

COURT OF APPEAL FOR ONTARIO

CITATION: Municipal Property Assessment Corporation v. Claireville Holdings
Limited, 2024 ONCA 598
DATE: 20240802
DOCKET: COA-23-CV-0473

Simmons, Thorburn and Favreau JJ.A.

BETWEEN

Municipal Property Assessment Corporation

Appellant (Appellant)

and

Claireville Holdings Limited, 2477879 Ontario Inc., 1579661 Ontario Inc., Frances
Danyliw and City of Toronto

Respondents (Respondents)

Melissa VanBerkum, for the appellant

Iain A.C. MacKinnon and Stephen Longo, for the respondents Claireville
Holdings Limited, 2477879 Ontario Inc., 1579661 Ontario Inc. and Frances
Danyliw

No one appearing for the City of Toronto

Heard: February 12, 2024

On appeal from the order of the Divisional Court (Justices Katherine E. Swinton,
Robbie D. Gordon and Wendy M. Matheson), dated June 3, 2022, with reasons
reported at 2022 ONSC 3293.

Favreau J.A.:

A. INTRODUCTION

[1] The respondents own five contiguous properties in the Entertainment District on King Street, in Toronto. At the relevant time, the properties consisted of two- and three-storey commercial buildings. The respondents intend to redevelop the properties into a mixed-use high-rise condominium project.

[2] The Municipal Property Assessment Corporation (“MPAC”), which is responsible for assessing properties in Ontario for the purpose of taxation, assessed the properties on the basis of their development potential as a mixed-use high-rise development. The respondents appealed the assessments to the Assessment Review Board (the “Board”). The Board allowed the appeal, finding that MPAC had not met its burden of proving that a mixed-use high-rise development was the properties’ “highest and best use” (“HBU”). Instead, the Board held that the properties should be assessed based on their current use, which the Board described as a presumption. The Divisional Court dismissed MPAC’s appeal.

[3] MPAC appeals with leave to this court and argues that the Board and the Divisional Court made a legal error in relying on a presumption of current use. MPAC submits that, instead, the Board should have relied on the most recent purchase prices for one of the properties and a nearby property.

[4] I would dismiss the appeal. The Board's decision was based on the evidence and submissions made by the parties. The Board was not satisfied that MPAC met its burden of proof and it then accepted the respondents' evidence regarding the current value of the properties. I see no legal errors in the Board's analysis and conclusion.

B. STATUTORY SCHEME

[5] Subsection 14(1) of the *Assessment Act*, R.S.O. 1990, c. A.31, requires MPAC to prepare an assessment roll for each municipality, which includes the current value of all land in the municipality.

[6] Subsection 19(1) of the *Assessment Act* provides that the assessment of land is to be based on its "current value". Subsection 1(1) of the Act defines "current value" as, "in relation to land, the amount of money the fee simple, if unencumbered, would realize if sold at arm's length by a willing seller to a willing buyer".

[7] Subsection 19.2(1) of the *Assessment Act* sets the valuation days that apply for specified valuation years. Subsection 19.2(1)3 sets January 1, 2012 as the valuation day for the taxation years 2013 to 2016. Subsection 19.2(1)4 sets January 1, 2016 as the valuation day for the taxation years 2017 to 2020.

[8] Pursuant to s. 40(1)(a)(i) of the *Assessment Act*, taxpayers are entitled to appeal the assessed value of their land to the Board. On an appeal, pursuant to

s. 40(17) of the Act, MPAC has the onus of proving the current value of the land. Pursuant to s. 44(3)(a) of the Act, the Board is required to determine the current value of the land. Section 45 of the Act gives the Board all the powers of MPAC to determine the current value.

C. BACKGROUND

(1) The properties and the development plans

[9] The respondents, Claireville Holdings Limited, 2477879 Ontario Inc., 1579661 Ontario Inc. and Frances Danyliw (collectively, “Claireville”) own five contiguous parcels of land on King Street West, in Toronto’s Entertainment District. The municipal addresses are 301 to 319 King Street West (collectively, “the Properties”). At the relevant time, there were two- and three-storey buildings on the land. They were used as commercial leased space.

[10] In May of 2012, Claireville owned four of the Properties and started discussions with the City of Toronto (the “City”) about a proposed development on them. In April of 2013, Claireville submitted a development application to the City for a 42-storey mixed-use building on the four properties. The City Planning Department opposed the application. Claireville was advised that more land was required for the proposed development.

[11] In August of 2015, Claireville purchased the adjoining property at 301 King Street West for \$8 million. Claireville next amended its application to add this property and sought approval to build a 48-storey mixed use building.

[12] By late 2017, the City had not yet decided whether to approve this new proposal. In the absence of a decision, Claireville appealed to the Ontario Municipal Board (which has since become the Local Planning Appeal Tribunal (the “LPAT”). In December 2019, the City made a “with prejudice” offer to settle the LPAT appeal on the basis of approval for a mixed-use 50-storey development.

[13] In February 2020, City Council passed a resolution approving the settlement offer in principle, subject to conditions including rezoning, site plan approval and Heritage Easement Agreements.

[14] At the time of the hearing before the Board (November 2020), the required rezoning change had not been approved.

(2) MPAC’s assessments

[15] MPAC assessed the current values of the Properties for the taxation years of 2014 to 2020 using the January 1, 2012 and January 1, 2016 valuation dates. MPAC assessed the Properties as a land assembly, with development potential for a high-rise development of 40 storeys or more. For the years 2014 to 2016, MPAC assessed the value of the properties at 305 to 319 King Street West as

\$20,474,000 for each year. For the years, 2017 to 2020, it assessed the value of the Properties at 301 to 319 King Street West as \$29,854,000 for each year.

(3) The Board's decision

[16] Claireville appealed the assessments to Board.

[17] The Board allowed the appeals. The Board reduced the assessments for the years 2014 to 2016 to \$7,775,000, and for the years 2017 to 2020 to \$14,314,000. In doing so, the Board relied on the Properties' current use as income-generating properties.

[18] In its decision, the Board explained that the assessed value of land is based on the state and condition of the land on the "assessment roll return date". As agreed by the parties, this includes the land's development potential. The Board further explained that the HBU methodology is to be used to determine whether land has development potential in excess of the value of its existing use.

[19] The Board set out the following definition of the HBU from a text co-authored by the Appraisal Institute and the Appraisal Institute of Canada:

[HBU] may be defined as follows: The reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, financially feasible, and that results in the highest value.

[20] The Board further stated that, to meet this definition, MPAC is required to present evidence that satisfied the four following four requirements: 1) legal

permissibility; 2) physical possibility; 3) financial feasibility; and 4) maximum productivity.

[21] The Board went on to state as follows:

The existing use of land is presumed to be the [HBU]. A party seeking to prove a different [HBU] must provide “compelling evidence of how another legally permissible, physically possible and financially feasible use is more productive than the current use...” [Emphasis added; citation omitted.]

[22] Following this explanation of the test for determining the HBU, the Board considered whether MPAC had met its onus of proving each of the four requirements to establish that a 50-storey mixed-use development was the HBU for the Properties. The Board was satisfied that the evidence supported a finding that the first two requirements were met:

- a. Legal permissibility: Based on the approval of a similar development in the area in 2013, the Board was satisfied that there was a reasonable probability that the zoning amendment would be granted.
- b. Physical possibility: The Board noted that Claireville agreed that MPAC’s proposed HBU was physically possible.

[23] However, the Board found that MPAC did not prove that its proposed HBU was financially feasible. In reaching this conclusion, the Board found that MPAC did not rely on a recognized appraisal methodology to prove that the development would be financially feasible. The Board found that it was a methodological error

for MPAC to simply rely on the “sales evidence of purportedly comparable properties” to satisfy the HBU financial feasibility test. Specifically, the Board found that MPAC failed to provide “narrative market and marketability analyses that include an analysis of residual demand”. The Board further found that MPAC failed to present evidence that would establish financial feasibility for each state and condition date.

[24] The Board then stated that, given that MPAC’s proposed HBU was not financially feasible, it was not necessary to determine whether it had established maximum productivity. However, the Board nevertheless commented as follows:

In any event, the maximum productivity test is a choice between the profitability of various Proposed Uses found to be financially feasible. As MPAC had only proposed a single [HBU], there is no choice required to be made among financially feasible proposed uses, to determine which would be maximally productive. [Emphasis added.]

[25] Having found that MPAC did not meet its onus of proving its proposed HBU, the Board accepted Claireville’s evidence of valuation based on the “income approach” for the existing use of the Properties as two- and three-storey commercial buildings. In doing so, the Board observed that MPAC had not presented any evidence based on the income approach for the existing buildings, and that, when cross-examined, “MPAC’s expert agreed with the valuations given by [Claireville’s] expert, if the Board found that the [HBU] as a high-rise residential building was not made out”.

(4) The Divisional Court's decision

[26] The Divisional Court granted leave to appeal the Board's decision but dismissed the appeal.

[27] At the Divisional Court, MPAC argued that the Board erred in stating that there is a presumption that a property's value is based on its current use. The Divisional Court rejected this ground of appeal as follows:

The articulation of the presumption in favour of current use value must be considered in the context in which disputes such as this one come before the Board, namely: (i) that the assessed value of the property has, in the past, been based on its actual use, which has not changed; (ii) the current value of the property has been assessed anew based on a different use of the property; (iii) the owner contests the current value as assessed and takes the position before the Board that the property's current or actual use should continue to be the basis for valuation; and (4) in accordance with s. 40(17) of the Act the burden of proof as to the correctness of the current value as assessed by MPAC rests with MPAC.

In this context, the articulation of the presumption is little more than a re-statement of the burden of proof.

In this case the Board made a factual determination that MPAC did not meet its burden of proof – that it did not establish a satisfactory evidentiary foundation for valuation based on a different use of the property. That left its current value to be determined based upon the current use of the property – the same use that had been the basis of the determination of its value in years past. The Board made no legal error in doing so.

[28] The Divisional Court also rejected two additional arguments made by MPAC that are not relevant to the issues on this appeal.

D. ANALYSIS

[29] On appeal, MPAC renews its argument that the Board erred in stating that there is a presumption that the current value of land will be assessed based on its current use. As discussed below, I see no error in the Board’s legal analysis and conclusions.

(1) Jurisdiction and the standard of review

[30] Subsection 43.1(1) of the *Assessment Act* provides that “an appeal lies from the [Board] to the Divisional Court, with leave of the Divisional Court, on a question of law”.

[31] On an appeal from the Divisional Court to this court, the court is to step into the shoes of the Divisional Court: *Onyskiw v. CJM Property Management Ltd.*, 2016 ONCA 477, 132 O.R (3d) 295, at para. 27.

[32] The appellate standard of review applies to a statutory appeal from an administrative tribunal: *Minister of Citizenship and Immigration v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, at para. 37; *Housen v. Nikolaisen*, 2002 SCC 3, [2002] 1 S.C.R. 84. Only legal errors or errors of mixed fact and law involving extricable questions of law can be appealed from the Board to the Divisional Court. The court cannot interfere if the Board made an error of fact or mixed fact and law that does not involve an extricable question of law. If the Board made a legal error, the

standard of review is correctness: *Municipal Property Assessment Corporation v. Zarichansky*, 2020 ONSC 1124 (Div. Ct.), at para. 26 and 28.

(2) The Board did not make a legal error

[33] On appeal, MPAC argues that the Board made a legal error when it stated that the “existing use of land is presumed to be the [HBU]” (emphasis added). MPAC submits that this is contrary to s. 19 of the *Assessment Act*, which requires that land be assessed at its current value. Notably, in making this argument, MPAC does not suggest that the Board erred in rejecting its proposed HBU of a mixed-use high-rise development. Rather, MPAC argues that, once the Board found that MPAC had not met its burden, the Board had a responsibility to independently determine the current value of the property rather than simply accepting Claireville’s position that the current value of the Properties should be based on their current use.

[34] MPAC argues that, in this case, this error led the Board to ignore comparable sales that would have established the current value. For the January 1, 2012 valuation day, a comparable property at 321 King Street West had sold for \$4,680,000. For the January 1, 2016 valuation day, Claireville purchased 301 King Street West for \$8,000,000 in August 2015. MPAC argues that the Board’s erroneous reliance on the presumption that the current use is the HBU led the Board to ignore this evidence, which in turn should have led the Board to find that

the current value of the Properties is higher than the value associated with their current use.

[35] I see no legal errors in the Board's analysis and conclusion.

[36] In principle, I agree with MPAC's argument that the *Assessment Act* does not create or allow for a *presumption* that the current use of a property is its HBU. As the Divisional Court explained in *Zarichansky*, at paras. 40 and 41, the Board is charged with determining the current value of lands and therefore cannot ascribe a value it knows is not the current value simply because MPAC has failed to meet its burden of proof:

Under the statutory scheme, MPAC is initially tasked with determining the current value of the property. However, where a taxpayer appeals to the Board, it is up to the Board to make that determination:

- Section 40(1)(a)i provides that a person can bring an appeal to the Board on the basis that the "current value" of his or her land is incorrect. Section 40(19) requires the Board to determine the "matter" after hearing submissions from the parties.
- Section 44(3) requires the Board to determine the "current value of the land", after which the Board can reduce the value to make it equitable in relation to land in the vicinity.
- Section 45 provides that, on an appeal, the Board has all of MPAC's powers in determining the value of the property.

In combination, these provisions make clear that an assessment must be based on the current value of the

property. The Board has no power to dodge this responsibility based on a finding that MPAC has not met its burden of proof. [Emphasis added.]

[37] However, that is not what happened in this case.

[38] While the Board made reference to a *presumption* that the current use of the Properties is its HBU, this is not in fact how the Board reasoned through its decision. As reviewed above, the Board first considered MPAC's proposed HBU and found that it had not met its burden of proving the financial feasibility of this proposed use. It is worth remembering that MPAC does not contest this finding. The Board then turned to the other expert evidence available regarding the value of the Properties, which consisted of Claireville's evidence regarding the current value of the Properties. Based on that evidence, which the Board accepted, it concluded that the Properties' current value should be based on the "income approach", which was based on the current use of the Properties as income properties. In making this finding the Board relied on a concession made by MPAC's expert that, if its proposed HBU was not made out, Claireville's proposed valuation was appropriate:

MPAC did not present any valuation evidence, based on the income approach, for the existing use as 2 and 3-storey commercial buildings. Under cross-examination, MPAC's expert agreed with the valuations given by the Appellants' expert, if the Board found that the [HBU] as a high-rise residential building was not made out. [Emphasis added.]

[39] I agree with the Divisional Court. The Board first found that MPAC had not met its onus, and then turned to Claireville's evidence. MPAC did not apply a presumption, but simply decided the case based on the evidence and arguments presented by the parties, while keeping in mind that MPAC bore the onus of proving its proposed HBU and current value.

[40] MPAC's position amounts to an argument that, while the Board rejected its proposed HBU, the Board should nevertheless have considered an alternative to its proposed HBU *and* to Claireville's position that the valuation should be based on the income approach. There is nothing in the record to suggest that MPAC made this alternative submission to the Board. MPAC conceded this point before us in oral argument.

[41] In the circumstances, in the absence of submissions on this issue and a properly developed evidentiary record, there is no basis for finding that the Board made a legal error by failing to use comparative sales as the basis for arriving at the current value for the relevant valuation dates. While the Board's role is to determine the current value of the Properties, it is to do so based on the submissions and evidence of the parties, keeping in mind that MPAC bears the onus to prove its proposed current value. The Board did not commit a legal error by failing to come up with its own current value in the circumstances of this case.

[42] This case is unlike *Zarichansky*, where the Board was not satisfied that MPAC met its burden and then reverted back to the prior valuation, knowing that it did not represent the current value of the property. In this case, the Board's valuation was based on evidence put forward by Claireville that it accepted, as it was entitled to do. This does not amount to a legal error.

E. DISPOSITION

[43] I would dismiss the appeal.

[44] As agreed between the parties, the respondents are entitled to costs for the leave motion and the appeal in the total amount of \$15,000 inclusive of disbursements and HST.

Released: August 2, 2024 "J.S."

"L. Favreau J.A."
"I agree. Janet Simmons J.A."
"I agree. Thorburn J.A."