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, Revised Statutes of Alberta 2000 (the Act).

between:

Elbow River Holdings Inc., COMPLAINANT (as represented by Altus Group Limited)

and

The City of Calgary, RESPONDENT

before:
J. Dawson, PRESIDING OFFICER
R. Kodak, MEMBER
J. Mathias, 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 2011 Assessment Roll as follows:

ROLL NUMBER:	**200374908**
LOCATION ADDRESS:	**218 - 18 Ave SE**
HEARING NUMBER:	**64237**
ASSESSMENT:	**$28,580,000**

This complaint was heard on the 16th and 18th days of August, 2011 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:

- *A. Izard* — *Agent, Altus Group Limited*
- *R. Brazzell* — *Agent, Altus Group Limited (for the record he is a lawyer but is there only for the purpose of a tax consultant)*
- *K. Li* — *Summer Student, Altus Group Limited (observer August 16th)*

Appeared on behalf of the Respondent:

- *D. Satoor* — Assessor, The City of Calgary
- *D. Lidgren* — Assessor, The City of Calgary

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

1. The Board and Respondent were ready to proceed for the 9:00 AM scheduled hearing at 9:00 AM August 16, 2011 however since the Complainant had a scheduling issue, the Board went to the next scheduled hearing. At 10:50 AM the hearing commenced as all parties were ready to proceed.

2. The Respondent indicated that they had a preliminary item regarding the Complainant's Disclosure Document(s) as they were filed late and not admissible. The file before the Board included a ***Complainant Disclosure Filed Late*** notice with no Complainant Disclosure Documents present. The Respondent referred the Board to Matters Relating to Assessment Complaints (MRAC) regulation where it reads;

> *8(2) If a complaint is to be heard by a composite assessment review Board, the following rules apply with respect to the disclosure of evidence:*
>
> *(a) the complainant must, at least 42 days before the hearing date,*
>
> *(i) disclose to the respondent and the composite assessment review Board the documentary evidence, a summary of the testimonial evidence, including a signed witness report for each witness, and any written argument that the complainant intends to present at the hearing in sufficient detail to allow the respondent to respond to or rebut the evidence at the hearing*

The Complainant objected to the preliminary issue citing this is the first time they have been apprised of the issue.

The Respondent countered by indicating there is no requirement within the legislation to notify the Complainant prior to the hearing of a preliminary issue.

The Complainant continued to object to this preliminary issue saying this is the first time they have been notified of the issue and they have not had an opportunity to prepare a defence as their records indicate that their Disclosure Document was sent on time.

The Respondent asserted to the Board that this is a pattern of behaviour from this specific agent. In addition we do have information from legal counsel for the Assessment Review Board stating that;

Panel member files will contain all lawful (within time) disclosure pursuant to the MRAC, anything filed after the obligatory filing time (23:59- or 23:59:59), on the date obliged by the regulation, will not be in panel member files, late filed data will be considered material within section 5(2) and 9(2) of the regulation.

The Complainant asked for a postponement for them to have an opportunity to respond to the allegation citing the Respondent has known for 42 days about this preliminary issue and chose to withhold that information and instead responded to the package as if the Complainant's Disclosure Document were on time. The Complainant argued that as a matter of Natural Justice and Procedural Fairness, not legislation, they should know the case being brought against them and be given an opportunity to defend against it.

The Presiding Officer granted a recess for 2 hours to provide an opportunity for the Complainant to gather evidence of their Disclosure Document being filed on time.

The hearing reconvened at 1:30 PM and the Complainant continued their complaint about not being provided notice and that under Natural Justice they should have time to prepare. The Board interprets Natural Justice to be;

> ***Audi alteram pertem*** *(Latin for, hear the other side): no accused, or a person directly affected by a decision, shall be condemned unless given full chance to prepare and submit his or her case and rebuttal to the opposing party's arguments.*

The Complainant further produced evidence showing 11:59 PM **sent** time for their Disclosure Document. The Assessment Review Board's evidence shows a 12:00 AM **sent** time, while the Respondent's evidence shows a 12:01 AM **received** time.

The Board after considering the evidence, found it to be inconclusive as to the exact time of submission. As there is no harm done to the Respondent by proceeding and as there would be considerable harm done to the Complainant by not proceeding, the Board provided the benefit of doubt to the Complainant and deemed the Disclosure Document as sent at 11:59 PM therefore admissible. The revised Disclosure Document sent at 12:29 AM is not accepted. Further the Board determined that a postponement was not required for the Complainant to prepare a case and the Board would not accept any evidence from either party on the merits of whether this is a pattern of behaviour or if there was precedent to accept late filings. The Board determined the regulation is clear in MRAC and the Board is satisfied that August 16th, 2011 is the *"date"* referred to in the legislation and 42 days prior is in fact July 4th, 2011 and whether a previous Board accepted or denied evidence outside of regulation is their determination and not the determination of this Board.

The Complainant further argued that the revised Disclosure Document should be admitted into evidence on a point of fairness and because the Respondent did in fact use that information when preparing their Disclosure Document. The Complainant feels there is sufficient case law to establish precedent for accepting late submissions and for the record the Complainant objected to the rejection of the revised Complainant Disclosure Document even though it was filed late.

The Board is satisfied that there is no question that the revised Complainant Disclosure Document was filed late, will not waiver from the previous decision, and does not accept the revised Complainant Disclosure Document into evidence.

3. The Respondent indicated that they had another preliminary item regarding, MRAC 8(2) on the grounds it did not contain *"a Summary of the Testimonial Evidence"* as required and there is no calculation that matches the requested assessment on the complaint form. The Respondent requested the Board to reject the Complainant's Disclosure Document previously admitted into evidence by the Board. The Respondent further argued that MRAC spoke clearly when it said;

   9(2) A composite assessment review Board must not hear any evidence that has not been disclosed in accordance with section 8.

   The Complainant argued this and the previous preliminary issue should have been disclosed prior to the hearing and the Summary of Testimonial Evidence was in fact submitted and responded to by the Respondent however it was in the revised Disclosure Document which has not been admitted into evidence by the Board. The Complainant asserted there is sufficient case law to establish precedent for accepting late submissions.

   The Board considered the application from the Respondent and found that under MRAC late evidence should not be permitted. The Board sought further interpretation from the Act which is the legislation guiding the regulations in MRAC and found the following guidance;

   464(1) Assessment review Boards are not bound by the rules of evidence or any other law applicable to court proceedings and have power to determine the admissibility, relevance and weight of any evidence.

   The Board has confirmed its previous decision and will allow the original Complainant Disclosure Document in its submitted condition and not allow the revised Complainant Disclosure Document which included the Summary of Testimonial Evidence and the calculations related to the assessment request.

4. The Respondent objected to the Complainant speaking to certain evidence which had been disallowed by the Board and was only contained in the Rebuttal Document and not presently before the Board.

   The Board carefully considered the order in which evidence will be presented and determined the Calgary Assessment Review Board Policies and Procedural Rules (March 2011) will prevail where it reads;

   36 A complaint hearing shall be conducted in the following order,
   - ***(a) Introduction and preliminary matters;***
   - ***(b) (i) Presentation of all complainant evidence;***
     - ***(ii) Respondent questions;***
     - ***(iii) Board questions;***
   - ***(c) (i) Presentation of all respondent evidence;***
     - ***(ii) Complainant questions;***
     - ***(iii) Board questions;***
   - ***(d) (i) Rebuttal evidence of complainant (if any);***
     - ***(ii) Respondent questions;***
     - ***(iii) Board questions;***
   - ***(e) Complainant summary of position and argument;***
   - ***(f) Respondent summary of position and argument;***
   - ***(g) Brief reply of complainant (if any)***
   - ***(h) Board conclusion of hearing.***

5. Following the presentation and questions on the Disclosure Document C3 the Respondent brought forward a request to complete the hearing based on failure to meet onus. The Complainant argued at length the information they have provided which created a prima facia case.

The Board carefully considered the request of whether onus had been established. The Board determined that onus had been met, as the threshold is low, therefore the hearing proceeded.

6. No further objections on procedure or jurisdiction were raised.

Property Description:

The subject property is located just south of downtown in an area referred to as the Beltline District. It has four (4) roadways abutting the property with;

1) a major four-lane, one-way roadway to the west (1 Street E),
2) a major four-lane, one-way roadway to the east (MacLeod Trail),
3) a busy four-lane, two lanes in each direction roadway to the north (17 Avenue S), and
4) a local two-lane, one-lane in each direction roadway to the south (18 Avenue S).

The land consists of 1.53 acres of assessable land with one building built in 2005 as a permitted use in the Direct Control 103Z2000 zoning district. The building consists of;

5) a main floor area of 57,690 square feet predominantly used for gaming establishment – casino,
6) a second floor area of 19,990 square feet predominantly used for office space for the gaming establishment - casino, and
7) a two floor underground parking area of 120,240 square feet providing 313 parking stalls for the gaming establishment - casino.

The Cost Approach was utilized by the Respondent calculating a market value of $13,774,940 for land at $195 per square foot and $14,805,751 depreciated replacement cost for the improvements on-site, resulting in a total current truncated assessment of $28,580,000.

Issues:

The Complainant identified eight matters on the complaint form, but acknowledged that only one matter is to be argued before the Board, that being an assessment amount; therefore the other seven matters have been resolved. These are the grounds for appeal listed on the complaint form relevant to the argument heard;

i. The assessment of the subject property is in excess of its market value for assessment purposes.
ii. The assessment of the subject property is unfair and inequitable considering the assessments of comparable properties.
iii. The assessment of the subject property is unfair and inequitable considering the assessments of other facilities that host casinos.
iv. The assessment of the subject property and its derivation using the Cost Approach are unfair and inequitable. Similar competing properties have been derived using the Income Approach which has resulted in lower comparable assessments.
v. The Complainant's estimate of value using the Income Approach suggests that the current assessed value is unfair, inequitable and incorrect.
vi. The assessment over-assesses the parking component and fails to properly account for parking that is required under the land use and development requirements of the subject property.

vii. The value attributed to the parking component is unfair, inequitable and incorrect.
viii. The assessment currently has not been based upon the fee simple interest as if unencumbered. The assessor is capturing value related to the liquor and gaming license as well as business value attributed to the operations in place.
ix. The current assessment captures value that is not related to the market value of the assessable improvements and land.

Complainant's Requested Value: $7,060,000 (complaint form)
$1,331,166 (Disclosure Document)
$14,130,000 (Rebuttal Document)
$16,400,000 (alternative, Rebuttal Document)

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

Is the assessment of the subject property in excess of its market value for assessment purposes.?

The Board finds the assessment of the entire subject property is assessed at market value.

The subject property, built in 2005 of a high quality construction, was designed and built for the use as a gaming establishment – casino. The Complainant in an attempt to provide comparables presented a myriad of Business Assessments (not Property Assessments) of grocery stores ranging in size and age along with two casino comparables.

In the Complainant's Rebuttal Document the argument was put forward:

Pg4(6) *Altus will outline that many decisions starting from the 1950 Supreme Court of Canada decision, Sun Life Assurance Co. of Canada v. City of Montreal, to the recent 2010 Nova Scotia Court of Appeal decision, Nova Scotia (Assessment) v. van Driel, to even the most recent 2011 Calgary Composite Assessment Review Board (CARB) decision, Loblaw Properties West Inc. v. City of. Calgary [2011] CARB (Calgary) No. 1149-2011-P, have all emphasized that whether it is the Cost Approach, the Income Approach, or the DirectSales Comparison Approach, the end result must be a reasonable reflection of market value; which in the Province of Alberta is defined by the Act in section 1(1)(n) as:*

> *Section 1(1)(n) states:*
> *"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;*

If the approach undertaken by the Assessor does not equate to a realistic estimate of Market Value, as defined by the Act, then the assessment should be considered based on the best evidence reflective of this interpretation, taking into account of course the assessment of similar properties within the Municipality.

The Board found little if any relevant evidence for the Complainant's final written requested assessment of less than 50% of the amount on the assessment notice as provided. The Respondent pointed out on page 33 of R1 that the land value in the area is assessed at $195 per square foot, which would equate approximately to $13,775,000. This is a mere $355,000 less than the Complainant's requested assessment.

The Complainant's primary argument is, if the building were to be used as something else, what would it be used for? The Board finds the answer to be somewhat simple; 1) the Complainant

would have under gone a lengthy process in order to obtain regulatory approval for a gaming establishment - casino in that location. 2) The Complainant further sought a vigorous rezoning of the site in 2000 from the council of The City of Calgary. And 3) then in 2005, the Complainant hired professional designers and builders to construct a specific building to meet the direct control zoning imposed by the City and the demands imposed by the regulating authority. This lengthy regulatory process of both provincial and municipal governments clearly shows the gaming establishment – casino cannot and will not relocate quickly as the Complainant has argued citing recent CARB decisions; *Loblaw Properties West Inc. v. City of Calgary [2010] CARB (Calgary) No. 1497-2010-P* and *Loblaw Properties West Inc. v. City of Calgary [2011] CARB (Calgary) No. 1149-2011-P* where both stated;

> *In the opinion of the Board, the Respondent failed to demonstrate that the subject has inherently unique features that would set it apart from similar sized buildings. The building has moveable partitions, and cooler compressor units that can be relocated. There is no evidence to convince the Board that the existing tenant could not relocate to alternative premises without undue hardship or time delays. In the Board's opinion, the building is not different enough to justify a separate approach to value.*

The Board is not convinced that the current owner would likely be willing to sell the subject site with essentially a new purpose-built improvement for little more than the underlying vacant land value as the Complainant suggests with their requested assessment.

The Board considered the *1950 Supreme Court of Canada decision, Sun Life Assurance Co. of Canada v. City of Montreal* where it states;

> *The "real value" is the "market value" or the "value in exchange", and in order to ascertain it, one must necessarily, even if there has been no sale of the building, try and find what would be the price of the building in the open market. The rule is not that because there is no buyer and no seller, as in the present case, the well known theory of "willing buyer and willing seller" does not apply. We must ask ourselves this question: What would occur if there was a buyer and a seller?*

The Board pondered that question in relation to the fact that the Complainant provided no evidence on the value of the land if vacant, and confirmed during the hearing that the land value was not in argument. The Board does not find it reasonable that a willing buyer would assume the $14,806,751 assessed improvement is worth only $355,000. Nor does the Board find that a willing seller would dispose of the recent substantial investment at a very marginal value.

The Board in reflecting upon all the evidence and argument before it found, given the two options presented, the Cost Approach, in this case, provided the best evidence.

Is assessment of the subject property unfair and inequitable considering the assessments of comparable properties? And is the assessment of the subject property unfair and inequitable considering the assessments of other facilities that host casinos?

The Board finds the assessment of the entire subject property to be fair and equitable.

The Complainant provided two casino comparables which; 1) had another business venture as the primary use of the property, and 2) is an old industrial building retrofitted to be a casino. These two comparables hardly seem comparable with the subject property in design, construction, zoning or location. The only bit of comparability was the fact all three properties have businesses located in them engaged in a similar business venture, which, is not what is being assessed for property assessment purposes. It's akin to comparing an old mobile home with fresh paint, siding, carpets and window coverings to a new luxury home in an upscale

neighbourhood claiming a family can just as easily live in either property therefore they must be the same value.

The Respondent provided a comparable located a mere few blocks from the subject property which too was built recently to a high standard and designed for the use as a gaming establishment – casino.

The Complainant did not provide any convincing evidence or argument to alter the assessment or that there is inequity and without relevant and comparable market data the Board is behoved to find the assessment fair and equitable as assessed.

The primary argument the Complainant made is what hypothetically would happen if the current tenant disappeared. The conclusion the Complainant made to the hypothesis is the subject site would become a big box retail centre likely with a grocery store. The Board found, in the *1950 Supreme Court of Canada decision, Sun Life Assurance Co. of Canada v. City of Montreal,* useful where it states;

> *The rule was laid down by Lord Parmoor in Great Western and Metropolitan Railway Companies v. Kesington Assessment Committee, that in such a case "the hereditament should be valued as it stands and as used and occupied when the assessment is made." In the yearly valuation of a property for purposes of municipal assessment there is no room for hypothesis as regards the future of the property. The assessor should not look to past, or subsequent or potential values. His valuation must be based on conditions as he finds them at the date of assessment.*

The Board in considering this passage finds the Respondent did in fact assess the property as found on December 31, 2010 and valued at July 1, 2010.

Is the assessment of the subject property and its derivation using the Cost Approach unfair and inequitable?

The Board finds that the valuation methodology used by the Respondent is one of the three accepted valuation methods.

The Board further contemplated the recent *2010 Nova Scotia Court of Appeal decision, Nova Scotia (Assessment) v. van Driel* wherein it states;

> *It noted that the Director's mass appraisal approach to assessment, involving the use of a computer to determine values based on replacement cost less depreciation, was simplistic and rudimentary and had nothing to do with what a buyer might be prepared to pay a willing seller.*

The Board determined it is not the methodology, but the resulting end valuation that should be in question. The Respondent chose the Cost Approach which produced a value of $28,580,000. The Complainant used an alternative approach which estimated a value of somewhere between $14,130,000 and $16,400,000. The two values were so far apart and the Board was not given any mechanism in which to find a middle ground. The Board was left with only two choices; either confirm the assessment or accept a value of approximately half without substantive evidence. The Complainant failed to demonstrate to the Board that their estimate of value was more correct.

The Board also read with interest the CARB decision *Airstate Ltd. v. City of Calgary [2010] CARB (Calgary) No. 0522-2010-P* wherein it states;

The legislation and attendant regulations do not identify the valuation approach chosen by an assessment authority to prepare assessments tor non-residential property to be the subject of a complaint to or adjudication by a Composite Assessment Review Board. Assessors routinely use any and/or all the three generally accepted valuation approaches to property assessment, the DirectSales Comparison Approach, the capitalized Income Approach or the Cost Approach, to establish values. Complainants also agree to challenge these values by using any and/or all of these approaches.

Given that legislation does not support a preferred valuation methodology and the lack of sales or lease data for the subject property and its direct comparable, the Board must accept this valuation method as fair and equitable.

Did the assessment over-assess the parking component and fail to properly account for parking that is required under the land use and development requirements of the subject property? And is the value attributed to the parking component unfair, inequitable and incorrect?

The Board finds the Respondent assessed the subject property correctly at its condition as of December 31, 2010 and at its value as of July 1, 2010 in a fair and equitable manner.

The direct control zoning on the site during the development permit process required, for the size and type of development, 360 parking stalls. The Complainant chose to provide up to 394 parking stalls as evidenced in R1 (page 38). There is no evidence to support the notion that because the Complainant required the parking in order to accomplish the development that it should not be assessed. In review of the legislation, the opposite is true, as it reads in the Act;

284(1)(r) "property" means

(i) a parcel of land,

(ii) an improvement, or

(iii) a parcel of land and the improvements to it;

The Board was not provided any legislation which refutes or exempts parking structures when the development requires the same. The Complainant could have chosen a smaller building and provided parking on-site via a surface lot; the result would have been a smaller improvement and likely a smaller assessment as a result.

Has the assessment currently been based upon the fee simple interest as if unencumbered? And is the assessor capturing value related to the liquor and gaming license as well as business value attributed to the operations in place? And does the current assessment capture value that is not related to the market value of the assessable improvements and land?

The Board is satisfied the Respondent, in this case, captured the value attributed to the property only, using a valuation method approved by legislation, in a manner consistent to find the market value of the subject property, and did so in a fair and equitable manner as legislated.

The legislation and regulation is clear, the Act states;

229(2) Each assessment must reflect

(a) the characteristics and physical condition of the property on December 31 of the year prior to the year in which a tax is imposed under Part 10 in respect of the property,

The Matters Relating to Assessment and Taxation (MRAT) regulation further expands by stating the following;

2 An assessment of property based on market value

(a) must be prepared using mass appraisal,
(b) must be an estimate of the value of the fee simple estate in the property, and
(c) must reflect typical market conditions for properties similar to that property

The Complainant provided no evidence to support this claim.

Board's Decision:

After considering all the evidence and argument before the Board, the complaint is denied, and the assessment is confirmed at $28,580,000.

DATED AT THE CITY OF CALGARY THIS 23 DAY OF SEPTEMBER 2011.

J. Dawson
Presiding Officer

APPENDIX "A"

DOCUMENTS PRESENTED AT THE HEARING AND CONSIDERED BY THE BOARD:

NO.	ITEM
1. C1	Complainant Disclosure – "Community-Neighbourhood Shopping Centres"
2. C2a	Rebuttal Document – "Elbow River Casino" Pages 1 through 95
3. C2b	Rebuttal Document – "Elbow River Casino" Pages 96 through 199
4. C2c	Rebuttal Document – "Elbow River Casino" Pages 200 through 299
5. C2d	Rebuttal Document – "Elbow River Casino" Pages 300 through 379
6. C3	Complainant Disclosure – "Elbow River Casino"
7. R1	Respondent Disclosure

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.

Municipal Government Board use only: Decision Identifier Codes				
Appeal Type	Property Type	Property Sub-Type	Issue	Sub-Issue
CARB	Other Property Type	Specialty Property	Cost Approach	Land Value Improvement Calculation
	Retail	Big Box Store	Income Approach	Net Market Rent / Equity