CALGARY
ASSESSMENT REVIEW BOARD
DECISION WITH REASONS

In the matter of the complaints against the property assessment as provided by the *Municipal Government Act*, Chapter M-26, Section 460, Revised Statutes of Alberta 2000 (the Act).

between:

First Capital Holdings (ALB) Corporation (as represented by Altus Group Ltd.) and Hudson's Bay Company (as represented by Wilson Laycraft, Barristers & Solicitors) COMPLAINANT

and

The City Of Calgary, RESPONDENT

before:

L. Wood, PRESIDING OFFICER
J. O' Hearn, MEMBER
A. Zindler, MEMBER

These are complaints 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 2011 Assessment Roll as follows:

ROLL NUMBER:	**086148301**
LOCATION ADDRESS:	**3915 51 ST SW**
HEARING NUMBERS:	**64170 & 64690**
ASSESSMENT:	**$23,550,000**

These complaints were heard on June 16, 2011, September 19, 2011, September 22, 2011 and November 2, 2011 at the office of the Assessment Review Board located at Floor Number 4, 1212 – 31 Avenue NE, Calgary, Alberta.

Appeared on behalf of the Complainant:

- *Mr. B. Dell* — *Lawyer, Wilson Laycraft, Barristers & Solicitors*
- *Mr. G. Chmelski* — *Tax Manager, Hudson's Bay Company*
- *Mr. A. Izard* — *Agent, Altus Group Ltd.*
- *Mr. D. Hamilton* — *Agent, Altus Group Ltd.*
- *Mr. R. Brazzell* — *Senior Manager, Altus Group Ltd.*

Appeared on behalf of the Respondent:

- *Ms. B. Thompson* — *Assessor, City of Calgary*
- *Mr. K. Gardiner* — *Assessor, City of Calgary*
- *Mr. I. McDermott* — *Assessor, City of Calgary*
- *Ms. K. Hess* — *Senior Manager, City of Calgary*

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

The Board notes there are two complaints associated with this roll number: Altus Group Ltd., on behalf of the property owner, the Richmond Square Mall; and Wilson Laycraft, Barristers & Solicitors, on behalf of the tenant, the Hudson's Bay Company/Home Outfitter. It was the intent of the parties and the Board to have multiple complaints associated with one roll number heard together (**CARB 0800-2011-P**). Additional time was required to hear these complaints throughout the course of the hearing season.

It is noted that the Complainant who filed a complaint on behalf of the tenant indicated that he had filed complaints on four of the six Home Outfitter stores located in Calgary. The Complainant requested that the evidence and argument submitted on this file **(#64690)** be cross referenced throughout the four complaints. The Respondent's evidence and argument would be cross referenced to files **#64686** and **#64688**. A separate assessment package would be submitted in regards to file **#64684**.

There were two preliminary issues that arose during the course of the shopping centre complaint: firstly, in regards to the Respondent requesting to withdraw a portion of their evidence; and secondly, the Respondent requesting that the Board rule on the issue of onus.

On September 19, 2011, the Respondent asked that it be allowed to withdraw a portion of its submission marked as Exhibit R1 prior to making its presentation to the Board, specifically removing pages 38, 39, 222 – 418. The Complainant objected to the Respondent's request to withdraw a portion of its evidence and requested the matter be postponed to consult with legal counsel. The Board agreed to the postponement until Thursday September 22, 2011.

On September 22, 2011, the parties requested an opportunity to present written arguments on this procedural matter. The Board scheduled the matter to be heard on November 2, 2011 with the following disclosure dates for the parties' written submissions:

- October 12, 2011 (Complainant's Written Argument)
- October 26, 2011 (Respondent Written Argument)
- October 28, 2011 (Complainant's Written Rebuttal)

On November 2, 2011, the parties made the following submissions to the Board:

The Complainant submitted that the Board should deny the Respondent's request to withdraw their material filed pursuant to *Matters Relating to Assessment Complaints Regulations AR 310/2009* (*"MRAC"*). He referred to section 14 which addresses the record of hearing. He argued that includes all documentary evidence filed in a matter even those documents not marked as an exhibit. He advised that the Board needs to be sensitive to the precedent that once you file a document, it becomes part of the record. There is direction that speaks to authority. The Board has the power to control and has the ability to require production. The Board should access all the evidence it needs to fulfil its mandate. It's presumably relevant and the Board should loathe excluding it in any circumstance.

In this instance, he argued it has gone past the point of filing and has been marked as an exhibit. The Complainant filed a response (rebuttal) to the Respondent's disclosure, understanding that it would be part of the record. It would be prejudicial to the Complainant because the rebuttal would lose its context. He argued that once it is disclosed and filed, it becomes part of the record and section 16 of *MRAC* confirms that. In this instance, the Board marking it as an exhibit takes it one step further. He argued if the Board allowed the Respondent to withdraw a portion of validly filed exhibits, it would be a reviewable error of law.

He submitted that legal decisions on this point are difficult to find, in part because the issue is self evident, but he submitted a few for the Board's consideration (Document C1 pages 9 – 47).

The Respondent submitted in prior years a party could have removed pages from a submission because at that stage it was still disclosure pursuant to section 8(2)(b) of *MRAC* (Document R1). In 2011, the administrative practice had changed at the Calgary Assessment Review Board office in which electronic submissions from the parties are being printed by the clerical staff as opposed to the parties bringing copies of their submissions to the Board. It is the Respondent's position that until it has presented that submission to the Board, it is disclosure, not evidence. Moreover the basis to remove the pages was due to the Complainant varying his evidence verbally as opposed to what he had submitted in his documentary evidence, particularly in regards to the Leased Fee Estate analysis. The Respondent was not advised of those errors prior to that hearing. Had it have known, their submission may have been different. The errors admitted to by the Complainant made the Respondent's capitalization rate evidence unnecessary.

The Respondent indicated that she requested the transcript of the September 22, 2011 hearing but there was no transcript. She referred to the comments made by the Presiding Officer indicating the risk is on the City to withdraw their evidence because the only evidence before the Board would be the Complainant's evidence. The Respondent stated that she was prepared to take that risk.

The Respondent argued that section 8(2) of *MRAC* refers to the exchange of evidence. She noted the sections refer to the term "disclose", not "filed". The Respondent indicated that it is her position that it is not evidence until the party has presented it to the Board, regardless of the Board marking it as an exhibit. She noted this has been a long standing practice of the

assessment review boards.

The Respondent submitted CARB 1311-2011-P in which the Board allowed a modification of the documents. The Respondent argued there is no prejudice to the Complainant because they have rested their case. The rebuttal should not be used to bolster the Complainant's submission. If the Complainant needed the information, then they should have filed it prior to the hearing.

The Respondent also argued there is a serious allegation in the Complainant's rebuttal that information was requested of the City but was not provided.

In rebuttal, the Complainant argued there was no change to their evidence but acknowledged the chart was mistitled (Document C2). He argued that the information provided by the Respondent showing the 7.25% capitalization rate used in the subject property's assessment does not explain anything.

In surrebuttal, the Respondent argued the Complainant's change in title changed the context.

The Board has set out its decision, in verbatim, as it was rendered to the parties on November 2, 2011 as follows:

> *The issue before the Board is whether the Respondent can retract, modify or alter their submission at this point in the hearing.*
>
> *It seems consistent, based on the parties' submissions, there is a common principle that a party cannot unilaterally retract, modify or alter a submission but requires the consent of all parties to do so (Document R1 Attachment 1 CARB 1311-2011-P page 3 and Document C1 page 39 Taylor v. City Sand & Gravel Ltd. para. 8(3)).*
>
> *If the Respondent is not allowed to retract, modify or alter their submission, then the Complainant is not allowed to do likewise, by changing the title of his capitalization rate analysis without the consent of the Respondent.*
>
> *The City has indicated that it has responded to a Leased Fee Estate Analysis based on this mislabelling. If that is indeed the case, this point will not be lost on the Board when it is making its decision.*
>
> *At the point evidence has been called and communicated it becomes part of the lawful record in accordance with MRAC and cannot be removed, severed or altered in any manner as per section 8 and 14 of MRAC, subject to the principle of consent.*
>
> *The Board acknowledges the matters pertaining to sections 299 and 300 as raised by both parties but that is not the issue before this Board today.*
>
> *It is on that basis that we are going to proceed with the merits of this case. The Respondent will now proceed with their submission.*

The Respondent requested that before it presents its submission, the Board rule on whether or not the Complainant has met onus. The Complainant raised two issues at that hearing on September 19, 2011: firstly, to reduce the assessed rental rate for the recreational space

(25,054 sq. ft.) from $12.00 psf to $9.00 psf and secondly to increase the capitalization rate from 7.25% to 7.75%. After allowing the parties an opportunity to provide oral submissions on that point, (which were brief), the Board rendered its decision as follows:

In determining the Complainant's onus of proof, the Board reviewed section 467(3)(c) of the Municipal Government Act which states:

An assessment review board must not alter any assessment that is fair and equitable, taking into consideration

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

In this case, the Board is in agreement with the City's position that the Complainant did not provide sufficient information to establish comparability in regards to the recreation space.

It is apparent to the Board there is an inconsistency with the data and methodology that has been utilized in the Complainant's capitalization rate analysis. For example:

1. *Actual parameters are mixed with typical parameters throughout;*
2. *The differences in size (29,722 -83,603 sq. ft.);*
3. *The spread of the cap rates utilized in this analysis (7.36 -8.66); and*
4. *Various differences in space type.*

All factors that would be required to determine similarity/ comparability.

In addition to these inconsistencies, there were no supporting documents provided to the Board to verify the values from within the analysis.

Based on the above, the Board finds the Complainant has not met the burden of proof in this instance.

Given the Board's ruling, this left the tenant's complaint (the Hudson's Bay/Home Outfitter) filed by Wilson Laycraft, Barristers & Solicitors, for consideration.

Property Description:
The subject property is the Home Outfitter store (40,673 sq. ft.) located at the Richmond Square Mall.

Issues:

1. The assessed rental rate for the Home Outfitter should be reduced from $17.00 psf to $15.00 psf.

Complainant's Requested value: $15.00 psf

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

1. The assessed rental rate for the Home Outfitter should be reduced from $17.00 psf to $15.00 psf.

The Complainant submitted the current lease rates for the six Home Outfitter stores located in Calgary that were signed in May 2001 – August 2009 (Exhibit C1 Tab 3). The leased areas are 32,356 – 40,731 sq. ft. and the rates range between $14.75 - $17.00 psf.

The Complainant's witness, Mr. Greg Chmelski, testified that rents signed by national retailers tend to be consistent across the country and therefore those rents are relevant in determining the market rent in any location. He indicated that rents for anchor tenants have been consistent for the past 4 – 5 years with no upward trends. He stated the typical areas for Home Outfitter store range between 30,000 – 40,000 sq. ft. and the typical rents are $14.00 - $16.00 psf. He indicated that typical tenant allowances are a minimum of $20.00 psf to get the store in functioning order (Exhibit C1 page 2). He submitted that this would translate into the net rental rate by reducing all of the rates by $1.33 - $1.50 psf over a 15 year initial term. The actual rental rate would be $14.00 psf. Mr. Chmelski also drew the Board's attention to several articles on retail in the submission (Exhibit C1 Tab 13).

The Complainant submitted that the rental rates for property assessments should equal the business assessments, which was the Respondent's practice in 2010. Accordingly the business assessments for the Home Outfitter as determined by the Local Assessment Review Board in 2010 should be the same as there is no evidence submitted by the Respondent to warrant an increase (Exhibit C1 Tab 9).

The Respondent submitted the $17.00 psf assessed rate was based on an analysis of recent leases for Junior Big Box space that commenced in January 2008 – October 2010. The Respondent referred to 30 lease comparables of leased areas between 14,836 – 37,809 sq. ft. with lease rates of $12.50 - $30.91 psf (median of $17.05 psf) (Exhibit R1 page 44).

The Respondent also submitted 64 equity comparables to show that the $17.00 psf rate was applied to leased areas of 14,836 – 46,043 sq. ft. (Exhibit R1 pages 45 & 46).

The Respondent argued, given the recent "McIntyre" decision, the assessed rental rates for business and property assessments are not the same for 2011.

The Board finds there was little evidence presented by the Complainant to support a $15.00 psf assessed rental rate. The Board was not persuaded by the Complainant's argument that the rental rates for business assessments and property assessments must be the same. The fact that the municipality had applied the same assessed rental rate to both the business and property assessments in 2010 does not convince the Board that methodology should still be employed given the recent court decision *Calgary (City) v. Canadian Natural Resources Limited* 2010 ABQB 417 as referred to by both parties.

In that decision, the Court found the City of Calgary was incorrect to have defined the net annual rental value ("NARV") in its Business Tax Bylaw *as the typical market annual rental value of the premises, exclusive of operating costs, but inclusive of costs of leasehold improvements* when determining the annual business assessments. The NARV reflects a value attributable to the landlord and typically tenant improvements do not add value to the owner. As

Justice McIntyre stated "*the failure of the City to consider the effect of leasehold improvements on the "net annual rental value" has the effect of incorrectly and inequitably inflating business tax assessments*" (para. 106, page 26).

Board's Decision:

The decision of the Board is to confirm the 2011 assessment for the subject property at $23,550,000.

DATED AT THE CITY OF CALGARY THIS 21st DAY OF DECEMBER 2011.

Lana J. Wood
Presiding Officer

APPENDIX "A"

DOCUMENTS PRESENTED AT THE HEARING AND CONSIDERED BY THE BOARD:

EXHIBIT NO.	ITEM
1. C1	Complainant's Submission (#64690)
2. R1	Respondent's Submission (#64690)
3. C1	Complainant's Submission (#64170)
4. C2	Complainant's Rebuttal (#64170)
5. R1	Respondent's Submission (#64170)
Document C1	Complainant's Written Argument (#64170)
Document C2	Complainant's Rebuttal Argument (#64170)
Document R1	Respondent's Written Argument (#64170)

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.

FOR ADMINISTRATIVE USE

SUBJECT	PROPERTY TYPE	PROPERTY SUB - TYPE	ISSUE	SUB - ISSUE
CARB	Retail	Neighbourhood Mall	Income Approach	Net Market Rent/ Lease Rates