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**
TAXABLE ASSESSMENT:	**$198,340,000**

This complaint was heard on the 14th day of November, 2011 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:

1) Mr. D. Hamilton and Ms K. Lilly

Appeared on behalf of the Respondent:

2) 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 a total of 764,417 sq. ft. of rentable space including anchor tenant space, commercial retail unit (cru) space, office space, storage, pad sites and other retail space. The property is situated on 2,744,887 sq. ft. of land which has its main frontage along 36 Street N.E.

Background

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. The CARB decision concerning this preliminary matter was issued as CARB 2728/2011-J on October 28th, 2011.

Preliminary Matter

The Respondent indicated that the CARB has directed that further evidence respecting the merit issues of this complaint will not be considered despite the postponement granted to deal with the Respondent's application respecting jurisdictional matters. The Complainant, however intends to introduce new evidence respecting the Respondent's disclosure marked as Exhibit R-4. The Complainant indicated that no new documentary evidence is being tendered; however the Complainant believes it has a right to respond to the Respondent's Exhibit R-4 as it did not have this document prior to the new disclosure timeline related to the Respondent's jurisdictional application.

The CARB ruled that the Complainant would be permitted to speak to the Respondent's Exhibit R-4 within the context of the merit issues before the Board.

Issues:

1) Is the income generated by the Mobile/Mini Retail Units (MRUs) or the space they occupy, assessable as part of the fee simple estate?

2) Is the vacancy allowance of 1% applied by the Assessor to all retail space types within the subject property incorrect and inadequate?

Other matters and issues were raised in the complaint filed with the Assessment Review Board (ARB) on March 7, 2011. The only issues however, that the parties sought to have the Composite Assessment Review Board (CARB) address in the hearing on November 14, 2011 are those referred to above, therefore the CARB has not addressed any of the other matters or issues initially raised in the Complaint.

Complainant's Requested Value:

Based on the Complainant's requested vacancy allowance adjustment and the removal of the assessment related to the MRUs, the requested taxable assessment for the subject property is $184,690,000.

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

1) The CARB decision is to confirm that the MRU spaces are assessable as part of the fee simple estate.

2) The CARB decision is to confirm the overall vacancy allowance of 1%.

Summary of the Party's Positions

Issue 1) MRU Space

The Complainant argued that the MRUs are not assessable in accordance with the provisions of Municipal Government Act (ACT) and the Matters Relating to Assessment and Taxation Regulation (MRAT). These units are granted operating space through a licensing agreement and not through a lease. The Complainant made reference to a text titled "Principals of Property Law" which describes the difference between a license and a lease. The basic premise is that a lease creates an interest in land whereas a license is merely a permission to do that which otherwise would be a trespass. The Complainant also relied on an excerpt from the Canadian Encyclopedic Digest and an Alberta court case "Cypress (County) v. Alberta (Municipal Government Board) which indicate that a license does not create an interest in the estate or land. Further a license is revocable on short notice and does not provide for exclusive possession as is the case with a lease which would identify the parties, specify the term, the date of commencement and the rent. The Complainant referred the Board to section 2 (b) of MRAT which provides that an assessment must be an estimate of the value of the fee simple estate in the property and argued that because the MRUs do not infer exclusive possession and

do not create an interest in the estate, they are not assessable.

The Complainant submitted a license agreement template that the owners had suggested would be the basis for license agreements within the subject property and argued that the key features of the MRU license agreements are as follows:

1) The right being conveyed is to use rather than to occupy;
2) The licenses are for very short terms;
3) The licenses are revocable with little notice;
4) The licensor has the right to relocate the MRU at any time;
5) The license agreement is not assignable;
6) The shopping centre remains in control of the licensee;
7) The license agreements all contain clauses specifying there is no landlord/tenant relationship.

It was argued that all of these provisions indicate a right to use the MRU for the sale of goods rather than the right to exclusive possession of a specific area, as is the case with CRU tenants.

The Complainant referred section 284 (r) and (j) of the Act which provides definitions of "property" and "improvements". 284 (j) indicates that an improvement means a structure or any thing attached or secured to a structure, that would transfer without special mention by a transfer or sale of the structure. The MRUs are mobile units with wheels allowing the unit location to be changed at will and on short notice. These units are located where power is accessible but are not attached to the structure and would not transfer on sale unless they were specifically mentioned. As such, these units do not meet the definition of "improvement" and are therefore chattels which do not form part of the fee simple estate of the subject property. The Complainant provided an analogy comparing fixtures, furnishings and equipment (FF&E) in hotel assessment with the MRUs in shopping centres. It was argued that FF&E is not considered to be part of the real estate and the owner is granted an allowance for the recovery of the FF&E expense as well as recovery of a return on the capital investment for FF&E. There is no attempt to add or attribute assessable income based on these chattels in hotels and there should not be in the case of MRUs. The Complainant did not dispute the assessment of kiosk space, however argued that these spaces are leased and are attached to the floor in a permanent location.

The Respondent also referred the Board to section 2(b) of MRAT indicating that the MRUs are retail outlets which occupy an area of the shopping centre and that area is an element of the fee simple estate. The Respondent provided marketing information and photographs to show that MRUs are advertised and marketed as leasing opportunities. The fact that these units are mobile does not negate the fact that they occupy retail space within the mall. The sample licensing agreement submitted by the Complainant refers to a "license area" and not to the unit used to display goods for sale. The space occupied by these units is no different than the space occupied by CRUs or Kiosks. The MRU spaces generate income to the landlord and increases the income stream attributable to the real estate. This income would be taken into account by any potential purchaser. The assessment must take into account the total income attributable to the real estate being assessed. This approach is supported by the Valuation Guide jointly published by the Alberta Assessors Association and the Alberta Department of Municipal Affairs.

Section 2(c) of MRAT provides that the assessment must reflect typical market conditions for properties similar to that property. MRU space within all other similar shopping centres has been

equitably assessed on the same basis as the subject. Three other similar complaints have been heard by the Calgary CARB for 2011; Marlborough Mall CARB 1197/2011-P, Northland Village Mall CARB 1144/2011-P and Southcentre CARB 1905/2011-P. These complainants were based on similar evidence and arguments to those advanced by the Complainant in this case and the CARB decisions in each case, were to confirm that assessments must include the MRU space.

Findings and Reasons for the Board's Decision Respecting the MRU Space

The CARB has carefully considered the arguments and evidence advanced by the parties respecting this issue and the relative legal framework found within the Act and Regulation (MRAT).

Section 284 of the Act provides guidance through definition as to what form of property is assessable. 284(r) defines property as follows:

> *"'property" means*
> *(i) a parcel of land,*
> *(ii) an improvement, or*
> *(iii) a parcel of land and the improvements to it;"*

Further 284 (j) defines improvements in part as follows:

> *""improvement" means*
> *(i) a structure,*
> *(ii) any thing attached or secured to a structure, that would be transferred without special mention by a transfer or sale of the structure,....."*

The Complainant argued that the MRUs are not a structure and are not attached to the structure, therefore they are not part of the improvement but rather are non assessable chattels. The CARB has concluded that the issue here is not the "MRU or cart" that is of importance to the determination of this matter but rather the "area or space" within the shopping centre which is occupied by the MRUs. The CARB has not placed significant weight on the sample licensing agreement submitted by the Complainant as it is not an actual agreement for an MRU within the subject property, it provides for numerous opportunities for optional wording, there is little evidence that it is intended for use respecting MRUs and there is no identification on its face that it is a document prepared by and used by the owners of the subject. As weak as this evidence may be, the document however refers throughout to the "Licensed Area" and not to a specific apparatus or retail cart. Even without this affirming evidence the CARB concludes that by the very nature and function of these units, they occupy valuable retail floor space within the mall which provides the landlord a considerable return from this space. It is therefore the availability of the physical space within the mall structure and the purpose to which this space is being used that is the key to determining whether or not this space as, occupied, is assessable. The fact that the space location may be changed from time to time has no effect on the return to the landlord or the purpose and use of this space.

Section 284 of the Act also includes a definition of a "structure" in sub section (u) which reads as follows:

""Structure" means a building or other thing erected or placed in, on, over, or under land, whether or not it is so affixed to the land as to become transferred without special mention by the transfer or sale of the land;"

Based on this provision the CARB concludes that there may be an argument that the carts or other apparatus placed on the assigned space could be assessed in addition to the space itself. The Board did not hear any compelling argument on this point and concludes that in this case the carts or the units which are placed on assessable space will be reckoned as being similar to other tenant improvements used to display retail goods.

The Complainant advanced considerable argument respecting the difference between a lease and a license supported by quotes from authorities who have articulated these differences. The Complainant went on to provide what it felt were the key features which distinguish a typical lease from the MRU licensing agreements within the subject as follows:

1) The right being conveyed is to use rather than to occupy;
2) The licenses are for very short terms;
3) The licenses are revocable with little notice;
4) The licensor has the right to relocate the MRU at any time;
5) The license agreement is not assignable;
6) The shopping centre remains in control of the licensee;
7) The license agreements all contain clauses specifying there is no landlord/tenant.

On these points the CARB concludes the following:

1) The CARB does not believe that anything turns on the terms use or occupy as there is not doubt that the MRUs occupy and use definable floor space within the subject.
2) The terms are not necessarily short as they range from 2 to 6 years.
3) The agreements may be revocable with a 30 day notice however the Board did not see specific evidence to affirm this point. In any case it is not unusual to see short notice periods for CRU leases that are short term, seasonal or month to month.
4) Again the Board did not have an actual agreement to analyze and it is not known how or if relocation actually takes place frequently and without the agreement of the retailer involved. In the end, the alternate space it is assumed would be equivalent to the previous space occupied by the MRU.
5) The Board was not provided with evidence to show that "non-assignment" clauses do not exist within other leases; however the Board assumes that such arrangements in the case of MRUs are found to be agreeable by both parties.
6) The degree of control by the shopping centre will no doubt vary depending on the lease or alternate agreements made with various tenants but this is not a compelling argument based on the minimal evidence available to the Board.
7) Again the Board did not have any agreements within the subject to consider but the facts appear to belie the complainant's assertion respecting "no landlord/tenant relationship".

Based on the evidence before the Board the CARB has concluded that notwithstanding the labels of lease or license, the MRUs spaces are made available to retailers who pay the landlord a reasonably high level of return for the space they occupy. The label attached to the document wherein the parties outline their agreement is not a compelling argument in the Board's view. The subject was designed or has been determined by the landlord to be capable of accommodating this form of retail space and any potential purchaser, while they may not acquire the carts or units themselves, the purchaser would acquire the space used for such

purposes. A purchaser would therefore also consider the revenue stream associated with replicating the same practice of providing space to MRUs retailers willing to pay for the use of such space.

The decision of the CARB is that the MRU spaces are assessable and the values determined by the Assessor for this space will remain as part of the assessment for the subject property.

Summary of the Party's Positions

Issue 2) Vacancy Allowance

The Complainant indicated that the Assessor has changed the approach used to analyze and apply vacancy allowances for the subject property and other similar properties for 2011. The previous approach had been to analyze and apply vacancy allowances by major space type. For example anchor space, CRU space, office space, storage space and so on. For 2011 the Assessor has combined vacancies across space types and has simply expressed the level of vacancy as a percentage of the total rentable space within the entire property. This approach ignores the fact that vacancies are generally higher within CRUs and similar spaces where operating costs are at the highest level within the mall. The Complainant provided a table to show that the actual loss of revenue associated with vacancies of CRU space as acknowledged by the Assessor exceeded the vacancy allowance used by the assessor by an amount of $82,683. The Complainant also provided the excerpts from the Alberta Assessors' Valuation Guide to show that the methodology previously applied by the Assessor and the method recommended in this case by the Complainant is the methodology recommended by the Valuation Guide.

The subject property was sold in September 2009 and part of the sales agreement was that the revenue associated with certain vacancies would be guaranteed by the seller for a defined period of time or until the space was leased. The Complainant indicated that the Assessor has not included this space as vacant space and argued that allowances for vacancy should be based on analysis over a longer period of time. Further, temporary revenue, because of an agreement with the purchasers, should not negate the accounting of this space which in reality was vacant. This vacant space has therefore been included in the analysis done by the Complainant. The Complainant also used a weighted average approach to determine the actual days lost to vacancy occurring throughout a full year. Based on a review of CRU space vacancies within the subject over a two year period the complainant's analysis show a vacancy level of 5.76%. The Complainant's analysis of Northland Village Mall showed an average vacancy level for CRU space to be 3.26% and Marlborough Mall to be 5.48%. Based on this information the Complainant proposed an adjustment from 1% to 4.75% for CRU and similar space within the subject.

The Respondent pointed out that the Complainant's own Assessment Request for Information (ARFI) return show that vacancy within the subject property stood at .83%. The Respondent provided information report by four regional centres including the subject which showed a range in overall vacancy from a low of .18% to a high of 4.06%. The median value was shown to be .98% and the Assessor selected 1% as the value for regional mall vacancy allowances for 2011. The Respondent argued that the vacant space subject to the revenue guarantee should not be

included as the revenue stream has not been affected by these vacancies. The vacancy allowance is to offset loss of revenue and there has been no revenue lost in these cases.

The Respondent defended the change in approach to vacancy allowance determination by arguing that there is no longer a situation where the anchor tenants were the primary draw to the regional shopping centres. The CRU tenants have a greater proportion of the centre's space and have equal drawing power to that of the anchors. The Respondent argued that its analysis of overall vacancy occurrences within the regional malls shows that a 1% allowance is appropriate. This allowance has been applied in an equitable manner across the regional mall sector.

The Respondent provided documentation concerning the sale of the subject property in September 2009. The value of the sale after adjusting for a second property that was included in the sale results in a value of $242,500,000 for the property under complaint. The Respondent argued that from this information it is obvious that the subject property is assessed below its actual market value and requested that on this basis the assessment should be confirmed.

Findings and Reasons for the Board's Decision Respecting Vacancy Allowance:

The CARB agrees with the Complainant's assertion that the vacant space subject to short term revenue guarantee should nevertheless be included as vacant space for vacancy analysis purposes. Vacancy allowances should be stabilized over a two or three year period and should not be affected by temporary and unusual circumstances such as the guaranteed revenue for vacant space. In reality this arrangement is not a depiction of market forces related to vacancy and the typical loss of revenue that is associated. The Board also favours the method of vacancy analysis recommended by the Valuation Guide and in this case proposed by the Complainant. The method applied by the Assessor has been shown not to produce a realistic allowance for the subject and also fails to properly measure the corresponding shortfall values. The CARB may have been persuaded to adopt the Complainant's recommended vacancy adjustment in this case except for the following:

Firstly, when there is potential grounds to justify a change to the vacancy allowance value, there must also be a determination as to whether the proposed vacancy value was used as the typical vacancy adjustment in the development of the capitalization rate (cap). If the new vacancy value was not used then it is possible that the cap rate will also require an adjustment. The Complainant failed to bring forward any evidence with respect to this matter and therefore the CARB is not convinced that the resulting overall proposed value for the subject is a reasonable estimate of market value. There must be consistency in the derivation and application of the cap rate as set out in the Westcoast Transmission v Assessor Area No. 9 (Vancouver) (1987) BCSC No. 1273 case. The court set out this principle in part through this excerpt:

"I stated above that the concepts used, in developing capitalization rates for application to the subject, should be used consistently. Thus it makes no sense to develop a capitalization rate on one set of assumptions about long-term vacancy rates, long term rents, and long term expenses, and then apply that rate to the income of the subject property if it is not derived in the same way."

Secondly, the sale of the subject property in September of 2009, adjusted for the value of a

second property included in the sale results in a value of $242,500,000 for the subject property. The Complainant provided no rebuttal to the evidence brought forward on the sale except within the context of the preliminary hearing on October 24, 2011. The Complainant's statements in that hearing were not substantiated and therefore the CARB places significant weight on this sale. There is approximately a $30,000,000 difference between the assessed value of the subject and its sale price in September 2009 before adjusting the assessed value for exempt space. The Board concludes that the sales price for the subject property is very compelling evidence that the assessment is not above the market value of the subject.

Thirdly, the Board has found not evidence to show that the subject property has been assessed differently or inequitably considering the assessments of similar properties within the municipality.

Decision Summary

The CARB found that MRUs occupy space and the respective retailers pay reasonable rates to the landlord for the space they occupy. From the evidence before the Board there is little to distinguish the MRU space and agreement thereto from the other tenants in the mall. These spaces were deemed to be assessable. The Board favoured the Complainant's approach to determination of vacancy allowances, however because the complainant had not completed their analysis to consider the impact on the cap rate and in light of the sale of the subject property at a value approximately $30,000,000 over the assessed value, the CARB decided it could not justify the vacancy adjustment requested. The taxable assessment for the subject is therefore confirmed at $198,340,000.

DATED AT THE CITY OF CALGARY THIS 18th **DAY OF** November **2011.**

Presiding Officer
Paul G. Petry

APPENDIX "A"

DOCUMENTS PRESENTED AT THE HEARING AND CONSIDERED BY THE BOARD:

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

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*

FOR ADMINISTRATIVE USE

Subject	Property Type	Property Sub-Type	Issue	Sub-Issue
Regional Mall	Shopping Centre	Mini Retail Units	Assessable	Vacancy rate