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:

Anthem Level Erlton Ltd. (as represented by Altus Group Limited), COMPLAINANT

and

The City Of Calgary, RESPONDENT

before:

S. Barry, PRESIDING OFFICER
P. McKenna, BOARD MEMBER
Y. Nesry, BOARD MEMBER

This is a complaint to the Calgary Composite Assessment Review Board (CARB) in respect of a property assessment prepared by the Assessor of The City of Calgary and entered in the 2013 Assessment Roll as follows:

ROLL NUMBER:	**201341716**	**201341690**
LOCATION ADDRESS:	**2418 Erlton Rd SW**	**2327 Macleod Tr SW**
FILE NUMBER:	**72594**	**72587**
ASSESSMENT:	**$2,050,000**	**$1,910,000**

This complaint was heard on the 10th and 11th days of June, 2013 at the office of the Assessment Review Board located at Floor Number 4, 1212 – 31 Avenue NE, Calgary, Alberta, Boardroom 2.

Appeared on behalf of the Complainant:

- *A. Izard, Altus Group Limited*

Appeared on behalf of the Respondent:

- *E. Borisenko, City of Calgary*
- *S. Trylinski, Legal Counsel, City of Calgary*

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

[1] There were no jurisdictional issues raised at the outset of the hearing; however, because file 72594 and 72587 are inter-related in terms of the development proposal affecting them both and because they are adjacent parcels for the purposes of the development proposal, the Parties requested, and the Board agreed, that they would be heard together. The Board has combined the facts, arguments, evidence, reasons and decision in this one document: CARB 72594/P-2013. Further, file 72594 will be referred to as Site 1 and 72587 will be referred to as Site 2.

Property Description:

[2] Site 1, at 2418 Erlton Rd SW, is a 1.76 acre parcel located in the Erlton Community in the south-west quadrant sector of the City. It is classed as 100 per cent non-residential, contains two small buildings used for commercial purposes, and is assessed using the sales comparison on a land only basis.

[3] Site 2, at 2327 Macleod Tr SW, is a 1.30 acre parcel located adjacent to the Site 1 parcel. It is classed as 100 per cent non-residential, is vacant, and is assessed using the sales comparison on a land only basis.

Issues:

[4] Site 1: should the assessment classification be changed from 100 per cent non-residential to 13.27 per cent non-residential and 86.73 per cent residential?

[5] Site 2: should the assessment classification be changed from 100 per cent non-residential to 7.40 per cent non-residential and 92.60 per cent residential?

Complainant's Requested Value:

[6] The Complainant does not contest the assessed values of $2,050,000 and $1,910,000 respectively.

Board's Decision:

[7] The assessment classifications for Site 1, file 72594 are amended to 13.27 per cent non-residential and 86.73 residential. The assessment classifications for Site 2, file 72587 are amended to 7.40 per cent non-residential and 92.60 residential. The assessment values of $2,050,000 and $1,910,000 are confirmed.

Position of the Parties:

Complainant's Position:

[8] The Complainant outlined the development proposal that affects these two parcels and another adjacent parcel that is not the subject of these Complaints. In summary, the lands form part of the Erlton Area Redevelopment Plan and are subject to DC Zoning Bylaw 118Z2007. Since the adoption of that bylaw, the owner has advanced some amendments to create a mixed use development that will be comprised of residential and commercial uses, including a grocery store, but eliminating the previously proposed office use. A Plus-15 to connect to the Erlton LRT is also part of the proposal. In anticipation of a formal development permit application, the owner initiated a change to the land use bylaw in March 2012 to narrow the uses to those proposed in his revised plan. It is the Complainant's evidence, documented in his disclosure package, that the revised bylaw has the support of the Calgary Planning Commission and that the bylaw is expected to be put before Council for approval in July of 2013. The Complainant provided considerable detail, both orally and through drawings and diagrams, about the proposed development which is not repeated here.

[9] The Complainant's main argument is whether the owner's intent, on December 31, 2012. as to the proposed or intended uses of land should supersede the actual uses of land on that date, for the purposes of assigning an assessment classification. The Complainant referenced S.289(2)(a) of the Act, and noted that, while the assessment must reflect "the characteristics and physical condition of the property on December 31 of the year prior to the year in which a tax is imposed . . . ", s.297 allows for multiple assessment classes on one property. He emphasized s.297(4)(b) which states that non-residential property "does not include . . land that is used or intended to be used for permanent living accommodation (Board's emphasis).

[10] The Complainant identified a number of actions that have been undertaken by the owner to bring the development proposal to fruition over the past several years; specifically: the acquisition and consolidation of all the parcels within the development plan area including a municipal road and the approval of a road closure bylaw; the submission and approval of a DC bylaw to give effect to a previous development proposal; amendments to the Erlton Area Redevelopment Plan; the demolition or removal of a number of structures on the two parcels; most recently, the submission of a new land use bylaw proposal, as noted above, in March of 2012 to eliminate the office use and more closely identify the intended uses within the new bylaw. The Complainant states that, with all these submissions, detailed drawings, designs and reports have been prepared and submitted to the City for its approval and that all of this work has been done in preparation for an as-yet-to-be-submitted development permit application. The Complainant also noted that the two small structures on Site 1 are the subject of short term leases both of which contain 30 day termination clauses.

[11] The Complainant cited Municipal Government Board (MGB) decision 088/06, MGB DL 106/08, CARB decision 0872-2012/P as well as the Alberta Court of Queen's Bench (ACQB)

Reasons for Judgment No. 0701-01387 which was a decision by Mr. Justice Hart on the City's application for judicial review of MGB 088/06.

[12] In essence, the Complainant contends that the owner has engaged in substantial acts to bring about the redevelopment of the property and that, at the present time, he needs only a final approval from the City with respect to a land use amendment specific to the project at which point he can apply for a development permit. His interpretation of the CARB, MGB and ACQB decisions is that these acts are sufficient to demonstrate intent for the purposes of s.297(4)(b) of the Act and that this intent was in evidence on December 31, 2012.

Respondent's Position:

[13] The Respondent stated that there has been no application made for a development permit on for the subject parcels but that there is a commercial use being made of Site 1 as evidenced through the Assessment Request for Information (ARFI) return and photographs of the site. In support of that position, the Respondent provided an extract from its files that details what applications have been made with respect to the two properties on dates that commenced on May 18, 2007 through to July 26, 2012. This report shows that a number of requests for pre-application meetings for a proposed outline plan or development have been made and held. As well, the Respondents acknowledged the Complainant's contention that a land use bylaw affecting these parcels is or was under review. There is no evidence within this chronology that a development permit application has been made.

[14] The Respondent contends that it uses three criteria for determining the correct classification of a property. They are: the use being made of the property at Dec 31 of the assessment year; the property's land use under a land use bylaw; and, whether or not there are active development permits. The Respondent cites a number of CARB decisions, specifically: 2359/2012-P, 1398/2012-P and 2621/2011-P, that speak to the lack of a development permit as being fatal to the existence of intent to use the property for permanent living accommodation. The Respondent expressed its concern that small steps could be taken along the way to advance a change in use but that, even with a development permit in place, there is no certainty that the proposed use will be developed. In the interim, the City is unable, under the loose terms of "intention" advanced by the Complainant, from collecting its proper taxes.

[15] The Respondent also provided three other 2012 CARB decisions on the parcels that comprise the proposed redevelopment lands in order to demonstrate that assessment classification was not raised by the Complainant last year.

[16] The Respondent's legal counsel referenced, but did not produce for this hearing, the decision of Madam Justice Hunt McDonald that, according counsel, says it is necessary to tether intention to something concrete. In the subject complaint, she said, there has been no concrete action, for example a development permit approval. In the absence of a development permit, the intended land use is simply speculative.

[17] The Respondent stated that it is necessary for the Board to reconcile ss.289 and 297 along with s.3 of *Matters Relating to Assessment and Taxation Regulation*, AR 220/2004 (M.R.A.T.) which further specifies the value of the property must be as of July 1 of the assessment year. The Board in considering that reconciliation, she said, must develop a benchmark for when intention moves from speculative to something concrete.

Board's Findings and Reasons for Decision:

[18] The "facts" of this complaint are not really in dispute. Some of the actions taken by the owner were not well documented in the Complainant's disclosure and, in one case, were proffered on the basis of a letter from a representative of the owner who was not in attendance to speak to it. However, the Respondent provided a timeline within its own evidence package that supports the Complainant's contention that a bylaw is under review by the City and that the Complainant is in ongoing "pre-application" meetings with the City with respect to a development proposal.

[19] The Board reviewed the CARB and MGB decisions put forward by the Parties and it is no surprise that those provided by the Complainant support his position that intention can be shown through a series of actions that advance the approval process without that final approval being in place or construction having commenced on December 31 of the assessment year. Conversely, the Board noted that the CARB decisions put forward by the Respondent were based on a much different fact scenario, one where development permits had been issued but had lapsed because of inactivity on the part of the applicant.

[20] In reconciling ss. 289 and 297 of the Act, the Board was guided by MGB 088/06 and the Judicial Review of that decision by Mr. Justice Hart. We do not quote these decisions but note that the Board in MGB 088/06 cited *Cunliffe, Green Meadows* and *Nova Scotia* to indicate that "present intent must be supported by some substantial act to carry out the intent". Justice Hart found that the Board had correctly interpreted these cases and, further, had appropriately examined the actions of the complainant to determine intent. We find further support in CARB 0872/2012-P where that Board further reviewed MGB 088/06 and concluded that a development permit was not necessary to form intent but that there had to be substantial acts to carry out that intent.

[21] The Respondent referenced the oral judgment of Madam Justice Hunt McDonald (Hunt McDonald) as it relates, she said, to the necessity of tethering intention to something concrete. While neither party produced the transcription of that judgment for this hearing, the Board considers it a public document. Upon review, this Board found nothing in that leave application contradicts the conclusions of Justice Hart, the MGB or CARB 0872/2012-P. CARB decision 2621/2011-P that is the subject of the Hunt McDonald leave application decision is distinguished from the subject complaint inasmuch as the development permit had lapsed. That CARB decision also demonstrated that the Board had examined intent through a variety of "indicia of development" and then concluded that in the absence of such indicia, the City's decision-making model was a workable solution "where intent cannot be inferred by zoning or the existence of a development permit". However, that CARB decision (2521/2011-P) noted that there was no evidence of "other indicia of development" as phrased by Hunt McDonald.

[22] In the Complaint at hand, the Board is not required to address the market value of the property at July 1, 2012 only whether "intent" existed on December 31, 2012.

[23] The characteristics and physical condition of the property are at issue, as is the intent of the owner with respect to the future use of the land. In this instance, the Board finds that the subject lands can be characterized as being part of an active development process. Studies have been performed; plans have been drawn up; land has been acquired and titles consolidated; roads have been acquired and closed; amending bylaws have been supported and are under active consideration for approval by the City. The development process is not neat, tidy or quick. Proposals undergo extensive review and revision. All of the noted activities are, in our view, substantial indicia of development activity leading to a forthcoming application for a development permit that will allow the project to move to the next step of building permits

and construction. All of this speaks to intent and we are satisfied that the Complainant has demonstrated that intent pursuant to s.297(4)(b) of the Act.

[24] The Respondent's concern that all this activity may not result in a physical project is understandable. However, as has been noted in other CARB decisions, the City has the opportunity to review the status of the project on an annual basis and adjust its valuation accordingly, based on the facts at that time.

[25] The Complaint is allowed and the assessment classifications are amended in accordance with paragraph 7, above.

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DATED AT THE CITY OF CALGARY THIS 4 DAY OF July 2013.

Susan Barry

Susan Barry
Presiding Officer

APPENDIX "A"

DOCUMENTS PRESENTED AT THE HEARING AND CONSIDERED BY THE BOARD:

NO.	ITEM
1. C1	Complainant's Disclosure
2. C2A	Complainant's Evidence Appendix, Part 1
3. C2B	Complainant's Evidence Appendix, Part 2
4. R1	Respondent's Disclosure
5. C3	Complainant's Rebuttal

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.

For Administrative Purposes Only

Municipality	Roll Number	Property Type	Property Sub-Type	Issue	Sub-Issue
Calgary	201341716	Non-Res'l	Commercial	Assessment Classification	s.289 vs s.297
Calgary	201341690	Non-Res'l	Commercial	Assessment Classification	s.289 vs s.297