

IN THE MATTER OF A COMPLAINT filed with the Town of Okotoks Composite Assessment Review Board pursuant to the *Municipal Government Act*, Chapter M-26.1 (Act), Section 460(4).

BETWEEN:

Invesco Mortgage Inc. - Complainant

- and -

The Town of Okotoks - Respondent

BEFORE:

H. Kim, Presiding Officer
D. Rasmussen, Member
J. Tiessen, Member

These are complaints to the Town of Okotoks CARB in respect of property assessments prepared by the Assessor of the Town of Okotoks and entered in the 2011 Assessment Roll as follows:

Roll Number	0051910
Address	4 Winters Way
Assessment	\$4,858,000

This complaint was heard on the 19th day of October, 2011 at the Town of Okotoks Council Chamber at 5 Elizabeth Street, Okotoks, Alberta.

Appearing on behalf of the Complainant:

- Altus Group – C. Van Staden

Appearing on behalf of the Respondent:

- P. Huskinson

Attending for the CARB:

- L. Turnbull, ARB Clerk

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Preliminary Matters

The evidence and argument with respect to this complaint overlapped substantially with that for roll number 0051940, the adjacent property located at 2 Winters Way. With the concurrence of the Complainant's representative and the Respondent, the two complaints were heard together. However, as the property owners were different, the CARB agreed to issue separate decisions for each matter.

The Respondent raised two preliminary matters, with respect to late disclosure and an issue not identified on the complaint form.

Preliminary Issue 1: Late Disclosure

Respondent's Position

The Respondent presented a screen shot of an email from the Complainant's representative, showing that the Complainant's disclosure had been emailed at 2:58 pm on Wednesday, September 7, 2011. This was 42 days prior to the hearing date, however the Respondent stated that the disclosure was late and should not be considered by the CARB. The Respondent referred to *Alberta Regulation 310/2009 Matters Relating to Assessment Complaints Regulation* (MRAC) and the *Interpretation Act, RSA 2000 Chapter I-8* (Interpretation Act) to support his position. Section 8 of MRAC specifies disclosure requirements and time limits in which it must be done:

- 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:
- (a) the complainant must, at least 42 days before the hearing date,
 - (i) disclose to the respondent 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 complainant intends to present at the hearing in sufficient detail to allow the respondent to respond to or rebut the evidence at the hearing, and
 - (ii) provide to the respondent and the composite assessment review board an estimate of the amount of time necessary to present the complainant's evidence;

The Interpretation Act provides for computation of time:

- 22(3) If an enactment contains a reference to a number of days expressed to be clear days or to "at least" or "not less than" a number of days between 2 events, in calculating the number of days, the days on which the events happen shall be excluded.

MRAC states the complainant must disclose "at least" 42 days before the hearing date. Therefore the date of the hearing and the date of disclosure are to be excluded and the submission was required 43 days prior to the hearing, or on Tuesday September 6. Evidence not disclosed in accordance with Sec. 8 must not be heard by the CARB, and there is no discretion within the legislation. Sec 9 of MRAC states:

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

Therefore, the Respondent submitted that there was no evidence before the CARB and the complaint could not be heard. The Respondent noted that the Okotoks CARB had previously dealt with this issue in two hearings on September 29, 2011 with the same agent, and determined there was no evidence properly before it and dismissed the complaints.

Upon questioning, the Respondent stated that should the CARB decide to grant a postponement to allow the evidence to be entered, he was ready to proceed and a postponement would not be required in order to allow time to review the late evidence.

Complainant's Position

The Complainant stated that disclosure dates for their files are tracked on a spreadsheet, and it was an inadvertent mistake that it was entered as 42 days prior to the hearing instead of 43 days. Other jurisdictions specify the due dates, not the number of days prior to the hearing. The Complainant presented hearing notices from the Town of Cochrane, the Town of High River, and the City of Airdrie, all of which specify the dates on which the disclosures are due, and in each case the due date is 42 days prior to the hearing. The Town does not specify the due date and references 42 days before the hearing.

The Complainant filed a legal brief which referenced the direction provided by the Supreme Court of Canada in *Québec (Communauté Urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] S.C.J. No. 78 where it set out the following principles:

- a. The interpretation of tax legislation should follow the ordinary rules of interpretation;
- b. A legislative provision should be given strict or liberal interpretation depending on the purpose underlying it, and that purpose must be identified in light of the context of the statute, its objective and legislative intent: this is the teleological approach;
- c. This teleological approach will favour the taxpayer or the tax department depending solely on the legislative provision in question, and not on the existence of predetermined presumptions;
- d. Substance should be given precedence over form to the extent that this is consistent with the wording and objective of the statute;
- e. Only a reasonable doubt, not resolved by the ordinary rules of interpretation, will be settled by recourse to the residual presumption in favour of the taxpayer.

These principles are reflected in Sec 10 of the Interpretation Act which states:

10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

Therefore, the Act and MRAC must be interpreted in a way that allows the attainment of their objects. The goal of the legislation at issue is to provide taxpayers with a means to contest their assessments. The Complainant concedes that the disclosure was one day

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late according to the computation of time in the Interpretation Act, however dismissal of the complaint for that reason would be contrary to the purpose of the legislation. The Complainant presented a number of CARB decisions from other municipalities in which a postponement was granted in order to allow the Respondent time to submit disclosure. The Complainant suggested that in this situation, the Respondent had filed materials and the CARB could proceed with the hearing. In the alternative, the CARB had the ability to postpone the hearing to allow time for disclosure in accordance with MRAC.

Findings and Reasons

The relevant provision in MRAC is enacted pursuant to Sec. 484.1(i) of the Act:

484.1 The Minister may make regulations

...

- (h) respecting the procedures and functions of assessment review boards;
- (i) governing the disclosure of evidence in a hearing before an assessment review board;

MRAC specifies CARB procedures with respect to how and when evidence must be disclosed before hearings. It requires disclosure “at least 42 days” before the merit hearing and also indicates that the CARB “must not hear” evidence that has not been disclosed in accordance with this rule.

As noted by the Respondent, the Interpretation Act states that with respect to calculating days in an enactment, “at least” and “not less than” is to mean clear days, and “at least” 42 days means 43 days or more. Since the Complainant’s disclosure occurred only 42 days before the hearing, the Respondent argues that the CARB must not hear it, thus effectively eliminating the complaint.

The CARB finds the result requested by the Respondent would be extremely unfair. One reason is that in common English usage, “at least” 42 days means 42 days or more rather than the meaning given by the Interpretation Act. This is evidenced by the hearing notices issued by the City of Airdrie and the Towns of Cochrane and High River, in which the disclosure dates are specified and are in each case 42 days prior to the hearing dates. Thus, if the Respondent is correct, a complainant would suffer the extreme penalty of losing their right to appeal even though they complied with a common interpretation of the wording in the notice. A second reason is that in this case, the Respondent has suffered no prejudice owing to the “late” disclosure and is ready to proceed with the hearing; therefore the penalty to the Complainant would be far out of proportion to any prejudice suffered by the Respondent.

The CARB is of the opinion that MRAC cannot have intended such a harsh result. While one goal of the disclosure provisions is no doubt to encourage timely and full disclosure, their overall object is to ensure a fair hearing whereby the parties have an

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opportunity to be apprised of the case they have to meet. It cannot be the intent of the disclosure provisions to effectively take away a right of appeal where there is no surprise or unfairness in the disclosure process. In this case, the spirit and intent of the provisions has been observed and its object of fair disclosure fully achieved. The CARB concludes that the Complainant's actions amount to substantial compliance with Sec 8(2)(a), and that consequently its evidence is not barred pursuant to Sec 9(2). Accordingly, the CARB exercised its power under 464(1) of the Act to allow the evidence into the record.

464(1) Assessment review boards ... have power to determine the admissibility, relevance and weight of any evidence.

An alternative option would have been to grant a postponement to the following day or later to allow the Respondent the full 43 days:

15(1) Except in exceptional circumstances as determined by an assessment review board, an assessment review board may not grant a postponement or adjournment of a hearing.

A taxpayer should not lose his right to appeal due to a failure to refer to the Interpretation Act when reading the provisions of MRAC. The Interpretation Act applies broadly to all enactments, and in other applications the computation of time provisions may deal with whether an appeal had been filed in time. In such a situation the provisions provide an additional day and have the effect of expanding the rights of the taxpayer, consistent with the fair, large and liberal interpretation that best ensures the attainment of the objects of the Act. In the situation at hand, applying the provisions for calculating time to Sec 8(2)(a) of MRAC has the opposite effect: making the disclosure deadline one day earlier, and not allowing the complaint to be heard if the deadline is missed. This result is not consistent with the objects of the Act. The CARB considered this situation would qualify as exceptional circumstances that justify granting a postponement.

However, in this case, the CARB determined that a postponement was not necessary for the reasons noted above and that the hearing should proceed.

Preliminary Issue 2: Issue not identified on Complaint Form

Respondent's Position

The Respondent objected to the use of the income approach in determining the requested assessment. The original complaint form stated a number of grounds for appeal, but focused on land rates and there was no reference to rental rates or other income approach parameters. MRAC states:

9(1) A composite assessment review board must not hear any matter in support of an issue that is not identified on the complaint form.

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The issue of income approach argued in the Complainant's disclosure was not identified on the complaint form and cannot be considered by the CARB.

Complainant's Position

The Complainant stated that the complaint form is completed based on information from the client taxpayer, prior to examining the assessment in detail. The issues listed are general, and intended to cover potential arguments to be made in the detailed disclosure. While land value had been listed as an issue, it was later determined that it would not be contested for the subject property.

The Complainant disputed that the income approach had not been identified as an issue. The complaint form lists, among others, the following:

Issues and Grounds

The assessment of the subject property is in excess of its market value for assessment purposes
The municipality has applied the incorrect valuation methodology when calculating the assessed value of the subject property

The rental rates and income approach parameters argued in the evidence are contained in the stated issues, and therefore this issue is properly before the CARB.

Findings and Reasons

The CARB finds that the issues on the complaint form noted by the Complainant encompass the use of the income approach and argument of appropriate rental rates. The complaint form is intended to identify the reasons for filing a complaint in the first instance, and it is not reasonable to require more than a general level of detail. The legislation provides a minimum of 28 days prior to the hearing for the Complainant to prepare disclosure at which time the detailed arguments and evidence would be expected to be prepared. Therefore the CARB will hear argument in support of the income approach and rental rates.

Property Description and Background:

The subject property is a 58,575 SF improvement constructed in 2007 on a 2.63 acre parcel of land zoned Aerodrome District (AD). It is assessed on the income approach based on 55,200 SF warehouse/airplane hangar at \$8/SF, 3375 SF office finish at \$15/SF less 7% vacancy and \$5/SF vacancy shortfall. The resulting income was capitalized at 9.0% to arrive at the total assessment of \$4,858,000.

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Issue

A number of issues were listed in the complaint form; however the only issue argued at the hearing was whether the correct income parameters were applied in calculating the value of the subject.

CARB'S Findings in Respect of the Issue

Complainant's Position

The subject property was constructed in 2007 as an airplane hangar with office space for tenants with small aircraft that would use the adjacent runway at Okotoks Air Ranch. The building has been vacant since construction, and the property was placed into receivership. In July 2010, the mortgage holder took title to the property. The building is for sale or lease, and was listed for \$3,900,000 in December 2010. It was reduced to \$3,700,000 in early 2011 and further reduced to \$3,490,000 in July 2011. There has been little activity with respect to the listing, and no offers pending.

With no leasing activity, the Complainant submitted that not only is the building not capable of achieving the rental rates applied by the Respondent, a further adjustment for chronic vacancy should be applied. The Complainant presented rents for industrial properties in Calgary that rent for far less than the rate applied to the subject, ranging from \$5.25 to \$7.80/SF with a median of \$6.25. The rents achieved in the property immediately adjacent to the subject, a smaller building with aircraft hangar that is fully occupied, is also far less than the subject. The occupants of that building recently renewed the lease in May 2010 at an overall rate of \$4.50/SF. The specific rates for the office and airplane hangar were stated but the Complainant requested they be left out of the record for confidentiality reasons. The Complainant stressed that while this was a renewal, it would have reflected market, as the subject vacant building was immediately adjacent to the tenants' space and available for lease, creating competition for the tenancy. The adjacent property has 5.5% vacancy, \$6.50/SF operating costs and 9.5% cap rate applied to its assessment. Using those income parameters, the indicated value of the subject property is \$2,465,100.

Alternatively, the \$6.25/SF rental rates from Calgary could be applied with a higher vacancy rate of 15% to adjust for chronic vacancy. Using those income parameters, and the \$6.50/SF operating costs and 9.5% cap rate applied to the adjacent property, the indicated value of the subject property is \$2,822,300.

The assessed value is in excess of its market value as of the valuation date. It is chronically vacant, there is insufficient demand for airplane hangar uses and there are limited alternative uses which can be located in the subject property. The income approach indicates the property value is a maximum of \$2,822,300. The current listing price at \$3,490,000 is the maximum of what the value of the property could have been

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at the valuation date. Based on similar rents for competing properties, the value is \$2,465,100. Accordingly, the Complainant requested that the assessment be reduced to \$2,822,300.

Respondent's Position

The Respondent presented an orthophotograph showing the location of the subject. The Okotoks Air Ranch was conceived as an aviation-centred residential development around the 3400 ft. landing strip. The subject property was built in 2007 at an actual construction cost of \$3.7 million. The Complainant had presented later listings when the asking prices were reduced, but neglected to mention the August 2010 listing, closer to the valuation date, at \$4.2 million.

The Respondent presented comparable assessments for industrial property to support the rates used in the assessment. In particular, one comparable, a storage facility assessed at \$10/SF main and \$5/SF mezzanine has no sewer and water, compared to the subject which is fully serviced. There was no complaint in 2011 on that property, suggesting to the Respondent that the assessment reflected market value. The Respondent conceded that the subject property was vacant; however AD allows a number of uses, including commercial schools, eating, drinking and entertainment establishments, offices and recreational facilities. While it does not specifically allow industrial or storage uses, the Respondent suggested that applications could be made to permit such uses. The Respondent noted the high quality construction, large clear spans and attractiveness of the office pods. The \$3.7 million construction cost and the August 2010 listing at \$4.2 million support the assessed value.

Findings and Reasons

An unsold listing demonstrates only that the market value is less than the asking price. It does not indicate how much less but cannot be more. The August 2010 listing price clearly shows the assessment is greater than market value at that time. The cost of construction in 2007 is not relevant to its market value in 2010; the subject property has been vacant since completion and is clearly a failed project.

The subject is not comparable to typical industrial properties. AD does not allow industrial uses, and vehicular access to the property is through residential roads which would not support industrial traffic. In response to questioning, the Respondent presented the uses permitted in General Industrial District (I-2), the zoning for the industrial property presented as a comparable. I-2 allows a much greater range of permitted uses, including manufacturing, warehousing and storage yards as well as a greater range of discretionary uses, including all of the discretionary uses permitted in AD other than Aerodrome Service Shops.

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Therefore, notwithstanding the appearance of the property as a new and well-built industrial building, rents achieved by industrial uses in I-2 districts are irrelevant to the rents that might be achieved by an airplane hangar in the AD district. The CARB notes that the potential alternate uses suggested by the Respondent were all discretionary uses, and a very large eating, drinking and entertainment establishment accessible only through residential roads might be expected to generate significant community opposition and with no reasonable likelihood of approval.

Under the circumstances, the CARB found that only rental rates for the approved uses at time of construction - aircraft hangar and offices, would be appropriate to value the property. The only evidence of rental rates for the aircraft hangar use was the rental rate for the adjacent property at \$4.50/SF. A single lease may not be reflective of typical rates; however in this case it is the only one available. It was contracted in May 2010, close to the valuation date, and the CARB is satisfied that it is a reasonable indicator of typical market rents in the municipality for aircraft hangar space.

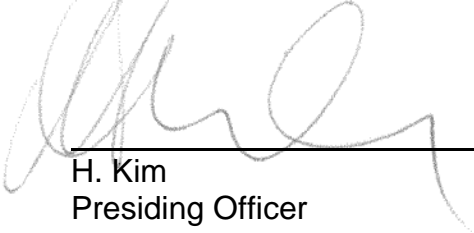
The Complainant did not provide evidence to support the request changes to the rental rate for the office space. The office space rental rate applied should be typical rates in the Town for similar space, and there was no evidence presented that the \$15/SF rate did not represent typical rents. The requested 15% allowance for chronic vacancy was likewise not supported by evidence. With respect to the operating cost and cap rate, while the CARB recognizes that the adjacent property is assessed at different values for operating costs and cap rate, it is a much older and smaller building. Therefore there was no convincing evidence to support a change in the income valuation parameters other than the rental rate for the airplane hangar. Accordingly, the CARB determined that the subject should be assessed based on a rental rate for the airplane hangar at \$4.50/SF with all other parameters unchanged.

Board's Decision

The complaint is allowed, in part, and the assessment is reduced to \$2,862,000.

It is so ordered.

Dated at the Town of Okotoks in the Province of Alberta, this 27th day of October 2011.



H. Kim
Presiding Officer

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Appendix A – Documents presented at the Hearing and considered by the CARB

- C1 Complaint form, Roll #0051910 - 4 Winters Way, Okotoks
- C2 Complaint form, Roll #0052340 - 2 Winters Way, Okotoks
- C3 Complainant's Evidence Submission, Roll #0051910 - 4 Winters Way, Okotoks
- C4 Complainant's Evidence Submission, Roll #0052340 - 2 Winters Way, Okotoks
- R5 Assessment Brief, Roll #0051910 - 4 Winters Way, Okotoks
- R6 Assessment Brief, Roll #0052340 - 2 Winters Way, Okotoks
- C7 Complainant's Legal Submission regarding preliminary matter of late submission
- C8 Decision - Calgary CARB 1279/2011-P (postponement to allow evidence)
- C9 Decision - Calgary CARB 2285/2011-P (postponement to allow evidence)
- R10 Decision - Calgary CARB 1471/2011-P (Respondent evidence late, not considered)
- R11 Decision - Calgary CARB 0927/2010-P (dismissal due to late evidence)
- R12 Decision - Okotoks CARB Order #0238/06/2011-J (dismissal due to late evidence)
- R13 Decision - Okotoks CARB Order #0238/05/2011-J (dismissal due to late evidence)
- R14 General Industrial District (I-2) List of Permitted and Discretionary Uses, P. 147 Okotoks Land Use Bylaw

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An appeal may be made to the Court of Queen's Bench in accordance with the Municipal Government Act as follows:

470(1) 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.

470(2) 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).*

470(3) 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.*