

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:

La Caille 16th Avenue Inc. (as represented by Altus Group Limited), COMPLAINANT

and

The City Of Calgary, RESPONDENT

before:

S. Barry, PRESIDING OFFICER
P. McKenna, BOARD MEMBER
Y. Nesry, BOARD MEMBER

This is a complaint to the Calgary Composite Assessment Review Board (CARB) in respect of a property assessment prepared by the Assessor of The City of Calgary and entered in the 2013 Assessment Roll as follows:

ROLL NUMBER:	045031309
LOCATION ADDRESS:	904 16 Av NW
FILE NUMBER:	72504
ASSESSMENT:	\$996,500

This complaint was heard on the 12th day of June, 2013 at the office of the Assessment Review Board located at Floor Number 4, 1212 – 31 Avenue NE, Calgary, Alberta, Boardroom 2.

Appeared on behalf of the Complainant:

- *A. Izard, Altus Group Limited*
- *K. Fong, Altus Group Limited*

Appeared on behalf of the Respondent:

- *T. Johnson, City of Calgary*
- *S. Trylinski, Legal Counsel, City of Calgary*

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

[1] The Complainant's primary disclosure document, referenced here as C1, was not included in the Board's package although it had been received by the Respondent. By way of a copy of an email, the Complainant demonstrated that it had been delivered to the Assessment Review Board (ARB) and, with no objection from the Respondent, the Board accepted a copy of C1, as made by the ARB clerk.

[2] The Respondent advised that they had an issue with respect to the Complainant's Rebuttal document but that he would raise the specifics at the time that it was brought forward. The Complainant withdrew his rebuttal after the argument of the Respondent.

[3] The Parties requested that general evidence and argument regarding the issue of intent be carried forward to this hearing from the previously heard files 72594 and 72587, recognizing that anything specific to the subject property would be introduced and argued. The Board concurred.

Property Description:

[4] The property under complaint is a 0.27 acre parcel located at 904 16th Ave NW in the community of Mount Pleasant. It is improved with a 3,556 sq.ft. building, constructed in 1960, which is used for vehicle repairs. The land use designation of the parcel is Commercial – Corridor 1 and it is classed as 100 per cent non-residential and valued, using the Sales Comparison Approach to value, on a land only basis.

Issues:

[5] Should the assessment classification be changed from 100 per cent non-residential to 11.74 per cent non-residential and 88.26 per cent residential?

Complainant's Requested Value:

[6] The Complainant does not contest the assessed value of \$996,500.

Board's Decision:

[7] The assessment classification for the subject property is amended to 11.74 per cent non-residential and 88.26 per cent residential. The assessment value is confirmed at \$996,500.

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

[8] The Complainant outlined the development proposal that affects this and two other adjacent parcels: one immediately to the west and the other immediately to the east of the subject across 8th Street NW. Neither of the other two parcels is under complaint inasmuch as the Respondent had assessed them using the proposed residential/non-residential classification percentages advocated by the land owner.

[9] The Complainant noted that the City has approved a development permit (DP2010-4008) that, as of April 25, 2013, is being advertised. The proposed project encompasses the three parcels and allows, inter alia, for the construction of two 10 storey residential towers with 120 residential units and with commercial uses planned for the main floors. The towers are to be built in phases, with Tower 1 occupying the most easterly parcel and Tower 2 occupying the two westerly parcels. Included in C1 was a City of Calgary My Property Report that indicates that the other two parcels are vacant.

[10] The Complainant noted that, although the City acknowledged the commercial building on the property, it is not included in the assessed value and that, normally, a functioning operation of this type would be assessed using the Income Approach and not as land only.

[11] The Complainant's main argument is whether the owner's intent, on December 31, 2012, as to the proposed or intended uses of land should supersede the actual uses of land on that date, for the purposes of assigning an assessment classification. The Complainant referenced S.289(2)(a) of the Act, and noted that, while the assessment 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 . . .", s.297 allows for multiple assessment classes on one property. He emphasized s.297(4)(b) which states that non-residential property "does not include . . . land that is used or intended to be used for permanent living accommodation (Board's emphasis).

[12] The Complainant identified a number of actions that have been undertaken by the owner to bring the development proposal to fruition; specifically: the application for and approval of the development permit; the architectural concept plan, advanced artistic renderings, sales signage on the adjacent parcel and the development of a website. A breakdown of the intended uses was provided along with detailed drawings submitted in support of the permit application.

[13] The Complainant cited Municipal Government Board (MGB) decision 088/06, MGB DL 106/08, and CARB decision 0872-2012/P as specific support for his argument on this complaint. The Board accepted that other cases, cited for the previously-heard complaints, were carried forward. These include: the Alberta Court of Queen's Bench (ACQB) Reasons for Judgment No. 0701-01387 which was a decision by Mr. Justice Hart on the City's application for judicial review of MGB 088/06. The Complainant relied heavily on CARB 0872-2012/P noting that it was the 2012 CARB decision on the subject property where that Board amended the assessment classification on both the subject and the easterly parcel in accordance with the intended uses and percentages of use.

[14] In essence, the Complainant contends that the owner has engaged in substantial acts to bring about the redevelopment of the property. His interpretation of the CARB, MGB and ACQB decisions is that these acts are sufficient to demonstrate intent for the purposes of s.297(4)(b) of the Act and that this intent was in evidence on December 31, 2012.

Respondent's Position:

[15] The Respondent's position is based, in part, on the existence of an operating automotive repair business on the property under complaint. The Respondent's disclosure R1 contains a copy of the Land Title Certificate for the subject which lists, among other caveats, the registration of a lease to the benefit of what is submitted to be the predecessor operator of the current automotive business. According to the caveat, the lease expires on March 31, 2015. The Respondent also included an email from him to a representative of the land owner and that representative's response indicating there was no option for early termination of the lease and that "we will begin construction as soon as we can following the expiry of the Lease, pending current market conditions." The land owner's representative was not in attendance at the hearing to speak to the email exchange or to answer questions. It is the Respondent's position that the lease operates as an absolute barrier to development in that it is not subject to early termination and therefore construction cannot commence until April 1, 2015.

[16] The Respondent submitted the development permit application in its disclosure document along with the Planning Commission detailed report. That report notes that, as a condition of approval, there will be two phases to be completed in sequence. However, the Respondent further argued that development has not yet occurred on this parcel, having regard to the City's Land Use Bylaw 1P2007, Part 2, Division 6, sections 44(4) and 44(5) which state:

- 44(4) For the purpose of subsection (3), **development** commences when the applicant has altered the **parcel** in furtherance of the construction.
- 44(5) Without restricting the generality of the foregoing:
- (a) excavation in anticipation of construction is an alteration of a **parcel**; and
 - (b) fencing a site, posting signage, obtaining permits and minor interior demolition are not alterations of the **parcel**. (all emphasis in the original)

Again, the Respondent argued that with the lease in place, no development can occur prior to April 1, 2015. Until that date, he said, the intended uses are merely speculative and cannot be actualized.

[17] The Respondent contends that it uses three criteria for determining the correct classification of a property. They are: the use being made of the property at December 31 of the assessment year – in this case commercial; the property's land use under a land use bylaw – in this case commercial and residential; and, whether or not there are active development permits. The Respondent expressed its concern that small steps could be taken along the way to advance a change in use but that, even with a development permit in place, there is no certainty that the proposed use will be developed. In the interim, the City is unable, under the loose terms of "intention" advanced by the Complainant, to collect its proper taxes.

[18] The Respondent's legal counsel referenced, but did not produce for this hearing, the decision of Madam Justice Hunt McDonald that, according to counsel, says it is necessary to tether intention to something concrete. In the subject complaint, she said, there has been no

concrete action, since the development permit approval cannot be activated until the lease expires. The Respondent submitted no new CARB or MGB decisions in addition to those carried forward from files 72594 and 72587.

[19] The Respondent stated that it is necessary for the Board to reconcile ss.289 and 297 along with s.3 of *Matters Relating to Assessment and Taxation Regulation*, AR 220/2004 (M.R.A.T.) which further specifies the value of the property must be as of July 1 of the assessment year. She said that the Board, in considering that reconciliation, must develop a benchmark for when intention moves from speculative to something concrete.

Board's Findings and Reasons for Decision:

[20] Because the valuation of the property is not at issue, the Board will not deal with whether that value should have been based on the income approach or land value only.

[21] The "facts" of this complaint are not really in dispute. Between the Parties it is agreed that there is a development permit and that only the assessment classification is at issue.

[22] The Board reviewed the CARB and MGB decisions put forward by the Parties and it is no surprise that those provided by the Complainant support his position that intention can be shown through a series of actions that advance the approval process without that final approval being in place or construction having commenced on December 31 of the assessment year.

[23] In reconciling ss. 289 and 297 of the Act, the Board was guided by MGB 088/06 and the Judicial Review of that decision by Mr. Justice Hart. We do not quote these decisions but note that the Board in MGB 088/06 cited *Cunliffe, Green Meadows* and *Nova Scotia* to indicate that "present intent must be supported by some substantial act to carry out the intent". Justice Hart found that CARB Board had correctly interpreted these cases and, further, had appropriately examined the actions of the complainant to determine intent. We find further support in CARB 0872/2012-P where that Board further reviewed MGB 088/06 and concluded that a development permit was not necessary to form intent but that there had to be substantial acts to carry out that intent.

[24] The Respondent's counsel referenced the oral judgment of Madam Justice Hunt McDonald (Hunt McDonald) as it relates, counsel said, to the necessity of tethering intention to something concrete. While neither party produced the transcription of that judgment for this hearing, the Board considers it a public document. Upon review, this Board found nothing in that leave application that contradicts the conclusions of Justice Hart, the MGB or CARB 0872/2012-P. The CARB decision (2621/2011-P), that is the subject of the leave application, demonstrated that the Board had examined intent through a variety of "indicia of development" and then concluded that in the absence of such indicia, the City's decision-making model was a workable solution "where intent cannot be inferred by zoning or the existence of a development permit". However, that CARB decision noted that there was no evidence of "other indicia of development" as phrased by Hunt McDonald.

[25] The Board took note of the commercial lease and agreed with the Complainant that it need not be an absolute barrier to development. There are several possibilities for resolving that issue that include mutual consent including an agreement to amend the lease or accept compensation in lieu. The Board is not speculating on what might happen, only observing that there are options. Further, the Board noted that, according to the conditions of approval for the development permit, the development is to be phased and "completed in sequence". Phase 1 is located on the vacant parcel to the east of the subject and it is not unreasonable to assume that construction on Phase 1 would precede Phase 2, by which time the expiry of the lease could

well be close at hand.

[26] Further, the Board notes that the Respondent's definition of development is particular to s.44(3) of the Land Use Bylaw. It is defined there in order to give clarity to the point in time within which development must commence following the date of approval of a development permit. Neither Party was able to specify the date of approval or the term of that approval. There was no submission that the approval or permit was other than active.

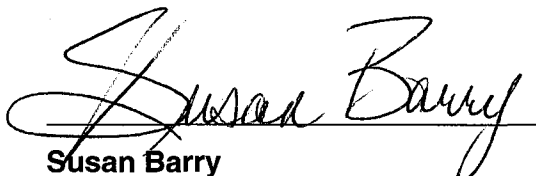
[27] The Board further noted that the assessment classification of the adjacent parcel to the west had been changed, substantially, to residential by the Respondent, acknowledging that at least part of the Phase 2 tower is intended to be built on that land. It is an incongruous decision that would allow the land intended to support part of a building to be classed as residential and the adjacent land that would support the other half of the same building as non-residential.

[28] At the risk of being repetitive, the only issue is the intent of the owner with respect to the future use of the land. In this instance, the Board finds that the subject lands can be characterized as being part of an active development process. Studies have been performed; plans have been drawn up and submitted and, apparently, approved. It appears that the project is being marketed for pre-sales. The development process is not neat or quick. The proposal appears to have undergone extensive review by the City. All of the noted activities are, in our view, substantial indicia of development activity leading to a forthcoming application for building permits and construction. All of this speaks to intent and we are satisfied that the Complainant has demonstrated that intent pursuant to s.297(4)(b) of the Act.

[23] The Respondent's concern that all this activity may not result in a physical project is understandable. However, as has been noted in other CARB decisions, the City has the opportunity to review the status of the project on an annual basis and to adjust its valuation accordingly, based on the facts at that time.

[24] The Complaint is allowed and the assessment classification is amended in accordance with paragraph 7, above.

DATED AT THE CITY OF CALGARY THIS 4 DAY OF July 2013.


Susan Barry
Presiding Officer

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

NO.	ITEM
1. C1	Complainant's Disclosure, Part 1 of 3
2. C2A	Complainant's, Disclosure Appendix, Part 1 of 3
3. C2B	Complainant's Disclosure Appendix, Part 2 of 3
4. C2C	Complainant's Disclosure Appendix, Part 3 of 3
4. R1	Respondent's 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.*

For Administrative Purposes Only

Municipality	Roll Number	Property Type	Property Sub-Type	Issue	Sub-Issue
Calgary	045031309	Non-Res'l	Commercial	Assessment Classification	s.289 vs s.297