

NOTICE OF DECISION NO. 0098 194/12

AEC International Inc.
1120, 10201 Southport Rd SW
Calgary, AB T2W 4X9

The City of Edmonton
Assessment and Taxation Branch
600 Chancery Hall
3 Sir Winston Churchill Square
Edmonton AB T5J 2C3

This is a decision of the Composite Assessment Review Board (CARB) from a hearing held on August 13, 2012, respecting a complaint for:

Roll Number	Municipal Address	Legal Description	Assessed Value	Assessment Type	Assessment Notice for:
1193390	10060 Jasper Avenue NW	Plan: 8221723 Lot: A Plan: 8221723 Lot: B Plan: 8221723 Lot: C	\$174,871,500	Annual New	2012

This decision may be appealed to the Court of Queen's Bench on a question of law or jurisdiction, pursuant to Section 470(1) of the Municipal Government Act, RSA 2000, c M-26.

cc: SCOTIA PLACE TOWER III INC

Edmonton Composite Assessment Review Board

Citation: AEC International Inc. v The City of Edmonton, 2012 ECARB 259

Assessment Roll Number: 1193390

Municipal Address: 10060 Jasper Avenue NW

Assessment Year: 2012

Assessment Type: Annual New

Between:

AEC International Inc.

Complainant

and

The City of Edmonton, Assessment and Taxation Branch

Respondent

DECISION OF
Warren Garten, Presiding Officer
Judy Shewchuk, Board Member
Darryl Menzak, Board Member

Preliminary Matters

[1] Upon questioning by the Presiding Officer, the parties present indicated no objection to the composition of the Board. In addition, the Board Members indicated no bias with respect to this file.

[2] The parties giving evidence before the Board were sworn in or affirmed.

[3] A preliminary matter was brought forward before the Board prior to the Respondent's submission of their evidence package (exhibit R-1). At issue was the request by the Respondent to increase the assessment to \$175,498,000. The resulting request was due to a requested change in the retail rental rate used in the original assessment.

[4] The Complainant argued that the retail rate was not brought up as an issue by the Complainant, and as such, the Respondent could not bring this "new issue" before the Board in their evidence package.

[5] The Board found that in order to properly consider the Net Operating Income (NOI), which has formed the basis of the assessment, the Board is required to complete a thorough analysis of all income related to the NOI of the property. As a result, the Board is required to review all rental rates and associated income.

[6] The Board found in favour of the Respondent, and heard the evidence by the Respondent pertaining to retail rental rates. This is in compliance with Section 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.

[7] The Respondent also argued that the evidence pertaining to the amount of shell space in relation to vacant space brought forward by the Complainant in the rebuttal should not be heard by the Board since this is new evidence being disclosed.

[8] The Board found that under section 9(2) of MRAC, the CARB must not hear any evidence that has not been disclosed in accordance with section 8.

[9] The Board found in favor of the Respondent and will not hear any evidence pertaining to the amount of shell space in the subject property.

Background

[10] The subject property is a large downtown high-rise office and retail complex comprising of four buildings including Tower 1 - 395,707 square feet (sq.ft.); Tower 2 – 179,571 sq.ft.; Tower 3 – 31,286 sq.ft.; and Tower 4 (Scotia Bank) 45,136 sq.ft.

[11] This appeal relates solely to Tower 1 and 2 and has one owner (Morguard Investments). Total assessed building area is 651,700 sq.ft. Tower 1 includes 13,944 sq.ft. of retail space, 454 sq.ft. of storage space and 318 parking stalls. Tower 2 is comprised entirely of office space.

[12] Tower 3 and Tower 4 are not subject to this appeal.

Issue(s)

[13] There are four main issues pertaining to this assessment appeal.

1. Did the Income Approach to Value as used in the 2012 City of Edmonton assessment arrive at the correct market value of the subject property as required in the legislation?

Sub Issues:

- i. Is the vacancy rate used correct?
 - ii. Cap Rate used – **withdrawn by Complainant**
 - iii. Office rental rate used – **withdrawn by Complainant**
 - iv. Structural allowance percentage used – **withdrawn by Complainant**
 - v. Is a retail rental rate increase, as requested by the Respondent, fair and equitable?
2. Is the exemption amount used by the City of Edmonton Assessment Branch correct?
It was agreed by both the Complainant and the Respondent to change the exemption amount from 16.108% to 20.297% for the period January to June 2011, and from 16.108% to 19.802% for the period July to December 2011.
 3. A request was made by the Complainant for a special reduction to recognize the lack of value for tenant improvements. Is this a fair and reasonable request?

4. A request was made by the Complainant for costs related to potential circumvention of sections 305(5) of the MGA. This pertains to the Respondent's requested increase in retail rental rates as used in the calculation of the NOI for the 2012 assessment.

Legislation

[14] The *Municipal Government Act* reads:

Municipal Government Act, RSA 2000, c M-26

s 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;

s 289(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

s 305(5) If a complaint has been made under section 460 or 488 about an assessed property, the assessor must not correct or change the assessment roll in respect of that property until a decision of an assessment review board or the Municipal Government Board, as the case may be, has been rendered or the complaint has been withdrawn.

s 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.

s 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.

Matters Relating to Assessment and Taxation Regulation AR 220/2004

s 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.

s 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.

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

(a) market value, or

s 5(1) The valuation standard for improvements is

(b) for other improvements, market value.

s 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.
MGA 305(5)

Matters Relating to Assessment and Complaints Regulation AR 310/2009

s 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:

(b) the respondent must, at least 14 days before the hearing date,
(i) disclose to the complainant 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 respondent intends to present at the hearing in sufficient detail to allow the complainant to respond to or rebut the evidence at the hearing, and

s 9(2) A composite assessment review board must not hear any evidence that has not been disclosed in accordance with section 8.

s 10(3) A time specified in section 8(2)(a), (b) or (c) for disclosing evidence or other documents may be abridged with the written consent of the persons entitled to the evidence or other documents.

Position of the Complainant

[15] The Complainant submitted an evidence package of 290 pages marked Exhibit C-1, as well as a rebuttal of 153 pages marked Exhibit C-2.

[16] The Complainant had requested that the exempt portion of the subject be revised from 16.108% to 17.538%. The Respondent recommended that the exempted portion for the period from January to June 2011 be revised to 20.297% and for the period from July to December 2011 to 19.802%. The Complainant accepted the Respondent's recommendation.

[17] The Complainant argued that here there is a conflict between mass appraisal and market value. Mass appraisal is an appropriate method of assessment for large numbers of similar properties. However, the subject is an atypical property due to its high vacancy rate. The Complainant submitted that the most appropriate assessment is market value as calculated on page 225 of C-1.

[18] In support of his position, the Complainant referred to *Mountain View (County) v. Alberta (Municipal. Government Board)*, 2000 ABQB 594 where the court said:

the Board was entitled in law to reduce the land assessment under review to market value as it did, notwithstanding that the resulting value was not determined by the use of mass appraisal

(Exhibit C-2, page 83).

VACANCY & NET OPERATING INCOME ISSUE

[19] The Complainant submitted that the vacancy rate of the office portion of the subject has been habitually higher than the typical vacancy of 8%. The Complainant asked the Board to increase the vacancy rate to 12% to better reflect the actual vacancy.

[20] The Complainant further submitted that the vacancy rate impacts the (NOI), which is calculated at \$10,023,408 while the actual NOI, according to the operating statement, is \$9,344,169.

[21] In support of his position the Complainant referred to operating statements, rent rolls, and quarterly reports to produce the following:

Quarter	Actual Vacancy Rate	Assessed Vacancy Rate	Actual NOI per Quarterly Reports	Actual NOI per Operating Statements	NOI as calculated by Respondent
3 rd 2008	8.9		4,879,100		
4 th 2008	8.8		7,091,972	6,868,553	
3 rd 2009	7.0	3.0	2,757,777		
4 th 2009	7.0	3.0	10,234,131		
1 st 2010	7.9	5.0 or 4	901,274		
2 nd 2010	8.6	5.0 or 4	4,592,645		14,190,906
4 th 2010	13.7	5.0 or 4	9,528,676	9,344,169	
1 st 2011	15.6	8.0	2,210,058		
2 nd 2011	17.4	8.0	4,564,235		10,023,408
3 rd 2011	19.7	8.0	5,292,226		
4 th 2011	20.0	8.0	9,071,009	8,348,869	

[22] The Complainant's witness, Glen Scheuerman, testified that the reasons for a higher than typical vacancy in the subject include a dark and dated lobby; tinted windows; the amount of window space in relation to wall space being less than typical; the location at the end of the line of the pedway system; and dated improvements. The cost of changing the granite in the lobby of the subject would be economically impracticable. He further stated that the vacancy issue has not been corrected.

[23] In response to the Respondent's questions, Mr. Scheuerman conceded that of the Respondent's comparables (Exhibit R-1, page 51):

- a. the ATCO and Brownlee Buildings and the Telus Plaza are not on pedways;
- b. Telus Plaza and Canadian Western Bank are of a similar age to the subject;
- c. all have brighter lobbies.

[24] The Complainant criticized the Respondent's vacancy study (Exhibit R-1, page 28) as being calculated by an incorrect method. He stated that the Respondent had erred in removing from the calculations vacancies over 20% and 0% vacancies.

SHELL SPACE & TENANT IMPROVEMENTS

[25] The Complainant stated that there was approximately 100,000 square feet of "shell space"; that is, space without tenant improvements. The Complainant stated that tenant improvements are generally between \$25 and \$45 per square foot, and that a typical tenant improvement in Edmonton around valuation date was \$25 per square foot. Accordingly, the Complainant submitted that the assessment should be reduced by \$2,500,000 to reflect this lack of leasehold value. In support of his position, the Complainant referred to a Composite Assessment Review Board (CARB) decision, CARB 2009/2010-P, where a CARB found that:

When an occupancy permit has been issued and cannot be occupied because the tenant improvements have not been installed, the area is not complete and should not be fully 100% assessed.

(Exhibit C-1, page 289)

[26] The Complainant also referred to MGB 049/11 (Keynote) (Exhibit C-2, page 64) where the MGB said that:

in order for a prospective tenant to occupy the unoccupied rental space, further refinements, improvements and permits would be required. Therefore, this portion of the building was not complete and should not have received a supplementary assessment.

(Exhibit C-2, page 73).

[27] The Complainant's witness, Glen Scheuerman, testified that a landlord would consider the marketability of rental space and then decide whether to remove existing tenant improvements. He further stated that demolition or removal of the improvements is a capital cost.

ONUS

[28] The Complainant stated that since he had made a prima facie case the burden of proof had shifted to the Respondent. As support for his position the Complainant referred to CARB 0656/2012-P where the CARB stated that:

the Complainant had raised a supported optional valuation of the subject property. The onus was then on the Respondent to convincingly support the land valuation.

(Exhibit C-1, page 232)

[29] The Complainant also referred to CARB 0657/2012-P where the CARB stated that:

the Complainant had raised a supported optional valuation of the subject property. The onus was then on the Respondent to convincingly support the income approach valuation.

(Exhibit C-1, page 238)

RESPONDENT'S REQUEST FOR INCREASE IN RENTAL RATES

[30] The Complainant objected to the Respondent's request to increase the rental rates for the Commercial Retail Units (CRUs) up to 1,000 square feet from \$13.50 to \$20.00 per square foot, and for CRUs between 1,001 to 3,000 square feet from \$14.50 to \$19.00 per square foot. The Complainant submitted that this was a new issue and that section 5 of the Complaint Form states that "specific" issues must be identified. As support for its position the Complainant referred to Capilano (Exhibit C-2, pages 23-39) where the Court of Queen's Bench of Alberta granted the Applicant (Complainant) leave to appeal on the issue of whether the CARB was correct in increasing the assessment.

[31] The Complainant submitted that if the Respondent was allowed to increase the rental rates for the CRUs, then the rates requested were too high. The rental rates for comparable properties were as follows:

Building	Sub-class	CRU up to 1,000 square feet	CRU for 1,001 to 3,000 square feet
Commerce Place	AA	\$19.25	\$18.50
Manulife Place	AA	\$16.75	\$16.00
Canada Place	AA	\$14.00	\$13.50
Subject assessment	AH	\$13.50	\$14.50
Requested assessment	AH	\$20.00	\$19.00

The Complainant's equity comparables showed that the requested rates were higher than those of any of the comparables, all of which were higher class buildings than the subject.

COSTS

[32] The Complainant made an application for costs on three grounds related to the Respondent's request to increase the rental rates (Exhibit C-2, pages 5-6). The Complainant stated that the Respondent was attempting to present new issues; attempting to present evidence in support of a new issue; and causing unreasonable delays to the hearing process.

[33] The Complainant stated that if the Respondent abandoned its attempt to increase the assessment the Complainant would abandon its cost application.

MISCELLANEOUS

[34] The Complainant stated that there is an offer in place to purchase Tower III for \$7.1 million and that the assessment for that tower is \$7,590,500.

Position of the Respondent

[35] On pages 15-16 of exhibit R-1, the Respondent presented a summary of their responses to the issues on the assessment complaint form. These included:

1. Recommended exemption increase from 16.108% to 20.297% for January to June and 19.802% from July to December, 2011;
2. City assesses the fee simple and not the lease fee;
3. City places little weight on 3rd party market data;
4. Chronic vacancy is applied when the average vacancy for 3 years is more than 10% (with the subject being 9.56%);
5. Vacancies/shell space are temporary and do not form part of the calculation;
6. Inducements are already taken into consideration in the rental rates;
7. Rental rates have been applied equitably;
8. The City does not account for renovations in the calculations;
9. Structural allowances are 2% over the economic life of the subject even in years when there are no costs incurred;
10. Vacancy cost shortfall is derived from total vacancy applied in the calculations;
11. Every year the City calculates a new assessment independent of prior years; and
12. City is recommending the retail rental rate increases based upon the results of a retail rate study of "A" buildings.

[36] The Respondent stated that mass appraisal was used in the preparation of the assessment, and also provided definitions for various common appraisal terms such as typical rent, effective net rent, stabilized vacancy, collection loss, vacancy space shortfall, common area maintenance (CAM), (NOI), actual and typical rental income (exhibit R-1).

RENTAL RATES

[37] The Respondent took the position that the assessment should be increased as the retail rental rates used to prepare the assessment for Tower I were too low. The Complainant objected to the Respondent requesting an increase to the assessment based on an increase to the CRU rental rates in C-2 because the rental rates was not an issue on the initial complaint. The Respondent was of the opinion that under the income approach to value the analysis of the income and expenses associated with income producing property should not be limited. The retail rental rates are part of market value and this is not a new issue. The Respondent also stated that the Board has a legislative mandate to increase or decrease an assessment and that the Board should write this in the decision.

[38] The Respondent provided evidence from Court of Queen's Bench of Alberta decision between Ag Pro Management Services and various municipalities (exhibit R-2) where the issue

arose as to the appropriateness of a Board to increase an assessment under appeal. The decision suggested that the Board should consider the ‘the reasonableness of the decision’ as stated in the court decision and that the Board should ensure the correctness and fairness in their decision. The Respondent also stated that it is the Board’s mandate to ‘get market value right’ and that the Respondent cannot make a MGA s.305 change after the Board has made its decision. The Respondent referred to the “doctrine of finality”.

[39] In response to the Complainant’s argument that the issue of the retail rental rates was not a specific issue addressed within section 5 of the complaint form, nor in the Complainant’s disclosure, the Respondent cited two decisions: *Edmonton (City) v. Edmonton Composite Assessment Review Board*, ABQB 154 and (cite) and *Edmonton v. Melcor Developments Ltd. et al.* (unreported, Action No. 1103 18120, April 4, 2012) with respect to section 5 on the complaint form, reasons for complaint. The Respondent felt that although “what is wrong with the assessment” may be on the complaint form and identified as specific issues, this does not discard all other issues from being addressed. The assessment is the issue under complaint and the retail rental rates make up part of that assessment.

[40] The Respondent referred to the pro forma for the entire property on pages 10-13 of R-1, and presented a new pro forma on page 14 indicating the revised retail rental rates for Tower I. The new pro forma indicated that the assessment for the property should increase to \$175,498,000 as requested by the Respondent.

[41] The Respondent provided a table (exhibit R-1, p.25) indicating recent rental transactions in the downtown area in class AH buildings. The time-adjusted median rent is \$18.70 and the average is \$18.87. The average for the last 6 months leading up to the valuation date is \$19.56 while the median for the same time period is \$20.00.

VACANCY AND NET OPERATING INCOME

[42] The Respondent stated that the NOI calculated in determining the value for the property is based on typical lease rates and not actual lease rates as used by the Complainant. However, the Respondent did not disagree with the quarterly reports provided by the Complainant.

[43] The City derives their vacancy rates from RFIs received. The vacancy study calculation uses an average from the vacancy statistics received. Any vacancies over 20% are not used in the calculation nor are the vacancies that are stated as zero. The 5.7% weighted average was calculated with weight placed on the areas of buildings.

[44] The subject does not meet the Respondent’s definition of a building suffering from chronic vacancy. The property would have to average above 10% vacancy for three years with at least two consecutive years being above 10 % vacancy. A chart of the actual vacancies (not weighted) for Tower I and II for the last three years was presented. (R-1, p.27) The Respondent indicated that there was no chronic vacancy with only 2011 being above 10%. Under questioning the Respondent stated that the 10% policy is relied upon from an equity standpoint, and that the subject has a higher than typical vacancy rate, but not chronic. The Respondent has increased the vacancy allowance in office space over the past three years from 3 or 4% in 2009 to 5% in 2010 and to 8% in 2011.

[45] The Respondent presented their 2009, 2010 and 2011 RFIs for the property indicating vacancy rates of 5.23%, 7.91% and 15.54% respectively. This indicates an average of 9.56% for the three years. Under questioning the Respondent stated that typically RFIs are received in

March or April and need to be analyzed prior to the valuation date and that the vacancy rates are not reflective of July 1.

[46] The Respondent stated that only the HSBC Bank Canada Building downtown received a chronic vacancy allowance. For the office area the vacancy allowance is 15% versus 8% for all other buildings and a CRU vacancy allowance of 20 % versus 5% for other office buildings.

SHELL SPACE

[47] The Respondent's position with respect to vacant space and vacant shell space was that vacancies are temporary, and that it is a management decision to remove improvements and strip them to the shell. The Respondent also objected to the Complainant bringing before the Board information regarding the amount of shell space in the vacant spaces. This information was not disclosed to the Respondent prior to the hearing and should not be brought before the Board.

MISCELLANEOUS

[48] The Respondent's downtown cap rate for three years was presented on page 43 of R-1. The average cap rate is 6.19 and the median cap rate is 6.38. On pages 44-49 are sales that were used in the study and support the cap rate used by the Respondent.

[49] The Respondent stated that they do not adjust for tenant inducements, or where free rent is provided by the landlord, or cash payments are made to the tenants as incentives to the tenant.

[50] The Respondent took the position that GAPP (General Accepted Accounting Principles) should not be used when analyzing income/expense statements as it includes all expenses. Appraisers/assessors generally do not use GAPP as it may understate the income.

Decision

[51] It is the decision of the Board to reduce the 2012 assessment for Towers 1 and 2 from the current assessment of \$154,205,792 to a total of \$141,261,500. The resulting total for roll number 1193390 will change from \$174,871,500 to a revised amount of \$161,927,500

[52] It is the decision of the Board to increase the exemption as requested by both the Respondent and the Complainant from 16.108% to 20.297% for the period January to June 2011, and from 16.108% to 19.802% for the period July to December 2011.

Reasons for the Decision

[53] Is the vacancy rate correct? The Board placed little weight on the Respondent's chart R-1 page 28 as this vacancy study was not dated, and excluded buildings with chronic vacancy such as HSBC among others. The Board determined that an appropriate study would be as at December 31 and or average during a 12 month period. Further the board could not determine the average "weighted" vacancy in the subject's class of AH.

[54] The Board considered the position of the Respondent and the city's policy of allowing a property with chronic vacancy if the property has over 10% vacancy in 2 consecutive years and an average of 10% vacancy over a three year period.

[55] The Board notes that pursuant to s 289(2)(a) “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”.

[56] The therefore board performed a number of tests in order to determine whether or not the property suffered from chronic vacancy as highlighted in paragraphs 57 to 60 below.

[57] The Board found that in order to determine the vacancy rate as at December 31st of each year, information was extracted from C-1 pages 135, 162 and 213. This is information from the Complainant’s internal reports. The actual vacancy reported was 7.0% as at December 31, 2009, 13.7% as at December 31, 2010 and 20.0% as at December 31, 2011. The result proved two consecutive years above 10% and an average of 13.57% over 3 years.

[58] As a further test, the Board found the average vacancy on all quarterly reports submitted by the Complainant for 2009, 2010 and 2011 on C-1 pages 118, 135, 144, 153, 162, 177, 186, 204 and 213 to be 11.76%

[59] As a final test the Board found that by taking 2008 vacancy information into account from C-1 pages 86 and 102 that the average vacancy over a 4 year period to be 11.04%

[60] For this issue regarding the chronic vacancy, the Board found in favor of the Complainant.

[61] Is a retail rental rate increase fair and equitable? The Board found by examining the Respondent’s evidence R-1 page 52, and upon questioning, that the retail leasing activity chart included other buildings that were not located in the downtown assessment district.

[62] The Board therefore determined that there was insufficient evidence of comparable leases to warrant a change to the retail rental rate for the calculation of the assessment. The board found in favor of the Complainant regarding this issue of increasing retail rental rates.

[63] Is the Complainant’s request for a special reduction due to vacancy as it related to the cost of tenant improvements for “shell” space fair and reasonable? The Board found that this problem is not atypical for the subject as it occurs throughout the City

[64] In addition, the Board could not find sufficient evidence that the vacancies were in fact “shell” space.

[65] The Board found insufficient evidence that tenant improvement costs were in fact \$25.00 per square foot and that the current office rental rate applied to the assessment had already taken this into account.

[66] The Board found in favor of the Respondent regarding this issue and has denied the allowance of a special deduction for “shell” space.

[67] The Complainant’s request for costs related to potential circumvention of sections 305 (5) of the MGA. This pertains to the Respondent’s requested increase in retail rental rates as used in the calculation of the NOI for the 2012 assessment. The Board found that in order to adequately determine whether or not the Net Operating Income is reasonable, all factors need to be evaluated.

[68] The Board found that simply looking at one or two specific input numbers related to the NOI does not allow the Board to determine market value of a property.

[69] The Board considers that s 305 properly construed only precludes an assessor from correcting or making a change to an assessment after an appeal has been filed. It does not prevent an assessor from requesting an increase from the Board, which as contemplated by the section can only be made after a decision has been rendered by the Board.

[70] Accordingly, the Board has denied this request by the Complainant for costs associated with the request for an increase in the retail rental rate.

Dissenting Opinion and Reasons

[71] There was no dissenting opinion.

Heard commencing August 13, 2012.

Dated this 13th day of September, 2012, at the City of Edmonton, Alberta.

Warren Garten, Presiding Officer

Appearances:

Brock Ryan, AEC International Inc.

Glen Scheuerman

Patrick Comrie

for the Complainant

Cam Ashmore, City of Edmonton, Law Branch

Darren Davies, City of Edmonton, Assessor

Moreen Skarsen

Tracy Ryan

for the Respondent