

**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:

***Peking Dragon Restaurant Inc (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:	079010906
LOCATION ADDRESS:	1904 – 4 Street S.W.
HEARING NUMBER:	62738
ASSESSMENT:	\$2,530,000

This complaint was heard on the 11th 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 2,716 sq. ft. single storey restaurant building known as the Peking Dragon Restaurant. The improvement was built in 1972 and is situated on 12,380 sq. ft. of land. The subject property has been assessed based on sales using a land value only approach.

Issues:

- 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 March 4, 2011. The only issues however, that the parties sought to have the Composite Assessment Review Board (CARB) address in the hearing on August 11, 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 \$1,260,000.

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 has produced a reasonable estimate of its market value as of July 1, 2010.
- 2) The CARB decision is that the value based on the income approach as applied by the Complainant does not capture the subject property's full market value.

Summary of the Party's Positions

The Complainant suggested that the Respondent's assessment based on land value is anticipatory and treats the subject as a vacant land site. This approach fails to recognize that the subject is a fully functioning income producing property. 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. The Respondent has failed to consider the improvement and the ongoing nature of the business. Other similar properties are valued using the income approach to value and the subject should be valued using this approach as well. 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 decision ARB 0817/2010-P, wherein the CARB 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 then went on to provide support for the value of factors typically used in the application of the income approach. The Complainant submitted seven lease comparables ranging from \$17 per sq. ft. to \$41 per sq. ft. and suggested that even though this property is located on 4th Street it is not in the preferred section of 4th Street ending at 17th Avenue. Based on this data the Complainant recommended that a rental rate of \$35 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 2%, 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 \$1,260,000 for the subject property.

The Complainant also provided the CARB with a table showing four 2009 and 2010 sales comparables which were all improved and based on unit values expressed as dollars per sq. ft. (assessment/sq. ft. of rentable space) the sales values ranged from \$326 per sq. ft. to \$484 per sq. ft. with an average value of \$445 per sq. ft. The subject is assessed at \$931 per sq. ft. of building area. The Complainant also pointed out that the assessments for these sold properties are all well below that of the subject as well.

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 \$1,260,000 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 argued that the sales brought forward by the Complainant have far higher building to land ratios ranging from 43% to 63%. The subject's building to land ratio, according to the Complainant, is approximately 22%. The value in land only captures the market value where a property is underdeveloped.

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) of the Act requires that assessments reflect the characteristics and physical condition of the property on December 31 of the assessment year and one of the significant characteristics is the low site coverage respecting the subject. It became obvious to the Board that a value of \$931 per sq. ft. of improvement is higher than usual but this appears to stem from the under utilization of the land available. 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 valuated, 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 CARB has not given much weight to the Complainant's argument concerning the DAAM as this document is acknowledged as only providing recommendations.

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; however in this case it is clear that the improvement underutilizes the available land and that some adjustment is necessary.

In this case the Respondent used a very simplistic analysis which does not stand up under scrutiny and cannot be considered an appropriate highest and best use analysis. However, the Complainant has not considered the value in the apparent excess land of the subject and has not provided any analysis to assist the CARB in reaching a fair conclusion with respect to valuing this aspect of the property. Despite the weaknesses of the Respondent's analysis the CARB finds no other evidence upon which to determine a fair and equitable assessment for the subject.

The Income Approach to Value

The Complainant has developed an income based approach which may have merit in a more typical situation. However as reviewed above the CARB has concluded that there is additional value in the land beyond that which is captured through the application of the income approach. The income approach as proposed therefore will not produce a reliable indication of the subject's market value.

Summary

The CARB has found the income approach proposed by the Complainant to be unreliable in this case and therefore, despite the weakness of the Respondent's land value only approach, has determined that the land value only approach used to develop the assessment for the subject property should not be overturned. The 2011 assessment for the subject property is confirmed at \$2,530,000.

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. C2	Complainant Appendix
2. R3	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*