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:

La Caille Fourth Avenue Inc. (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:	**201499431**
LOCATION ADDRESS:	**526 4 Av SW**
FILE NUMBER:	**72863**
ASSESSMENT:	**$9,430,000**

This complaint was heard on the 12th day 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:

- *T. Johnson, City of Calgary*
- *S. Trylinski, Legal Counsel, City of Calgary*

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

[1] The Respondent advised that they had an issue with respect to the Complainant's Rebuttal document but that he would raise the specifics at the time that it was brought forward.

[2] The Respondent objected to the introduction of the leases shown on pp.12-27 of Rebuttal but later withdrew that objection. The Respondent also objected to pp. 29-82 of the Rebuttal but it was determined that they are all admissible CARB or legal decisions, some of which are contained in the Respondent's package but with different emphasis supplied by the Complainant. In any event, while the documents remained in the Rebuttal package, the Complainant elected to speak to them in his summary argument. The Respondent agreed with retaining pages 94-97 in the Rebuttal; this was evidence of extensions to the Development Permit that weren't available prior to the disclosure date. Finally, the Respondent objected to the inclusion of pp.98 thro 115 as being repetitive of the documents in C1. The Complainant advised that they were included to clarify the pagination of the original documents for the benefit of the Board and Respondent. In the end, the Board did not require the removal of any of the pages from the Rebuttal document.

[3] The Parties requested that general evidence and argument regarding the issue of intent be carried forward to this hearing from the previously heard files 72594, 72587 and 72504, recognizing that anything specific to the subject property would be introduced and argued. The Board concurred.

Property Description:

[4] The property under complaint is a 0.64 acre parcel located at 526 4 Ave SW in the Downtown Commercial Core. It is improved with two older retail buildings of 2,880 sq.ft. and 8,455 sq.ft., constructed in 1970 and 1966 respectively. Between them they house several retail operations. The land use designation of the parcel is Downtown Business District and it is classed as 100 per cent non-residential and valued, using the Sales Comparison Approach to value, on a land only basis.

Issues:

[5] Should the assessment classification be changed from 100 per cent non-residential to 64.43 per cent non-residential and 35.57 per cent residential?

Complainant's Requested Value:

[6] The Complainant does not contest the assessed value of $9,430,000.

Board's Decision:

[7] The assessment classification for the subject property is amended to 64.43 per cent non-residential and 35.57 per cent residential. The assessment value is confirmed at $9,430,000.

Position of the Parties:

Complainant's Position:

[8] The Complainant referred to his document package C1 to show that there is a development permit in effect for the subject property. DP2007-2672 was issued on the 19th of May 2009. The permit allows for the development of a 126 room hotel, a licenced restaurant, retail stores, an office and 120 dwelling units. The Complainant pointed to correspondence in the package to show that the original May 14, 2012 deadline for starting development had been extended to May 14, 2013 and advised that there had been a subsequent extension to May 14, 2014 as shown in his Rebuttal document.

[9] The Complainant noted that there are four tenant leases in the subject property which have termination provisions ranging from 90 days to 6 months. Three of the four leases were contained in the Rebuttal document.

[10] The Complainant provided renderings and floor plans that form part of their marketing documents.

[11] 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).

[12] The Complainant cited Municipal Government Board (MGB) decision 088/06, MGB DL 106/08, and CARB decision 0872-2012/P as specific support for his argument on this complaint. The Board accepted that other cases, cited for the previously-heard complaints, were carried forward. These include: 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.

[13] In essence, the Complainant contends that the owner has engaged in substantial acts to bring about the redevelopment of the property. 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:

[14] The Respondent's position is based, in part, on the existence of retail tenants within the subject property. The Respondent's disclosure R1 contains a copy of the 2011 and 2012 Assessment Request for Information responses which indicate that there are leases in place until as late as 2016. It is the Respondent's position that these leases operate as an absolute barrier to development in that construction cannot commence until March 1, 2016 at the earliest.

[15] The Respondent argued that development had not yet occurred on this parcel, having regard to the City's Land Use Bylaw 1P2007, Part 2, Division 6, sections 44(4) and 44(5) which state:

44(4) For the purpose of subsection (3), **development** commences when the applicant has altered the **parcel** in furtherance of the construction.

44(5) Without restricting the generality of the foregoing:

(a) excavation in anticipation of construction is an alteration of a **parcel;** and

(b) fencing a site, posting signage, obtaining permits and minor interior demolition are not alterations of the **parcel.** (all emphasis in the original)

Again, the Respondent argued that with the leases in place, no development can occur prior to March 1, 2016. Until that date, he said, the intended uses are merely speculative and cannot be actualized. Other than the issuance of a development permit, no other actions to develop the property have occurred.

[16] 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 December 31 of the assessment year – in this case commercial; the property's land use under a land use bylaw- in this case commercial and residential; and, whether or not there are active development permits. 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 this respect he pointed to the lack of any other action by the Complainant to advance the development. In the interim, the City is unable, under the loose terms of "intention" advanced by the Complainant, to collect its proper taxes.

[17] The Respondent provided a body of prior decisions including: CARB 2499-2011-P which was a decision on the 2011 assessment amount for the subject property and noted that the complaint about the assessment classification was withdrawn. Additional CARB decisions were presented where assessment classification was an issue. Legal counsel referenced Madam Justice Acton's decision (*697604 Alberta Ltd. v. Calgary (City of) 2005 ABQB 512*) to demonstrate that intent does not speak to market value. Finally, the decision of Madam Justice Hunt McDonald, referred to in previous hearings on this same issue, was produced. That decision, according to counsel, says it is necessary to tether intention to something concrete. Counsel also suggested that it supports the City's three pronged approach to determining use and intent. In the subject complaint, she said, there has been no concrete action taken, since the development permit approval, which cannot be activated until the leases expire.

[18] The Respondent's counsel 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 speculation to something concrete.

Board's Findings and Reasons for Decision:

[19] The "facts" of this complaint are not really in dispute. Between the Parties it is agreed that there is a development permit and that only the assessment classification is at issue.

[20] The Board reviewed the CARB and MGB decisions put forward by the Parties and found 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 construction having commenced on December 31 of the assessment year.

[21] 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 that 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 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.

[22] The Respondent's counsel referenced the oral judgment of Madam Justice Hunt McDonald (Hunt McDonald) as it relates, counsel said, to the necessity of tethering intention to something concrete. Upon review, this Board found nothing in that leave application contradicts the conclusions of Justice Hart, the MGB or CARB 0872/2012-P. The CARB decision (2621/2011-P), that is the subject of the leave application, 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". (emphasis added) However, that CARB decision noted that there was no evidence of "other indicia of development" as phrased by Hunt McDonald.

[23] The Board took note of the commercial leases and agreed with the Complainant that they need not be an absolute barrier to development. There are several possibilities for resolving that issue that include mutual consent including an agreement to amend the lease, provide notice, or accept compensation in lieu. The Board is not speculating on what might happen; only observing that there are options. Further, the Board noted that there was evidence that at least three of the four leases have provision for early termination. The development permit gives the land owner until May 2014 to commence development on this project.

[24] Further, the Board notes that the Respondent's definition of development is particular to s.44(3) of the Land Use Bylaw. It is defined there in order to give clarity to the point in time within which development must commence following the date of approval of a development permit.

[25] Of particular interest to the Board were the provisions within the bylaw that deal with extensions to the development permit approval vis-a-vis the time frame within which development must occur before the permit becomes inactive. Upon application by the owner, the City can extend the original "development by" date with up to two one year extensions and it is clear from the documentation provided that the parties have done just that. The City has been a willing partner in ensuring the uses intended by the development permit approval stay alive.

[26] At the risk of being repetitive, the only issue 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. A development permit has been issued; it is still active; and, indeed, the City itself has taken measures to ensure it remains active. These are actions initiated by the land owner. 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.

[27] We note that it is not up to the Board to establish a generic or legislative benchmark for where intent stops and starts. Our role is to determine, on the facts of the specific complaint, if we are satisfied that there is a bona fide intention to proceed with development for the proposed uses. In this case we are satisfied.

[28] 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 to adjust its valuation accordingly, based on the facts at that time.

[29] The Complaint is allowed and the assessment classification is 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. C2	Complainant's, Rebuttal
3. R1	Respondent's 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.

For Administrative Purposes Only

Municipality	Roll Number	Property Type	Property Sub-Type	Issue	Sub-Issue
Calgary	201499431	Non-Res'l	Commercial	Assessment Classification	s.289 vs s.297