CALGARY
ASSESSMENT REVIEW BOARD
DECISION WITH REASONS

In the matter of the complaint against the Property assessment as provided by the *Municipal Government Act*, Chapter M-26, Section 460(4).

between:

Altus Group Limited, COMPLAINANT

and

The City Of Calgary, RESPONDENT

before:

Paul G. Petry, PRESIDING OFFICER
Don Steele, MEMBER
Ike Zacharopoulos, MEMBER

These are complaints to the Calgary Assessment Review Board in respect of Property assessments prepared by the Assessor of The City of Calgary and entered in the 2010 Assessment Roll as follows:

ROLL NUMBER	Hearing Number	Assessment Amount	Address
201464104	59812	$12,850,000	2031 – 33 Avenue S.W.
200669646	59165	$5,430,000	14815 Bannister Road S.E.
113011993	59515	$11,940,000	70 Glendeer Circle S.E.

The jurisdictional matter concerning these complaints was heard on 6th day of July, 2010 at the office of the Assessment Review Board located at Floor Number 3, 1212 – 31 Avenue NE, Calgary, Alberta, Boardroom 11.

Appeared on behalf of the Complainant:

- Altus Group Limited – R. Brazzell and A. Izard

Appeared on behalf of the Respondent:

- City of Calgary – K. Hess

Background:

The three properties referred to above were scheduled for merit hearings on July 6, 2010; however the City of Calgary (City) brought forward a preliminary matter at the outset of the hearing. The City stated that the Complainant had not disclosed their evidence respecting any of these complaints on or before the deadline as prescribed by section 8(2) of the Matters Relating to Assessment and Complaints Regulation (MRAC) and as set out by the ARB in the hearing notices dated April 6, 2010. This written decision therefore deals only with this preliminary jurisdictional matter common to all three complaints. The CARB provided the parties with its abbreviated oral decision on July 6, 2010 and therefore this is the CARB's follow-up written decision with reasons.

Issues:

1. Was the Complainant's disclosure received after the deadline specified by MRAC and the notice of hearing for the subject complaints?

2. If so does the CARB have jurisdiction to use discretion in allowing the Complainant's evidence to be heard and do the circumstances warrant the exercise of that discretion in this case?

3. If the CARB decides that it can and will grant relief respecting the late filing, how should the matters be scheduled going forward to provide fairness to both parties?

4. Do the circumstances and actions of either party in this case warrant the potential awarding of costs under section 52(3) of MRAC?

Board's Decision in Respect of Each Matter or Issue:

Issue 1 – The Complainant's disclosure of evidence was late and received after the deadline set out in MRAC and the date set out by the ARB Clerk in the notice of hearing.

Issue 2 – The CARB has jurisdiction to exercise discretion in this case and decides to allow the complainant's evidence in each case even though it was received after the deadline.

Issue 3 – The CARB decided to postpone the merit hearing of these matters to August 26 and 27, 2010 giving the Respondent the usual period of time to develop and disclose their evidence 14 days before the hearing date of August 26, 2010.

Issue 4 – The CARB has decided that the primary cause of the need for a preliminary jurisdictional hearing on July 6, 2010 and the resulting postponement was the late filing of its disclosure by the Complainant and therefore costs will be considered against the Complainant under section 52(3) and Schedule 3 of MRAC.

Late Disclosure

Overview of the Positions of the Parties

The City of Calgary (City) stated that in the subject cases the hearing notices sent to the parties by the ARB clearly set out that the Complainant's disclosure in each case was due on or before May 25, 2010 and if received after that deadline will not be heard by the Board. MRAC requires under section 7 that the clerk notify the Complainant of the date, time and location of the hearing and the requirements and timelines for disclosure of evidence under MRAC section 8. This was done and these facts are not in dispute. The disclosures for the subject complaints were received by the Respondent as follows:

Roll Number	201464104	May 26, 2010	1:07 am
Roll Number	200669646	May 26, 2010	3:03 am
Roll Number	113011993	May 26, 2010	1:45 am

The City argued that the disclosures for these complaints were received on the day following the deadline of May 25, 2010 which is mandatory in nature. Further MRAC section 9(2) states "the composite assessment review board must not hear any evidence that has not been disclosed in accordance with section 8". The City also stated that while it is recognized that section 10(3) of MRAC allows that time for disclosure may be abridged with written consent of the persons entitled to the evidence, the City will not provide such consent in this case. The only information then that is properly before the Board is the complaint form itself. The City acknowledged that the Assessor's disclosure of evidence in these cases would have been June 21, 2010, however the City decided that there was no need to disclose their evidence.

The Complainant referred to the same evidence as did the City with respect to when the disclosures were sent. These disclosures were forwarded by email and there is no dispute with the times referred to by the City. The Complainant acknowledged in each case that the City had sent a letter to the ARB indicating that the City was taking the position that because of the Complainant's late filing of evidence the only information the Complainant could rely upon at the hearing would be the complaint form itself. The City did not disclose anything of substance respecting the assessment but rather provided information they would rely on respecting their jurisdictional challenge. The

Complainant while acknowledging the date and times the disclosures were sent to the City suggested that these disclosures were not in fact late as the City would not attend to them in any event until approximately 8:00 am the following morning of May 26, 2010. The Complainant also referred a list of complainants showing hearing and disclosure dates and the resulting varying number of days disclosures were required in advance of the hearing. The number of days as calculated by the Complainant ranged from 41 to 43 days. Based on this information the Complainant argued that the ARB appears to be flexible in their time frames for scheduling and this flexibility supports a less rigid interpretation of the disclosure deadline for the Complainant.

Findings and Reasons:

The CARB has reviewed section 8 of MRAC and agrees with the City that correct interpretation is that the complainant's disclosure must be received at least 42 clear days before the date of the hearing. In actual fact it appears that the system adopted by the ABR clerk is that the notice of hearing disclosure dates are set to accommodate the section 22(2) and (3) of the Interpretation Act. This results in slight variances to the 42 days of lapsed time because of the occurrences of weekends. The Board therefore has determined that there can be no doubt that the Complainant's disclosure in each case was late, by a minimum of one to three hours based on the deadlines stated in the notice of hearing.

Jurisdiction and Disposition of Complainant's Evidence

Overview of the Positions of the Parties

The City referring to section 8(2)(a) of MRAC argued that this provision contains the imperative "must" and therefore this requirement of "at least 42 days before the hearing" is mandatory leaving the CARB without authority to consider evidence filed later than 42 days before the hearing. Further it was argued that section 9(2) reaffirms this requirement again using the word "must". "*A composite assessment review board must not hear any evidence that has not been disclosed in accordance with section 8*". The abridgement provision in section 10 requires the consent of the person entitled to the evidence and the City of Calgary will not provide their consent, therefore the CARB should proceed to hear the complaint without admission of the Complainant's late evidence. If the CARB allows the Complainant's evidence in, the Board in that event would have to expand the time in order to allow the City the required time to develop and disclose their evidence.

The Complainant argued that the Board should find that the Complainant has complied with the basic intent of section 8. The Complainant pointed out that for the most part the City had received the same or similar disclosure of the same evidence on earlier complaints and therefore were not disadvantaged by not having the same materials prior to May 26, 2010 for the subject complaints. In any case the City have not argued that these filings were - made after 11:59 pm May 25, 2010 - caused harm or in any way was prejudicial to the City. The Altus Group claimed that the City has been late in their filing of evidence from time to time and this lateness has generally been overlooked by the Altus Group. In the Complainant's view the City should have disclosed their evidence in response to the disclosure of the Complainant and having not done so places the Board in an awkward position. If the CARB finds that the complaints are technically late then the rules of natural justice should prevail and the Board should not disallow the Complainant's evidence but rather exercise its authority under section 15 of MRAC and postpone the hearing of this matter. Disallowing the Complainant's evidence and proceeding with the hearing would be tantamount to dismissing the complaint. Such a decision of the Board would be disproportionate to the minor

technicality of an hour or so late in filing disclosure documents. The Complainant referred the CARB to numerous decisions of the MGB and the courts to support their contention that the Board should not disallow their evidence based on a technicality and should exercise its discretion to ensure that procedural fairness and the tenants of natural justice are served. These cases included the Alberta Queen's Bench City of Calgary v Gaspar Szenter Holdings case wherein the decision sets out that the primary purpose of the legislation is to provide access to the tribunal and procedures that accord with natural justice. The Boardwalk Reit v City of Edmonton case was relied on in support of the concepts of reasonableness, substantial compliance and that any penalty must not be disproportionate to the error or fault. The Complainant also cited MGB 105/09 which dealt with the late filing of an issue statement. The Complainant highlighted the following "*The MGB does not agree with the Respondent's position but rather endorses the Appellant's view of recent case law. The denial of the right to appeal is a very serious penalty, and in absence of mischievous or repetitive behaviour the right to appeal should not be denied on a mere technical basis*". Other MGB orders and CARB orders were also cited in relation to the argument of substantial compliance, severity of penalties and reasonableness. It was argued that in this case substantial compliance has been met and procedural fairness can be achieved through the Board's exercise of its discretion to postpone under section 15 of MRAC. The Board should also be mindful that this is the first year of a new complaint system wherein all parties have to adapt to new processes.

Findings and Reasons

The CARB has determined that it does have jurisdiction to decide whether or not to allow the Complainant's evidence to be heard even though it may technically be late. Under section 10(2) of MRAC "the composite assessment review board may at any time by written order expand the time specified in section 8(2)(a), (b) or (c). Section 8(2) (a) and (b) deal with the relevant time frames for the matters before the CARB. In order to facilitate an expansion of time it may be necessary for the CARB to grant a postponement which the Board has authority to do under section 15 of MRAC.

The next question the Board must answer is whether the Board should in this case exercise its discretion to take the steps necessary to allow the Complainant's evidence to be heard while at the same time provide the Respondent with a fair opportunity to develop and disclose their evidence in this matter. All of the Complainant's cases were reviewed by the Board. However, only a few will be singled out for reference in our written decision. The decision of the Alberta Queen's Bench City of Calgary v Gaspar Szenter Holdings was made under the old Alberta Complaints and Appeals Regulation, however the overall purpose of the legislation remains. This decision sets out that weight should be given to the purpose of the legislation which is to provide access to the tribunal and procedures that accord with natural justice. The Board also accepts the reasoning in the Boardwalk case and others that the penalty must not be disproportionate to the fault. In these cases the filing of disclosure evidence by the Complainant was late by at least 1 – 3 hours albeit hours during the very early morning. The Respondent did not argue that the late filing in this case resulted in any form of prejudice or even practical inconvenience to them. The CARB therefore is swayed by the body of case law and by the tenants of natural justice to allow the Complainant's evidence to be heard.

The CARB nevertheless is disturbed by the fact that there appeared to be little to support the reason for the lateness of disclosure and also by the fact that there have been other instances of the same behaviour by the same agent in the past. The Complainant highlighted a quote from MGB 105/09 in support of their position before this Board as follows "*The MGB does not agree with the Respondent's position but rather endorses the Appellant's view of recent case law. The denial of the right to appeal is a very serious penalty, and in absence of mischievous or repetitive behaviour*

the right to appeal should not be denied on a mere technical basis". While the CARB in this case has followed the main thrust of the view taken by the MGB in that case the CARB nevertheless must express its concern with regards to the mischief and repetitive behaviour aspects referred to in this same quote. As was mentioned in the Board's oral decision and repeated here as well; the Board is aware of other instances of the same behaviour. However, the full record of previous instances was not before the Board. A repetitive pattern, if shown clearly, would give rise to the potential considerations of mischief and may also signal a serious disrespect of the opposing party, the CARB and the procedures under which the complaints system operates. The CARB decision in this case has not been significantly influenced by these considerations. However the Board believes the Complainant should be aware of the Board's sensitivity to these matters.

In keeping with the principles of administrative law and the principles of natural justices and based on the foregoing considerations the CARB decision is to allow the Complainant's evidence to be heard in the merit hearings of these matters.

Expansion of Time and Postponement

The CARB understood that both parties agreed that should the CARB decided to allow the Complainant's evidence, that decision would be facilitated through an expansion of time under section 10(2) and a postponement under section 15 of MRAC. In order to facilitate the decision above and to ensure procedural fairness the CARB expands the time for the Respondent to disclose their evidence to August 11, 2010 and postpones the hearing of these matters to August 26 and 27, 2010.

Potential Awarding of Costs Under Section 52(3) of MRAC

In its decision on this jurisdictional matter the CARB has found in favour of the Complainant, however that decision does not negate the potential that the Board may wish to award costs against the Complainant's as set out under section 53(3) of MRAC. The ARB had scheduled merit hearings on July 6, 2010 for all three of the subject complaints. At the beginning of the hearing the City of Calgary brought forward a motion that the CARB disallow the Complainant's evidence because it had been disclosure after the deadline set out in section 8(2). Both parties had filed evidence relating to this jurisdictional matter and were well prepared to argue their respective positions. As a result the hearing of these preliminary matters consumed the time that had been set aside by the ARB for the merit hearings. The City, believing that the CARB was without jurisdiction to allow the Complainant's evidence to be heard, had not prepared or filed any evidence in response to the Complainant's late filing. The Board believes that it is obvious in this case that the route cause of the time required for the preparation and hearing of these preliminary jurisdictional matters is that the Complainant was late in submitting their disclosure of evidence for the merit hearings of the subject complaints. To resolve these matters in a procedurally fair manner the CARB had little choice but to expand the time and provide a corresponding postponement of the merit hearings.

Under section 52(3) the CARB "may on its own initiative and at any time award costs". The CARB is considering taking action in this case to award costs against the Altus Group in favour of the City of Calgary in accordance with one or both of the categories outlined in the third and fourth points of Part 1 of Schedule 3 of MRAC. The CARB therefore invites the parties to make written submissions to the CARB respecting this matter. The Respondent's submission must be received by the ARB office and the Altus Group no later than 4:00 pm on August 4, 2010. The Complainant submission

must be received by the ARB and the City of Calgary Assessment Unit no later than 4:00 pm on August 18, 2010. The parties will be given a brief opportunity to speak to their respective submissions at the beginning of the rescheduled merit hearings for the subject complaints on August 26, 2010. The CARB will consider the parties submissions in making its final decision respecting the awarding of costs in this matter.

Decision Summary

The Complainant's evidence disclosed on May 26, 2010 respecting the subject complaints is allowed. The City of Calgary will have until August 11, 2010 to disclose their evidence respecting these complaints and the Complainant must disclose on or before August 18, 2010 any rebuttal evidence they may have in response. The merit hearings for these complaints will commence at 9:00 am on August 26, 2010 continuing on August 27, 2010 if required. The parties will also be given an opportunity to address their written submissions on the matter of costs, if they so choose, at the beginning of the merit hearings on August 26, 2010.

It is so ordered.

DATED AT THE CITY OF CALGARY THIS 22 DAY OF July 2010.

P. Petry
Presiding Officer

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.

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).*

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.*