Appendix F

THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2012 SKCA 24 Date: 20120306

Between: Docket: CACV1981

Sasco Developments Ltd.

Appellant

- and -

City of Moose Jaw and
Saskatchewan Assessment Management Agency

Respondents

Coram:
Cameron, Jackson and Herauf JJ.A.

Counsel:
Leonard D. Andrychuk, Q.C. for the Appellant
David Gerecke for the Respondents

Appeal:

From:	Assessment Appeals Committee Saskatchewan Municipal Board
Heard:	January 15, 2012
Disposition:	Appeal dismissed
Written Reasons:	March 6, 2012
By:	The Honourable Mr. Justice Cameron
In Concurrence:	The Honourable Madam Justice Jackson The Honourable Mr. Justice Herauf

CAMERON J.A.

[1] This is an appeal from a decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board regarding the 2009 assessed value for municipal tax purposes of the Heritage Inn, a hotel located in the City of Moose Jaw and owned by Sasco Developments Ltd.

[2] The value of the land and building associated with the operation of the hotel was assessed by the Saskatchewan Assessment Management Agency. This agency, known as SAMA, serves by local appointment as the assessor for a number of cities, including the City of Moose Jaw. As such, SAMA assessed the value of the property at $8,777,300. Sasco Developments then appealed to the City's Board of Revision on the ground the valuation was excessive. The Board agreed and reduced it to $5,257,704. With that, the City and SAMA appealed to the Assessment Appeals Committee. The Committee decided the Board of Revision had erred and therefore set aside its decision and restored the original assessment.

[3] Sasco Developments then brought the appeal now before the Court. It did so with leave granted pursuant to section 33.1 of *The Municipal Board Act*, S.S. 1988-89, c. M -23.2, which provides for appeal, with leave, on questions of law or jurisdiction. In general the appeal was taken on the grounds the Committee erred in law, by misinterpreting or misapplying the relevant assessment provisions of *The Cities Act,* S.S. 2002, c. C-11.1, and failed to exercise its jurisdiction properly by failing to fully address the case before it.

I. *The Cities Act*

[4] The relevant assessment provisions of the *Act* are those that call for non-regulated property assessment (which involves estimating the market value of property using standard appraisal methods), as distinct from regulated property assessment (which involves determining the fair value of property using the formulas, rules, and principles found in the Saskatchewan Assessment Manual). The relevant provisions call upon assessors to estimate the market value of property as of a given date by means of mass appraisal and in keeping with a defined market value standard. Unlike single property appraisal, which entails the valuation of a particular property, mass appraisal entails the systematic appraisal of a group of properties based in significant part on market value data common to the group.

[5] It is these provisions that underlie the questions of law to which the appeal gave rise. They are found in sections 163 and 165 of Part X of the *Act*.

> **163** In this Part;
>
> (f.1) **"market value standard"** means the standard achieved when the assessed value of property:
>
> (i) is prepared using mass appraisal;
>
> (ii) is an estimate of the market value of the estate in fee simple in the property;
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> (iii) reflects typical market conditions for similar properties; and
>
> (iv) meets quality assurance standards established by order of the agency.
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> (f.2) **"market value"** means the amount that a property should be expected to realize if the estate in fee simple in the property is sold in a competitive and open market by a willing seller to a willing buyer, each acting prudently and knowledgeably, and assuming that the amount is not affected by undue stimuli.

> (f.3) **"mass appraisal"** means the process of preparing assessments for a group of properties as of the base date using standard appraisal methods, employing common data and allowing for statistical testing.
>
> ...
>
> 165(1) An assessment shall be prepared for each property in the city using only mass appraisal.
>
> (2) All property is to be assessed as of the applicable base date.
>
> (3) The dominant and controlling factor in the assessment of property is equity
>
> ...
>
> (5) Equity in non-regulated property assessments is achieved by applying the market valuation standard so that the assessments bear a fair and just proportion to the market value of similar properties as of the applicable base date.

[6] The definitions appearing in paragraphs (f.1) to (f.3) of section 163, together with the provisions appearing in subsections 165(1) and (5), were enacted in 2006 (S.S. 2006, c. 4, ss.13 and 15). They served to introduce the ideas, new to Saskatchewan, of assessing the market value of property using standard appraisal methods. As such, they introduced something of a new scheme of assessment.

II. The New Assessment Scheme

[7] While the scheme was introduced in 2006, it did not take effect until the beginning of 2009, when all properties in the province fell to be revaluated. The scheme contemplates estimating the market value of "the estate in fee simple" in property, a term that is taken in the work-a-day world of assessment to mean the land and building, or the real estate. More particularly, the scheme contemplates estimating market value using standard appraisal methods.

[8] There are three such methods. They are the income method, the cost method, and the comparable sales method. Of the three, the income method is preferred in relation to the assessment of hotel property. This is so because hotels are revenue-producing properties that are typically built or bought based upon their income-producing or investment potential. Hence this method contemplates determining the annual net operating income that a hotel property can be expected to generate in the market place, and then dividing that amount by an appropriate capitalization rate, or a rate, used to convert future income to present value, reflective of anticipated return on investment.

[9] Suppose, for example, that a hotel property may be expected to generate annual net operating income of $600,000 and a capitalization rate of 10%, or .10, is used for this conversion. Dividing the one by the other yields the figure of $6,000,000. Assuming that each of the annual net operating income and the capitalization rate has been determined appropriately, the market value of the property may be taken to be $6,000,000 on the premise this is the amount a prudent and knowledgeable buyer dealing at arm's length could be expected to pay for the property if seeking a return on investment of 10%.

[10] The example begs the question of how a municipal assessor, called upon to estimate the market value of a hotel property using the income method of appraisal, is to determine both annual net operating income and an appropriate capitalization rate. Let us address this subject having regard for the process of mass appraisal and its implications in this regard.

[11] To begin with, the income method draws upon the same basic principles

in relation to both mass appraisal and single property appraisal. However, the appraisal techniques vary appreciably from the one to the other. Among other things, the techniques associated with mass appraisal are grounded in data common to a group of properties, whereas the techniques associated with single property appraisal are grounded in the main in data specific to a particular property. This is of considerable significance for two reasons. First, because the "market valuation standard" defined in section 163 must be met, and can only be met if the assessed value of a property is "prepared using mass appraisal." Second, because subsection 165(1) explicitly states that an assessment shall be prepared for each property "using only mass appraisal."

[12] Mass appraisal is defined in section 163 to mean the process of preparing assessments for a group of properties using standard appraisal methods, employing common data and allowing for statistical testing. Read in context, the term "a group of properties" may be taken on application to mean a group of "similar" properties. And the term "common data" may be taken to mean pieces of information in the form of facts and statistics pertaining to market value and common to a group of similar properties.

[13] Hence, mass appraisal of hotel properties, using the income method adapted to this end, entails gathering such pieces of information for the threefold purpose of (i) classifying and grouping hotel properties by similarity, a process known as stratification; (ii) establishing the common data base requisite to the determination of the annual net operating income that a hotel property in a group of similar properties can typically be expected to generate in the market place; and (iii) selecting an appropriate capitalization rate.

III. SAMA's Response re: Hotel Valuation

[14] With the need in mind to gather such pieces of information for this threefold purpose, SAMA collected a good deal of information pertaining to a good many hotels. To a significant extent it did so in exercise of the powers conferred upon assessors by section 171 of the *Act*, having regard for the fact the base date for assessment was fixed at June 30, 2006, a date that was to remain in effect throughout the 2009-2012 assessment cycle. Thus SAMA collected a plethora of information from hotels located within its assessment jurisdictions, including the Heritage Inn, for the years 2004, 2005, and 2006. The reason it collected this information for each of these years was to give it a stable base of information with which to work in achieving the purpose.

[15] The information it collected extended to hotel location, physical characteristics, amenities, number and kind of rooms available, room charges, occupancy rates, and revenue and expenditure attributable to room rentals. The information also extended to the revenue and expenditure attributable to the operation of hotel dining rooms, lounges, beverage rooms, meeting rooms, and so on, together with their seating capacities. In addition, the information it collected included information regarding the sale and purchase over these three years of a significant number of hotels.

[16] On the whole, this information, together with other information gathered from other sources such as municipal and land titles records, enabled SAMA to meet the threefold purpose for which the information was collected, beginning with stratification.

(i) *stratification*

[17] The information pertaining to such things as hotel location, physical characteristics, amenities, occupancy rates, and so on enabled SAMA to compile the common data needed to classify and group hotel properties by similarity. Based thereon SAMA classified a number of hotel properties as "Primary Accommodations." Some of these, otherwise similar in many respects, offered a limited range of services whereas others offered a full range of services and amenities, meaning they not only had rooms for rent on a daily basis but also had dining rooms and lounges and bars, meeting rooms, and so on. Those that offered services such as these were further classified as "Full Service Hotels", and SAMA placed them into one of two groups, depending in significant part on variations in location and occupancy rates. The two groups were identified as "Major Urban With Rest./Bar" and "Minor Urban With Rest./Bar."

[18] With that, we may turn to the second purpose for which SAMA gathered the information, namely to establish the data base for determining annual net operating income when assessing the value of such hotel properties.

(ii) *annual net operating income*

[19] The information pertaining to the likes of the number and kinds of rooms available, room charges, occupancy rates, and revenue and expenditures attributable to room rentals, enabled SAMA to compile common data related to room rental income and, on analysis, to put the data to use.

Having regard for such common data as room types, median posted room rates, median occupancy rates, and median ratios of income to expense associated with room rentals, the agency was able to generate sets of statistical data, largely in the form of tables reflecting these median indicators of potential net income generation. The tables were established for later use across the board in determining the net operating income that hotel properties in the group identified as "Major Urban With Rest/Bar", for example, could typically be expected to realize from room rental, having regard, of course, for the type and number of hotel rooms specific to each of the hotels within the group.

[20] Similarly, the information regarding such matters as the revenues and expenditures attributable to the operation of hotel dining rooms, lounges, beverage rooms, meeting rooms, and so on, coupled with their seating capacity, enabled SAMA to generate sets of statistical data, again largely in the form of tables reflecting the likes of median ratios of income to expense attributable to each of such operations. As before, the tables were established for later use across the group in determining the net operating income that a hotel in this group could typically be expected to realize from such operations on a per seat basis.

[21] To be sure, this is the briefest account of the process under consideration, and is meant only to illustrate in the most general way how SAMA went about the business of compiling and using common data to lay the foundations for later use in determining the annual net operating income, and ultimately estimating the market value, of each of the hotel properties within the group identified as "Major Urban With Rest./Bar."

[22] The remaining purpose for which SAMA collected the information was to select a capitalization rate for valuing hotel properties in this group.

(iii) *capitalization rate*

[23] To speak of a capitalization rate is to speak about a critical component in converting future income into present value. There are two methods of doing this. One is called the direct capitalization method, the other the discounted cash flow method. The first is more efficient and is therefore generally regarded as the most suitable for use in mass appraisal. Hence, SAMA used the first.

[24] According to standard appraisal practice, an appropriate capitalization rate, using the direct capitalization method, may be determined by means of analyzing the arm's length sale and purchase of similar hotel properties. If a hotel property had been purchased for $6,000,000, let us say, and had been generating annual net operating income of $600,000, the capitalization rate would equal 10% ($600,000 ÷ $6,000.000 = .10 = 10%). If an analysis of the sale and purchase of a significant number of similar hotel properties yielded substantially the same result, the appropriate capitalization would be 10% when estimating the market value of a like hotel using the income method of appraisal.

[25] To further illustrate how this business works, suppose the analysis of the arm's length sale and purchase of similar hotel properties had yielded a capitalization rate of 12%, rather than 10%. Applying a rate of 12% to a hotel

property expected to generate $600,000 in annual net operating income would serve to drive down the market value of the property from $6,000,000 to $5,000,000 ($600,000 ÷ $5,000,000 =.12 =12%). The idea, of course, is that a buyer looking to purchase this property and realize a return on investment of 12%, rather than 10%, would not be willing to pay $6,000,000 but only $5,000,000, or $1,000,000 less.

[26] Mindful of all of this, SAMA collected information regarding the sale and purchase of a number of hotel properties, including a significant number that it regarded as similar. Its analysis of the common data derived from these sales and purchases led it to conclude that a capitalization rate of 10% was appropriate when estimating the market value of hotel properties within the group identified as "Major Urban With Rest./Bar."

[27] Once again, this is but a brief account of this process and is meant only to illustrate in a general way how SAMA went about determining an appropriate capitalization rate.

[28] To digress momentarily we might say, having regard for the whole of the foregoing, that there is much more to the whole than this—more in the way of technical content and precision, and principle and fact—but this will do for the purpose of addressing the case before us. Indeed, at this early stage of working with the new assessment scheme it is unwise to go farther afield than necessary. Much in the way of contending with the provisions of the new scheme lies ahead of us, meaning all of us having a hand in working with it. That said, we may turn to the original assessment and how it was made.

IV. The Original Assessment

[29] The Heritage Inn was built in 1979 on 233,040 square feet of land. It has 104 guest rooms of one kind or another on two storeys. In addition to offering rooms for rent on a daily basis, it also offers food and beverage services. It has a dining room, lounge, and beverage room. It also has a conference room, and so on. The dining room seats 140 persons, the lounge 40, the beverage room 202, and the conference room 750.

[30] SAMA first classified the Heritage Inn as "Primary Accommodation" and then further classified it as a "Full Service Hotel." At that, it placed this hotel property in the group of hotel properties identified as "Major Urban With Rest./Bar." Then, using the income method adapted to mass appraisal, the agency estimated the market value of the property, as of the base date of June 30, 2006, to be $8,777,300. This became the taxable assessment on the combined authority of sections 166 and 167 of *The Cities Act* and sections 12 and 13 of *The Cities Act Regulations*, R.R.S., c. C-11.1, Reg 1.

[31] The assessed value of $8,777,300 reflects potential annual net operating income of $877,730 and a capitalization rate of 10%. SAMA arrived at this amount of income on application of the tables it had earlier established for use in estimating the market value of hotel properties within the group identified as "Major Urban With Rest./Bar". The application of the tables entailed applying their various median values to the number and type of hotel rooms held by the Heritage Inn, together with the seating capacity of each of its dining room, lounge, beverage room, convention room, and so on.

[32] In a nutshell, then, this is how SAMA arrived at the market value of $8,777,300 and hence the assessed value.

[33] Sasco Developments was dissatisfied with the assessment, so it appealed to the Board of Revision.

V. The Appeal to the Board of Revision.

[34] The company appealed "the valuation" of the property, as it was entitled to do under section 197 of *The Cities Act.*

[35] On such appeals the function of the Board of Revision is to review the valuation for error by the assessor—error as specifically alleged in the notice of appeal—and, if such error be found to exist, to give effect to it subject to the limitations imposed upon the Board's remedial powers: *Regina (City)* v. *Laing Property Corp.*, [1995] 3 W.W.R. 551 (Sask. C.A), 128 Sask R.29. By error is meant material error of fact, or law, or standard appraisal principle and practice, or some combination of these. And the person who takes the appeal bears the burden of establishing, on a balance of probabilities, the error or errors the assessor is alleged to have made: *Estevan Coal Corp.* v. *Estevan (Rural Municipality No. 5),* 2000 SKCA 82, 199 Sask. R. 57.

[36] The company's notice of appeal did not set out the specific grounds of appeal upon which it alleged the assessor had erred, as required by subsection 197(6)(a) of the *Act*, and in the result the hearing was not as structured or focused as it might otherwise have been. The notice of appeal merely stated

that the appeal was taken on the ground "the assessment valuation is in excess and should be lowered to reflect market value." This was said to be so in light of the fact that in the years 2004 to 2006 the Heritage Inn had not actually generated annual net operating income of $877,730. According to the information the hotel had earlier furnished SAMA, when the agency was collecting information of this kind from various hotels, the hotel's occupancy rate was significantly lower than the median occupancy rate used by SAMA in its calculations; and the hotel's expenses were said to be significantly higher.

[37] Thus the company submitted that SAMA should have estimated the market value of the property based on its actual financial performance, pointing out that this is what the agency had done when assessing the value of a nearby property, namely Temple Gardens Mineral Spa. The company also submitted that the capitalization rate of 10% used by SAMA was inappropriate, suggesting the agency should have determined the capitalization rate by means of the discounted cash flow method instead of the direct capitalization method. In any event it said a capitalization rate in the range of 11% to 12% should have been used, as was the case in other assessment jurisdictions such as Regina and Saskatoon.

[38] In response, SAMA contended that it was precluded from estimating the market value of the Heritage Inn property based on its actual financial performance. To do so would contravene the requirements of the assessment scheme and its call for mass appraisal. As for the Temple Gardens Mineral Spa, SAMA pointed out that this was a unique property—there was not another of

its kind in the province—so the agency was left to estimate its market value on a stand-alone basis, having regard for its actual financial performance. Moreover there was nothing wrong, the agency said, with its use of a capitalization rate of 10%.

[39] The Board of Revision decided that SAMA had erred, not in relation to the capitalization rate but otherwise. Before rendering its decision, however, it asked the agency to perform some fresh calculations based upon the Heritage Inn's "own income and expenses". Then, having received the agency's calculations, the Board rendered its decision:

> The Board concluded that the assessor erred in using median occupancy rates from reported primary accommodations in Moose Jaw, Yorkton, and the R.M. of Prince Albert # 461. Because of the low occupancy for the subject property it warrants a separate assessment as is the case for the Temple Gardens Mineral Spa in order to achieve equity.
>
> Through an undertaking, the Board asked the assessor to calculate a new assessed value to the subject property based on its own income and expenses as reported in the 2004, 2005, and 2006 "Hotel/Motel Information Request Form", using median values and a Capitalization rate of 10%.
>
> It is the decision of the Board that the appeal be upheld and the total assessed value shall be $5,257,704.

[40] With that, the City and SAMA appealed to the Assessment Appeals Committee. So, too, did Sasco Developments.

VI. The Appeals to the Assessment Appeals Committee

[41] The appeals were taken pursuant to section 216 of *The Cities Act,* which allows for appeal "respecting a decision of a board of revision." The function

of the Committee on such appeals is not to rehear the case, in the sense of deciding anew whether the assessor erred, but to review the decision of the Board of Revision for error as alleged in the notice of appeal: *Regina (City)* v. *Laing Property Corp.* (cited earlier). If error be found, which is to say material error which so affects the decision of the Board that its decision cannot stand, the Committee is empowered by section 226 of the *Act* to modify the decision of the Board by adjusting the assessment either up or down. But, according to subsection 226(3), the Committee is not permitted to vary a non-regulated property assessment "using single property appraisal techniques." Nor, according to subsection 226(3.1), is it permitted to do so "if equity has been achieved with similar properties."

[42] The City and SAMA appealed on the grounds, among others, that the Board of Revision erred in law (i) in failing to ensure that the assessed value of the Heritage Inn property met the market value standard prescribed by section 163 of the *Act* and (ii) by so varying the assessment as to create inequity contrary to subsection 165(5). In consequence, they asked for relief in the form of an order setting aside the decision of the Board and restoring the original assessment.

[43] Sasco Developments appealed on the substantive ground that, despite the significant reduction made by the Board of Revision, the assessed value of the property nevertheless remained excessive, given the hotel's actual financial performance. Hence, the company asked for relief in the nature of an order further reducing the assessed value to bring it into line with the

company's analysis of the value of the hotel property based on its own income and expenses.

[44] The Committee first addressed the appeal by the City and SAMA. It allowed their appeal on the primary ground the Board of Revision had erred in law in ordering the agency to revise the assessed value of the property based on the hotel's "own income and expenses." In so holding, the Committee said that, while property owners might reasonably expect the assessed value of their properties to reflect significant variations from the group norm, "to use individual values offends the market value standard as the required statistical testing is no longer possible."

[45] In this same vein the Committee suggested, speaking hypothetically, that by one means or another it might be possible within the context of a mass appraisal model to accommodate individual variations of some kind. But this was a matter beyond the scope of the appeal, it said, meaning consideration of the matter would have to await an appeal focused specifically on alleged deficiencies in the evaluation model employed by SAMA.

[46] From there the Committee went on to fault the decision of the Board of Revision for holding that SAMA should have assessed the value of the Heritage Inn property on the same basis the agency had assessed the value of Temple Gardens Mineral Spa. In doing so, the Committee observed that the assessment of the Temple Gardens property was not before it, making it difficult to know just how that assessment had been prepared. Assuming, however, that the agency had prepared it on the basis in general of Temple

Gardens' "own income and expenses", the Committee suggested the assessed value would not satisfy the market value standard. That said, the Committee held that the Board of Revision had erred in this regard:

> [15] The Board erred when it ordered a revision to the subject assessment based on its own income and expenses to achieve equity with the Temple Gardens Mineral Spa.

[47] The Committee then turned to the appeal of Sasco Developments and dismissed it for the following reasons:

> [16] The owner's appeal is intended to modify the value stemming from the [Board's] decision, so in the normal course it must be dismissed as it is not possible to improve upon an action that should not have been taken in the first place.

[48] In the end, having in the meantime discussed in general some of the challenges and potential pitfalls in working with the new assessment scheme, the Committee said this:

> [34] In conclusion, for SAMA's appeal, the Committee decides that the Board erred in its decision to revalue the subject property based on its own income and expenses. SAMA's appeal is sustained. As the owner's appeal is to revise the value stemming from the Board's incorrect decision, there is no avenue to do so, therefore, the appeal is dismissed.
>
> [35] Given the information in the record, the Committee finds that the value must revert to the original roll value.

VII. The Appeal to the Court

[49] As remarked upon at the outset, Sasco Developments appealed on the grounds in general that the Assessment Appeals Committee erred in law, by misinterpreting or misapplying the relevant assessment provisions of *The*

Cities Act, and failed to exercise its jurisdiction properly by failing to fully address the case before it.

[50] Let us begin with the alleged errors of law. They were raised in the form of questions framed by counsel for the appellant. There are two such questions. Each has to do with whether the Committee misconstrued or misapplied the provisions of sections 163 and 165 of the *Act*.

The First Question

> Did the Committee err in law by interpreting the requirements of the "market valuation standard" and "mass appraisal" under *The Cities Act* to preclude determination of a non-regulated property assessment by taking into consideration some or all of the property's own characteristics?

[51] This question, viewed in the context of the decision of the Assessment Appeal Committee, reduces to whether the Committee erred in law in holding that the Board of Revision had erred in ordering SAMA to revise the assessed value of the Heritage Inn based on "its own income and expenses." This was the primary ground upon which the Committee allowed the appeal from the Board and restored the original assessment. Hence, the question that *arises out of the decision* of the Committee is whether it erred in law in so holding.

[52] We are of the opinion it did not do so. SAMA was required by law to prepare the assessment "using mass appraisal" in the words of the market value standard defined in section 163 of the *Act*. And, in keeping with the market value standard, the assessed value had to reflect "typical market

conditions for similar properties." Not only that, SAMA was required to "use only mass appraisal", in the words of subsection 165(1), which entails preparing assessments "for a group of properties...employing common data and allowing for statistical testing." Hence, it was not open to the agency to estimate the market value of the Heritage Inn property based in general on "its own income and expenses." This would amount, in effect, to single property appraisal, using single property appraisal techniques.

[53] Nor was it open to the Board of Revision to direct that SAMA do so. Boards of Revision are expressly prohibited, when it comes to non-regulated property assessment, from varying an assessment using single property appraisal techniques. Subsection 210(1.1) of *The Cities Act* states that, notwithstanding the power in a board of revision to change an assessment by increasing or decreasing it, "a non-regulated property assessment shall not be varied on appeal using single property appraisal techniques." The same stricture applies, as we have seen, to the Assessment Appeals Committee.

[54] These provisions prohibiting variation using single property appraisal techniques appear to be unique to Saskatchewan. At least they do not appear in the legislation underpinning the decisions from other jurisdictions to which we were referred in argument. Counsel for Sasco Developments referred us to a number of such decisions, suggesting, among other things, that appellate bodies in other jurisdictions are able, using single property assessment techniques, to vary mass appraisal assessments. Whatever the case elsewhere, based on legislation elsewhere, this is not permitted in Saskatchewan by reason of subsections 210(1.1) and 226(3) of the *Act*.

[55] The cases to which we were referred in this and related respects are distinguishable on this basis, or on the basis of other aspects of the legislation underlying them, including such cases as *Assessor Area #09 (Vancouver)* v. *Bramalea Limited*, 1995 Canlii (BCSC); *697604 Alberta Ltd* v. *Calgary (City)*, 2005 ABQB 512; *Chateau Lake Louise Corp.* v. *Improvement District No. 9*, 2004 ABQB 579, 366 A.R. 318; *Edcyn Inc.* v. *Nova Scotia*, 2000 NSUARB 35; *Mountain View (County)* v. *Alberta (Municipal Government Board)*, 2000 ABQB 594, [2001] 2 W.W.R. 398; and *Nova Scotia (Director of Assessment v. van Driel*, 2010 NSCA 87, 296 N.S.R. (2d) 244.

[56] Decisions from other jurisdictions can be helpful to a better understanding of things, but assessment schemes vary from province to province in one respect or another, making it imperative to pay close attention to the legislation underlying these decisions so as not to import ideas that are incompatible with the assessment scheme in place in this province.

[57] Let us be clear as about all of this. We are of the opinion it is not open to assessors in this province, employing the income method of appraisal adapted to mass appraisal, to use singe property appraisal techniques that are incompatible with mass appraisal techniques. In effect, then, it is not open to assessors, employing this method to estimate the market value of a hotel property, to do so on the basis in general of that hotel's "own income and expense." Nor is it open to a board of revision to vary an assessment using such techniques. Hence, we are of the opinion the Assessment Appeals Committee did not err in law in holding that the Board of Revision had erred

in ordering SAMA to revise the assessed value of the Heritage Inn based on "its own income and expenses."

[58] This is not to be taken as having any bearing upon what the Committee had to say, speaking hypothetically, about the possibility by one means or another of accommodating some individual variations from the group norm in the context of a mass appraisal model. As the Committee suggested, this is a complex and multi-faceted subject, the consideration of which it left for a case specifically focused on the evaluation model used by SAMA, or some aspect of the model.

[59] That brings us to the second question of law.

The Second Question

> Did the Committee err in finding that the order of the Board to reduce the assessment of the subject property by basing its assessment on its own income and expenses did not meet the market value standard under *The Cities Act*, notwithstanding SAMA's own conclusion that the assessment of another Primary Accommodation Property hotel on the same basis met the market value standard.

[60] This question, unlike the first, has it genesis in the secondary rather than the primary ground upon which the Assessment Appeals Committee allowed the appeal from the Board of Revision. The secondary ground lay in the Board having ordered a reduction in the assessed value of the Heritage Inn property based on the hotel's own income and expenses so as "to achieve equity with the Temple Gardens Mineral Spa." Given our response to the first question, concerning the primary ground upon which the Committee allowed the appeal,

the need to address the second is doubtful. So we shall keep our remarks to a minimum.

[61] In essence the question concerns the application by the Committee of subsection 165(5) of the *Act*, which reads thus:

> (5) Equity in non-regulated property assessments is achieved by applying the market valuation standard so that the assessments bear a fair and just proportion to the market value of similar properties as of the applicable base date.

As a matter of law, this is what the Committee had in mind in faulting the decision of the Board in the respect under consideration.

[62] As a matter of fact, according to the record before the Committee, Temple Gardens Mineral Spa, unlike the Heritage Inn, is a unique property. Assessing the value of unique properties by means of mass appraisal presents its own set of difficulties, as it has done on occasion both here and in Alberta. (See, for example, *Estevan Coal Corp.* v. *Estevan (Rural Municipality No. 5)* and *Chateau Lake Louise Corp.* v. *Improvement District No. 9* (both cited above)). Faced with such difficulties in relation to the 2009 assessment of Temple Gardens Mineral Spa, SAMA ended up assessing the value on a stand-alone basis, based on the income and expenses specific to the property.

[63] This left the Committee with serious reservations about the validity of the assessment of Temple Gardens Mineral Spa. It acknowledged that this assessment was not before it, making it difficult to know just how the assessment had been prepared. But, if SAMA had prepared the assessment based in general upon Temple Gardens' "own income and expenses", as

appeared to be the case, the Committee ventured the view the assessment could not satisfy the market value standard. In other words it thought this assessment had in all probability been prepared in error.

[64] SAMA took heed, it seems, for it acknowledged that it should have taken a different approach to the 2009 assessment of Temple Gardens Mineral Spa, and that it has since done so. Such are the challenges of working with a new assessment scheme, especially when it comes to the assessment of unique properties.

[65] In the light of all of this we are not satisfied the Committee erred in law in faulting the Board for having ordered a reduction in the assessment of the Heritage Inn property based on the hotel's own income and expenses so as "to achieve equity with the Temple Gardens Mineral Spa." In other words we are not satisfied, in the circumstances of the case, that the Committee erred in law by misapplying subsection 165(5) of the *Act*. Equity cannot be achieved by discarding the requisites of mass appraisal, or through compound error of this kind.

[66] This serves to complete our consideration of the issues of law and to bring to the fore the issue of jurisdiction. This issue, too, was raised by way of a question framed by counsel for the appellant.

The Third Question

Did the Committee err in law or jurisdiction by ordering that the subject property revert to its original assessed value without addressing or

> finding any error in the Board of Revision's finding of fact that the subject property was not similar to the properties assessed using SAMA's Primary Accommodation model?

[67] The import of the question is this: The Committee, having set aside the decision of the Board reducing the assessment of the Heritage Inn property from $8,777,300 to $5,257,704, failed to properly exercise its remedial jurisdiction or powers, inasmuch as it restored the original assessment without having had regard for the fact, as found by the Board, that the Heritage Inn property was not similar to the hotel properties within the group identified as "Major Urban With Rest./Bar."

[68] Lest it be thought otherwise, the Committee did have regard for the record of the proceedings before the Board when, in exercise of its remedial jurisdiction or powers, it decided to restore the original assessment. The point finds illustration in the circumstances of the case and the Committee's response. In the circumstances it was not open to the Committee, having set aside the Board-ordered assessment for the reasons it did, to either sustain the Board-ordered assessment or to reduce it, as Sasco Developments had asked it to do. There was no basis upon which the Committee might have done so. This left it with having to restore the original assessment, as the City and SAMA had asked it to do, or alternatively to order SAMA to have another go at it, which no one, most of all the company, had asked the Committee to do. Nevertheless, the Committee appears to have considered and rejected the alternative, for it concluded by saying, "Given the information in the record, the Committee finds the value must resort to the original roll value."

[69] This statement, read in the context of the Committee's reasons as a whole, coupled with the record of the proceedings before the Board, is tantamount to the Committee having held that in the circumstances there was no tenable basis for doing otherwise than restoring the original assessment.

[70] There is yet another procedural twist to all of this. On the appeal to the Court, the appellant sought no other relief than an order quashing the decision of the Committee and restoring that of the Board. However, restoring the decision of the Board is out of the question, given the errors of law the Board made in reducing the assessment. So the best we could do, assuming the Committee somehow erred in the respect under consideration, would be to remit the case to the Committee for reconsideration. But, since we were not asked to do so, we would have to do this on our own motion.

[71] Leaving that aside, at least for the time being, the only conceivable basis upon which we might remit the case to the Committee for reconsideration is this. Contrary to the Committee's view of it, the record demonstrates that the Board found as a fact that the Heritage Inn property was not similar to the hotel properties in the group identified as "Major Urban With Rest./Bar", similar, that is, in the sense contemplated by the assessment scheme. This would be tantamount to the Board having found that SAMA, in the exercise of its judgment and the measure of discretion it enjoys in relation to the process of stratification, had erred in placing the Heritage Inn property in this group because the hotel's occupancy rate was significantly lower than the median occupancy rate derived from data common to the group.

[72] Whatever else may be said of the matter, this much is clear. The Board did not expressly make such a finding of fact. This leaves the matter to implication, beginning with such implication as the Board's identification of the error made by SAMA might suggest. The Board said this of the error:

> The Board concluded that the assessor erred in using the median occupancy rates from reported comparable primary accommodations in Moose Jaw, Yorkton, and the R.M. of Prince Albert # 461. Because of the low occupancy for the subject property it warrants a separate assessment as is the case for the Temple Gardens Mineral Spa in order to achieve equity.

This is all the Board had to say of the error it ascribed to SAMA.

[73] This might suggest that the Board *found as a fact* that, contrary to SAMA's assessment of the matter, the Heritage Inn property was not similar to the other hotel properties in the group identified as "Major Urban With Rest./Bar" because of its lower occupancy rate. It might also suggest that all the Board did was *conclude* that, because the actual occupancy rate was in fact lower than the median occupancy rate used by SAMA, the Heritage Inn property warranted assessment separate from the group, as in the case of the Temple Gardens Mineral Spa, in order to achieve equity. On the face of it, the latter is stronger than the former, but there is an element of ambiguity here.

[74] The ambiguity falls to be resolved having regard for the whole of the record of the proceedings before the Board. On the whole, it is difficult to suppose the Board found as a fact that, contrary to SAMA's assessment of the matter, the Heritage Inn was not similar to the other hotel properties in the group. Indeed, to suppose it did so is to suppose quite a lot.

[75] To begin with, it is to suppose: (i) that the notice of appeal initiating the appeal to the Board specifically alleged that SAMA, in classing and grouping hotel properties according to similarity, erred in placing the Heritage Inn property in the group identified as "Major Urban With Rest./Bar"; (ii) that the evidence before the Board was such as to warrant a finding that SAMA had so erred, bearing in mind not only the burden upon the appellant in this regard but the exercise by the agency of judgment, even a measure of discretion, in so stratifying these hotel properties; (iii) that the Board put its mind to this issue in these contexts; and (iv) that the Board then found, as a matter of fact, that the Heritage Inn property did not qualify for inclusion in the group for it was not similar to the others in the group. The record does not bear this out.

[76] Nor does it disclose a finding by the Board that SAMA had erred in arriving at the median occupancy rate it used for the purposes of both stratification and determining the annual net operating income that the hotel properties in the group could be expected to generate. For the Board to have made such a finding, it would have to have considered whether the agency had arrived at the median occupancy rate by reference, for example, to a hotel property or properties that had driven up the median occupancy inordinately by reason of something atypical to the group. As well, the Board would have to have considered whether the median occupancy rate failed to withstand statistical testing, having regard let us say for the statistical test employing coefficients of dispersion. The record discloses nothing of the kind.

[77] What it does disclose, when it comes to findings of fact made by the Board, is that the Board accepted the uncontested facts: (i) that the self-

reported occupancy rate of the Heritage Inn in the years 2004 to 2006 was significantly lower, at 44.87%, than the median occupancy of 59.51% used by SAMA in its assessment and calculations; and (ii) that SAMA had assessed the value of the Temple Gardens Mineral Spa, a unique property, on a stand-alone basis, having regard in general for the income and expenses specific to Temple Gardens. This is the sum total of the facts found or acted upon by the Board.

[78] Now, the magnitude of the variation between the actual and the median occupancy rates is suggestive of possible error on the part of SAMA in relation to either stratification or the statistical basis for determining net annual operating income that hotel properties in the group could be expected to generate, or both. This raises the possibility of error but does not in itself demonstrate error. Rather it invites inquiry, for it is in the very nature of a median occupancy rate that some hotels within a group of similar hotels will have higher occupancy rates, whereas others in the group will have lower occupancy rates.

[79] The difference might lie in differing levels of management, for instance, making it possible that a lower occupancy rate associated with a particular hotel is attributable to a standard of management below the industry or group norm. This would be so, for example, if furniture, furnishings, and the like were allowed to deteriorate beyond the industry norm. Or the difference might be attributable to an atypical level of competition by reason of an atypical specific location. Aside from such issue of fact, issues of appraisal principle and practice arise, such as how much deviation from the norm is tolerable,

whether some level of deviation can and should be accommodated and, if so, how this might be done consistent with sound mass appraisal technique. Could this be done by means, for example, of using a range of median occupancy rates rather than a fixed median occupancy rate? And so it goes.

[80] The point is this. While a variation of the magnitude present here may suggest error, it does not in itself demonstrate error by the assessor. Instead, it invites inquiry into the underlying issues of fact and appraisal principle and practice. And what invites inquiry, in the event of dispute, invites decision. But nowhere in the record may the Board of Revision be seen to have decided such issues or to have made findings of this sort.

[81] Turning from the detail of all of this to the import of it, we are not satisfied that the Board found as a fact that, contrary to SAMA's assessment of the matter, the Heritage Inn was not similar to the hotels in the group identified as "Major Urban With Rest./Bar", similar in the sense contemplated by the assessment scheme. The *effect* of the Board's decision might be seen as having removed the Heritage Inn property from this group, though even that is debatable. But the effect is not the product of a *finding of fact* by the Board that the Heritage Inn was not similar to the other hotels in the group. Rather, the effect is the product of *error of law* by the Board in thinking that it could order the value of the Heritage Inn property to be assessed on the basis in general of the hotel's "own income and expense" and in thinking that this was called for "so as to achieve equity with the Temple Gardens Mineral Spa."

[82] Hence, we are not satisfied the Committee failed to properly exercise its remedial jurisdiction or power as suggested by the third question.

[83] On the whole, then, and for these reasons, we have decided to dismiss the appeal. This is not to say the 2009 assessment of the Heritage Inn property was without flaw of some kind. Indeed, counsel for the appellant informed us that SAMA substantially reduced the 2010 assessment. But that is immaterial to the case at hand, given the structure of the case throughout. The point is that on this appeal we can find no tenable basis for interfering with the decision of the Assessment Appeals Committee on the ground it erred in law, or failed to properly exercise its jurisdiction, as suggested by the three questions. There will be judgment accordingly. However, there will be no order for costs, given the newness of the assessment scheme and the difficulty everyone, including SAMA, has experienced in adjusting to and working with it.

Dated this 6th day of March 2012.

"Cameron J.A."
Cameron J.A

I concur:

"Jackson J.A."
Jackson J.A

"Herauf J.A."
Herauf J.A.