

**CALGARY
ASSESSMENT REVIEW BOARD
DECISION WITH REASONS**

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

between:

ALTUS GROUP LTD., COMPLAINANT

and

The City Of Calgary, RESPONDENT

before:

***Earl K Williams, PRESIDING OFFICER
Ray Deschaine, MEMBER***

This is a complaint to the Calgary Assessment Review Board in respect of Property/Business assessment prepared by the Assessor of The City of Calgary and entered in the 2010 Assessment Roll as follows:

ROLL NUMBER: 086156296

LOCATION ADDRESS: 5255 Richmond Rd SW

HEARING NUMBER: 59252

ASSESSMENT: \$21,980,000

This complaint was heard on 28th day of July, 2010 at the office of the Assessment Review Board located at Floor Number 4, 1212 – 31 Avenue NE, Calgary, Alberta, Boardroom 6.

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 and R Ford

Board's Decision in Respect of Procedural or Jurisdictional Matters:

No Procedural or Jurisdictional Matters were identified.

Property Description:

The property is a 70,811 square foot (sq ft) Shopping Centre (Classified as a CM0203 Retail Shopping Centre – Neighbourhood Shopping Centre) on a 7.19 acre site located in the Community of Glamorgan. The Centre is anchored by a London Drugs and has a freestanding bank and restaurant on the property.

Background:

This Composite Assessment Review Board ("CARB") was convened to hear a preliminary matter related to Matters Relating to Assessment Complaints Regulation ("MRAC") section 8 (2).

On July 13, 2010 the property was scheduled for a merit hearing, however, at the outset of the hearing the Respondent brought forward a Preliminary Matter related to late filing and non compliance with section 8(2) of MRAC. They City stated that the Complainant had not disclosed their evidence respecting the complaint on or before the deadline as prescribe by section 8(2) of the MRAC and as set out by the Assessment Review Board Notice of Hearing ("Notice") dated April 6, 2010.

The Board rendered an oral decision that the Preliminary Matter related to late filing and non compliance with section 8(2)(a) of MRAC would be heard as a separate matter. As this late filing was not a single occurrence but was representative of a pattern of late filings by the Complainant, the CARB requested that the Respondent's evidence package include a historical summary of the Complainant's and this agent's compliance with section 8(2) of MRAC for the Assessment years 2009 and 2010.

The parties agreed to July 29, 2010 as the date for hearing the Preliminary Matter and to the schedule for the disclosure of evidence. Subsequent to the Board scheduling the date for the Preliminary Matter the parties mutually agreed to amend the hearing date to July 28, 2010 with a one day adjustment in the schedule for the disclosure of evidence.

Issue:

The Respondent advised that in regard to Roll Number: 086156296 the the Complainant had not complied with the Disclosure of Evidence time frame of 42 days before the hearing required by MRAC section 8(2)(a). As set out by the Assessment Review Board Notice of Hearing dated April 6, 2010 the evidence was required by May 31, 2009. The Complainant filed at 00:23 a.m. on June 1, 2010.

Based on the Complainant's late filing the Respondent requested that:

- because of the non compliance with MRAC that a postponement not be granted, and
- if the Board were to grant a postponement to allow the evidence, then costs as provided for in MRAC section 52 and set out in Schedule 3 Table of Costs be levied against the complainant as this was not the first time the Complainant had disregarded MRAC, the instruction of the Board and had filed late.

Board's Decision in Respect of the Issue:

Complainant and Respondent presented a wide range of relevant and less relevant evidence in respect of the issues.

Respondent

Referring to section 8(2)(a) of MRAC the Respondent 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". Specifically a CARB 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 Respondent will not provide their consent unless costs are to be awarded.

The Respondent presented evidence that the Complainant had not complied with the Disclosure of Evidence time frame required by section 8(2)(a) of MRAC. In respect of Roll Number 086156296 the Complainant Disclosure Due Date was May 31, 2010 as contained in the Notice of Hearing mailed from the Assessment Review Board on April 6, 2010. The Complainant filed the evidence electronically at 00:23 a.m. on June 1, 2010. The parties did not disagree that the evidence had been filed late.

The Respondent advised that this late filing is not a single event rather there is a history of late filings by the Complainant and specifically by this agent. In support of the matter of non compliance the Respondent presented Exhibit 1: Written Submission of the City of Calgary. The evidence presented included the background to the issue, and two tables documenting the late filings by the Complainant. The title of the tables and comments provided in the evidence were as follows:

- 2009 Non Filing or Late Filing of Issue Statements – Altus failed to file an issues statement as required in section 3 of ACAR a total of 46 times
- 2010 Altus – Altus has failed to file in accordance with MRAC 12 times for property and 5 times for business complainants.

A review of the 2010 late filings determined that: 7 were filed the day following the due date, 4

were never filed. The Respondent advised that an analysis of the 2010 late filings determined that 5 of the 7 filings were related to the same agent. Further it was noted that 3 of the late filings had been granted postponements on July 6, 2010 by CARB Board Order 0830/2010.

It was argued that the practice of late filings has a financial and non financial impact on the Complainant appeal process. There are delays in decisions, the required preparation for hearings on preliminary matters, preparation for appeals to the MGB, and overall reallocation of resources which impacts through the system.

In summary the Respondent argued that:

- the Respondent is prejudiced by the actions of the Complainant,
- the requirements of MRAC section 8(2) must be met,
- the repetitive behaviour by the agent of not compiling with MRAC section 8 (2) is disrespectful and must be considered when deciding on a request for a postponement,
- a postponement in respect of Roll Number 086156296 not be granted, and
- if the Board grants a postponement then costs are to be awarded.

Complainant

The Complainant presented an evidence package identified as follows: Exhibit 2: London Place West, 5255 Richmond Road SW, 2010 Assessment Review Board – Preliminary Issue Response. The evidence included: a Clarification of the Respondents' Listing of 2009 Alleged Late Filings, additional Arguments and Precedents and a listing of Altus 2009 and 2010 Calendar Year Evidence Exchanges.

The Complainant did not disagree with the Respondent's evidence that listed the 2009 and 2010 late filings. However, the Complainant argued that an examination of the details and in certain cases the final outcome of the filings is required. The Complainant analysis of the 2009 evidence exchanges is presented on page 2 and pages 5 through 57. The analysis of the Respondent's list of 2009 late filings included details on 5 of the late filings which were appealed to the MGB and a favorable decision was received and the matter was heard on the merits of the appeal.

A table titled 2010 Altus on page 4 of the evidence presented an analysis of the 2010 evidence exchanges which did not comply with MRAC section 8. The Complainants analysis of this data reported that of the 12 late filings; 7 have either been heard or postponed; 3 withdrawn and 2 had decisions rendered. It was determined that 7 of the 12 late filings were filed by the same agent.

The Complainant presented in a section titled Altus Group 2009-2010 Calendar Year Evidence Exchanged (pages 121-225) provided details on all of the evidence exchanges. An analysis of all the 2009 and 2010 evidence exchanges is presented in a table on page 123 and reported for the:

- Taxation years 2008 and 2009 out of a total 2,732 evidence exchanges the late filings were 6 (0.2196%);
- Taxation year 2010 out of a total of 1,476 filings there has been 7 late filings or 0.4743%.

Based on the reported analysis the Complainant argued that the analysis of the evidence exchanges demonstrates that the Complainant has complied with the basic intent of section 8. The late filings are less than 0.5% in 2010 when working with a new complainant system. In 2009 when working within the requirements of a well established system the late filings were 0.2% of the total filings.

It was emphasized by the Complainant that MGB Board Order 004/10 and 105/09 recognize that a denial of the right to complain against assessments would be disproportionate to the gravity of the error, that being a late filing.

In the written and oral arguments the Complainant referred the CARB to MGB Board Orders and the courts to support their contention that the Board should not disallow their evidences based on a technicality and should exercise its discretion to ensure that the procedural fairness and the tenants of natural justice are served. It was argued by the Complainant (evidence page 61) that the decision made by the Alberta Court of Queen's Bench (A.B.Q.B. No. 0701/04629) in the City of Calgary v Gaspar Szentor Holdings et.al supports that the primary purpose of regulations like MRAC is not administrative efficiencies but rather to provide access to the tribunal and procedures that accord natural justice.

Other MGB orders, CARB orders, decisions from the Court of Queen's Bench of Alberta and Court of Appeal for Saskatchewan were also cited in relation to the argument of substantial compliance, severity of penalties and reasonableness. It was argued that substantial compliance has been met and procedural fairness can be achieved through the Board's exercise in its discretion as provided for in MRAC. Disallowing the complainant's evidence and proceeding with the hearing would be tantamount to dismissing the complainant. 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 cited from MGB Board Order 105/09 which dealt with the late filing of an issue statement, the following statement: "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 behavior the right to appeal should not be denied on a mere technical basis."

In summary the Complainant argued a number of points:

- time is a narrow issue and in their view does not affect the outcome of the appeal of the assessment value,
- no one is harmed by a late filing of evidence especially if the filing is within a day of the required filing date,
- the Complainant has complied within the basic intent of section 8,
- Section 8 should not be interpreted in isolation it is to be interpreted in the broader context of the appeal process,
- the Board should be mindful that this is the first year of a new complaint system wherein all parties have to adapt to new processes,
- If the CARB find 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 as provided for in section's 10 and 15 of MRAC.

Board Decision and Reasons

The Board examined and has determined that it does have jurisdiction under the Municipal Government Act and MRAC to decide on each of the matters raised by the Respondent. The findings and reason for each matter is presented below:

Postponement

A decision to not grant a postponement on the basis of non compliance with MRAC is a matter with serious consequences for the Complainant and has been the subject of a number of cases reviewed by the Board and the Alberta Court of Queen's Bench.

Further to not grant a postponement impacts directly on the Complainant and not the agent representing the Complainant. When an agent is engaged to represent a Complainant through the process, the agent has a responsibility to the Complainant to ensure that the disclosure of evidence is handled in accordance with MRAC.

In respect of Roll Number 086156296 the evidence shows and the Complainant acknowledges that the evidence was filed 23 minutes late. The Complainant provided no explanation as to why the evidence exchange did not comply with section 8(2).

As the filing was only 23 minutes late the Board examined whether the magnitude of the lateness, be it minutes, hours or days, is a consideration in a decision on postponement. MRAC's Disclosure of Evidence section 8(2) provides the rules which apply with respect to the timing for the disclosure of evidence to the Complainant and the Respondent; specifically the number of days before a hearing that the evidence must be provided. The introductory statement for each of the sub clauses of section 8 (2) contains the imperative "must". Specifically:

- 8 (2)(a): the complainant must, at least 42 days before the hearing date,
- 8 (2)(b): the respondent must, at least 14 days before the hearing date,
- 8 (2)(c): the complainant must, at least 7 days before the hearing date,

MRAC is silent on the magnitude of lateness it simply says the party "must" disclose evidence by a specific date. It is the view of the Board that magnitude of lateness is not the primary consideration in deciding on granting of a postponement. However, the deadlines prescribed in MRAC Section 8(2) must be met by the parties. A decision on postponement is typically based on an examination of all of the evidence and the gravity of the error.

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 evidences based on a technicality of a late filing and should exercise its discretion to ensure that the procedural fairness and the tenants of natural justice are served. Further the Board also accepted the reasoning that the penalty must not be disproportional to the fault.

In reaching their decision the Board paid particular attention to the decision of the Alberta Court of Queen's Bench (A.B.Q.B. No. 0701/04629) in the City of Calgary v Gaspar Szenter Holdings et.al. It is recognized that this decision was made under the old Alberta Complaints and Appeals Regulation; however the overall purpose of the legislation remains. The primary

purpose of regulations like MRAC is not administrative efficiencies but rather to provide access to the tribunal and procedures that accord natural justice. This means 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

Based on the evidence, the body of case law, the principles of administrative law and natural justice the CARB has decided to:

1. Allow the Complainant's evidence to be heard in a merit hearing of these matters,
2. Expand the time specified in section 8(2) for the disclosure of evidence as provided for in section 10(2) of MRAC, and
3. Grant a postponement based on the provisions of MRAC section 15 in order to facilitate the expansion of time.

Complainant's Repeated Failure to Comply with Rules for Disclosure of Evidence

MRAC's Disclosure of Evidence section 8 (2) provides the rules which apply with respect to the timing for the disclosure of evidence to the Complainant and the Respondent; specifically the number of days before a hearing that the evidence is to be provided. The introductory statement for each of the sub clauses of section 8 (2) contains the imperative "must". The Oxford Canadian Dictionary defines the word "must" as: "*be obligated or required to*".

The City of Calgary's administrative procedure requires an Assessment Review Board's Notice of Hearing ("Notice") be forwarded to the Complainant. On this Notice is the date of the hearing and the Complainant disclosure due date.

In summary MRAC and the Respondent's Notice provides the parties ample notice and time for the preparation and filing of the evidence.

The Respondent's evidence supported their argument that non compliance with MRAC section 8(2) by the agent is not a single occurrence but representative of a repetitive behavior by this agent to not comply with the requirements of MRAC. Further the CARB was concerned that no explanation or apology was provided by the agent for the repeated non compliance.

The Complainant did not disagreed with the Respondent that there have been a number of the filings that were not in compliance with section 8 (2) of MRAC and the majority were related to the same agent. The Complainant argued that the non compliance with MRAC was just an administrative technically.

Further the Complainant's argued that even though there was noncompliance with MRAC section 8(2) a number of the late filings had been appealed to the MGB, a favorable decision received and the assessment was heard on the merits of the appeal.

MGB Board Order MGB 105/09, referenced by the Complainant in support of their position for granting a postponement, stated 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 behavior the right to appeal should not be denied on a mere technical basis."

The CARB focused attention on the following phrase from the above statement from MGB 105/09: "*in absence of mischievous or repetitive behavior the right to appeal should not be*

denied on a mere technical basis." MGB 105/09 speaks to the seriousness of mischievous or repetitive behavior to the complaint process by referencing that in its absence the right to an appeal should not be denied on a mere technical basis. If a decision on an appeal can be impacted by the presence of mischievous or repetitive behavior then such a behavior must be viewed as an abuse of the complaint process. The Respondent's evidence shows that there has been repetitive non compliance which is an abuse of the complaint process.

Non compliance with the MRAC is a serious matter at any time but is a major concern when the non compliance is a repetitive behavior. Repeated non compliance is bordering on deliberate mischief and disrespect of the Legislation, the Board, the Complainant, the Respondent and the procedures under which the complainant system operates.

Based on the evidence presented the CARB decided that:

1. Disclosure of Evidence rules contained in section 8(2) of MRAC **must** be honoured.
2. Repeated non compliance by the same agent will not be tolerated and may become a consideration when a CARB is deciding on granting a postponement.
3. Section 9(2) of MRAC states: "A composite assessment review board must not hear any evidence that has not been disclosed in accordance with section 8."

Costs

The Respondent requested that if the Board were to grant a postponement to allow the evidence, then costs as provided for in MRAC section 52 and set out in Schedule 3 Table of Costs be levied against the Complainant as this was not the first time the Complainant had disregarded MRAC, the instructions of the Board and had filed late.

The CARB examined MRAC section 52 which is the legislative authority for addressing the matter of costs and determined that:

- Section 52 (1) gives a party the authority to make an application to a CARB for an award of costs in an amount set out in Schedule 3 of MRAC
- Section 52 (2) gives the CARB the basis on which to award costs. Section 52 (2)(a) references when there was an abuse of the complaint process and Section 52 (2)(b) requires consideration if the party applying for the costs incurred additional or unnecessary expenses as a result of the abuse of the complaint process.

The CARB did grant a postponement on the basis that the primary purpose of regulations like MRAC is not administrative efficiencies but rather to provide access to the tribunal and procedures that accord natural justice. The CARB was of the view that the granting of the postponement was not a sufficient basis alone to award the Respondent's request for costs. A decision on awarding costs is based on an examination of all of the evidence and the gravity of the error.

This agent's repeated non compliance with MRAC section 8 is a greater concern to the CARB. The Complainant did not dispute the Respondent's evidence that the majority of the non compliance was related to the same agent and no explanation was provided for the repeated non compliance. As the CARB stated earlier in this Board Order repeated non compliance is bordering on deliberate mischief and disrespect of the Legislation, the Board, the Complainant, the Respondent and the procedures under which the complainant system operates.

Based on MRAC section 52(2) and Schedule 3 Table of Costs the CARB awards costs in the amount of \$2,000 based on:

1. The repeated non compliance with MRAC section 8(2) by the same agent was an abuse of the complaint process, and
2. That the respondent would have incurred additional costs to prepare for the hearing on this preliminary matter.

Board's Decision:

Postponement

Based on the evidence, the body of case law, the principles of administrative law and natural justice it was decided to:

1. Allow the Complainant's evidence to be heard in merit hearing of these matters, even though it was not filed in compliance with the time frames contained in MRAC section 8(2);
2. Expand the time specified in section 8(2)(a), (b) or (c) for the disclosure of evidence as provided for in section 10(2) of MRAC and
3. Grant a postponement based on the provisions of MRAC section 15 in order to facilitate the expansion of time.

Complainant's Repeated Failure to Comply with Rules for Disclosure of Evidence

Based on the evidence presented it was decided that:

1. The Disclosure of Evidence rules contained in section 8 (2) of MRAC **must** be honoured. repeated non compliance with MRAC Section 8 (2) by the same agent was an abuse of the complaint process, and
2. Repeated non compliance by a specific agent will not be tolerated and may become a consideration when a CARB is deciding on granting a postponement.
3. Section 9 (2) of MRAC states: "A composite assessment review board must not hear any evidence that has not been disclosed in accordance with section 8.

Costs

Based on MRAC Section 52 (2) costs were awarded in the amount of \$2,000 based on:

1. The repeated non compliance with MRAC Section 8 (2) by the same agent was an abuse of the complaint process, and
2. That the respondent incurred additional costs to prepare for the hearing on this preliminary matter.

DATED AT THE CITY OF CALGARY THIS 14th DAY OF SEPTEMBER 2010.



Earl K Williams
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.*