ASSESSMENT REVIEW BOARD

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NOTICE OF DECISION NO. 513/10
POSTPONEMENT/ADJOURNMENT REQUEST

Reynolds Mirth Richards and Farmer LLP
3200 Manulife Place
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Edmonton, AB T5J 3W8

The City of Edmonton
Assessment And Taxation Branch
600 Chancery Hall
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This is a decision of the Composite Assessment Review Board (CARB) from a hearing held on October 19, 2010 respecting a postponement or adjournment request for:

Roll Number	Assessed Value	Municipal Address	Legal Description	Assessment Type	Assessment Notice for
1111038	$2,594,500	8951 Winterburn Road	NW 30-52-25-4	Annual - Revised	2010
1111111	$8,308,000	9510 199 Street NW	SE 31-52-25-4	Annual - Revised	2010
9940023	$233,500	18710 122 Avenue NW	Plan: 9621905 Lot: 5	Annual - Revised	2010
9946014	$776,500	1310 Potter Greens Drive NW	Plan: 9121141 Block: 4 Lot: 41	Annual - Revised	2010
9971791	$281,000	10 Lewis Estates Boulevard NW	Plan: 9925471 Lot: 6B	Annual - Revised	2010
10022611	$681,000	259 Lewis Estates Boulevard NW	Plan: 0424383 Block: 8 Lot: 80	Annual - Revised	2010
10022612	$270,000	2000 Brennan Crescent NW	Plan: 0424383 Block: 19 Lot: 64	Annual - Revised	2010
10036961	$281,000	208 Lewis Estates Boulevard NW	Plan: 0523775 Block: 20 Lot: 66	Annual - Revised	2010
1111129	$7,174,500	9321 Winterburn Road	SW 31-52-25-4	Annual - Revised	2010
1070267	$3,016,500	1610 141 Street SW	NE 23-51-25-4	Annual - Revised	2010
1070275	$1,819,000	1571 156 Street SW	NW 23-51-25-4	Annual - Revised	2010
1070283	$3,129,000	14931 Ellerslie Rd SW	NW 23-51-25-4	Annual - Revised	2010
1070291	$1,206,500	1704 141 Street SW	SE 23-51-25-4	Annual – Revised	2010

Before:

David Thomas, Presiding Officer

Persons Appearing: Complainant/ Applicant
Carol M. Zukiwski
Barrister and Solicitor
Reynolds Mirth Richards and Farmer LLP

Persons Appearing: Respondent
Rebecca Ratti
Barrister and Solicitor
City of Edmonton

BACKGROUND

The solicitor for the Complainants (Lewis Estates and Jagare Ridge Golf Course), asks for a postponement of the merit hearing for Lewis Estates scheduled to be heard November 30, 2010, and Jagare Ridge Golf Course, unscheduled at this time. It is the wish of both parties that these two golf course hearings be heard concurrently, as they involve similar issues and fact evidence.

The Applicant seeks a new merit hearing date in late February or early March.

ISSUES

1. Do the facts alleged by the Applicant constitute "exceptional circumstances" as required by MRAC?
2. Can a new hearing date be set that would comply with the requirements of Section 468(1) along with necessary disclosure?
3. Does the Board lose jurisdiction where a complaint cannot be heard within the time specified in Section 468(1) MGA?
4. Does the Board have authority to request of the Minister the exercise of his powers under Section 604(2) to confirm hearing dates beyond the limits set out in Section 468(1) MGA?

LEGISLATION

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

Section 468(1) requires written decisions of hearings to be rendered within 30 days or, in any event, before the end of the taxation year.

Section 605(2) authorizes the Minister to vary deadlines set out in the MGA and MRAC.

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

Section 15(1)(3) requires a finding of exceptional circumstances by the Board to consider adjournment or postponement. If exceptional circumstances are found, a new hearing date shall be set.

POSITION OF THE APPLICANT

This Applicant is the recently appointed solicitor for the owners of these two golf courses comprising the roll numbers set out in Schedule "A" to this order.

Previous to the engagement of the Applicant (in late August 2010), these complaints were in the hands of another law firm. Together with ten other golf courses, in the preceding years (2006, 2007, 2008), they had been heard in concurrent hearings before the ARB and the MGB.

The most recent decision was that of the MGB issued in July 2010 for the assessment years 2007 and 2008. The complaints for 2009 are still before the MGB and have not yet been heard. The 2010 complaints were scheduled to be heard beginning November 30, 2010.

This Applicant, Reynolds, Mirth, Richards and Farmer LLP, was engaged to review the July 2010 MGB decision for an opinion on possible judicial review. As well, the Applicant was retained to act on the 2009 MGB complaints and the 2010 CARB complaints.

The circumstance leading to this application for postponement is that despite repeated requests, the Applicant advises it has not received sufficient of its client's files (from the former solicitor) to render an opinion on possible judicial review or to formulate an appropriate appeal and disclosure for the scheduled November 30, 2010 hearing date.

The Applicant states it is contemplating a report to the Law Society of Alberta and is prepared to take that step if necessary to meet the client's needs.

The Applicant notes that, even if it quickly gets the necessary material, a later date in December is not possible as the Applicant is already committed to a three-week hearing in December.

Accordingly, the Applicant believes that, prior to the end of 2010, there is no possibility of a hearing that will provide them an appropriate and fair opportunity to prepare and meet the requirements of disclosure and of a fair hearing.

Notwithstanding this difficulty, the Applicant cites the following propositions:

1. The CARB does not lose jurisdiction to hear these complaints because they cannot be heard before the year-end.
2. The deadlines set out in Section 468(1) MGA are procedural in nature and should not serve to extinguish a right of complaint.
3. There is an avenue open to the CARB through the Minister to seek an extension for the deadlines set in Section 468(1) MGA.
4. The circumstances of this application for a postponement constitute "exceptional circumstances" as contemplated by MRAC.

In support of "exceptional circumstances" existing here, the Applicant cites City of Edmonton vs. Edmonton ARB and Eco-Industrial Business Park Inc. given orally by Mr. Justice A. W. Germain.

In this case, the City of Edmonton sought a postponement to respond to an expert's report disclosed by the Complainant after a postponement had been granted to the Complainant to allow such a report to be prepared. Both parties agreed but the CARB refused.

Mr. Justice Germain noted in this case:

> *[40] The Regulation however must be interpreted contextually, as it is ancillary to the overarching authority given t the ARB to deal with the serious matters of municipal tax assessment. ARB decisions often have significant economic consequence. A property owner may by virtue of an erroneous assessment pay more than they should, or alternatively the City may receive less than it should. For this reason the Board must both have the power, as well exercise the power appropriately, to ensure that the parties*

have a fair, complete and comprehensive hearing. By inference, this must include sufficient time to prepare.

[43] The Regulation must therefore be interpreted in such a way that the definition of exceptional circumstance cannot be so narrow and restrictive as to prevent hearings that are fair to both litigants.

[44] ... However, as here, if the currently scheduled hearing date does not allow a party sufficient time to prepare, that must be an exceptional circumstance as the failure to grant an adjournment could result in a miscarriage of justice.

[45] ... However, where two responsible litigants have concluded that more time is necessary and express that opinion by consenting to an adjournment, such consent should be given some deference and not lightly ignored in the absence of compelling reasons.

Additionally, the Applicant notes the cases of Tolko Industries Ltd vs. Big Lakes (MD) wherein the Court of Queen's Bench found the MGB did not lose jurisdiction even if it had not issued a decision within 150 days, as then required under the Act, but rather exposed itself to an application for mandamus or for costs if it failed to comply.

The Applicant followed this case by presenting Rendezvous Inn Ltd vs. St. Paul (Town) wherein the MGB had not only failed to issue a decision within the 150-day deadline, but had not commenced to hearing of the appeal in that time. Here the court held:

These decisions indicate that the remedy for inaction by a tribunal is mandamus. As well, the Court of Appeal in Rankel, a case dealing with a disciplinary hearing, held that the time limit was not in the nature of a limitation and accordingly no jurisdiction was lost.

Based on the reason in Tolko, supra, and Rankel, supra, namely, that mandamus is the remedy for dilatoriness and the time period is not in the nature of a limitation, the MGB is free, in the absence of a mandamus application, to routinely commence appeals after the expiration of the 150-day period.

Finally, the Applicant notes the case of Rahman vs. Alberta College and Association of Respiratory Therapy wherein the disciplinary board was to hold a hearing within 90 days of a complaint being filed and failed to do so.

Here Mr. J. Coutu noted the Admin Law text by David J. Mullan and cited from that on the issue of directory or mandatory legislative provisions:

If the provision is mandatory, strict compliance is generally necessary and failure to comply gives rise to a remedy. Substantial compliance with a directory provision may be sufficient and, in certain cases, even non-compliance may be excused, provided breach of the provision in issue does not cause a substantial miscarriage of justice.

and

... The mere fact that the procedural provision uses the word "shall" or "must" is highly significant but not determinative.

Mr. Justice Coutu stated in his decision that:

The word "shall" in s. 15.1(2), on a prima facie basis, tends to support a mandatory interpretation. ... However, considering all other factors, the word "shall" is not determinative;

In my view, the Legislature did not intend that the hearing must proceed within 90 days at all costs no matter what the circumstances. This is not a reasonable interpretation. Hearings can be complex; there are often difficulties in finding hearing dates that meet the schedules of counsel and witnesses. Counsel may require more time to prepare or counsel or witnesses may be ill. The legislature must have contemplated it may not be possible to commence the hearing within 90 days ...

If s. 15..1(2) is applied in a mandatory fashion, then the failure of the committee to comply with the statute results in there being no hearing. The public interest purpose of the statute is defeated. This could hardly have been the Legislature's intention ...

The intention of the Legislature is to be ascertained by weighing the consequences of holding a statute to be directory or mandatory. The issue is whether a directory or mandatory interpretation would create prejudice. If the section is read as directory, I do not see any prejudice arising by a two month adjournment beyond simple delay. On the other hand, prejudice exists if the section is read as mandatory. The hearing does not proceed, the complainant is unable to pursue the complaint, and the public interest of ensuring that a complaint against a member of a health discipline is investigated is lost. This prejudice could hardly have been the Legislature's intent. Similarly, if s. 15.1(2) is mandatory the committee may not be able to accommodate legitimate requests for adjournments and this could be prejudicial. It could not have been the intention of the Legislature to create such an unreasonable situation.

The fact that statute does not contain any penalty for failure to observe the time limit tends to show the provision was intended to be directory.

The 90-day time limit is procedural in nature. Section 15.1(1) confers a right to a hearing. Section 15.1(2) merely provides the procedural steps for the hearing (to be commenced within 90 days). (Cook, supra.)

... time periods for appeals which are substantive rights and not procedural requirements. Time periods for substantive matters are mandatory.

By these references, the Applicant states it is open to the CARB to grant this postponement in the interest of a fair process to the Applicant.

POSITION OF THE RESPONDENT

The Respondent supports the application.

FINDINGS OF FACT

1. Exceptional circumstances exist that warrant the granting of leave to postpone these hearings.
2. A hearing date cannot fairly be set before the end of 2010.
3. The CARB has no authority to fix hearing dates in 2011.
4. In order to ensure a fair hearing process is available to the Applicant, an application is necessary to seek ministerial approval for the proposed hearing date in 2011.

DECISION

The application for a postponement for the hearing of these roll numbers is granted. A tentative hearing date of February 28, 2011, shall be noted for these roll numbers.

The administration and/or legal counsel for the Edmonton CARB is requested to seek ministerial approval for the tentative date of hearing for these matters.

REASONS FOR THE DECISION

The CARB agrees that it is the right of a complainant owner to engage the services of an agent or solicitor of their choice.

In this case, after a number of years of appeal history in concert with other golf course owners by a single law firm, these complainants have chosen to change counsel. Nothing was presented that would indicate this was done to frustrate or delay a timely hearing. Indeed, the "exceptional nature of these circumstances" and the inability of the Applicant to proceed to a fair hearing on the scheduled date is demonstrated by the support of the Respondent to this application.

As it noted in the "Rahman" case, the CARB again observes that no penalty exists in the MGA for failure to meet the time limits and, as in Rahman, the CARB finds the time limits of Section 468(1)(a) and (b) MGA to be directory, notwithstanding the use of the word "must".

The CARB cannot ignore the policy objectives of Section 468(1)(a) and (b) MGA when establishing a new hearing date. However, as MRAC Section 15 contemplates, "exceptional circumstances" can arise in the hearing process. Clearly, here such circumstances exist.

The CARB notes also that the provisions of Section 604(2) MGA give ministerial exception to any guideline set.

The CARB believes the appropriate approach to achieve a fair process in conflict with a stated deadline is to establish workable tentative hearing dates and, as in this case, seek ministerial sanction when it is appropriate.

Dated this 17th day of November, 2010, at the City of Edmonton, in the Province of Alberta.

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Presiding Officer

cc: Municipal Government Board
Lewis Estates Communities Inc.
Jagare Ridge Communities Inc.