

Edmonton Composite Assessment Review Board

Citation: Colliers International Realty Advisors Inc v The City of Edmonton, 2012 ECARB 2217

Assessment Roll Number: 4313524
Municipal Address: 9920 90 AVENUE NW
Assessment Year: 2012
Assessment Type: Annual New

Between:

Colliers International Realty Advisors Inc

Complainant

and

The City of Edmonton, Assessment and Taxation Branch

Respondent

DECISION OF
Patricia Mowbrey, Presiding Officer
Taras Luciw, Board Member
Tom Eapen, Board Member

Preliminary Matters

- [1] At the outset of the hearing, the Complainant requested that the objection to the composition of the Board be carried forward from October 9, 2012, when roll number 4313524 was originally to have been heard. The Preliminary Matter, as framed in that preliminary decision, was as follows:

Should the current Presiding Officer (the “Presiding Officer”) step down on the basis of an allegation of bias brought forward by the Complainant? On what grounds should a Board member step down when an allegation of bias is raised?

Position of the Complainant Respecting the Preliminary Matter

- [2] The Complainant stated that he was shocked that he was not advised that the bias issue would be revisited, and that he was now being asked to re-present his position from October 9, 2012. The Complainant indicated that he did not have the supporting documents with him on October 10, 2012. The Complainant further alleged that the documents were probably in the Board’s possession and the Board had probably reviewed them. The Complainant stated he could speak generally to the content of the documents but not to the specifics.
- [3] The Complainant complained of bias in a letter he wrote to the Minister and the Chair of the Board (Municipal Government Board) sometime in November or December of 2011.

In the letter the Complainant referenced a Board Order written by the Presiding Officer which confirmed an assessment. The Complainant alleged the reasons in this decision were unwarranted, ill-advised and not representative of the facts presented at the hearing. The Complainant also completed a statistical analysis of the Presiding Officer's participation on the Board and indicated the results were staggeringly in favor of confirmations (92%).

- [4] The Complainant stated that, based on the letter, it was only natural that there would be an apprehension of bias. He further stated he was disappointed that the Presiding Officer was not aware of the letter.
- [5] The Complainant reiterated that he was not prepared to revisit the bias issue he had originally raised on October 9, 2012. He stated he was not given notice that bias would be revisited and considered it unfair that he was put in a position to recall the contents of a letter that was written nearly 11 months ago.

Position of the Respondent Respecting the Preliminary Matter

- [6] The solicitor for the Respondent (the "Respondent") stated that he was happy to receive reasons for the bias application. The Respondent was surprised the Complainant stated he was ambushed by the re-visitation of the bias issue, as the Respondent had clearly indicated on four occasions the previous day that reasons were required from the Complainant in support of the allegation.
- [7] The Respondent stated that he reviewed two text books to try and determine what reasons the Complainant may have had in support of his allegation. The text books were *Principles of Administrative Law*, Jones de Villars, fifth edition, and *Practice and Procedure Before Administrative Tribunals*, Macaulay and Sprague.
- [8] After hearing the Complainant's reasons, the Respondent indicated that there is no authority to suggest that a statistical analysis can support a reasonable apprehension of bias on the part of one member; that is why there are three members to a Board. Percentages of confirmations when a Presiding Officer is sitting are irrelevant. The Respondent stated it is disturbing the Board (presumably the MGB) told the Complainant that the Complainant would not have to appear before the Presiding Officer again.
- [9] The Respondent stated that when an apprehension of bias is raised, a reason supporting the allegation must be provided. If the allegation concerns conduct, the conduct at issue must be identified, and the person against whom the bias is alleged must decide whether they can hear the case without bias.
- [10] The Respondent stated the reason the Complainant did not want to present his evidence on October 9, 2012 was because the Complainant's reasons were ludicrous. The Respondent further stated he was prepared to proceed with the Presiding Officer sitting.

Argument of the Parties Respecting the Preliminary Matter

- [11] The Complainant stated he was not a lawyer and could not respond to any legal issues. He further stated he came to the hearing to argue a complaint. The Complainant agreed with the Respondent that it was the Presiding Officer's decision to decide whether there was bias.

[12] The Complainant stated that on October 9, 2012 he objected to the Presiding Officer sitting, and his request for the Presiding Officer's recusal was granted orally. It is the Complainant's view that the Board should be seen to perform in a fair and equitable manner and there should not be any stain on future decisions by the Board.

[13] The Respondent stated that the mere allegation of bias does not automatically create bias, and that it is inappropriate for a party to bring a disqualification motion if the essential purpose is a form of reverse judge shopping because of dissatisfaction with the arbitrator. The Respondent described the Complainant as engaging in tactics in an effort to change the Presiding Officer.

[14] The Complainant responded that the Respondent's opinion of the Complainant's motives was completely false. The Complainant again referenced the letter the Complainant wrote to the Minister as the basis for the claim of bias. The Complainant stated that any reasonable person reviewing this scenario would agree the Presiding Officer was put in a difficult position, but not as difficult a position as the Complainant and the tax-payer. The Complainant indicated that what trumps all is a fair and equitable hearing.

Decision on the Preliminary Matter

[15] The Decision of the Presiding Officer is to remain in the chair.

Reasons for the Board's Decision on the Preliminary Matter

[16] The hearing of October 9, 2012 was reopened in order that the Board could revisit the issue of bias brought forward by the Complainant, and the verbal decision given at that time.

[17] The Board in their deliberation for a written decision from the hearings of October 9, 2012 found two significant pieces of information missing:

1. The roll number to which a decision can be attached;
2. A reason on which a decision can be based.

[18] The Board heard the Complainant's comments that he was shocked by not being informed about the re-visitation of the bias issue on October 10, 2012. The Board is of the opinion that the Complainant originally raised the issue of bias in the hearing on October 9, 2012, and the Complainant should have had the supporting evidence for the claim at that time.

[19] The Board heard the Complainant's reasons for claiming bias were based on a statistical analysis of the Presiding Officer's decisions from the past year, which indicated that 92% of the Presiding Officer's decisions confirmed assessments. The Complainant stated this was indefensible for a Board member. The Complainant also indicated there was incompetence shown by the Presiding Officer in a particular decision. The Board noted there was no indication that the particular decision was appealed. The Board considered the statistical analysis to be without merit.

[20] There was no supporting evidence presented by the Complainant on either October 9 or October 10, 2012. Contrary to the allegations raised by the Complainant, the Board had

not seen any evidence or letter, nor reviewed any letter written by the Complainant. Further, no response to this letter had been brought to the attention of the Board.

[21] The Board is of the opinion a decision-maker should not step down simply because a party has raised an apprehension of bias. The Board is an adjudicator and should not be seen as disqualified when in law it is not.

[22] The Board recognized that the verbal decision given on October 9, 2012 was hastily made. The decision of the Presiding Officer to step down would only bring the authority of the Board into question.

[23] The Board concluded that the evidence and facts presented in a hearing are the basis on which a decision is made. That decision is made by three Board members, and if there is a dissenting opinion, it is noted. As such, the statistical analysis conducted by the Complainant is without merit.

[24] The test for bias is objective and reflects a strong presumption in law that a decision-maker is impartial and will act appropriately.

[25] In *Committee for Justice and Liberty v. National Energy Board* [1978] 1 SCR 369, the test for bias was outlined as follows:

“What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would he think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly?”

[26] The Presiding Officer is of the opinion that an informed person viewing the current matter realistically and practically, and having thought the matter through, would not find bias. Therefore, the Presiding Officer will remain in the chair.

Procedural Matters

[27] At the request of the Respondent’s Solicitor, the witnesses for the Complainant and the Respondent were affirmed at the outset of the hearing.

[28] Upon questioning by the Presiding Officer, the Board members indicated there was no bias with respect to the file.

Background

[29] The subject property is a 3 1/2 storey, two building, low rise walk-up apartment, constructed in 1976. It contains 42 suites with surface parking stalls and is located at 9920 - 90 Avenue NW in the Strathcona neighborhood of Edmonton.

Issue(s)

[30] Is the 2012 assessment of the subject property correct?

(a) Is the Gross Income Multiplier (GIM) appropriate?

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 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

Position of the Complainant

[31] The position of the Complainant was that the 2012 assessment of \$5,009,500 was incorrect and stated that the GIM used in the assessment was too high. The Complainant accepted the Potential Gross Income (PGI) reflected in the assessment as reasonable and indicated the subject property rent roll differed only by 5%. The Complainant provided the following evidence to support the statement:

- Evidence Brief, exhibit C-1 – 37 pages
- Rebuttal, exhibit C-2 – 10 pages

[32] The Complainant stated that the 2012 assessment was based on an EPGI of \$428,199, with a 3% vacancy factor, a GIM of 11.69934 for a multi residential assessment of \$5,009,500 or \$119,273 per suite. The complainant requested an assessment of \$4,213,000 or \$100,309 per suite.

[33] The Complainant provided a list of 16 city-wide multi-residential comparable building sales from March 2010 to June 2011, along with their respective GIMs (C-1, page 11). The GIMs ranged from 7.24 to 10.67 with an average of 9.29 and a median of 9.32, fully 185 basis points below the GIM of 11.69934 used in the 2012 assessment of the subject (C-1, page 9).

[34] The Complainant selected three of the 16 sales that were closest in proximity to the subject, all of which are 2 ½ storey buildings, with the number of suites ranging from 11 to 20. The effective year built on these sales comparables ranged from 1947 to 1969, and the sale prices per suite ranged from \$92,545 to \$106,750 (C-1, page 12).

[35] These three sales comparables, (C-1, page 12 & 13) are located in the subject market area 3 and indicate a range of GIMs from 9.35 to 10.64 with a median of 9.52 and an average of 9.84. The Complainant stated that the subject property is assessed with a GIM of 11.69934 which is vastly greater than any of these comparable properties. The Complainant indicated the results are nearly identical to the city-wide chart with 16 sales.

The Complainant indicated the use of a GIM that is in excess of typical for the market is “double counting” these features. The Complainant suggested the most reasonable GIM as shown by the closest transactions in the market is 9.84, and, when multiplied by the EPGI of \$428,199, (taking into account a 3% vacancy factor), resulted in the requested value of \$4,213,000 or \$103,321 per suite.

[36] The Complainant presented the same three sales comparables for the use of Direct Comparison Approach to Value (C-1, page 14), which is based on the principle of substitution. The Complainant explained that a purchaser would not pay more for a property than it cost to purchase a suitable alternative property with similar physical characteristics, tenancy and location. The Complainant stated that the comparables were recent sales and relatively similar to the subject.

[37] The subject property has a current assessment of \$119,273 per suite, and the chart presenting the 16 sales comparables showed an average sale price of \$92,323 per suite and a median of \$91,272 per suite. By focusing on the selected three sales from the subject area within market area 3, the sales comparables range from \$92,545 to \$106,750 per suite, with an average of \$99,573 and a median of \$99,425.

[38] The Complainant’s requested market value was based on \$99,573 per suite and when applied to the 42 suites of the subject property it equated to the requested assessment of \$4,182,000.

[39] The Complainant stated that the GIM approach resulted in a multi residential market value of \$100,321 per suite, which is supported by the direct comparison approach of \$99,573 per suite.

[40] The Complainant concluded the evidence supported a reduction based on the Income Approach (GIM) to \$4,213,000, which is supported by the Direct Sales Comparison Approach.

Position of the Respondent

[41] The position of the Respondent was that the 2012 assessment is correct. In support of this position, the following evidence was presented :

- Assessment Brief, Exhibit R-1 – 70 pages
- Errors inherent information, Exhibit R-2 – 85 pages
- Law and Legislation, Exhibit R3 – 44 pages

[42] The Respondent explained to the Board that Mass Appraisal methodology was the basis for assessment of the subject property and, for the purpose of the 2012 annual assessment, low rise apartments were valued based on the income approach using typical potential gross income (PGI), typical vacancy, and a typical gross income multiplier (GIM). Income data from all properties responding to the Request For Information (RFI), which is sent out each year to property owners, is analyzed to form the basis of the potential gross income model. The Respondent included a copy of the RFI for the subject property (R-1, pages 17 – 24).

- [43] The Respondent indicated that among the significant variables used in the PGI model is the building type, which is separated into low-rise, high-rise, row-house and four-plex.
- [44] The Respondent further indicated that the typical vacancy rate for the 2012 assessment year was 3%, the typical laundry income was calculated at the rate of \$12.00 per suite per month and monthly parking income was added to the model-predicted PGI. The Respondent explained to the Board that other income, which includes laundry and parking, is added to the calculated gross rental income to arrive at a gross income multiplier. The Respondent brought to the Board's attention the fact that the Complainant had included only the gross rental income and vacancy factor to arrive at an effective gross income and gross income multiplier.
- [45] The Respondent described the multi residential market area for the 2012 assessment of the subject property as market area 3. The subject is located in the Garneau area, where the University of Alberta and University Hospital are situated. Market area 3 is approximately bordered by 120 Street and the river valley to 96 Street and from the top of the south river bank to 63 Avenue. The Respondent provided the Board with maps showing the boundaries of market area 3, and the subject's location within it (R-1, page 6 & 7).
- [46] The Respondent submitted five sales comparables, (R1-Page 25) all of which are low rise walk-up apartments. The total suites in these comparables ranged from 20 to 65, and years built ranged from 1967 to 1970. The sales price per suite ranged from \$106,000 to \$133,750 and GIMs ranged from 11.68 to 13.59, with a median GIM was 12.31. Three of the comparable sales are located in the subject market area 3 and two comparables are located in the downtown market area 1C.
- [47] The Respondent provided a chart with five equity comparables (R-1, page 31), all low rises located in the subject market area 3. The total number of suites ranged from 30 to 39; the effective year built ranged from 1969 to 1981; the 2012 assessments per suite ranged from \$113,041 to \$121,700; and with GIMs ranging from 11.48 to 11.85. The Respondent indicated the subject property GIM of 11.70 is within the comparable range.
- [48] The Respondent commented on the Complainant's three sales comparables, (C1-page 12/14), located in the subject market area 3, and noted that the three sales comparables used to derive the requested GIM of 9.84 should be discredited:
- Sale 1: (9104 – 99 Street) Was built in 1947, and had a GIM of 9.52. It also had functional obsolescence because of the age of the building and a wall dividing the building, with a separate entrances for each side. The Respondent noted these factors affected the sale price.
 - Sale 2: (10707 – 81 Avenue) Was built in 1969, and had a GIM of 9.35. It required \$100,000 in repairs, was a non-arms length sale between family members and was not considered a valid sale.
 - Sale 3: (10015 – 83 Avenue) Was built in 1966, and had a GIM of 10.64. At the time of sale a condition respecting condominium conversion was included. It was not in the Respondent's multi- residential inventory.

Complainant Rebuttal

[49] The Complainant submitted rebuttal (C-2, pages 3 &4) to the Respondent's evidence, specifically in response to the five sales comparables submitted by the Respondent.

- Sale 1: (10240 – 122 Street) The Complainant noted that the third party document stated “rental rates are somewhat below average at market rentals”. The document also stated that the cap rate was 5.22%. The Complainant stated “therefore, we can adjust to the market rates”. The Complainant adjusted the cap rate to 6.29% from the 5.22% and adjusted the GIM to 9.37 and included calculations for the change.
- Sale 2: (10725 – 83 Avenue) The Complainant indicated that there was no Network third party sale document reporting this sale.
- Sale 3: (10556 – 84 Avenue) The Complainant stated that the Network third party sales document indicated that “rental rates are somewhat below market” and that typical rates provided by the CMHC resulted in a GIM of 11.08.
- Sale 4: (10227 – 119 Street) was also utilized by the Complainant.
- Sale 5: (10742 – 81 Avenue), The Complainant commented that it was a “highly leveraged sale”, and a fully renovated project, with a vendor take back which is atypical financing.

[50] The Complainant stated that from the evidence presented, the most persuasive evidence was presented by the Complainant and supported a reduction of the 2012 assessment to \$4,213,000.

Respondent Surrebuttal

[51] The Respondent presented surrebuttal in response to the Complainant's rebuttal and referred to sale 1 on page 3 of C-2. The Respondent pointed out that the City did its own analysis, unlike the Complainant who relied on third party information. The Respondent noted from the Complainant's rebuttal that the Network, a third party source, indicated that the comparable rents in place were below average. The Respondent questioned what constitutes a below average rent, what locations were included and “where did the income come from”? The Respondent suggested the Complainant's income for this property was unreliable as was its GIM.

[52] The Respondent questioned the Network information for sale 1 as the Network indicated the property had 66 – 1 bedroom suites and the Respondent stated it had 65 – 1 bedroom suites. Thus, the Network based the gross rent calculation on more suites than actually existed.

Decision

[53] The decision of the Board is to confirm the 2012 assessment of \$5,009,500.

Reasons for the Decision

[54] The Board considered the evidence presented by the Complainant and the Respondent.

[55] The Board was of the opinion the Income Approach to Value, using the gross income multiplier, was the appropriate method of valuation and noted that both the Complainant and the Respondent applied this method for the subject property valuation.

[56] The Board accepted the Respondent's explanation that the assessment was prepared using the Mass Appraisal methodology, which is regulated by the Municipal Government Act, and *Matters Relating to Assessment and Taxation Regulation*, AR 220/2004 (MRAT), which states that "the valuation must reflect typical market conditions" (s. 2(c)). The typical rental income and typical vacancies are collected annually by means of the RFI from individual property owners.

[57] The Board noted the Respondent referred to the *Appraisal of Real Estate Second Canadian Edition*, which states:

"In developing an income or rent multiplier, it is essential that the income or rent of the properties used to derive the multiplier is comparable to that of the subject and that the specific multiplier derived be applied to the same income base". (R-2, page 26).

[58] The Board accepted the Complainant's explanation that the assessment PGI was acceptable to the Complainant and noted that the actual income of the subject property's two buildings approximated \$212,760 and \$207,180 for a total of \$419,940 (C-1, page 10). Further, the assessment PGI (including laundry and parking income) was \$441,422, which the Complainant considered reasonable since the difference was within 5%.

[59] The Board noted that of the Complainant's three sales comparables extracted from the 16 city-wide sales comparables, two were 2 ½ storey and one was a 3 ½ storey apartment. The number of suites ranged from 11 to 20 and were closest in proximity to the subject (all in market area 3).

[60] The Board considered the Complainant's sale comparable 1 was a 2 ½ storey building with no balconies, 11 suites, constructed in 1947, that is divided in two by a wall. Further, each side must be entered separately. The Board finds this comparable is highly incomparable to the subject which was constructed in 1971, and has 42 suites with balconies.

[61] The Board noted that the Complainant's sales comparable 2 was an estate sale between family members, and as such was a non-arms length transaction (as reported by the Respondent and the Network). The Complainant provided no further evidence to support the sale price. Therefore, the Board finds that the reported non-arms length estate sale is questionable.

[62] The Board reviewed the Complainant's sale comparable 3 and noted the third party report indicated the purchaser planned to renovate for future condo conversion. The Respondent also indicated that the property was not in its multi-residential inventory. The Board finds this property to be less comparable to the subject.

[63] The Board noted the Complainant's three sales comparables indicated a GIM range of 9.35 to 10.64 with a median of 9.52 and an average of 9.84. The Complainant applied the average of 9.84 to the assessment's typical PGI, and applied a 3% vacancy factor which resulted in a requested value of \$4,213,000. The Board was not convinced that the

selected GIM from the three sales comparables could be appropriately applied to the assessment's typical gross income as the GIM was not derived from a similar income base as the PGI. That, in the Board's opinion, lacked the basis for "typical market conditions", which is a statutory requirement for mass appraisal.

[64] The Board considered the Complainant's Direct Sales Approach which made use of the same three sales comparables used in the Income Approach. The Direct Sales Approach is based on the principle of substitution, which takes into account physical characteristics, tenancy and location. The Board was not persuaded that the comparable sale properties and the subject property were sufficiently similar to warrant comparison. No adjustments had been applied to distinguish the walk up comparables for age and other characteristics.

[65] The Board considered the Respondent's five sales comparables, three of which were located in the subject market area 3 and two in the downtown market area 1C. The Board noted the Respondent pointed out that the subject market area accommodates students and employees from the University of Alberta and the University Hospital (both in market area 3). The Board noted the three sales comparables located in market area 3 were similar in age, number of suites, suite size and sale dates.

[66] The Board placed greatest weight on the Respondent's three sales comparables located in the subject market area 3. These comparables had GIMs that ranged from 12.31 to 13.59 and a median of 13.10, and the sales prices per suite ranged from \$122,429 to \$133,750, whereas the subject GIM was 11.69 and the sale price per suite was \$119,273.

[67] The Board is also persuaded by the five equity comparables provided by the Respondent. These are walk-up apartments located in the subject market area 3 with estimated GIMs ranging from 11.48 to 11.85. Their assessment per suite ranged from \$113,041 to \$121,700 as compared to the assessment of the subject, with a GIM of 11.70 and assessment per suite of \$119,273.

[68] The Board finds the 2012 assessment of the subject property is correct, fair and equitable.

Dissenting Opinion

[69] There was no dissenting opinion.

Heard commencing October 18, 2012.

Dated this 31 day of October, 2012, at the City of Edmonton, Alberta.

Patricia Mowbrey, Presiding Officer

Appearances:

Greg Jobagy

Stephen Cook
for the Complainant

Allison Cossey
Cameron Ashmore
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.