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(4), Revised Statutes of Alberta 2000 (the *Act*).

between:

Calgary Co-operative Association Limited, COMPLAINANT,
as represented by Altus Group

and

The City Of Calgary, RESPONDENT

before:

T. Helgeson, PRESIDING OFFICER
E. Reuther, MEMBER
Y. Nesry, 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: 200449429

LOCATION ADDRESS: 1115 10th Avenue N.W.

HEARING NUMBER: 64520

ASSESSMENT: $9,660,000

Part of this complaint was heard on Wednesday, the 9th of November, 2011, at the office of the Assessment Review Board, Floor Number 4, 1212 – 31 Avenue NE, Calgary, Alberta, Boardroom 4, and the hearing was continued on Wednesday, the 16 of November, 2011, at the office of the Assessment Review Board, Floor Number 4, 1212 – 31 Avenue NE, Calgary, Alberta, Boardroom 5.

Appeared on behalf of the Complainant:

- *D. Mewha, A. Izard*

Appeared on behalf of the Respondent:

- *L. Wong, D. Lidgren*

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

At the commencement of the Hearing on November 9th, 2011, the Complainant stated that the Respondent's "written argument" was deficient, that a DC bylaw had been mentioned but not included in the Respondent's evidence, and that it was not clear where the Respondent was going with pages 23 through 91 of his Assessment Brief. Without an explanation for the inclusion of pages 23 through 91, said the Complainant, they were unable to respond. The Complainant then suggested proceeding with the Hearing with pages 23 to 91 excluded, or a postponement to permit the Respondent to explain what was meant by the inclusion of the pages. In the result, the hearing was recessed briefly to allow the parties to discuss the matter. When the hearing reconvened, the Complainant and the Respondent agreed that there was no issue. Accordingly, the hearing of evidence and argument proceeded.

By 3:50 p.m. on the day of the hearing, November 9th, the Complainant had completed a portion of its submission, and because one of the members of the Board had to leave to attend to an important matter, the hearing was postponed, with the consent of the parties, to Wednesday, November 16th.

Property Description:

The subject property is a parking lot, 49,567 sq. ft. in area, and is part of a complex known as "Midtown Market." The subject property has been assessed as land only at $195 per sq. ft. The subject property is one of three parcels of land that comprise an entire city block between 10th and 11th Avenue and 10th and 11th Street SW. Before development commenced, the city block was designated "DC Direct Control District" under the Land Use Bylaw, a designation that provides for a floor area ratio ("FAR") of 8. The 2011 assessed value of the subject property is $9,660,000.

A Co-op grocery store is on the parcel to the west of the subject property and contiguous with it, and a high-rise condominium, "Vantage Pointe," is on the parcel to the east of the subject property, and contiguous with it. The subject property provides surface parking for the Co-op grocery store, as well as the Co-op liquor store, which occupies part of the ground floor of the condominium. There is also some underground parking beneath the subject property that is used by Co-op employees.

Regarding Brevity

In the interests of brevity, the Board will restrict its comments to those items the Board found relevant to the matters at hand. Furthermore, the Board's findings and decision in this matter reflect the evidence that was presented and examined by the parties before the Board at the time of the hearing.

Issues:

1. Does the subject property meet the one of the Respondent's conditions for being assessed as a parking lot with a nominal assessed value of $750.00?

2. Does the assessment of the subject property reflect the characteristics and physical condition of the subject property on December 31st of the assessment year, as required by Section 289(2)(a) of the *Act.*

Complainant's Requested Value: $750.00

Summary of the Complainant's Submission:

The Respondent has incorrectly applied the principles of highest and best use, without considering the legally permissible use of the subject property. This same issue on the subject property was dealt with last year in CARB 2308/2010-P. In that Decision, the Board ruled that the subject property should not be assessed as vacant land, but as a required servient parcel for the adjacent dominant tenement, the Co-op grocery store. Accordingly, the Board reduced the assessment to $750.00, the nominal rate for parking lots.

The subject property has not changed physically, yet in one year the assessment has increased to $9,660,000. The Respondent failed to take note of last year's Decision on this property, thus demonstrating a blatant disregard for the principles set forth in *Globexx Properties Ltd.* v. *The City of Edmonton*, a 2011 Decision of Madam Justice D. L. Shelley of the Alberta Court of Queen's Bench (C-1, pages 48 & 49):

> *I consider that the ability (or not) of a municipality and a CARB to ignore a successful appeal (the effect of which was to direct the City to place a revised assessment on the Property which would then become the starting point for the 2010 assessment) is a question of law.*
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> . . . . .
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> *I am also not convinced by the City's argument that, because there is a new assessment each year, the City is entitled to disregard the effect of a successful appeal of the previous year's assessment. To the contrary, this is a mass appraisal system which is legislated under the MGA. Each property is not individually assessed each year. In a mass appraisal system the City starts with the previous year's assessment as its base and then applies various factors (derived from its analysis of market data collected over the intervening year) as appropriate to particular properties.*

Furthermore, the current assessment of the subject property has created an inequity in relation

to the various grocery stores and supermarkets, in contradiction of the key points of the Supreme Court of Canada in *Jonas* v. *Gilbert,* [1881] S.C.J. No. 356 (quote, at C-1, page 6):

> *. . . I think we must assume, in the absence of any provision clearly indicating the contrary, that the legislature intended the Act to be construed on the principle of uniformity and impartiality; and in this case, I think it never could have been the intention of the legislature, not only to discourage the transaction of business in St. John, but to do injustice to those seeking to do business there, by granting to any one person or class pecuniary advantages over other persons or classes in the same line of business; in other words, to restrain the right of any particular individual or class to do business in the city by enabling the corporation to favour by imposition of a license tax, one individual or class, at the expense of other individuals or classes transacting the same business, thereby enabling certain individuals or classes to do business on more favourable terms in the one case than on the other.*

A restrictive covenant is in place on the subject property. The restrictive covenant was required for the subject parcel as part of the subdivision approval when the city block was subdivided into three parcels. The restrictive covenant, to which the Respondent was a party, burdened the subject property (the servient tenement) as the parking site for the Co-op store (the dominant tenement). The restrictive covenant was registered on title in 2004.

We have provided evidence of thirty-nine properties, each with nominal $750.00 assessments for their parking space. Only two of these properties, 9915L Macleod Trail SE and 140 Millrise Boulevard SW, are subject to restrictive covenants in connection with their parking. Among the remaining 37 properties whose parking is mandated by a Land Use Bylaw are Shopper's Drug Mart in Kensington, Beckam's Pub & Eatery on 17th Avenue NW, Starbuck's Coffee on 16th Avenue NW, Nick's Steakhouse on Banff Trail NW, and Tipperary's Pub on 16th Avenue NW. In the case of the subject property, its value is amply captured in the assessment of the Co-op store. The aggregate assessment of the Co-op store and the subject parcel is $20,980,000, double the assessment of similar, competing properties in the vicinity. The parking for the nearby Beltline Safeway Store at 813 11th Avenue SW, three blocks east of the subject, has been recognized through zoning, not by restrictive covenant. The Direct Control Bylaw stipulates a parking ratio of 4.66 stalls per 1,000 sq. ft. Similarly, the parking for Earl's Tin Palace on 24th Avenue SW is required under zoning. Then there is the Canadian Tire Store at 9915L Macleod Trail SE, which enjoys an assessment of $750 for two full acres of parking.

Highest and best use is not determined through subjective analysis by the assessor. Instead, highest and best use is shaped by the competitive forces within the market. Therefore, the analysis and interpretation of highest and best use calls for an economic study and a financial analysis focused on the subject property. When estimating the highest and best use of a site, the assessor should not only identify the use, but also the general characteristics of improvements that would, if constructed, result in the optimal outcome for the site.

Summary of the Respondent's Submission:

There are no restrictions on what can be built on the subject property. It is zoned DC Direct Control District. Under that zoning, the subject property has a floor area ratio of eight. A building of 622,630 sq. ft. could be built on the subject property. The restrictive covenant only restricts building on 6,113 sq. ft. of the subject property, for the purpose of an access lane. The subject property does provide required parking pursuant to the Land Use Bylaw, but there are alternatives. The nearby Safeway site is different; you can't build anything more on it. You can't

build anything on the Erlton site either, and the Sunterra site has underground parking. There is unrealized value on the subject property.

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

With respect to the nature of the restrictive covenant, the Respondent is right. Section 4 of the restrictive covenant makes it clear that the dominant tenement's only control over the subject property is with respect to that portion of the subject property within 7 meters of the front of the Co-op store:

> *4. Until such time as the store currently being constructed on the Store Site is demolished, no buildings or other improvements shall be constructed on that portion of the Parking Site within 7 meters of the Store Site except for:*
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> > *(i)such improvements as are usually required in connection with a surface parking lot of the type being constructed on the Parking Site together with improvements for associated landscaped areas; and*
> >
> > *(ii)such buildings or other improvements as the City may at any time hereafter approve, subject to compliance with all requirements and conditions imposed in connection therewith of required by any applicable laws, orders, regulations or enactments.*

Simply put, there is no provision in the restrictive covenant that restricts the use of the subject property to parking, nor is there anything that would prevent the subject property being sold separately from the Co-op grocery store parcel. If the restrictive covenant does anything to support the Complainant's position, it is the fact that it recognizes the use of the subject property for parking. That said, the Board will now examine the Respondent's conditions for the application of the $750 assessment for exterior surface parking, as shown below:

> *(1) The $750.00 assessment value is applied to titled parcels that are used as an exterior surface parking area. These areas must only be used to satisfy the parking requirements of another parcel (usually contagious)* (sic)*, and have a caveat on title linking these two parcels in the event of sale.*
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> *(2) When a building permit is granted by the city and the parcel in question is not large enough to satisfy the bylaw requirements for parking, and the permit stipulates that additional parking must be provided to satisfy the respective bylaw, then that parcel will be assessed at $750.00.*

For the reasons stated above, Condition 1 does not apply, hence the question becomes: does the subject property meet Condition 2? To answer that question, the panel turned to Exhibit C-7, the report to the Calgary Planning Commission of May, 2003 with respect to the application for development of the City Block. In that report at page 5, we find the following:

> *Because of requirements by the applicant to achieve as many surface parking stalls as possible between the two buildings, it was not deemed feasible to provide a landscaped buffer within the future property boundaries without losing a number of stalls. In addition, the location of the underground parkade prevents planting of larger trees in the surface parking area. As compensation the applicant is proposing planters and creative design elements, which incorporate light standards, signage and flower baskets, throughout the parking lot.*

and further, on page 6:

> *The surface parking holds 169 stalls, which together with the 48 underground stalls for staff comes to a total of 217 commercial parking stalls. Because the total site area is more than one acre, the bylaw requires parking provision according to the standards of a "Neighbourhood Shopping Centre" to a total of 300 stalls. This is significantly more than the standard of 1 stall per 90m2 net floor area applied elsewhere in the Beltline for office and retail developments which would require only 54 commercial stalls. Although the application technically is deficient of 83 commercial stalls, the parking provision is considered acceptable in this location.*
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> . . . . .
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> *The community supports a position that additional parking would be counter-productive to the vision for the Beltline, and that this redevelopment site should not be measure against suburban standards.* ***A relaxation of the commercial parking requirements is therefore recommended.*** [Board's emphasis].

We know that the parking requirements under Land Use Bylaw 2P80 were "relaxed" as per the recommendation of the Planning Commission because there are only 154 surface stalls on the subject property; the remaining 15 stalls are on the Co-op grocery store site. Clearly, the Co-op store site was not large enough to satisfy the requirements of the Land Use Bylaw for parking. We don't know whether the building permit stipulated that "additional parking must be provided to satisfy the respective bylaws," but obviously there were enough parking stalls on the subject property to satisfy the requirements of the development permit, or it would not have been issued, and had the development permit not been issued, there would have been no building permit. The Board is satisfied that the subject property meets the requirements of Condition 2 for an assessed value of $750.00.

The Respondent acknowledges that the subject property is required parking, but insists there are "alternatives." In the context of the Respondent's submission, the Board understands "alternatives" to mean the possibility of redevelopment of the subject parcel. The Respondent looked to a "higher and better use" for the subject property in preparing the assessment. It may be helpful at this juncture to examine Section 289(2)(a) of the *Act:*

> *(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 . . .*

What is the meaning of s.289(2)(a) in the context of highest and best use? On December 31st of the assessment year, the subject property was a parking lot that provided parking for the Co-op grocery store, and perhaps the Co-op liquor store as well. The subject property continues to do just that, yet the Respondent seems to believe that there are alternatives for the subject property, apparently based on development potential left over from the FAR of 8 in the DC Direct Control District. The Respondent has stated that the Complainant's comparables are, unlike the subject property, subject to zoning that would prevent development of anything other than what currently exists.

In the decision cited as CARB 2315/2010-P (at page 161 of Exhibit C-4) the Board considered a complaint with respect to the assessment of a Co-op grocery store, the very same Co-op grocery store mentioned in the present case. The assessment had been arrived at by the land value approach rather than the income approach, on grounds that its highest and best use was for redevelopment. At page 6 of its decision, the Board dealt with possible "alternative uses" as follows:

> *A use must be probable, not speculative. Conjecture and unsupported opinions of alternative uses are insufficient evidence to show that the existing use is not the highest and best use. The timing of an alternative use is critical but that is another factor that the Respondent has not addressed. The existing store on the property is near to the beginning of its economic life of up to 60 years. For that reason, very strong evidence would have to exist to show that the building is obsolete at such a young age.*

In the result, the panel that heard the complaint concerning the Co-op grocery store found that there was no compelling evidence to support the notion that the highest and best use of the site of the Co-op store was to be found in redevelopment, and reduced the assessment to an amount arrived at through use of the income approach.

The subject property is a necessary component of Midtown Market. The Co-op stores and the parking on the subject property function as a unit. If for some reason the Complainant, owner of both stores and the subject property, were to redevelop the subject property, the parking for the Co-op stores would vanish. The stores would face a dramatic loss of revenue, and worse, the lack of parking would bring them within the purview of the dire measures available to the Respondent's development authority under Section 645 and 646 of the *Act.* The Board finds that the reasoning in the decision cited above clearly applies to the subject property, for if the Co-op grocery store site is not likely to be redeveloped, then neither is the subject property.

Strong evidence is needed to demonstrate that the subject property is likely to be redeveloped in the near future. In the present case the Respondent provided nothing to support the likelihood of alternative uses finding a home on the subject property. The Respondent offered only the fact that the zoning of the subject property provides for an FAR of 8, and that there is still some development potential left over from the construction of Vantage Pointe, which was built to an FAR of 16. To the Respondent, unrealized potential for development seems to be synonymous with inevitability of redevelopment.

The Board notes that the only permitted uses in the DC Direct Control District that apply to the subject property are "Ancillary commercial uses," "Essential public services," "Home occupations – Class 1," "Parks and playgrounds," and "Utilities." The rest of the uses, all 40 of them, are discretionary, and may be approved or refused in the absolute discretion of the Respondent. As the Complainant has pointed out, no matter how likely redevelopment might be, it would be years before approvals for other uses could be obtained given the requirements of the Respondent's multi-faceted planning process, and the sensitivity of the neighbourhood to changes in land use.

Assessments are prepared on a year-to-year basis, which obviates the need for speculative assessments. To gain a better understanding of the meaning of s.289(2)(a) of the *Act*, the Board turned to Exhibit C-4, Rebuttal, page 24. There, the Board found *Workshop 158, Highest and Best Use Student Reference Manual* by the International Association of Assessing Officers. At page 7, paragraph E of that document, the following was found:

> *Another factor to be considered in this discussion is the revaluation timeframe in an assessment jurisdiction.* ***Because the assessment of property is an annual function, or at least a periodic function, the market value established is an assessment that should really reflect the highest and best use of the property in the immediate future.*** *This time frame constraint tends to eliminate the speculative element from a highest and best use analysis in an assessment valuation.* ***If an assessor/appraiser knows the use of a property over the next year and that he/she will only be held accountable for his/her estimate of property value for a period of***

> ***one year, then he/she generally does not have to speculate what the highest and best use of the property will be.*** [Board's emphasis throughout]

The Board agrees with the reasoning in the above paragraph. It is the market, not the zoning of a property, that determines highest and best use. The Respondent has not provided an estimate of when one of his alternative uses might arrive on the subject property, nor has he identified the most likely alternative use. When an assessment is based on development alternatives born of speculation, the owner of the assessed property may be burdened with excessive taxation for years before one of the alternatives arrives, if it ever does. This is not fair. In the view of the Board, that explains why s.289(2)(a) was included in the *Act.*

The evidence of the Respondent was insufficient, and failed to persuade the Board that alternative uses were likely to arrive on the subject property, not only in the immediate future, but in the reasonably foreseeable future. The Board finds that the assessment of the subject property is not in accordance with s.289(2)(a) because the characteristics and physical condition of the subject property were ignored by the assessor. Ample evidence was provided by the Complainant to demonstrate that the assessment of the subject property is inequitable when compared to the assessments of similar properties, and as noted above, the subject property meets the Respondent's Condition 2 for an assessment of $750.00. Furthermore, the Board is satisfied that the value of the subject property as a parking lot is, for all intents and purposes, captured in the assessment of the Co-op grocery store.

Board's Decision:

The assessment of the subject property is adjusted to $750.00.

DATED AT THE CITY OF CALGARY THIS 13 DAY OF December 2011.

[redacted]

Presiding Officer

Exhibits:

C-1, Complainant's Evidence Submission

R-1, Respondent's Procedural Matter Submission

C-1(a), Complainant's Evidence Submission

C-1(b), Complainant's Evidence Submisson Appendix

C-1(c), Complainant's Land Titles Examples

C-2, Notice of Decision with Photograph of man pointing at something

R-2, Respondent's Assessment Brief

C-3, Totem Developments, 14625 69th Street NW, 2011 Rebuttal Submission

R-3, Schedule B, Direct Control District, Bylaw #14Z2001

C-4, Complainant's ARB Evidence Rebuttal

C-4(2), Material from Alberta Spatial Information System

C-5, Report to the Subdivision and Development Appeal Board, July 17th, 2003

C-6, Excerpt from Calgary Land Use Bylaw 2P80

C-7, Report to the Calgary Planning Commision re: Development Permit, DC 14Z2001

C-8, One page, showing Conditions for $750.00 Assessment, Exterior Surface Parking.

C-9, CARB 2485/2011-P

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Appeal type	Property type	Property sub-type	Issue	Sub-issue
CARB	Other Property Types	Parking	Development Land	Land Value

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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.