

**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:

808 4TH Avenue SW Nominee Inc. (as represented by Linnell Taylor Assessment Strategies), COMPLAINANT

and

The City Of Calgary, RESPONDENT

before:

***W. Kipp, PRESIDING OFFICER
R. Cochrane, MEMBER
R. Kodak, 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: | 067 017 004 |
| LOCATION ADDRESS: | 395 – 7 Street SW, Calgary AB |
| HEARING NUMBER: | 60948 |
| ASSESSMENT: | \$20,710,000 |

This complaint was heard on the 4th day of November, 2011 at the office of the Assessment Review Board located at Floor No. 4, 1212 – 31 Avenue NE, Calgary, Alberta, Boardroom 4.

Appeared on behalf of the Complainant:

- *Joel Mayer (Linnell Taylor Assessment Strategies)*

Appeared on behalf of the Respondent:

- *Jim Toogood (Assessment Business Unit)*

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

Neither party had any objection to the Board as constituted. There were no procedural or jurisdictional matters to be decided.

Property Description:

The property that is the subject of this complaint is a "mixed use" property in the DT2 market area of downtown Calgary. It comprises an eight storey apartment building, known as Neff Apartment, containing 91 bachelor suites and one 1 bedroom suite and a separate 10 storey office building (now known as United Place – formerly known as McDougall Place) with a rentable area of 83,508 square feet. There are 11 surface parking stalls beside the office and 72 parking stalls in an underground parkade. Both buildings were constructed in 1975.

In Calgary, multi-family residential properties are assessed using an income approach wherein a Gross Income Multiplier (GIM) is applied to a "typical" Effective Gross Income (EGI) estimate. Office properties are assessed using an income approach wherein an estimate of the "typical" Net Operating Income (NOI) is converted to a value estimate by dividing it by a Capitalization Rate extracted from an analysis of sales of similar properties. The subject property is assessed by valuing each component by the appropriate valuation method and then adding the two value conclusions together. The office component is valued as a Class B- office at \$13,489,911 (\$162.24 per square foot of rentable area). The apartment component is valued at \$7,222,675 (\$77,663 per apartment unit).

Issues:

The Assessment Review Board Complaint form, filed February 25, 2011 had a check mark beside No. 3 (Assessment amount) in Section 4 (Complaint Information). For Section 5 (Reason(s) for Complaint), there was an attachment stating "1. The assessed value is incorrect" and "2. The assessed value is too high." It went on to state that the subject property traded for a consideration that is less than the assessment.

At the hearing, the Complainant expanded on the reasons by clarifying that only the office building valuation was being challenged, however, the requested assessment is the purchase price for the whole property. In support of the request, the Complainant challenged the capitalization rate and the number and rent for the office building parking stalls. If the requested

changes are made to parking stall number and rent and to the capitalization rate, the new value when added to the apartment building value is \$17,624,637 which supports the sale price of \$17,650,000. *NOTE: The Board noted that the calculations for the requested office building assessment was based on 77 underground parking stalls rather than 72 which caused the income and thus the value to be slightly over-stated.*

Complainant's Requested Value: \$17,650,000

Party Positions on the Issues:

Complainant's Position:

The subject property sold with a title transfer in December 2010 at an arms-length price of \$17,650,000.

In a number of cases, the Alberta Municipal Government Board (MGB) and the Alberta Court of Queen's Bench (ABQB) have agreed that a sale of the subject property is prima facie evidence of value. Copies of decisions were provided in evidence and excerpts were set out in argument:

MGB 036/06 (Page 77 of 165)

Upon hearing and considering the representations and the evidence of both parties, the MGB finds the fact in the matter to be as follows.

The arm's length sale of the subject property is prima facie evidence of its market value.

ABQB 512

[23] There is also no reasonable explanation for the MGB's adoption of a definition of market value that included the sale price plus additional anticipated costs that the Applicant might incur. As noted above, market value is a defined term in the Act and means "the amount that a property, as defined in section 284(1)(r), might be expected to realize if it is sold on the open market by a willing seller to a willing buyer". The MGB had no authority to impose a definition of market value that differed from the definition in the Act.

[24] In my view, the MGB's failure to rely on the evidence of value provided by the recent sale of the Property fails to meet the test of reasonableness. I agree with the following comments from Re Regional Assessment Commissioner, Region No. 11 vs. Nesse Holdings Ltd. et al. (1984) 47 O.R. (2d) 766 (Ont. H.C.J. Div. Ct.) at p. 767:

It seems to me to be worth remembering that where the Assessment Act, R.S.O. 1980, c. 31 requires the determination of what a property might be expected to realize if sold on the open market by a willing seller to a willing buyer (s. 18(2)), the price paid in a recent free sale of the subject property itself, where, as in this case, there are neither changes in the market nor to the property in the interval, must be very powerful evidence indeed as to what the market value of the property is. It is for that reason that the recent free sale of a subject property is generally accepted as the best means of establishing the market value of that property.

...

... I think that generally speaking the recent sales price, if available as it was in this case, is in law and, in common sense, the most realistic and most reliable method of establishing market value.

In rebuttal, the Complainant provides a copy of MGB decision 026/03 wherein the MGB decided that post-facto sales cannot be considered on their own but can be used in combination with past and current sales to confirm a trend.

The income approach valuation used by the assessor incorporates a capitalization rate of 9.0%. The Complainant argues that this rate is too low for a mixed use property such as the subject. One reason for this argument is that mixed use properties are not popular with investors because they require two sets of management skills (i.e., residential and commercial).

Proof of this argument is found in the comparison of capitalization rates from two prior sales of the subject property to prevailing office market capitalization rates at the times of the sales. In 1999, the property sold on the basis of a 10.5% capitalization rate which was 1.2% to 1.5% higher than capitalization rates from sales of single use office buildings. In 2004, the subject sold with a reported capitalization rate of 11.2% which was 2.13% to 2.3% higher than office building capitalization rates. For the December 2010 sale of the subject, capitalization rates are found by relating actual NOI at the time of sale and typical NOI used in the Respondent's assessment valuation. Rates of 12.6% and 11.6% were found. For the requested assessment however, the Complainant starts with the 9.0% rate from the assessment and adds 1.5% which is taken from the analyses of the 1999 and 2004 sales of the subject.

The subject office building has 72 underground and 11 surface parking stalls. The assessment has 100 stalls assessed on the basis of an annual rent of \$4,800 per stall (\$400 per month). This should be revised to 72 stalls at an annual rent of \$4,080 per stall (\$340 per month) plus 11 stalls at an annual rent of \$3,480 (\$290 per month)(these are actual rents being received for the stalls).

Respondent's Position:

Upon receipt of the Complainant's disclosure document, the Respondent reviewed the assessment and made a recommendation that the assessment be reduced to \$19,620,000. It was found that a tenant in the office building qualified for property tax exemption, therefore the component of the assessment for that tenant should be taken from the current roll number and put onto a related roll number (201 695 269). Further, the assessment should be adjusted to account for just 83 parking stalls at the rent rate of \$4,800 per year.

The Complainant acknowledges that the recommendation recognizes the parking stall count but not the parking rent rate or the capitalization rate and therefore it cannot be accepted.

With respect to the sale of the subject property, the Respondent argues that this December 13, 2010 sale is "post-facto" in that the property transferred almost 5 ½ months after the valuation date of July 1, 2010. Two Calgary LARB (Local Assessment Review Board) and one CARB (Composite Assessment Review Board) decisions are cited wherein post-facto sales of a subject property were not accepted as grounds for an assessment reduction. Further, the Respondent argues, the cut-off date for finalization of assessments has been set by the Assessment Business Unit at November 30. It would not have been possible for the assessor to consider the sale when title did not transfer until December 13.

The Respondent presents evidence to support input factors into the income approach formula.

Also presented is the response to the Assessment Request For Information (ARFI) received by the Respondent on March 22, 2010. A rent roll attached to the ARFI confirms the office building floor area at 83,508 square feet. It also shows that there was a vacancy of over 25% but this was not discussed. Copies of reports from third party analysts support the 13% office vacancy rate and the rent rate of \$400 per month used for parking stalls.

Summaries of rental information for office space, vacancies, operating expenses and capitalization rates are included in Respondent's disclosure evidence. The capitalization rate used for assessment of Class B offices is 9.0%. Third party industry analysts show capitalization rate ranges from 7.3% to 9.25% for this class.

A table of data entitled "2011 High Rise Mixed Use GIM Study" sets out data on five properties that sold between August 2008 and November 2009. All of these properties are apartment style buildings and one of them that sold for \$18,500,000 has a commercial component valued by the Respondent at \$1,044,325. There is no explanation of why the other four properties are considered to be mixed use properties even though the table shows no amounts for non-residential components.

Board's Decision:

The 2011 assessment is reduced to \$17,650,000.

Reasons for the Decision:

LEGISLATION

MUNICIPAL GOVERNMENT ACT

Chapter M-26 RSA 2000

1(1) In this Act,

(n) "market value" means the amount that a property, as defined in section 284(1)(r), might be expected to realize if it is sold on the open market by a willing seller to a willing buyer;

289(1) Assessments for all property in a municipality, other than linear property, must be prepared by the assessor appointed by the municipality.

(2) Each assessment must reflect

- (a) the characteristics and physical condition of the property on December 31 of the year prior to the year in which a tax is imposed under Part 10 in respect of the property, and
- (b) the valuation and other standards set out in the regulations for that property.

Numerous decisions of assessment tribunals and the courts have been rendered regarding sales of the subject property and post-facto sales. The Board will examine the decisions presented in evidence at this hearing recognizing that it may be guided by them but is not compelled to decide this matter in the same manner as any of those decisions.

MGB 036/06

The Complainant quoted one line from this decision. The quoted line related to a sale of the subject property that was within the one year period leading up to the valuation date. There was no post-facto sale argument. This Board concurs that an arm's length sale of the subject property is *prima facie* evidence of its market value, however there must be consideration given to the date of the sale.

Court of Queen's Bench of Alberta - 2005 ABQB 512

This decision overturned an MGB decision. It accepted that a sale of the subject property was the best evidence of market value. In the case, the sale date was recorded as July 18 and the valuation date had been July 1. The MGB had rejected the sale but not simply because it occurred after the valuation date. There were other reasons given for its rejection but the QB judge disagreed. This Board finds this case particularly relevant.

MGB 026/03

There was no sale of the subject property. The MGB ruled that post-facto sales could be used, in combination with past and current sales to confirm a trend. This Board concurs with this finding but it finds that it is not particularly relevant to the complaint at hand. In the current case, there are no other sales in evidence and the only issue is the post-facto sale of the subject property.

Calgary ARB 0038/2011-P

This decision was pursuant to a complaint against the assessment of a single family residential property. The sale of the subject property resulted in a transfer on November 5, 2010 which was after the July 1, 2010 valuation date. It was stated in evidence that the offer to purchase had been accepted at the end of September. The ARB considered the sale to be a post-facto sale and gave it no weight in the decision. This Board does not find a lot of similarity between that complaint hearing/decision and this one. In that residential hearing, it was apparent that there were sales of other properties that occurred within the valuation year leading up to the valuation date and these other sales provided evidence of value that translated into the subject assessment. In the case at hand, there are no other sales in evidence. The only sale reported is the post-facto sale of the subject.

Calgary ARB 0665/2011-P

This case appears to be very similar to the one considered above. It involved a November 18, 2010 sale of a single family residential property. There was insufficient detail in the decision to convince this Board of its relevance to this case. The sale price was \$395,000 and the Complainant's requested assessment was \$400,000.

Calgary CARB 1660/2011-P

This was a decision on a complaint against a shopping centre in a suburban community. It was noted that the Complainant had not relied upon the December 2010 sale of the subject property as an influence on value as at July 1, 2010 but had relied upon it to illustrate that the assessment may have been excessive. The sale of the subject was not one of the issues in the complaint. This Board finds that the CARB decision in the case was not based on rejection of the sale. There were other reasons given for the decision that was reached.

Firstly, a general finding of the Board is that the weight given a post-facto sale of the subject property should be greater than weight given to other post-facto sales.

In the case at hand, this Board finds the Complainant's analysis of prior sales of the subject property compelling evidence that mixed use properties are perceived differently in the market. The Respondent has not challenged the analysis. Evidence from the Respondent, for the most part, is intended to support the input factors that went into the income approach formula for a Class B- office property. Unfortunately, almost the entirety of that evidence (other than office rental rate which was not challenged by the Complainant) consists of copies of reports from industry analysts such as Cresa Partners, Colliers, CBRE, Avison Young and Barclay Street. This Board along with numerous others finds that these third party reports are not sufficient evidence of rents or capitalization rates because these analysts rely on surveyed opinions of market participants and not on actual property sales. These reports might be useful in supporting rates found through an actual market analysis but that is not the case here.

The Complainant has provided sufficient support for the argument that the subject mixed use property is unique in the market and as such, should be valued differently than it has been. The sum of the individual values of the office and apartment components is not an acceptable indicator of market value of the whole property.

The post-facto subject property sale is accorded weight by the Board.

- It did occur during the calendar year of the valuation date (2010).
- The transaction does meet the criteria in the MGA definition of market value at Section 1(1)(n) – willing seller and buyer acting in an open market.
- Post-facto sales of a subject property are relevant when there are insufficient sales that took place during the valuation year.
- Section 289(1) of the MGA compels the assessor to consider characteristics and condition of the assessed property as at December 31 of the valuation year. The Respondent's November 30 cut-off date is an arbitrary date chosen by the Respondent and it has no sanction in legislation.
- The characteristics and condition date of December 31 is support for the decision that a sale of the subject property within the calendar year has relevance.
- There was no evidence before the Board that there had been changes in the market or to the property between July 1, 2010 and December 13, 2010.

The post-facto sale does support the unchallenged recalculation of the income approach using a higher capitalization rate. The Complainant's capitalization rate is supported by sales analysis.

DATED AT THE CITY OF CALGARY THIS 18 DAY OF November 2011.



W. Kipp
Presiding Officer

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

| NO. | ITEM |
|------------|------------------------|
| 1. C1 | Complainant Disclosure |
| 2. R1 | Respondent Disclosure |
| 3. C2 | Complainant Rebuttal |

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.*

For Administrative Use:

| Appeal Type | Property Type | Property Sub-Type | Issue | Sub-Issue |
|--------------------|----------------------|--------------------------|-----------------|------------------|
| CARB | Other | Office/Apartment | Income Approach | Mixed Use |