

**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:

Sunridge Mall Holdings Inc. (as represented by the Altus Group), COMPLAINANT

and

The City Of Calgary, RESPONDENT

before:

P Petry, PRESIDING OFFICER

D Julien, MEMBER

J Rankin, MEMBER

This is in reference to 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:	201517315
LOCATION ADDRESS:	2525 36 Street N.E.
HEARING NUMBER:	63299
ASSESSMENT:	\$198,340,000

The hearing of this complaint was originally scheduled for July 21st, 2011. At the opening of that hearing the Respondent brought forward an application to have the Complainant's entire disclosure in this matter excluded from the merit hearing of this complaint. The Composite Assessment Review Board therefore convened a preliminary hearing on 24 day of October, 2011 at the office of the Assessment Review Board located at Floor Number 3, 1212 – 31 Avenue NE, Calgary, Alberta, and Boardroom 12, to hear the Respondent's Application.

Appeared on behalf of the Complainant:

- Mr. D. Hamilton and Ms K. Lilly

Appeared on behalf of the Respondent:

- *Ms K. Hess and Ms B. Thompson*

Property Description:

The subject property is classified as a regional shopping centre and is known as the Sunridge Mall. This property contains over 800,000 sq. ft. of rentable space and has its main frontage along 36 Street N.E.

Background

This complaint was to be heard on the 21st day of July, 2011, however at the outset of that hearing the Respondent brought forward an application respecting an issue concerning section 9 (3) of the Matters Relating to Assessment Complaints Regulation (MRAC). The Complainant required time to review the details of the Respondent's application and to develop its response. The Board therefore postponed the merit hearing of this complaint to allow the Complainant to have a fair opportunity to respond to the Respondent's application. As a result The CARB set the merit hearing back to November 14th, 2011 and set October 24th, 2011 for a hearing of the preliminary matters raised by the Respondent's application. A preliminary jurisdictional hearing was held on October 24th, 2011 and this is the decision of the Calgary Composite Assessment Review Board with respect to those matters.

Preliminary – Jurisdictional Issues

1. Is the information requested by the Assessor on August 13, 2010, October 25, 2010 and November 1, 2010, necessary for the Assessor to prepare an assessment or to determine if the property is to be assessed?
2. Would the information requested by the Assessor on August 13, 2010, October 25, 2010 and November 1, 2010, assist the Assessor in preparing the assessment or determining if the property is to be assessed?
3. If the CARB finds that the information requested by the Assessor is necessary or would assist the Assessor in preparing the assessment or in determining if the property is assessable and further finds that the information was not provided, what remedy or penalty should be imposed?

Board's Decision in Respect of The Issues:

1. The CARB decides that the Respondent has not clearly shown that the information requested was necessary for the preparation of the assessment or to determine if the property is assessable.
2. The CARB accepts that four of the six components of the Respondent requests would assist the assessor in the preparation of the assessment.
3. The Complainant is therefore restricted with respect to introducing evidence relating to these four components of the Respondent's requests. The direction of the CARB on these matters is found under the heading "Board's Direction toward the end of this decision."

Overview of the Positions of the Parties**Respondent**

The Respondent provided the CARB with a chronology of communications between the Respondent and the Complainant respecting the information the Respondent had requested. The Respondent's initiatives in this regard begin with Assessment Request for Information (ARFI) sent out to the Complainant and other property owners on March 10, 2010. This was followed, in early March 2010, by a second ARFI specific to the sale of the subject property. The Complainant had responded to the first request on May 21, 2010 and to the request for information concerning the sale of the subject on March 31, 2010. The Respondent later requested certain clarification and additional information with respect to the Complainant's May 21, 2010 ARFI response as follows:

August 13, 2010 – Email from the Respondent to the Altus Group

1. Request for an explanation of what (SL) means under the column – Lease Type as the SL entries do not show base rent, CAM, or tax but do show other income.
2. Request for rental income for leases in a segment of the rent roll titled "New Leases" on page 2 as this information is not readable or is absent.
3. Request for a Mall Directory map if available.

October 25, 2010 – Letter from the Respondent to the Altus Group

4. Request for clarification of whether the rental information provided on the ARFI dated May 21, 2010 includes overage rent, or if the rental rates provided therein are face rents only. The letter adds *"Please confirm if the information submitted includes overage rent, or provide the rental information, specifying face rent and overage rent/percentage rent for each tenant, by 2010, November 1"*.

November 1, 2010 – Email from the Respondent to the Altus Group

5. Request for clarification as to why there are three different income values for the

subject property based on three different documents:

- \$14,083,311 determined by the Respondent as total actual net operating income from the rent roll submitted by the Complainant
- \$16,811,289 as shown on the ARFI respecting the sale of the subject
- \$17,200,400 as shown on the RealNet report of the sale of the subject

This request discusses the importance of the requested information to the Respondent's preparation of the 2011 assessment roll indicating that this sale is the only sale of a regional mall and the information being vital to the formulation of a capitalization rate (cap rate) for this type of property.

6. Request for an explanation as to what (MRU) stands for in the unit ID of the rent roll.

The Respondent provided communication documents to show that it had reminded the Complainant several times that the information requested had not been received and had received a number of assurances from the Altus Group that the information would be forthcoming. The requested information however has not been provided. The Respondent pointed out that section 295 (4) of the Municipal Government Act (MGA) provides that a complaint may not be filed when information requested is not received and that MRAC section 9 (3) provides that the CARB must not hear any evidence from a Complainant which was requested but not provided. The Respondent asserts that the complainant now seeks to rely upon the information requested to support a change to the assessment based on an adjustment for vacancy and the removal of the assessment for mini retail units (MRUs). The cap rate for the assessment relied upon the income generated by the MRUs, therefore if the assessment for this portion of the mall is altered, the cap rate must also be altered. The Respondent argued that the information requested was needed by the Assessor to prepare the assessment and further that provisions similar to MRAC section 9 (3) also apply equally to the Respondent when information is requested by the Complainant. In this case the Respondent asserts that the entire submission of the Complainant relies upon information requested by the Respondent but not provided by the Complainant. While the Respondent stated it is not requesting that the complaint be dismissed under the provisions of section 295 (4) of the MGA, it is asking the CARB to invoke the provisions of section 9 (3) of MRAC and exclude all of the Complainant's evidence from the merit hearing.

Complainant

The Complainant argues that none of the information requested by the Respondent, and not supplied by the Complainant, is necessary for the preparation of the subject's assessment. The MGA section 295 (1) provides that such requested information must be necessary. Further, Complainant is not relying on any of the supplementary information requested by the Respondent and therefore none of the Complainant's evidence should be excluded under section 9 (3) of MRAC.

The Complainant indicates in its submissions for this preliminary hearing that the difference in net operating income (NOI) reported in the standard ARFI and that shown in the sale ARFI is due to business value and non-assessable items which are both confidential and commercially sensitive matters unrelated to the assessment of the subject. The Complainant went on to refer to the Alberta Court of Appeal decision, *Boardwalk Reit LLP v. Edmonton* where in the court indicates that when interpreting the word "necessary" a very high standard must be applied and

at paragraph 121 the court states as follows:

"In English, the word "necessary" means indispensable; not merely expedient, nor useful, nor convenient"

The Complainant argued that when this strict interpretation is applied it is clear that the information requested is not necessary. The Complainant also referenced other "Boardwalk" excerpts respecting the concepts of "substantial compliance" and "reasonableness". The Complainant believes that the standard ARFI and the sale ARFI provided to the Respondent are reasonable, relevant and sufficient. The Complainant provided a list of the evidence it has disclosed and will address at the merit hearing and stated that none of this is related to the supplementary information requested by the Respondent. The Complainant indicated that the Respondent did not clarify its supplemental requests were 294 or 295 requests except for the reference in the October 25, 2010 letter. The Complainant argues that its actions respecting the Respondent's requests are reasonable and that invoking section 9 (3) of MRAC to exclude all of the Complainant's evidence would be disproportionate to any possible failure on its part. The Complainant asks the CARB to deny the application of the Respondent to bar all of the Complainant's evidence under section 9 (3) of MRAC.

Board Findings and Decision

During the hearing of this matter the CARB heard much about the respectful communication between the parties including reminders to the Complainant about the information requested and the numerous promises from the Complainant that the information would be forthcoming. This communication occurred over the summer and fall of 2010. At this hearing, however, Mr. Hamilton indicated that at some point after the last Altus communication from Ms Sweeney-Cooper saying that Mr. Izard would be working with the client to resolve the Respondent's questions, Altus made a decision not to respond to any of the Respondent's requests and not to advise the Respondent that they had made that decision. Had such notice been given to the Respondent last fall, when Altus made its decision not to provide the information requested, the Respondent would have been in a position to bring its application to the CARB much earlier, thereby avoiding the delay of the merit hearing. The Altus Group's decision to withhold notice to the Respondent that no answers to their requests would be forthcoming is not only disrespectful and unprofessional but may also have caused a delay in resolving this preliminary matter and the subsequent postponement of the merit hearing.

The Respondent's focus respecting the information it had requested and not received related to the supplementary and clarification requests of August 13, 2010, October 25, 2010 and on November 1, 2010. The Respondent referred the Board to the MGA section 295 (1) and argued that each aspect of this information was "necessary" for the Assessor to prepare the assessment for the subject property or to determine if the property is to be assessed. The Respondent relied on broad arguments respecting the necessity of this information and did not demonstrate with any degree clarity why and how this information was necessary to accomplish either of the purposes set out under 295 (1) of the MGA. The CARB is indeed guided by the Alberta Court of Appeal decision, *Boardwalk Reit LLP v. Edmonton* wherein it sets out that the word "necessary" must be interpreted applying a relatively a high standard. This decision of the

Court of Appeal is also very clear with respect to applying the standards of substantial compliance and reasonableness where a taxpayer faces the potential penalty set out under section 295(4) of the MGA. In this case the CARB has concluded that the Respondent has not made out a case that the requested information was "necessary" as contemplated by section 295 (1) of the MGA. The CARB understands that the Respondent is not seeking dismissal or asking for the Board to deny the right of the Complainant to proceed to hearing, however because the Respondent appeared to place significant weight on the 'necessity' of the information requested, the Board believed that this point should be made.

While the Respondent's argument centred on the need for the information requested, the relief sought was to have the entirety of the Complainant's evidence barred from the merit hearing of the complaint by invoking section 9 (3) of MRAC. First this would result in the equivalent penalty as set out in 295 (4) of the MGA which the Board has already determined to be inappropriate to the facts of this case. Further the CARB finds no obvious relationship between the information requested and the list of the Complainant's evidence as provided in exhibit C-1. There may, however be evidence within the Complainant's disclosure which the topics listed by the Complainant do not capture. The CARB has not examined the Complainant's disclosure to determine the potential of such relationships.

MRAC section 9 (3) reads as follows:

Failure to disclose

"9(3) A composite assessment review board must not hear any evidence from a complainant relating to information that was requested by the assessor under section 294 or 295 of the Act but was not provided to the assessor."

To determine whether the provisions of MRAC 9 (3) should be invoked the CARB considered the following:

1. Are the requests made by the Assessor under section 294 or 295 of the MGA?
2. Are the requests "necessary" as set out in 295 (1) or would the information assist the Assessor in preparing the assessment as set out in 294 (1)(b) of MRAC?
3. Is the all of the Complainant's evidence which the Respondent seeks to exclude, related to the information requested under sections 294 and 295 of the MGA?

First, in this case the requests originate with the City Of Calgary Assessment office by individuals acting on behalf of the Assessor. The information requests is supplemental to information supplied by the Complainant through the Respondents annual ARFI which would be information requested under 294 or 295 of the MGA. Also the request made on October 25, 2010 clarifies that the Respondent is relying on its right to request this information specifically under section 294 (1)(b) of the MGA.

Secondly, the information requested would generally appear to be useful or of assistance to the Respondent in the process of preparing the assessment notwithstanding the finding of the CARB that this information has not been shown to be necessary.

Thirdly, the information is not related to all of the Complainant's evidence. The Respondent failed to show each element of its requested information juxtaposed with the specific evidence

of the Complainant to demonstrate the relationship between the two. The Respondent requests that the CARB conclude that the six components of its various requests somehow relate to all of the evidence disclosed by the Complainant and this has not been shown to be the case. The CARB therefore has considered each of the six components of Respondent's requests and directs as follows:

Board's Direction

1. Request for an explanation of what (SL) means under the column – Lease Type as the SL entries do not show base rent, CAM, or tax but do show other income.

The Complainant will not be permitted to introduce any documentary or testimonial evidence which addresses the acronym "SL" including base rent, CAM, tax and other income pertaining to the SL entries on the rent roll. This bar will also include any rebuttal evidence or argument concerning the conclusions the Respondent may have made respecting the "SL" entries.

2. Request for rental income for leases in a segment of the rent roll titled "New Leases" on page 2 as the information is not readable or is absent.

The Complainant will not be permitted to introduce any documentary or testimonial evidence which addresses the entries under New Leases on page two of the rent roll. This bar will also include any rebuttal evidence or argument concerning the conclusions the Respondent may have made respecting this information.

3. Request for a Mall Directory map if available.

The Respondent did not indicate how this information would be of assistance and this information would be available to the public. The CARB finds that there should be no exclusion of evidence relating to the mall directory or map.

4. Request for clarification of whether the rental information provided on the ARFI dated May 21, 2010 includes overage rent, or if the rental rates provided therein are face rents only. The letter adds *"Please confirm if the information submitted includes overage rent, or provide the rental information, specifying face rent and overage rent/percentage rent for each tenant, by 2010, November 1"*.

The Complainant will not be permitted to introduce any documentary or testimonial evidence which addresses the matter of "overage rent" or add any further clarification to the information in the rent roll relating to this matter. This bar will also include any rebuttal evidence or argument concerning the conclusions the Respondent may have made respecting this information.

5. Request for clarification as to why there are three different income values for the subject property based on three different documents:
 - \$14,083,311 determined by the Respondent as total actual net operating income from the rent roll submitted by the Complainant
 - \$16,811,289 as shown on the ARFI respecting the sale of the subject
 - \$17,200,400 as shown on the RealNet report of the sale of the subject

The Complainant failed to respond to this question within the context of the Respondent's requests for this information, almost one year ago, and only now indicates that the difference between the rent roll income and the income reported respecting the sale is explained as business value and non-assessable items. This explanation is too late and without substance and therefore also without credibility. The degree of importance this information may have is not known at this point however the Respondent did indicate that the subject sale was used in its cap rate analysis. All of these values have their genesis in the information held by the Complainant including the value used by RealNet. This information would have potentially been very useful to the process of determining the actual income generated by the real property of the subject.

The Complainant will not be permitted in the merit hearing to address these values through documentary or testimonial evidence. This bar will also include any rebuttal evidence or argument concerning the conclusions which the Respondent may have made in absence of the Complainant's response to the Respondent's request.

6. Request for an explanation as to what (MRU) stands for in the unit ID of the rent roll.

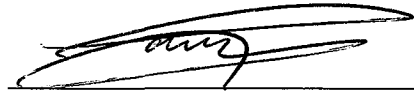
The CARB is somewhat confused as to the reason for this request as both parties appear to use the same acronym to reference the mobile or mini retail units in the mall. The CARB sees no need to exclude any reference or evidence that may be found within the Complainant's disclosure relating to this acronym. The Assessor's inquiry certainly does not go to the issue raised by the Complainant as to the whether these units are assessable or not.

As indicated earlier in this decision, the information requested by the Respondent as it pertains to the Complainant's evidence has not been shown in a specific manner and so the CARB has not been able to deal with the exclusion of evidence by referencing pages or paragraphs.

We leave it to the parties to implement the Board's direction with respect to the documentary evidence already disclosed. Further, the Board will consider objections in accordance with the above direction, respecting testimonial evidence, during the course of the merit hearing.

The merit hearing of this complainant is scheduled on November 14 and 15, 2011.

DATED AT THE CITY OF CALGARY THIS 28th DAY OF OCTOBER 2011.



Presiding Officer
Paul G. Petry

APPENDIX "A"

**DOCUMENTS PRESENTED AT THE HEARING
AND CONSIDERED BY THE BOARD:**

NO.	ITEM
1. C-1	Complainant's Submission Respecting the Preliminary Matters
2. R-1	Respondent's Submission Respecting the Preliminary Matters
3. R-3	Respondent's Rebuttal
4. R-4	Respondent's Spreadsheet on the Rent Roll

FOR ADMINISTRATIVE USE

Subject	Property Type	Property Sub-Type	Issue	Sub-Issue
Regional Mall	Shopping Centre		Jurisdictional	294/295/MRAC 9 (3)

An appeal may be made to the Court of Queen's Bench in accordance with the Municipal Government Act as follows:

470(1) *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.*

470(2) *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).*

470(3) *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*