



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:

Bowness Commercial Development Ltd. (as lessee), (as represented by Altus Group Ltd)
COMPLAINANT

and

The City Of Calgary, RESPONDENT

before:

Board Chair; J. Zezulka
Board Member; M. Grace
Board Member; K. Bickford

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 2013 Assessment Roll as follows:

ROLL NUMBER: 040021925

LOCATION ADDRESS: 133 - Bowness Centre NW.

FILE NUMBER: 72807

ASSESSMENT: \$970,000

This complaint was heard on 15th day of October, 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:

- *D. Hamilton*

Appeared on behalf of the Respondent:

- *N. Domenie*

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

(1) The subject property is owned by the City of Calgary, and is held under lease by Bowness Commercial Developments Ltd.. Section 460(3) of the Municipal Government Act states that "*A complaint may only be made by an assessed person or a taxpayer.*" The 2013 Property Assessment Notice, issued by the City of Calgary, identifies the assessed person as Bowness Commercial Developments Ltd.

(2) It was agreed by the parties that there could be certain exemption issues connected to this roll number. However, these are being withdrawn by the Complainant. This aspect was acknowledged by the Respondent.

(3) Having dispensed with the preliminary issues, the merit hearing proceeded.

Property Description:

(4) The property consists of an undeveloped land parcel situated on the north side of Bowness Road, in the Bowness neighbourhood of NW Calgary. The parcel size is 0.48 acres. The parcel is paved, and is used for unrestricted parking by the surrounding commercial retail properties (some of which are owned by the Complainant), as well as the public at large.

Issues / Appeal Objectives

(5) The single issue brought forward by the Complainant is market value, stating that the current assessment does not properly reflect the market value of the site. Currently, the property is assessed using the sales comparison approach. The assessment calculates to \$46.25 per s.f. The Complainant argues that, for reasons that will be elaborated on in this decision, the assessment should be at a nominal value.

Complainant's Requested Value:

- (6) \$1,000

Board's Decision:

- (7) The assessment is reduced to \$1,000.

Legislative Authority, Requirements and Considerations:

(8) This Board derives its authority from section 460.1(2) of the Municipal Government Act (MGA), being Chapter M-26 of the revised statutes of Alberta.

(9) Section 2 of Alberta Regulation 220/2004, being the Matters Relating to Assessment and Taxation Regulation (MRAT), states as follows;

"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"

(10) Section 467(3) of the Municipal Government Act states;

"An assessment review board must not alter any assessment that is fair and equitable, taking into consideration

(c) the assessments of similar property or businesses in the same municipality."

(11) For purposes of this Complaint, there are no extraneous requirements or factors that require consideration.

Preamble

(12) Prior to 1956, the subject parcel was owned by Bruce Morris, William J. Treanor, and Ambris Baldwin. On July 25, 1956, the subject, together with other lands in the vicinity, were transferred to the Town of Bowness for the sum of \$1.00 paid to the transferors by Bowness Commercial Developments Ltd. The land was essentially gifted to the Town. Within the transfer document, the following clause appears;

".....subject to the following restrictions and reservations being condition precedent to this transfer, which restrictions and reservations are and shall be considered to be covenants running with the land, that is to say:

(a) The said lands shall be used for the purpose only of a public parking area for motor vehicles of all kinds and for underground sewerage disposal"

(13) A Restrictive Covenant protecting the condition precedent was registered against the Certificate of Title on December 27, 1956. At some time between 1956 and 1994, this Restrictive Covenant was "dropped" from the Certificate of Title, either inadvertently or otherwise. The Restrictive Covenant was reinstated by Judges Order No. 941198332 on July 28, 1994.

(14) During 1960, the Complainant requested that the Town of Bowness pave the subject site. Rather than pave the site, the Town entered into an agreement with the Complainant, wherein the Complainant would maintain the land in exchange for a lease interest in the land.

(15) On June 18, 1963, the Town of Bowness entered into a 20 year lease agreement with Bowness Commercial Developments Ltd. The lease refers to the prior 1960 agreement, and was pre-dated to October 1, 1960. Relevant clauses are as follows;

"Yielding and paying therefor yearly and in every year during the term hereby granted unto the lessor the clear annual rent of one dollar (\$1.00)....."

The lessee covenants with the lessor as follows;

2.(f) Use the demised premises for the sole and exclusive purpose of automobile parking and permit all persons to enter upon the demised premises and use same for the parking of automobiles.

3. The lessee shall have the right and privilege without the consent of the lessor being first obtained, of

assigning this lease or subletting the demised premises, to the person, firm or corporation from time to time being the successors, heirs or assigns of Bowness Commercial Developments Ltd.

7. *This lease shall be renewable for succeeding terms of twenty (20) years, on the same terms and conditions, upon the written application of the lessee at least 30 days before the expiration of each current term.*

(16) On September 30, 1964, the Town of Bowness was annexed into the City of Calgary. The land was transferred to the City of Calgary by virtue of the annexation.

(17) The Complainant is the owner of adjacent retail properties that apparently derive some benefit from the available parking on the subject.

Position of the Parties

(18) The Complainant takes the position that the market value of the subject land is adversely impacted by the conditions of the lease and the Restrictive Covenant, and for that reason, there should only be a nominal value applied.

(19) The Complainant argues that the applicant / assessed person is not in occupation of the land, nor does the applicant have possession of the land, or the legal right of occupation of the land.

(20) The Respondent argues that the subject is no different than a typical parking lot within the City that is assessed using the sales comparison approach. No market data was presented in support of the assessed land value.

(21) During testimony, the Respondent conceded that the site was impacted by the use restriction to parking only, and recommended that the assessment be reduced by 25 per cent, which is the universal per cent adjustment for land use restrictions in the City. The change would reduce the assessment to \$727,500.

Board's Reasons for Decision:

(22) The Board is cognizant of the fact that the 25 per cent adjustment for land use restriction refers not necessarily to parking, but moreso to limitations imposed on proposed development of a parcel, which is not the issue in this instance.

(23) The applicant has no right to exclusive occupancy under the lease. The lease restricts the use of the subject to public parking. The document does not even protect a single parking stall for the exclusive use of the lessee.

(24) There is no guarantee, at any time, that parking of any kind will be available to the applicant, or the retail customers of the applicant, in the adjoining retail shopping centres.

(25) From the Board's perspective, the lease confers on the lessee the obligation to maintain the site, with no corresponding benefits in return.

(26) About the only certainty regarding the subject is that the use, for now and the foreseeable future, is restricted to public parking, protected by a Caveat that was reinstated by a Judges Order in 1994.

(27) The lease is silent on the question of whether or not the applicant has the right to charge for public parking on the site. Up until now, the applicant has not charged a fee, either because an agreement with the landowner that precludes paid parking, or because paid parking is an unenforceable proposition.

(288) One of the principles of real estate valuation states that value is created and maintained in accordance with the utility to which a property can be put, or the utility that a property provides to its owner.

(29) The existing assessment is presumably based on comparables of commercial land that are developable in a conventional sense, in accordance with the provisions of the appropriate land use guidelines. The subject, partly because of the existing lease contract, but more so because of the restrictive covenant, is simply not legally developable, and therefore provides very limited utility to any particular individual. No doubt, parking is a benefit to the surrounding community. But the benefit is not one that can be measured in a monetary sense, much like a public park or other institutional uses.

(30) Typically, land of this nature can be valued on the basis of its alternative highest and best use. However, even a hypothetical alternative highest and best use must meet certain criteria. Any hypothetical use must be probable, and not only possible. An alternative highest and best use for the subject might be physically possible, and it might be capable of providing an economic return. However, it must also be legally permissible, and the restrictive covenant precludes the legal possibility. Legally, no physical development of any kind can take place on the subject land until such time as the restrictive covenant is removed. And, at this stage, that does not appear as a probability. As such, the subject is likely to remain as a parking lot for which there is no open, competitive market.

(31) On the surface, at least, it would appear that the comparables used to establish the assessment for the subject might not be comparable because of planning reasons, and potential utility. The Board has no way of knowing, since none were presented in evidence.

(32) Having said that, this Board concludes that the Complainant has presented sufficient evidence to cast doubt on the accuracy of the existing assessment. The onus, therefore, has shifted to the Respondent to prove the assessment is correct in light of the subject's obvious impediments. The Respondent has failed to do so.

DATED AT THE CITY OF CALGARY THIS 29 DAY OF November 2013.



Jerry Zezulka

Presiding Officer

APPENDIX "A"

**DOCUMENTS PRESENTED AT THE HEARING
AND CONSIDERED BY THE BOARD:**

NO.	ITEM
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| 1. | C1 Complainant Disclosure |
| 2. | R1 Respondent 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 MGB Administrative Use Only

Decision No. CARB 72807P/2013			Roll No. 040021925	
<u>Subject</u>	<u>Type</u>	<u>Issue</u>	<u>Detail</u>	<u>Issue</u>
CARB	Land	Market Value	Lease and restrictive covenant	N/A.