IN THE COURT OF APPEAL OF MANITOBA

Coram: Huband, Kroft and Monnin JJ.A.

B E T W E E N:

TERRACON DEVELOPMENT LTD.	)	***K. M. Saxberg*** *and*
	)	***R. Olschewski***
	)	*for the Appellant*
(Appellant/Respondent) Appellant	)	
	)	***D. A. M. Pambrun*** *and*
	)	***P. P. Hamilton***
- and -	)	*for the Respondent*
	)	
	)	***T. D. Gisser***
ASSESSOR FOR THE CITY OF WINNIPEG	)	*for the Municipal Board*
	)	
	)	*Appeal heard:*
	)	***June 14, 2002***
(Respondent/Appellant) Respondent	)	
	)	*Judgment delivered:*
	)	***September 20, 2002***

KROFT J.A.

INTRODUCTION

1 This is an appeal from the Municipal Board (the Board) to the Court of Appeal pursuant to s. 63(1) of *The Municipal Assessment Act*, C.C.S.M., c. M226 (the *Act*). The order is described as No. A-00-262 and was delivered in writing on August 30, 2000.

2 In this appeal, the appellant (owner) alleges that the Board erred in law by failing, and thereby effectively refusing, to address a novel and important issue that was squarely before it. It acted, not on any basis of law,

but by declaring that it was not satisfied with the quality of the evidence and by avoiding a duty that it was bound to discharge as part of its statutory obligation to assess a property at its "value." Leave to appeal was granted by Philp J.A. in chambers on September 28, 2001.

3 The owner argues that the Board erred in law by refusing to consider important evidence, which will materially affect the net value of the properties. In making this submission, the owner looked for support to the two decisions of this court rendered in *3391397 Manitoba Ltd. v. Winnipeg City Assessor* (1998), 126 Man.R. (2d) 63, and (1998), 131 Man.R. (2d) 298. The first report is the decision given when granting the application for leave, the second is the substantive judgment holding that the Board had in fact erred, and that the matter should be returned to it to carry out its statutory duty to evaluate.

4 In the present case, Philp J.A. granted leave on the specific question of whether the Board had erred in failing to determine the effect of infrastructure costs, and management expenses on the value of the owner's properties. In so doing, he stated at para. 11:

> The Board appears to have ignored the owner's evidence of infrastructure expenses because it decided it was not "cogent" and was not presented in the form that the Board thought it should have been. I paraphrase the conclusion of Scott C.J.M.: Presumably, if there had been "cogent evidence", the Board might have come to a different conclusion. That being the case, the Board <u>was required to make its own determination</u> of the effect of the infrastructure expenses upon the values of the properties: **Devan Properties Ltd. v. Winnipeg City Assessor** (1992) 75 Man.R. (2d) 238; 6 W.A.C. 238 (C.A.).
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> [Underlining is mine]

5 The learned chambers judge has firmly expressed the opinion that we have here a question of law that should be resolved. I agree. This court must respond to the appeal and if its answer is in the affirmative, it must consider the appropriate remedy.

BASIC FACTS AND DESCRIPTION OF PROCEDURE

6 The fundamental situation giving rise to the question before us is not seriously disputed by the parties, and for the most part, it was acknowledged by the Board in its reasons.

7 The owner's properties, located at 1 Terracon Place and 101 Elan Boulevard, together comprise a six-building, multi-tenant, industrial warehouse complex. The property is unique in that it is the only industrial property in Winnipeg where the infrastructure (that is the roads, sewers, waterlines, street lighting, sidewalks, retention ponds and landscaping) was built, is maintained and, if required, will be replaced by the owner. Those services and the costs related to them (described by the Board as "management expense" and "reserve for replacement") are supplied and paid for by the City of Winnipeg for all other comparable properties.

8 This case arises because of what the Board perceived as inadequacy in the form and quality of the evidence related to infrastructure costs and management expense. Although it received financial statements from the owner and heard extensively from the consultant, Storey (a chartered accountant), it decided there should have been more and better fiscal details and more expert testimony presented. On that basis it concluded:

> In the circumstances, the Board has no alternative but to accept the evidence presented by the Assessor as to Management expense and not to allow any of the extraordinary expenses claimed by the Owner's Agent.
>
> [Underlining is mine]

9 Notwithstanding the foregoing conclusion, it must be noted that the following facts were essentially undisputed by the parties and, more importantly, were acknowledged by the Board in the course of its reasons:

- The owner's property is a multi-tenant industrial complex.

- It is the only such industrial park where the infrastructure was built by and will be serviced and maintained by the owner on an ongoing basis.

- In other industrial parks, the City itself owns and pays for the infrastructure at no direct cost to the property owner.

- If Terracon were to try to sell the property, its arrangement with the City would negatively affect the price that a willing purchaser would pay.

- The income approach to value is the correct methodology to be used in determining the assessed value of a property like this (when I say income, I intend that to mean revenue, less justifiable expenses, not simply gross revenue).

- Income is to be assessed on the basis of comparable market rents.

- If Terracon rents are comparable to rents on similar properties, but its relevant expenses are higher, then its net income will inevitably be lower.

COMMENTS AND CONCLUSIONS

10 It is my belief that the order of the Board, when examined in the light of its own reasons, cannot be sustained. With respect, I must say that the Board's decision to dismiss the appeal because the "Owner's Agent did not provide cogent evidence," amounts to an avoidance by the Board of its statutory duty. Reference to any authoritative dictionary will show that the word "cogent" is not synonymous with "admissible" or "relevant." "Admissibility" and "relevancy" are elements of proof. "Cogency," however, relates to "force," "power" and "incisiveness." "Cogent" evidence is desirable, but is not essential to proof.

11 As these reasons suggest, and the transcript of the proceedings before the Board reveals there was, in fact, a considerable amount of admissible and relevant evidence presented by the owner. Perhaps the task of the Board would have been made easier if the owner had presented more evidence, but the absence of it does not permit that quasi-judicial tribunal to discharge its responsibility simply by declaring that there is no evidence to support the claim that there are extraordinary expenses which cause reduction of assessed value.

12 This self-evident statement by me cannot be mitigated by adding the word "cogent." Either way, the Board's words amount to a declaration of no evidence. That is an error which goes beyond mere methodology. Clearly, there is evidence which requires attention.

13 It is worth noting that the type of analysis that I have employed is entirely consistent with those provisions of the *Act*, pertaining to process and

burden of proof. In particular I refer to:

> 1(1) In this *Act*,
>
> . . . . .
>
> "value" means, in respect of property being assessed under this Act, the amount that the property might reasonably be expected to realize if sold in the open market in the applicable reference year by a willing seller to a willing buyer.
>
> . . . . .
>
> 53(1) Subject to subsections (2) and (3), a board shall, at a hearing of an application that pertains to the amount of an assessed value, place the burden of proof on the assessor on matters at issue with respect to the amount of the assessed value.
>
> 53(2) A board shall, at a hearing of an application that pertains to liability to taxation or the classification of property, place the burden of proof on the applicant on matters at issue with respect to liability to taxation or classification of property.
>
> . . . . .
>
> 59(5) Subject to subsection (6), the Municipal Board shall, at a hearing of an appeal, place the burden of proof on the assessor on matters at issue with respect to the amount of the assessed value and on the appellant on matters at issue with respect to the classification of property.

14 As already indicated, I am convinced that the Board erred when it failed to give consideration to the extraordinary expenses claimed by the owner's agent. While the appeal will be allowed, there remains to determine the appropriate remedy.

15 The reassessment of the evidence and the establishment of value, whatever it may be, cannot and should not be undertaken by this court.

Difficult though it may be, that is a job for the Board. Therefore, as was done in *3391397 Manitoba*, the order will be set aside and the matter will be remitted to the Board to be fully reconsidered by a panel, which if necessary, may be differently constituted than the original.

16 The owner will have its costs in this court and on the application for leave.

_____ J.A.

I agree: _____ J.A.

MONNIN J.A. (dissenting**)**

17 Leave to appeal was granted on the question of whether the Municipal Board (the Board), erred in law in failing to determine the effect of infrastructure costs and expenses on the value of the appellant owner's (Terracon) properties.

18 Terracon is the owner of multi-tenant warehouse complexes that as a whole form an industrial park. The development is, however, different than any other in the City of Winnipeg in that the infrastructure of the complex; i.e. roads, sewers, waterlines, street lighting, sidewalks, retention ponds, etc., were built by and are owned and maintained by Terracon.

19 The matter came before the Board by way of an appeal by the respondent (assessor) from a decision of The Board of Revision of the City

of Winnipeg. Before the Board, Terracon presented evidence of the infrastructure expenses it incurs. This evidence was presented by way of oral evidence as well as documentary evidence that included summaries taken from Terracon's financial statements.

20 In setting out Terracon's position, the Board in its decision, states the following:

> The bulk of the difference, however, between the position of the Owner's Agent and that of the Assessor was a result of the additional expenses which, the Owner's Agent claimed, were incurred by the Owner of the subject property due to the Owner being responsible for the installation and maintenance of the infrastructure located on the subject property.

21 Dealing then with the issue of the infrastructure costs, the Board went on to decide as follows:

> With respect to the Reserve for Replacement, Management expense and the additional expense associated with the maintenance of the infrastructure, the Board prefers the position taken by the Assessor. In this regard, the Board notes that the Owner's Agent did not provide cogent evidence as to any of the relevant costs or expenses relative to this valuation, including the cost of the infrastructure and the expenses of maintaining and replacing this infrastructure.
>
> Where any party appears before this Board seeking to have the Board accept Management or any Other expenses far in excess of typical amounts and to allow extraordinary expenses such as Reserves for Replacement, the Board requires complete details of these expenses and evidence as to the appropriate calculation of any required reserves. In the current circumstances, the Board was not provided the costing or invoices which would establish the cost of the infrastructure; financial statements which would confirm all the relevant expenses related to the subject property; or the evidence of an accountant or other qualified professional as to the property; or the evidence of an accountant or

> other qualified professional as to the appropriate Reserve for Replacement of the infrastructure. Only if such evidence were available to this Board could the Board determine whether the additional expenses claimed were appropriate and, secondly, whether a Reserve for Replacement was necessary and, if so, the amount of such reserve. In the circumstances, the Board has no alternative but to accept the evidence presented by the Assessor as to the Management expense and not to allow any of the extraordinary expenses claimed by the Owner's Agent.

22 It is this finding that brings about this appeal.

23 The short version of Terracon's argument is that the Board, because it did not like the form in which Terracon's evidence was tendered, simply ignored it in arriving at its decision and, therefore, committed an error in law. Terracon goes on to argue that in rejecting this evidence, the Board failed in its statutory duty under *The Municipal Assessment Act*, C.C.S.M., c. M226, to determine the amount that the property might reasonably be expected to realize if sold in the open market, by a willing seller to a willing buyer.

24 Terracon relies on the decision of *Devan Properties Ltd. v. Winnipeg City Assessor* (1992), 75 Man.R. (2d) 238 (C.A.), for the proposition that the Board is duty bound to make its own determination of the market value of a property, even when it does not accept the evidence as presented in a hearing and, that by failing to do so in this case, it was in error.

25 Terracon also relies on the decision of Scott C.J.M. in *3391397 Manitoba Ltd. v. Winnipeg City Assessor* (1998), 131 Man.R. (2d) 298 (C.A.), wherein he granted leave to appeal because the Board had made a

mistake and overlooked precise and uncontradicted evidence on an issue before it. In short oral reasons following the appeal hearing, Scott C.J.M. reinforces the basis on which leave was granted – see (1998), 126 Man.R. (2d) 63 – in allowing the appeal on the following basis at paras. 1-2:

> In the reasons given for granting leave to appeal, it was noted that an evidentiary error may, in certain circumstances, amount to an error in law. This is such a case. The Municipal Board erroneously stated in its decision that there was no evidence with respect to a matter of potential relevance to the assessment, when there was such evidence.
>
> The appeal is accordingly allowed with costs, and the matter is remitted to the Municipal Board so that the appeal to it may be considered on the basis of the evidence actually before it.

26 The position advanced by the assessor is firstly, that the matter of the methodology used by the Board in reaching its conclusion of value is a matter within its area of expertise and it is not for this court to question; and secondly, the assessor argues that what the Board did was not to ignore the evidence, but rather come to the conclusion that the evidence put forth by Terracon was insufficient to justify the position it was advancing. Instead, the Board accepted the evidence of the assessor, which it was entitled to do. The assessor argues that the Board has the right to reject evidence, and by doing so, it cannot be said to have ignored evidence.

27 Put in other words, the argument of the assessor is that the quality of the evidence led by Terracon was lacking. The quality of the evidence led by the expert for Terracon was not, in the words of the Board, "sufficiently cogent." That is a finding that the Board is entitled to make.

28 I am not at all convinced that the two authorities that Terracon relies

upon to justify its position are all that helpful to it in the circumstances of this case. In *3391397 Manitoba*, the Board was found to have made a finding that there was no evidence before it, when that finding was clearly wrong. In the case before us, the finding was that the evidence of Terracon was insufficient or lacking sufficient cogency to substantiate its position. That is a far cry from saying that there was no evidence.

29 Insofar as *Devan Properties* is concerned, my reading of it leads me to the conclusion that the appeal was upheld because the Board failed to make a determination of market value, which it was duty bound to do. In the case before us, the Board did make a determination of market value. Terracon's position, when looked at with close scrutiny, is simply that it does not like the result. That result has a direct correlation with the quality of evidence that it tendered to the Board. This is not a case of no evidence; this is a case of evidence that does not convince or persuade. It is not an error in law for the Board to have come to the conclusion that it did. It is part of the determining function of the Board.

30 I would therefore dismiss the appeal with costs.

_____ J.A.