CALGARY
ASSESSMENT REVIEW BOARD
DECISION WITH REASONS

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

between:

Hanson Square General Partner INC. (as represented by Altus Group Limited), COMPLAINANT

and

The City Of Calgary, RESPONDENT

before:

K. D. Kelly, PRESIDING OFFICER
J. Pratt, MEMBER
D. Steele, 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:	**201420171**
LOCATION ADDRESS:	**909 – 17 AV SW**
HEARING NUMBER:	**68961**
ASSESSMENT:	**$26,900,000**

(Supplementary – prorated for 3 months at $6,725,000)

This complaint was heard on 17th day of April, 2013 at the office of the Assessment Review Board located at Floor Number 4, 1212 – 31 Avenue NE, Calgary, Alberta, Board 1.

Appeared on behalf of the Complainant:

- *Ms. A. Izard – Altus Group Limited*

Appeared on behalf of the Respondent:

- *Mr. R. Natyshen - 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:

Matter #1

[2] At the beginning of the hearing the Board was presented with a document received from the Complainant which had been sent to Board administration on April 15, 2013 and was deemed to be "Late". The Complainant clarified that this document is intended to supersede an identical document whose pages were not numbered. He clarified that everything in the document is identical to the "in time" document currently before the Board, except that now the pages are numbered. He suggested that numbering of the pages would make it easier for the parties during the hearing, and accordingly he requested that the "late" document be permitted to replace the "in time" document.

[3] Upon examination, the Respondent agreed that the documents were identical except for pagination, and he therefore had no objection to its inclusion in the hearing to replace the non-paginated copy. The Board accepted the document into evidence as C-4.

Matter #2

[4] At the Rebuttal stage of the hearing the Respondent objected to certain materials in the Complainant's Rebuttal packages C-4 and C-5 because he considered them to be "new evidence" not previously disclosed. In document C-4 the Respondent objected to page 42; pages 43 to 45 inclusive; page 74; pages 78 to 95 inclusive; and page 83. In document C-5 the Respondent objected to page 119 and pages 120 to 126. The Complainant explained that he added the contested material to C-4 and C-5, to clarify certain aspects of the Respondent's evidence in document R-1.

[5] The Board retired to consider the Respondent's objections.

[6] After due consideration the Board re-convened and directed that page 74, and pages 78 to 95 inclusive, be deleted from rebuttal document C-4. The Board also directed that pages 119 to 139 be deleted from document C-5 – all of which the Board considered to be new evidence. The Board considered that the remaining pages objected to by the Respondent, were legitimate rebuttal to matters referenced by the Respondent in R-1.

Matter #3

[7] The Respondent identified that the subject was assessed using an incorrect total square footage value of 84,818 square feet (sf), and the Complainant has corrected this number to 91,201 sf in his alternate calculations of value. The Respondent confirmed to the Board and the Complainant that he accepts the Complainant's correction of 91,201 sf for the subject, but not his alternate calculations of value based on this revised figure.

Property Description:

[8] The subject is a four-storey, multi-tenant 91,201 square foot (sf) office and retail complex (Hanson Square) located at 909 – 17 AV SW in the Mount Royal Beltline area of Downtown Calgary. The ground floor is partly demised into 2,100 sf and 4,107 sf of "finished" CRU retail space occupied by "Swimco" and "Wild Mountain" retail enterprises respectively. The 27,058 sf second floor is occupied entirely by "Best Buy" electronics retailer. The third floor has 7,955 sf of finished space occupied by "Western Securities", whereas the entire fourth floor is vacant and undemised, or unfinished with respect to tenant improvements. The subject property contains 154 underground parking spaces. The subject is assessed using the Income Approach to Value methodology based on a blend of per square foot current lease values of $38; $23; and $24 per sf, resulting in an indicated supplementary assessment of $6,725,000 (based on an incorrect 84,818 sf of total building space).

Issues:

[9] The subject is assessed by the Respondent based on an incorrect interpretation of s. 314(2) of the Municipal Government Act (MGA) and an incorrect Capitalization Rate.

[10] The subject's 154 parking spaces have been assessed at a typical $350 per stall per month which is incorrect and inequitable.

Complainant's Requested Value:

[11] $5,133,021.82

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

Issue #1

[12] The Complainant argued in his brief C-1 that the subject property has been assessed in a supplementary assessment as though it is complete but it is not. The Complainant argued that space in a building is primarily unimproved "shell" space which is not complete until it is "improved" and able to be occupied, and a City of Calgary Occupancy Permit has been issued by the City for that "improved" space. He argued that this is not the case for approximately 55% of the space in the subject property in the assessment year of 2012. He suggested that buildings in this condition inherently carry more risk and therefore he proposed an increase in the Capitalization rate from 6.75% to 7.75%.

[13] The Complainant argued that the property was only 45% "completed" and "occupiable" during the 2012 assessment year and only the completed portion is to be assessed. He argued that this position is supported by recent MGB decisions as well as other case law, and 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.

[14] The Complainant further argued 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)

[15] The Complainant argued that the issue in dispute is whether the "unfinished" 49,827 sf in the subject was "completed" within the meaning of section 314(2)(a) of the MGA. 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. He argued that the "unfinished (as to tenant improvements) portion of the subject property was not occupiable by a tenant at the time of the supplementary assessment and is, therefore, not "completed" for supplementary assessment purposes. The Complainant argued further that the City's methodology is therefore 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 below at [21].

[16] The Respondent provided his Brief R-1 which contained a copy of an "Occupancy Permit" for the subject signed August 2, 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.

[17] The Respondent offered that while the occupancy permit for the building was issued in August of 2012, the City had deferred the supplementary assessment until October, when a portion of the building had been leased and occupied by Best Buy, and lease values were

established. He provided a copy of the Occupancy Permit for Best Buy which was issued October 18, 2012 after the Best Buy tenant improvements had been completed, and they could move in and start conducting business from this improved space.

[18] The Respondent also clarified that typically, when the tenant improvements for other tenants in the building are completed, occupancy permits are issued by the City to allow the "improved" spaces to be used by the tenants. He confirmed that additional occupancy permits would also be required prior to tenants moving into the remainder of the building's unimproved space, when that space was "tenant improved" as well.

[19] 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".

[20] 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. Several recent photos were provided by both the Complainant and Respondent of the "tenant improved" and occupied portions of the building, including the retail and "common" and Reception areas of the structure.

[21] The Complainant offered a number of current Court, Municipal Government Board, and Composite Assessment Review Board decisions in his document C-2 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**.

[22] 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 capable of earning revenue, and by deducting therefrom, the value of the Annual Assessment. The resulting value was then prorated for 3 months to the end of 2012, based in part on the October 2012 occupancy of 27,058 sf by tenant Best Buy. The Respondent maintained that this technique is one that has been consistently used by the City in these circumstances. The Respondent provided a copy of the City's 2012 "Supplementary Assessment Bylaw" 6M2012. He also made reference to sections 289(1); 291(1); 314(2)(4); and 315(2)(b) of the MGA, arguing that when read together, these sections of the MGA support the City's Supplementary Assessment methodology.

[23] The Respondent referenced selected marketing materials for the subject and argued that the Complainant's technique of not assessing the so-called "unimproved" (as to tenant improvements) space means the Complainant assigns no value to this space, which is erroneous.

[24] The Complainant argued however that the space does indeed have value, and the City has captured this value at $119.19 per sf in the City's Annual Assessment of the subject. He also noted that the City typically deducts the value of the annual assessed value from the Supplementary Assessment calculation. He argued that by assigning another per square foot rent value to the unimproved space "as if a tenant were in it and paying rent," means that the City is "double dipping" in terms of valuing the subject.

Issue #2

[25] The Complainant argued that while the subject contains 154 underground parking spaces which are leased to tenants at $250 per stall per month, the parking spaces should not be assessed at $350 per stall per month. He argued that indeed, the stalls should not be assessed at all because the City failed to assess 124 underground parking stalls in a similar nearby building at 815 – 17 AV SW. He argued that to assess the subject's 154 stalls in any manner, would create an inequity that is prevented by law. The Respondent clarified that the clerical error which lead to the 124 spaces not being assessed has been corrected for 2013.

[26] The Complainant argued however, that should the Board determine that the stalls must indeed be assessed, then a value of $225 per stall be used instead of the City's typical rate of $350 per stall. In support of his position he provided a matrix of the differing monthly parking rates for each of the 124 underground spaces at 815 – 17 AV SW and concluded that an average of $225 per stall per month was indicated.

[27] The Complainant also provided another matrix for the subject, demonstrating that the 154 spaces in it, currently rent for $250 per month. He argued that the Respondent has provided only six parking space lease comparables on which to base the $350 per space per month "typical" lease rate used to assess the subject and other similar properties in the BL-6 Business zone containing the subject, and this is insufficient. He also argued that the Respondent's parking data fails to provide sufficient detail as to location and other factors, such that it is not possible to analyze it effectively.

Board's Decision With Reasons:

Issue #1

[28] 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.

[29] 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."

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

1. At page 7 of 16 in MGB 088/10 the 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 the 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"

[31] 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.

[32] 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. Thus the Board finds for and accepts the Complainant's position that the subject has received an incorrect Supplementary Assessment. The Board also finds that it is compelled to follow the precedent of the Court in this issue.

[33] The Board finds that both the Respondent and the Complainant accepted the latter's area calculations which increased the overall floor area of the subject to 91,201 sf instead of the assessed 84,818 sf. Pursuant to pages #3 and #5 of C-3, area #14 (unfinished office space) increased from 29,885 sf to 36,581 sf; whereas area #1 (Best Buy) decreased from 27,122 sf to 27,058 sf; and area #5 (unfinished CRU space) decreased from 13,495 sf to 13,246 sf

[34] The Board finds that therefore that based on the Court established principle of assessing only the completed and occupied portions of the structure, as corrected by, calculated, and requested by the Complainant on page 5 of C-3, the assessment is not – for the purposes of these calculations - $26,900,000 but instead is $20,532,087, which includes the value of 154 parking stalls at $225 per stall per month. Based on a period of three months therefore, the Supplementary assessed value equals $5,133,022.

Issue #2

[35] The Board finds that the 154 parking spaces in the subject should be assessed, contrary to the assertions of the Complainant. The City's clerical error in failing to assess 124 parking spaces in a nearby building is not sufficient reason to entirely ignore the value of the 154 parking space in the subject. The Board finds that it would be inequitable to assess all of the other parking spaces in Business Zone BL-6, and ignore the subject – all as a result of a clerical error regarding one property, which has been corrected for the 2013 assessment year.

[36] The Board finds that the Respondent provided insufficient support for the $350 per parking stall per month which was used to calculate this supplementary assessment. The Board accepts that notwithstanding the $250 per stall per month evidently being achieved in the subject, the $225 per stall per month represents a reasonable approximation of the general marketplace, given that a more correct value may lie somewhere between the two values on average. The Board found that the Respondent did not fully challenge the two values of $250 and $225 per month, other than to suggest they were not "typical values" as ascribed to the BL-6 market zone pursuant to City research. The Board finds $225 per stall per month for the subject is appropriate in the context of this hearing.

Board's Final Decision

[37] The term of the Supplementary Assessment is confirmed at 3 months, and the prorated Assessment is corrected to $5,133,022.

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 – Supplementary
3. C-3	Complainant Disclosure – Corrected Valuation Calculations
4. C-4	Complainant Disclosure – Rebuttal
5. C-5	Complainant Disclosure – Statutory Interpretations
6. 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-Issue
CARB	Suburban office	Multi-tenant office and retail building	Supplementary assessment and market value	s. 314 MGA; Equity