ASSESSMENT REVIEW BOARD

Churchill Building
10019 103 Avenue
Edmonton AB T5J 0G9
Phone: (780) 496-5026

NOTICE OF DECISION NO. 0098 786/11

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 February 13, 2012, respecting a complaint for:

Roll Number	Municipal Address	Legal Description	Assessed Value	Assessment Type	Assessment Notice for:
3773587	3451 Calgary Trail NW	Plan: 9122235 Block: 38 Lot: 1A	$7,394,000	Annual New	2011

Before:

John Noonan, Presiding Officer
Brian Hetherington, Board Member
Howard Worrell, Board Member

Board Officer:

Annet Adetunji

Persons Appearing on behalf of Complainant:

Walid Melhem, Altus Group Ltd

Persons Appearing on behalf of Respondent:

Tim Dmytruk, Assessor, City of Edmonton
Tanya Smith, Barrister & Solicitor, City of Edmonton Law Branch

PRELIMINARY MATTERS

The Complainant's evidence package contained material showing the outcome of previous years' assessment complaints for the subject property. A Municipal Government Board (MGB) Notice of Decision showed the 2007 assessment had been reduced from $5,424,500 to $3,447,500 and a Withdrawal and/or Agreement to Correction signed by representatives of the same parties showed the 2008 assessment had been corrected to $5,570,500 from the original $6,175,500. The agent, Altus Group Ltd., had not represented the Complainant in 2009 but had done so in 2010. Both parties included in their evidence a copy of the full written decision rendered by the 2010 Composite Assessment Review Board (CARB).

The Complainant contended that the issue before the Board was recurring: that the typical lease rate applied to develop the subject's assessment was over-stated, and that a strong component in each year's argument was that an immediate neighbouring retailer was assessed at a significantly lower rate. Following the 2007 decision was a page showing the income proforma development of the original assessment amount using a lease rate of $14 per sq.ft., and the reduced assessment developed from a $9 lease rate, with all other parameters unchanged. As well, an assessment proforma showed how the City had developed the assessment of the neighbour using a $9 lease rate with all other inputs the same but for vacancy: 5% for the neighbour and 3% for the subject. Following the 2008 Withdrawal and Agreement to Correction document was another proforma comparison, showing the derivation of the original assessment using a lease rate of $14 per square foot, and the corrected value using a $12.65 lease rate, which was the actual rent paid.

The Respondent's counsel, Ms. Smith, objected to the 2007 and 2008 assessment proforma comparisons. The MGB Notice of Decision simply gave a decision amount, as was the practice of the day. If reasons had been given in the presentation of the MGB's oral decision, they were not presented in evidence here. It is not possible to know on what grounds the MGB acted. The Complainant's suggestion that the Board employed the neighbour's $9 rate is unsubstantiated. Similarly, it is not possible to know what negotiations were undertaken to arrive at the corrected 2008 assessment. It is not the Respondent's duty to disprove the assertion that the lease rate was the sole issue acted upon, and the influence of the neighbouring property's rate; rather, it is the Complainant's duty to provide evidence proving it. The City's Assessor, Mr. Dmytruk observed that each annual assessment is a new assessment, independent of what may or may not have occurred in prior years.

The Complainant's representative, Mr. Melhem, could not recollect if he represented the file in the 2007 hearing, or had involvement in the 2008 discussions. He understood the proformas to represent the information acted on, the lease rates, but could not say if these documents had been prepared before or after the decision/negotiation in the respective years.

The Board noted the Respondent's objection to the particular pages in the Complainant's evidence submission, and the hearing continued.

BACKGROUND

The subject is a 35,000 square foot Future Shop retail store constructed in 1994 and located on an 87,662 square foot lot in the South Trail power centre.

ISSUE(S)

The Complainant's presentation contained a schedule of issues:

1. The subject property is assessed in contravention of Section 293 of the Municipal Government Act and Alberta Regulation 220/2004.
2. The use, quality, and physical condition attributed by the municipality to the subject property are incorrect, inequitable and do not satisfy the requirement of Section 289 (2) of the MGA.
3. The assessed value should be reduced to the lower of market value or equitable value based on numerous decisions of Canadian Courts.
4. The assessment of the subject property is in excess of its market value for assessment purposes.
5. The assessment of the subject property is not fair and equitable considering the assessed value and assessment classification of comparable properties.
6. The information requested from the municipality with regards to the assessment roll was so expensive that the costs impeded access to information.
7. The classification of the subject premise is neither fair, equitable, nor correct.

At the hearing, the CARB heard evidence and argument on the following issues:

1. Does the application of a typical $18 lease rate produce an inequitable assessment in comparison to neighbouring, similar properties?

2. Do the actual lease rates of the neighbouring, similar properties show that the subject is assessed in excess of market value?

LEGISLATION

***Municipal Government Act*, RSA 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.

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

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

POSITION OF THE COMPLAINANT

The Complainant provided a 53-page brief identified as C-1. This brief contained an executive summary, issue statement, maps, photos, assessment proforma, rent roll, market lease comparables, assessment lease rate comparables, and copies of MGB and CARB Decisions.

A decision of the MGB from March 25, 2008 for the 2007 assessment year and a withdrawal to correction by the City of Edmonton on August 6, 2008 for the 2008 assessment year show a history of over assessment.

In dealing with the 2010 assessment the CARB commented;

"The Board reviewed the Complainant's neighboring equity comparable, located next door at 10340- 34 Avenue and which was assessed an $11.00 per square foot rental rate. However the Board did not find that this singular comparable, particularly in the absence of further information to establish comparability, was sufficient evidence to persuade the Board that the lease rate of $16.50 per square foot applied in the assessment was incorrect."

To address the deficiency identified in the 2010 CARB Decision, the Complainant provided exterior and interior photographs of the subject Future Shop at 3451 Calgary Trail and the immediately neighboring HomeSense store at 10340 34 Avenue, both located in the South Trail power centre. These photographs show that the HomeSense store, if anything, had a higher quality finish than the subject in terms of floor treatment and ceiling. The subject was assessed at a far higher attributed lease rate of $18.00 per square foot vs. the $12.50 per square foot rate for the adjacent HomeSense property. There is no difference in location, the buildings are only separated by a few feet and both were constructed in the same year. The subject has been inequitably assessed in comparison to its immediate neighbor.

Also provided by the Complainant was a Rent Roll for the subject property that showed the lease commenced November 8, 1995 and as of May 2010 was at $12.65 per square foot.

The Complainant also presented the Board with details of another comparable, a Winners Store located a few blocks away at 3312- Gateway Blvd. The Winners and HomeSense properties were both advanced as Market Lease rate and Equity comparables. Details of these comparables are shown in the following charts.

Market Lease Rate Comparables

Roll Number	Address	Age	Start Date	NLA	Rent/sq.ft
3928355	10340 34 Avenue	1994	30/09/03	24,508	$12.50
3820271	3312-Gateway Blvd	1991	11/09/03	35,557	$11.25
				Average	**$11.88**
				Requested	**$12.50**
	Subject				
3773587	3451- Calgary Trail	1994	12/1/2006	35,000	$12.65

Assessment Lease Rate Comparables

Roll Number	Address	Age	Space Type	NLA	Rent/sq.ft.
3820271	3312-Gateway Blvd	1991	Junior Anchor	35,557	$12.50
3828355	10340 34 Ave	1994	Junior Anchor	24,508	$12.50
				Median	**$12.50**
				Requested	**$12.50**
	Subject				
3773587	3451- Calgary Trail	1994	Junior Anchor	35,000	$18.00

A Requested Value Proforma was provided by the complainant that showed that based upon the requested lease rate of $12.50 per square foot, the 2011 assessment should be reduced from $7,394,000 to $5,106,500.

POSITION OF THE RESPONDENT

The Respondent presented the Board with a 117-page brief (R-1), which contained a 43-page Law & Legislation document, together with a Notice of Decision from a CARB hearing held on November 15, 2010 on the subject property.

In opening his presentation, the Respondent told the Board that the City classifies Junior Anchor tenants in power centers - such as the Calgary Trail South subdivision, in which the subject is located – in one of two categories; Class A (Better) or Class B (Lower). He added that all power centre Class A Junior Anchor tenants across Edmonton are assessed at a rate of $18.00 per square foot, while Class B Junior Anchor tenants are assessed at a rate of $12.50 per square foot

Mr. Dmytruk advised the Board that he was new to the Power Centre/Shopping Centre group. He understood that the Class B Junior Anchor category had been created in response to difficulties the City had encountered in defending assessments of TJX properties: Winners, HomeSense and JYSK. He told the Board that the TJX group employs a business model focused on discounted merchandise and has convinced landowners to accede to lower rental rates in recognition of the drawing power of their brands.

In response to the Complainant's equity argument, the Respondent also presented the Board with a chart of 7 power centres across Edmonton which contained 16 Class A Junior Anchor tenants, including a range of retail operations such as Future Shop, Toys R Us, Staples, Pet Smart and Michaels, and which were all assessed at the Class A Junior Anchor rate of $18.00 per square foot. The chart also included a section on Class B Junior Anchor tenants. The ones shown on the chart were the two comparables presented by the Complainant, Winners in South Trail Plaza, about a block south of the subject, and HomeSense, located immediately adjacent to the subject. These were assessed at a rate of $12.50 per square foot.

The Respondent referred the Board to the 2010 CARB decision on this property pointing out that on that occasion the Complainant had presented the Board with 15 market lease comparables and 11 equity rental rate comparables but in the current appeal the Complainant has supplied only two, the HomeSense and Winners stores that have Class B Junior Anchor classifications.

The Respondent presented the Board with extracts of the Colliers Real Estate Review (CRER) of 2009 and 2011. The Board's attention was drawn to two portions of the extracts, dealing with a Retail Overview from the 2011 report and the Big Box comparisons from the 2009 report. In quoting from the CRER Retail Overview, the Respondent suggested to the Board that the comment "*Edmonton is seeing a large influx of American retailers. This trend is expected to continue throughout 2011 and 2012"* is supported by the fact that the subject property is no longer occupied by Future Shop, which moved its operation at the end of January, 2012 to South Edmonton Common, and the space will soon be taken over by the US-based TAG group.

The statistics on Big Box stores, taken from the 2009 edition of CRER is shown below:

Big Box	
Typical Size	15,000-60,000/sq.ft
Rental Rates	$16.00- $22.00/sq.ft
Operating costs	$6.00-$8.00 /sq.ft.
Vacancy	2.5%

Addressing market lease rates, the Respondent presented the Board with a chart of 12 unidentified Junior Anchor tenants in power centres across the city, with leases commencing March, 2007 to October, 2010. The net rents per square foot of those Junior Anchor tenants ranged from $17.00 to $27.00, creating an average of $20.87. The Respondent confirmed that the 2011 assessment rate for Class A properties was set lower at $18.00 per square foot.

DECISION

The CARB confirms the assessment of $7,394,000.

REASONS FOR THE DECISION

In reaching its decision, the CARB wrestled with some interesting and fundamental concepts of property assessment. In most hearings, including this one, the parties confine their oral presentations to the nuts and bolts particulars of the complaint. On too infrequent occasion, the Board finds intrigue in the otherwise dull and neglected pages of the parties' legal briefs.

From *Jonas v. Gilbert* (1881), 5 S.C.R. 356:

> *Unless the legislative authority otherwise ordains, everybody having property or doing business in this country is entitled to assume that taxation shall be fair and equal, and that no one class of individuals, or one species of property, shall be unequally or unduly assessed.*

From *MRAT* AR 220/2004:

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.

As previously mentioned, the Assessor explained it was his understanding that the Class B Junior Anchor category was created to accommodate those properties where TJX companies were tenants. This was in response to a number of assessment complaints where the City had tried and failed to defend its assessments based on a single junior anchor lease rate. The Board considered a number of obvious implications, chief among them the question of equitable assessment, the main issue raised by the Complainant.

Here, the CARB is dealing with very similar retail properties, built in the same year at adjoining locations. The equity comparable is in the business of retailing household goods and the subject sells consumer electronics. At first glance, the idea that these properties should be assessed at markedly different rates seems an affront to *Jonas v Gilbert* and *MRAT,* let alone *Bramalea v. British Columbia (Assessor of Area No. 9 – Vancouver)(BCCA), [1990] BCJ No. 2730.*

In a perfect and easier world, the Board would have the benefit of new leases dated June 30, 2010 for both properties to confirm a significant difference in lease rates. However, even if such information were conveniently available, the question would then arise whether the landlord had surrendered a leased fee interest in the property to the tenant blessed with the preferential rental rate. This question might or not be answered if both properties sold the following day, full-blown utopia, to different but knowledgeable and creditworthy purchasers. In the absence of heaven-sent market data, the CARB returns to a laboured slog through murky trenches, guided by the feeble light of what the legislation doesn't say.

On the topic of preparing assessments, the *Act* and *Regulation* give assessors direct and specific principles and standards to measure their results, but few and vague instructions between start and endpoints. Section 297 (1) of the *Act* commands that one or more "classes" be assigned to a property: residential, non-residential, farm land, or machinery and equipment. Beyond these very broad classes, assessors are given free rein to exercise their art and craft. In practice, the term "class" takes on a narrower meaning than specified in the *Act* as assessors stratify properties into many different classes and subclasses, or more properly, strata and sub-strata. Consequently, a newly-built suburban low rise office building will find itself in a different subclass than a 40-year old downtown high rise. Should the market so dictate, these properties might exhibit the same or vastly different vacancy rates, but it is within the prerogative of the assessor whether one or both be assessed on a sales comparison or capitalized income approach. The legislation does not interfere with the process of stratification beyond the instruction an assessment be prepared in a fair and equitable manner, and neither does the CARB. Acting on a complaint, the CARB might decide that a valuation approach different from that used by the assessor yields a better estimate of market value for a particular property, but the Board usually avoids "re-classifying" a property. In a similar vein, a CARB might decide that a Class A downtown office building fails to generate the level of income typically attributed to that class, and instead substitute Class B income parameters. In such a situation, the CARB is not necessarily changing the Class designation or passing judgment on the quality of construction, but is instead emphasizing the property's ability to generate income as the prime determinant of market value.

The Respondent has created two "sub-classes" for junior anchor properties. On the basis of evidence heard, the significant difference is that a long list of well-known national retailers are prepared to pay a certain level of rent, and these properties are in the A (higher) category. At the other end of the spectrum, another retailer with 3 well-known brands has apparently managed to convince landlords to accept far lower rents, and the Respondent accepted this market reality with the B (lower) category. The Complainant's equity argument rests on the comparison of an "A" to two "B's".

If the CARB were to accept the Complainant's argument, it is trite to speculate the immediate consequence: every "A" anchor would soon be clamoring for a "B" assessment rate. The evidence before the Board showed recent "A" anchor leases at or above the 2011 assessed rate of $18; although there was no recent leasing evidence to support the $12.50 "B" rate, the CARB has no reason to believe the Assessment Department has suddenly decided to subvert its assessment roll. The CARB concludes there is a two-tier market for junior anchor space. Why this dichotomy has arisen might perplex the panel, as does the question why one group would command better bargaining power than other prominent tenants. However, the CARB is not charged to understand every peculiarity of the market, merely to observe the results.

Assessment equity is maintained precisely because the Respondent has created two junior anchor "sub-classes" with different typical lease rates. Inequity would arise if there were only one category or class, some assessed at a lower rate than the others. Although the junior anchor "B" category is currently populated only by TJX Group tenants, the Board did not hear that the lower rate will only and forever be reserved for TJX.

Neither party presented the Board with sales evidence. The only information derived from the market was with regard to leases. The CARB was satisfied that the Respondent's leasing evidence was newer and covered many more properties than that advanced by the Complainant. Consequently, the Board believes the assessment is a better estimate of the subject's market value than the Complainant's requested amount.

Dated this 28th day of February, 2012, at the City of Edmonton, in the Province of Alberta.

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John Noonan, 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.

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cc: Canadian Property Holdings (Alberta) Inc