

**PROPERTY ASSESSMENT APPEAL BOARD
OF BRITISH COLUMBIA**

IN THE MATTER OF AN APPEAL PURSUANT TO S. 50 OF THE *ASSESSMENT ACT*

CONCERNING:

**AMACON GROUP
0710223 BC LTD
0746113 BC LTD
0710227 BC LTD**

APPELLANTS

AND

ASSESSOR OF AREA #09 - VANCOUVER SEA TO SKY REGION

RESPONDENT

**Appeal Nos.: 2013-09-00090; 2013-09-00091; 2013-09-00092; 2013-09-00104
2014-09-00005; 2014-09-00006; 2014-09-00007; 2014-09-00008**

Refer to as: 0710223 BC Ltd, et al v. Area 09 (2014 PAABBC 20140014)

Date of Decision: September 25, 2014

**Properties: 09-39-200-029-134-606-05-0000, 1001 Seymour Street, City of Vancouver
09-39-200-029-134-606-17-0000, 1001 Seymour Street, City of Vancouver
09-39-200-029-134-606-21-0000, 1001 Seymour Street, City of Vancouver
09-39-200-029-134-606-43-0000, 1035 Seymour Street, City of Vancouver
09-39-200-029-134-606-49-0000, 1045 Seymour Street, City of Vancouver
09-39-200-029-134-606-53-0000, 1045 Seymour Street, City of Vancouver
09-39-200-029-134-606-59-0000, 1055 Seymour Street, City of Vancouver**

Heard: June 2 to 4, 2014 at Richmond

**Appearances: Ludmila Herbst, for the Appellants
David Houston, for the Respondent**

**Board Panel: Dale Pope, QC, Panel Chair
Bruce Maitland, Panel Member**

INTRODUCTION

[1] These appeals are from the decisions of the 2014 Property Assessment Review Panel. The properties that are the subject of these appeals comprise nine lots in the 1000 block of Seymour Street in Vancouver (collectively, the “Property”) in the area known as Downtown South. The Property has minimal commercial improvements and is being held for future residential development with minimal or no commercial development.

[2] The *Prescribed Classes of Property Regulation*, B.C. Reg. 438/81 (the “Regulation”) provides that land should be classified as Class 6 Business and Other, unless it falls into another class. A property can be Class 1 Residential if it is used for residential purposes (Section 1(1) (a) of the Regulation) or if it has no present use and is specifically zoned for residential, non-business uses (Section 1(1)(c) of the Regulation).

[3] The Appellants (collectively, the “Appellant”) appeal on the basis the classification of the Property should be split between commercial and residential because a portion of the Property has no present use and is specifically zoned for residential, thus meeting the requirements of Section 1(1)(c) of the Regulation.

[4] The Assessor classified the Property as Class 6 Commercial for the 2013 and 2014 assessment rolls.

ISSUE

[5] The issue is whether the present classification of the Property as 100% Class 6 Commercial is correct, or should the classification be amended as contemplated by Section 1(1)(c) of the Regulation and the classification split into Class 6 Commercial and Class 1 Residential with the ratio as per the present zoning.

FACTS

[6] The parties prepared and filed an Agreed Statement of Facts, Exhibit 2, and the current zoning by-law for the Property. The Property is comprised of nine 25-foot by 120-foot lots in the 1000 block of Seymour Street in Vancouver encompassing 27,000 square feet.

[7] The Property has the following improvements:

1001 Seymour – surface commercial parking lot with 49 stalls;

1035 Seymour – 6,000 square foot single storey commercial building;

1045 Seymour – surface commercial parking lot with 22 parking stalls; and

1055 Seymour – 5,500 square foot commercial building.

[8] The total assessment for the Property is \$19,240,900 (Land \$19,214,000; Improvements \$26,900). The Property is zoned DD-L1 that permits a maximum density of 3 Floor Space Ratio (3 FSR) or three times site coverage ($3 \times 27,000 = 81,000$ square feet). For eight of the nine lots, the maximum commercial density is 1 FSR or 24,000 square feet. For one corner lot (Lot 38 at 1001 Seymour), the maximum density is 1.83 FSR or 5,490 square feet. Residential use is permitted in the remaining 51,540 square feet of the Property.

EVIDENCE AND SUBMISSIONS

Assessment Calculation

[9] The Assessor classifies the Property as 100% Class 6 Commercial, but the Assessor determines actual value as if the Property is residential.

[10] For the Appellant, Mr. Ryan Tung AACI, a qualified appraiser, testified that commercial values in downtown Vancouver are in the \$60 per square foot buildable range. Residential values are in the \$200 per square foot buildable range. The vacant land value for the Property is \$19,214,000. This equates to \$236 per square foot buildable. Responding to a question from the panel, Mr. Tung said that the assessed land value for the Property represents residential values.

[11] The Assessor did not dispute Mr. Tung's assertion that the assessed land value for the Property is based on residential values, and not commercial values. As a result, the Board accepts Mr. Tung's evidence.

[12] One of the Assessor's submissions is that the Appellant has asked this Board to involve itself in tax policy because it is the application of the City of Vancouver's mill rate that results in the higher tax burden to the Appellant and the issue is, therefore, outside the Board's jurisdiction. We accept that we have no jurisdiction to deal in any way with tax policy and accordingly this decision will not deal with tax policy. Rather, our mandate is to ensure that the Property's market value is determined applying appraisal principles, and in accordance with the law. This we will endeavour to do.

[13] As noted above, the parties have agreed on the total value for 2013 and 2014, the total maximum density and the maximum commercial density for the Property. They have also agreed on the applicable zoning, namely DD-L1 and the applicable FSR for commercial and residential improvements. As indicated above, in testimony, the Board learned that the assessed value represents residential value but the land is classified as commercial because of some surface commercial use, including parking.

ANALYSIS AND DECISION

[14] To address the issue before us, an analysis of Section 1 of the Regulation is required. Section 1, in part, reads as follows:

1 (1) Class 1 property shall include only:

(c) land which has no present use and which is neither specifically zoned nor held for business, commercial or industrial purposes, except that

(i) if land is included in Class 9, it is not included in Class 1, and

(ii) if

(A) a zoning bylaw under section 903 or 904 of the *Local Government Act* or under section 565 or 565.1 of the *Vancouver Charter*, a phased development agreement under section 905.1 of the *Local Government Act*, an official development plan under section 562 of the *Vancouver Charter*, a covenant under section 219 of the

Land Title Act, or a land use contract under the *Local Government Act* applies to the land, and

(B) the bylaw, agreement, plan, covenant or contract, either itself or, if more than one applies, read together, permits a specified portion, or a percentage, of the land to be used for residential purposes but does not permit that portion or percentage to be used for business, commercial or industrial purposes, other than a home occupation or bed and breakfast use in conjunction with a single family residence that is the principal residence of the owner or manager, only that portion or percentage is included in Class 1;

[15] The Assessor makes two points: the Property has a current present use, and the allowed additional FSR is air space and not land; therefore, Section 1(1)(c) does not apply. The Appellant says the Property falls squarely within the Regulation and thus a split classification as permitted by Section 10 of the Regulation should be applied. Section 10 reads as follows:

Split classification

10 Where a property falls into 2 or more prescribed classes, the assessor shall determine the share of the actual value of the property attributable to each class and assess the property according to the proportion each share constitutes of the total actual value.

[16] It should be noted that Section 1(1)(c) was amended in 2010 to allow for the exception upon which the Appellant relies.

[17] The Appellant submits four points to support its position:

- a. the Property includes land which has no present use;
- b. the zoning bylaw DD-L1 is a bylaw as described in Section 1(1)(c);
- c. the zoning bylaw permits residential development to 2 FSR; and
- d. class should be split accordingly.

- a. Does the Property include land that has no present use?

[18] The Appellant says land is not confined to the surface area alone, but includes the three dimensional area above the ground. It contends this position conforms to legal authorities. The Appellant quoted from *Black's Law Dictionary*, 8th ed., the definition of 'land' as follows:

Land, *n.* 1. An immovable and indestructible three dimensional area consisting of the earth's surface, the space above and below the surface and everything growing on or permanently affixed to it. 2. An estate or interest in real property...

In its legal significance, 'land' is not restricted to the earth's surface, but extends below and above the surface. Nor is it confined to solids, but may encompass within its bounds such things as gases and liquids. A definition of 'land' along the lines of 'a mass of physical matter occupying space' also is not sufficient, for an owner of land may remove part or all of that physical matter, as by digging up and carrying away the soil, but would nevertheless retain as part of his 'land' the space that remains.

Ultimately, as a juristic concept, 'land' is simply an area of three-dimensional space, its position being identified by natural or imaginary points located by reference to that space, although, as we shall see, the owner of that space may well own those fixed contents. Land is immovable as distinct from chattels, which are moveable; it is also in its legal significance, indestructible. The contents of the space may be physically served, destroyed or consumed, but the space itself, and so the 'land' remains immutable. (Peter Butt, *Land Law* 9 (2d ed. 1988)).

[19] The Assessor concedes that there is 'unused density' but says this density does not convert to land unless and until the Appellant has created a legal parcel capable of transfer; that is, the air space is not yet land. The Assessor quotes from *Merriam Webster's* dictionary defining land as "the solid part of the surface of the Earth; an area of ground; an area of the Earth's solid surface owned by someone". Further, the Assessor says *Terminal City Club Tower v. Assessor of Area #09 – Vancouver*, 2002 PAABBC 20027309 supports this point and the requirement that air, in order to be land must be part of a legal air space parcel capable of transfer. In our opinion, this interpretation of Terminal City is not correct. In fact, the Board in Terminal City said as follows:

[35] Therefore, although the Assessment Act and the Regulation does [sic] not specifically deal with air space parcels, the land title scheme in the [sic] B.C. clearly

acknowledges that air space constitutes land and lies in grant. It can be subdivided transferred, mortgaged, leased and assessed for taxation.

[36] “Real property” as used in the definition of “parcel” in the *Assessment Act* is not defined. Traditionally, the owner of land owns not only the ground and soil, but everything attached to the earth, whether natural or manmade. Ownership also extends indefinitely above and below the surface, taking in both the air above and the minerals below. This is the concept of land as a three-dimensional entity. This concept was discussed in the appraisal context in *The Appraisal of Real Estate* (Cdn Edition, 1992) at page 120:

The vertical division of real property is based on the legal conception of land as a volume of space with boundless height and depth... As the density of building in urban areas increases, fewer sites are available for new construction and land values escalates. This trend has produced a growing interest in developing air rights.

[37] This concept of land as a three-dimensional entity underlies the land title scheme in B.C., which allows air space parcels to be created, transferred, mortgaged, leased and subdivided.

[20] In affirming the Board decision the B.C. Court of Appeal, (2004 BCCA 466), quoted with approval the above paragraphs.

[21] This decision also accords with the statutory scheme. Section 139 of the *Land Title Act*, RSBC 1996, c. 250, says that ‘air space constitutes land and lies in grant’. The *Assessment Act*, in defining land excludes coal and other minerals, recognizing that land extends below the surface as well.

[22] Finally, on this point, the Appellant says the land that is valued must be the land as classified. Here, it is apparent from Mr. Tung’s evidence that the Property’s highest and best use, when considering use that is legally permissible, is residential. Mr. Savage, Senior Development Manager with the Appellant, also testified for the Appellant, and we accept that the ground land area is irrelevant to his determination of value and that what matters is the

maximum density that is legally allowed on land he is valuing for acquisition. Therefore, if land is treated as residential (to take into account its density) for valuation purposes, it is not logical to treat the land differently for classification purposes by considering only the surface use as the Assessor said he did (both in Mr. Sisodraker's evidence and in argument), and ignoring the legally permitted use which drives the market value.

[23] Considering all the above, we conclude that "land" includes the air space above. This accords with the law and evidence referred to above. Thus, this unused land has no present use. As it is land that has no present use, it qualifies for consideration under Section 1(1)(c) of the Regulation.

[24] We find, and the parties agree, that the Property's current zoning DD-L1 is a bylaw that permits residential use, and is, therefore, covered by Section 1(1)(c).

[25] We also find that a present ground use, as a parking lot, does not disqualify the vertical column from qualifying for consideration as having no present use. Separate titles are not required for split classification to occur. This is in conformity with Section 10 of the Regulation and the decision in *Berane Construction Ltd. v. Assessor of Area #11 – Richmond/Delta* (2008 PAABBC 20081860), at para 9.

[26] The parties also raised an issue of equity in that one of the DD-L1 zoned properties located at 1111 Seymour Street has had its assessment changed from commercial to split classification in a manner similar to that proposed for the Property. The Assessor says equity does not apply, and for any equity analysis, the competitive set for comparison must be much larger than a single property. In light of our findings on the applicability of Section 1(1)(c) to the Property, there is no need to address this argument.

CONCLUSION

[27] The Board concludes that the classification of the Property should be amended to include the split classification applied for.

ORDER

[28] As noted above, the parties have confirmed in Exhibit 2 their agreement on the percentages if split classification was found to be applicable. The Board orders the Assessor to amend the 2013 and 2014 assessment rolls as follows (Note: the values are taken from the Agreed Statement of Facts):

Roll No. 09-39-200-029-134-606-21-0000 – Appeal No. 2013-09-00104

		FROM		TO
Land:	Class 1 – Residential	\$ 0	\$	1,414,707
	Class 6 – Business and Other	\$ 2,460,000	\$	706,293
Improvements:	Class 6 – Business and Other	\$ 300	\$	300
Total Assessed Value:		\$ 2,460,300	\$	2,121,300

Roll No. 09-39-200-029-134-606-21-0000 – Appeal No. 2014-09-00006

		FROM		TO
Land:	Class 1 – Residential	\$ 0	\$	1,414,707
	Class 6 – Business and Other	\$ 2,121,000	\$	706,293
Improvements:	Class 6 – Business and Other	\$ 300	\$	300
Total Assessed Value:		\$ 2,121,300	\$	2,121,300

Roll No. 09-39-200-029-134-606-17-0000 – Appeal No. 2013-09-00104

		FROM		TO
Land:	Class 1 – Residential	\$ 0	\$	1,414,707
	Class 6 – Business and Other	\$ 2,460,000	\$	706,293
Improvements:	Class 6 – Business and Other	\$ 300	\$	300
Total Assessed Value:		\$ 2,460,300	\$	2,121,300

Roll No. 09-39-200-029-134-606-17-0000 – Appeal No. 2014-09-00006

		FROM		TO
Land:	Class 1 – Residential	\$ 0	\$	1,414,707
	Class 6 – Business and Other	\$ 2,121,000	\$	706,293
Improvements:	Class 6 – Business and Other	\$ 300	\$	300
Total Assessed Value:		\$ 2,121,300	\$	2,121,300

Roll No. 09-39-200-029-134-606-05-0000 – Appeal No. 2013-09-00104

		FROM		TO
Land:	Class 1 – Residential	\$ 0	\$	2,787,691
	Class 6 – Business and Other	\$ 5,043,000	\$	1,578,309
Improvements:	Class 6 – Business and Other	\$ 1,100	\$	1,100
Total Assessed Value:		\$ 5,044,100	\$	4,367,100

Roll No. 09-39-200-029-134-606-05-0000 – Appeal No. 2014-09-00006

		FROM		TO
Land:	Class 1 – Residential	\$ 0	\$	2,787,691
	Class 6 – Business and Other	\$ 4,366,000	\$	1,578,309
Improvements:	Class 6 – Business and Other	\$ 1,100	\$	1,100
Total Assessed Value:		\$ 4,367,100	\$	4,367,100

Roll No. 09-39-200-029-134-606-43-0000 – Appeal No. 2013-09-00091

		FROM		TO
Land:	Class 1 – Residential	\$ 0	\$	2,830,081
	Class 6 – Business and Other	\$ 4,920,000	\$	1,412,919
Improvements:	Class 6 – Business and Other	\$ 10,800	\$	10,800
Total Assessed Value:		\$ 4,930,800	\$	4,253,800

Roll No. 09-39-200-029-134-606-43-0000 – Appeal No. 2014-09-00005

		FROM		TO
Land:	Class 1 – Residential	\$ 0	\$	2,830,081
	Class 6 – Business and Other	\$ 4,243,000	\$	1,412,919
Improvements:	Class 6 – Business and Other	\$ 10,800	\$	10,800
Total Assessed Value:		\$ 4,253,800	\$	4,253,800

Roll No. 09-39-200-029-134-606-53-0000 – Appeal No. 2013-09-00092

		FROM		TO
Land:	Class 1 – Residential	\$ 0	\$	1,414,707
	Class 6 – Business and Other	\$ 2,460,000	\$	706,293
Improvements:	Class 6 – Business and Other	\$ 200	\$	200
Total Assessed Value:		\$ 2,460,200	\$	2,121,200

Roll No. 09-39-200-029-134-606-53-0000 – Appeal No. 2014-09-00007

		FROM		TO
Land:	Class 1 – Residential	\$ 0	\$	1,414,707
	Class 6 – Business and Other	\$ 2,121,000	\$	706,293
Improvements:	Class 6 – Business and Other	\$ 200	\$	200
Total Assessed Value:		\$ 2,121,200	\$	2,121,200

Roll No. 09-39-200-029-134-606-49-0000 – Appeal No. 2013-09-00092

		FROM		TO
Land:	Class 1 – Residential	\$ 0	\$	1,414,707
	Class 6 – Business and Other	\$ 2,460,000	\$	706,293
Improvements:	Class 6 – Business and Other	\$ 200	\$	200
Total Assessed Value:		\$ 2,460,200	\$	2,121,200

Roll No. 09-39-200-029-134-606-49-0000 – Appeal No. 2014-09-00007

		FROM	TO
Land:	Class 1 – Residential	\$ 0	\$ 1,414,707
	Class 6 – Business and Other	\$ 2,121,000	\$ 706,293
Improvements:	Class 6 – Business and Other	\$ 200	\$ 200
Total Assessed Value:		\$ 2,121,200	\$ 2,121,200

Roll No. 09-39-200-029-134-606-59-0000 – Appeal No. 2013-09-00090

		FROM	TO
Land:	Class 1 – Residential	\$ 0	\$ 1,414,707
	Class 6 – Business and Other	\$ 2,150,000	\$ 706,293
Improvements:	Class 6 – Business and Other	\$ 14,000	\$ 14,000
Total Assessed Value:		\$ 2,164,000	\$ 2,135,000

Roll No. 09-39-200-029-134-606-59-0000 – Appeal No. 2014-09-00008

		FROM	TO
Land:	Class 1 – Residential	\$ 0	\$ 1,414,707
	Class 6 – Business and Other	\$ 2,121,000	\$ 706,293
Improvements:	Class 6 – Business and Other	\$ 14,000	\$ 14,000
Total Assessed Value:		\$ 2,135,000	\$ 2,135,000

FOR THE BOARD




Dale Pope, QC, Panel Chair

Bruce Maitland, Panel Member

APPEAL OF BOARD'S DECISION

Pursuant to section 65(1) of the *Assessment Act*, any person who is affected by the above decision may appeal by way of Stated Case to the Supreme Court of British Columbia **on a question of law only**. To do so, you must notify the Board in writing **and** include the question(s) of law that you want the Court to answer **within 21 days** of your receipt of the Board's decision. You may contact the Board for a form, which can be used for this purpose.

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