

**CALGARY
ASSESSMENT REVIEW BOARD
DECISION WITH REASONS**

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

between:

***OPUS Equities Corporation (as represented by Linnell Taylor and Associates),
COMPLAINANT***

and

The City Of Calgary, RESPONDENT

before:

***P Petry, PRESIDING OFFICER
S Rourke, MEMBER
J Pratt, MEMBER***

This is a complaint to the Calgary Assessment Review Board 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:	067226506
LOCATION ADDRESS:	1304 – 17 Avenue S.W.
HEARING NUMBER:	60929
ASSESSMENT:	\$2,840,000

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

Appeared on behalf of the Complainant:

- Mr. J Mayer

Appeared on behalf of the Respondent:

- Mr. J Toogood

Property Description:

The subject property is a single storey building which was purpose built for Wendy's Restaurant in 1987. The net rentable area is 3,338 sq. ft. and the land size is 13,915 sq. ft. Wendy's continues to lease the subject property and the current lease runs to 2018. The subject property has been assessed based on sales using a land value only approach.

Issues:

The issues and evidence of both parties in this case is similar to that considered by the CARB in its decision CARB 1853/2011-P and therefore this decision will repeat much of that decision.

- 1) Does the current assessment based on a land value only approach, produce an assessment which is at market value and which is equitable?
- 2) If the subject assessment is found not to be at market value or equitable, does an assessment based on the income approach provide a better estimate of the subject's market value and an assessment which is equitable with similar properties within the municipality?

Other matters and issues were raised in the complaint filed with the Assessment Review Board (ARB) on February 25, 2011. The only issues however, that the parties sought to have the Composite Assessment Review Board (CARB) address in the hearing on August 10, 2011 are those referred to above, therefore the CARB has not addressed any of the other matters or issues initially raised by the Complainant.

Complainant's Requested Value:

Based on the Complainant's request that the income approach be applied as recommended, the assessment for the subject property is \$2,500,000.

Board's Decision in Respect of The Matter or Issue:

- 1) The CARB decides that in this case the land only value for the subject property is not the best estimate of its market value as of July 1, 2010.
- 2) The CARB decision is that the value of the subject property should be based on the income approach and at a value of \$2,500,000.

Summary of the Party's Positions

The Complainant suggested that the Respondent's assessment based on land value only is anticipatory as it treats the subject as a vacant land site and fails to recognize that the subject is a fully functioning national fast food restaurant with a lease that extends for another seven and one half years. Section 289 (2) of the Municipal Government Act (Act) requires that each assessment must reflect the characteristics and physical condition of the property on December 31 of the year prior to the year in which the tax is to be imposed. This therefore requires the Respondent to recognize the legality of the leases in place which would in turn cause the highest and best use approach to fail on its first premise (legal permissibility). In support of this position the Complainant referred the CARB to decision, ARB 0819/2010-P in wherein the CARB in that case recognized that both the ongoing nature of a lease and potential cost associated with early termination of the lease are factors which must be considered.

The Complainant made reference to the requirements of the Detailed Assessment Audit Manual (AR 200/2004) (DAAM) wherein it was suggested there are specific recommendations as to the valuation approach for specific classes of property. DAAM recommends the income approach and the Respondent has chosen to apply the income approach to office and retail properties across the city. Therefore the Respondent should not depart from that approach to the "highest and best use" approach without completing the full analysis required. The Complainant referred the CARB to the decision of the CARB last year for the subject property wherein the Board found that the income approach is the appropriate valuation approach to determine the assessment for the subject property. This decision is ARB 0817/2010-P, and the CARB also found that the highest and best use value cannot simply apply a land value but must take into account full consideration of all components of highest and best use.

The Complainant set out the four criteria that must be met as follows:

1. **Legal Permissibility** - public restrictions including zoning guidelines, utility right-of-way, etc. and private restrictions such as leases and easements.
2. **Physically Possibility** - site size, configuration, topography, availability of utilities, street improvements, accessibility.
3. **Financially Feasibility** – marketability in terms of supply/demand characteristics, profitability as relates to return on cost, market rent levels etc. and the availability and cost of capital.
4. **Maximum Profitability** – use that produces the highest residual land value consistent with the rate of return warranted by the market for that use.

The Complainant also argued that the British Columbia Court of Appeal decision known as

"Bramalea" deals with the question of inequity created when different assessment approaches lead to higher assessments for some properties in the same class and where they compete for the same customers. The following was quoted from that case:

"where the taxpayer subject to the higher assessment is in competition with others in the same class and is for this reason unable to pass on the extra tax burden to customers, the unfairness of such a result becomes blatant" and further "it seems to me that the Assessment Authority has the duty of deciding, so far as possible, in respect of each class of property an approach most likely to arrive at "actual value" as defined in law, and thereafter to apply available data to each in such a way as to ensure that all within the class are valued, so far as possible, on the same basis". and still further "the Assessor is not permitted to discriminate between them in arriving at assessed value".

On this basis the Complainant argues that the income approach must be applied in reaching the assessment of the subject and to do otherwise would be inequitable. The Complainant in further support of its equity argument cited the Matters Relating to Assessment and Taxation Regulation (MRAT) section 2 (c) which requires that an assessment of property based on market value *"must reflect typical market conditions for properties similar to that property"*. The Respondent has not applied similar market conditions to the subject as other similar properties are assessed using the income approach.

The Complainant argued that there has been no specific review of an alternate use for the subject and Bylaw IP2007 requires land for parking beyond the current space available.

The Complainant then went on to provide support for the value of factors typically used in the application of the income approach. The current lease rate for the subject is \$55.42 per sq. ft. The Complainant also submitted six lease comparables ranging from \$32.50 to \$70 per sq. ft. Based on this data and assessed rates for other restaurant businesses in the Beltline the Complainant recommended a rental rate of \$55 per sq. ft. be applied to the subject. Based on CB Richard Ellis reporting and the Complainant's rationale for the subject, the following factor values were recommended: A vacancy allowance of 1%, an operating cost of \$9 per sq. ft. for vacancy and a capitalization rate (cap) of 7.25%. Applying these values within its pro-forma the Complainant produced a value of \$2,500,000 for the subject property.

The Complainant referred the CARB to many other Municipal Government Board orders, CARB decision and ARB decisions which deal with the highest and best use or land value only approach. The majority of these decisions stress the need for a complete highest and best use analysis and that any alternative use must be shown to be possible within a reasonably short time frame.

Based on the above evidence and argument the Complainant requested that the CARB accept the value of \$2,500,000 as a correct and equitable market value for the subject.

The Respondent indicated through its evidence that the subject property has been valued based on a base rate of \$195 per sq. ft. of land with an additional corner lot influence of 5% for a total rate of \$204.75 per sq. ft. The Respondent explained that in all cases, it applies both an income approach to value and a land only approach to value. The higher of these two valuations is then selected as the assessment for the year in question. The Respondent acknowledged that there are not a lot of Beltline sales, however, provided a list of five sales used to derive the base rate

of \$195 per sq. ft. for land as of the valuation date, July 1, 2010. Four of these sales included improvements; however the Respondent indicated that it had determined a value of the improvements using the Marshall and Swift depreciated cost approach and these values were then removed from the sales prices. The five sales showed a range in value from a low of \$151 per sq. ft. to a high of \$324 per sq. ft. and median value of \$196 per sq. ft. The Respondent had applied a value of \$195 per sq. ft. as its base land rate for the majority of the Beltline, excluding only BL 1 on the eastern side of the Beltline and BL 5 on the far western edge of the Beltline. The Respondent had also completed a test income pro-forma for each sale to show the level of income necessary to produce the sales price and stated that these properties could not be expected to achieve these rents.

The Respondent also provided four sales that had been sold through the courts to show that even under those circumstances the values are over \$200 per sq. ft. One of these sales was post-facto by a month or so and sold at a rate of \$164 per sq. ft. Three property listings were also cited in support of the land value applied by the Respondent. The Respondent referred the CARB to a large number of previous ARB and CARB decisions which it believed support the application of land value where that value exceeds the value produced by a typical income approach. Based on the sales which support the land value, the equitable application of this approach and the previous board decisions also supporting the land value approach, the Respondent requested that the assessment be confirmed.

Findings and Reasons for the Board's Decision:

Land Value Only Approach

The Complainant has challenged the Respondent's approach to value as being anticipatory and without proper analysis of all the components of highest and best use. Section 289 (2) requires that assessments reflect the characteristics and physical condition of the property on December 31 of the assessment year. Under usual circumstances the CARB would not entertain an argument about the encumbrance of tenant leases as the value must be of the fee simple estate. In this case, however the Respondent is suggesting a value not considering the current improvements and makes the assumption that the subject property is at present or could be within a very short time, a vacant land site. This is simply not the case in this instance and the legal ramifications and associated costs in achieving vacant land on the subject site have not been considered. The CARB has not given much weight to the Complainant's argument concerning the DAAM as this document is acknowledged as only providing recommendations. The issue as to whether the subject property is equitably assessed with other properties and the guidance of the "Bramalea" decision deserves consideration. While the CARB agrees that the Assessor clearly has the option of using the valuation approach which is believed to be best suited to the class or stratum of properties being valued, picking and choosing various approaches within a class or stratum of properties can lead to inequity. In this case the Complainant did not provide sufficient evidence to show that similar properties having similar attributes within the same class and within the same economic zone were assessed differently, resulting in inequitable values.

The Complainant had set out the four components for evaluating the highest and best use. The CARB agrees with the finding set out in ARB 0817/2010-P that a highest and best use value cannot simply be a land value but must take into account full consideration of all components of highest and best use.

In this case the Respondent used a very simplistic analysis which does not stand up under scrutiny. The CARB found the following deficiencies respecting the analysis applied by the Respondent as conveyed by the evidence before the Board:

1. The analysis has not addressed any of the four components of highest and best use in a thorough way.
2. There was no evidence respecting the Respondent's income value approach which the Respondent indicated had been determined in comparison to the land value only approach.
3. The sales analysis is found to be weak and was not relied upon for these reasons:
 - There are only five sales – the Board suggests there are too few to make all of the conclusions necessary for the Beltline in general.
 - The sales are unadjusted for property size.
 - The sales are unadjusted for location.
 - The sales are unadjusted for differences in land use.
 - There are only two sales with the same land use as the subject and their values vary widely from a property with 6505 sq. ft of land at \$151 per sq. ft. to a property with only 1251 sq. ft. of land at \$324 per sq. ft.
 - While the analysis subtracts a value for improvements, no detail has been provided as to the specific determination of these values.
 - The analysis does not provide any allowance for the demolition and removal of the existing improvements.

The CARB could not accept the Respondent's analysis as being reliable given the concerns expressed above. The Board therefore concluded that in this case and despite previous ARB and CARB decisions which turn on different facts but appear to have favoured both parties' positions in the past, that the land value assessment of the subject does not produce its market value or an equitable assessment.

The Income Approach to Value

Having reached the decision on the first issue the CARB then considered the approach recommended by the Complainant. The Complainant had developed values for each of the capitalized income factors from its own research in the case of rental rates and using third party reporting agency data for other factors such as vacancy, operating costs for vacancy shortfall and the cap rate. The Board notes that the cap rate recommended by the Complainant of 7.25% is lower than the 7.5% the Respondent used to test the income required to meet the sales prices for its five sales.

The Respondent did not bring forward its own income valuation pro-forma nor did it recommend alternative values for those recommended by the Complainant. Therefore the CARB had little choice in this matter; however it believes the values adopted by the Complainant are reasonable. Applying these factor values to the subject parameters produces an amount of \$2,500,000. The CARB also notes that if some weight were to be placed on the Respondent's

land sale at 508 – 15 Avenue S.W., which is closest in size considering the two sales with the same land use as the subject, its unit rate produces a value of \$2,101,165 for the subject, well below the \$2,500,000 value recommended by the Complainant.


The CARB concludes that the income approach as set out above is more reliable in producing a value for the subject in this case.

Summary

The CARB has not found the land value approach applied by the Respondent to be reliable in this case and has accepted the income approach to value as proposed by the Complainant to provide a better estimate of the subject's market value and a value which is fair and equitable in the circumstances. The 2011 assessment for the subject property is set at a value of \$2,500,000.

It is so ordered.

DATED AT THE CITY OF CALGARY THIS 25 DAY OF August 2011.



Presiding Officer
Paul G. Petry

APPENDIX "A"

DOCUMENTS PRESENTED AT THE HEARING AND CONSIDERED BY THE BOARD:

NO.	ITEM
1. C1	Complainant Disclosure
2. R1	Respondent Disclosure

An appeal may be made to the Court of Queen's Bench in accordance with the Municipal Government Act as follows:

470(1) *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.*

470(2) *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).*

470(3) *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*