

**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:**

***Sears Canada Inc., COMPLAINANT (as represented by AEC International Inc.)***

**and**

***The City of Calgary, RESPONDENT***

**before:**

***J. Dawson, PRESIDING OFFICER***

***H. Ang, MEMBER***

***A. Zindler, 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:

<b>ROLL NUMBER:</b>	<b>135001709</b>
<b>LOCATION ADDRESS:</b>	<b>25 Dufferin Place SE</b>
<b>HEARING NUMBER:</b>	<b>63596</b>
<b>ASSESSMENT:</b>	<b>\$ 47,560,000</b>

This complaint was heard on the 29<sup>th</sup> day of September, 2011 at the office of the Assessment Review Board located at Floor Number 4, 1212 – 31 Avenue NE, Calgary, Alberta, Boardroom 1.

Appeared on behalf of the Complainant:

- J. Luong Agent, AEC International Inc.

Appeared on behalf of the Respondent:

- J. Lepine Assessor, City of Calgary

### **Board's Decision in Respect of Procedural or Jurisdictional Matters:**

#### **Preliminary Issue 1 - Onus**

After the Complainant finished presenting their Disclosure Document, the Respondent and the Board thoroughly questioned the Complainant on the evidence and its relevance to this hearing. The Respondent then requested the Board to determine if onus had shifted.

The Board referred to *MacAulay and Sprague, Hearings Before Administrative Tribunals, Fourth Addition, (c) 2010 Thompson Reuters Canada Limited*, as guidance of whether onus had been met:

*The concept of "burden of proof" (or "onus of proof") simply refers to who has the burden of establishing a fact. As noted by the Alberta Court of Appeal in Alberta Provincial Judges' Association v. Alberta (1999), 1999 CarswellAlta 687, 177 D.L.R. (4<sup>th</sup>) 418, 16 Admin. L.R. (3d) 154 (Alta. C.A.), additional reasons at (1999), 1999 CarswellAlta 1136 (Alta. C.A.), leave to appeal refused (2000), 2000 CarswellAlta 482 (S.C.C.), the concept is only really relevant where there is no evidence whatever to establish a fact or issue or where the evidence is evenly balanced. It serves as the rule which indicates who wins or loses.*

*The general rule is that whoever asserts a proposition bears the burden of proving it.*

**After careful consideration of all the evidence and materials duly before the Board, the Board determined that the evidence presented established some doubt therefore permitted the appeal to continue.**

The Board found that the Complainant, in this case, hired a professional tax agency which, as well as any person appearing before the Board, should understand the basic premise of assessment appeals and their duty to prove their case to the Board. The Board determined that in order to meet onus, it involved more than presenting any evidence, the evidence must establish a fact being stated or support an issue being raised. While the evidence presented was weak there appeared to be some doubt over the assessment in the mind of at least one Board member therefore the Board felt hearing the Respondent was a less harsh remedy than ceasing the hearing based on onus.

#### **Preliminary Issue 2 - Permitting the presentation of the Rebuttal Document**

The Board was asked if the Rebuttal Document can be presented if the Respondent does not present their Disclosure Document. This posed an interesting question for the Board because the Respondent has full knowledge of the contents and perhaps their case is stronger with no evidence if it meant that the Board could not see the rebuttal. The Board reviewed the Act

and *Matters Relating to Assessment Complaints* (MRAC) regulation and found no guidance on the question; ***if and when rebuttal can be presented?*** The Board reviewed the *Calgary Assessment Review Board, Policies and Procedures (ARB Policy) March, 2011* where it found;

- 36      A complaint hearing shall be conducted in the following order:
- (a) Introduction and preliminary matters,
  - (b)      (i) Presentation of all complainant evidence,  
            (ii) Respondent questions,  
            (iii) Board questions,
  - (c)      (i) Presentation of all respondent evidence,  
            (ii) Complainant questions,  
            (iii) Board questions,
  - (d)      (i) Rebuttal evidence of complainant (if any),  
            (ii) Respondent questions,  
            (iii) Board questions,
  - (e)      Complainant summary of position and argument,
  - (f)      Respondent summary of position and argument,
  - (g)      Brief reply of complainant (if any),
  - (h)      Board conclusion of hearing.

The Board sought further guidance in *Black's Law Dictionary Ninth Edition* © 2009 Thomson Reuters, wherein it defines rebuttal as;

**Rebuttal**, *n.* (1830) 1. In-court contradiction of an adverse party's evidence. 2. The time given to a party to present contradictory evidence or arguments. 3. The arguments contained in a reply brief.

The Board noted that the ARB Policy did not say that Rebuttal Document can or cannot be presented based on if the Respondent presented their evidence; it merely said the Rebuttal Document can be presented ***if any*** exists. Black's Law Dictionary characterizes rebuttal as time to present contradictory evidence which somehow suggests that there must be evidence to rebut but then it goes further to suggest the arguments contained in a reply brief.

**After careful consideration of relevant legislation, regulation, policy and resources available to the Board, the Board determined that it was not clear if the Rebuttal Document should be permitted to be presented. In this case, the Board permitted the presentation of the Rebuttal Document even if the Respondent chose not to present their evidence.**

### **Preliminary Issue 3 - Admissibility of Rebuttal Document evidence**

The Respondent objected to certain pages (13-16) contained within the Rebuttal Document C2 as it contained new evidence which is not permitted under MRAC regulation:

**The Board determined that the value and relevance of this evidence was uncertain until hearing the presentation and permitted the inclusion of pages 13-16 of Rebuttal Document C2 and would assign the appropriate weight during deliberations.**

No additional objections in respect of procedural or jurisdictional matters were raised.

**Property Description:**

The subject property is an Industrial-General (I-G) land use property with one Industrial Warehouse Single Tenant (IW S) building located in the Dufferin Industrial area. The subject site has an area of 29.97 acres providing site coverage of 47.84%. The building on site had a gross building area of 628,068 square feet built in 1999 with 2% finish.

**Issues:**

The Complainant identified one issue on the complaint form:

1. assessment amount is incorrect
  - a. Income Approach vs. Direct Sales Comparison Approach
    - i. Market Rental Rate
    - ii. Vacancy
    - iii. Unrecoverable Management Expense
    - iv. Vacancy Rate Shortfall
    - v. Capitalization Rate

**Complainant's Requested Value:** \$ 38,050,000 (complaint form)  
\$ 43,008,000 (disclosure)  
\$ 43,454,000 (at hearing to correct an error)  
\$ 37,631,000 to \$ 45,094,000 (rebuttal)

**Board's Decision in Respect of Each Matter or Issue:**

1. assessment amount is incorrect

**The Board determined the assessment is correct, fair and equitable.**

In making our decision the Board carefully looked at the evidence supplied by the Complainant using the Income Approach. If the Board accepted the **verifiable** leases supplied by the Complainant as correct then the market rental rate would be \$ 5.75 per square foot. The other inputs into the Income Approach, if accepted by the Board, would be; vacancy rate 5.1%, the unrecoverable management expense 1%, vacancy rate shortfall \$1.75, and the capitalization rate 7.25%, equating to \$3,336,883 in net operating revenue which in turn calculates to a truncated market value of \$46,020,000 or approximately 3.25% less than the assessment. This calculation assumes the Board accepted the justification of using this methodology over the Direct Sales Approach utilized by the Respondent, and it assumes that the Board accepts the inputs described above, which in this case, the inputs had no evidence for the Board to accept them.

Whereas no evidence was provided to dispute the methodology of the Direct Sales Comparison Approach utilized by the Respondent, and whereas the evidence supplied by the Complainant, though not accepted, supported the assessment of the Respondent, the Board found no reason to alter the assessment.

**Board's Decision:**

After considering all the evidence and argument before the board, the assessment is confirmed at \$47,460,000.

DATED AT THE CITY OF CALGARY THIS 28 DAY OF October 2011.

  
**J. Dawson**  
**Presiding Officer**

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

<b>NO.</b>	<b>ITEM</b>
1. C1	Complainant Disclosure
2. R1	Respondent Disclosure
3. C2	Rebuttal Disclosure

*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.*

<b>Municipal Government Board use only: Decision Identifier Codes</b>				
Appeal Type	Property Type	Property Sub-Type	Issue	Sub-Issue
CARB	Warehouse	Single-Tenant	Sales Approach	Land & Improvement Comparables
			Income Approach	Net Market Rent