

## **Edmonton Composite Assessment Review Board**

**Citation: Altus Group Ltd v The City of Edmonton, 2013 ECARB 01352**

**Assessment Roll Number:** 9980213

**Municipal Address:** 2331 66 Street NW

**Assessment Year:** 2013

**Assessment Type:** Annual New

Between:

**Altus Group Ltd**

Complainant

and

**The City of Edmonton, Assessment and Taxation Branch**

Respondent

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### **DECISION OF**

**John Noonan, Presiding Officer**

**Jack Jones, Board Member**

**Robert Kallir, Board Member**

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### **Procedural 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 on this file.

### **Background**

[2] The subject property is a Community Shopping Centre/Multi-Story Office known as Millwoods Town Centre located at 2331 66 Street Edmonton. The City assessed area of the retail section is 572,740 square feet (sf) while the area as per the rent roll of the Complainant is 564,189 square feet. The value of the multi-story office is not at issue. The retail portion of the property includes several "out parcels" or pad sites, all located on a lot of 2,673,288 square feet.

[3] The Respondent produced and mailed an assessment in the amount of \$134,976,500 (the original assessment). Two complaints were filed, one by AEC International representing one of the two anchor tenants and this complaint filed by Altus Group representing the owner. In negotiations with the anchor's agent, the Respondent reached an agreement which reduced the typical market rents applied to the anchor areas. In consideration of the anchor complaint being withdrawn, the City (Respondent) agreed to recommend to the Composite Assessment Review Board (CARB) that the assessment be reduced to \$123,054,500. Turning its attention to the second complaint, the City discovered errors or omissions with regard to areas and lease rates applied to some of the CRU spaces in the original assessment. In making corrections, the City's new proforma indicates a value of \$125,167,500. The Respondent recommends the assessment be reduced from the original almost \$135 million to \$125,167,500. In addition, the Respondent discovered a needed change to the tax-exempt portion of the subject property.

## **Preliminary Matters**

[4] The Complainant raised two issues related to preliminary matters:

1. In effecting changes to certain lease areas and their annual rents, is there proper authority for the City to seek an increase to an assessment?
2. Does the Board have jurisdiction to hear a matter, the exemption amount, that was not identified on the Complaint form?

## **Legislation**

***The Municipal Government Act, RSA 2000, c M-26, reads:***

305 (1) If it is discovered that there is an error, omission or misdescription in any of the information shown on the assessment roll,

- (a) the assessor may correct the assessment roll for the current year only, and
- (b) on correcting the roll, an amended assessment notice must be prepared and sent to the assessed person.

305(3) If exempt property becomes taxable or taxable property becomes exempt under section 368, the assessment roll must be corrected and an amended assessment notice must be prepared and sent to the assessed person.

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

312 If it is discovered that there is an error, omission or misdescription in any of the information shown on an assessment notice, an amended assessment notice may be prepared and sent to the assessed person.

368 (1) An exempt property or part of an exempt property becomes taxable if

- (a) the use of the property changes to one that does not qualify for the exemption, or
- (b) the occupant of the property changes to one who does not qualify for the exemption.

(2) A taxable property or part of a taxable property becomes exempt if

- (a) the use of the property changes to one that qualifies for the exemption, or
- (b) the occupant of the property changes to one who qualifies for the exemption.

(3) If the taxable status of property changes, a tax imposed in respect of it must be prorated so that the tax is payable only for the part of the year in which the property, or part of it, is not exempt.

***The Matters Relating to Assessment Complaints Regulation, AR 310/2009 reads:***

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.

30(2) A one-member local assessment review board may hear and decide one or more of the following matters:

- (e) any matter, other than an assessment, where all of the parties consent to a hearing before a one-member assessment review board.

36(2) A one-member composite assessment review board may hear and decide one or more of the following matters:

- (d) any matter, other than an assessment, where all of the parties consent to a hearing before a one-member composite assessment review board.

### **Summary of Party Positions**

[5] In dealing with issue (1) set out above the Complainant referred the Board to the following cases:

- Canadian Natural Resources Ltd. v Wood Buffalo (Regional Municipality), 2012 ABQB 177 (“CNRL”)
- Edmonton East (Capilano) Shopping Centres Limited (AEC International Inc.) v Edmonton (City), 2012 ABQB 445 (“Capilano”)
- Ag Pro Grain Management Services Ltd. v Lacombe (County of), 2006 ABQB 351 ( “Ag Pro”)

[6] The Complainant stated that CNRL and Capilano decisions are authority that the City cannot be a “de facto appellant”. The Respondent gave a brief history of the CNRL and Capilano cases, advising that only the leave to appeal decision had been presented here. The appeal decision itself had not been presented here, though it could be produced upon request. For the most part, the appeal had been dismissed, but that decision was now at the Court of Appeal. In the Capilano case, final argument had been made some six months ago and a decision was pending. However, these cases were irrelevant to the current situation where the City sought changes in sizes of various spaces and their associated lease rates. Indeed, the City was recommending a decrease from the original assessment of \$134,976,500 to \$125,167,500 and not an increase. The CNRL and Capilano cases both dealt with increases to the assessment.

[7] Both the Complainant and Respondent referred the Board to sections 460(3) and 467(1) of the Municipal Government Act, RSA 2000 (“MGA”)

[8] In dealing with issue (2) the Complainant drew attention to the complaint form that initiated these proceedings. At section 4 of the form, box 3 had been checked, and as explained on the back of the form, box 3 indicates the complaint is about an assessment amount. There is a box 10 available for instances when the matter for complaint is “whether the property or business is exempt from taxation”. This box had not been checked. At section 5 of the complaint form is a bolded “Note: An assessment review board must not hear any matter in support of an issue that is not identified on the complaint form.”

[9] The Respondent referred the Board to sections 305 and 368 of the MGA and stated that it makes practical sense for the Board to deal with the exemption issue to prevent a multiplicity of hearings notwithstanding that the Complainant had not marked box 10 in section 4 of the

complaint form. Once a complaint was filed, the City could not correct the roll, leaving two alternatives: request the Board to change an exemption amount despite its lack of status as a complaint form issue, or await a CARB decision and then correct the roll. There were at least two difficulties with the second approach. An assessor may only correct a roll in the current year, and a decision rendered late in the year might preclude correction. And a corrected roll after a Board decision could breach the doctrine of finality. Consequently, the City has decided to come to the Board as a “defacto appellant” in regard to the correct exempt amount. Counsel advised that the *Act* is silent on this point and neither is there Court direction. In previous situations where an exemption change was requested, complainant(s) have agreed to deal with the matter at the complaint hearing, or were only too happy to see a situation where an exemption amount increased. To the best of Counsel’s recollection, this was the first time an objection had been raised at the CARB.

### **Decision**

[10] The Board decides with respect to preliminary issue #1 that the Respondent may request an upward revision to the assessment.

[11] The Board decides with respect to preliminary issue #2 that it does not have jurisdiction to hear matters not identified on the complaint form. The Respondent cannot request a revision to the exemption status of the subject property in the current circumstances.

### **Reasons for the Decision**

[12] The Respondent has the right to request an assessment be revised up or down as provided by section 467(1) of the MGA. It is noted that both the CNRL and Capilano decisions are under appeal to the Alberta Court of Appeal. Pending decision(s), the Board follows established practice: if procedural fairness has been observed, it is proper for a Respondent to seek and an assessment review board to decide **to make a change to an assessment roll**. This practice dates to at least *City of Edmonton v. Army & Navy Department Stores Ltd.*, MGB BO 112/02 and confirmed in the AgPro Court of Queen’s Bench decision.

[13] As a result, the Board does not have to address whether in this set of circumstances the change being sought by the Respondent is an increase or a decrease. In the Complainant’s view, it is an increase from the \$123 million agreed with the anchors; the Respondent argues the now-sought \$125 million assessment is a decrease from the original \$135 million. The Board concludes a change is sought, but in the spirit of obiter comments, would be inclined to believe the withdrawal to correction contract between City and anchors could not come into force so long as the second complaint was live, as per MGA s 305(5).

[14] There is no need to decide whether the comments of Madam Justice Sulyma in paragraph 166 of CNRL are obiter on the basis of her decision in paragraph 165 of CNRL.

[15] The Board has no jurisdiction, in the absence of consent, to hear the exemption issue as it was not identified on the Complaint form. The complaint form uses mandatory language, repeated at MRAC s 9(1): must not hear. The Board understands this proscriptive language has been liberally interpreted, so long as the matter for complaint is an assessment and the issue has been identified in the process of evidence disclosure. Here, as observed by Counsel for the Respondent, the City is truly in the role of defacto Appellant, a position not contemplated in the legislation.

[16] The Board finds in the legislation somewhat an analogue for the current situation at MRAC s 30(2)(e) and s 36(2)(d) where a one-member board may hear any matter, other than an assessment, but with the inconvenient proviso, “where all of the parties consent”. In the real world of bulk justice where the CARB deals with many complaints on a tight timeline, panels have dealt with changes to the exempt portion of a property as a matter of course, identified issue or not. Such practice should continue, if only for reasons of efficiency, but has always been done with the consent of the parties.

[17] Section 305 of the MGA allows for the correction of the roll and the issuing of an amended assessment. Given this available avenue to address the required change to the exempt portion of this property, the Respondent is able to fulfill its fiduciary responsibilities to all taxpayers, including the Complainant. The Board heeds the clear declarative instruction of the legislation and accepts the plain meaning of the admonition that it must not hear a matter that is not identified on the complaint form.

[18] On delivery of oral decision on the preliminary matters, and the promise of reasons in this written decision, the hearing proceeded.

### **Background**

[19] The subject property is a neighborhood Shopping Centre/Multi-Story Office known as Millwoods Town Centre located at 2331 66 Street Edmonton. The City assessed area of the retail section is 572,740 square feet while the area as per the rent roll of the Complainant is 564,189 square feet. The land size is 2,673,288 square feet

### **Issue(s)**

[20] Is the 2013 assessment of the subject property at \$134,976,500 correct?

[21] What is the correct lease area of certain of the CRU premises located on the subject property?

[22] What is the appropriate rental rate for certain of the CRU space located on the subject property?

[23] What is the appropriate capitalization rate for the subject property?

### **Legislation**

[24] **The *Municipal Government Act*, RSA 2000, c M-26, reads:**

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
- (c) the assessments of similar property or businesses in the same municipality.

### **Position of the Complainant**

[25] The Complainant referred the Board to the Schedule of Issues set out on Exhibit C-2 page 3 and the Executive Summary set out on Exhibit C-2 Page 5 and stated that:

- a) the subject property is not treated fairly as similar properties are getting preferential treatment as they are assessed at 95% of their actual area.
- b) the lease rate for certain of the CRU space is excessive.
- c) the size for certain of the CRU space is incorrect.
- d) the capitalization rate is too low for a property of this age and historic vacancies. The capitalization rate should reflect the risk and be 7.5 percent.

[26] The Complainant noted that the subject property's actual area per the rent roll is 564,189 square feet (Exhibit C-4, page 1) while the Respondent records the leasable space of the subject property as 572,740 square feet (Exhibit C-4, page 1).

[27] The Complainant stated that the appropriate Capitalization (CAP) rate for the subject property being requested by the Complainant is 7.5% and not 7.00% as set out on Exhibit C-2 page 12.

[28] The Complainant stated that he was only contesting the assessment for the retail component of the subject property set out on Exhibit C-2 page 13 and that the Complainant was not contesting assessment for the office component set out on Exhibit C-2 page 14.

[29] The square foot sizes of the CRU space as marked in yellow on Exhibit C-4 page 1 were in dispute with the Respondent. The rental rates for CRU<1000, CRU 3000-5000, CRU>10,000 and CRU Kiosk as set out on Exhibit R-1 page 15 were in dispute between the Complainant and the Respondent.

[30] The Complainant stated that the rent roll set out in Exhibit C-2 pages 21-27 was dated March 1, 2013 but was the same as the rent roll for December 2012. No written evidence was supplied in this regard. The Complainant noted that the rent roll being used by the Respondent was dated December 1, 2011 (Exhibit R-1 pages 39-47).

[31] The Complainant referred the Board to the sales of the subject property, Westmount Centre, Meadowlark Park Shopping Centre and the Time Adjusted Factor Chart of the Respondent for 2013 as well as the Assessment Notice of the City for the subject property for 2013 set out in Exhibit C-2 pages 35-39.

[32] With respect to the sale of the subject property it was noted (a) that the sale date was December 20, 2010 between two arm's length parties and (b) the purchase price comprised cash of \$38,300,000 and a demand mortgage of \$56,300,000 to the Royal Bank of Canada at an interest rate of 3% per annum.

[33] The Complainant referred the Board to sales information of retail properties set out in Exhibit C-2 pages 34 and 45-96 and stated that the sales marked in yellow on page 34 had been excluded in determining the CAP rate of 7.00% on page 34. The Complainant noted that he had used all types of retail properties in his analysis and had not restricted himself to shopping centre malls similar to the subject property.

[34] The Complainant referred the Board to the Capitalization theory information set out in Exhibit C-2 pages 108-109.

[35] The Complainant described the subject property's assessment as not fair and equitable with other properties as the City has two retail assessment units (standard retail properties and shopping centres the latter of which includes Super Regional Malls, Regional Malls and Community Malls). One retail assessment unit assesses at 100% of rent roll size and the other retail assessment unit assesses at 95% of the leasable size (Exhibit C-2, page 10).

[36] To support the position of the assessment of the subject property as not being fair and equitable as set out in paragraph 26 above the Complainant provided a 438 page "95% Rental Area Analysis", entered as Exhibit C-2. This analysis detailed 92 properties of differing sizes and space type that were assessed at between 81% and 98% of the space defined by the rent roll. The average percentage was 94% and the median was 95%. This information was supported with a copy of the Assessment Detail Report and a rent roll for each property.

[37] The CAP charts provided by the Respondent (Exhibit R-1 pages 53-57) did not necessarily present data from completed transactions as noted in the said charts.

[38] The Board was referred to the Southgate Shopping Mall sale information and the pro forma prepared by the Respondent (Exhibit R-1 pages 60-62). Southgate Shopping Mall is assessed at approximately 80% of its sale price and assessed typical income is approximately 86% of actual income (Exhibit R-1 pages 60-62.)

[39] On the basis of the submissions of the Complainant, the Complainant requested that the assessment of the subject property be reduced to \$100,137,500 as set out in Exhibit C-4 page 4.

#### **Position of the Respondent**

[40] In defending the current year assessment, the Respondent presented a 387 page document (Exhibit R-1) assessment brief to the Board that included the details leading to the recommended 2013 assessment of \$125,167,500.00. (Exhibit R-1, page 15).

[41] The Board was referred to Exhibit R-1 pages 357-363 where the attributes of a Community Shopping Centre were set out. The Respondent stated that the subject Property was classified by the City as a Community Shopping Centre to which a 6.5% CAP rate should be applied. The Respondent stated that depending on the condition and tenant mix of a shopping centre the City does amend CAP rates up or down in certain cases.

[42] The City has two retail assessment groups ( standard retail properties and shopping centres the latter of which includes Super Regional Malls, Regional Malls and Community Malls) and that they use different approaches to assessment valuation for each of them (Exhibit R-1, pages 358-359).

[43] The Respondent stated that in respect of retail properties, the information provided by owners in response to the City's request for information (RFI) was frequently incomplete or inaccurate. As such, the City did a study and found that the net leasable space for the retail valuation group was, typically, 95% of the gross leasable area. (Exhibit R-1, page 202). However, this assessment method was not applicable to the subject property as it belonged to the shopping centre (Community Mall) assessment category.

[44] The Respondent referred the Board to Exhibit R-1 pages 14-21 dealing with the original assessment and revised assessments for the subject property. It was noted that the difference between the assessments of \$125,167,500 and \$123,054,500 related to the rental rates for CRU<1000, CRU 3000-5000, CRU> 10,000 and CRU Kiosk as set out on Exhibit R-1 page 15 which were in dispute between the Complainant and Respondent. In this regard it was noted that the assessment of \$123,054,500 was the agreed upon assessment with AEC International in relation to an appeal by one of the anchor tenants in the subject property. (Exhibit R-1 page 18)

[45] The Respondent referred the Board to the Net Operating Income of the subject property set out in Exhibit R-1 pages 29, 48 and 49 as well as the rental rate calculations on pages 50 and 51. The Respondent stated that the rent roll provided to the City by the Complainant had been received by the City in the Spring of 2012.

[46] The Respondent referred the Board to the Regional/Community Shopping Centre CAP rate information set out on Exhibit R-1 page 53-63.

[47] The Respondent noted that the Zellers tenancy in the Subject property had been assumed by Target and that Target had opened for business in the subject property in May of 2013 (Exhibit R-1 page 11).

[48] The subject property should be assessed on the basis that the sale in December 2010 was a leased fee sale as opposed to a fee simple sale.

[49] The Respondent presented Mr. A. Chopko from Impact Property Advisors as an expert witness (Exhibit R-2) with respect to CAP rates for large commercial/retail facilities that included the subject property. Mr Chopko referred to his report (Exhibit R-1, pages 64-144). The Complainant did not object to Mr. Chopko as an expert witness or his report. Mr Chopko made the following observations

- a) At the time that the subject property was sold in December 2010 it was in his opinion a Class C shopping mall
- b) Since December 2010 there have been both physical and tenant improvements to the subject property with the addition of Target, Lifestyle Fitness and Academy of Learning as tenants of the subject property
- c) Rental rates for the subject property have increased since December 2010
- d) The subject Property needed refurbishment as at the sale date of December 20, 2010
- e) The subject property would as a result of the improvements set out in paragraph 35(b) above be classified as a lower level B Class property as at December 31, 2012



- f) Primary C Class large commercial properties are estimated to have an overall CAP rate of 7.5 %. Primary B Class large Commercial properties are estimated to have an overall CAP rate of 6.75 %
- g) In his opinion the CAP rate for the subject property should be 6.75%. Available vacant land on the subject property would improve the risk rating of the subject land and therefore would reduce the CAP rate from the CAP rate that would have been applied should there not have been any vacant land.
- h) The annual absorption chart in Exhibit R-1 page 74 indicated softness in the market place in 2010.
- i) The subject property is in the same shopping centre class as Capilano, Londonderry and Northtown shopping malls.
- j) The CAP Chart set out in Exhibit R-1 page 128 deals more with shopping plazas as opposed to shopping malls

[35] The Respondent requests an assessment of the subject property of \$125,167,500

### **Decision**

[50] The decision of the Board is to reduce the 2013 assessment of the subject property from \$134,976,500 to \$102,054,500.

### **Reasons for the Decision**

[51] The City in calculating market rent for the subject property utilized weighted actual rents for the CRU space and established a market rent for the anchor tenants. In preparing its property assessments for the 2013 assessment year the rental rate utilized by the City for the anchor tenants at Southgate, Kingsway and Londonderry shopping malls is \$5.25 per square foot and Meadowlark shopping mall is \$6.00 per square foot (Exhibit C-2 page 32 and Exhibit R-1 page 62). It is noted that the actual rent for the anchor tenants at the subject property is \$5.21 and \$6.00 per square foot. The \$7.50 per square foot established by the City for the anchor tenants for the subject property does not relate to rent for other anchor tenants in the shopping malls set out in this paragraph 51.

[52] No evidence was provided that the replacement of Zellers by Target as a tenant has improved the quality of the subject property or increased the Net Operating Income (NOI) of the subject property. In addition no evidence was provided that Zellers at any time ceased to comply with its lease obligations or that the terms of the lease had been amended in any way as a result of Target assuming the obligations of Zellers. None of the Target, Academy of Learning or Lifestyle Fitness leases make any significant difference to the quality of leases of the subject property for the 2013 assessment.

[53] The NOI of the subject property of \$6,763,900.00 (Exhibit C-2 page 35) for 2010 could not be verified from the documentation provided. There was no way to relate the actual income of the subject property for the 2011 calendar year (Exhibit R-1 pages 29 and 48-49) to the actual income for the 2012 calendar year. There was no way to relate the assessed income by the City for the subject property for the 2011 calendar year to the assessed income by the City for the 2012 calendar year (Exhibit R-1 page 14) The increase in the NOI of the subject property from

\$6,763,900.00 ( Exhibit C-2 page 35) for 2010 to \$7,577,928.00 ( Exhibit R-1 pages 29 and 48-49) in 2011 is not comparing comparable data.

[54] There is conflicting evidence as to what is an appropriate CAP rate that should be used in determining the value of the subject property. According to evidence provided the CAP rate could be somewhere in the range of 6.50% to 7.50%.

[55] There is insufficient evidence provided to enable the Board to determine the exact CRU areas in dispute. In the absence of evidence the Board is unable to determine whether the exact size of the leasable area of the subject property is 572,740 square feet or 564,189 square feet as noted in Exhibit C-1 page 1.

[56] The Board was not persuaded by the in depth analysis performed by the Complainant to determine if the subject property's lease area is assessed equitably with other similar properties. The Board notes that all properties within the shopping centre inventory (Super Regional Malls, Regional Malls and Community Malls) are valued using the same assessment methodology and assessed using 100% of the NLA. The subject property falls within the shopping centre inventory (Community Malls).

[57] In 697604 Alberta Ltd v Calgary (City)[2005] A.B.Q.B. No.512 Madam Justice Acton held, inter alia,

"I think that generally speaking the recent sales price, if available..... is in law and, in common sense, the most realistic and most reliable method of establishing market value".

[58] The Board noted that when the sale price of the subject property in December, 2010 for \$94,600,000 is time adjusted to July, 2011 it falls in line with the 2012 assessment at \$98,663,000. A further time adjustment to July 2012 to a value of \$102,054,500 (an increase of 3.4%) appears to be appropriate considering there were no significant changes to the subject property that could substantiate the Respondent's recommended 2013 assessment at \$125,167,500.

[59] The Board also noted that the assessed value of Southgate Mall at 80% of the sale value (deemed a valid sale by the Respondent) suggested an inequity with the subject property which is being assessed at a value far in excess of its sale price.

[60] In view of the reasons outlined above the Board determined that the sale price of the subject property adjusted pursuant to the City 2013 Time Adjustment Factor Chart is the best determinate of value and finds that a revised 2013 assessment of the subject property at \$102,054,500 is fair and equitable.

### **Dissenting Opinion**

[61] There was no dissenting opinion

Heard August 13 - 15, 2013.

Dated this 17<sup>th</sup> day of September, 2013, at the City of Edmonton, Alberta.

A handwritten signature in dark ink, appearing to read 'J. Noonan', is written over a horizontal line.

John Noonan, Presiding Officer

**Appearances:**

John Trelford  
for the Complainant

Andy Chopko  
Cameron Ashmore

Ken Eliuk

Maureen Skarsen

Tim Dmytruk  
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.*