CALGARY
ASSESSMENT REVIEW BOARD
DECISION WITH REASONS

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

between:

YEGRE Quarry Central LTD. (as represented by Altus Group Limited), COMPLAINANT

and

The City Of Calgary, RESPONDENT

before:

K. D. Kelly, PRESIDING OFFICER
D. Steele, MEMBER
J. Pratt, MEMBER

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

ROLL NUMBER:	**201101839**
LOCATION ADDRESS:	**115 Quarry Park RD SE**
HEARING NUMBER:	**68964**
ASSESSMENT:	**$39,870,000**

(Supplementary – prorated for 7 months at $23,257,500)

This complaint was heard on 15th day of April, 2013 at the office of the Assessment Review Board located at Floor Number 4, 1212 – 31 Avenue NE, Calgary, Alberta, Boardroom 1.

Appeared on behalf of the Complainant:

- *Mr. D. Mewha - Altus Group Limited*
- *Ms. D. Chabot - Altus Group Limited*

Appeared on behalf of the Respondent:

- *Mr. M. Ryan - Associate Assessor, City of Calgary*
- *Ms. L. Dunbar-Proctor - Intern Assessor, City of Calgary*

REGARDING BREVITY:

[1] The Composite Assessment Review Board (CARB) reviewed all the evidence submitted by both parties. The extensive nature of the submissions dictated that in some instances certain evidence was found to be more relevant than others. The CARB will restrict its comments to the items it found to be most relevant.

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

[2] None.

Property Description:

[3] The subject is a new three-storey textured concrete and glass suburban office building located at 115 Quarry Park Rd. SE, Calgary. It contains a total of 154,947 square feet (sf) and is located on 5.50 acres (ac) of land. As of December 31, 2011 it accommodated two tenants – one being Aker Solutions Oilfield Services occupying 27,399 sf of ground floor space, and a second being Fluor Canada Ltd. occupying 57,967 sf of second floor space. Together they leased and occupied 85,366 sf, or about 55% of the new building in demised, "improved", or "finished" office space. Moreover, as of December 31, 2011, the remaining 69,581 sf, or about 45% of the building (predominantly on the third floor), was incomplete for office use, and unoccupied.

[4] The subject's entire 154,947 square feet is assessed using the Income Approach to Value at $24 per sf, as if the entire structure were improved and occupied. The Complainant does not object to the $24 per sf assessed for the occupied finished office space, but contends that $24 per sf cannot, and should not be applied to the 69,581 sf of unimproved and unoccupied space representing 45% of the subject. He contends that to do so is contrary to relevant Legislation; an Alberta Court of Queen's Bench Decision; and several Decisions of both the Alberta Municipal Government Board (MGB) and Calgary Assessment Review Board.

[5] **Issues:**

Issue #1

The entire 154,947 sf of the subject has been provided a supplementary assessment as though it was "complete" and able to be fully occupied as of December 31, 2011, which it was not, and this is contrary to Section 314(2)(a)(b) of the Municipal Government Act (MGA).

Issue #2

The number of assessable months for the subject's supplementary assessment is 5 months and not 7 months.

Complainant's Requested Value:

[6] $7,973,333.33

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

Issue #1

[7] The Complainant argued on page 63 of his brief C-1 that :

"The subject property has been assessed by a supplementary assessment as though it is complete; yet it is not. The Complainant's position is that space within a building is not complete until it is able to be occupied, as supported by a City of Calgary certificate of occupancy which is issued by the planning and building department, which is not the case for the subject property in the assessment year of 2012. The property was only 55% completed during the 2012 assessment year and only the completed portion is to be assessed. This position is supported by recent MGB decisions as well as other case law; however, despite these decisions the Respondent continues to assess buildings as "complete" as soon as the building shell has been finished with disregard to the state of the interior of the building."

[8] The Complainant further argued on page 63 of C-1 that the following is relevant:

"Section 314(2) of the *Municipal Government Act, R.S.A. 2000, c. M-26* (MGA) directs the assessor to prepare supplementary assessments 'for other improvements' in certain circumstances:

314(2) the assessor must prepare supplementary assessments for other improvements if

(a) **they are completed** in the year in which they are to be taxed under part 10,

(b) **they are occupied** during all or part of the year in which they are to be taxed under part 10... (note - emphasis Complainant's)

(3) A supplementary assessment must reflect

(a) the value of an improvement that has not been previously assessed, or

(b) the increase in the value of an improvement since it was last assessed.

(4) Supplementary assessments must be prepared in the same manner as assessments are prepared under Division 1, but must be prorated to reflect only the number of months during which the improvement is complete, occupied, located in the municipality or in operation....

315(1) Before the end of the year in which supplementary assessments are prepared, the municipality must prepare a supplementary assessment roll.

(2) A supplementary assessment roll must show, for each assessed improvement, the following;

(a) the same information that is required to be shown on the assessment roll;

(b) **the date that the improvement**
(i) **was completed, occupied or moved into the municipality**, or,
(ii) began to operate" (note – emphasis Complainant's)

[9] The Complainant argued on page 63 of C-1 that:

> "In this matter, the issue under dispute is whether the subject" (i.e the disputed "unfinished" 69,581 sf) "was 'complete' within the meaning of section 314(2). The Complainant's position is that an improvement, to be considered complete, must be occupiable, although not necessarily occupied, at the time of the supplementary assessment. The subject property was not occupiable by a tenant at the time of the supplementary assessment and is, therefore, not complete for supplementary assessment purposes."

[10] The Complainant clarified on page 63 of C-1 that when he refers to "the subject" he is only referencing the unoccupied, unfinished (i.e. as to tenant improvements) 85,366 sf of space in the overall 154,947 sf structure. He is not referring to the 85,366 sf of "tenant improved" (completed) space currently being leased and occupied. The Complainant also clarified that when the Respondent refers to "the subject", he is referencing the entire 154,947 sf of the structure. The Respondent concurred.

[11] The Respondent provided his Brief R-1 which contained a copy of an "Occupancy Permit" for the subject signed June 28, 2012 by a City of Calgary Building Inspector. The Respondent argued that this permit certifies that the construction of (the shell of) the building (i.e. the building) is "complete" and ready for occupancy. The Respondent clarified that according to typical City procedures, when this occupancy permit is issued, the City is in a position to consider a supplementary assessment for the now-completed structure. He offered that while the occupancy permit for the building was issued in June of 2012, the City had deferred the supplementary assessment until October, when a portion of the building had been leased and occupied (Fluor Canada and Aker Solutions) and lease values were established.

[12] The Respondent also clarified that when the tenant improvements for Fluor and Aker were completed, in typical procedure, two additional occupancy permits were issued by the City to allow each of the "improved" spaces to be used by each of the two tenants. He confirmed that additional occupancy permits would also be required prior to tenants moving into the remainder of the building's space, as that space was "tenant improved" as well.

[13] The Complainant argued that the MGA does not define either of the words "complete" or "occupied", therefore pursuant to legal interpretation, the ordinary meanings of the words apply. He offered Webster's Dictionary definitions of the two words. He also offered definitions provided by the Calgary Real Estate Board (CREB) for terms such as "building shell; "fit up"; "fixture"; "shell space"; "space planning"; and "tenancy".

[14] The Complainant also provided personally-taken, reasonably-current, photographs of the interior and exterior of the subject structure. The photos demonstrated that a large portion of the structure had no tenant improvements and hence was not "completed" to the point where a tenant could physically move into the space and immediately conduct business. No photos were provided by either the Complainant or Respondent of the "tenant improved" and occupied portions of the building, other than the "common" and Reception areas of the structure. The Respondent confirmed that he had not been to the second and third floors of the building.

[15] The Complainant provided limited leasing data for two tenants – Fluor Canada Ltd. and Aker Solutions Oilfield Services. Fluor occupies 57,967 sf of the second floor, and Aker occupies 27,399 sf of the first floor. Together they occupy 85,366 sf, or about 55% of the building's 154,947 sf. Therefore, the Complainant argued that a supplementary assessment should not have been issued for the remaining 69,581 sf – or about 45% of the structure.

[16] The Complainant offered a number of current Court, Municipal Government Board, and Composite Assessment Review Board decisions which he argued support his position. Of particular relevance the Complainant provided and referenced the following:

1. **Court of Queen's Bench of Alberta – *citation:697604 Alberta Ltd. v. Calgary (City of), 2005 ABQB 512 – Memorandum of Decision of the Honourable Madam Justice L.D. Acton. At [27], and [29]***

2. Alberta Municipal Government Board (MGB) – **Board Order 088/10**.

[17] The Respondent explained that the Supplementary Assessment was calculated using the Income Approach to Value presuming the building to be 100% complete and occupied, and by deducting therefrom, the value of the Annual Assessment. The resulting value was then prorated for seven months to the end of 2012, based on the date of issuance of the City's Occupancy Permit for the completed "shell" of the structure. The Respondent maintained that this technique is one that has been consistently used by the City in these circumstances. Therefore, based on his analysis of the MGB and Court Decisions identified by the Complainant, he concluded that the Decisions were erroneous based on the City's typical methodology employed in these matters.

[18] The Complainant argued however that the City's methodology is incorrect based on an incorrect interpretation of Section 314(2) of the MGA, all as affirmed by the Courts and various Board Decisions as outlined above.

Issue #2

[19] The Complainant argued that based on the staged occupancy of the main structure, the number of months applicable to the supplementary assessment should be five months, and not the seven assessed. The Complainant argued that the lease start date for tenant Aker was June 1, 2012, meaning they occupied the site for seven assessable months. Fluor's lease start was October 15, 2012, meaning they occupied the site for three assessable months.

[20] The Complainant calculated therefore that a weighted average of the "months to supplement" for the two occupants was 4.28 months. The Complainant argued therefore that a reasonable time frame for a supplementary assessment for the subject would be 5 months, and not the 7 months used by the City.

[21] The Respondent argued and maintained that based on the date the original occupancy permit for the "shell" of the building was signed by the City, and pursuant to s. 314(4) MGA, the number of prorated assessable months should be seven. He argued that s. 314(4) supports this position and states in part:

> "...Supplementary assessments must be....prorated to reflect only the number of months....**including the whole of the first month** in which the improvement was completed, occupied....**or began to operate.**" (emphasis Respondent's)

Board's Decision With Reasons:

Issue #1

[22] The Board finds that the core principle of this issue has previously been presented to and argued before several Municipal Government and Composite Assessment Review Boards, and the Court of Queen's Bench in Alberta.

[23] Of particular importance, this Board finds that the following is highly relevant:

1. at *[27], and [29] in* **Court of Queen's Bench of Alberta – *citation:697604 Alberta Ltd. v. Calgary (City of), 2005 ABQB 512 – Memorandum of Decision of the Honourable Madam Justice L.D. Acton,*:**

"[27] For example, the second factual conclusion reached by the MGB reads: 'Capital improvements are an assessable part of the real estate.' I accept the Applicant's submission that this is only so once the improvements have been done and cannot operate on an anticipatory basis. Circumstances could easily have arisen in which the improvements might never have been done. In my view, it is unreasonable for the MGB to speculate about what might happen in the future, for example, renovating the premises, in order to determine value in the past."

"[29] Another error was made by the MGB in its analysis of "Lease Up Costs" (p. 13). The MGB determined that '...tenant improvements are an assessable part of the realty...'. While this is correct, in my view, tenant improvements that do not exist at the time of the assessment cannot be considered assessable; including them demonstrates an unreasonable analysis of the evidence."

[24] The Board also finds that **MGB Decision 088/10** is relevant as follows:

1. At page 7 of 16 in MGB 088/10 that Board found these "Findings of Fact on the Completion Date":
   "(1) A tenant could not occupy the disputed area of the building on February 1, 2009

   (2) When an area is not occupiable, it is not complete"

2. At page 8 of 16 in MGB 088/10 that Board offered these reasons for its Decision:

"The parties did dispute whether a space that is not occupiable because tenants' improvements are not yet installed could be considered complete, as required by s. 314(2) (of) the Act, and whether it should be assessed. The Act does not define "complete" or "occupy." The Appellant submits that an area that has received an occupancy permit but remains in a state that cannot be occupied because tenants' improvements have not been installed is not complete and should not be assessed. The Respondent submits that an area that has been deemed occupiable by the issuance of an occupancy permit is complete, even if tenants' improvements have not been installed, and should be assessed.

The MGB agrees that the area was not occupiable by a tenant on February 1, 2009, the date the Respondent deemed the building complete. In applying a market rental rate of $21 per square foot, the Respondent relies on an underlying assumption that the leasable area being assessed is capable of generating $21 per square foot of income. The subject property on February 1, 2009 was not capable of generating $21 per square foot of income. A tenant could not occupy the space without either the tenant or owner doing considerable finishing work on the area, such as installing proper office lighting and washrooms, electrical, heating, etc. Until the area was completed by either a tenant or the owner, it is speculative to assume the property could earn $21 per square foot of income. The Respondent is not permitted to assess properties on an anticipatory basis (*697604 Alberta Ltd. v. Calgary (City of), supra*), which is essentially what they are trying to do to the subject property in this situation. Until the property has reached the point a tenant could occupy the area, it cannot be assessed by the Respondent because it is not complete and does not meet the requirements in s. 314(2) of the Act.

The Respondent submitted that the situation of the subject property was not different than an area that had been leased but whose tenant vacated the premises. In that situation, however, a new tenant could occupy the area immediately because the area is occupiable, although the new tenant may choose to install their own improvements. In the subject property, however, no tenant could occupy the incomplete area and it would be impossible for the owner to earn $21 per square foot until basic features as lighting and plumbing, flooring, ceiling, heating, ducting and controls were installed, The two situations are different and should be treated differently"

[25] While the Complainant provided but did not dwell on them, the Board reviewed Alberta Municipal Government Board (MGB) **Board Orders 103/10** and **192/98,** and Calgary Composite Assessment Review Board Decision **CARB 2325/2010-P.** The Board finds that the Boards in each of these hearings, dealt with the identical principle as presented in **MGB 088/10** and to this Board today. The Board finds that in each case, the Boards in question, decided the issue in a manner consistent with **Court of Queen's Bench of Alberta – *citation: 697604 Alberta Ltd. v. Calgary (City of), 2005 ABQB 512 – Memorandum of Decision of the Honourable Madam Justice L.D. Acton,*** and in a manner similar to, if not identical to **MGB 088/10** supra. The details of those decisions therefore need not be repeated here.

[26] The Board finds that on the face of the evidence before it in this hearing, the Complainant's arguments with respect to Issue #1 are compelling, whereas the Respondent's are not. The Board finds that it is compelled to follow the precedent of the Court. Therefore the Board finds that the subject has received an incorrect Supplementary Assessment which the Board will correct.

[27] The Board finds therefore that based on the Court established principle of assessing only the completed and occupied portions of the structure, as requested by the Complainant, the annual assessment is not – for the purposes of these calculations - $49,570,000 but instead is $28,836,000 as calculated by the Complainant on page 35 of C-1 – minus the 2012 Original Assessment of $9,700,000 which equals $19,136,000. Based on a period of five months, the Supplementary assessed value equals $7,973,333.

Issue #2

[28] The Board finds and accepts that the different "start" dates of the two separate leases for the two tenants Fluor Canada and Aker Solutions, represent a minor dilemma in terms of a reasonable approach to a correctly prorated number of assessable months to be used in calculating the Supplementary Assessment for the property.

[29] Nevertheless the Board finds that it does not accept the Respondent's assertions, based on his interpretation of s. 314(4) MGA, that seven months is the correct time frame to be used, since seven months is primarily based on the date of issuance of the City's Occupancy Permit for the completed "shell" of the structure.

[30] The Board finds instead, that the Complainant's weighted average of the "start" dates of the leases and coincidental occupancy of the finished spaces for the two tenants at 4.2 months, which is then rounded up to five months, is a reasonable approach. Therefore the Board finds and accepts that five months is an appropriate and corrected prorated value to be used in the Supplementary Assessment.

Board's Final Decision

[31] The term of the Supplementary Assessment is reduced to 5 months, and the prorated Assessment is corrected to $7,973,333.

DATED AT THE CITY OF CALGARY THIS 15th DAY OF MAY 2013.

Donald V. Steele - BOARD MEMBER

FOR: **K. D. Kelly**
Presiding Officer

APPENDIX "A"

DOCUMENTS PRESENTED AT THE HEARING AND CONSIDERED BY THE BOARD:

NO.	ITEM
1. C-1	Complainant Disclosure
2. C-2	Complainant Disclosure – Rebuttal
3. R-1	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.

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Appeal Type	Property Type	Property Sub-type	Issue	Sub-Issues
CARB	Suburban office	Multi-tenant office building	Supplementary assessment and Market value	s. 314(2) and 314(4) MGA