

2011 CarswellOnt 10888
Ontario Assessment Review Board

Ren v. Municipal Property Assessment Corp., Region No. 19

2011 CarswellOnt 10888, [2011] O.A.R.B.D. No. 357, 70 O.M.B.R. 415

**In the matter of Section 40 of the Assessment
Act, R.S.O. 1990, c. A.31, as amended**

In the matter of appeals with respect to taxation years 2010 and 2011 on premises
known municipally as 814 Upper Wentworth Street (Con 6 Pt Lot 11 Btn Ham)

Xiaojing Ren, Assessed Person/Appellant and The Municipal Property
Assessment Corporation, Region No. 19 and the City of Hamilton, Respondents

C. Roberts Member, J. Laws Member

Heard: November 30, 2010 - April 6, 2011

Judgment: October 13, 2011

Docket: WR 106065

Counsel: C. Biron, for Assessed Person / Appellant

W. Somerville, B. Ellis, for Municipal Property Assessment Corporation

No one for Municipality

Subject: Public; Tax — Miscellaneous; Municipal

Headnote

Municipal law --- Municipal tax assessment — Valuation — Method of assessment — Miscellaneous

Table of Authorities

Cases considered:

Ontario Property Assessment Corp. v. Praxair Canada Inc. (2002), 2002 CarswellOnt 75, 44 O.M.B.R. 64, 155 O.A.C.
360, 26 M.P.L.R. (3d) 262 (Ont. Div. Ct.) — considered

Statutes considered:

Assessment Act, R.S.O. 1990, c. A.31

s. 1(1) "current value" — referred to

s. 7(1) — referred to

s. 7(2) — referred to

s. 19(1) — referred to

s. 19.2(1) ¶ 2 [en. 2004, c. 7, s. 3(1)] — referred to

s. 40(17) — referred to

s. 40(19) — referred to

s. 44(3) — referred to

s. 44(3)(b) — referred to

Regulations considered:

Assessment Act, R.S.O. 1990, c. A.31

General, O. Reg. 282/98

s. 3(1) ¶ 1(i) — referred to

s. 5(1) — referred to

Decision of the Board:

1 These appeals came before the Assessment Review Board on November 30, 2010, February 25, 2011 and April 6, 2011 in the City of Hamilton.

Issue

2 The subject property, 814 Upper Wentworth Street, is a detached, one-and-one-half storey building with a total building area of 1,421 square feet built in 1949. The building is situated on a lot measuring 17,821 square feet (71 effective feet by 251 effective feet). There is a second, smaller structure on the property which the Municipal Property Assessment Corporation (MPAC) has classified as a detached garage. The property is located on a busy street with heavy traffic.

3 For the 2010 and 2011 taxation years, the property is assessed at \$230,000. In 2010 the assessment was returned with the property classified entirely in the residential property class. In 2011 the assessment was returned with a portion of the property valued at \$175,800 classified in the residential property class and a portion of the property valued at \$54,200 classified in the commercial property class. MPAC, after inspecting the property on April 21, 2010, noted that a portion of the property had been used commercially and served the parties with a *Special Notice by Party of Request for Higher Assessment and/or Higher Tax Rate Property Class* pursuant to Rule 33 of the Board's Rules of Practice and Procedure (Rules).

4 At the hearing MPAC proposed a reduced assessed value of \$206,000 apportioned as follows: Residential Property Class — \$157,700 Commercial Property Class — \$48,300

5 There are two main issues for the Board's determination: (1) Whether the subject property is assessed at its current value and whether it is equitably assessed and (2) Whether a portion of the subject property falls within the commercial property class.

Decision

6 For the reasons set out below, the Board finds that the current value of the subject property for the 2010 and 2011 taxation years is \$187,000. The Board finds that this current value is equitable with that of similar lands in the vicinity and no further reduction is warranted.

7 The Board also finds that the classification of the subject property is the residential property class and that no portion of the property falls within the commercial property class.

8 The result is that for the 2010 and 2011 taxation years the assessment is reduced from \$230,000 to \$187,000. The residential property class is confirmed for the 2010 taxation year.

9 For the 2011 taxation year the value apportioned to the residential property class increases from \$175,900 to \$187,000 and the value apportioned to the commercial property class is reduce to zero and the class is cancelled.

Legislation

10 For the 2010 and 2011 taxation years, in determining the value at which land shall be assessed, the Board must have regard to the following provisions of the *Assessment Act* R. S. O.1990, c. A.31, as amended (*Act*):

11 [Section 1 of the Act](#) defines "current value" as follows:

"**current value**" means, 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.

12 Subsection 19.(1) of [the Act](#) states:

19.(1) Assessment based on current value. — The assessment of land shall be based on its current value.

13 [Subsection 19.2\(1\) 2 of the Act](#) states:

19.2(1) Valuation days. — Subject to subsection (5) ¹, the day as of which land is valued for a taxation year is determined as follows:

2. For the period consisting of the four taxation years from 2009 to 2012, land is valued as of January 1, 2008.

14 Subsection 44.(3) of [the Act](#) states:

44.(3) Same, 2009 and subsequent years. — For 2009 and subsequent taxation years, in determining the value at which any land shall be assessed, the Board shall,

(a) determine the current value of the land; and

(b) have reference to the value at which similar lands in the vicinity are assessed and adjust the assessment of the land to make it equitable with that of similar lands in the vicinity if such an adjustment would result in a reduction of the assessment of the land.

15 Subsection 40.(17) of [the Act](#) states:

40.(17) Burden of proof. — For 2009 and subsequent taxation years, where value is a ground of appeal, the burden of proof as to the correctness of the current value of the land rests with the assessment corporation.

16 Subsection 40.(19) of [the Act](#) states:

40.(19) Board to make determination. — After hearing the evidence and the submissions of the parties, the Board shall determine the matter.

17 With respect to Classification, the Board must consider [section 7 of the Act](#):

7.(1)Property Classes. — The Minister shall prescribe classes of real property for the purposes of this Act.

7.(2)Same. — The classes prescribed by the Minister shall include, but are not restricted to, the following:

1. The residential/farm property class.
2. The multi-residential property class.
3. The commercial property class.
4. The industrial property class.
5. The pipe line property class.
6. The farmlands property class.
7. The managed forests property class.

- 18 The Board must also have regard to the following provisions of [Ontario Regulation \(O. Reg.\) 282/98](#):

RESIDENTIAL/FARM PROPERTY CLASS

- 3 (1) The residential property class consists of the following:

1. Land used for residential purposes that is,
 - i. land that does not have seven or more self-contained units,

COMMERCIAL PROPERTY CLASS

- 5.(1) The commercial property class consists of the following:

1. Land and vacant land that is not included in any other property class.
2. A care home, as defined in the [Tenant Protection Act, 1997](#), to which that Act does not apply, that is operated with the intention of generating a profit and that does not have seven or more self-contained units.
3. If a portion of land is in the office building property class, any other portion of the land that is not included in any other property class.
4. If a portion of land is in the shopping centre property class, any other portion of the land is not included in any other property class.

- 19 For the notice of a higher assessment or higher tax rate property class, the Board's Rules provides:

33. Special Notice by Party of Request for Higher Assessment and/or Higher Tax Rate Property Class

(a) If a party intends to request a change in property class to a class with a higher tax rate or an assessment that would result in a higher assessment than that fixed by the Municipal Property Assessment Corporation, it must give notice in writing of its intention to all other parties and the Board. This notice must include the amount of the assessment and the class requested. This notice must be given at least 50 days before the hearing of the matter, unless otherwise directed by the Board. If this notice of higher assessment is not served, the Board may refuse to consider the request.

Reasons for Decision

1. Current Value

20 The property was inspected by Ms. Mirella Oatway on behalf of MPAC on April 21, 2010. Ms. Oatway testified that the subject property was below average condition and needed work. She acknowledged seeing cracks in the basement foundation, rotten wood in the floor joists and decking, and water damage in the basement. Ms. Oatway also agreed that she had seen water damage in the bathroom, and that the property definitely required repairs, but she was unable to estimate the cost of the repairs.

21 The property was assessed as returned at \$230,000, however, following an inspection MPAC reduced the quality rating of the property from "average" to "fair" and, as a result, recommends that the assessed value be reduced to \$206,000.

22 Despite this reduction, Mr. Biron submitted that the assessment was still too high. He testified that the house had been used by a previous owner as a "grow-op" and adduced numerous photographs of the poor state of repair that had resulted. These included photographs of rotten window sills and doors, severely damaged hardwood floors, (water damage from the grow-op has damaged the floors beyond repair), damaged ceilings, and extensive water damage and mould throughout the house.

23 Based upon all the evidence, the board is persuaded that the house has suffered extensive harm. MPAC has acknowledged that the quality assessment of the property could be further reduced from "fair" to "poor," and Ms. Barbara Ellis on behalf of MPAC, testified that she believed a characterization of "poor" would further reduce the property assessment by about 5 percent.

24 Accordingly, the Board finds that the property should be characterized as "poor" quality, and the current value should be reduced accordingly.

25 The best evidence of current value is an arm's length and market tested sale of the subject property on or close to the valuation date of January 1, 2008. If, as in this case, no such transaction has taken place, the Board looks to sales of comparable properties in the same vicinity for evidence of the current value.

26 Mr. Biron submitted into evidence a "Comparative Market Analysis" (Exhibit #4) prepared by a realtor from the Sutton Group. The report shows 16 properties which are located within a few blocks of the subject property. Nine of these properties are only one-storey buildings. Accordingly, the Board finds that these nine properties are not comparable to the subject, which is one-and-one-half storeys. While the remaining seven properties are one-and-one-half storeys, they all have significantly smaller lots (ranging from 2,460 to 4,838 square feet), and the Board received insufficient data on which it could make a meaningful comparison between them and the subject. The Board was not provided with evidence of the total square feet of living space or the condition of the properties. Furthermore, all of the sales take place in 2010 and 2011. As the sales are so far removed in time from the valuation date of January 1, 2008, they are of no assistance to the Board. For all of these reasons, the Board places no weight on the evidence of these sales.

27 MPAC submitted as Appendix "A" of Exhibit #1, a "Current Value Study" showing four properties, which it suggests are comparable to the subject property and support the recommended assessment of \$206,000. All four of the properties are similar in age, building size and number of storeys. All sold in 2008 and MPAC provided time adjustment calculations to adjust the sale prices to the valuation day of January 1, 2008.

28 The Board finds that MPAC's sale of 111 Mohawk Road East is directly comparable to the subject. It sold for \$250,000 in March 2008. Of all of the sales presented by the parties, 111 Mohawk has the largest lot at 10,000 square feet (whereas the other three properties' lots range in size from 4,023 to 6,102 square feet) and like the subject, it was built in 1949, is one-and-one-half storeys, has a detached garage, an unfinished basement and is located on a busy street with heavy traffic.

29 The sale value per square foot of 111 Mohawk is \$141.32 ($\$250,000 / 1,769$ square feet). Applying this value to the square footage of the subject results in a value of \$200,820 ($\$141.32 \times 1,421$ square feet). Based on this evidence it is clear that the subject property would not be worth more than \$200,820.

30 For the reasons set out above, the Board has found that the property description should be reduced from "fair" to "poor" and the current value should be reduced by 5 percent as a result. Accordingly, the value of \$200,820 should be reduced by 5 percent to \$190,779.

31 The subject property has a second structure which MPAC has assessed as a detached garage, with a value of \$3,588. Mr. Biron testified that the "garage" is too small and narrow to accommodate a car, and in fact it has an ordinary front door, not a garage door. He provided photographs of the structure. He also testified that there was no car access to the "garage". Although Ms. Oatway asserted that the structure should still be considered a "garage", the Board finds that the structure is not a garage, and based upon the photographs, is better described as a shed. Mr. Biron also gave evidence that the structure was rotten in places and generally in a poor state of repair. He produced a home inspection which supports his description. Based upon all of the evidence, the Board finds that the second structure adds no value to the property, and could even be considered a liability. Accordingly, the Board has further reduced the assessed value of the property by \$3,588. The Board thus finds that the current value of the subject property is \$187,191 or \$187,000, rounded.

32 The Board thus finds that the current value of 814 Upper Wentworth Street is \$187,000.

2. Classification

33 The subject property was inspected by Ms. Mirella Oatway on behalf of MPAC on April 21, 2010. When she attended at the property, she discovered that Mr. Biron, the husband of the property owner Xiaojing Ren, was operating a paralegal business from a room on the first floor of the subject property. Mr. Biron is a licensed paralegal who defends people charged with traffic offences.

34 Prior to the inspection, the property had been classified as falling within the residential property class. MPAC advised the Board that on December 16, 2010, it served the parties with a *Notice of Higher Assessment and/or Higher Tax Rate Property Class* pursuant to Rule 33 of the Board's Rules. MPAC is seeking to alter the assessment from wholly in the residential property class to \$194,000 in the residential property class and \$36,000 in the commercial property class.

35 Mr. Biron objects to the change in classification. He describes his office as a "home office" or "home based business" and submits that the classification should remain 100% residential.

36 It is clear, based upon the legislation cited above, that the classification of the property is to be determined based upon the use to which the property is put.

37 The proper approach to the classification of land was considered by the Ontario Superior Court of Justice (Divisional Court) in *Ontario Property Assessment Corp. v. Praxair Canada Inc.* (2002), 155 O.A.C. 360 (Ont. Div. Ct.). Speaking for the Court, Cameron J. stated at paragraph 20:

"Land" and "real property" mean portions of parcels rather than parcels. Classification must be determined with due regard to the function of the portion under consideration. It cannot be based solely on the zoning of the portion except where prescribed specifically.

38 MPAC asserts that Mr. Biron uses the office on the first floor of the property to operate a business, therefore a portion of the property should be classified as commercial.

39 The legislation does not enumerate criteria for inclusion in the commercial class. Rather, based upon the wording of subsection 5.(1) of [O. Reg. 282/98](#), the commercial classification is a "catch-all" for properties that do not fall within any other property class. Until recently, the subject property was classified entirely as residential, and there is no issue that the greater portion of the subject property remains within the residential property class. The issue before the Board then, is whether the "use" of the office portion of the property is sufficient to take it out of the residential classification, such that it would, by default, fall within the commercial class instead. For the reasons set out below, the Board finds that the property should remain completely within the residential property class, and should not be reclassified as partly within the commercial class.

40 Mr. Biron testified that the property is primarily residential in use, and stated that the property is designated as his primary residence. While he acknowledged that he does conduct some administrative work in the office portion of the building, he testified that the primary work he does for his clients takes place off-site. He stated that the nature of his business is to represent clients in traffic court, and that the substance of his business thus takes place in the court house, rather than in the subject property.

41 The office is used solely by residents of the house; Mr. Biron testified that he does not have any non-resident employees. In addition, he does not have external signage. A photograph was submitted by MPAC showing a sign advertising the business in the window of the property. However, that sign was hand-drawn, on what appeared to be large pieces of paper or cardboard, and was not of a permanent or lasting construction. The sign was not affixed to the outside of the building, nor did it appear to be professionally made. Mr. Biron testified that the sign has since been removed. As a result, the Board does not find the photograph to be persuasive evidence of non-residential use.

42 Mr. Biron testified that the property is not zoned commercially by the City of Hamilton; rather, it is zoned residential and agricultural. While the Board cannot rely solely on the zoning of the subject property, zoning can be one indicator of use.

Mr. Biron called as a witness Ms. Kimberly Coombs, who is a Superintendent of the Municipal Law Enforcement Office of the City of Hamilton. Ms. Coombs inspected the subject property on December 7, 2010 in response to a complaint that a business was being operated in the subject property, contrary to the zoning by-law.

43 Ms. Coombs testified that she inspected the entire property, and viewed the office, the kitchen, and the bedrooms upstairs. Ms. Coombs stated that she observed no retail business on the premises, no employees, only two parking spaces and no outside storage. She estimated that the room containing the office was less than 25% of the square footage of the house. She concluded that Mr. Biron was operating a home-based business as permitted under the by-law, and was not operating a commercial enterprise in contravention of the zoning. She testified that the property appeared to her to be used as a residence. Ms. Coombs is an independent and impartial witness, and the Board finds her evidence to be persuasive.

44 Based on the totality of the evidence, the Board finds that the subject property is primarily used as a residence, and the home-based business is not sufficient to take that portion of the property out of the residential property class. The Board notes, in passing, that each of the four sales which MPAC submitted as "comparable" to the subject property in its Current Value Study, were classified as purely residential properties. Accordingly, the Board finds that the subject property should be classified as 100% residential.

3. *Equity*

45 Once the Board has determined the current value of the property, the Board is required by subsection 44.(3)(b) of [the Act](#) to consider whether the valuation is equitable, having regard to the value at which similar lands in the vicinity are assessed.

46 As was noted above, Mr. Biron did submit a "Comparative Market Analysis"; however, this analysis was based on sales which were more than two years removed in time from the valuation date of January 1, 2008. Unfortunately, Mr. Biron did not submit any evidence of the assessments of these properties, so they do not assist the Board in the equity analysis.

47 MPAC submitted an Equity Analysis to the Board, in support of its assessment, which included the sales of 122 residential properties in the vicinity of the subject, between January 2007 and December 2008. A comparison of the assessed values of these properties to their sale prices discloses a range of assessment to sale ratios (ASR) of from 0.86 to 1.30, with a median ASR of 1.00. As the median ASR is 1.00, no adjustment on the basis of equity is necessary.

48 Accordingly, for the reasons set out above, the Board finds the current value of the subject property to be \$187,000.

Footnotes

- 1 Subsection 5 permits the Minister to prescribe a different valuation day. A different day has not been prescribed.