ASSESSMENT REVIEW BOARD

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NOTICE OF DECISION NO. 0098 150/10

Colliers International Realty Advisors
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The City of Edmonton
Assessment and Taxation Branch
600 Chancery Hall
3 Sir Winston Churchill Square
Edmonton AB T5J 2C3

This is a decision of the Composite Assessment Review Board (CARB) from a hearing held on August 3, 2010, respecting a complaint for:

Roll Number	**Municipal Address**	**Legal Description**
3567609	10079 Jasper Avenue NW	Plan: F Lot: 2
Assessed Value	**Assessment Type**	**Assessment Notice for:**
$1,805,000	Annual New	2010

Before: **Board Officer:** Alison Mazoff

James Fleming, Presiding Officer
Dale Doan, Board Member
Jack Jones, Board Member

Persons Appearing: Complainant
David Porteous, Colliers International Realty Advisors

Persons Appearing: Respondent
Allison Cossey, Assessor, City of Edmonton

PRELIMINARY MATTERS

The parties did not object to the composition of the Board. Neither the Board nor the parties raised any issues of bias.

The Complainant raised a preliminary issue with respect to exchange of evidence and rebuttal.

ISSUE

The Complainant indicated that he did not receive the Respondent's evidence until the end of July, and was, therefore, requesting a postponement to give the Complainant the opportunity to properly review and respond to the Respondent's evidence.

POSITION OF THE RESPONDENT

The Respondent indicated that she had faxed the presentation on July 19, 2010, and had received a confirmation that the fax had been delivered. In addition, the Respondent had followed up with the Complainant's office and had verbal confirmation that the information had been received. The Respondent is prepared to proceed and is unwilling to consent to the postponement request.

POSITION OF THE COMPLAINANT

The Complainant indicated that there may have been a communication mix-up at their end. In the first instance the Complainant had used old stationery which contained a fax number that was at least three years out of date. In addition, The Complainant suggested that other files were received that day from the Respondent, and their staff may have thought that was the file to which the confirmation request related. Finally, no one had picked up on the fact that the Respondent's evidence had not been received until staff was preparing for the hearing. The Complainant requested that the Board accept these errors as unintentional and grant the postponement.

The Board raised the issue of postponements & adjournments in relation to the new Municipal Government Act and Matters Relating to Assessment Complaints (*MRAC*), the associated regulations, which came into force January 1st, 2010. *MRAC* Sec. 15(1) provides that "except in exceptional circumstances as determined by an assessment review board, an assessment review board may not grant a postponement or adjournment of a hearing." The Board found that the Complainant did not fulfill their side of the disclosure by neglecting to update their contact information for such a long period of time, and that this lapse in communication did not qualify as an exceptional circumstance. Neither party made further representations on this matter.

LEGISLATION

Matters Relating to Assessment Complaints Regulation, Alberta Regulation 310/2009 (MRAC)

s. 8(1) *In this section, "complainant" includes an assessed person who is affected by a complaint who wishes to be heard at the hearing.*

(2) *If a complaint is to be heard by a composite assessment review board, the following rules apply with respect to the disclosure of evidence:*

(a) the complainant must, at least 42 days before the hearing date,

(i) disclose to the respondent and the composite assessment review board the documentary evidence, a summary of the testimonial evidence, including a signed witness report for each witness, and any written argument that the complainant intends to present at the hearing in sufficient detail to allow the respondent to respond to or rebut the evidence at the hearing, and

(ii) provide to the respondent and the composite assessment review board an estimate of the amount of time necessary to present the complainant's evidence;

(b) the respondent must, at least 14 days before the hearing date,

(i) disclose to the complainant and the composite assessment review board the documentary evidence, a summary of the testimonial evidence, including a signed witness report for each witness, and any written argument that the respondent intends to present at the hearing in sufficient detail to allow the complainant to respond to or rebut the evidence at the hearing, and

(ii) provide to the complainant and the composite assessment review board an estimate of the amount of time necessary to present the respondent's evidence;

(c) the complainant must, at least 7 days before the hearing date, disclose to the respondent and the composite assessment review board the documentary evidence, a summary of the testimonial evidence, including a signed witness report for each witness, and any written argument that the complainant intends to present at the hearing in rebuttal to the disclosure made under clause (b) in sufficient detail to allow the respondent to respond to or rebut the evidence at the hearing.

s. **15(1)** *Except in exceptional circumstances as determined by an assessment review board, an assessment review board may not grant a postponement or adjournment of a hearing.*

(2) *A request for a postponement or an adjournment must be in writing and contain reasons for the postponement or adjournment as the case may be.*

(3) *Subject to the timelines specified in section 468 of the Act, if an assessment review board grants a postponement of adjournment of a hearing, the assessment review board must schedule the date, time and location for the hearing at the time the postponement or adjournment is granted.*

Cases Cited

R. v. Canadian National Railway (1922) 64 S.C.R. 264 (S.C.C.), affirmed in [1923] A.C. 714 (P.C.).
R. v. McNiven (1943), [1944] 1 W.W.R. 127. (Sask. K.B.).

DECISION

The request for a postponement is denied.

REASONS

In interpreting the words "exceptional circumstances" (s. 15(1) *MRAC*) the Board used the "Golden Rule" cannon of construction and read the words in their ordinary meaning:
"…in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther," (*R. v. Canadian National Railway* (1922)).

Further, statutes are presumed to use words in their popular sense (*R. v. McNiven* (1943)**.** Having considered the facts, the Board finds that the current situation does not qualify as an exceptional circumstance because;

- The Complainant said the fax number changed approximately 3 years ago and so the use of improper stationery cannot be justified on the basis of a recent move.
- The Respondent indicated that they followed up with a phone call and specifically mentioned the subject property which demonstrates that the Respondent took additional reasonable steps to ensure receipt.

- The Complainant advised it was at fault for the failure to monitor the file.
- The Complainant had adequate time (14 days as per sec. 8(b) *MRAC*) to advise the Respondent he had not received the required evidence, and should not have waited until the hearing to raise this matter.

The Board acknowledges that while there may have been many reasons for the lack of diligence in the Complainant's communications with the Board and the Respondent, this negligence is not an exceptional circumstance.

BACKGROUND

The subject is a 1953 vintage theatre which is now used as a punk rock /live music club. It is located in downtown Edmonton. The subject is in average condition and was assessed using the income approach to value. The site is 7,514 square feet, and is improved with a building that has a gross area of 11,451 square feet. It has a net leasable area of approximately 8,077 square feet. The property is zoned CCA with an EVZ (effective zoning) of CB2.

ISSUES

1. What is the best evidence of rental rate for the subject?
2. Should the subject's capitalization rate be the same as a neighbouring high rise office building?
3. Should there be a vacancy allowance for the basement space?

LEGISLATION

The *Municipal Government Act*, R.S.A. 2000, c. M-26;

s.467(1) An assessment review board may, with respect to any matter referred to in section 460(5), make a change to an assessment roll or tax roll or decide that no change is required.

s.467(3) An assessment review board must not alter any assessment that is fair and equitable, taking into consideration

a) the valuation and other standards set out in the regulations,
b) the procedures set out in the regulations, and
c) the assessments of similar property or businesses in the same municipality.

POSITION OF THE COMPLAINANT

The Complainant listed seventeen issues on the complaint form, but, at the hearing, confirmed that the two live issues were the rental rate for the space and the capitalization rate.

The Complainant summarized that the subject was formerly a theatre, and is incapable of competing in the modern theatre world, and so, it is forced to seek alternate uses. He further indicated that the best comparable is another former theatre located approximately two blocks west of the subject. The Complainant asserted that both of these properties are atypical and are best considered comparable to each other.

The comparable (Paramount Theatre 10243 Jasper Ave.) is currently used as a church. The Complainant represented that the Church signed a 4 year lease on July 1, 2007 at $13.75 per square foot, and thus this rent should be applied to the subject.

The Complainant also requested that the capitalization rate on the subject be set at 8.0% as opposed to the current 7.5%. He noted that the EPCOR building located next door has an 8.0% capitalization rate and argued that the EPCOR building has much less risk associated with it than the subject property. Therefore, the subject should have a capitalization rate at least the same as EPCOR.

The Complainant briefly identified a vacancy factor issue for the basement space, but this matter was not argued orally. Based on these three issues, the Complainant requested a reduction in the assessment to $1,120,000.

In response to questions, the Complainant acknowledged the difference in uses between the properties at issue. Further, the Complainant was unable to provide actual rents for the subject property or assessed rents for the comparable. In addition, he was unable to supply the attributes for the comparable property.

POSITION OF THE RESPONDENT

The Respondent stressed that the subject may have been a theatre once, but was currently used and classed as a restaurant, and so, was compared with other restaurants for assessment purposes.

The Respondent did not provide any details on the other theatre that the Complainant was using as a comparable, stating that it was a church, and so not similar to the subject. The Respondent provided 3 restaurant equity comparables for the subject which showed assessments from $147.78 to $231.54 per square foot, which they indicated provided good support for the subject assessment of $133.29.

In addition, the Respondent provided 2 comparable equity rents, one of which was an older but still operating theatre on Whyte Avenue, and the other, which was a restaurant bar on Jasper Avenue. Both of these properties showed assessed rents higher than the $20.75 per square foot at which the subject was assessed. The Respondent also noted that no rent was assessed for the mezzanine space in the subject, indicating that the value of that space is captured within the main floor rent.

With respect to the capitalization rate request, the Respondent indicated that the Complainant had only shown one other cap rate and this was for a multi-storey office building which was not a comparable property, so the Board should disregard it. The Complainant requested confirmation of the assessment at $1,805,000.

FINDINGS

1. In this instance, the best evidence of rental rate is properties having a similar use to the subject.

2. The neighbouring property is not comparable to the subject, and so, may not have a cap rate that is comparable to the subject.

DECISION

The assessment is confirmed at $1,805,000.

REASONS FOR THE DECISION

1) With respect to the rental rate, while the Board acknowledges that the subject was a theatre in the past, the current use of the property is as a restaurant, and it would create an inequity to assess it differently from other restaurants. Therefore a rate of $20.75 per square foot is appropriate based on the equity rents provided by the Respondent.

2) Neither party provided actual rents for the subject or typical rates for the Complainants' comparable. Without this information, and with no other argument or evidence, the Board was unable to adequately assess whether the two theatres were atypical for the area and in their use. Finally with respect to the rental rate, there was no evidence as to the attributes of the Complainant's comparable in order to assess the comparability, beyond the fact that both properties were built as theatres.

3) With respect to the capitalization rate, while the Board recognizes that a capitalization rate can reflect investment risk, the Board also notes that there are many different types of property which can have different stratifications and capitalization rates. The Board has observed that capitalization rates are not homogeneous, and rates for apartments, for example, often are different from office buildings, which are different again from shopping centers. For a variety of reasons, these rates do not often compare, nor are the relationships between the rates for different types of property always consistent. Consequently, without providing additional information to document the actual relationship, the Board is unwilling to accept the suggested relationship between the capitalization rate for the subject and the neighbouring office building.

Reference was made earlier to the fact that there was some mention made in the Complainant's brief on the vacancy shortfall in the subject. As noted, there was no reference to it in the presentations of either party, and so by default, the Board confirms the rate in the assessment calculations of the Respondent.

DISSENTING DECISION AND REASONS

There were no dissenting decisions or reasons.

Dated this 25TH day of August, 2010, at the City of Edmonton, in the Province of Alberta.

James Fleming
Presiding Officer

This Decision may be appealed to the Court of Queen's Bench on a question of law or jurisdiction, pursuant to Section 470(1) of the Municipal Government Act, R.S.A. 2000, c.M-26.

CC: Municipal Government Board
GE Canada Real Estate Equity Holding Company
James W E Forster, Colliers International Edmonton