EDMONTON
Assessment Review Board

10019 103 Avenue, Edmonton, AB T5J 0G9
Ph: 780-496-5026
Email: assessmentreviewboard@edmonton.ca

NOTICE OF DECISION NO. 0098 940/11

Altus Group
780-10180 101 ST NW
EDMONTON, AB T5J 3S4

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 June 13, 2012, respecting a complaint for:

Roll Number	Municipal Address	Legal Description	Assessed Value	Assessment Type	Assessment Notice for:
10010642	16820 107 AVENUE NW	Plan: 0324518 Block: 1 Lot: 24	$13,919,000	Annual New	2011

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: FINWEST HOLDINGS INC

Edmonton Composite Assessment Review Board

Citation: Altus Group v The City of Edmonton, 2011 ECARB 1158

Assessment Roll Number: 10010642
Municipal Address: 16820 107 AVENUE NW
Assessment Year: 2011
Assessment Type: Annual New

Between:

The City of Edmonton, Assessment and Taxation Branch

Applicant

and

Altus Group

Respondent

COSTS DECISION OF
Robert Mowbrey, Presiding Officer
Jasbeer Singh, Board Member
Mary Sheldon, Board Member

Preliminary Matters

[1] The Presiding Officer asked the Board Members if they had any bias on this file. One Board Member disclosed that she had previously shared legal office facilities with the legal representative of the Respondent. The Applicant stated that if there was no current financial interest involved the Applicant had no objection. The Board Member confirmed that there was no current financial interest involved. The other Board Members stated they had no bias on this file. The parties indicated they had no objection to the composition of the Board.

[2] Witnesses giving testimony were sworn in or affirmed, the choice being that of the individual witness.

Background

[3] The parties appeared before the Board on February 27, 2012 with regard to the 2011 assessment of the subject property. The Board issued a decision on February 28, 2012 confirming the 2011 assessment. The Applicant, (City of Edmonton, Respondent in the original merit hearing), filed a written submission on March 29, 2012 for costs against the Respondent (Altus Group, Complainant in the original merit hearing), under section 468.1 of the *Municipal Government Act*, RSA 2000 c M-26 [MGA].

Issues

[4] The following issues arose in the hearing:

1. Was the application for costs made in accordance with the time limits specified in the *Matters Relating to Assessment Complaints Regulation*, AR 310/2009 [MRAC]?

2. If the conclusion of the Board with respect to issue #1 is affirmative, should costs be awarded under MRAC for disclosure of irrelevant evidence and/or causing a hearing to proceed with no reasonable chance of success, and if so, in what amount?

Legislation

[5] Section 22(4) of the Interpretation Act, RSA 2000, Chapter I-8 reads:

> If an enactment contains a reference to a number of days not expressed to be clear days or "at least" or "not less than" a number of days between 2 events, in calculating the number of days, the day on which the first event happens shall be excluded and the day on which the 2nd event happens shall be included.

[6] Section 468.1 of the MGA reads:

> A composite assessment review board may, or in the circumstances set out in the regulations must, order that costs of and incidental to any hearing before it be paid by one or more of the parties in the amount specified in the regulations.

[7] Section 470(3) of the MGA reads:

> An application for leave to appeal must be filed with the Court of Queen's Bench within 30 days after the persons notified of the hearing receive the decision under section 469, and notice of the application for leave to appeal must be given to
>
> (a) the assessment review board, and
>
> (b) any other persons as the judge directs.

[8] Section 52 of MRAC reads:

> 52(1) Any party to a hearing before a composite assessment review board or the Municipal Government Board may make an application to the composite assessment review board or the Municipal Government Board, as the case may be, at any time, but no later than 30 days after the conclusion of the hearing, for an award of costs in an amount set out in Schedule 3 that are directly and primarily related to matters contained in the complaint and the preparation of the party's submission.
>
> (2) In deciding whether to grant an application for the award of costs, in whole or in part, the composite assessment review board may consider the following
>
> (a) whether there was an abuse of the complaint process;
>
> (b) whether the party applying for costs incurred additional or unnecessary expenses as a result of an abuse of the complaint process.
>
> (3) A composite assessment review board or the Municipal Government Board may on its own initiative and at any time award costs.

(4) Any costs that the composite assessment review board or the Municipal Government Board award are those set out in Schedule 3.

[9] Schedule 3 of MRAC reads:

Schedule 3
Table of Costs

Where the conduct of the offending party warrants it, a composite assessment review board or the Municipal Government Board may award costs up to the amounts specified in the appropriate column in Part 1.

Where a composite assessment review board or the Municipal Government Board determines that a hearing was required to determine a matter that did not have a reasonable chance of success, it may award costs, up to the amounts specified in the appropriate column in Part 2 or 3, against the party that unreasonably caused the hearing to proceed.

	Assessed Value			
Category	**Up to and including $5 million**	**Over $5 million up to and including $15 million**	**Over $15 million up to and including $50 million**	**Over $50 million**
Part 1 — Action committed by a party				
Disclosure of irrelevant evidence that has resulted in a delay of the hearing process.	$500	$1000	$2000	$5000
A party attempts to present new issues not identified on the complaint form or evidence in support of those issues.	$500	$1000	$2000	$5000
A party attempts to introduce evidence that was not disclosed within the prescribed timelines.	$500	$1000	$2000	$5000
A party causes unreasonable delays or postponements.	$500	$1000	$2000	$5000
At the request of a party, a board expands the time period for disclosure of evidence that results in prejudice to the other party.	$500	$1000	$2000	$5000
Part 2 — Merit Hearing				
Preparation for hearing	$1000	$4000	$8000	$10 000
For first 1/2 day of hearing or portion thereof.	$1000	$1500	$1750	$2000
For each additional 1/2 day of hearing.	$500	$750	$875	$1000
Second counsel fee for each 1/2 day or portion thereof (when allowed by a board).	$250	$500	$750	$1000
Part 3 — Procedural Applications				
Contested hearings before a one-member board (for first 1/2 day or portion thereof).(i.e. request for adjournment)	$1000	$1500	$1750	$2000
Contested hearings before a one-member board (for each additional 1/2 day or portion thereof).	$500	$750	$875	$1000

Position Of The Applicant

[10] The Applicant provided the Board with an information package (A1), copies of the documents that were before the board at the merit hearing (C1 and R1), and an audio recording of the merit hearing.

[11] The Applicant also submitted to the Board evidence concerning the amount of time spent by the City of Edmonton assessment department dealing with this file in the original merit hearing. The evidence provided indicated that the assessment department spent approximately 5 hours in discussing and responding to the Respondent's disclosure as the Complainant in that original merit hearing and that, in the opinion of the assessor, this was a conservative estimate.

[12] With respect to the issue of the timeliness of the costs application, the Applicant argued that the application was filed in a timely manner and offered two alternative arguments to the Board. Firstly, the Applicant argued that its application for costs had been made verbally during closing arguments at the merit hearing on February 27, 2012. The Applicant submitted to the Board that the requirement in section 52(1) MRAC for cost applications did not require that the application be made in a written form and that therefore, the oral submission at the close of the merit hearing was sufficient.

[13] In the alternative, the Applicant argued that interpreting section 52(1) of MRAC to require an application for costs be filed within 30 days of the last day of a hearing would be absurd. The Applicant pointed out that under section 468(1) of the MGA, a board has 30 days from the last day of a hearing to render a decision. As such, a party would be required to make an application for costs without the benefit of the decision from the original merit hearing. The Applicant therefore suggested that the requirement in section 52(1) should be interpreted as requiring an application for costs to be filed within 30 days of receipt of the decision from the merit hearing.

[14] In support of this position the Applicant drew the Board's attention to prior decisions of the Board in which the contents of the decision from the original merit hearing were used in determining the outcome of a subsequent costs application.

[15] With respect to the issue of costs to be awarded in this application, the Applicant requested that the Board consider an award of costs under either Part 1 or Part 2 of Schedule 3 MRAC. Since the assessment of the property in question was just under 14 million dollars, the Applicant submitted that the amounts should be taken from the second column of Schedule 3. The Applicant formally requested the highest possible amount under this column for the relevant categories of either Part 1 or Part 2. However, the Applicant advised that it left the decision of the appropriate size of the cost award for the determination of the Board.

[16] With respect to an award of costs under Part 1 of Schedule 3, the Applicant requested that $1000 costs be awarded under the category of "disclosure of irrelevant evidence that has resulted in a delay of the hearing process." The Applicant noted that there had been only one issue in the merit hearing, whether the calculation of excess land on the subject property was accurate. The Respondent as the Complainant in that original merit hearing had brought only evidence of a subdivision that had occurred after the end of the condition year. The merit decision had characterized this evidence of irrelevant.

[17] With respect to an award of costs under the category of "unreasonable delay" in Part 1 of Schedule 3, the Applicant suggested that there was a delay in this case because the hearing had to be held at all. The Applicant submitted to the Board that this argument was perhaps a "stretch."

[18] With respect to an award of costs under Part 2 of Schedule 3, , the Applicant requested that $5500 costs be awarded as "a hearing was required to determine a matter that did not have a reasonable chance of success" as set out in the preamble to Schedule 3. The Applicant submitted that

costs of $4000 for preparation for a hearing, and $1500 for a hearing of less than one half of one day would be appropriate. The Applicant argued that if the only evidence brought to the hearing was irrelevant, the hearing must have had no reasonable chance of success.

[19] The Applicant submitted to the Board that a cost award was required in order to dissuade complainants from wasting the time and resources of the Board and the municipality.

[20] In response to the arguments of the Respondent, the Applicant argued that it was not necessary for the Board to consider the factors set out in section 52(2) of MRAC as that section was permissive and not mandatory, and further that it was not necessary for the Board to find that there had been bad faith or any particular intent before awarding costs. In the Applicant's submission, it was enough that a hearing had no reasonable chance of success, or that irrelevant evidence had been disclosed.

Position Of The Respondent

[21] The Respondent provided the board with a package of evidence and argument (B-1).

[22] With respect to the issue of the timeliness of the application for costs, the Respondent argued that the application could not be considered by the Board, as it was not made in the timelines specified in section 52(1) of MRAC.

[23] With respect to the Applicant's argument that an application for costs had been made at the close of the original merit hearing, the Respondent argued that what the Applicant had done at that time did not amount to applying for costs. The Respondent argued that an application for costs would require a more formal process.

[24] The Respondent argued further that accepting the Applicant's submission that their words at the end of the merit hearing constituted an application for costs would give parties the ability to completely eliminate the effect of the timeline in section 52(1) of MRAC, and would be contrary to the intent of the legislation.

[25] With regard to the Applicant's argument that the timeline specified in section 52(1) of MRAC should run from the time at which the parties receive the decision from a merit hearing, the Respondent argued that this was contrary to the clear, unambiguous language of the regulation. The Respondent expressed this argument in their written brief B-1 at page 5 as follows:

> 6. One of the basic principles in statutory interpretation is that the words chosen by the Legislature were purposeful. The Respondent submits that with respect to costs, the Legislature purposefully chose to use "conclusion of the hearing" rather than the phrase "after receiving the decision" as is suggested by the Applicant…
>
> 7. If the Legislature had intended that an application for costs could be made 30 days after the decision was received, it would have explicitly said so as it did in the provisions related to appeals to the Court of Queen's Bench. However, it did not. It must be assumed, therefore, that this exclusion was purposeful.

[26] With regard to the absurdity claimed by the Applicant of requiring parties to apply for costs prior to receiving a merit decision, the Respondent suggested that there was no absurdity as the decision of whether to award costs was independent of the question of what the result of the hearing had been. The Respondent pointed out that this must have been the case, as in this

case the Applicant made the Board aware of their intent to apply for costs before the merit hearing had even completed.

[27] The Respondent therefore submitted that the Board was without jurisdiction to hear the Applicant's costs application.

[28] However, the Respondent went on to argue that, should the Board disagree with its position that the Applicant's cost application was filed out of time, the Board should dismiss that cost application. With regard to the application for costs under Part 1 of Schedule 3, the Respondent argued that there was no delay that resulted from the disclosure of the evidence with regard to excess land on the subject property. The Respondent pointed out that the merit hearing had not been postponed, and the hearing itself was only 30 minutes long.

[29] With regard to the application for costs under Part 2 of Schedule 3, the Respondent argued that costs were not available under this part because the factors in section 52(2) of MRAC had not been made out. There was no suggestion that there had been an abuse of the complaint process, nor was there any evidence of any additional expense incurred by the Applicant as a result of an abuse of process.

[30] Further, the Respondent argued that in order to order costs against the Respondent the Board would need to find that there had been some intent or bad faith on the part of the Respondent, and that this had not been shown.

[31] With regard to whether the hearing had unreasonably been caused to proceed with no reasonable chance of success, the Respondent cautioned the Board against taking advantage of the benefit of hindsight. In the opinion of the Respondent, the fact that the Respondent's argument about excess land had not been successful did not mean that it had been an unreasonable decision to present the argument. In support of the reasonableness of the Respondent's argument at the merit hearing, considerable evidence was presented about what argument had been made.

[32] The Respondent explained that at the merit hearing, the Respondent had argued that the excess land attributed to the subject property by the Applicant was too large, as the estimate of the land required for the building on the subject property was too low. As evidence, the Respondent entered as evidence a subdivision of the subject property that had happened after the end of the condition year for the assessment in question. The Respondent argued that the property owner who had requested this subdivision was motivated to subdivide out as much land as possible for the purpose of sale, leaving the building on as small a lot as possible.

[33] At the cost hearing the Respondent argued that this was a novel argument, and that while it had been unsuccessful, it was not unreasonable to think that it might have been compelling, particularly considering that the Respondent, a tax agent who appears before the Assessment Review Board on a regular basis, had not made the argument before. In this regard the Respondent asked the Board to take into account that the agent making the argument had considerable experience in the field, and had no motivation to waste his own, the Board's, or the City's resources with an application that he believed had no reasonable chance of success. The agent testified that he did, in fact, believe that it had a reasonable chance of success.

[34] The Respondent further argued that even if the Board concluded that the argument had no reasonable chance of success, costs ought not to be awarded in a case such as this as there was

already a disincentive for a professional tax agent to bring applications with no reasonable chance of success. To do so would cost the Respondent his own time, his own resources, and potentially his reputation. The Respondent argued that costs should only be available in cases of extreme bad behavior by parties before the Board.

[35] The Respondent also argued that the effect of awarding costs in this sort of circumstance would set a precedent that would have a chilling effect on the rights of ratepayers to complain about inaccurate assessments, particularly if the cost award was based primarily on having lost the merit application, and not on any discernable bad faith or malice.

[36] With regard to the size of a potential cost award, the Respondent argued that the sum requested by the City under Part 2 of Schedule 3 of $5500 would amount to more than $1000 per hour of the assessor's time, which seemed an extremely high estimate of the costs incurred by the Applicant in dealing with a half-hour hearing. The Respondent, through questioning of the Complainant, also brought to light that only two pages of the Applicant's submission at the merit hearing, R1, directly addressed the issue of excess land, and that one of those two pages was redundant to something that had already been submitted by the Respondent in their evidence C1. The Respondent submitted that it would be unreasonable to award anything approaching $5500 for 5 hours of work that resulted in two pages of documentation.

Decision

[37] The decision of the Board is that the application for costs was not received on time. The application for costs is not validly before the board, and therefore it is dismissed.

Reasons For The Decision

1. Issue 1: Was the application for costs made in accordance with the time limits specified in MRA

[38] Section 52(1) of MRAC requires that an application for costs be made no later than 30 days after the conclusion of the hearing. The parties disagreed as to what meaning should be given to the words "conclusion of the hearing". The Applicant submitted that this requirement should be interpreted to mean 30 days after the receipt of the decision by the parties. The Respondent submitted that the words should be interpreted to mean the last day of the merit hearing.

[39] The Board understands the Applicant's position that to require a party to file an application for costs no later than 30 days from the last day of the merit hearing is problematic in that the decision in that hearing might not be available at the point when a party must file for costs. In particular, the Board notes that that costs may be available under Part 2 of Schedule 3 MRAC where a party has unreasonably caused the hearing to proceed, and that the outcome of the hearing is particularly pertinent to the question of whether a hearing was unreasonably caused to proceed. A party who wins cannot be said to have been unreasonable. The result is the risk of costs applications being made without all of the important or relevant evidence available. In some cases, cost applications might have to be withdrawn should the merit hearing decision disclose that the cost application is doomed to fail.

[40] However, the Board does not feel that this inconvenience meets the level of absurdity required to displace the plain meaning of section 52(1) MRAC. The Board is of the opinion that

the Respondent's argument in this regard is compelling -- that the wording in the section is clear, and that if the drafters of the legislation had intended that the deadline should run from the day the decision was received by the parties, they had every opportunity to say so, and did not. The Board notes examples in the legislation where the drafters of the legislation did state this clearly. In particular, s 470(3) MGA which deals with appeals to the Court of Queen's Bench explicitly states that an application for leave to appeal is to be filed within "30 days after the persons notified of the hearing receive the decision under section 469". The Board concludes that the legislation purposely excluded this from s. 52(1) MRAC .

[41] The Board therefore finds that the words "conclusion of the hearing" in section 52(1) means the day on which the hearing ended, and that the 30 day limit in that section runs from that date.

[42] The Board heard evidence that the original merit hearing on this matter concluded on February 27, 2012. The members of the Board reviewed the transcript of the proceedings of February 27, 2012 and noted the words spoken by the presiding officer that the hearing was closed. The Board then turned to the Interpretation Act for a calculation of time. S. 22(4) of the Interpretation Act is applicable in this case and according to that section, the 30 day period from the conclusion of the merit hearing ended on March 28, 2012. The Board had been supplied with evidence that the written application for costs had been submitted by the Applicant on March 29, 2012. In the opinion of the Board, it has no discretion in legislation or facts to extend this time limit. The Board notes the opinion of Justice S.D. Hillier in *The City of Edmonton and The City of Edmonton Assessment Review Board and Stephen Richard Wood* para 82 that "the language chosen to invoke this time limit simply cannot support the exercise of an unexpressed discretion having full regard to the purpose of the legislation."

[43] The Board then turned to the argument of the Applicant that even if the written submission was not filed in a timely manner, the application for costs had been made during the merit hearing. The Applicant argued that it was indicated in closing argument during the merit hearing that the City of Edmonton was applying for costs. In the opinion of the Applicant, this should satisfy the requirement for an application under section 52(1) of MRAC. The Applicant noted that the regulation does not require that the application for costs should be made in a written form.

[44] The Respondent had argued that it would be contrary to the intent of the legislation to allow a party to effectively overcome the time limit set out in section 52(1) by simply declaring intent to make an application for costs at a later date.

[45] The Board agrees with the Applicant that the regulation does not require an application for costs to be made in written form, and can imagine circumstances in which such an application could be made orally during a merit hearing. In order to determine what exactly was said during the merit hearing, the Board reviewed the audio recording of the original merit hearing in its entirety. The Board notes that the only words uttered by the representative of the Applicant with regard to costs appear at 27:58 of the recording. These words are "The City of Edmonton is going to be reserving its rights to make a costs application on this property." The Board does not find that reserving the right to apply for costs is the same thing as making an actual application for costs.

[46] Therefore, the Board finds that the Applicant did not apply for costs during the merit hearing. As decided above, the Applicant's written application was submitted out of time. The

application for costs is therefore not properly before the Board, and it is dismissed. Since the cost application is not properly before the Board, it is unnecessary for the Board to consider the second issue.

Heard commencing June 13, 2012.
Dated this 3rd day of July, 2012, at the City of Edmonton, Alberta.

_____
Robert Mowbrey, Presiding Officer

Appearances:

Brennen Tipton
Cameron Ashmore
for the Applicant

John Trelford
Stephanie Wanke
for the Respondent