IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Assessor of Area #14 – Surrey/White Rock) v. Fraser Park Realty Ltd.,* 2024 BCSC 1480

Date: 20240814
Docket: S237433
Registry: Vancouver

In the Matter of a Stated Case under the *Assessment Act*, R.S.B.C. 1996, c. 20, s. 64, and in the Matter of an Appeal to the Property Assessment Appeal Board of British Columbia

Between:

Assessor of Area #14 – Surrey/White Rock

Applicant

And

Fraser Park Realty Ltd. and Property Assessment Appeal Board

Respondents

Before: The Honourable Mr. Justice Milman

On appeal from: A decision of the Property Assessment Appeal Board of British Columbia, dated November 8, 2022 (*Fraser Park Realty Ltd. v. Area 14*, 2022 PAABBC 20220017).

Reasons for Judgment

Counsel for the Applicant:	M.J. Watson
Counsel for the Respondent, Fraser Park Realty Ltd.:	J.H. Shevchuk
Place and Dates of Hearing:	Vancouver, B.C. July 24-25, 2024
Place and Date of Judgment:	Vancouver, B.C. August 14, 2024

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I. Introduction

[1] This is an appeal from a decision of the Property Assessment Appeal Board (the "Board") that comes to the court by way of stated case pursuant to s. 64 of the *Assessment Act,* R.S.B.C. 1996, c. 20 [*Act*].

[2] The assessments in issue concern real property located at 1530 Foster Street in the City of White Rock, British Columbia (the "Property"). In assessing the Property for the years 2020 and 2021, the assessor of area #14 – Surrey / White Rock (the "Assessor") refused to consider the effect of two encumbrances registered on title to the Property, namely, an easement and a restrictive covenant (the "Encumbrances"), that operate to restrict the use to which the Property can lawfully be put.

[3] Fraser Park Realty Ltd. ("FPRL"), the developer of the Property, disagreed with the assessments and brought an appeal to the Board under the *Act*, arguing that the assessments, because of that omission, were not conducted as required by the *Act*.

[4] In a decision dated November 8, 2022, styled as *Fraser Park Realty Ltd. v. Area 14* (2022 PAABBC 20220017) (the "Decision"), the Board agreed with FPRL, finding that the Encumbrances may impact or affect the market value of the Property and must therefore be considered in the assessment of the Property on the question of value.

[5] At the request of the Assessor, the Board gave the parties notice of this stated case, seeking the court's determination as to whether the Decision was correct as a matter of law. For the reasons that follow, I have concluded that it was.

II. Factual Background

[6] The Encumbrances originated in 1959. At the time, what is now the Property formed part of a parent parcel that was owned by Canada Safeway Limited ("Safeway"). Safeway had built or was in the process of building a supermarket on the site but did not need all of the land for that purpose. It decided to subdivide and

sell off a portion of the parent parcel that it considered to be surplus to its needs, which became the Property. The rest of the parent parcel, now known as 15176 North Bluff Road, was retained by Safeway and became the dominant tenement.

[7] The purchaser of the Property planned to build a strip mall there. Safeway appears to have had two concerns about that plan. First, it did not want the purchaser or its successors to operate a competing business on the Property. Second, it did not want customers visiting the strip mall to use parking spaces on the dominant tenement intended for the use of Safeway's customers.

[8] In order to address those concerns, Safeway and the purchaser executed and registered various instruments on title, thereby creating the Encumbrances, with the intention that they would run with the land. The Encumbrances restrict the owner of the Property from:

a) operating on the Property one or more grocery, supermarket or specialty food shops or other good retail outlets with a floor area exceeding 1,000 square feet; and

b) erecting, constructing or maintaining any building on the Property without setting aside 2.5 units of area for parking for every one unit used for the erection or construction of buildings.

[9] The Property has been used as a paved parking lot since then. There are no improvements.

[10] In recent decades, development pressure in White Rock has grown considerably. FPRL, through an affiliate, 1530 Foster Street Ltd. ("1530"), recently purchased the Property with the intention of building residential towers and low-rise buildings there. The Encumbrances severely limit its ability to carry out those plans. In an effort to overcome that impediment, it caused 1530 to bring a petition to this court seeking a declaration that the restrictive covenant was void and unenforceable. In the alternative, it also sought a declaration interpreting its terms in a manner that

would allow for the parking requirement to be satisfied above and below ground level. The chambers judge refused to grant either form of relief.

[11] On appeal, 1530 was only partly successful. In its decision, indexed as *1530 Foster Street Ltd. v. Newmark Projects Ltd*., 2018 BCCA 198, the Court of Appeal agreed with the chambers judge that the restrictive covenant was valid and ran with the land, but allowed the appeal in part by overturning the chambers judge's finding that the parking requirement could only be satisfied at ground level.

[12] In 2020 and 2021, the Assessor assessed the Property at $29,497,000 and $31,240,000 respectively, as if it were unencumbered by the Encumbrances. It is not clear what the assessed value of the Property would have been in those years if the Encumbrances had been considered in the assessment, but it appears to be common ground that it would have been considerably less than that.

[13] In its subsequent appeal to the Board from those assessments, FPRL raised the preliminary issue of the relevance of the Encumbrances to the assessments. After the Board rendered the Decision in favour of FPRL on that issue, this stated case followed.

[14] In the stated case, the Board has formulated the following questions for the opinion of the Court:

> 1. Did the Board err in law when it found that the "the fee simple interest in land and improvements" referred to in s. 19 of the Assessment Act in some cases can actually be an "encumbered fee simple interest, contrary to the binding authority of *Standard Life* and/or other case law and legal principles?
>
> 2. Did the Board err in law when it found that there are two competing tests applicable to the sole identified issue in the interim decision, and applied what it called the "Command Aviation" test, thereby interpreting s. 19 of the Assessment Act contrary to the binding authority of *Standard Life* and/or other case law and legal principles?
>
> 3. Did the Board err in law when it found that the private encumbrances registered on title to the Subject Property must be considered as "a 'circumstance affecting the value of land'" pursuant to s. 19(3)(h) of the Assessment Act, contrary to the binding authority of *Standard Life* and/or other case law and legal principles?
>
> 4. Did the Board err in law when it misconstrued the 'bundle of interests' legal theory, when it suggested that a 'private party• could restrict "the entire

> 'bundle of interests' which make up the unencumbered fee simple interest', contrary to the binding authority of *Standard Life* and/or other case law and legal principles?
>
> 5. Having identified the 'bundle of interests' theory as a salient legal theory to the disposition of the interim decision, did the Board err in law by then reaching a conclusion which is inconsistent with the 'bundle of interests' theory, contrary to the binding authority of *Standard Life* and/or other case law and legal principles?
>
> 6. Having identified the 'bundle of interests' theory as a salient legal theory to the disposition of the interim, decision, did the Board err in law by failing to consider the interest that the covenantee held in the Subject Property (instead just focusing on a hypothetical purchaser's interest), contrary to the binding authority of *Standard Life* and/or other case law and legal principles?
>
> 7. Did the Board err in law when it found that "whether a covenant is a section 219 covenant or one created by private parties the Assessor should consider the affect the restrictions in the covenant might have on subsequent purchasers and if it should have an affect then the Assessor should consider that affect when assessing market value", contrary to the express provisions of the Assessment Act, the binding authority of *Standard Life* and/or other case law and legal principles?
>
> 8. Did the Board err in law when it ordered that the private encumbrances registered on title to the Subject Property "may impact or affect the market value of the subject and must therefore be considered on the question of value", contrary to the binding authority of *Standard Life* and/or other case law and legal principles?

III. Standard of Review

[15] The parties agree that the sole issue raised on this appeal is one of pure law, attracting a standard of review of correctness: *Beach v. Assessor of Area #01 – Capital*, 2021 BCSC 1770.

IV. The Legal Framework

[16] The task which the Assessor must perform in assessing land and improvements under the *Act* is set out in s. 19(2), which states as follows:

> (2) The assessor must determine the actual value of land and improvements and must enter the actual value of the land and improvements in the assessment roll.

[17] The term “actual value” is defined in s. 19(1) to mean “the market value of the fee simple interest in land and improvements”. The term “fee simple interest” is not defined, but the *Act* lists a number of factors that the assessor must consider in

going about that exercise. One of them is any covenant registered on title under s. 219 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*] (s. 19(7)). In addition, s. 19(3) lists other factors that the assessor may consider, including the property's:

a) present use;

b) location;

c) original cost;

d) replacement cost;

e) revenue or rental value;

f) selling price of the land and improvements and comparable land and improvements;

g) economic and functional obsolescence; and

h) any other circumstances affecting the value of the land and improvements.

[18] It is well-established in the jurisprudence, and not disputed on this appeal, that restrictions on the use of property that run with the land, at least if they are imposed by government, must be considered in assessing market value for this purpose, regardless of whether those restrictions take the form of a s. 219 covenant or not.

[19] The seminal case establishing that principle in British Columbia is *C.N.R. v. Vancouver*, [1950] 4 D.L.R. 807 (B.C.C.A.). At issue, there was a property, now known as the Pacific Central Station on Terminal Avenue in Vancouver, that was subject to an agreement with the City of Vancouver requiring that it be used exclusively as a railway terminal. The Court of Appeal ultimately held that the use restriction was properly considered in valuing the property for assessment purposes. One of the majority judgments was written by O'Halloran J.A., who explained the result as follows at p. 811:

> What is the yardstick to be applied in the assessment of railway terminal lands of this kind restricted in their use as they are here? No statutory guidance is available and counsel have been unable to furnish leading decisions to assist the Court in determining appropriate tests of their valuation for assessment purposes. … The Court is faced therefore with the necessity of reasoning out a method of approach consistent with the peculiar conditions that exist.
>
> If land en bloc cannot be used for other than railway terminal purposes, that factor alone must make it inequitable to assess it at the same value as surrounding lands subdivided into choice small parcels for industrial sites understandingly in demand by expanding business in a large city. It is their very proximity to railway facilities that gives the surrounding sub-divided parcels much of their attraction as industrial sites.

[20] He went on to add, at pp. 813-4, that relevant restrictions on land use may come in a variety of forms, stating as follows:

> *Grampian Realties Co. v. Montreal East* [[1932] 1 D.L.R. 705] puts its stamp of approval upon the principle that land ought to be assessed according to the value disclosed by its use for the purpose for which it is most suitable. That principle must cut both ways. If land by statute, agreement with the City (as here) or otherwise, is restricted to the special use to which it is put, then the assessment rationally must be related to its value in that use, even though the land would be properly assessable at a much higher figure if it could be put to some other use. Hence it is reasoned that the lands here must be regarded as assessable in the light of their use for railway terminal purposes, and are not assessable as industrial sites, a use that is prohibited to them. …
>
> [Emphasis added.]

[21] In the decades that followed, these *dicta* sparked a debate in the jurisprudence about what other kinds of land use restrictions were intended to be captured by the phrase “or otherwise”.

[22] That question arose in *British Columbia (Assessor of Area No. 10 - Burnaby/New Westminster) v. Central Park Citizen Society* (1993), 86 B.C.L.R. (2d) 24 (S.C.), 1993 CanLII 392. At issue in that case was a financing arrangement with the Canadian Mortgage and Housing Corporation (“CMHC”) through which CHMC had provided financing for a high-rise apartment building in Burnaby. One of the terms of the financing allowed CMHC to set rental rates for tenants in the building until the loan was repaid. The rents charged under that arrangement were

consistently below market rates. The City of Burnaby, at the request of the owner, had rezoned the land to allow for that use.

[23] The land was assessed in the first instance without regard to the CMHC restrictions. The owner successfully appealed to the Board, arguing that the City had agreed to the restrictions, thereby engaging the exception set out in *C.N.R.* so that the restrictions ought to be considered in the assessment. The assessor's further appeal came to this court by way of stated case.

[24] In allowing the appeal in part, Tysoe J. (then of this court) canvassed the jurisprudence that had arisen in the wake of *C.N.R.* and, in doing so, reformulated the test to be applied. In particular, he specifically rejected the argument that "an agreement which affects the value of property is not to be taken into account in determining the assessed value of the property unless the agreement is with the municipality or the municipality otherwise agrees." That argument had found support in a line of cases decided outside of British Columbia, most notably in *Consolidated Shelter Corp. Ltd. v. Rural Municipality of Fort Garry* (1965), 49 D.L.R. (2d) 565 (Man. C.A.).

[25] In rejecting that argument and refusing to follow that line of authority, Tysoe J. preferred the test articulated by Verchere J. in *Re Desautel's Appeal* (1959), 29 W.W.R. 665 (B.C.S.C.), 1959 CanLII 572, in which the outcome was said to turn on whether the use restriction affected the value of the land itself, as opposed to the owner's interest in the land. He explained his reasoning as follows:

> Although the Manitoba Court of Appeal in *Consolidated Shelter* distinguished the *C.N.R.* case on the basis that the agreement restricting the use of the land was with the City of Vancouver, I do not think that a judge of this Court can disregard the statements made by O'Halloran J.A. in the *C.N.R*. case. In particular, I do not think I can disregard the words "or otherwise" in the statement made by O'Halloran J.A. quoted above from p. 344 of that case (namely: "If land by statute, agreement with the city (as here), *or otherwise*, is restricted to the special use to which it is put, then the assessment rationally must be related to its value in that use ...") (my emphasis). The *Consolidated Shelter* decision has been applied by some other courts but it has not yet been followed in this province.
>
> I prefer the approach taken by this Court in *Re Desautel's Appeal*. In that case the taxpayer had acquired the property from The Director, The Veterans'

> Land Act and he agreed with the Director that if he sold the property within the next 10 years, he would pay an amount to the Director which was equal to the funds expended by the Director in connection with the land. On a stated case Verchere J. expressed the opinion that the agreement with the Director was not to be taken into account in assessing the land. Verchere J. said the following in the course of his opinion:
>
> > It goes without saying that it would not affect any subsequent purchaser, because such purchaser ... could not be party to or bound by the agreement ... (p. 673)
> >
> > ...
> >
> > Although under section 328 of the *Municipal Act* the Assessor may take into consideration any circumstances affecting the value of the lands, it has been held that the peculiar value of certain lands to the owner should not be taken into account; see *C.N.R. v. Vancouver (City)* ... It should be borne in mind that the Assessor is required to assess the *land* and not the *owner*, and it would therefore seem to me that the Assessor should take into account only those restrictions which would bind and affect a prudent purchaser. This opinion is, I think, within the meaning of the finding of the Court of Appeal in *C.N.R. v. City of Vancouver*, where the lands in question were restricted in their use to railway terminal purposes only. (p. 674).
> >
> > ...
> >
> > I cannot concur in the submission that the appellant's contractual obligation, not running with the land should be regarded by the Assessor in arriving at his assessment. (p. 676)
>
> I think that Verchere J. made a very important distinction between agreements that affect the value of the owner's interest in the land and agreements that affect the value of the land. It is the value of the land which [is] being assessed; agreements personal to the owner should not be taken into account. On the other hand, agreements that would be binding on subsequent purchasers of the land will affect the market value of the land and should be taken into account. In this case, the operating agreement with CMHC falls in the former category because the CMHC financing can be repaid at any time and the agreement will not be binding on a subsequent purchaser unless it elected to assume the CMHC financing.

[26] These and other authorities were later considered by the Court of Appeal in *Standard Life Assurance Co. v. British Columbia (Assessor Area #01 – Capital)*, 1997 CanLII 4012 (B.C.C.A.), the case mentioned by the Board in each of the questions posed in the stated case before me. *Standard Life* was one of the first cases to be decided after the *Act* was amended into its current form, with the term

"actual value" defined to mean, "the market value of the fee simple interest in land and improvements".

[27] At issue in *Standard Life* was the relevance, in an assessment under the *Act*, of a lease that limited the amount of rent that could be charged at the subject property. The Court of Appeal ultimately held that the restriction should not be considered. In explaining that result, Hollinrake J.A., writing for the Court, stated as follows:

> [10] I think the real issue in this case is what is meant by the phrase "the fee simple interest in land and improvements" in s.26 [now s. 19] of the Act. My conclusion is that the Assessor is correct in submitting that the fee simple interest includes all the interests in the land and buildings and not just the owner's interest. In my opinion, the assessor here had to consider not just the owner's interest, as I think the judge below did, but also the tenant's interest. That, for practical purposes, leads to the conclusion that the totality of the interests properly considered should, generally speaking, be the equivalent of the owner's unencumbered interest.
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> [Emphasis added.]

[28] In other words, although it is generally true that the fee simple interest should be assessed as if it were unencumbered, there are exceptions to that rule as recognised in cases such as *C.N.R.* and *Central Park*. However, those exceptions did not apply in the circumstances before the Court in *Standard Life* for the following reasons:

> [24] In the *[C.N.R.]* case the constraint on the use of the land resulted from an agreement with the City of Vancouver restricting that use to railway terminal purposes. In the *[Central Park]* the taxpayer's agreement with a mortgagee preventing the taxpayer from charging market rents in a seniors' housing complex was held to be an agreement personal to the owner since the financing could be repaid at any time and the agreement could not be said to be binding upon a subsequent purchaser.
>
> [25] I do not think these cases help the respondent before us. I say this because the *[C.N.R.]* case was on its facts one where a restraint on use was imposed by agreement with the City of Vancouver.
>
> [26] While the dicta in *[Central Park],* which I have reproduced above, would appear to support the respondent's position, I think that dicta must be limited to fact situations similar in principle to the *[C.N.R.]* case where a restraint was placed on the use of the land itself.
>
> [Emphasis in original.]

[29] By emphasising the word “use”, Hollinrake J.A. was confining the *C.N.R.* exception to cases in which “a restraint was placed on the use of the land itself” as opposed to the owner’s interest in the land, echoing the reasons of Tysoe J. in *Central Park*. There was no suggestion in either case that the use restriction had to be imposed by government for the exception to apply. On the contrary, that proposition appears to have been specifically rejected by Tysoe J. in *Central Park*.

[30] Further support for the proposition that land use restrictions, even if imposed privately, can be relevant to the assessment exercise can be found in the subsequent judgment of the Supreme Court of Canada in *Musqueam Indian Band v. Glass*, 2000 SCC 52, [2000] 2 S.C.R. 633. At issue in that case was the correct approach to valuation of the notional fee simple interest in certain lands for the purpose of setting rental rates under a lease. In explaining which restrictions on the use of the land were potentially relevant to that exercise, Gonthier J., writing for the majority, stated as follows:

> 47 Legal restrictions on land use, as opposed to restrictions found in the lease, may affect the market value of freehold property. In *Revenue Properties*, *supra*, at p. 182, the court held that “[a]ll applicable statutes and laws relating to use such as zoning by-laws must be considered” when assessing land value. All three appraisers in the case at bar considered legal restrictions on land use, chiefly zoning, in their reports. This is consistent with professional appraisal practice in Canada. To determine land value, whether as vacant or as improved, the appraiser (unless otherwise instructed by the lease) considers the highest and best use that is “legally permissible, physically possible, financially feasible, and maximally productive”. Legal impediments include “[p]rivate restrictions, zoning, building codes, historic district or other non-zoning land use controls, and environmental regulations” (Appraisal Institute of Canada, *The Appraisal of Real Estate* (Canadian ed. 1999), at p. 270).
>
> [Emphasis added.]

[31] It is against the backdrop of that history that the two lines of authority in the Board’s earlier jurisprudence, discussed in the Decision, must be understood.

[32] In the Decision, the Board chose to apply the test as set out in its earlier decision in *Command Aviation Services Ltd et al v. Area 15* (2008 PAABBC 20070593). At issue in that case was the valuation of the airport in Pitt Meadows.

Until 1998, it had been owned and operated by the Federal Crown. In that year, the Crown sold it to a society for $10, on terms that required the society to continue to use the land as an airport until 2077. If, at any time until 2077, the land was no longer being used as an airport, the Crown had the option to force the society to transfer the land back to the Crown for nominal consideration.

[33] The property was assessed without regard to the restriction preventing it from being used other than as an airport. When the society appealed the assessment to the Board, the assessor sought to justify the assessment relying on *Consolidated Shelter*. In allowing the appeal, the Board relied on *Central Park*, from which it drew the following test (as summarised by the Board in the Decision in this case):

> Does the agreement affect the value of the land itself and not the owner's interest in the land and does it affect a subsequent purchaser's use of the land, regardless of whether the municipality is a party to the agreement. In other words, is the covenant/agreement binding on subsequent purchasers?

[34] In *Command Aviation*, the Board also relied on *Fredant Investments Ltd. v. Winnipeg (City) Assessor* (1998), 162 D.L.R. (4th) 382, 1998 CanLII 19450 (Man. C.A.), in which the Manitoba Court of Appeal overruled its own earlier decision in *Consolidated Shelter* in favour of the approach taken by Tysoe J. in *Central Park*. In explaining its reasons for doing so, Huband J.A., writing for the Court, stated as follows:

> [29] In the *Consolidated Shelter* case, it would seem that the Court lost sight of the driving imperative in assessment cases; namely, the requirement to determine the value of the property. Instead, the Court permitted the assessment to be based on another factor; namely, that a restrictive agreement, adversely affecting value, should not be taken into account because the municipality was not a party to it. In doing so, the Court was deflected from the search for market value as the basis for property assessment and thus erred in principle. To depart from the *Consolidated Shelter* case is not, therefore, a mere difference of opinion.

[35] In more recent years, however, the Board has, in several decisions, reverted to the *Consolidated Shelter* reasoning by narrowing the *C.N.R.* exception to cases where the use restriction is imposed by government in specified contexts. That other line of authority is exemplified by *New Chelsea Society v. Area 10* (2019 PAABBC

20190015). In that case, the Board adopted the following test (as summarised by the Board in the Decision in this case):

> Does the restriction run with the land, does it affect the use of the land and did it arise from the actions of governmental powers of taxation, expropriation, police power and escheat.
>
> [Emphasis added.]

[36] The underlined words appear to have had their origin in modern appraisal literature, rather than legislation or court jurisprudence. As authority for adding that new qualification to the test, the Board has, in those cases, relied on *Standard Life*, despite the fact that no such language is to be found in that case. An earlier example of that same line of authority is *Five Mile Holdings Ltd. v. Area 10* (2014 PAABBC 20140278), a case that, like this one, concerned a private parking easement that ran with the land. The Board attributed the narrower test it applied in that case to *Standard Life*, stating as follows:

> [14] … In light of the Court's affirmation [in *Standard Life*] that it is the market value of the totality of the interests in land that must be considered in determining actual value for assessment purposes, the restrictions on use contemplated by O'Halloran J.A.'s use of the word "or otherwise" in the *CNR* case, can only mean those restrictions imposed by government, or a taxing or expropriating authority.
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> [Emphasis added.]

[37] Shortly after the Board released its Decision in this case, the Court of Appeal released its decision in *Seaspan ULC v. North Vancouver (District),* 2022 BCCA 433. That case concerned the assessment of contaminated property in the District of North Vancouver that was subject to a remediation order under the *Environmental Management Act*, S.B.C. 2003, c. 53. The issue raised was whether the remediation order, insofar as it required others to contribute to the remediation costs, ought to be considered as a benefit that offset the burden of the potential liability to remediate the contamination, in assessing the market value of the property under the *Act*. The Board had answered that question in the negative, reasoning that the benefit of the remediation order attached to the owner's interest only and did not run with the land because it could be removed by the owner, and therefore was to be ignored in the

assessment. On appeal by way of stated case to this court, Gomery J. disagreed and his decision was ultimately upheld by the Court of Appeal.

[38] In setting out the applicable law on the issue of when restrictions on land use are to be considered in assessing property under the *Act*, Harris J.A., writing for the Court, referred with approval to both of the competing tests considered by the Board in the Decision, stating as follows:

> [36] It follows that a critical distinction must be drawn between whether a restriction on the use of land attaches to the owner's interest or to the land itself. This is the point on which the judge and the Board disagreed.
>
> [37] Property ownership is subject to certain limitations via the powers of government such as taxation, expropriation, escheat, or "police powers", which can refer to zoning requirements, building codes, and environmental regulations: *908118 Alberta Ltd. v. Calgary (City),* 2015 ABQB 681 at para. 42. Legal constraints on the use of the land imposed by government authority are generally considered in valuing the land: *908118 Alberta Ltd.* at paras. 41–54.
>
> [38] By contrast, an agreement limiting the use of land in a way that diminishes its value should affect the value of the land only if it is binding on subsequent purchasers and cannot be removed by the owner without the concurrence of the party who benefits: *British Columbia (Assessor of Area No. 10 – Burnaby/New Westminster) v. Central Park Citizen Society* at paras. 25, 28. Mutual consent to discharge the agreement may also be sufficient: *Assessor of Area #10 – North Fraser Region v. Gomez et al.* (23 September 2015), 2015-10-00046 (B.C. Property Assessment Appeal Board).
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> [39] As captured in *Lakewood Terrace Housing Co-op et al v. Assessor of Area 09 – Vancouver Sea to Sky Region*, 2020 PAABBC 20200013 at para. 93, when land is arguably burdened by restrictions in some way, the valuation exercise involves asking:
>
> a) whether the restriction affects the use of the land;
>
> b) whether the restriction runs with the land; and
>
> c) whether the restriction arises from the exercise of government powers such as a police power.

V. Discussion

[39] The Assessor argues that the only test applicable in a case such as this, involving the assessment of land burdened by restrictions on its use, is that set out in para. 39 of *Seaspan*. That test is not satisfied here, it is argued, because the use restrictions in issue here do not arise from the exercise by government of the police power. Further, the Assessor adds that the Board erred in interpreting its own

jurisprudence as having promulgated two competing tests, when in reality there has only ever been one. In particular, the Assessor argues that *Command Aviation* was also a case about the exercise of police power because it was the Federal Crown, acting in the public interest, that imposed the restriction requiring the land to be used exclusively as an airport.

[40] The Assessor says this result flows from *Standard Life*, in which it was held that what is to be assessed under the *Act* is the unencumbered fee simple interest. Restrictions on use that are imposed by the Crown through the exercise of the police power are, according to the Assessor, in a different category because the fee simple interest at common law was originally a form of feudal tenure granted by the Crown and therefore inherently subject to Crown reservations. The Encumbrances at issue here, having been privately generated, can be bought and sold and therefore ought to be treated as merely one stick in the "bundle of sticks", or one pin in the "pin cushion" that make up the totality of the interests in the land, and are, as such, irrelevant to the assessment.

[41] FPRL disagrees. It disputes the Assessor's premise that what is to be assessed is only the unencumbered fee simple interest. Rather, it relies heavily on an article published by the International Association of Assessing Officers, dated August 2019 and entitled, "Setting the Record Straight on Fee Simple", in which the authors observe that it was only in the 1980s that the assessment community began adopting a definition of "fee simple" that was coupled with the modifier "unencumbered" – a newly revised definition with no grounding in the law or legislation. The result was to distort the assessment process by ignoring encumbrances, such as those in issue in this case, that ought properly to be considered.

[42] Although I agree with the Assessor that the adoption of the "unencumbered fee simple interest" as a benchmark is now firmly entrenched in the law through cases such as *Standard Life* and, more recently, *Seaspan*, that observation does not advance the analysis very far. It is also clear from the jurisprudence canvassed

above that, despite the adoption of that language, not all encumbrances are to be ignored.

[43] The *Act* itself expressly mandates consideration of at least one kind of encumbrance, namely, covenants registered on title under s. 219 of the *LTA*. In addition, it has been clear, at least since *C.N.R.* was decided, that there are others. The Assessor's argument that the *C.N.R.* exception applies only to restrictions that are imposed by government through the exercise of the police power is not well supported in the jurisprudence.

[44] In *Central Park,* Tysoe J. rejected the argument that the involvement of the City of Vancouver was essential to the result in *C.N.R*. After *Standard Life* was decided, the Supreme Court of Canada signalled in *Musqueam* that privately generated restrictions on land use are properly to be considered in assessing the land's market value. Nothing said in *Seaspan* suggests that the law has changed in that regard.

[45] Ultimately, the issue posed is one of statutory interpretation. The rules to be applied when the court is confronted with an ambiguity in a taxation statute were set out by Lebel J., writing for the court in *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, as follows:

> 21 In *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, this Court rejected the strict approach to the construction of taxation statutes and held that the modern approach applies to taxation statutes no less than it does to other statutes. That is, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (p. 578): see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. However, because of the degree of precision and detail characteristic of many tax provisions, a greater emphasis has often been placed on textual interpretation where taxation statutes are concerned: *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, at para. 11. Taxpayers are entitled to rely on the clear meaning of taxation provisions in structuring their affairs. Where the words of a statute are precise and unequivocal, those words will play a dominant role in the interpretive process.
>
> 22 On the other hand, where the words of a statute give rise to more than one reasonable interpretation, the ordinary meaning of words will play a

> lesser role, and greater recourse to the context and purpose of the Act may be necessary: *Canada Trustco*, at para. 10. Moreover, as McLachlin C.J. noted at para. 47, "[e]ven where the meaning of particular provisions may not appear to be ambiguous at first glance, statutory context and purpose may reveal or resolve latent ambiguities." The Chief Justice went on to explain that in order to resolve explicit and latent ambiguities in taxation legislation, "the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation".
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> 23 The interpretive approach is thus informed by the level of precision and clarity with which a taxing provision is drafted. Where such a provision admits of no ambiguity in its meaning or in its application to the facts, it must simply be applied. Reference to the purpose of the provision "cannot be used to create an unexpressed exception to clear language": see P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (5th ed. 2005), at p. 569; *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622. Where, as in this case, the provision admits of more than one reasonable interpretation, greater emphasis must be placed on the context, scheme and purpose of the Act. Thus, legislative purpose may not be used to supplant clear statutory language, but to arrive at the most plausible interpretation of an ambiguous statutory provision.
>
> 24 Although there is a residual presumption in favour of the taxpayer, it is residual only and applies in the exceptional case where application of the ordinary principles of interpretation does not resolve the issue: *Notre-Dame de Bon-Secours*, at p. 19. Any doubt about the meaning of a taxation statute must be reasonable, and no recourse to the presumption lies unless the usual rules of interpretation have been applied, to no avail, in an attempt to discern the meaning of the provision at issue. …

[46] Reading the words of the *Act* in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Legislature, I have concluded that both versions of the test identified by the Board, and subsequently cited with approval by Harris J.A. in *Seaspan*, are legally correct, but they apply in different contexts. Where the use restriction has not been imposed by government through the exercise of the police power, it is the *Command Aviation* test that ought to be applied.

[47] The Assessor's argument to the contrary overlooks the provisions in the *Act* expressly stating that restrictions on use, whether imposed by government or not, are appropriately considered (see s. 18(2)(b) and 19(3)(a), which speak of "permitted uses" and the land's "present use" as factors relevant to the assessment, without mention of the need for government involvement). Moreover, the Assessor's

proposed interpretation does violence to the object and scheme of the *Act*, for the reasons set out by Huband J.A. in *Fredant*, quoted above.

[48] In summary, I agree with the Board that the *Command Aviation* version of the test is the legally correct one applicable in this case.

VI. Disposition

[49] The questions posed by the Board in the stated case are answered in the negative.

[50] As the successful party, FPRL is entitled to its costs.

"Milman J."