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:

First Capital (Transcanada) Corporation (as represented by Altus Group), COMPLAINANT

and

The City Of Calgary, RESPONDENT

before:

W. Kipp, PRESIDING OFFICER
P. McKenna, MEMBER
P. Pask, MEMBER

This is a complaint to the Calgary Assessment Review Board in respect of amended property assessments prepared by the Assessor of The City of Calgary and entered in the 2012 Assessment Roll as follows:

ROLL NUMBERS:	**052221215 and 200184117**
LOCATION ADDRESS:	**1440 – 52 Street NE, Calgary AB**
FILE NUMBERS:	**68947 and 68946**
ASSESSMENTS:	**$37,140,000 (Taxable) and $1,950,000 (Tax Exempt)**

This complaint was heard on the 18th day of March, 2013 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:

- *K. Fong and B. Neeson*

Appeared on behalf of the Respondent:

- *B. Thompson and R. Ford*

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

[1] There are two complaint files for this property because a portion of the shopping centre is occupied by a tenant that is exempt from taxation. One file (68946 – Roll 200184117) is for the tax exempt portion and the second file (68947 – Roll 052221215) is for the taxable portion. Complaints were filed for each roll number and the disclosure materials were combined to avoid having to duplicate materials. Of primary concern to the Complainant was the taxable assessment of $37,140,000.

[2] The original 2012 taxable assessment was $36,570,000. After the assessment notice was received, a complaint was filed and the CARB heard the complaint on August 1, 2012. At that hearing, one issue was raised. That was the capitalization rate that was a part of the income approach valuation of the shopping centre property. The assessment was based on a capitalization rate of 7.25% and the Complainant provided evidence and argued for a 7.75% rate. The CARB rendered its decision on August 31, 2012, upholding the use of the 7.25% capitalization rate and thereby confirming the taxable assessment of $36,570,000.

[3] On November 26, 2012, amended assessment notices for the property were issued, including one for a taxable assessment of $37,140,000. Complaints were made to the Calgary Assessment Review Board on December 21, 2012 and this hearing was scheduled to consider the complaints.

[4] At the outset of the hearing, the Respondent introduced two preliminary jurisdictional matters: 1) the complaint should be dismissed because it is no more than an attempt to get a rehearing of the capitalization rate issue that was heard and decided in August 2012 and, 2) the Respondent should be awarded costs in accordance with the Matters Relating to Assessment Complaints Regulation (MRAC).

[5] The Respondent explained that the amended assessment was made in accordance with Section 305(3) of the Municipal Government Act (MGA) which requires that the assessment roll be corrected in the event that exempt property becomes taxable or taxable property becomes exempt under Section 368 of the Act. An amendment was required because a tenant in the property changed from exempt status to taxable status during the year. None of the parameters of the income approach assessment changed from the original 2012 assessment.

[6] After the CARB decision was issued following the original assessment hearing in August 2012, the Complainant had 30 days to make application for leave to appeal to the Alberta Court of Queens' Bench. No application was made. Now, the Complainant seeks to have the capitalization rate issue reheard based on the amended assessment notice even though that amended assessment used the same capitalization rate as the original assessment. The

Respondent's disclosure brief (Exhibit R1) contains a copy of the Complainant's evidence that was filed for the August 2012 hearing (the original assessment complaint). A comparison to the disclosure for this hearing shows that there have been no changes to the Complainant's evidence which indicates that the Complainant is attempting to have the same capitalization rate evidence reheard for this amended assessment complaint.

[7] In support of its position, the Respondent provided the CARB with copies of prior Calgary Assessment Review Board decisions – CARB 2323/2010-P, CARB 0825/2011-P, CARB CO-0004/2012-P, CARB 0776-20132-P, CARB 1213/2012-P, CARB 1222/2012-P and LARB 2407/2012-P.

[8] CARB 1213/2012-P is the August 2012 decision on the original assessment of the subject shopping centre and 1222/2012-P is a similar decision on another shopping centre property that more thoroughly set out the CARB's reasons for its decision.

[9] CARB 2323/2010-P concerns a complaint against a 2010 supplementary assessment on a downtown Calgary property wherein the CARB refused to hear the complaint because it was based on the same issue as the complaint on an earlier 2010 assessment of that property that had been heard and decided.

[10] CARB 0825/2011-P deals with one of several hearings regarding retail properties. In the decision, the CARB found that the Complainant insisted on providing capitalization rate evidence that was identical to evidence that the CARB found deficient on a prior file, thereby wasting time and resources. Costs were levied against the Complainant.

[11] CARB CO-0004/2012-P is a decision regarding an application for costs. In that case, the Respondent had prepared an assessment using valuation parameters that had been found unacceptable in a CARB decision rendered the previous year. Nothing new was presented by the Respondent for the second year's complaint hearing. The CARB, in its cost decision, recognized that the Respondent was awaiting completion of an application seeking leave to appeal the prior year's CARB decision but found that the Respondent's defence of the newer assessment on the same evidence and argument had no reasonable chance of success before the CARB. Costs were awarded to the Complainant in the case.

[12] CARB 0776-2012-P is a July 2012 decision on a shopping centre complaint wherein the CARB found the Complainant's requested 7.75% capitalization rate to be sufficiently supported whereas the Respondent provided no evidence to support its 7.25% rate. Following this decision, the Respondent began to provide its own capitalization rate analysis and subsequent decisions found that 7.25% was the correct rate.

[13] LARB 2407/2012-P is a decision regarding amended assessments of residential lots. Notwithstanding that it is a different property type than the subject shopping centre, the LARB findings are relevant to this complaint. The LARB found that it did not have authority to rehear a complaint previously heard and decided for the same properties within the same tax year.

[14] The Complainant provided copies of CARB 1714/2012-P. In this September 2012 decision, there was capitalization rate analysis and argument from both parties. The CARB found that the Complainant's analysis was well founded and decided to change the capitalization rate from 7.25% to 7.75%.

[15] The Complainant also referenced 10 other 2012 CARB decisions that were included in the Complainant's rebuttal disclosure document (Exhibit C3). In those decisions, various CARB panels found that the Complainant's requested 7.75% capitalization rate had the best support.

[16] The position of the Complainant was that the amended assessment constituted a new

assessment and the taxpayer had the right to complain against the assessment. Refusing to hear the complaint would be unfair to the taxpayer and the assessment would be inequitable since other northeast Calgary shopping centres had their capitalization rate changed to 7.75%.

[17] With respect to the matter of costs, the Respondent argued that the capitalization rate issue was not properly before the CARB since it had already been heard and decided for the 2012 tax year. As a result, the Respondent had spent unnecessary time preparing evidence for this hearing and was entitled to be compensated for the wasted time and effort put into its preparations. The request, pursuant to Schedule 3 of MRAC is $8,000 plus $1,750 for the first half day of the hearing plus $1,750 for each half day thereafter if the hearing goes beyond one half day. The Respondent stated that there had been telephone conversations between City of Calgary Assessment Unit staff and representatives of Altus Group. These had taken place in late February and early March of 2013. During these conversations, the assessment department representative informed the Altus representative that there would be an application made for costs if Altus insisted on going forward with the complaint. The Respondent acknowledged that none of the telephone conversation participants were present at this hearing.

[18] With respect to the cost application made by the Respondent, the Complainant argued that there was no reference to the application in the Respondent's evidence disclosure. The complaint is properly before the CARB, therefore the matter of costs should not be an issue.

Property Description:

[19] The property that is the subject of this complaint is a shopping centre designated for assessment purposes as "CM1402 Retail – Shopping Centres – Community." The buildings on the 16.46 acre site have a total rentable area of 183,243 square feet. The property is known as Trans-Canada Centre or Trans-Canada Mall. The address in the Marlborough Park community is 1440 – 52 Street NE. The centre was originally constructed as an enclosed mall in 1974 but it was reconfigured and other buildings were added in 1992. There is a free-standing supermarket and amongst the numerous retail spaces, there are some where the tenant is exempt from taxation.

[20] For the 2012 tax year, the shopping centre was assessed using the income approach using net market rental rates, market supported vacancy rates and a 7.25% capitalization rate. The original assessment was $36,570,000 on the taxable roll and $2,380,000 on the tax exempt roll. In November 2012, the assessment was amended to account for changes in the exempt portion. The amended taxable amount is $37,140,000 and the tax exempt amount is $1,950,000.

Issues:

[21] In the Assessment Review Board Complaint form, filed December 21, 2012, Section 4 – Complaint Information had check marks in the boxes for #3 "Assessment amount" and #4 "Assessment class."

> In Section 5 – Reason(s) for Complaint, the Complainant stated four grounds for the complaint: 1) the assessment is not fair and equitable; 2) the property details as assessed are incorrect; 3) information requested from the municipality pursuant to Sections 299 and/or 300 of the MGA has not been provided and 4) the assessment is in excess of market value of the property due to the application of an excessively low

capitalization rate (7.25%).

At the hearing, the Complainant was prepared to pursue only the capitalization rate issue.

Complainant's Requested Value: $34,740,000 (Taxable) based on increasing the capitalization rate from 7.25% to 7.75%.

Board's Decision on Preliminary Matters With Reasons:

[22] The CARB has considered the party submissions and decided that the merit hearing cannot proceed.

[23] As discussed in Sihota vs. Edmonton (City) 2013 ABCA 43, the doctrine of *issue estoppel* is applied. The Court of Appeal of Alberta (ABCA), referenced a Supreme Court of Canada (SCC) decision as being the leading decision on issue estoppel arising from decisions of administrative tribunals. The SCC stated that in order for the doctrine to be engaged:

(a) the same issue must be involved,

(b) the decision said to create the estoppel must be final,

(c) the same parties or their privies must be involved, and

(d) as a discretionary matter, it must be fair and just to apply the doctrine of issue estoppel in the particular circumstances.

[24] The issue here is not whether the CARB is bound by its previous decisions. Issue estoppel does not arise because the prior decision is binding on the CARB. Issue estoppel means the prior decision is binding on the parties. The doctrine prevents them from re-litigating what has already been decided.

[25] The complaint form and Complainant's disclosure evidence pursuant to the amended assessment notice indicate that the Complainant seeks to have the same issue (capitalization rate) heard for a second time. The Complainant does not deny this and argues that the amended notice reflects a new assessment and the taxpayer is entitled to complain against that assessment regardless of the reason for the amendment.

[26] The CARB does not accept the Complainant's argument.

[27] If the CARB heard the merit argument, it would, in effect, be rehearing the same capitalization rate issue that had been heard and decided upon at the August 2012 hearing.

[28] The Complainant has argued that if the CARB refuses to hear this merit complaint, the taxpayer would be treated in an unfair manner and the assessment would be inequitable. Both parties provided copies of other CARB decisions wherein different CARB panels made capitalization rate decisions. In some cases, the rate was upheld at 7.25% while in others, it was increased to 7.75%. For this reason, the Complainant's equity argument does not apply. The subject property is not being assessed in a different manner than all other similar properties.

[29] There was a capitalization rate decision made for the subject property for the 2012 tax year. The Complainant did not seek leave to appeal that CARB decision to the Court of Queen's Bench. The taxpayer should not be provided an opportunity to present the same evidence and argument for a second time during the same tax year. The taxpayer is not being denied the opportunity to be heard on the capitalization rate issue. It had that opportunity in August 2012 and a decision was rendered following that hearing.

[30] This CARB does not have jurisdiction to grant a rehearing of the same matter based on the same evidence that was previously heard, even though there has been an amended assessment. There comes a point in time when finality is achieved and that occurred in August 2012 when CARB 1213/2012-P was issued.

[31] The MGA and its regulations are silent on the matter of a CARB rehearing a matter during the same taxation year other than the reference in Section 470.1(2) wherein a Court of Queen's Bench ruling could refer a matter back to a CARB for a rehearing. There is no provision in the Act or its regulations that permits an assessment review board to elect to rehear any matter.

[32] **COSTS**: On the matter of costs, the CARB notes that there has been no written application for costs from the Respondent. The CARB recognizes that there is no requirement for written costs applications even though that might more clearly set out the grounds for the request. The Respondent stated that the Complainant had notice of the intent to seek costs when representatives of the parties spoke in telephone conversations in February and March of this year. The CARB notes that none of the participants in the telephone conversations were present at this hearing.

[33] Any party is entitled to seek costs against another party. It is the CARB decision that if the Respondent seeks a cost order against the Complainant, it has 30 days from the date of this hearing to make its application (Section 52 – MRAC). It is the direction of this CARB that if the Respondent makes an application it shall do so by filing a request with reasons in a written application with the Calgary Assessment Review Board by 4:00 P.M. on April 17, 2013 with a copy provided to the Complainant. If an application is made, the Complainant has until 4:00 P.M. on May 1, 2013 to respond with its position. A cost hearing would then be scheduled.

[34] Since this complaint has been dismissed on the basis of a preliminary matter, the merit issue was not heard and there is no need to address evidence or argument regarding that issue.

DATED AT THE CITY OF CALGARY THIS 3 **DAY OF** April **2013.**

W. Kipp

W. Kipp
Presiding Officer

APPENDIX "A"

DOCUMENTS PRESENTED AT THE HEARING AND CONSIDERED BY THE BOARD:

NO.	ITEM
1. C1	Complainant Disclosure – Part 1
2. C2	Complainant Disclosure – Part 2
3. R1	Respondent Disclosure
4. C3	Complainant Rebuttal

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 Internal Use

Appeal Type	Property Type	Property Sub-Type	Issue	Sub-Issue
CARB	Jurisdiction/Procedural	Amended Assessment	CARB Jurisdiction	Rehearing