

**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:**

***Ish Capital 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>097001200</b>
<b>LOCATION ADDRESS:</b>	<b>4216 – 54 Avenue SE</b>
<b>HEARING NUMBER:</b>	<b>63247</b>
<b>ASSESSMENT:</b>	<b>\$ 27,400,000</b>

This complaint was heard on the 30<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:

- B. Ryan Agent, AEC International Inc.

Appeared on behalf of the Respondent:

- I. Baigent Assessor, City of Calgary

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

#### **Preliminary Issue 1 - Disclosure Document; summary of testimonial evidence and signed witness statement**

The Respondent objected to the acceptance of the Disclosure Document from the Complainant whereas it did not satisfy the requirements under the Act's *Matters Relating to Assessment Complaints* (MRAC) regulation, wherein the Disclosure Document failed to provide a summary of testimonial evidence or a signed witness sheet. The regulation reads:

- 8(2) *If a complaint is to be heard by a composite assessment review board, the following rules apply with respect to the disclosure of evidence:*
- (a) *the Complainant must, at least 42 days before the hearing date,*
    - (i) *disclose to the respondent and the composite assessment review board the documentary evidence, a summary of the testimonial evidence, including a signed witness report for each witness, and any written argument that the Complainant intends to present at the hearing in sufficient detail to allow the respondent to respond to or rebut the evidence at the hearing,*

The Complainant apologized to the Board and explained that the individual who authored the Disclosure Document had been terminated by AEC International Inc. and wished to express that errors and omissions of this nature would not occur in the future under his direction of the Calgary operations.

**The Board determined that in this case the Complainant would be provided a short recess in order to provide the missing summary of testimonial evidence and to signify that he, as authorized agent of the taxpayer, would be a witness.**

The Board found that hearing the Complainant was a far less harsh remedy than ceasing the hearing based on a missing summary of testimonial evidence therefore the Board provided time for the Complainant to write a summary and to sign the unsigned Disclosure Document.

#### **Preliminary Issue 2 - Rebuttal Document; summary of testimonial evidence**

The Respondent objected to the acceptance of the Rebuttal Document from the Complainant whereas it did not satisfy the requirements under MRAC regulation wherein the Rebuttal Document failed to provide a summary of testimonial evidence. The regulation reads:

- 8(2) *If a complaint is to be heard by a composite assessment review board, the following rules apply with respect to the disclosure of evidence:*
- (c) *the Complainant must, at least 7 days before the hearing date, disclose to the*

*respondent and the composite assessment review board the documentary evidence, a summary of the testimonial evidence, including a signed witness report for each witness, and any written argument that the Complainant intends to present at the hearing in rebuttal to the disclosure made under clause (b) in sufficient detail to allow the respondent to respond to or rebut the evidence at the hearing.*

The Complainant apologized to the Board and explained that a summary of testimonial evidence was provided that is eight pages in length.

**The Board determined that in this case the Complainant would be provided a short recess in order to provide a more concise summary of testimonial evidence as the Board defined to be; between 1 and 4 pages with a synopsis capable of directing the Board to the heart of the argument on each point.**

The Board found that hearing the Complainant's Rebuttal Document was a far less harsh remedy than ceasing the hearing based on a missing summary of testimonial evidence therefore the Board provided time for the Complainant to write a summary for the Rebuttal Document.

#### **Preliminary Issue 3 - Distribution of a CARB decision**

The Complainant explained that the author of the Disclosure Document was terminated by AEC International Inc. and requested to provide CARB 1214/2010-P, a previous decision on the subject property, for evidence in their appeal.

In support of the request the *Calgary Assessment Review Board Policies and Procedural Rules (March 2011)* was reviewed wherein the Board found the following guidance:

- 37(8) *A decision of a court or tribunal may be considered by the Board in a complaint hearing even where such a decision has not been provided in disclosure materials, and court or tribunal decisions shall not be marked as exhibits, nor do they form part of the Board record.*

**The Board determined that the request to provide a previous CARB decision was reasonable and permitted within the Board's policy guidelines.**

The Board found that policy of the Calgary ARB to be clear in that the Board may accept decisions even when not disclosed previously.

#### **Preliminary Issue 4 - Postponement Request**

Prior to hearing the ruling from the Board regarding the disclosure and rebuttal evidence the Complainant requested a postponement of 15 days to allow an opportunity to prepare for the preliminary items raised by the Respondent in that they were unaware of the request to quash their evidence as this objection was not previously disclosed. The Complainant cited procedural fairness and natural justice in support of their request.

In order to access this request, the Board referred to a Supreme Court of Canada decision, *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 CarswellNat 1124, 174 D.L.R. (4<sup>th</sup>) 193, 243 N.R. 22, 14 Admin. L.R. (3d) 173, [1999] 2 S.C.R. 817 (S.C.C.), for guidance:

*Although the duty of fairness is flexible and variable, and depends on an appreciation of the*

*context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.*

*Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances.... The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness....*

*A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates": Old St. Boniface, supra, at p.1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted....*

*A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated....*

*Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances...*

*Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances ... While this, of course, is not determinative, Important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: I.W.A., Local 2-69 v. Consolidated Bathurst Packaging Ltd.,[1990] 1 S.C.R. 282, 42 Admin. L.R. 1, 68 D.L.R. (4<sup>th</sup>) 524 (S.C.C.), per Gonthier J.*

The Board noted that the Complainant, in this case, hired a professional tax agency that in turn employed a talented and capable agent as their director for the Calgary operations. The Board determined that any person appearing before the Board who understands the basic premise of assessment appeals is capable of mounting a defence of this nature before the Board. The Board also noted that the decision of the Board, on this issue, ought not to represent a grave impact to the persons affected, and an appeal process is available for the Complainant if the Board has erred. In addition, the Board notes that in each and every appeal, the Complainant is required to complete a simple complaint form wherein it reads in plain language what the disclosure must include:

- All relevant facts supporting the matters of complaint described on the complaint form.
- All documentary evidence to be presented at the hearing.
- A list of witnesses who will give evidence at the hearing.
- A summary of testimonial evidence.
- The legislative grounds and reason for the complaint.
- Relevant case law and any other information that the Complainant considers relevant.

**It was obvious to the Board, that in this case, the individual before us was capable of proceeding with the preliminary issues raised by the Respondent without delay.**

The Board was impressed with the knowledge, professional conduct and presentational talent which the Complainant exhibited to the Board and was convinced that no harm would be caused by proceeding at this time and that a postponement, in this case, would only delay the hearing, which in turn would provide no benefit to the taxpayer, the municipality or the Board.

#### **Preliminary Issue 5 - Admissibility of Rebuttal Document evidence**

The Respondent objected to certain pages within the Rebuttal Document as it contained new evidence which is not permitted under MRAC regulation:

**The Board determined that this decision will be made when the Rebuttal Document is entered into evidence.**

Whereas the final preliminary issue regarding onus resulted the conclusion of the hearing the preliminary issue regarding the Rebuttal Document was never readdressed.

#### **Preliminary Issue 6 - Onus**

After the Complainant finished presenting their Disclosure Document with the recently authored summary of testimonial evidence, and after the Respondent and the Board thoroughly questioned the Complainant on the evidence and its relevance to this hearing, the Respondent requested the Board to determine if onus or burden of proof had been met.

The Complainant requested that a postponement was in order to allow opportunity to provide a defence and case law pertaining to onus.

The Board noted that in *MacAulay and Sprague, Hearings Before Administrative Tribunals, Fourth Addition, (c) 2010 Thompson Reuters Canada Limited*, provided an excellent foundation to help judge 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 a delay was not necessary for the Complainant to explain how its evidence shifted the burden of proof as the Board clearly understood the evidence as presented and was satisfied that onus had not been met. The Board found that onus had not been met and concluded the hearing.**

The Board again noted that the Complainant, in this case, hired a professional tax agency that in turn employed a talented and capable agent as their director for the Calgary

operations. The Board determined that any person appearing before the Board who understands the basic premise of assessment appeals is aware of their duty to proving their case to the Board and should be capable of mounting a defence of this nature before the Board without delay.

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 twelve Industrial Warehouse Multi Tenant (IW M) buildings located in the Foothills Industrial area. The subject site has an area of 16.71 acres providing site coverage of 42.57%. The buildings on site had a gross building area of 315,606 square feet comprised of the following characteristics:

Building Number	Footprint	Building Area	Year of Construction	Finish Percentage	Assessment per sq ft	Net Assessment
1	19,200	19,200	1978	11%	\$ 97.00	\$ 1,877,377
2	19,200	19,200	1978	22%	\$ 98.75	\$ 1,896,020
3	19,200	19,200	1978	12%	\$ 97.98	\$ 1,879,280
4	19,200	19,200	1978	3%	\$ 97.04	\$ 1,863,261
5	19,200	19,200	1978	15%	\$ 98.14	\$ 1,884,205
6	18,840	18,840	1978	8%	\$ 99.18	\$ 1,868,466
7	25,780	26,350	1978	4%	\$ 85.41	\$ 2,250,522
8	25,600	25,600	1978	0%	\$ 85.51	\$ 2,189,087
9	51,409	51,409	1978	12%	\$ 77.69	\$ 3,994,025
10	30,720	30,720	1978	18%	\$ 84.20	\$ 2,586,524
11	30,720	30,720	1978	11%	\$ 83.63	\$ 2,569,242
12	30,720	30,720	1978	4%	\$ 82.98	\$ 2,549,138
<b>TOTAL</b>	<b>309,789</b>	<b>310,359</b>				<b>\$ 27,407,147</b>

### **Issues:**

The Complainant identified one issue on the complaint form:

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

**Complainant's Requested Value:** \$ 21,000,000 (complaint form)  
 \$ 25,804,000 (disclosure with typical vacancy)  
 \$ 19,369,000 (disclosure with chronic vacancy)  
 \$ 25,730,000 (verbal request at hearing)



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

1. assessment amount is incorrect

**The Board determined that onus had not been met. 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 evidence supplied by the Complainant, as correct then the building area would be 314,109 square feet, the market rental rate would be \$ 6.99 per square foot, the chronic vacancy rate would be 8.3%, the unrecoverable management expense would be 2%, the vacancy rate shortfall would be \$1.75, and the capitalization rate would be 7.25%, equating to \$1,945,084 in net operating revenue which in turn calculates to a truncated market value of \$26,820,000 or approximately 2% 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, it assumes that the Board accepted the inputs described above, which had no evidence for the Board to accept them. Most compelling is the Act which reads;

*467(3) An assessment review board must not alter any assessment that is fair and equitable, taking into consideration*

- (a) the valuation and other standards set out in the regulations,*
- (b) the procedures set out in the regulations, and*
- (c) the assessments of similar property or businesses in the same municipality.*

The Matters Relating to Assessment and Taxation (MRAT) regulation referred to in 467(3)(a) further expands to offer this guidance;

*10(3) For any stratum of the property type described in the following table, the quality standards set out in the table must be met in the preparation of assessments:*

<b><i>Property Type</i></b>	<b><i>Median Assessment Ratio</i></b>	<b><i>Coefficient of Dispersion</i></b>
Property containing 1, 2 or 3 dwelling Units	0.950 - 1.050	0 - 15.0
All other property	0.950 - 1.050	0 - 20.0

Whereas no evidence was provided to dispute the methodology of Direct Sales Comparison by the Respondent, and whereas the evidence supplied by the Complainant, though not accepted, supported the assessment of the Respondent, the Board found that onus had not been met and ended the hearing.

**Board's Decision:**

After considering all the evidence and argument before the board, the complaint is dismissed, and the assessment is confirmed at \$27,400,000.

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

  
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**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

*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	Multi-Tenant	Sales Approach	Land & Improvement Comparables
			Income Approach	Net Market Rent