EDMONTON
Assessment Review Board

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NOTICE OF DECISION NO. 0098 79/12

Altus Group
780-10180 101 ST NW
EDMONTON, AB T5J 3S4

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 June 26, 2012, respecting a complaint for:

Roll Number	Municipal Address	Legal Description	Assessed Value	Assessment Type	Assessment Notice for:
9937133	8901 112 Street NW		$2,488,500	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: GOVERNORS OF THE UNIVERSITY OF ALBERTA

Edmonton Composite Assessment Review Board

Citation: Altus Group v The City of Edmonton, 2012 ECARB 1294

Assessment Roll Number: 9937133
Municipal Address: 8901 112 Street NW
Assessment Year: 2012
Assessment Type: Annual New

Between:

Altus Group

Complainant

and

The City of Edmonton, Assessment and Taxation Branch

Respondent

DECISION OF
Peter Irwin, Presiding Officer
Lillian Lundgren, Board Member
Ron Funnell, Board Member

Preliminary Matters

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

Background

[2] The subject property is located in the HUB Mall & Residence at the University of Alberta and is the portion of the building that has been demised into 70 Commercial Retail Units (Hub Mall). The Commercial Retail Units (CRUs) include the University's School of Business, the Faculty of Extension, Campus Security, a variety of restaurants and medical facilities, and other general retail, as well as space for its sister institution, Athabasca University. Given the Respondent's recommendation that a portion of the building should be exempt from taxation, the dispute before the Board in this hearing is whether the balance of Hub Mall should be exempt from taxation.

Issues

[3] The issue in this hearing is whether the subject property meets the requirements for exemption from taxation under section 362(1)(d)(i) of the *Municipal Government Act*, RSA 2000, c M-26 (the *Act*).

a) Is the subject property "held" by the Board of Governors of the University?

b) Is the subject property "used in connection with educational purposes"?

Legislation

[4] The *Municipal Government Act* reads:

> ***Municipal Government Act,* RSA 2000, c M-26**
>
> 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 of business in the same municipality.
>
> **Exemptions for Government, churches and other bodies**
>
> s 362(1) The following are exempt from taxation under this Division:
>
> (d) property other than a student dormitory, used in connection with educational purposes and held by any of the following:
>
> (i) the board of governors of a university, technical institute or public college under the *Post-secondary Learning Act*;

Position of the Complainant

[5] The Complainant stated that they are accepting the assessed value of the subject property and that the sole issue is its tax exemption status, in accordance with section 362 of the *Act*.

[6] The Complainant submitted that there are two distinct criteria for an exemption under the *Act*.

1. Is the subject property "held" by the Board of Governors of the University?

[7] With respect to the first criterion, the Complainant submitted that the subject property is held by the Governors of the University of Alberta as the fee simple owners and that they are the assessed "person" of record, according to the City's tax roll, as evidenced by the Assessment Notice and Land Title documents.

[8] Three decisions were included in support of the "held by" requirement:

[9] In *Cypress (County) v. Alberta (Municipal Government Board)*, [2000] A.J. No. 1336 (Q.B.), the court found that if a property is owned by a party, it is "held by" that party. Madam Justice Rowbotham stated at paragraph 45:

> Given the principles of statutory interpretation discussed above I conclude that the better interpretation of the word "held" is the broad one. In other words, the property is exempt from assessment where it is either owned or physically controlled by the Crown. Here, there is no question that the Crown owns the property. That is sufficient to trigger the exemption despite the fact that the Crown has entered into the Agreement with Ski Hill Ltd.

[10] In the case of *University of Alberta v. Edmonton (City of)*, 2005 ABCA 147 [*Aramark*], Madam Justice Fruman stated that the Municipal Government Board (MGB) had incorrectly relied on section 304(1)(c) in determining if the properties were "held" by Aramark, and stated in paragraph 12:

> Disregarding s. 304(1)(c), it would be equally logical to conclude that the University holds the properties for the purposes of s. 362(1)(d) because it holds title in fee simple.

[11] In *The Governors of the University of Alberta and City of Edmonton*, Board Order No. MGB 116/05, the MGB agreed with the Appellant's suggestion that evidence of ownership is demonstrative of the fact of the fact that a property is "held by" a particular body, stating on pages 8 and 9:

> The MGB believes that the above interpretation of the words "held by" best aligns with the purpose and intent of the legislation to bestow tax breaks on educational institutions. In accordance with the above interpretation, when property is owned, physically controlled or possessed by the Board of Governors of a University that property will be found to be "held by" the University. The University, in this case, owns the subject property and is the assessed person under section 304(1)(b) of the *Act*. The MGB does not believe that the Respondent's strict approach, wherein which property will be found to be "held by" the University only when the University has effective control of the property, accords with the purpose of the subject exemption provision of the *Act*.

2. Is the subject property "used in connection with educational purposes"?

[12] With respect to the second criterion, the Complainant submitted that the property is "used in connection with educational purposes" and that the courts have found that the intent of the exemption provisions relating to universities was to provide educational institutions with tax relief based on a broad interpretation of the relevant legislation. The Complainant provided seven decisions supporting that position.

[13] It was submitted that *Aramark* provides clear guidance on the principles to be applied when determining if the property is to be "used in connection with educational purposes" as per s 362(1)(d)(i) of the *Act*. Fruman J.A. commented on this component of the exemption test. The Complainant's description of her comments is quoted here from page 253 of the Complainant's submissions.

> She stated that it was not reasonable for the MGB to conclude that the food services at issue in that case were not used in connection with educational purposes due to the services being commercial, for-profit operations that compete with off-campus services. Madam Justice Fruman stated that the MGB's conclusion was "… unreasonable because commercial and educational purposes *are not mutually exclusive and a commercial service may be connected with educational purposes"* (italics are the Complainants). She

> went on to say that "It is also unreasonable to conclude that on-campus services that compete with off-campus services cannot be connected with educational purposes."
>
> Madam Justice Fruman also rejected the "necessary and integral part" test applied by the MGB as being too restrictive and not in accord with the plain wording of the *Act*. She concluded that the wording in section 362 (1)(d), "used in connection with educational purposes", is broader than the "necessary and integral part" test: "The requirement that the service be a "necessary and integral part of the provision of education" would only capture a subset of properties used in connection with educational purposes. … Perhaps a helpful consideration to apply is whether the properties are used `for the purpose of achieving [educational purposes] in a practical and efficient manner'".

[14] A passage from *St. John's-Ravenscourt School v. Metropolitan Corporation of Greater Winnipeg and Rural Municipality of Fort Garry* (1965) 49 D.L.R. (2d) 662 [*St. John's-Ravenscourt School*] stated at paragraph 11 that:

> Education is not a matter of a few hours a day. The ideal is to aim at covering all actions of the day. Education is imparted not only through academic teaching, but even through casual remarks in all phases of human activities, as the occasion may arise … Education takes place not only in the classroom, but on the playing fields, in the dining rooms and study-room.

[15] It was submitted that *Centenary United Church v. Regional Assessment Commission, Region No.19 et al*. (Re) 1979, 27 OR (2d) 790 (Co. Ct.) [*Centenary*] assists with interpretation of the words "used in connection with." That case established that a caretaker's apartment in the basement of the church building fell within the definition of a place of worship as "land used in connection therewith." In the last paragraph the court stated:

> "Every place of worship and land used in connection therewith" and therefore such premises are exempt from taxation for the year 1979.

[16] The Board was also referred to *Governors of the University of Alberta v City of Edmonton*, Board Order No. MGB 116/05, in which the MGB found (at page 14) that food services were in fact "used in connection with educational purposes". Further, the MGB stated that "…a broad interpretation of the term 'educational purposes' should be adopted. The MGB does not believe that it would be within the spirit and intendment of the *Act*, to carve out the food service areas from the broader tax exempt University and make it subject to taxation".

[17] The Complainant also referred the Board to *Assessors of Areas #1 and #10 v. University of Victoria*, 2010 BCSC 133, for the proposition found at paragraph 27 that a post-secondary, degree granting institution is not just a collection of learning facilities.

[18] The Board was also referred to *Carmelite Nuns of Western Canada v. Alberta (Assessment Appeal Board)* [1994] A.J. No. 595 (Q.B.) for the proposition that non-educational parts of a university can also be exempt from taxation. In this case, the Court stated, at paragraph 12: "exemptions are not lost simply because part of a building that would otherwise be exempt has an ancillary or incidental purpose in addition to the chief purpose of divine service, public worship or religious education".

[19] The Complainant submitted that exemptions are not lost simply because part of a tax-exempt property has an ancillary or incidental purpose. It was submitted that it is not within the intent or spirit of the *Act* to carve out areas for taxation from the broader, tax-exempt University.

[20] The Complainant further submitted that there is nothing in the legislation that removes "for profit" services from the exemption. The Complainant argued rather that commercial activities and educational activities are not mutually exclusive.

Position of the Respondent

[21] The Respondent submitted that the subject property has 70 areas within it that are fully taxable, based on the fact that the spaces are not used in connection with educational purposes, and instead operate on a strictly for profit basis with no connection to education other than they are found on campus. The Respondent recommended, following a review of the tenancy use of the spaces within Hub Mall, that the taxable space be reduced from 60,577 sf to 36,736 sf and recommends that 39.53% of this tax roll be exempt from taxation. The Respondent drew to the attention of the Board three listings of areas within Hub Mall: the All Areas listing, the Taxable Tenants listing and the Exempt Tenants listing. Examples of taxable tenants included A & W and Armstrong Law. Examples of exempt tenants include The Faculty of Arts and the Bookcellar.

[22] The Respondent agreed that the subject property is owned by the Board of Governors of a University. They argued that there are no restrictions on users of the subject property. The Respondent points out that there is a Light Rail Transit (LRT) stop and a major bus station attached to and beside the subject property. The Respondent argues that the LRT and bus depot serve both the student community and the wider residential demographic around the University making it more likely that this mall caters to more than just students.

[23] The Respondent informed the board that the Complainant previously entered into an agreement in 2006 with the City of Edmonton for the 2006 tax year only. The purpose was to distinguish between those areas that were tenanted and taxable within the mall, versus those areas that were tenanted but exempt.

[24] In answer to Board questions, the Respondent indicated that the agreement may be used as a guideline in determining future tax agreements; however, it will not have a binding effect on any future taxation year.

[25] The Respondent submitted that the City is in agreement with the Complainant that there are two requirements in the test for educational exemptions: (1) the property must be "held" by the educational body, and (2) it must be "used in connection with educational purposes".

1. Is the subject property "held" by the Board of Governors of the University?

[26] The Respondent indicated that there was no question that the property is owned by the board of governors of a university and conceded that simple ownership will *usually* mean that the property is also "held" by the owner, although fee simple ownership alone may not *always* mean that the property is held by the owner. For example, the owner may not hold the property if a lease effectively cedes all rights and obligations except the bare simple fee ownership to a tenant. The Respondent argued that without a review of the leases in place, it is impossible to determine whether enough control has been retained, however, on the assumption that the leases are standard commercial leases, the City assumes that they are standard and therefore the CRU areas are held by the board of governors by the University of Alberta.

2. Is the subject property "used in connection with educational purposes"?

[27] The Respondent submitted that the wording for an educational exemption in Alberta is *not* that the property is "held" in connection with educational purposes, but that it is *used* in connection with educational purposes, i.e. that the actual use of the property is vital in determining the exemption.

[28] The Respondent submitted that the CARB needs to be wary of adopting too broad a test which does not accord with the purpose of the legislation; that an interpretation that adopts an approach of exempting property simply because it is convenient for students or is a normal part of campus life would not correctly capture the intent of using the term educational purposes within this section.

[29] The Respondent submitted that it was vital to differentiate between the terms "educational purposes" and "university purposes". It was noted that Black's law dictionary defined "educational purposes" as:

> Term used in constitutional and statutory provisions exempting property so used from taxation, includes systemic instruction in any and all branches of learning from which a substantial public benefit is derived.

[30] Alternatively, the term "university purposes" has a considerably greater breadth and University life has many other components that are not educational. Reference was made to the B.C. case (*Assessors of Areas #1 and #10* v. *University of Victoria*, 2010 BCSC 133) in which comments were made about universities and the wide range of ancillary services they legitimately provide beyond the pure education function. The Respondent highlighted the differences in legislation wording between B.C. and Alberta with respect to exemptions. The Respondent additionally noted the different factual underpinnings the in B.C. case, particularly that the food operations chosen to be part of the campus society by the student society were giving students special discounts and were operating under leases structured to make it clear that they were catering to students.

[31] The Respondent discussed the case of *Aramark*, noting that it did not say that a CARB cannot look at both the actual use and whether a business is purely profit driven as factors in the determination of whether a portion of a property is exempt. Differences in the facts underlying the *Aramark* decision and the operational facilities in Hub Mall were identified; specifically, that the Aramark properties were geared toward students and the students were given cost breaks. By contrast, it was submitted that in Hub Mall, there was no evidence of operating in a similar fashion.

[32] The Respondent submitted that the test is not convenience to students. "If a Wal-Mart was on campus, students would use the Wal-Mart as convenient, but it would have nothing to do with education. Stores that sell condoms, lingerie, video games, tickets to concerts might be attractive for students, but have nothing to do with education."

[33] The Respondent submitted that partitioning the property into taxable and non-taxable pieces is not only allowed by the legislation but is required by it, in accordance with section 367 of the *Act*, and contemplates exempt portions:

> s 367 A property may contain one or more parts that are exempt from taxation under this Division, but the taxes that are imposed against the taxable part of the property under this Division are recoverable against the entire property.

[34] The Respondent submitted that the courts have determined that it is necessary to look at both the amount of space and the amount of time that the property is used for an exempt purpose, citing the leading case respecting the concept: *Ukrainian Youth Unity of General Roman Schucheych – Chuprynka* v. *Edmonton (City)* [1997] A.J. 921 (Q.B.).

[35] Further, the Respondent noted that the MGB (MGB 149/02) previously determined that the property is partly exempt and partly taxable. The Respondents also raise the fact that the Complainant entered into an agreement with the City of Edmonton in 2006 that some portions of the property and tenants were exempt and others taxable, although the Respondent acknowledged that that agreement was no longer in effect.

[36] In support of its position that the City must look specifically at the nature of the commercial venture as a factor in determining the connection to education, the Respondent noted some sample CRUs worthy of scrutiny:

a. A lawyer/ law firm that specializes in academic appeals may be different than a lawyer that specializes in criminal law (although both) would likely be frequented by students;

b. A daycare that only accepts students children is operating differently than a day home located on campus but accepts any children;

c. A student cafeteria that caters to student needs (and gives them price breaks) is operating differently from a fast food restaurant that is operating on campus no differently than it would if it were located off campus.

[37] The Respondent suggested that the CARB would have to ask how the CRU units are being used in connection with educational purposes with questions such as:

a. Is the business operated in the same manner as an off campus business?

b. Is the business strictly for profit or is there some sort of cost sharing scheme (as in Aramark)?

c. Is the business geared specifically towards students in terms of product line or services and does the product line or services have a connection to education?

d. Are price subsidies offered for students?

e. Are the profits being used to fund education in some way?

f. Are the terms of the CRU lease somehow geared towards student use?

[38] The Respondent pointed out that the subject property was used not just used by students, but also by staff as well as people living nearby. Further, with an LRT station nearby, the CRUs could be used by people with no affiliation to the University.

[39] The Respondent discussed the changes in legislation with respect to educational exemptions that have occurred over the years, noting that the *Municipal Government Act*, RSA 2000, c M-26, now requires a property to be not only held by the board of governors of a university, technical institute or public college under the *Post-secondary Learning Act*, RSA 2000 c P-19.5, but also the property must be used in connection with educational purposes. The Respondent submitted that this is **more restrictive** than the previous *Municipal Taxation Act*, RSA 1980, c M-31 which only required the property to be **held** by the board of governors.

[40] Upon questioning, the Respondent stated that, in determining which CRUs were exempt and which were taxable, a list of criteria was not used. The Board was directed to the list of Exempt tenants on page 102 (Ex. R-1). When they did the inspection, they looked at the purpose of the organization, the use of office space and storage space, and whether it was staffed by University personnel. They considered necessity versus convenience. If the same type of CRU was located out of Hub Mall, the one in Hub Mall would be taxable.

[41] In summation, the Respondent submitted that the breakdown of exempt vs. taxable areas that the City presented is both correct and fair and that those portions of the subject property that are purely commercial and/or not connected to educational purposes should remain taxable.

Decision

[42] The subject property is 100% exempt from taxation.

Reasons For The Decision

[43] The MGA provides exemptions from property tax for government, churches and other bodies provided certain requirements are met. The relevant legislation for the subject property is section 362(1)(d)(i).

> s 362(1) The following are exempt from taxation under this Division:
>
> (d) property, other than a student dormitory, used in connection with educational purposes and held by any of the following:
>
> (i) the board of governors of a university, technical institute or public college under the *Post-secondary Learning Act*;

[44] In determining whether the subject property is exempt from taxation under this section, the Board considered whether the property is "held by" the Board of Governors of the University and whether the property is "used in connection with educational purposes". The parties agree on the requirements to be met; however, the parties disagree on whether the requirement with respect to "used in connection with educational purposes" has been met by the Complainant.

1. Is the subject property "held" by the Board of Governors of the University?

[45] First, the Board considered whether the property is "held by" the Board of Governors of the University. The property is owned by the Board of Governors of the University of Alberta as shown on the Land Title Certificates and there is no evidence that the property owner ceded all rights and obligations except the bare fee simple ownership to a tenant. The Respondent assumed that the leases in place are standard commercial leases and that the Hub Mall is therefore held by the Board of Governors of the University. In the absence of any evidence that the leases are not

standard leases, the Board finds that the subject property is held by the Board of Governors of the University of Alberta.

2. Is the subject property "used in connection with educational purposes"?

[46] The main issue of this complaint is whether the subject property is used in connection with educational purposes.

[47] Since "used in connection with educational purposes" is not defined in the *Act*, the Board relied on court decisions to interpret this section of the legislation. The *Aramark* decision exempted from taxation space used by Aramark Services Ltd., a provider of food services to various university buildings. In this decision, Madam Justice Fruman stated:

> No Alberta precedent establishes a definitive test for "used in connection with" in the context of s. 362(1)(d). Perhaps a helpful consideration to apply is whether properties are used "for the purpose of achieving [educational purposes] in a practical and efficient manner".

[48] In this decision, the Court also stated that:

> … commercial and educational purposes are not mutually exclusive and a commercial service may be connected with educational purposes…..It is also unreasonable to conclude that on-campus services that compete with off-campus services cannot be connected with educational purposes.

[49] As well, the Court stated that the "necessary and integral part" test is too restrictive and does not accord with the plain meaning of the statute. Therefore, the Board will apply a more liberal test of whether the subject property is used for the purpose of achieving educational purposes in a practical and efficient manner.

[50] In addition, the decision in *Centenary* offers guidance in the interpretation of the words "used in connection with". This decision determined that the caretaker's apartment in the basement of a church was exempt from taxation. The Court found that the occupation of the apartment by the caretaker was for the purpose of achieving in a practical and efficient manner the accomplishment of the functions which are materially beneficial to the applicant and that the premises were used in connection with the place of worship. Clearly, the apartment was not used for the purpose of worship but was considered by the Court to be used in connection with the church.

[51] The Board considers the facts of *Centenary* to be similar to the case at hand. The subject property is comprised of CRUs in Hub Mall that are not necessarily used for educational purposes but are used in connection with the educational purposes of the university. The tenants of the CRUs provide services primarily to the students and faculty members. All of the services provided in Hub Mall enable the students and faculty members to attend to their daily needs while on campus, therefore, the test of "achieving educational purposes in a practical and efficient manner" is met.

[52] The Respondent separated the Hub Mall tenants into two groups: exempt tenants and taxable tenants. While the Respondent did not have a list of criteria to determine whether a tenant should be exempt, the Respondent did consider a number of factors. In answer to questions, the Respondent stated that the exempt status was based on considerations such as

whether the tenant space was staffed by the University, whether the service provided by the tenant is a necessity and whether the tenant would be taxable if located off-campus. The Respondent stated that the *Aramark* decision was not used to determine the exempt status of the tenants.

[53] In contrast to the considerations used by the assessment department to determine the exempt status of the Hub Mall tenants, Counsel for the Respondent provided the Board with a different list of questions the Board should ask. The Board finds these questions inconsistent with the test suggested by the Court in *Aramark*. The test suggested by the Court is whether the properties are used for the purpose of achieving educational purposes in a practical and efficient manner.

[54] It is useful to refer to the decision of *St. John's-Ravenscourt School* because it deals with the question of whether the residential facilities are used for educational purposes. The Court exempted the residential facilities from taxation and included these comments in the decision:

> Education is not a matter of a few hours a day. The ideal is to aim at covering all actions of the day. Education is imparted not only through academic teaching, but even through casual remarks in all phases of human activities, as the occasion may arise. Residence is part of the educational program: learning to live together and get along together. Education takes place not only in the classroom, but on the playing-fields, in the dining-rooms and study-rooms, which includes the rooms where resident pupils study and sleep.

[55] The Board is not bound by this decision; however, the Board finds these comments supportive of interpreting the statute very broadly. In the case of the subject property, the Board is also interpreting the provisions in section 362 (1)(d)(i) broadly.

[56] In light of the court decisions cited above, the Board finds that the subject property meets the requirements for exemption from taxation under section 362(1)(d)(i) of the *Act*.

Dated this 25th day of July, 2012, at the City of Edmonton, Alberta.

_____

Peter Irwin, Presiding Officer

Appearances:

Chris Buchanan
Kerry Reimer
for the Complainant

Cam Ashmore
Doug McLennan
Maureen Skarsen
for the Respondent