ASSESSMENT REVIEW BOARD

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NOTICE OF DECISION NO. 0098 618/11

Altus Group
17327 106A Avenue
Edmonton, AB T5S 1M7

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 January 10, 2012, respecting a complaint for:

Roll Number	Municipal Address	Legal Description	Assessed Value	Assessment Type	Assessment Notice for:
9567801	4903 Eleniak Road NW	Plan: 7520797 Block: 2 Lot: C	$6,723,500	Revised	2010

Before:

David Thomas, Presiding Officer
George Zaharia, Board Member
Mary Sheldon, Board Member

Board Officer:

Annet Adetunji

Persons Appearing on behalf of Complainant:

John Trelford, Altus Group
Chris Buchanan, Altus Group
Bruce Simpson, Serecon Valuations & Agri. Consultants

Persons Appearing on behalf of Respondent:

Darren Nagy, Assessor, City of Edmonton
Steve Lutes, Barrister & Solicitor, City of Edmonton

PROCEDURAL MATTERS

The Presiding Officer stated that this was a rehearing of a 2010 complaint as directed by the Court of Queen's Bench. Upon questioning by the Presiding Officer, the parties indicated no objection to the composition of the Board. In addition, the Board members stated that they had no bias on this file.

PRELIMINARY MATTERS

There were no preliminary matters.

BACKGROUND

The subject property, located in the Pylypow Industrial neighbourhood with a municipal address of 4903 Eleniak Road NW, is 436,581 square feet (10.022 acres) in size and does not include any improvements. The original 2010 assessment showed the effective zoning of the land to be AG (Agricultural District) and the actual zoning to be IL (Light Industrial). The original assessment was amended resulting in the effective zoning of the land to be changed from AG to IL. With the change in the effective zoning and the corresponding change in the mill rate, this resulted in the 2010 assessed value of the subject property to be increased from the original $863,000 to the revised $6,723,500.

ISSUE

Should the subject property be assessed as farmland as it had been up to 2009, and therefore valued according to the regulated farm rates?

LEGISLATION

***Municipal Government Act*, RSA 2000, c M-26**

S. 289 (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.

S. 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.

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.*

***Matters Relating to Assessment and Taxation Regulation,* AR 220/2004**

S.1 (i) "farming operations" means the raising, production and sale of agricultural products and includes

(i) horticulture, aviculture, apiculture and aquaculture,

(ii) the production of horses, cattle, bison, sheep, swine, goats, fur-bearing animals raised in captivity, domestic cervids within the meaning of the Livestock Industry Diversification Act, and domestic camelids, and

(iii) the planting, growing and sale of sod.

POSITION OF THE COMPLAINANT

1. The Complainant argued that the City erred in changing the effective zoning of the subject property from AG to IL, in that the property continued to be used for farming purposes in 2009 as it had been used previously for many years. To support the position that the subject property continued to be used for farming purposes, the Complainant provided five photographs taken August 25, 2010 that showed that the hay (alfalfa/grass hay mix) had been swathed in preparation for being baled (Exhibit C-1, pages 13 to 17).

2. The Complainant provided copies of annual farming leases for the subject property from 1999 to 2010 (Exhibit C-1, pages 18 to 41). The subject property is one of five parcels of land covered by the leases between Mr. Richard Johnsen (the Lessee) and Capital Management Ltd. (the Property Owner). The leases were for one year terms, but the Johnsen family had leased this land for in excess of fifteen years (Exhibit C-1, page 43)

3. In support of its position, the Complainant engaged the services of Mr. Bruce Simpson, an "expert witness" to answer three questions:

    a. What is the subject land currently being used for?
    b. Is that use for growing an agricultural crop?
    c. Is the agricultural crop viable and the use considered farming? (Exhibit C-1, page 43).

    Mr. Simpson is a Professional Agrologist (P. Ag.), 1981, and an Accredited Appraiser (AACI), 1989, Appraisal Institute of Canada (Exhibit C-1, page 51). In his report to the property owner, Mr. Simpson provided four photographs taken August 31, 2010 showing the swathed hay curing. It was the opinion of Mr. Simpson that the subject property was being used for the production of a viable agricultural crop and that the land is being farmed as per the MGA definition (Exhibit C-1, page 50).

4. The Complainant stated that the subject property should be valued pursuant to the *Matters Relating to Assessment and Taxation Regulation* (*MRAT*). Section 4(1) states: *"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.* As per Section 4(3)(d) that states: "*an area of 3 acres that (i) is located within a parcel of land, and (ii) can be serviced by using water and sewer distribution lines located in land that is adjacent to the parcel"* these three acres would be valued at market rates. The Complainant stated that as per *MRAT*, the first three acres should be valued at market while the remaining 7.022 acres should be valued according to the regulated farm rate of $350/acre (Exhibit C-1, pages 68, 69 and 89).

5. The Complainant argued that the tax rate that should be applied to the assessed value of the subject property for Municipal, Education and Provincial Education Requisition Allowance is a total of 0.0073487 (Exhibit C-1, page 139).

6. The Complainant requested the Board reinstate the farmland status for the subject property and confirm the original 2010 assessment of $863,000.

POSITION OF THE RESPONDENT

1. The Respondent provided two photographs taken May, 2010 showing old growth (Exhibit R-1, pages 12 & 13), stating that the subject property was not farmed in 2009 and, therefore did not qualify for farm status.

2. The photographs provided by the Complainant, taken August 2010, pose a different question and if the subject property was being farmed again, it would then be given a new status.

3. The Respondent stated that the May 2010 photographs "*show no farming took place*." Additionally, the August 2010 photographs provided by the Complainant are for the purposes "*to obtain Farmland status for this property*" (Exhibit R-1, page 14).

4. The 2011 assessment has reinstated farmland status, with the first three acres being valued at the market rate (Exhibit R-1, pages 8 & 9).

5. The Respondent stated that historic information is not relevant in that each year's assessment is independent of the previous years.

6. The Respondent stated that both parties had a problem to prove whether the subject property was farmed in 2009 since no one inspected the property, nor took any photographs during that year.

7. The Respondent relied on an email sent May 10, 2010 by a former analyst employed by the Complainant wherein he concurs with the opinion of the assessor that the subject property had not been farmed in 2009 (Exhibit R-1, page 19).

8. The Respondent stated that the only reason that the Court of Queen's Bench Justice granted the appeal was because the original CARB did not provide adequate reasons for its decision – not with the findings of fact. In support of this position, the Respondent referred the Board to paragraph 67 of the Memorandum of Decision rendered by Honourable Madam Justice J. M. Ross in the case between Associated Developers Ltd. as Represented by Altus Group Ltd. and The City of Edmonton and Edmonton Assessment Review Board. Paragraph 67 states: "*Importantly, the CARB in its reasons, did not address the appropriate test under the legislation and regulations for determining whether the property should be assessed as farmland. Without that analysis, there is no way for this court on appeal to determine whether the CARB accepted the City's argument that a crop must be produced (swathed and baled) every year on the Property to qualify as farmland, and if so, why. Nor did it provide a basis for rejecting Mr.*

Simpson's argument that property could still be assessed as farmland if it lay fallow for a justifiable agricultural reason" (Exhibit C-1, page 155).

9. The Respondent took the position that in order for land to be considered as farmland it must meet three conditions identified in Section 1, Definitions 1(i) of the *Matters Relating to Assessment and Taxation Regulation* (*MRAT*) that reads: *""farming operations" means the raising, production and sale of agricultural products and includes ……"* (Exhibit C-1, page 66). The Respondent stated that the Board must determine if the conditions were met.

10. The Respondent stated that the burden of proof falls on the Complainant to prove that farmland status should be applied to the subject property, and since there was no evidence to support this position, the Respondent requested the Board to confirm the amended IL effective zoning of the subject property and the resulting 2010 revised assessment of $6,723,500.

DECISION

The decision of the Board is to return the subject property to farmland status. The original 2010 assessment of $863,000 is therefore confirmed.

REASONS FOR THE DECISION

1. The Board placed considerable weight on the leases between the property owner and the renter that covered the period from 1999 to 2010, thereby encompassing the year in dispute – 2009 (Exhibit C-1, pages 18 to 41). The five parcels of land comprising 205.71 acres from 1999 to 2006 (Exhibit C-1, pages 26 to 41) and being reduced to 191.79 acres from 2007 to 2010 (Exhibit C-1, pages 18 to 25), had the same identical six conditions listed in the leases. The subject property identified as Lot C, Block 2, Plan 7520797, remained constant throughout all of the leases. Of note, since the matter of leaving land fallow had been raised as an issue, the leases clearly stated in condition (2) that summer fallowing as required was contemplated as part of *"a good husband manlike manor"*. The Board was persuaded that there was no evidence that proved the subject property was used for anything other than farming in 2009.

2. Condition (5) of the leases is also compelling since it states what would happen if the property owner would enter upon the said lands at any time during the lease, and what would be the resulting consequences. This condition reads:

   > *"Capital Management Ltd. and its authorized representatives shall be entitled to enter upon the said lands at any time during the said term for any purpose related to development or servicing of the said lands provided that you will be compensated for any and all crop damage resulting therefrom".*

   It is clear that the property owner contemplated the possibility of entering the land for development purposes and was prepared to compensate the renter accordingly; however, in absence of any evidence from the Respondent that the renter was compensated for intrusion upon the land in 2009, the Board finds that condition (5) was not enacted in any way, shape or form, and must conclude that the land was used for farming purposes in 2009 as identified in the lease.

3. The Board placed little weight on the May 2010 photographs provided by the Respondent as proof that the subject property was not farmed in 2009. If the photographs were of stubble, it would indicate a crop in the previous year; if the photographs were of black soil that had markings of being worked with a cultivator or disker, it would clearly indicate that the land had been fallow in the previous year; but to suggest that a field of dead grass, that was just starting to show evidence of a new year's growth, was proof that the land had not been farmed the previous year, is a far stretch.

4. Again, referring to the Respondent's May, 2010 photographs, the Board was not persuaded by the Respondent's comment made during the original CARB hearing: "*As you can tell by the height of the dead grasses and everything, and this is taken in the spring, you are able to see that they didn't swath the property*" (Exhibit R-1, page 29, lines 2 to 5). It would take psychic abilities to look into the past, and indeed a very keen eye, to see that the subject land was not farmed in 2009. As well, the Respondent's comment: *"What happened is Mr. Johnsen didn't cut hay on the property…."* (Exhibit R-1, page 29, lines 11 & 12), is not supported by any evidence that the senior Mr. Johnsen, or the son (upon Mr. Johnsen's passing) actually made this statement.

5. The Board was dismayed with the Respondent's response to the Complainant's question as to the proof he had that the subject property was not farmed in 2009 during the original CARB hearing: *"Well here is what I have for proof: I have my word, I have this picture, and I have an email from one of your employees saying that it wasn't farmed"* (Exhibit R-1, page 30, lines 6 to 9). First, if any quasi-judicial board would acknowledge that it just accepted someone's word without any collaboration, it would completely undermine this process; second, the Board has already commented on the value of the picture; and third, the Board placed little weight on the position taken by the Complainant's former employee since he only made a visual inspection of the subject property in May of 2010, seeing no more than what the photograph would have shown. The Board was not influenced by this "proof".

6. The Board placed some weight on the August 2010 photographs provided by the Complainant only to the extent that it showed that the subject property was producing a hay crop in 2010, continuing a farmland status that was not in dispute prior to 2009.

7. In contemplation of the Judge's comment in paragraph 67 of the Memorandum of Decision, the Board examined section 1(i) of MRAT to answer the question *"whether the subject property should be assessed as farmland"*. In the definition that reads, *""farming operations" means the raising, production and sale of agricultural products and includes ……"*, there is no compulsory or mandatory direction that all three conditions must be met. The regulation does not impose a mandatory condition that would follow from language such as: "*in a farming operation, there must be the raising, production and sale of agricultural products to qualify for farm status*". If the narrow interpretation of the Respondent was to be accepted, all unbroken land, hay land used for the feeding of the farmers own cattle, and summer fallow would not qualify for farmland status throughout the province. In the Board's opinion, this would not be logical, and therefore the Board finds that the subject property would not lose its farmland status simply because it is alleged that no hay crop was taken off it in 2009.

8. The Board found no reason not to accept Mr. Simpson's testimony that just because land may have lain fallow in any given year, that this would preclude the land from having farmland status. Mr. Simpson advised that from speaking with the renter, the land had been seeded to hay approximately ten years earlier and was due to be plowed and reseeded to maximize production. If the need for reseeding had any bearing on the alleged non-swathing in 2009, there was no evidence to suggest this, but it was clearly proven by photographs taken by Mr. Simpson that there was hay production in 2010. As well, Mr. Simpson's credentials were very appropriate to the evidence that he was providing, a fact evidently agreed to by the Respondent since the Respondent did not challenge Mr. Simpson's credentials.

9. The Board concurred with the Respondent's position that each year's assessment is independent of prior years' assessments when determining what a willing buyer would pay a willing seller for a property in any given year. However, the question facing the Board in this complaint was whether the subject property should be designated as farmland as it had been up to 2009, or had some mitigating factors eliminated this status.

10. The Board is bound by s. 4(1) of the *Matters Relating to Assessment and Taxation Regulation* (*MRAT*) that reads "*The valuation for a parcel of land is (a) market value, or (b) if the parcel of land is used for farming operations, agricultural use value*" and *MRAT s.4(3)(d)* that addresses the first three acres within a parcel of land in determining the assessed value for the subject property for the 2010 assessment. Since the Complainant did not dispute the market value for the first three acres of the subject property, and acknowledged the regulated farm rate for the remaining acreage, the Board values the subject property for the 2010 assessment year at $863,000 as shown by the Respondent in the initial assessment notice issued to the property owner.

DISSENTING OPINION AND REASONS

There was no dissenting opinion.

Dated this 13th day of January, 2012, at the City of Edmonton, in the Province of Alberta.

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David Thomas, 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, RSA 2000, c M-26.

cc: Associated Developers Ltd.