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 Ltd., COMPLAINANT

and

The City Of Calgary, RESPONDENT

before:

J. Gilmour, PRESIDING OFFICER
M. Peters, MEMBER
I. Zacharopoulos, MEMBER

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

ROLL NUMBER:	**200449429**
LOCATION ADDRESS:	**1115 10 Av SW**
HEARING NUMBER:	**60410**
ASSESSMENT:	**$10,650,000**

This complaint was heard on the 17th day of December, 2010 at the office of the Assessment Review Board located at Floor Number 4, 1212 – 31 Avenue NE, Calgary, Alberta, Boardroom 2.

Appeared on behalf of the Complainant:

- *A. Izard* *Agent, Altus Group Ltd.*
- *D. Mewha* *Agent, Altus Group Ltd.*

Appeared on behalf of the Respondent:

- *D. Lidgren* *Assessor, The City of Calgary*
- *A. Cornick* *Assessor, The City of Calgary*

Preliminary Issue:

The Respondent, prior to the merit hearing, stated that he had only two days to review the rebuttal evidence filed by the Complainant in response to a number of recent Board decisions the Respondent intended to file with the Panel. The Respondent also remarked that such documents were public and were admitted in evidence at the commencement of previous hearings by other panels.

In the disclosure of evidence as outlined in the *Matters Relating to Assessment Complaint Regulation* (*MRAC*), Section 8(2) describes the following rules which must apply:

(i) The Complainant must, at least 42 days before the hearing, disclose his evidence to the Respondent
(ii) The Respondent in return must, at least 14 days before the hearing, disclose his evidence to the Complainant, and
(iii) The Complainant must, at least 7 days before the hearing, disclose to the Respondent his rebuttal to the Respondent's evidence.

The disclosure of evidence process is then complete, prior to the hearing. Previous Board decisions are considered and similar facts are weighed in the determination of issues before each Board panel in reaching their decision. As noted by the parties, each Board panel is primarily interested in the specific facts and evidence before it, in reaching a fair and equitable decision. Although prior Board decisions may be useful, based on similar facts, in reaching a decision, such prior determinations are not necessarily binding on a panel hearing the specific case at hand.

The disclosure rules of evidence described in *MRAC* seem clear and unambiguous. They have been established to ensure that both parties get a reasonable time to respond to each other's evidence and are not blind-sided during the hearing. If the Board allowed one party at the last minute to file past Board Orders, the other side would likely ask for time to rebut such cases, arguing that the facts of such cases were not the same as the case in hand. In other words, if Section 8(2) of *MRAC* were not adhered to, the disclosure process could continue on indefinitely; which would defeat the legislative intent of abiding by the regulations.

For the above reasons, the Board denied any further evidence to be filed before this Panel prior

to the commencement of the merit hearing, other than the disclosure of evidence process described and permitted in Section 8(2) of *MRAC*.

Property Description:

The subject property is a parking lot in the Beltline area for the Calgary Co-Op Midtown Market, consisting of 164 parking stalls. The site area consists of 49,567 sq. ft., or 1.14 acres.

Issue:

What is the assessed market value of the subject parking lot?

Background:

The subject property was assessed by the City in 2007 at $550, in 2008 and 2009 for $500 and in January 2010 for $750. The assessment was then amended in July 2010 for $10,650,000 as vacant land at $215 per sq. ft.

Complainant's Requested Value: $750

Summary of Complainant's Evidence:

The land use designation for the subject property was approved by City Council in February 2001 as a DC Direct Control District with both permitted and discretionary land uses (Bylaw #14Z2001) (EX R-1, Page 57).

In 2004 Subdivision approval was given to three adjacent lots by the City as follows:

Site	Land Area
Co-Op Store	55,328 sq. ft.
Parking Lot	49,567 sq. ft.
Vantage Pointe Tower (Condominium)	26,003 sq. ft
Total	130,898 sq. ft.

As part of the subdivision approval for the three lots, a restrictive covenant was included for the subject parking lot in Land Titles in December 2004.

Some of the important encumbrance provisions of this restrictive covenant should be noted as follows (EX C-1, Pages 124-128):

Paragraph "D": The Grantor (Calgary Co-Operative Association Limited) has agreed to grant the restrictive covenant as set out in this agreement to burden the parking site as the servient tenement and benefit the store site as the dominant tenant, the restrictive covenant being intended to prohibit the construction of buildings and other surface improvements on a portion of the parking site in accordance with the provisions of this restrictive covenant agreement.

Paragraph "E": As a condition of approving the plan of subdivision that, when requested at the Land Titles Office, will result in the creation of separate titles to the parking site and the store

site, the City requested the Grantor and Grantee (Calgary Co-Operative Association Limited) to register this restrictive covenant agreement and agree not to amend or discharge this restrictive covenant agreement without the consent of the City.

Paragraph 2: The restrictions and covenants contained in this restrictive covenant agreement:

(a) shall be deemed to be covenants running with and appended to the parking site, as the servient tenement, and shall be binding upon the parking site and the Grantor; and

(b) shall run with and enure to the benefit of the store site, as the dominant tenement, and the Grantee.

Paragraph 4: Until such time as the store currently being constructed on the store site is demolished, no buildings or other improvements shall be constructed on that portion of the parking site within seven meters of the store front of the store being constructed on the store site except for:

(i) such improvements as are usually required in connection with a surface parking lot of the type being constructed on the parking site, together with improvements for associated landscaped areas; and

(ii) such buildings or other improvements as the City may at any time hereafter approve, subject to compliance with all requirements and conditions imposed in connection with applicable laws, orders, regulations or enactments.

Paragraph 5: The Grantor and Grantee covenant for themselves and their successors in title to the parking site and the store site not to amend or discharge this restrictive covenant agreement without first receiving the prior written consent of the City . . ..

Paragraph 12: This restrictive covenant agreement and all rights, privileges and obligations herein contained shall extend to and enure to the benefit of and be binding upon the parties and their respective successors and assigns and their respective successors in interest of the parking site and the store site.

The Calgary Co-Operative Association Limited and the City of Calgary both signed the restrictive covenant.

The Complainant relied on three primary comparables:

1. Canada Safeway Store at 813 11 Av SW (approximately three blocks from the subject property). This property did not have a restrictive covenant but a land use restriction (Bylaw No. 27Z96, dated 13 May 1996) (EX C-1, Page 58), which restricted the land use to a retail food store only and a maximum floor area of 38,200 sq. ft.

2. Earl's Tin Palace at 2401 4 Street SW also had a land use restriction (Bylaw No. 13Z87, dated 19 January 1987) (EX C-1, Page 80), which noted the land could only be used as a restaurant or lounge, with a maximum gross floor area of 7,600 sq. ft.

3. The last comparable was the Canadian Tire Store at 9915 Macleod Trail SE. Similar to

the subject parking lot, this comparable did have a restricted covenant filed with Land Titles noting that "direct vehicular access to Macleod Trail South from the parcel of land shall not occur" (EX C-1, Page 109).

The Complainant's rebuttal evidence (EX R-1) consisted primarily of reviewing the basic principles of the "highest and best use", and Board decisions which reflected these principles.

Summary of Respondent's Evidence:

The assessor referred to the Board the definition of "fee simple" noted in the *Matters Relating to Assessment and Taxation Regulation* (*MRAT*). Section 2(a) of the regulation states as follows:

"An Assessment of property based on market value

(b) must be an estimate of the value of the fee simple estate in the property".

The assessor also referred the Board to the "Appraisal of Real Estate: Second Canadian Edition Chapter 5, Page 5.2", which states under the heading of "Fee Simple":

" Absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, expropriation, police power, and escheat" (EX R-2, Page 9).

The Respondent then referred the Board to the land use designation for the subject property (Bylaw 14Z2001, dated 2001 February 28) (EX R-1, Page 29), to DC Direct Control District, which listed a number of "permitted uses" and some "Discretionary uses".

On the basis of the 2001 City Bylaw, the assessor argued that there were no restrictions on use for the subject property from being developed like other vacant land lots in the Beltline area of the City. As noted by the Respondent, the assessed rate for vacant land lots in this area is $215 per sq. ft., based on the "highest and best use" principle.

For the above reasons, on the grounds of equity for commercial properties in the Beltline, the Respondent stated that the revised assessment for the subject property should be confirmed.

Findings of the Board:

The Board recognizes, based on the argument of the Respondent, that fee simple land can have restrictions imposed on it by governments. In this case, although the land use by-law was enacted by the City in 2001 for the area as DC Direct Control, the subdivision approval for the three lots (which included the subject parking lot) put a restrictive covenant on the parking lot with significant encumbrances on the property in 2004. The restrictive covenant agreement notes that the document cannot be amended without the consent of the City, no buildings or improvements can be constructed on the parking lot until the adjacent retail store is developed and the encumbrances would still apply to a new buyer of the store site. It also states in the agreement that it cannot be amended "without the prior written consent of the City".

The Respondent in its evidence produced a number of vacant lots in the City, but none had a similar "restrictive covenant" attached to the title, as does the subject parking lot.

The Board acknowledges that the City also signed the restrictive covenant agreement. For these reasons, this parking lot is unique and cannot be considered as similar to other vacant land lots in the Beltline. This panel considers that an assessed rate of $215 per sq. ft. for this property is inequitable and unfair since it is unlikely, due to the aforementioned encumbrances listed in the restrictive covenant agreement, that this land could be developed in the near future.

Decision of the Board:

The assessment for the subject property be reduced to $750.

DATED AT THE CITY OF CALGARY THIS 21 DAY OF December 2010.

J. Gilmour
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.