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:

Heritage Plaza LTD. (Lessee) [as represented by G5 Financial Corp.], COMPLAINANT

and

The City Of Calgary, RESPONDENT

before:

K. D. Kelly, PRESIDING OFFICER
J. Mathias, BOARD MEMBER
J. Pratt , BOARD 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 2014 Assessment Roll as follows:

ROLL NUMBERS:	**201266228** **201266244**
LOCATION ADDRESSES:	**8330 MacLeod Trail SE** **8312 MacLeod Trail SE**
FILE NUMBERS:	**74086** **74088**
ASSESSMENTS:	**$19,400,000** **$1,330,000**

These two complaints were heard together on the 27th day of August, 2014 at the office of the Assessment Review Board located at Floor Number 3, 1212 – 31 Avenue NE, Calgary, Alberta, Boardroom 10.

Appeared on behalf of the Complainant:

- *D. Genereux – G5 Financial Corp.*

Appeared on behalf of the Respondent:

- *J. Lepine – Assessor, City of Calgary*

Regarding Brevity:

[1] The Composite Assessment Review Board (CARB) reviewed all the evidence submitted by both parties. The nature of the submissions dictated that in some instances certain evidence was found to be more relevant than others. The CARB will restrict its comments to the items it found to be most relevant.

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

[2] The Parties requested that the Board hear these two appeals together since they represent one integrated development site on two separate, but adjacent, city-owned land parcels.

Property Description:

[3] The subject of file # 74086 is a 194,367 square foot (SF) land parcel owned by the City of Calgary but leased to Heritage Plaza Ltd. for a term of 40 years commencing in 1985. This parcel is improved with a 63,773 SF building which is leased to several tenants, the major one being London Drugs. The lease expires in 2025 whereupon all buildings on the parcel must be completely removed and the site restored to an "original" vacant condition. The vacant site then reverts to the City of Calgary for its use. Access to the property is via one entrance from the MacLeod Trail northbound lane; one entrance from eastbound Heritage Drive SE; and one entrance from southbound Bonaventure Dr SE. Together with the contiguous parcel in File #74088, the property accommodates 400 parking spaces, of which approximately 280 are said to be on this parcel. It is assessed at $19,400,000.

[4] The subject of file #74088 is a 90,097 SF vacant land parcel situated entirely at the SE intersection of Heritage DR SE and MacLeod Trail SE. It is owned by the City of Calgary and "Licensed" for parking use (120 spaces) by the contiguous Heritage Plaza Ltd. under a "License of Occupation". The License of Occupation is revocable upon 30 days notice. The parcel is generally level on its easterly side, but slopes downward to the west and north towards the MacLeod Trail and Heritage DR SE intersection. Its shape is irregular because it is intended as an "off-ramp" for a future overpass over MacLeod Trail at this location. It is assessed at $1,330,000.

Issues:

[5] (a) For File # 74086 - What is the correct capitalization rate to be applied when calculating the assessed value of the subject?

(b) For File # 74088 - Should the subject be assessed at a nominal value of $1,000?

Complainant's Requested Value:

[6] (a) For File # 74086 - The Complainant requested that the assessment be reduced to $9,760,000.

(b) For File # 74088 - The Complainant requested that the assessment be reduced to a nominal $1,000.

Board's Decision:

[7] (a) For File # 74086 - The Board reduced the assessment to $8,430,000.

(b) For File # 74088 - The Board confirmed the assessment at $1,330,000.

Legislative Authority, Requirements and Considerations:

[8] (a) The Complainant referred to pertinent parts of sections 1(1)(n) and 289 and 293 of the Act. The Complainant also referred to pertinent sections of Alberta Regulation 220/2004 being *"Matters Relating to Assessment and Taxation Regulation" (MRAT).*

(b) The Respondent also referenced and rebutted the Complainant's interpretation of the foregoing sections, as well as referencing section 284(1)(c) and (r) of the Act.

The relevant sections are as follows:

Municipal Government Act

"Interpretation

1(1) In this Act,

(n) "market value" means the amount that a property, as

defined in section 284(1)(r), might be expected to realize if it is sold on the open market by a willing seller to a willing buyer;"

"Part 9
Assessment of Property

Interpretation provisions for Parts 9 to 12
284(1) In this Part and Parts 10, 11 and 12,

(c) 'assessment' means a value of property determined in accordance with this Part and the regulations;
Assessments for property other than linear property."

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

"289(1) Assessments for all property in a municipality, other than linear property, must be prepared by the assessor appointed by the municipality.
(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, and,
(b) the valuation and other standards set out in the regulations for that property."

"Duties of assessors
293(1) In preparing an assessment, the assessor must, in a fair and equitable manner,
(a) apply the valuation and other standards set out in the regulations, and
(b) follow the procedures set out in the regulations.

(2) If there are no procedures set out in the regulations for preparing assessments, the assessor must take into consideration assessments of similar property in the same municipality in which the property that is being assessed is located."

Alberta Regulation 220/2004 (MRAT)

Part 1
Standards of Assessment

"Mass appraisal
2 An assessment of property based on market value
(a) must be prepared using mass appraisal,
(b) must be an estimate of the value of the fee simple estate in

the property, and
(c) must reflect typical market conditions for properties similar to that property."

"**4(1)** The valuation standard for a parcel of land is
(a) market value, or
(b) if the parcel is used for farming operations, agricultural use value."

"Valuation standard for a parcel and improvements
6(1) When an assessor is preparing an assessment for a parcel of land and the improvements to it, the valuation standard for the land and improvements is market value unless subsection (2) or (3) applies."

Positions of the Parties

Complainant's Position:

[9] The Complainant clarified that both parcels of land in these two files are contiguous and owned by the City of Calgary. The parcel in file #74086 is, and has been leased to Heritage Plaza Ltd. for a term of 40 years starting in 1985. Currently only 11 years remain on the lease. It is developed with a multi-tenant commercial building which must be removed immediately upon expiration of the lease. The parcel also accommodates a large number of parking spaces, which is required customer parking for the several retail businesses in the onsite improvement.

[10] The Complainant clarified that the land parcel in file #74088 is controlled by Heritage Plaza Ltd. under a "License of Occupation". The license is not registered on title and can be cancelled upon 30 days notice. The land parcel operates in conjunction with the adjacent commercial operation (eg. London Drugs; Dominos Pizza; TD Canada Trust) and supplies 120 spaces of the total parking requirements for the combined-parcel commercial site.

[11] The Complainant argued that while the Respondent is required by legislation to assess the Fee Simple market value of the two subject parcels, it has not taken into consideration that the Leaseholder/Licenseholder does not retain a Fee Simple interest in either parcel. He argued that in file #74086 for example, his client retains only a portion of the "full bundle of Rights" associated with fee simple ownership, that being a leasehold interest. Therefore, he argued, it is improper and inequitable for the Respondent to firstly assess that parcel as if his client had a "typical" Fee Simple interest (land and buildings) in it, and secondly, to then assess the leaseholder for the resultant value. He alleged that this practice represented "double counting" or "double taxation".

[12] The Complainant noted that while the Respondent must assess the subject of file #74086 using "typical" values from "comparable" fee simple commercial mall sites, the subjects are not typical or comparable to properties to which they are being compared. He argued therefore that the "typical" Capitalization Rate of 6.75% used to assess the subject does not

recognize the broad number of risk factors associated with this site, and is therefore inapplicable to it. The Complainant argued that the City's process is contrary to Sections 289 and 293 of the Act.

[13] The Complainant suggested that because there is only 11 years remaining on the lease for the site in file #74086, and, that the improvements must be removed when the lease expires, there is considerable risk associated with this site. He noted that his client (the leaseholder) has unsuccessfully attempted to renew the current lease with the City. The Complainant identified several city-wide examples where the City declined to renew similar leases, and the related improvements were later removed. He suggested that because the situation at hand is identical, it has resulted in an understandable reluctance to invest in the property, and to offer lease extensions to tenants. He suggested that there is considerable business uncertainty associated with the site given these circumstances.

[14] The Complainant argued that should the City exercise its discretion and revoke the License of Occupation for the land parcel used strictly for parking in file #74088, not only would the site be short of required parking from a technical perspective, according to the Development Permit for the site, but it would significantly impact the ability of the existing businesses to successfully operate. Moreover, it would "trigger" a clause in the lease requiring the Lessee to construct a multi-million dollar parkade on the adjacent improved parcel (file #74086) – a financially significant requirement given the short lifespan of the lease.

[15] The Complainant argued that because of all of these issues and more, the potential risk being assumed by the leaseholder/licenseholder for these two parcels is not "typical" and therefore warrants an increase in the "typical" Cap Rate used to assess the subject in file # 74086 from the current 6.75% to 13.42%.

[16] The Complainant clarified that the assessments of the two land parcels in these files (#74086 and #74088) have been successfully appealed each year since 2005, although no appeal was launched in either 2012 or 2013. He provided a copy of Municipal Government Board (MGB) Decision "MGB 105-06", which he argued is not only specific to the subjects, but is authoritative in this matter. He noted that this decision has been referenced repeatedly by successive Appeal Boards over the years when considering this two-parcel site.

[17] The Complainant advised that the principles defined in this decision – namely the "*Direct Capitalization Straight Line Overall Investment Recovery Analysis*" (p. 108 of C-1) - were used to calculate his requested cap rate of 13.42%. In addition the Complainant referenced the following from MGB 105/06 commencing at page 22 of 27:

> "While the MGB acknowledges the Respondent's mandate of using Mass Appraisal methodology when assessing a property on market value, the issue at hand is not merely the value of the fee simple estate in the property as determined by mass appraisal. Namely, the issue at hand is the unusual short life of the building and the investment recapture rate that results from it. The Respondent cannot hide behind the veil of fee simple assessment to claim that the appellant has an obligation to use mass appraisal in their submission.

The MGB recognizes that the Respondent is bound to follow a clear mandate by law, which specifies that fee simple estates must be assessed using mass appraisal. However, the accompanying regulations further specify that the standard for this kind of land is market value. Market value is defined as an estimate of the fee simple estate in the property and reflects typical market conditions for properties similar to the assessed property. The MGB accepts the Appellant's claim that the initial assessment does not reflect the characteristics and physical condition of the property contrary to MGA s.289(2)(a) and hence is neither fair nor equitable contrary to s.293(1), exceeding market value and not reflecting typical market conditions for similar properties.

In order to support its mass appraisal, the Respondent should have found and submitted in evidence of similar properties with finite lives. While the four sales presented by the Respondent are also neighbourhood shopping centres located on MacLeod Trail, no evidence was presented as to any special encumbrances on their respective leases, including any terms that limit the life of the comparable property."

"The MGB holds that when a public body encumbers a piece of fee simple property, it takes away a portion of the owner's bundle of rights. The MGB feels that the case at hand is consistent with a previous order in the case of McKenna Enterprises Inc. v. City of Calgary. In this case, the primary issue (sic) the value of encumbered leased land that the Appellant leased from the Province of Alberta."

"The MGB ruled that the City's sales evidence that supported the assessed capitalization rate was not comparable to the subject because those properties were not similarly encumbered. Furthermore, the MGB rejected the City's claim that the encumbrances do not affect the market value of the subject lands. The MGB stated that the transportation and utility corridor and the utility rights of way affect market value and restricted long-term and alternative use of the property. Moreover, the short-term lease prevented the landlord from entering into long-term arrangements with prospective lessees who would benefit from such commitment. It was held that the fee simple interest value of the lands was impacted by characteristics related to their current designation and future uses."

"This decision confirms that (sic) the principle that in valuing the fee simple title, encumbrances imposed by a public body impact market value and that comparison cannot be drawn with sales that are not similarly encumbered. Furthermore, this decision stands for the proposition that fee simple valuation does not mean that two apparently like parcels of land will carry the same exchange value in the market place, where long-term use is designated to a restricted purpose. Moreover, interim temporary uses should not elevate to the same level as unencumbered land. The MGB affirms that this principle is applicable to the case at hand, where a public body; namely, the City landlord, constructed the lease for public interest effectively encumbering the Appellant"

"The MGB recognizes the fact that the property generates market rent today. However, the subject property is highly unlikely to do so as the remaining lease term narrows. This concept was affirmed in the aforementioned Board Order, given that the limited term of the lease would discourage potential lessees looking for long-term leases. This places the property at a significant competitive disadvantage versus properties that are unhindered by finite life. To achieve fairness and equity, the capitalization rate must be adjusted to reflect that disadvantage."

[18] The Complainant requested that the Board accept 13.42% as the correct cap rate to be used in assessing the "improved" subject of file #74086 and reduce the assessment to $9,760,000. He argued that the formal Appraisal of the site to be presented by the Respondent is of limited assistance to the Board.

[19] The Complainant argued that the land parcel used only for parking in file #74088, should be assessed at a nominal $1,000, just as it had been by the City in previous years. He noted that all of the rationale he advanced regarding the shortcomings of the improved parcel, must be considered for this parcel (used for parking) as well, including the fact that it is retained for use only by an unregistered License of Occupation. The Complainant did not provide any market evidence to support the requested $1,000 market value of this parcel.

Respondent's Position:

[20] The Respondent argued that by legislation, it must assess the fee simple value of properties under the Mass Appraisal system used by the City. He clarified that when using this methodology, the City must assume a parcel is unencumbered and retains the "full bundle of rights" available to it. Thereafter it must calculate a parcel's market value using "typical" valuation parameters – including a cap rate that is also "typical" to such properties.

[21] The Respondent reiterated that the City must assume that any parcel of land it assesses is typical. He noted that the improved and leased subject in file #74086 for example, was considered to be "typical" for assessment purposes, and it was therefore compared to several nearby MacLeod Trail commercial retail properties that the City considered "typical" and comparable to it. He provided several examples of properties the City considered to be comparable to the improved subject of #74086. He clarified under questioning that none of the property comparables to which the improved parcel was compared, were encumbered in any manner similar to this parcel.

[22] The Respondent clarified that in order to "test" its methodology it commissioned a professional appraisal of the improved subject in file #74086. The appraisal was to examine and value, as of July 1, 2013, both the "Fee Simple" and the "Leased Fee Estate" interests in this property. A complete copy of the document was presented in the Respondent's evidence package R-1. The appraisal concluded that the Fee Simple value (ignoring all in-place leases and encumbrances) was $24,300,000 and the Leased Fee Estate Valuation (taking into account existing retail leases) was $22,865,000. The Respondent confirmed that in assessing the improved subject of file #74086, it ignored all of the leasehold interests attached to that parcel, and not just selected encumbrances of one type or another.

[23] The Respondent argued that the Complainant has not directly challenged the typical 6.75% cap rate used to assess the improved subject of file #74086, with any independent market evidence. Moreover, he argued that a leaseholder is not entitled to relief from "paying full taxes just because he is a leaseholder, and that is why you ignore the limits imposed by a lease" when assessing such properties under Mass Appraisal.

[24] The Respondent clarified that with respect to the subject of file #74088 held under License of Occupation and used for parking, the City's current Policy as of 2014, is to not provide nominal values of $1,000 as it did in the past for this or any comparable parcel used for parking in the city. He clarified that current City practice for parcels used for parking, is to assess them at market value, and then deduct that value from the adjacent improved parcel which relies for its required parking, on that parcel.

[25] In the matters before this Board, the Respondent clarified that he had retroactively intended to apply this new methodology to the two files in dispute, by issuing Amended Assessment Notices for each file. However, because they were under appeal and before the Board, he was barred from doing so.

Board's Reasons for Decision:

[26] The Board finds that the Respondent is required by legislation under Mass Appraisal to assess the Fee Simple market value for the subjects of files #74086 and #74088 by using Mass Appraisal.

[27] The Board finds that in assessing the Fee Simple market value of these two parcels, the Respondent is required to use "typical" market values from properties which, by market analysis, are deemed to be comparable to one another and to the subjects.

[28] The Board finds that the improved land parcel, the subject of file #74086, is not comparable to the improved fee simple parcels to which it has been compared, because it is held under lease and does not have access to the "full bundle of rights", unlike the parcels to which it is being compared by the Respondent. Therefore the assessment does not reflect the characteristics and physical condition of the property contrary to s.289(2)(a) and s.293(1) of the Act as alleged by the Complainant.

[29] The Board acknowledges that the formal appraisal of the improved subject in file #74086 is professionally completed, however given the range of evidence before the Board in this hearing, MGB Decision MGB 105/06 is more relevant and applicable to the current matters at hand. This decision dealt with precisely the same issues before the current Board in file #74086 and has been detailed in part by the Complainant in [17] above. This Board concurs with the analysis and conclusions of that Board in its written decision MGB 105/06.

[30] The Board finds that in order to recognize and accurately quantify the market value differences in form and function between the improved subject of file #74086 and the fee simple parcels to which it is being compared under Mass Appraisal, the *"Direct Capitalization Straight Line Overall Investment Recovery Analysis"* formula identified by the Board in MGB 105/06 to establish a capitalization rate is highly relevant. The Respondent did not challenge this formula.

[31] The Board finds that the Complainant has used the *"Direct Capitalization Straight Line Overall Investment Recovery Analysis"* formula identified by the Board in MGB 105/06 to calculate his revised capitalization rate of 13.42%. When this cap rate, instead of the Respondent's "typical" cap rate of 6.75% is used to calculate the market value of the improved subject of file #74086, the indicated value is $9,760,000.

[32] The Board finds that contrary to the assertions of the Respondent, the Complainant is in fact challenging the 6.75% "typical" cap rate used to assess the subject since he proposes and requests that it be amended by the Board to 13.42% based on the *"Direct Capitalization Straight Line Overall Investment Recovery Analysis"* Ordered by Municipal Government Board Decision MGB 105/06.

[33] The Board finds that with respect to the subject of file #74088 (used for parking) the Complainant provided no independent market evidence to support his request for a nominal assessed value of $1,000. The Board therefore confirms the assessment for the subject of file #74088 at $1,330,000.

[34] The Board finds that in 2014 the Respondent changed its methodology for assessing vacant land parcels used for parking. The Respondent no longer provides a nominal value for them, but instead assesses such parcels at full market value using Mass Appraisal, then deducts that value from the assessed market value of the improved adjacent parcel which relies on the vacant parcel for its required parking. The Respondent clarified that it had erroneously neglected to apply this methodology to the subjects of files #74086 and #74088.

[35] The Board accepts the Respondent's revised methodology as clarified in [24] and [25] above. The Board reduces the re-calculated assessment of $9,760,000 for the improved parcel in file #74086 by the assessed value of $1,330,000 for the vacant parcel in file #74088 used for parking. The assessment of the improved parcel in file #74086 is therefore $8,430,000.

DATED AT THE CITY OF CALGARY THIS 18th **DAY OF** September **2014**

K. D. Kelly
Presiding Officer

APPENDIX "A"

DOCUMENTS PRESENTED AT THE HEARING AND CONSIDERED BY THE BOARD:

NO.	ITEM
For file #74086	
1. C-1	Complainant Disclosure
2. C-2	Complainant Disclosure – Rebuttal
3. R-1	Respondent Disclosure
For file # 74088	
1. C-1	Complainant Disclosure
2. C-2	Complainant Disclosure – Rebuttal
3. R-1	Respondent 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 Use Only

Appeal Type	Property Type	Property Sub-type	Issue	Sub-Issue
CARB	commercial	Improved and vacant land	market value	Fee simple vs leasehold interests