Ontario Court of Appeal upholds decision quashing property assessment based on potential use - Law360 Canada

Law360 Canada (August 2, 2024, 4:26 PM EDT) -- The Ontario Court of Appeal has upheld a decision setting aside property assessment of certain commercial buildings based on their potential use, rejecting arguments that the Assessment Review Board had presumed that the current use of the property was its highest and best use.

In [*Municipal Property Assessment Corporation v. Claireville Holdings Limited*, 2024 ONCA 598], released on Aug. 2, Justice Lise G. Favreau held that while the board had made reference to a presumption that the current use of the properties is its highest and best use, it had not relied on the presumption in its reasoning.

The respondents, Claireville Holdings Limited, 2477879 Ontario Inc., 1579661 Ontario Inc. and Frances Danyliw (collectively Claireville), own five contiguous properties in the Entertainment District on King Street, in Toronto.

In May 2012, Claireville owned four of the properties and started discussions with the City of Toronto about a proposed 42-storey mixed-use building on the properties that, at the relevant time, had two- and three-storey buildings on them.

The city planning commission opposed the development and advised Claireville that more land was required for the proposed development.

In August 2015, Claireville purchased the adjoining property for $8 million and amended its application to add this property and seek approval to build a 48-storey mixed-use building.

By late 2017, the city had not yet decided on the proposal and Claireville appealed to the Ontario Municipal Board. In December 2019, the city made a “with prejudice” offer to settle the appeal on the basis of approval for a mixed-use 50-storey development.

In February 2020, the city council passed a resolution approving the settlement offer in principle, subject to conditions including rezoning, site plan approval and heritage easement agreements.

The Municipal Property Assessment Corporation (MPAC) assessed the current values of the properties for the taxation years of 2014 to 2020 using the Jan. 1, 2012, and Jan. 1, 2016 valuation dates.

The MPAC assessed the properties as a land assembly, with development potential for a high-rise development of 40 storeys or more. MPAC assessed the value of the four properties initially owned by Claireville as $20,474,000 for each year from 2014 to 2016. For the years, 2017 to 2020, it assessed the value of all five of the properties as $29,854,000 for each year.

Claireville appealed the assessment to the Assessment Review 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).

Under s. 19(1) of the *Assessment Act*, the assessment of land is to be based on the current value or the amount of money the arm's length sale of the property would generate.

The board stated that the existing use of land is presumed to be the HBU and that 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.

The board held that MPAC had failed to prove that its proposed HBU was financially feasible, noting that the MPAC had not relied 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.

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, relying on the properties' current use as income-generating properties.

The MPAC appealed the decision before the Divisional Court arguing 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 the appeal finding that the articulation of the presumption in the context of the case was little more than a restatement of the burden of proof.

MPAC appealed the decision, renewing 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.

MPAC submitted that the board's statement was contrary to s. 19 of the Act, which requires that land be assessed at its current value.

The appellant argued that once the board had found that MPAC had not met its burden, it 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.

MPAC further argued that this error led the board to ignore comparable sales that would have established the current value.

Justice Favreau accepted 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.

The judge cited *Municipal Property Assessment Corp v. Zarichansky*, 2020 ONSC 1124, in which the Ontario Superior Court held that the board is required to make a determination of the current value of a property if it finds that MPAC has not met its burden of proof with respect to an assessed current value.

"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," wrote Justice Favreau.

The court observed that after finding that the appellant had not met its burden of proving the financial feasibility of the proposed use, the board had turned to the other expert evidence available regarding the value of the properties, which consisted of Claireville's evidence regarding their current value.

The court noted that the board had 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.

The court also noted that, in making this finding, the board had relied on a concession by MPAC's expert that if its proposed HBU was not made out, Claireville's proposed valuation was appropriate.

The court also held that there was nothing in the record that MPAC had made the submission to the board that it should consider an alternative to its proposed HBU and to Claireville's position that the valuation should be based on the income approach.

"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," the judge wrote.

The court held that the board did not commit a legal error by failing to come up with its own current value.

Justice Favreau dismissed the appeal. Justices Janet Simmons and Julie Thorburn concurred in the decision.

The decision means that MPAC will need to make sure it has sufficient expert and factual evidence to support its proposed highest and best use in future cases said counsel for Claireville, Iain MacKinnon of Linden & Associates.

"Otherwise, if the Board rejects MPAC's proposed HBU, and the property owner has filed its own evidence to support its lower valuation based on a different HBU, MPAC's valuation will be rejected," the told Law360 Canada in an email.

He also highlighted the court’s finding that MPAC cannot simply ask the board to consider an alternative to its proposed HBU and ignore a property owner’s own expert evidence, particularly when MPAC agreed with the property owner’s valuation evidence before the board.

Stephen Longo of Walker Longo & Associates LLP also acted as counsel for Claireville Holdings Limited, 2477879 Ontario Inc., 1579661 Ontario Inc. and Frances Danyliw.

Counsel for MPAC was Melissa VanBerkum of CDG Lawyers. She was not immediately available for comment.

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