

**Calgary Assessment Review Board****DECISION WITH REASONS**

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

between:

**908118 Alberta Ltd., (as represented by Wilson Laycraft, Barristers & Solicitors),
COMPLAINANT**

and

The City of Calgary, RESPONDENT

before:

**L. Wood, PRESIDING OFFICER
A. Maciag, BOARD MEMBER
D. Pollard, BOARD MEMBER**

These are complaints to the Calgary Assessment Review Board in respect of property assessments prepared by the Assessor of The City of Calgary and entered in the 2013 Assessment Roll as follows:

ROLL NUMBER	LOCATION ADDRESS	FILE NUMBER	ASSESSMENT
068176601	1415 1 ST SW	71706	\$3,580,000
068176403	1411 1 ST SW	71708	\$ 641,000
068176304	207 14 AV SW	71718	\$ 640,000
068176502	1401 1 ST SW	71720	\$1,000,000

These complaints were heard on the 22nd and 23rd day of July, 2013 at the office of the Assessment Review Board located at Floor Number 4, 1212 – 31 Avenue NE, Calgary, Alberta, Boardroom 6.

Appeared on behalf of the Complainant:

- Graham O'Connor President, 908118 Alberta Ltd.
- Greg Smith Business Partner
- Graham Kerslake Consultant with Altus Group Ltd.
- Gil Ludwig Lawyer, Wilson Laycraft, Barristers & Solicitors

Appeared on behalf of the Respondent:

- Erin Currie Assessor
- Nathan Irving Lawyer, City Law Department

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

[1] At the commencement of the hearing, one of the panel members, Doug Pollard, disclosed that he was acquainted with two of the Complainant's witnesses, specifically Graham Kerslake and Greg Smith; he had coached their children in baseball. Notwithstanding Mr. Pollard stated that he was willing to proceed with the matter and maintain impartiality. The Board provided the parties with an opportunity to object to Mr. Pollard participating in the hearing. All parties stated that the matter should proceed with Mr. Pollard as part of the panel.

[2] The parties requested that the four complaints be heard together as the complaints relate to an improved parcel and three adjacent surface parking lots. The Board agreed to do so and designated file 71706 as the master file in which the evidence and argument can be located and cross referenced those materials to the remaining three files: 71708; 71718; and 71720.

Property Description:

[3] The subject property consists of a 0.48 acre parcel, improved with a 10,652 square foot (sq. ft.) building that was constructed in 1940, and three surface parking lots of 0.09 to 0.14 acres, located adjacent to the improved parcel. The land use designation is Centre City Commercial Corridor District (CC-COR). The subject property is commonly known and operated as O'Connor's Men and Women's Clothing & Footwear ("O'Connors").

[4] The issue before the Board relates to the (Beltline) land rate of \$160 psf that was applied to the three surface parking lots. It is noted that the parking lot located at 1401 1 ST SW has a +5% corner lot influence applied to its assessment. The assessment for the improved parcel, based on the income approach to value, is not contested by the Complainant, but a complaint was filed on it to illustrate how the properties and their respective values relate to each other. The four properties are collectively referred to as the subject property throughout this Board Order but each has a separate Land Title Certificate.

[5] The three surface parking lots were under complaint in 2011, but not the improved parcel. The Board had confirmed the assessments, the reasons for which are set out in CARB 1553/2011-P. That decision was granted leave to appeal by the Court of Queen's Bench, the reasons of the Honourable Madam Justice C.L. Kenny are set out in *908118 Alberta Ltd. v. Calgary (City)*, 2013 ABQB 100.

Issues:

[6] The issues for complaint were identified as follows:

- a) The assessments are in excess of market value.
- b) The assessments fail to take into account legal restrictions imposed on the properties.
- c) The assessments are inequitable.

Complainant's Requested Values: \$1000 for each of the three surface parking lots, the value of \$3,580,000 for the improved parcel is not challenged.

Board's Decision: The assessments for the surface parking lots are revised to \$1000 each and the assessment for the improved parcel of \$3,580,000 remains unchanged.

Legislative Authority:

Municipal Government Act

Interpretation

1(1)(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;

Assessments for property other than linear property

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.*

Decisions of assessment review board

467(1) *An assessment review board may, with respect to any matter referred to in section 460(5), make a change to an assessment roll or tax roll or decide that no change is required.*

(2) An assessment review board must dismiss a complaint that was not made within the proper time or that does not comply with section 460(7).

(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.*

Matters Relating to Assessment and Taxation Regulation AR 220/2004**Mass appraisal**

2 *An assessment of property based on market value*

- (a) must be prepared using mass appraisal,*
- (b) must be an estimate of the value of the fee simple estate in the property, and*
- (c) must reflect typical market conditions for properties similar to that property.*

Valuation date

3 *Any assessment prepared in accordance with the Act must be an estimate of the value of a property on July 1 of the assessment year.*

Valuation standard for a parcel of land

4(1) *The valuation standard for a parcel of land is*

- (a) market value, or*
- (b) if the parcel is used for farming operations, agricultural use value.*

Valuation standard for a parcel and improvements

6(1) *When an assessor is preparing an assessment for a parcel of land and the improvements to it, the valuation standard for the land and improvements is market value unless subsection (2) or (3) applies.*

Position of the Parties:**Complainant's Position:**

[7] O'Connors is a retail business that is comprised of an improved site and three surface parking lots, each of which has a separate Land Title Certificate. The retail operation was assessed based on the income approach to value which is not contested by the Complainant. The three surface parking lots have been assessed based on vacant land value. Historically, the parking lots have been assessed at a nominal value, which the Complainant is asking the Board to reinstate in this instance, in recognition of the parking restrictions attached to the improved parcel by means of a municipal bylaw and condition of the development permit.

[8] Greg Smith testified to the condition in the development permit DP2001-0124 that sets out the parking requirements as per the City of Calgary's Land Use Bylaw 2P80 that was in effect at that time (Exhibit C3 page 8). Section 18(2)(iv) of that Bylaw states:

In all other areas, 1 parking stall per 46 square meters of net floor area with no less than 1 parking stall for each individual store or shop.

[9] Based on this provision, the minimum number of parking stalls required for the subject property is 26 stalls. There are 37 parking stalls in total. At the time, there was an exception to the onsite parking which allowed parking on a site within 120 meters of the proposed development. However, Mr. Smith indicated that land was not available then and noted that the exception no longer exists in subsequent bylaws (Exhibit C3 pages 9 – 15). Mr. Smith testified to changes to the configuration of the parking stalls and noted the closure of the access point from 1st Street SW (Exhibit C3 pages 19 - 24).

[10] Between 2007 and 2010, these parking lots were assessed at a nominal value of \$520 - \$1000. In 2011, the parking lots were assessed at full market value of \$780,000 - \$1,220,000 (Exhibit C3 pages 25 – 45). Mr. Smith testified that in discussions with assessor, Ian Cope, the reason for the increase in the assessments was because these parcels were used as comparables in other assessment complaints.

[11] Graham O'Connor submitted that he had purchased the subject property from Valentine Volvo in 1999. At that time, it was not a desirable area. He indicated that he worked closely with representatives from the City of Calgary to revitalize the area and is widely credited for successfully transforming the area into a retail destination.

[12] He testified that O'Connors is the largest, independently owned menswear retailers in Canada. It is a financially viable and vibrant business in a highly competitive market and has 34 employees. It has also expanded to include women's wear. Additional real estate (3,700 sq. ft.) was purchased in the condominium across the street for the women's fashion line as the parking restrictions on the subject property did not allow for further expansion of the improvement. Mr. O'Connor indicated that it is his intention to continue to grow the business, and has no plans of redevelopment.

[13] The expert witness, Graham Kerslake, an accredited appraiser, testified that it was his opinion that the current use of the property as a retail operation and associated parking is the highest and best use of the subject property. He submitted that this is a growing and thriving business, noting that additional real estate was purchased across the street for expansion, and that no change or plan to redevelop the site is imminent.

[14] Mr. Kerslake provided market evidence of two land transfers which have significant restrictions imposed on them through bylaw and had traded for a nominal value (Exhibit C1 pages 42 – 81). The first occurred in September 2008, a transfer of the Lake Chaparral Community Land comprised of approximately 58 acres from Genstar Titleco Limited to Lake Chaparral Residents Association for \$1.00. The land use restriction by the City of Calgary required these lands to be kept as Community Association Lands (Exhibit C1 pages 42 – 62). The second occurred in February 2007, a transfer of lands from ¼ section, restricted to that of a school site by the City of Calgary via its land use classification. These lands were transferred from Genstar Titleco Limited to the City of Calgary by way of a subdivision plan and no monetary consideration was given to the owner (Exhibit C1 pages 63 – 81). The absence of market evidence was acknowledged by the Complainant in regards to their complaints before

the CARB in 2011, and the inclusion of these two transfers was an attempt to address that deficiency.

[15] Mr. Kerslake indicated that the current assessment of the improved parcel based on the income approach to value is reasonable and does not warrant an adjustment. The income approach already contemplates the value of the parking lots in the assessed rental rates of \$22.00 psf (for retail space), and \$14.00 psf (for retail space below grade) (Exhibit C1 page 7). Mr. Kerslake provided two examples of retail properties (the Safeway located at 813 11 AV SW and the Mountain Equipment Co-op located at 830 10 AV SW) which are also assessed based on the income approach to value and the parking lots (130 – 200 parking stalls) are included in the rental rates (Exhibit C1 pages 34 – 41). He argued it is incorrect to apply the direct sales comparison approach to value the surface parking lots (based on land sales) as the parking is already captured in the income approach to value for the main retail site.

[16] Mr. Kerslake submitted 17 equity comparables which were assessed on nominal values and drew the Board's attention to two of those equity comparables in which the reference of "nominal parking assessment" was stated on the assessment record (Exhibit C1 pages 93 – 126).

[17] Mr. Kerslake submitted that the Respondent will assign nominal values to exterior surface parking if particular conditions are met. He referred to the following passage set out in CARB 2807/2011-P (Exhibit C1 page 87):

(1) The \$750.00 assessment value is applied to titled parcels that are used as an exterior surface parking area. These areas must only be used to satisfy the parking requirements of another parcel (usually contiguous)(sic), and have a caveat on title linking these two parcels in the event of sale.

(2) When a building permit is granted by the city and the parcel in question is not large enough to satisfy the bylaw requirements for parking, and the permit stipulates that additional parking must be provided to satisfy the respective bylaw, then that parcel will be assessed at \$750.00.

[18] The Complainant argued that the parking lots cannot be considered or valued in isolation because they are an integral part of the overall retail operation and the business could not operate without the parking. The current assessments of the surface parking lots at full market value equate to "double" assessments. There have been no changes in use or redevelopment to the site since the Development Permit was issued to warrant such a significant increase in these assessments. Unless there is a +50% chance of redevelopment taking place on this site in the immediate future, it is incorrect to value the lands based on speculation. Regard must be given to the legislative requirements including section 289(2) of the Act, and the direction of the courts. The Complainant referred to the following excerpt from the *T. Eaton Co. v. Alberta (Assessment Appeal Board)* [1995] A.J. No. 859, para. 39:

... development restrictions are a factor to be taken into account in determining the market value of land. Speculation that such restrictions may be relaxed in the future is irrelevant: Re Intervenor, supra, unless there is evidence of a reasonable expectation amounting to a probability, that is, something higher than a 50% possibility that a change in the development status of the land will take place.

[19] The Complainant argued that nominal value can constitute market value particularly if there are restrictions imposed on a property by a municipal bylaw which would have an adverse effect on the value of the property unlike similar properties without those restrictions. The Honourable Madam Justice Kenny in deciding the Leave to Appeal application stated *the restrictive effect of the Bylaw is not to be considered in isolation* (para. 36). The Complainant submitted several court cases in support of his argument that a nominal value should be applied in this instance.

[20] Based on their submission, the Complainant requested the parking lots be assessed at a nominal value of \$1000 each and the assessment for the improved parcel remains unchanged at \$3,580,000.

Respondent's Position:

[21] At the commencement of her submission, the assessor, Erin Currie presented a recommendation of \$3,530,000 for the improved parcel (Exhibit R1 pages 133 & 134). She submitted that the original assessment of \$3,580,000, which was based on the income approach to value, was derived in error and should have been assessed at land value similar to its previous assessments (Exhibit R1 pages 144 - 154). The recommendation was based on the Beltline's vacant land rate of \$160 psf and included a +5% adjustment for corner lot influence (Exhibit R1 page 136). Given that the complaint was before the Board, Ms. Currie indicated that she was unable to issue an amended notice (section 305(5) of the Act) and instead had to present it at the hearing.

[22] The Respondent submitted that, given the recommendation, the subject property is properly assessed as vacant land. It has not been developed to its fullest and therefore is considered to be a redevelopment site. The land use designation of CC-COR is common to all four parcels and therefore the same land rate of \$160.00 psf was applied in a fair and consistent manner.

[23] The Respondent submitted that each of these parcels have an individual Land Title Certificate, with no caveats or restrictions on title (except for an encroachment on 207 14 AV SW which is unrelated to the parking requirements at hand). It is therefore reasonable to assume that each parcel could be sold separately and at full market value. She doubted that the Complainant would sell each of the parking lots for \$1000. The Respondent argued that restrictions imposed through bylaw are not uncommon because all development permits have restrictions. However the improved parcel has correctly been assessed as a redevelopment site. Once it is redeveloped, the current development permit with the parking restrictions will cease to exist.

[24] The Respondent submitted that the highest and best use of the subject property is not the current retail operation but its vacant land value. The Respondent submitted to continue the retail operation is a business decision. It does not mean that the property should be valued for less. The current bylaw proposes a number of permitted and discretionary uses which could occur on this site. The parking restriction applies to the existing use whereas the value in exchange is the highest and best use of the property which is the land value. This is in contrast to the two sales comparables that the Complainant presented in which the restrictions were limited to one use only.

[25] The Respondent submitted that if an income producing property cannot generate a capitalized income greater than the underlying land value, then the land value will be used to assess the property. The improvement under those circumstances adds little value to the

property. The Respondent submitted it will base its assessment on the higher of those two values. The Respondent indicated that this approach is not new and has been widely accepted by the Board in past decisions (Exhibit R1 pages 125 & 126). In this instance, she argued that the land value for all four parcels exceeds the capitalized income of the improved parcel and the proposed nominal value of \$1000 for each of the parking lots; therefore, the land value of \$160 psf should be applied consistently amongst the four parcels.

[26] The Respondent submitted two land sales of redevelopment sites in which the properties sold for more than the improved value and the building was later demolished for land value. The first property is located at 901A 10 AV SW. The lot size is 29,334 sq. ft. There was a two storey building on site of 28,750 sq. ft. It sold in September 2011 for \$7,300,000 or \$249 psf (Exhibit R1 pages 472 - 482). The second property is located at 1515 8 ST SW. It has a 0.522 acre site and was improved with a 10,684 sq. ft. two storey building. It sold in July 2012 for \$5,500,000 or \$242 psf (Exhibit R1 pages 483 - 499).

[27] The Respondent disagrees with the Complainant's request to place a nominal value on the parking lots. She submitted the sale of 15220 Shaw RD SE and 50 153 AV SE is similar to the case at hand. The property located at 15220 Shaw RD SE in an improved parcel and it required a minimum number of parking stalls in accordance to a development permit (Exhibit R1 pages 464 - 468). The condition was satisfied by having the adjacent property located at 50 153 AV SE as its surface parking lot. The improved property is currently assessed at \$3,560,000 and the parking lot is assessed at \$1,680,000 for a total of \$5,240,000. They sold in September, 2011 for \$5,500,000 (Exhibit R1 pages 217 & 218). If the parking lot was assessed at nominal value as the Complainant is suggesting in this instance, then the Assessment to Sales Ratio ("ASR") would be 0.65 as opposed to the Respondent's ASR of 0.95.

[28] The Respondent referred to the 17 equity comparables submitted by the Complainant (Exhibit R1 page 165). She indicated that the first two equity comparables were assessed in error and subsequently amended assessment notices were sent on July 9, 2013 upon her review of the Complainant's submission. The assessments increased from a nominal value of \$1000 each to \$1,460,000 and \$1,150,000 (Exhibit R1 pages 165 - 171).

[29] The Respondent argued that the Board must not lose sight of the legislated standard of market value. Nominal value is not in accordance with the Act. This position is supported by the recent court decision *Edmonton (City) v. Edmonton (City) Composite Assessment Review Board*, 2012 ABQB 439 in which the Court held that the CARB made a finding not of market value but rather of "nominal" value. It was not entitled to do so (para. 32).

[30] The Respondent argued that the Development Permit and Bylaw do not affect market value, only the restrictions of existing use. Moreover the definition of market value is not tied to the owner's use of the property. It is an objective standard, not subjective. This is different than development limitations which can impact value (for example zoning) which are not tied to the existing use but what can be made of the subject property. The Respondent submitted several court cases in support of his argument that a nominal value does not reflect market value.

[31] The Respondent submitted that the assessments be confirmed for the surface parking lots of \$640,000, \$641,000 and \$1,000,000 and to accept the recommendation for the improved parcel of \$3,530,000.

Complainant's Rebuttal:

[32] In rebuttal, the Complainant submitted the property located at 15220 Shaw Road SE was a former Bingo Hall and required 50 153 Avenue SE for extensive parking. This property was then acquired for a car dealership. In this instance the development permit can be ignored because it is a change in use. The Complainant argued little weight should be afforded to the Beltline sale of 1515 8 Street SW, a former Shoppers Drug Mart store. It was purchased as part of a land assembly for redevelopment. The purchaser owns several properties around that site.

Board's Reasons for Decision:

[33] The Board accepts the uncontested evidence submitted by the Complainant's expert witness, Graham Kerslake, that the highest and best use of the subject property is its existing use as a retail operation and associated parking lots. The Board notes that Mr. Kerslake's opinion was not challenged by the Respondent under cross examination. While the Respondent asserted the current use is not the highest and best use of the subject property, there was no evidence produced to substantiate that claim. The Respondent did not suggest what the alternative use would be or when it would take effect. As the courts have said, the probability must be greater than 50% that a change in development status will take place. It cannot be based on mere speculation.

[34] In this instance, there was insufficient evidence to suggest that this site will be redeveloped in the imminent future. The evidence submitted to the Board indicates that this is a thriving business and additional real estate was purchased across the street to accommodate expansion which suggests to the Board that O'Connors has an inherent interest to maintain and continue the retail operations on the subject site. Moreover, Mr. O'Connor testified at the hearing that he has no plans to redevelop the subject property. No evidence was produced to contradict his testimony.

[35] The legislation attempts to remove speculation by preparing and issuing assessments on an annual basis which should capture any changes to a property from a previous year's assessment. Section 289(2) states that assessments must reflect the characteristics and physical condition of the property on December 31 of the year prior to the year in which a tax is imposed. As of December 31, 2012, this property was comprised of a retail operation and associated parking lots.

[36] The Board was not persuaded by the Respondent's sudden change in methodology for the improved parcel from a capitalized income approach to a vacant land valuation in defence of the assessment. There was no market evidence presented in support of the Respondent's land rate of \$160 psf. The Board was also not persuaded by the sale of 15220 Shaw Road SE and 50 153 Avenue SE and finds that it is distinguishable from the case at hand due to its change in use, which, conceivably, would have increased its value.

[37] The Board also notes that the income approach that was initially applied to the improved parcel was higher than the land only valuation, which contradicted the Respondent's evidence that the higher of the two values would be applied. The Board finds that by switching to a land only valuation, it could be perceived as an attempt to avoid addressing the restrictions on the site. The Respondent had conceded at the hearing that the parking restrictions would be considered a characteristic pursuant to section 289(2) of the Act. Both parties indicated that the income approach is the method typically used to assess retail properties. There was no

evidence before the Board to suggest that the income parameters used were incorrect and therefore the Board accepts the value of \$3,580,000 as correct, fair and equitable.

[38] The evidence before the Board was that retail properties are typically assessed based on the income approach to value. Generally, the rental rate(s) used to assess the retail property will incorporate the value of the parking lot and the parking lot will be given a nominal value. Furthermore, there was evidence before the Board that the Respondent has a policy in regards to the circumstances in which a nominal value is applied to exterior surface parking lots as set out in CARB 2807/2011-P. (It is noted that both parties in this instance referred to those two conditions as set out in CARB 2807/2011-P and applied them to the case at hand. It is further noted that only the first condition was in dispute). The Board finds that it is arguable that the first condition was satisfied in this instance. This is one contiguous operation and while there is no caveat on title to link the parcels together, there is common ownership. Notwithstanding, the Board concurs with the parties that the second condition was met in this instance. The Board finds that the parking requirements are intertwined with the retail operations and are a condition of the development permit. Having satisfied both conditions of the Respondent's policy, the Board finds the nominal rate of \$1000 is applicable to each of the parking lots in this case. Moreover, in light of the 15 equity comparables that have received a nominal value, it is fair and equitable to apply the same in this instance.

DATED AT THE CITY OF CALGARY THIS 12 DAY OF September 2013.



Lana J. Wood
Presiding Officer

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

EXHIBIT NO.	ITEM
1. C1	Complainant's 2013 Property Tax Assessment Consulting Report by Graham Kerslake
2. C2	Complainant's Legal Brief
3. C3	Complainant's Summary of Testimony of Greg Smith & Graham O'Connor
4. C4	Complainant's Rebuttal Brief
5. C5	Complainant's Rebuttal Evidence
6. R1	Respondent's Assessment (and Legal) Brief

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

Subject	Property Type	Property Sub -Type	Issue	Sub - Issue
CARB	Retail	Stand Alone	Sales Approach	