted Property Assessment Notice when the omission is discovered.[2]

[6] Here the omissions were not inadvertent but intentional. MPAC knew that the building in question was completed and fully occupied. But MPAC was having difficulty coping with the deluge of new condominium registrations. Lacking the manpower to do all of the current value assessments on an annual basis, MPAC decided as a matter of internal policy to do the condominium assessments in two steps several years apart: it first sent out a property assessment notice for each condo (or apartment) unit pegged at $30,000 ostensibly valuing only the "vacant land" portion. Then, because s. 33(1) allows re-assessments for omitted land going back two years before the current year (and land is defined to include buildings) MPAC was able to delay the assessment for the building itself for at least two years. When it had the time and resources to complete the assessment, MPAC sent out the Omitted Property Assessment Notices for the increased amounts.

[7] In a 2007 training manual, MPAC explained the "placeholder" process to its assessors:

> When MPAC places a value of $30,000 on newly constructed condominium units, the value is intended to represent some portion of the land-only value and does not include any assessment of the building. Therefore MPAC can issue omitted assessments for the new condominium units once they commence to be used, since the omitted assessment is capturing the building itself which had previously been omitted from the roll.

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[2] *Badder Funeral Homes Limited v. Municipal Property Assessment Corporation et al.* (28 February 2005), (Ont.S.C.J.) [unreported] at paragraphs 40 and 44 – 45; *Arcway Welding (1972) Ltd. v. Burlington (City)* et al. (1988) CarswellOnt 571, 39 M.P.L.R. 164 (Ont. Dist. Ct.); *Re Ross et al. and McCann et al.* (1976), 12 O.R. (2d) 398 at 399 – 400 (Div.Ct.)

[8] The training manual excerpt concludes with this comment: “It is possible that MPAC could be challenged on this....”

[9] MPAC’s practice of using vacant-land “place-holders” is being challenged in this application.

Decision

[10] In my view, for the reasons set out below, MPAC’s practice of assessing a fully-occupied residential property as “vacant land” and later re-assessing the property by purporting to “rectify the omission” by adding the “omitted” building does not fall within the letter or spirit of section 33(1). If MPAC has a manpower problem, then this should be addressed directly or the law should be amended to allow this questionable two-step assessment process.

[11] The application is granted.

Analysis

[12] The issue, as already stated, is the validity of the Omitted Property Assessment Notices. This in turn depends on the interpretation of s. 33(1) and whether any “land liable to assessment has been omitted in whole or in part from the tax roll.”

[13] At the time the tax roll was prepared for each of the 2007 and 2008 taxation years, the 293 apartment units were individually placed on the roll and correctly identified and described as required by s. 14(1) of the *Assessment Act.* Prima facie, no land liable to assessment had been omitted.

[14] The $30,000 assessment notices received by the Owner said nothing about “vacant land.” On the contrary, the original Property Assessment Notices, addressed to each of the 293 units, described the Property Classification as “residential-taxable-full” and the $30,000 amount as “the assessed value of your property” that is, the property value that “will be used by your municipality to calculate [your 2007 or 2008] property taxes.”

[15] The only reference to “vacant land” is found in the tax roll inscription and then only via the initials “VL.” According to the affidavit evidence of Joe Regina, a senior manager at MPAC, the letters “VL” under the column “U/C” (meaning “unit class”) stand for “vacant land.” There is also reference to “RTC” and “RTQ” which are intended to stand for “realty tax class” and “realty tax qualifier.” There is no legend or explanation for any of these codes on the tax roll document.

[16] MPAC concedes that even though the apartment units were classified as “vacant land in the residential class” for the 2007 and 2008 taxation years, there is no such vacant land sub-class for property in the residential tax class. Further, once a building is occupied, the

land beneath the building cannot be described as "vacant land" unless the building becomes substantially unusable: Ont. Reg. 282/98, ss. 1(1) and 1(2).

[17] The City of Toronto did not appeal the $30,000 assessments to the Assessment Review Board under s. 40 of the Act, as has been done in the past, if the assessment was thought to be too low or otherwise incorrect. Indeed, as already noted, the City did not file an appearance in this application and has taken no position.

[18] The Act is based on the concept of annual current value assessment. The evidence is clear that MPAC knew that the building in question was completed and occupied. MPAC knew it was a residential building. It correctly described and placed the residential apartment units on the tax rolls. The "vacant land" valuation was not an assessment of the current property value as required by the Act. Indeed, no vacant land existed on this property as of the date MPAC delivered the rolls to the City.

[19] Section 33(1) provides MPAC with the ability to "rectify" or correct an assessment notice if "land liable to assessment has been in whole or in part omitted from the tax roll..." The use of the words "rectify the omission" rather than simply "include the omission" suggests that the concern is with correcting or making right an omission that was inadvertently excluded through oversight or negligence. Here neither situation applies. MPAC's decision not to include the completed building in the original assessment was intentional not inadvertent. In my view, there is nothing to rectify and correct.

[20] Counsel for MPAC relies on a 1988 decision of the Ontario District Court in *Arcway Welding (1972) Ltd. v Burlington (City)*.[3] Clarke D.C.J. concluded that "the reasons for the omission are irrelevant ... once it is shown that land liable to assessment was omitted from the collector's roll, the section [33(1)] comes into play. The culpability of the assessor is not germane."[4]

[21] In *Arcway Welding*, the assessment department failed to assess an expansion of a building that had been enlarged to almost double its original size. The failure to assess the expansion was due to "oversight or negligence."[5] Judge Clark correctly concluded on these facts that "the culpability of the assessor is not germane." It was enough that the unassessed enlargement of the building had been overlooked and "omitted." This is a far cry, in my view, from the situation at bar – where there is no suggestion of oversight or negligence. MPAC decided to assess a large residential apartment complex as vacant land knowing this was not correct.

[22] The 2005 decision of the Arbitration Review Board in *WBH Woodstock Limited and the City of Woodstock,*[6] is helpful on several fronts. In this case, MPAC had assessed each of the 61 units in a condominium complex as vacant land at $30,000 as per its "place-

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[3] 1988 CarswellOnt 571.
[4] *Ibid.*, at para. 16.
[5] *Ibid.*, at para. 15.
[6] (2005) 50 O.M.B.R. 379 (A.R.B.)

holder" practice. The city of Woodstock objected to the low valuations. Note: MPAC officials considered issuing Omitted Notices but were advised by their legal department *"that this would not be appropriate"* (my emphasis).

[23] Realizing that the time for appealing the assessments had passed, the city filed an application under s. 359(1) of the *Municipal Act, 2001*[7] which allows a municipality to increase property taxes in cases of a "manifest...clerical or factual error ...but not an error in judgment in assessing the land."

[24] The Assessment Review Board rejected Woodstock's application and cancelled the purported tax increases. The findings made by the A.R.B. are relevant to the case at bar:

- MPAC incorrectly valued the condominium units as vacant land, resulting in their assessments being much lower than they should have been.

- It appears that MPAC put a "default" or "holding" assessment of $30,000 on each unit based on land value only and never amended these figures [under s. 32(1)] to show current values of the units.[8]

- The undercharge was not caused by a factual error as MPAC, well aware that it was assessing condominium units, chose to assess them as vacant land and did not correct the assessments. This was an error in judgment in assessing the units and accordingly subsection 359(1) does not permit the municipality to increase the taxes.[9]

[25] I take three things from the *Woodstock* decision: one, assessing a completed condominium unit as "vacant land" was an error that should have been corrected or amended under s. 32(1) before the assessment roll was returned to the city; two, failing to do so, and letting the vacant land assessment stand, was an error in judgment; and three, at least in this case, MPAC's legal department wisely concluded that issuing Omitted Notices "would not be appropriate."

[26] The *Assessment Act* requires all property to be assessed at current value. Intentionally assessing a completed and occupied apartment or condominium as "vacant land" knowing this is not the case is not current value assessment. And then two years later re-assessing the same unit this time as a completed condominium and claiming that one is simply rectifying an "omission" is not consistent with the intention and plain language in s. 33(1).

[27] If nothing else, the Owner is right when he says that "no land liable to assessment has been omitted from the tax roll." It is one thing to issue an Omitted Property Assessment

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[7] S.O. 2001, c. 25.
[8] The A.R.B. must be referring to the right to make amendments under s. 32(1) of the *Assessment Act.* Section 32(1) allows MPAC to correct any errors, omissions or misstatements in any assessment provided this is done before the tax roll is returned. However, once the roll has been returned to the municipality, no corrections are permitted. The only alteration allowed is via s. 33(1) and then only if land liable to assessment has been "omitted" from the tax roll.
[9] *Ibid.* at page 6 of 7.

Notice when the value of part of a land parcel or building was left out of the tax roll because of oversight or negligence. It is another thing altogether when the so-called omission was intentionally created by the assessor by wrongly assessing the property as vacant land simply to buy time and defer doing a proper current value assessment as required by the Act. Forgive the alliteration but it is surely not good public policy to twist a legislative provision into a linguistic pretzel simply to deal with an internal staffing problem.

Disposition

[28] The application for declaratory relief is granted. Order to go that the Omitted Property Assessment Notices issued by MPAC for the 2007 and 2008 tax years relating to the 293 apartment units at 925 Bay St., Toronto, are invalid and of no force or effect.

[29] Order further to go that any monies collected from the applicant pursuant to these Notices shall be refunded.

[30] The parties have agreed that costs should be fixed at $5000. The costs award is therefore $5000 all-inclusive, payable by MPAC forthwith.

[31] My thanks to counsel for their assistance and co-operation.

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Belobaba J.

Date: June 8, 2010