

Edmonton Composite Assessment Review Board

Citation: Windermere Residents Association v The City of Edmonton, 2012 ECARB 1380

Assessment Roll Number: 10123964
Municipal Address: 2004 Warry Link SW
Assessment Year: 2012
Assessment Type: Annual New

Between:

Windermere Residents Association

Complainant

and

The City of Edmonton, Assessment and Taxation Branch

Respondent

DECISION OF
Peter Irwin, Presiding Officer
Brian Carbol, Board Member
John Braim, Board Member

Preliminary Matters

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

Background

[2] The subject property is a Community Recreational Facility and adjoining lands, constructed circa 2009 and located in the Windermere subdivision of the City of Edmonton. The building has a gross building area of 1,298 square feet. The property has a surface area of 42,900 square feet. The subject property is an amenity to the Windermere Residents Association and contains parkland on which a clubhouse, tennis courts/basketball court/hockey rink and swimming pool have been built.

Issue

[3] The ultimate issue before the Board is whether the subject property is exempt from taxation. In order to make a decision on this issue, the Board examined the following sub-issues:

1. Does the Windermere Residents Association (the “Complainant”) meet the requirements for the definition of a “residents association”, as outlined in the Community Organizations Property Tax Exemption Regulation, Alta. Reg. 281/1998 [COPTER] s.13(e.1)? Specifically:

- a) Is the Complainant a “non-profit organization”?
- b) Does the Complainant require membership for residential property owners in a specific development area?
- c) Does the Complainant secure its membership fees by a caveat or encumbrance on each residential property title?
- d) Is the Complainant established for the purpose of managing and maintaining the common property, facilities and amenities of the development area for the benefit of the residents of the development area?
- e) Is the Complainant established for the purpose of enhancing the quality of life for residents of the development area or enhancing the programs, public facilities, or services provided to the residents of the development area?
- f) Is the Complainant established for the purpose of providing non-profit, sporting, educational, social, recreational or other activities to residents of the development area?

2. Does the Windermere Residents Association meet the requirements for tax exempt status pursuant to s. 14.1 of COPTER? Specifically:

- a) Is the subject property owned and held by and used in connection with a residents association?
- b) Is the subject property used in the operation of a professional sports franchise?
- c) For more than 40% of the time that the property is in use, are the ages of the majority of those participating in activities 18 years or older?

3. Is the subject property restricted more than 30% of the time under s. 7 of COPTER, on the basis of:

- a) Race, culture, ethnic origin or religious belief?
- b) Ownership of property?
- c) The requirement to pay a fee other than a minor service or entry fee?
- d) The requirement to become a member of an organization?

4. Are any of the above restrictions in place for safety and liability reasons or to avoid contravention of a law? (COPTER s. 7(3)).

Legislation

[4] The *Municipal Government Act* reads:

Municipal Government Act, RSA 2000, c M-26 [MGA]

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. 460(5) A complaint may be about any of the following matters, as shown on an assessment or tax notice:

(j) whether the property or business is exempt from taxation under Part 10.

[PART 10]

s. 362(1) The following are exempt from taxation under this Division:

(n) property that is

(ii) held by a non-profit organization and used solely for community games, sports, athletics or recreation for the benefit of the general public,

and that meets the qualifications and conditions in the regulations and any other property that is described and that meets the qualifications and conditions in the regulations;

[5] The applicable regulation is the ***Community Organization Property Tax Exemption Regulation, Alta. Reg. 281/1998 [COPTER]***, which reads:

s. 6 When section 362(1)(n)(i) to (v) of the Act or Part 3 of this Regulation requires property to be held by a non-profit organization, community association or residents association is defined in section 13 for the property to be exempt from taxation, the property is not exempt unless

(a) the organization or association is a society incorporated under the *Societies Act*

s. 7(1) In this Regulation, a reference to the use of property being restricted means, subject to subsections (2) and (3), that individuals are restricted from using the property on any basis, including a restriction based on

(a) race, culture, ethnic origin or religious belief,

(b) the ownership of property,

(c) the requirement to pay fees of any kind, other than minor entrance or service fees, or

(d) the requirement to become a member of an organization.

(2) The requirement to become a member of an organization does not make the use of the property restricted so long as

- (a) membership in the organization is not restricted on any basis, other than the requirement to fill out an application and pay a minor membership fee, and
- (b) membership occurs within a short period of time after any application or minor fee requirement is satisfied.

(3) Not permitting an individual to use a property for safety or liability reasons or because the individual's use of the property would contravene a law does not make the use of the property restricted.

s. 13(e.1) "residents association" means a non-profit organization that requires membership for residential property owners in a specific development area, that secures its membership fees by a caveat or encumbrance on each residential property title and that is established for the purpose of

- (i) managing and maintaining the common property, facilities and amenities of the development area for the benefit of the residents of the development area,
- (ii) enhancing the quality of life for residents of the development area or enhancing the programs, public facilities or services provided to the residents of the development area, or
- (iii) providing non-profit sporting, educational, social, recreational or other activities to the residents of the development area.

s. 14.1(1) Property that is owned and held by and used in connection with a residents association is exempt from taxation.

(2) Despite subsection (1), the following property owned and held by and used in connection with a residents association is not exempt from taxation under section 362(1)(n) of the Act:

- (a) property to the extent that it is used in the operation of a professional sports franchise;
- (b) property if, for more than 40% of the time that the property is in use, the majority of those participating in the activities held on the property are 18 years of age or older;
- (c) property if, for more than 30% of the time that the property is in use, the use of the property is restricted within the meaning of section 7 as modified by subsection

(3) For the purposes of subsection (2) (c), limiting the participation in activities held on a property to persons of a certain age does not make the use of the property restricted.

[6] A large portion of the applicable portions of COPTER is the result of a recent amendment to that regulation, which came into force on January 1, 2012 (*Community Organization Property Tax Exemption Amendment Regulation, Alta. Reg. 204/2011*).

Position of the Complainant

[7] The Complainant maintained that the subject property should be 100% tax exempt.

[8] The Complainant argued that amendments to COPTER were intended to exempt Residents Associations from taxation. In support of this position, the Complainant provided

- a. evidence from *The Standing Committee on Private Bills of the Legislature of Alberta* (Exhibit C-1, pages 425-428) in which the taxation of residents associations was discussed;
- b. a copy of a PowerPoint presentation by the Government of Alberta, (C-1, pages 422-424); and
- c. correspondence between Harvey Fairfield, City Assessor, City of Calgary and Steve White, Executive Director, Assessment Services, Government of Alberta (C-1, pages 418-421) in which Mr. White indicated that “a residents association would only be considered as restricting use if they do not permit use to all residents within the development area.”

[9] The Complainant defined the development area as the neighbourhood commonly known as Upper Windermere, excluding the Windermere Ridge properties to the west, and the properties zoned multifamily and mixed use, adjacent to Windermere Way (C-2 and C-1, page 21). Property owners in the Windermere Ridge area have been given the opportunity for optional membership with access to the amenities for a fee of \$1080 per year. It is anticipated that this may be extended to all property owners in Windermere Ridge if a majority wish to become members. No similar option has been made available to owners/tenants of multi-family properties on the eastern edge of the defined development area.

[10] In testimony, the Complainant’s witness stated that the Windermere Residents Association, which was incorporated in 2007 and was granted title to the subject property in 2009, will eventually be governed by directors elected from the property owners in the development area, likely when the development is 75% sold. At present, the Windermere Residents Association governance consists of two directors currently employed by the developer of the area, Beaverbrook Windermere Ltd.

[11] The Complainant argued that the Residents Association provisions in COPTER should be interpreted in the broad sense. The Complainant cited the Supreme Court of Canada case of *Quebec (Communaute urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] S.C.J. No. 78, which stated that “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” (Exhibit C-1, page 11).

[12] The Complainant submitted that the correct way to interpret s. 7 of COPTER is to consider whether use is restricted between members that live within the applicable development area. Following this interpretation, if use was restricted between members within the area, then the property would no longer qualify for an exemption (C-1, page 14). The Complainant maintained that no such restrictions exist within the development area.

[13] The Complainant provided a flow chart to illustrate how the subject property successfully meets the test for tax exempt status pursuant to the MGA and COPTER. Supporting evidence was provided for the tests in the chart including the Windermere Residents Association Articles of Incorporation, Articles of Association, programming schedules, encumbrances evidencing membership fees, and fee schedules for City of Edmonton recreational facilities (C-1 page 221-413). The Complainant concluded that the subject property should be tax exempt (C-1, pages 15, 16).

[14] Regarding the “general community”, the Complainant’s position was that a neighbourhood is comprised of several thousand people so, is not restricted in the sense meant by the legislation. The Complainant added that this position is supported by MGB Order 076/10 (C-1, page 17). The Complainant further argued that the Windermere Residents Association provides benefits to the general public as not only are there opportunities for anyone in the City to use the subject properties, the population of the community is larger than most towns.

[15] The Complainant further maintained that the Articles of Association and the Programming/Event Guides illustrate that:

- Usage is not restricted by ownership of property as family members and guests of members use facilities and tenants are permitted to be full members when the owner transfers membership to the tenant. There is currently one tenant member.
- The membership fee is like a condo fee and is minor when compared to fees charged for similar services by the City. The Complainant stated that the fees charged through encumbrances ranging from \$550.00 to \$1080.00 (C-1, page 382). These compare favorably to City of Edmonton family passes (2011) which ranged from \$1167.00 to \$1782.00, annually. The Complainant also responded to the Respondent’s description of a “minor fee” as being \$5.00 to \$10.00 per visit, by illustrating that if a family of four made only four visits per month at this \$5.00 “minor fee” the family would pay \$960.00 annually. This figure is within the range of the encumbrance fees charged by the Complainant.
- The property is used for over 60% of the time by a majority of persons under the age of 18 years with no restrictions based on race, culture, ethnic origin or religious belief.

[16] In support of the contention that the bulk of users of the subject property’s amenities are after school users and young families with two to three children, the Complainant included a chart documenting pool usage for July, 2012 (C-1, page 383). The Complainant also presented a rink schedule showing that the majority of arena programs are intended for families and children (C-1, page 381). Only 8 of the 77 weekly hours were available for adult skating. In addition to the statistical information provided for 2011 children’s skating lessons and 2012 information for children’s swimming lessons (C-1, page 382), the Complainant provided further anecdotal evidence estimating that the usage of the amenities is mainly by those under 18 years of age and that probably 75% of the users are under 18 years of age.

[17] In testimony, the Complainant emphasized that approximately 50% of the membership fees collected through the encumbrance were utilized to maintain common property within the development area. These included flower beds, lawns, walkways and some snow removal, all of which provided a net benefit for the larger community.

[18] The Complainant noted that the only restrictions to use of the subject property were for safety and legal consideration and included key fob access, pool and rink rules and restricted hours of operation.

[19] The Complainant concluded that there is ample evidence to show that the Windermere Residents Association and the subject property meet all of the conditions in COPTER (C-1, pages 15, 16).

[20] The Complainant requested the Board to grant the subject property 100% exemption from taxes pursuant to s. 14.1 of COPTER.

Position of the Respondent

[21] It is the recommendation of the Respondent, the City of Edmonton, that the exemption percentage for tax roll account 10123964 remain at 0%.

[22] The Complainant applied for and was denied tax exemption under COPTER. The Respondent stated that the reason for denial was that the use of the property is restricted under Section 14(2)(c) and 7 of COPTER. Further, more than minor entrance or service fees are required to be a member of the Windermere Residents Association. The Respondent also contended that for more than 40% of the time that the property was in use, the majority of those participating in the activities held on the property were 18 years of age or older.

[23] In support of its position, the Respondent referred to a Composite Assessment Review Board (CARB) Order, from a hearing held May 22, 2012 (Exhibit R-1, pages 28-40). This decision was respecting the subject property's 2011 assessment, in which the Board found:

- That the subject property was held not for the benefit of the general public but rather was held primarily for the benefit of the members, tenants and guests of the Windermere Residents Association.
- That signage on the property stated that it was for the exclusive use of Members and their guests.
- That there was insufficient evidence to determine whether or not the subject property was used by a majority of persons under the age of 18 years old at least 60% of the time.
- That the subject property is restricted based on the ownership of property.
- That even though being a 'Tenant Member' "does not require ownership, tenant's access is dependent on provision of the access by an 'Owner Member'".

[24] Further to this, the Respondent produced Calgary CARB Order 2257/2011-P (Exhibit R-1, pages 41 to 64). This CARB also found that property held by residents associations was not held for the benefit of the general public.

[25] The Respondent provided the Upper Windermere Home Owners brochure as evidence of the restriction to access based on membership (Exhibit R-1, pages 88, 89.) Also provided was an

Upper Windermere FAQ document stating that the yearly fee is to provide a community owned private leisure centre that requires access passes.

[26] The Respondent argued that the fees charged by the Windermere Residents Association are not minor. When questioned about what would constitute a minor fee, the Respondent indicated that a fee of \$5.00-\$10.00 could be considered minor. While the Respondent agrees that a fee can be charged, it was emphasized that not just any fee can be charged, just a minor fee. The Respondent indicated that the Windermere Residents Association charges up to \$1080.00 per year.

[27] The Respondent argued that the subject property may not be “held by” the Windermere Residents Association in that Beaverbrook Windermere Ltd. physically controls the operation of the Association instead of the residents. The Municipal Government Board Order 090/08 was offered in support of this position (R-1, page 100).

[28] In summary, the Respondent emphasized that the Complainant did not meet the onus required to show that a 100% tax exempt status is appropriate for the subject property. Specifically:

- There was no evidence presented to show that the encumbrances were registered.
- That there was insufficient evidence to determine whether or not the subject property was used by a majority of persons who are under the age of 18 years old, at least 60% of the time.
- The Respondent argued that the 2012 taxation year is based on the operation of the Residents Association in 2011. This was supported by MGB Order 100/01 (R-3, carried forward from Roll 9984373.) The Respondent noted that while some data for the year 2011 was collected, this data was not complete and that the Complainant could have collected a more complete data set but did not do so.
- With regard to letters written between the City of Calgary and the Government of Alberta Assessment Department, the Respondent urged the Board to consider these only as opinions about the Regulation and to rely on the Regulation itself for guidance in making its decision.
- The Respondent contended that the Windermere Residents Association restricts access to homeowners within the development area with the exception of the Windermere Ridge lots on the west side of the development area.
- The Respondent argued that, since the Windermere Ridge properties are not subject to an encumbrance and are not part of the development area, the validity of the Complainant servicing a specific development area is questioned, particularly when the ability to access the amenities through membership is not offered to property owners on the east side of the development area.
- The Respondent argued that access to the amenities is non-transferable.

Decision

[29] The 2012 assessment of the subject property is confirmed at \$753,500, 100% taxable. The Windermere Residents Association does not qualify for tax exempt status pursuant to the provisions contained within the *Community Organization Property Tax Exemption Regulation, Alta. Reg. 281/1998*.

Reasons for the Decision

[30] In order to arrive at a decision the Board examined the sub-issues of the case.

1. Does the Windermere Residents Association (the “Complainant”) meet the requirements for the definition of a “residents association”, as outlined in the Community Organizations Property Tax Exemption Regulation, Alta. Reg. 281/1998 [COPTER] s.13(e.1)? Specifically:

a) Is the Complainant a “non-profit organization”?

[31] The Board finds that the subject property is owned by a non-profit organization, the Windermere Residents Association. This is evidenced by a certificate of incorporation under Part 9 of the *Companies Act*, R.S.A. 2000, c. C-21 (C-1, page 386) and testimony by the Complainant to that effect. This was not disputed by the Respondent.

b) Does the Complainant require membership for residential property owners in a specific development area?

[32] The Board finds that membership in the Windermere Residents Association is mandatory for all homeowners within the development area outlined by the Complainant (C-2).

c) Does the Complainant secure its membership fees by a caveat or encumbrance on each residential property title?

[33] The Board finds evidence and testimony implying that an encumbrance is in place on the title of all properties within the development area for the Windermere Residents Association. This evidence is contained in the Articles of Association for the Windermere Residents Association (C-1, page 265-272). The Board is satisfied that this documentation indicates that membership fees are secured by encumbrances on homeowners' certificates of title.

[34] The Board notes that an area on the west side of the development area and an area bordering the east side of the development area have not been included as part of the development area for the Windermere Residents Association. While property owners in the west area, known as Windermere Ridge, have been granted the option to become members of the Windermere Residents Association there are currently no plans to include the east area. The Board views this as a contradictory position for the Windermere Residents Association to take.

d) Is the Complainant established for the purpose of managing and maintaining the common property, facilities and amenities of the development area for the benefit of the residents of the development area?

[35] The Board finds that the Windermere Residents Association has been established for the above purposes according to its Memorandum of Association (C-1, page 238).

- e) *Is the Complainant established for the purpose of enhancing the quality of life for residents of the development area or enhancing the programs, public facilities, or services provided to the residents of the development area?*

[36] The Board finds evidence of the above in the Windermere Residents Association Memorandum of Association, as well as the Windermere Description of Amenities (C-1, pages 222 and 237.)

- f) *Is the Complainant established for the purpose of providing non-profit, sporting, educational, social, recreational or other activities to residents of the development area?*

[37] The Board finds evidence of the above in the description of amenities in the Upper Windermere Leisure Centre Background, and the Windermere Residents Association Memorandum of Association (C-1, pages 222 and 382).

Conclusion

[38] The Board concludes that the Complainant is a residents association within the meaning of the definition contained at s. 13(e.1) of COPTER.

2. *Does the Windermere Residents Association meet the requirements for tax exempt status pursuant to s. 14.1(2) of COPTER? Specifically:*

- a) *Is the subject property owned and held by and used in connection with a residents association?*

[39] The Board accepts that the subject property is owned by the Windermere Residents Association as evidenced by the Certificate of Title, showing land was transferred to the Association on January 21, 2009 (R-1, page 93.) The Board is also satisfied that the subject property is used in connection with the Windermere Residents Association.

[40] The Board finds that the subject property is not “held by” the Windermere Residents Association. During the hearing, the Board heard testimony to the effect that the two Windermere Residents Association directors are employees of the developer. Currently, no residents who are members of the Windermere Residents Association have any responsibility for the Association, as there have been no elections to date. This lack of control is also evidenced by the Windermere Management Agreement (C-1, pages 225-230.) The Board notes that one individual has signed the Windermere Management Agreement, representing both the Windermere Residents Association and Beaverbrook Windermere Ltd. Therefore, since the developer is “running the show” so to speak, the Board finds that the subject property is not in fact ‘held by’ the Windermere Residents Association.

- b) *Is the subject property used in the operation of a professional sports franchise?*

[41] There is no evidence that the subject property is used in the operation of a professional sports franchise as defined in COPTER.

- c) *For more than 40% of the time that the property is in use, are the ages of the majority of those participating in activities 18 years or older?*

[42] While the Board finds evidence on enrolments in some programs (e.g. skating, swimming) there is insufficient evidence to support this requirement for the Windermere Residents Association for the 2012 taxation year. No evidence was presented with respect to total usage in terms of participants or breakdowns of age groupings using the facilities in 2011. The Board notes that that MGB Order 100/01 (R-3, carried forward from Roll 9984373) clearly states that the taxation year is based on the previous year; therefore the decision on this issue must be based on evidence from the year 2011. The conclusion of the Board on this sub issue is that the Complainant has not met this requirement under COPTER.

3. *Is the subject property restricted more than 30% of the time under s. 7 of COPTER, on the basis of:*

a) *Race, culture, ethnic origin or religious belief?*

[43] The Board finds no evidence of restrictions on the use of the subject property based on race, culture, ethnic origin or religious belief as per COPTER s. 7.1

b) *Ownership of property?*

[44] The Board finds that the subject property is restricted more than 30% of the time based on the ownership of property. As noted in the Upper Windermere FAQ (R-1, page 90), in order to obtain a fob to access the leisure centre the homeowner will “need to provide a copy of [their] Certificate of Title.” Each homeowner is entitled to one key fob.

[45] The Board also has concerns with the apparent inconsistencies in the COPTER regulation whereby the legal tests under ss. 7 and 14 may be interpreted as contradictory to the definition of a residents association. Upon reviewing the legislation, the Board is not persuaded that the Complainant’s interpretation of the legislation is correct. The Board recognizes that, while evidence relating to the intention of the lawmaker can be of assistance, in this case, the plain meaning of COPTER is primary. The Board finds that the Complainant’s evidence with respect to intention, namely, the correspondence from Municipal Affairs and the transcript of *The Standing Committee on Private Bills of the Legislature of Alberta*, are not evidence of the Legislature or the Minister’s intention, and are not of assistance when interpreting the residents association provisions in COPTER.

c) *The requirement to pay a fee other than a minor service or entry fee?*

[46] The Board finds that the subject property is not restricted based on the requirement to pay fees other than minor entrance or service fees.

[47] While the Board recognizes that a fee is required by all property owners within the Windermere Residents Association and that this mandatory fee is enforced through an encumbrance on each property, it gives more weight to the arguments of the Complainant regarding the nature of the fee. In particular, the Board was persuaded by the Complainant’s arguments that compared the fees of the Windermere Residents Association, ranging from \$550.00 to \$1080.00, to City of Edmonton family recreation passes, ranging from \$1167.00 to \$1782.00 per year. The Board accepts the argument made by the Complainant that a fee described as minor by the Respondent at \$5.00 per visit would result in an annual fee of \$960.00 if a family of four used a facility only four times in a month. The Board finds this to be in the range of the fees charged by the Residents Association and therefore considers the Windermere Residents Association fees to be minor in this context.

d) The requirement to become a member of an organization?

[48] The Board finds that the subject property is restricted for more than 30% of the time on the basis of the requirement to become a member of an organization. Signage on the gates to the property read "Private Leisure Centre" (R-1, page 22, 23). It is clear to the Board that one must be a member or a guest to gain access to the subject property. Gate access and the use of key fob passes as well as part-time security services preclude non- members from gaining access to the property and amenities.

[49] The Board finds that the Complainant's current practice of selectively inviting neighboring properties to have access to the amenities provides further evidence that the subject property is restricted to a privately determined membership that goes beyond simply filling out an application and paying a minor fee (COPTER s. 7(2)(a)). The Board accepts that the Complainant has extended membership to the Windermere Ridge residences outside of the encumbranced properties. However, member has not been offered to other portions of the Upper Windermere neighborhood.

4. Are any of the above restrictions in place for safety and liability reasons or to avoid contravention of a law? (COPTER s. 7(3)).

[50] The Board finds that there are some restrictions in place for safety and liability reasons. These restrictions are outlined in Pool Rules and Skating Rink Rules (C-1, pages 384 and 385). However, there is no evidence to indicate that the restrictions based upon ownership of property and the requirement to become a membership in the Windermere Residents Association are in place for safety, liability reasons or to avoid contravention of a law.

Conclusion

[51] In summary, the Board finds that the subject property did not meet the legislative tests required for property tax exemption status. While the Board finds that the subject property is owned and operated by the Windermere Residents Association, a residents association within the meaning of COPTER, the subject property does not satisfy the requirements for tax exempt status contained in COPTER s. 14.1.

[52] The subject property fails to satisfy ss. 14.1(1), 14.1(2)(b) and 14(2)(c) of COPTER. The subject property is not held by the Windermere Residents Association. The Complainant has failed to provide sufficient supporting 2011 evidence to prove the usage of the subject property. The Board finds that the subject property is restricted for more than 30% of the time pursuant to ss. 14.1(2)(c) and 7. Use of the subject property is restricted based upon ownership of property within the development area. Further, use of the subject property is restricted based upon the requirement to become a member of the Windermere Residents Association, a membership which is selectively available to neighboring properties.

[53] Accordingly, the 2012 Assessment of \$753,500, 100% taxable, is confirmed.

Dissenting Opinion

[54] There was no dissenting opinion.

Heard September 28, 2012 and October 18, 2012.

Dated this 19 day of November, 2012, at the City of Edmonton, Alberta.

Peter Irwin, Presiding Officer

Appearances:

Chris Buchanan

Kerry Reimer

for the Complainant

Moreen Skarsen

Steve Lutes

for the Respondent

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.