ASSESSMENT REVIEW BOARD

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NOTICE OF DECISION NO. 0098 633/10

Colliers International Realty Advisors Inc.
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Calgary AB T2P 1C9

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 December 15-16, 2010 respecting complaints for the annual new 2010 assessments as follows:

Roll Number	Municipal Address	Legal Description	Assessed Value
5140306	4439 127 Avenue NW	Plan: 3381CL Block: Y	$8,079,000
5140108		Plan: 1012AY Block: C	$5,421,500

Before:

James Fleming, Presiding Officer
Tom Eapen, Board Member
John Braim, Board Member

Board Officer:

J. Halicki

Persons Appearing: Complainant

Brian Dell, Solicitor
Wilson Laycraft, Barristers & Solicitors

Christopher Hartley, Vice President
Colliers International Realty Tax Services

Persons Appearing: Respondent

Steve Lutes, Solicitor
City of Edmonton, Law Branch

Gordon Petrunik, Assessor
Assessment and Taxation Branch

Observers:

Jerry Sumka, City of Edmonton
Hanneke Brooymaus, The Edmonton Journal

PROCEDURAL MATTERS

The parties expressed no objection as to the composition of the CARB; Board Members expressed no bias toward these rolls. Evidence was provided under oath by both parties.

During the course of the hearing, the Complainant requested that the Board seal pages 499 to 554 (inclusive) of exhibit C-3, (i.e. purchase and sale agreement dated August 16, 2007) and tab 1 of exhibit R1 (purchase and sale agreement dated June 9, 2008). The Board concurred.

The parties agreed that, if it were necessary, the decision(s) for both rolls could be issued after December 31, 2010.

PRELIMINARY MATTER

The Respondent raised an objection to the Complainant's disclosure document received on October 5, 2010 with the exception of the last two pages thereof. The Respondent asserted that the balance of the document could have been submitted as part of the initial disclosure and questioned if it constituted proper rebuttal evidence or whether it was an attempt to split the Complainant's case and an attempt to introduce new evidence that could have been disclosed in the original disclosure. In support, the Respondent noted jurisprudence from its Law Brief, notably *R. v. Krause [1986] S.C.J. No.65* In closing, after argument, the Respondent also requested that if the Board allowed the full rebuttal to be heard, the Respondent's surrebuttal should also be allowed to be heard.

The Complainant noted, in accordance with the principles of natural justice and a right to a full and fair hearing, that the Respondent had suffered no prejudice considering the document had been properly disclosed in accordance with the *Matters Relating to Assessment Complaints Regulation* AR310/2009, and that it constituted proper rebuttal. The Complainant maintained the Respondent had sufficient time to file surrebuttal. The Complainant also noted that the objection to the rebuttal and the surrebuttal information had only been received by the Complainant the previous day, and amounted to an ambush, noting that the rebuttal had been received by the Respondent well over a month earlier (and in compliance with disclosure timelines) and so the Respondent had sufficient time to review and advise if they were concerned with the content. In the Complainant's opinion, case law supported their position, notably, *Edmonton (City) v. Assessment Review Board of the City of Edmonton 2010 ABQB 634* and *Calgary (City) v. Gaspar Szenter Holdings et al* (action: No. 0701-04629). The Complainant also advised that if the decision was to allow the surrebuttal, they would be prepared to proceed if they had some time to review the material.

The Board ruled that it would allow the rebuttal (subsequently exhibit C-3) in its entirety. It would also allow the requested surrebuttal by the Respondent.

Reasons:

The Board reviewed the testamentary submissions in conjunction with the above-noted legislation and concluded:

1. In the interests of fairness to both parties and natural justice, the Board would allow the Complainant's full rebuttal to be heard, and also the surrebuttal of the Respondent.

2. The Board also considered the rebuttal information and the surrebuttal information would be essential for the Board to fully understand and comprehend the evidence that would be subsequently presented.

3. The Board acknowledged that it had not seen the content of the rebuttal, and reserved the right to amend its decision if the Board found the rebuttal did not meet the standard for rebuttal. When the Board considered the rebuttal in the merit hearing, the Board found that the nature of the rebuttal addressed an issue raised by the Respondent which reflected a different approach to valuation than the Complainant. The Complainant need not have included that type of information in their original submission. Accordingly, the Complainant's response to that information did not constitute proper rebuttal.

BACKGROUND

The subject properties are located in the Homesteader subdivision in northeast Edmonton It comprises a former Domtar Inc. wood processing facility that has not been operational since 1987. The parcel included three lots, two of which were under complaint. The parcel was used as a wood processing facility between 1924 and 1987. The chemical treatment associated with lumber processing and wood preservation resulted in substantial soil and hydro geological contamination of the lands as indicated by numerous environmental studies. The subject property has a land use designation of AGI or industrial.

There are three parcels of land in the sales agreement; however, only the following two roll numbers are under complaint: #5140306 and #5140108. The three parcels contain a total area of 90.00 acres; whereas the two parcels under complaint respectively contain 63.697 acres and 23.643 acres for a total area 87.34 acres.

The two parties agreed the subject property is contaminated. The degree of contamination is substantial and three methods of dealing with the problem have been proposed ranging in cost from $5,000,000 to $23,000,000.

ISSUES

1. Has the subject property been assessed at market value?

2. Is the sale of the subject property a valid sale within the normal definition of market value?

3. Is the sale post-facto?

LEGISLATION

The *Matters Relating to Assessment Complaints Regulation* AR 310/2009 states:

s. 8(2)(c) *If a complaint is to be heard by a composite assessment review board, the following rules apply with respect to the disclosure of evidence: 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.

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

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.

The *Matters Relating To Assessment and Taxation Regulation* AR 220/2004 states:

S. 4(1) (a) The valuation standard for a parcel of land is market value, or

POSITION OF THE COMPLAINANT

1. The position of the Complainant is that the subject lands are vacant and have no present use (C-1, pg. 2). The site suffers from contamination and as at December 31, 2009 there was uncertainty as to the exact extent of the contamination and how remediation would progress, but the contamination was very substantial (numerous references (C-2, pg. 209; C-3, pgs. 489-499; R-1, tab 3, Fig. #12 et al.). The Complainant maintained the Respondent had failed to consider the negative effects the contamination had on the subject property and, furthermore, they had not recognized the loss in value due to the contamination.

2. The Complainant also pointed out that the subject land had additional problems in addition to the contamination issue. The larger parcel, to the east, was landlocked and had no access. The north side is flanked by a private landholder (Gold Bar) that has frontage to Hermitage Road. In addition, there is a smaller triangular parcel at the northeast corner that also has some frontage to Hermitage Road and the laneway or right-of-way to the east side of the subject property.

3. The two parcels under complaint, together with a third, and adjoining parcel, had sold in a transaction that was subsequently registered in Land Titles on March 15, 2010. The Complainant maintained that the sale of the subject land is the best evidence of market value. As at December 31st, 2009 the subject lands were contaminated and the purchaser was fully aware of the contamination. The Complainant argued that the "value in use" is not the standard for assessment but rather the " value in exchange" which is determined by the market and speculative factors with regard to value in use should play no role in the assessment process (C-1, pgs. 4-5) (*T. Eaton* v. *Alberta Assessment Appeal Board*) (1995), 128 D.L.R. (4th) 469. (Also see C-1, tab 7 for relevant extracts).

4. The Complainant asserted the subject property may have been a stigmatized sale, but was not a distressed sale as the site had been unused since 1987. Risk is common to all sales, even when there are no apparent risks. In the case of the subject property the risk is known but the exact extent of the risk is unknown. The Complainant also informed the Board that, though the sales negotiations that occurred between the vendor and purchaser were prolonged, the parties were unrelated. The terms and conditions of the purchase and mortgage documents were typical and conditional for contaminated properties.

5. The Complainant had provided a rebuttal with a number (5) of scenarios relating to the varying estimates for cleaning up the land. This was based on "remediated" land values of $135,000/acre and $150,000/acre respectively. It was suggested that the remediated land value had been obtained from an agreement for sale of an adjoining parcel of land (between the City as vendor and Cherokee as purchaser) in the sum of $150,000/acre. The parcel is the property that adjoins the northeast corner of the subject and has frontage to Hermitage Road. This parcel is 3.00 acres in size and a considerable downward adjustment would be required to compensate for the site size, location, and accessibility whereas a small upward adjustment would be required to compensate for the triangular shape of this site. Although this sale has not yet been completed, Cherokee and the City signed-off on this deal in May and June 2009 respectively.

6. Jurisprudence, relating to contaminated properties and special use properties from various jurisdictions, was presented to demonstrate that a downward adjustment was required to the assessment of the subject property to accommodate the negative impact the contamination (in this case) had on the subject property.

POSITION OF THE RESPONDENT

1. The Respondent claims the assessment for the subject property is fair and equitable given the requirements of mass appraisal. The subject property had residential property to the north, east and west sides and was considered to be potentially residential land in the future. The assessment had been accomplished utilizing a more conservative prospect of industrial land.

2. The Respondent provided nine sales (R-1, tab "Sales") of larger parcels of land ranging from 24.89 acres to 160 acres that sold between January 2005 and December 2008 and that were time adjusted to July 31, 2009. The sale prices ranged from $220,439/acre to $752,254/acre with an average of $427,549/acre. Two of the sales involved were located in the north east quadrant of the city. They were reported to be contaminated properties and they sold for an average time adjusted sale price of $230,687/acre ($220,439/acre and $240,935/acre).

3. The Respondent did not accept the purchase agreement was reflective of market value, *inter alia*, since it was a post-facto transaction, was not listed on the open market, and may not have been sold at arm's length. Further, the vendor was highly motivated as evidenced by the favourable terms of the vendor take back mortgage agreement.

4. In addition, paragraph three of the vendor mortgage (an encumbrance) referred to an earlier agreement dated June 16, 2008 (C-2, pg. 16) with the purchaser, Cherokee Canada

Inc., a business specializing in restoring contaminated land. Notwithstanding the registration of the sale for $1.8 million, the sum $1,750,000 was noted for the mortgage to make up the balance of the $50,000 deposit.

5. The Respondent also supplied a surrebuttal utilizing the same five scenarios relating to the varying estimates for cleaning up the land. This was based on "remediated" land values of $377,808/acre and $416,699/acre respectively that had been interpolated from the land sales analysis.

6. The Respondent maintained the requested assessment of $20,000/acre by the Complainant represented an approximate 95% reduction in the assessed land value. This suggested the land had been under assessed.

FINDINGS OF FACT

The Board found the sale of the subject land was a valid sale. There was no evidence of collusion. This was based on both the testamentary evidence of the Complainant and supported by the Land Title certificates, the transfer document, and the affidavit of value (C-2, pgs. 6-343). The Board found the sale was between Domtar Inc. of Montreal and 1510837 Alberta Ltd. a subsidiary of Cherokee Canada Inc. of Toronto.

The Board accepts the conclusion of the sale is post-facto in the sense it was registered at Land Titles on March 15, 2010 and the transfer documents were signed on February 26, 2010. In preparing the assessment for the subject property, the Respondent would not have access to this information. Notwithstanding this fact, the Board were informed that negotiations probably commenced in 2007 culminating in the first Purchase and Sale Agreement effective August 16, 2007 at $1,250,000, (C-3, pgs. 526–554) subject to the purchaser completing their due diligence on the property. A subsequent Purchase and Sale Agreement in the sum of $2,000,000 (R-1, tab 1) was made as of June 9, 2008, again, subject to the due diligence of the purchaser. It appears to the Board further negotiations took place between June 2008 and February 2010 resulting in the final sale price of $1,800,000. As the ultimate sale price is between the second Agreement and the final Agreement the Board considers there was basically a meeting of the minds as far back as 2008 or earlier and the sale price is very relevant to the valuation date of July 1, 2009.

DECISION

The decision of the Board is to reduce the current assessments for roll #5140306 from $8,079,000 to $1,274,000 (rounded) and for roll #5140108 from $5,421,500 to $473,000 (rounded).

REASONS FOR THE DECISION

1. The parties in this matter have each adopted a different method of valuing the property. The Complainant asserts that the sale between two unrelated parties is the "best" estimate of value, acknowledging that the closing date is post-facto, but arguing that the terms of the sale had been decided within a narrow range prior to valuation date. The changes in

value reflect the results of continued due diligence which they argued is typical of sales of contaminated property.

2. The Respondent chose to use the valuation that had been negotiated with the previous owner (Domtar Inc.) for the prior year's assessment. They defended this value in the context that the best value was obtained from estimating a conservative highest and best use value (which they chose as industrial), and subtracting from that value the cost to cure (remediate) the subject lands.

3. At first glance, these would appear to be different approaches to estimating value. The Board noted however (and as was highlighted in the rebuttal (C-3, pg. 571) and surrebuttal (R-2) that the sale price appeared to have been obtained using the same method as was used by the Respondent. The principal (and, in fact, the only) difference in the two approaches were the starting assumptions for the value of the land. The Respondent was using a blended value averaging around $400,000 per acre (taking into account the different values based on parcel size), while the Complainant's were using a value range of $135,000 and $150,000 per acre with no distinction for parcel size.

4. The fact that the Respondent considers the sale to be post-facto, that is, the date of registration of the sale (March 15, 2010), the Board recognizes that negotiations initially commenced in August 2007 with the first offer to purchase at $1,250,000 with both parties being fully aware that the subject land is contaminated. Due diligence and negotiations were carried out subsequent to this initial offer in which the price increased in June 2008 to $2,000,000 with Domtar Inc. to provide a vendor take back mortgage on the property (R-1, tab 1, pg. 5). The Board accepts the position of the Complainant that the terms of the mortgage were reasonable given the fact that the property was contaminated. Domtar Inc. signed the transfer document on February 26, 2010 some eight months after valuation date in the sum of $1,800,000. This is post-facto and the Respondent was not in error in assessing the property at valuation day.

5. The Board was informed during argument, that the prior year's assessment on the subject property had been a "negotiated" assessment between the Respondent and the Complainant and the current year's assessment was, in fact, a continuance of the same assessment. There was little evidence provided to the Board that the assessment had been prepared in the normal manner via the model.

6. The Board concluded it needed to consider the basis for each of the beginning values in order to determine the best or most appropriate value.

7. To support their values, the Respondent provided nine city-wide sales (R-1, tab "Sales"). These sales produced an average value of $427,549 per acre. To establish actual value, they factored in the size of the parcels and adjusted according to their model. From these values they subtracted the estimated remediation costs obtained from the Complainant's Scenario "C" (which both parties used as the basis in their analysis). This analysis produced values in excess of the subjects' $8,079,000 and $5,421,500 (R-2) which they argued supported their assessment. In reviewing this methodology, the Board noted two of them were zoned RA7, a use far in excess of the subject's current use value assuming the subject was uncontaminated. The balance of the sales were zoned AG (2 sales): AGI (1 sale); IM (3 sales) and IH (1 sale). With regard to the remaining balance of four, no evidence, other than size and general location was provided to the Board to enable them

to determine if they were even similar to the subject. Three sales were located in the same general area: in northeast Edmonton, but, again, the Board had insufficient information to enable them to compare these properties with the subject parcels. Only two of the sales were located in the northeast that appeared to be close to the subject and these sales were much lower ($230,687/acre) than the city-wide average. The Respondent indicated the two northeast sales were both contaminated sites which probably resulted in the lower prices. However, there was insufficient information for the Board to be able to compare either of these two sites with the subject property. The Complainant noted in rebuttal that neither of these sales was listed in Alberta Environment's register of contaminated sites.

8. In evaluating the Respondent's sales, The Board concluded that less weight should be placed on the sales for the following reasons:

   - The clustering of prices (lower in the northeast) did not appear to support a city-wide average, and the Respondent did not provide sufficient evidence to convince the Board of the validity of their assumptions and calculations.

   - There was insufficient evidence that certain sites were contaminated, or if they were, what the nature of the contamination was, and the level of confidence in the estimates to remediate these sites. The Board felt that additional information would be required to make a proper analysis.

9. With respect to the Complainant's "remediated" land value, there was little direct evidence to support $135,000 or $150,000 per acre that has been used in the analysis. In addition, the Respondent indicated in argument that there were elements of the sale that should cast its validity in doubt. Principally, the Respondent said that there was no evidence that this property has been exposed to the open market, as is required for a market sale, and that the extent of the negotiations might allow one to infer that additional issues were at play in the transactions and that Domtar was an unreasonably motivated seller in order to minimize its liability for mediation. They also highlighted that the sale was not on commercial terms as evidenced by the minimum down-payment ($50,000) and $1,750,000 vendor-take-back mortgage (VTB); also both as regards to the loan value ratio (over 95%) and the terms which included no interest payments for almost two years.

10. The Complainant responded that this property had been unoccupied since 1987, and while there was no evidence of an actual listing, it was reasonable to assume that Domtar had discussions about sales with interested parties over the years. In addition, there was no evidence of any relationship between the purchases and seller other than as parties to commercial transactions. Finally, with respect to the terms of the transaction, the Complainant argued that the terms were "typical" of sales of contaminated properties, where each party was looking to take reasonable steps to reduce the uncertainty and liability of their positions. These terms should not diminish the fact that it was a market transaction.

11. The other piece of evidence placed before the Board to assist in establishing the value of the subject property was the details of an accepted offer to purchase by Cherokee Canada Inc. (CCI) of a small (3.0 acres) parcel adjacent to the subject. CCI was purchasing the

property from the Respondent for $455,000 (approximately $150,000 per acre). The Complainant pointed out that the land to be purchased was in a much better location, because it has access to a fully paved road, (as opposed to the larger of the subject properties which was landlocked), and as well were much smaller than the properties under complaint by factors of 10 and 30 times respectively for the subject parcels. Accordingly, the Complainant argued if the land to be sold was worth a $150,000 per acre, (as evidenced by the willingness of the Respondent to sell at that price), the subject lands that are under complaint were worth much less than $150,000 per acre; and thus the $150,000 per acre was a reasonable estimate of value. It was noted that the sale had not closed yet, but the Complainant argued this was due to continued due diligence by the purchaser, not because the Respondent was unwilling to sell at that price.

12. The Respondent argued the proposed sale actually supported their valuation, pointing out the executed agreement for sale specified that the land was contaminated, and, therefore, the $150,000 per acre was actually the value for the contaminated land. They pointed out that when the cost of remediation was added, the value of the land would easily approach the value of their assessment.

13. The Complainant responded that due to the contamination and the legislated responsibility that ensues with such sales, it was only reasonable for the Respondent to include a clause asking the purchaser to acknowledge the contamination, but this did not mean that the site was definitely contaminated. In fact, the Complainant argued CCI's due diligence on the three lots led them to conclude that the run-off from the subject properties entirely avoided the small lot they were purchasing, and the $150,000 acre price was for "uncontaminated" land.

14. Unfortunately, the parties brought forward little evidence which would clearly demonstrate the intents of the parties on this issue.

15. The Board considered the assessment agreement from the previous year between the City and Domtar, the previous owner. Although the Board recognizes it is an annual assessment, the agreement between the parties constituted the basis for the 2010 assessment, and thus the basis for the agreement should be considered. The Respondent represented that the agreement was between two sophisticated parties, both with knowledge of the properties and the market, and thus represented a reasonable estimate of value. The Complainant indicated they had no knowledge of how or why the previous owner had arrived at the value, but in any event, the sale was a valid transaction, and the sale price should form the basis for the assessment.

16. The Board considered all of the arguments and evidence. As noted previously, the Board put less weight on the Respondent sales for the reasons noted above. Likewise, the Board was troubled by the values of the Complainant. The primary support available for the Complainant's values, which formed the basis for requested assessment (approximately $20,000 per acre), was the fact that the sale was concluded at that value. In addition, the Complainant argued that the sale price of the small site from the Respondent was negotiated based on a price of $150,000 per acre, and as such, was in a similar range to the subject, assuming it was remediated. While this was initially persuasive for the Board, further consideration raised the fact that in the eyes of the City, the $150,000 per acre was for "unremediated" land, and, therefore, the "remediated" land would be an unknown, but higher value.

17. In addition the Complainant argued the parcel of land adjoining the north east corner of the subject had been assessed at $18,797/acre, as noted above in Position of the Complainant #2. This would normally require sizeable upward adjustments for size and location and possibly a small downward adjustment for shape.

18. In the final analysis, in the absence of sufficient evidence of either party, the Board makes its decision on what each party's evidence contained the greatest certainty. Since both parties use the same cost of remediation, and because the cost of remediation is subject to such potential volatility based on actual experience, the cost to cure was not helpful in weighting the evidence of either party. There were weaknesses in each of the party's remediated values, as previously noted, and so the remediated values were not helpful in terms of weighting the decision.

19. This left the Board to contrast the sales transaction value with the assessment previously agreed for the prior year between the Respondent and the property owner. The Board concluded that without any details as to the basis of the agreement between the Respondent and Domtar Inc., the previous owners, the balance of certainty tilted in favour of the actual sales transaction, particularly because these values were supported by the assessment of the additional small parcel at $ 50,000 ($18,797 per acre), and because there was little evidence that the transaction was not arms length for this type of property. Accordingly, the assessment is reduced as noted above

DISSENTING OPINION AND REASONS

There were no dissenting opinions.

Dated this 30th day of December, 2010 A.D., at the City of Edmonton, in the Province of Alberta.

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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
City of Edmonton, Assessment and Taxation Branch
Dominion Tar & Chemical Ltd.
Domtar Inc.
Wilson Laycraft, Barristers & Solicitors