

**COMPOSITE
ASSESSMENT REVIEW BOARD
DECISION WITH REASONS**

In the matter of the complaint against the property assessment as provided by the *Municipal Government Act*, (MGA) Chapter M-26, Section 460, Revised Statutes of Alberta 2000 (the Act).

between:

***Ivanhoe Cambridge 1 Inc.*
(as represented by Altus Group Ltd.), COMPLAINANT**

and

The City Of Calgary, RESPONDENT

before:

***C. J. Griffin, PRESIDING OFFICER*
B. Jerchel, MEMBER
*R. Deschaine, MEMBER***

This is a complaint to the *Composite Assessment Review Board* (CARB) in respect of a property assessment prepared by the Assessor of The City of Calgary and entered in the 2011 Assessment Roll as follows:

ROLL NUMBER: 024014706

LOCATION ADDRESS: 901 – 64th Avenue NE

HEARING NUMBER: 64741

ASSESSMENT: \$92,250,000.

This complaint was heard on 9th, 10th and 28th day of November, 2011 at the office of the Assessment Review Board located at 3rd Floor, 1212 – 31 Avenue NE, Calgary, Alberta, Boardroom 1.

Appeared on behalf of the Complainant:

- K. Lilly (appearing as a tax agent)
- D. Hamilton (appearing as a tax agent)
- M. Kehoe (appearing as a witness)

Appeared on behalf of the Respondent:

- D. Zhao
- B. Thompson

Preliminary and/or Procedural Matters

1.) The Respondent objected to certain pages (3 through 8, 9 through 15, 16 through 34 and 43 and 44) of the Complainant's Rebuttal Submission (Exhibit C-3) on the basis that same constitute new evidence that has not been properly exchanged as required by Section 8(2)(c) of the *Matters Relating to Assessment Complaints Regulation (MRAC), Alberta Regulation 310/2009*.

The Complainant maintains that the pages in question are merely clarification details pertaining to information that was properly disclosed.

The CARB was of the judgment to allow the information to be submitted on the basis that the CARB would only give such weight to the information as deemed appropriate.

2.) The Respondent brought forward a recommendation to reduce the assessed value of the subject to \$91,960,000. The recommendation stems from a size correction.

The Complainant acknowledged the size correction but did not accept the Assessor's recommendation as the final assessed value for the subject property.

Property Description:

The subject property is, according to the Assessment Summary Report (Exhibit C-1 pg. 22) a combination "C" and "C+" Class Regional Shopping Centre which is commonly known as the Deerfoot Mall. The property has a total assessed area of 625,684 Sq. Ft. The property was constructed in two parts with the original 454,460 Sq. Ft. having been constructed in 1980 and the remaining 171,224 Sq. Ft., being a free standing Wal-Mart store, having been constructed in 2003. The underlying site is reportedly 67.91 acres in size. The assessed value of the subject has been derived through application of the Income Approach to Value with the following inputs:

<u>Space Category</u>	<u>Area (Sq. Ft.)</u>	<u>Assessed Rental Rate</u>
CRU 0 – 1,000 Sq. Ft.	7,084	\$ 40/Sq. Ft.
CRU 1,001 – 2,500 Sq. ft.	35,582	\$ 30/Sq. Ft.
CRU 2,501 – 6,000 Sq. Ft.	83,471	\$ 18/Sq. Ft.
CRU 6,001 – 15,000 Sq. Ft.	40,435	\$ 18/Sq. Ft.
CRU 15,001+ Sq. Ft.	90,660	\$ 8/Sq. Ft.
Food Court	7,071	\$100/Sq. Ft.
Kiosk(s)	468	\$165/Sq. Ft.
MRU(s)*	7	\$14,000 each
Recreational Space	21,141	\$ 8/Sq. Ft.
Anchor (Sears)	167,635	\$ 5/Sq. Ft.
Anchor (Wal-Mart)	171,224	\$ 7/Sq. Ft.
Storage	906	\$ 12/Sq. Ft.
	625,634 Sq. Ft.	

Assessment inputs Cont'd.

Vacancy Rate	4%
Non-Recoverable Allowance.	4%
Operating Costs CRU 0 – 15,000 Sq. Ft.	\$ 12.59/Sq. Ft.
Operating Costs CRU 15,001 + Sq. Ft.	\$ 5.00/Sq. Ft.
Operating Costs Food Court & Kiosks	\$ 42.13/Sq. Ft.
Operating Costs Anchors	\$ 2.25/Sq. Ft.
Operating Costs Recreational	\$ 5.00/Sq. Ft.
Operating Costs MRU	\$2,530 each
Capitalization Rate	7.25%

*Mini Rental Unit(s)

Issues:

There are a number of interrelated issues outlined on the Assessment Review Board Complaint form; however, as outlined in their brief (Exhibit C-1 pgs. 3 & 4), at the Hearing the Complainant reduced the issues to be considered by the CARB to:

1. The current assessed capitalization rate of 7.25% is neither supported by market indicators nor reflective of the characteristic and condition of the property.
2. The rental rate of \$8/Sq. Ft. applied to the *Kacz Kids* space is excessive and inequitable – a rate of \$5/Sq. Ft. should be applied.
3. The rental rate of \$40/Sq. ft. applied to the CRU <1,000 Sq. Ft. is excessive of market – a rate of \$36/Sq. ft. should be applied.
4. The rental rate of \$30/Sq. Ft. applied to CRU 1,001 – 2,500 Sq. ft. is excessive of market – a rate of \$25/Sq. ft. should be applied.
5. The rental rate of \$18/Sq. Ft. applied to 2,501 – 15,000 Sq. Ft. is excessive of market – a rate of \$16/Sq. Ft. should be applied.
6. The rental rate of \$8/Sq. ft. applied to the recreational space is excessive of market – a rate of \$5/Sq. ft. should be applied.
7. The assessment of the Mini Retail Units (MRU) should be removed as these units are not part of the real estate.
8. The assessed area allocation does not match the rent roll of the subject.
9. The total assessment of the subject is excessive of market value.

Complainant's Requested Value: \$71,750,000.

Party Positions:**Complainant's Position**

The Complainant called their witness, Mr. Michael Kehoe, a respected retail real estate authority who is very familiar with the subject property. Mr. Kehoe's Curriculum Vitae (CV) (Exhibit C-1 pgs. 333 – 337) provides a sound basis for this CARB to accept him as being a well qualified expert in matters relating to retail properties. Mr. Kehoe addressed such matters as the location of the subject property in comparison to other regional shopping centres (inferior) as well as the sales performance of this centre compared to others in the city (inferior). In addition to the testimony of Mr. Kehoe, the Complainant introduced (Exhibit C-1 pgs. 53 – 128) a copy of a *Cladding Report*, a *Parking Lot Inspection Report* and a *5 Year Capital Plan*, all of which refer to the current condition of the property together with a recommended program to correct the

deficiencies noted in the referenced reports. Additionally, the Complainant noted that the subject property had been offered For Sale in 2010 and introduced (Exhibit C-1 pgs.159 – 220) an *Investment Offering Summary* prepared by *RBC Capital Markets Real Estate Group* in 2010. The Complainant noted that, while post-facto, the property did sell in 2011 for approximately \$68 million, net of the extra land involved in the sale.

In support for their requested increase in the assessed capitalization rate (Complainant Issue #1), the Complainant introduced (Exhibit C-1 pgs. 227 – 256) their *Community – Neighbourhood Shopping Centres 2011 Capitalization Rate Analysis & Argument*. The analysis, which is referred to as *Leased Fee Estate Valuations*, involves five (5) shopping centre properties and concludes with a mean capitalization rate of 7.87% and a weighted mean of 7.70%.

With regard to their Issues 2 – 6, the assessed rental rates, the Complainant bases their request on two factors, namely: 1) the actual rates being generated by the property (Exhibit C-2 pg. 2) and 2) a proposed agreement between the property owner (and/or their agent) and the assessor responsible for assessing the subject (Exhibit C-1 pgs. 291 – 296).

With regard to their Issue # 7, the Complainant introduced (Exhibit C-1 pg.16) the definition of property according to the MGA, Section 284 which states:

(r) “property” means

- (i) a parcel of land
- (ii) an improvement, or
- (iii) a parcel of land with improvements on it;

An improvement is also defined in the Act:

(j) “improvement” means

- (i) a structure,
- (ii) anything attached or secured to a structure, that would be transferred without special mention by a transfer or sale of the structure,
- (iii) a designated manufactured home, and
- (iv) machinery and equipment.

It is the contention of the Complainant (Exhibit C-1 pg. 17) “... that these MRUs are not operated under leases, but rather under license agreements which do not constitute an interest in land, and thus not a part of the fee simple estate. A license is not an interest in real property; in this instance it is only creating a right to use the property where such use would otherwise be an illegal trespass. Professor Bruce Ziff, in his text *Principles of Property Law*, best describes the legal distinction as follows at page 292:

A lease is a grant of exclusive possession: the key feature that distinguishes a lease from a license. The juridical differences between these two entitlements can be significant. A lease creates an interest in land; the grant of a license, without more, does not. A license is merely a permission to do that which would otherwise amount to trespass. Therefore, as a general matter, a license does not have standing to sue in trespass; a license is not binding on a purchaser of land over which the license is granted; the right to revoke a license may (and often will) differ from the principles governing the termination of tenancies; and a licensee of

residential premises may not (there is provincial variation here) enjoy the panoply of statutory protections afforded to residential tenants."

In their Conclusion (Exhibit C-1 pgs 18 – 19) the Complainant states:

"Carts and mini retail units are chattels. They are not attached to the shopping centre, as demonstrated by photographic evidence, and are moved around regularly and at will. As such they do not fall under the definition of 'improvement' in the Act and are not assessable.

Even if the CARB were to find that the carts meet the definition of 'improvement', the revenue derived from the carts is derived from a non realty source; a license agreement. License agreements are not interests in real property and therefore do not form part of the fee simple estate."

Incorporating their requested rental rates and their requested capitalization rate together with removing the MRU's from their analysis results in the Complainant's requested assessed value of \$71,750,000. (Exhibit C-1 pg. 329).

Respondent's Position

In support of their applied capitalization rate of 7.75%, the Respondent introduced (Exhibit R-1 pg. 71) a copy of the *City of Calgary Assessment 2011 Regional Centre Capitalization Rate Summary* which shows a summary analysis of the sale of the *Sunridge Mall*, the only reported sale of a regional shopping centre recorded within the timeframe applicable to the assessment Date of Valuation. The Assessor's analysis of this sale indicates a capitalization rate of 5.84% and based upon this the Assessor has, on an admittedly somewhat subjective basis, concluded a capitalization rate of 6.50% for the Group A Regional Centres, 6.75% for the Group B and 7.25% for the Group C (the subject) Regional Centres. Additionally, the Respondent provided (Exhibit R-1 pg. 69) a summary of the capitalization rates, vacancy rates and operating costs utilized by the Assessor in this assessment year. The Respondent pointed out to the CARB that the capitalization rate analysis carried out by the Complainant is a 'leased fee estate' analysis which is not in keeping with the mandate of the Assessor and, additionally, their analysis excludes the only regional shopping centre sale that was been recorded within the applicable time period for the subject assessment year.

In terms of the applied rental rates adopted by the Assessor, the Respondent introduced (Exhibit R-1 pgs. 62 – 67) support for same in the form of recent leases from within the subject property, sorted by size category, which were then averaged to produce the applied rental rates.

With regard to the MRUs, the Respondent stressed to the CARB that it is not the actual retail carts that are being assessed but rather it is the floor space deemed to be occupied by these carts that is being assessed. The Respondent does not argue the fact that the retail carts may well be considered as chattels as they are not permanently affixed to the real estate; however, it is the viewpoint of the Assessor that the floor space occupied by these carts is generating income for the property owner and that is what is being assessed. The Respondent extends this argument by suggesting that any owner of the property would take advantage of this revenue source. To underline their point, the Respondent referred the CARB to (Exhibit R-1 pg. 44) a photograph of a MRU being offered "For Lease" in the subject property. The Respondent also suggested to the CARB that while the actual agreement to lease these MRUs is a "Temporary Occupancy License Agreement" (Exhibit C-1 pgs. 261 – 273) the advertising etc.

related to the opportunity to utilize an MRU is referred to as an opportunity to lease as is indicated (Exhibit R-1 pgs.87 – 95) in the advertising materials for the subject property. Additionally, the Respondent points out that the referenced “*Temporary Occupancy License Agreement*” refers (Exhibit C-1 pg. 261) to a *License Area* which is defined as:

“... the area as generally indicated in outline on “Schedule A” attached, the exact location, size and configuration of which will be specified by the Licensor at its sole discretion.”

The Respondent introduced (Exhibit R-2) four 2011 Decisions of the CARB and/or LARB that uphold the assessment of these MRUs (the CARB notes that Decision # 2728/2011-J does not actually uphold any particular assessed value as that Decision relates to Preliminary and/or Jurisdictional Matters only).

Complainant’s Rebuttal:

The Complainant introduced (Exhibit C-3) a Rebuttal brief wherein reference is made to the sale of the subject property (pgs. 4 – 8) and the purchase price being reduced to \$78 million from the \$80 million indicated in the original purchase agreement (Exhibit C-1 pgs. 223 – 226), noting that this amended purchase price is still inclusive of the undeveloped land parcels that have an uncontested assessed value of approximately \$10 million. The Rebuttal also refers to the definitions of an ‘outlet mall’ (Exhibit C-3 pgs. 24 – 38) from such sources as the *International Council of Shopping Centres* (ICSC), the *Canadian Retail Real Estate Standard* and the *Appraisal Institute of Canada* (AIC). The Complainant suggested to the CARB that the very fact that such properties sell discounted goods would, logically, lead one to believe that would lead to lower or discounted rents.

The Rebuttal also refers (Exhibit C-3 pgs. 41 – 44) the “percentage rents only” being paid in the subject and how much these rents equated to on a square foot basis. The Complainant also indicates (Exhibit C-3 pg. 44) how some of these percentage rents, being fully gross rents, actually equate to a net loss to the landlord.

Board’s Decision:

The complaint is denied; however, the assessment is **reduced**, in recognition of the recommendation of the Assessor, to: **\$91,960,000**.

Decision Reasons:

The CARB does not accept the capitalization rate analysis of the Complainant as it does not include the only regional mall sale, it is a leased fee analysis and for the reasons given in CARB Decision 2761/2011-P.

With regard to the assessed rental rates, the CARB is of the judgment that the evidence of the Respondent, which bases same on recent leases from within the subject property, is more convincing than that of the Complainant which, also based upon leases from within the subject property, was found to be more selective in nature.

In terms of the MRUs being assessed, the CARB fully concurs with the decision outlined in CARB Decision 2858/2011-P which deals with the same issue. The conclusion of that CARB panel is summarized on Page 6 of the referenced Decision as follows:

"Based on the evidence before the Board the CARB has concluded that notwithstanding the labels of lease or license, the MRUs spaces are made available to retailers who pay the landlord a reasonably high level of return for the space they occupy. The label attached to the document wherein the parties outline their agreement is not a compelling argument in the Board's view. The subject was designed or has been determined by the landlord to be capable of accommodating this form of retail space and any potential purchaser, while they may not acquire such carts or units themselves, the purchaser (sic) would acquire the space used for such purposes. A purchaser would therefore also consider the revenue stream associated with replicating the same practice of providing space to MRUs retailers willing to pay for the use of such space.

The decision of the CARB is that the MRU spaces are assessable and the value s determined by the Assessor for this space will remain as part of the assessment of the subject property."

The Complainant referred the CARB to the sale of the subject property; however, this sale, while clearly significantly below the 2011 assessed value, is clearly post-facto and it would not be reasonable to expect that the Assessor would have been aware of such information at the time the assessment was prepared. It is the view of the CARB that the referenced sale of the subject property be given serious consideration in preparation of the assessment for the subject property in the year(s) ensuing the 2011 assessment year.

DATED AT THE CITY OF CALGARY THIS 22 DAY OF December 2011.


C. J. Griffin
Presiding Officer

APPENDIX "A"**DOCUMENTS PRESENTED AT THE HEARING
AND CONSIDERED BY THE BOARD:**

NO.	ITEM
1. C-1	Complainant's Brief
2. C-2	Complainant's Replacement Pages for pages 131 and 133 in Exhibit C-1
3. C-3	Complainant's Rebuttal
4. R-1	Respondent's Brief
5. R-2	Respondent's LARB/CARB Decisions from 2011 upholding the assessment of MRUs.

An appeal may be made to the Court of Queen's Bench on a question of law or jurisdiction with respect to a decision of an assessment review board.

Any of the following may appeal the decision of an assessment review board:

- (a) the complainant;*
- (b) an assessed person, other than the complainant, who is affected by the decision;*
- (c) the municipality, if the decision being appealed relates to property that is within the boundaries of that municipality;*
- (d) the assessor for a municipality referred to in clause (c).*

An application for leave to appeal must be filed with the Court of Queen's Bench within 30 days after the persons notified of the hearing receive the decision, and notice of the application for leave to appeal must be given to

- (a) the assessment review board, and*
- (b) any other persons as the judge directs.*