

IN THE MATTER OF A COMPLAINT filed with the City of Grande Prairie *Composite Assessment Review Board*] (CARB) pursuant to Part 11 of the *Municipal Government Act* being Chapter M-26 of the Revised Statutes of Alberta 2000 (Act).

BETWEEN:

City of Grande Prairie - Applicant

- a n d -

Altus Group Ltd. representing Dolemo Development Corp. - Respondent

BEFORE:

Member:

J. Noonan, Presiding Officer

A hearing was held on September 24, 2010 in the City of Grande Prairie in the Province of Alberta to consider jurisdictional matters relating to complaints about the assessment of the following property tax roll numbers:

Roll No./ Property identifier	Assessed value	Address
625830	\$8,157,200	12102 100 Street
520510	\$11,278,700	11633 100 Street

PART A: BACKGROUND AND DESCRIPTION OF PROPERTY UNDER COMPLAINT

Roll number 625830 is known as the Stonebridge Hotel, formerly the Trumpeter Hotel, and the registered owner is Trumpeter Hotel Inc at an address in Calgary. The Stonebridge has 126 rooms with food and beverage facilities and a liquor store. Roll number 520510 is a 204 room hotel with food, beverage and small commercial areas known as The Grande Prairie Inn. The registered owner is a numbered company with the same address in Calgary as the Stonebridge. The Respondent here is Dolemo Development Corp., at the same Calgary address, whose assessment affairs have only recently begun to be handled by the agent, Altus Group. The

jurisdictional hearings for these two properties are addressed by this single decision, as the evidence and argument for the two were identical.

Reference should be made to Decision 2010GP777690J which dealt with a hotel owned by another party, but with identical issues and similar evidence. The hearings ran concurrently with occasional reference to minor differences between these Dolemo files and the other case, a Holiday Inn.

On July 3, 2009 the Assessment Department mailed annual requests for information (ARFIs) to hotel owners, and specified a return date no later than September 11, 2009. For the Grande Prairie Inn and the Stonebridge, there were no responses to the requests for information until May 2010 when Altus Group, in the course of preparation for potential complaints, learned of the situation. Altus immediately assembled the missing information and more, and dispatched it to the City.

PART B: PROCEDURAL or JURISDICTIONAL MATTERS

The CARB derives its authority to make decisions under Part 11 of the Act. During the course of the hearing, the parties raised the following jurisdictional issues, which are addressed below.

- Jurisdictional issue: Should the right of complaint be lost for failure to provide information requested by the assessor?

Sub-issue 1: Was the request received?

Sub-issue 2: Was the requested information necessary for the preparation of the assessment?

LEGISLATION:

Municipal Government Act

295(1) A person must provide, on request by the assessor, any information necessary for the assessor to prepare an assessment or determine if property is to be assessed.

(4) No person may make a complaint in the year following the assessment year under section 460 or, in the case of linear property, under section 492(1) about an assessment if the person has failed to provide the information requested under subsection (1) within 60 days from the date of the request.

Sub-issue 1: Was the request received? (Presumption of service)

Positions of the Parties:

The Applicant sent by regular mail July 3, 2009 the requests for information to the owner at the registered address in Calgary, and hand delivered the same request packages to the front desks of the Grande Prairie Inn and the Stonebridge. There was no response to either request until May, 2010 when Altus Group became aware of the situation, and supplied the information. The requests had specified a response date no later than September 11, 2009. The 2009 assessments were prepared in late 2009, using the income approach, valuation date July 1, 2009.

The Respondent concedes the letters of request were composed, but sees no proof they were sent or received. There is no evidence of a mail log, no receipt of registered or unregistered mail, and no evidence of public notice of delivery by way of newspaper or other media advertisement. The delivery of the request packages to the front desks of the hotels is problematic in that 1) the Applicant has no signed receipt of such deliveries, 2) given the high level of turnover of front desk staff it is questionable whether these important documents reached the owner, and 3) if they were delivered to the front desks, this was improper delivery as the registered address of the owners was in Calgary. The Respondent has also provided a list of changes in management staff at the head office of Dolemo during the months of June and July, 2009 which may have contributed to neglect or confusion of duties. The current controller commenced employment July 18, 2009 and her first encounter with a request for information was that for the 2010 assessment, which she completed and filed within the requested time frame. She also facilitated the provision of the July 2009 requested information when made aware in May 2010.

Findings:

1. The CARB finds it highly likely that the requests for information, both mailed and delivered to the front desks, found their way to the office of the Respondent. Once there, it is equally likely that they went astray due to significant staff turnover at the time of delivery.
2. Contrary to the suggestion that the Applicant had done something wrong in delivering duplicate requests to the front desks, the CARB views this more as a courtesy than controversy. While not delivery to the registered owner's address, it demonstrates effort on the part of the Applicant to ensure the owner received the request.

3. There is no requirement in the *Municipal Government Act (MGA)* that assessment notices, tax notices or requests for information need be sent by anything other than regular mail.
4. Unlike the delivery of assessment notices, there is no requirement for publication of notice and therefore presumption of service in regard to the mailing of requests for information.

Sub-issue 2: Was the requested information necessary for the preparation of the assessment?

Positions of the Parties:

Amongst other details, the assessor requested 3 important pieces of information:

1. Year end 2008 income and expense statements. For the assessment, the assessor would employ an average of the 2006, 2007, and 2008 income and expenses, equally weighted. The 2006 and 2007 information was already on file.
2. Overall occupancy rate for 2008 and the first half of 2009. Here, the assessor would have determined an average occupancy from rates for 2007, 2008, and H1 2009. The 2007 information was on file.
3. Rack rates and discounted rates to determine an average daily room rate as of July 1, 2009.

[It was not established precisely how the assessor filled the information vacuum in regard to 2008 income and expenses, and the overall occupancy rates, i.e. whether estimates were employed based on prior data, whether “typical” data were imported from those properties which had reported, or perhaps a blend of the two methods.]

The Respondent submitted there had been no demonstration of mischievous behavior by the owner; to the contrary, the owner had acted in good faith by supplying the requested information prior to filing the complaints. Neither had it been demonstrated that the requested information was necessary, given the historical information already in the hands of the assessor, the availability of occupancy information from HVS (Hotel Valuation Service), and other available information including responses from other hotels, all of which could be used to generate a mass appraisal valuation. Indeed, for the assessor to perform her duty, the required information was an average room rate, occupancy rate and the number of rooms.

Findings:

1. To prepare accurate and equitable hotel assessments, the information requested by the assessor is necessary. As mentioned, it was not clearly established, for instance, how the 2008 expense ratio of the subject had been determined. However the information gap was filled, it highlights the importance of a continuous information stream, especially for hotel assessments which employ site-specific averages. It is also worthwhile to consider the extreme: what would happen if all the hotels in the subjects' subset failed to provide information? Or did so for several years?
2. The Respondent's suggestion that all that was really required to generate the assessment was an average room rate, occupancy rate and the number of rooms, is simplistic, failing to account for revenue from non-room sources, and expenses.

CASE LAW

The parties presented precedential CARB decisions in support of their positions on *MGA* 295. The Applicant referred to a decision of the Calgary CARB, 1078/2010-P, a very brief decision where 295(4) was used to deny a complaint for failure to respond to a Request for Information. The Respondent introduced a 303 page legal brief containing numerous tribunal and court decisions, and focused on an un-numbered decision of the City of Lethbridge CARB dated June 17, 2010 by P. Petry that involved 16 properties represented by Altus on behalf of Transglobe Property Management Services. In that case, the 16 [multi-residential] properties represented 20% of this property type in Lethbridge, and the requests for information were claimed not to have been received, though other mail reached Transglobe before and after the mailing of the requests. The decision gave the benefit of the doubt to Transglobe due to lack of definitive evidence whether the requests had been received. Petry also found that the assessor, missing responses from one party holding 20% of a particular property type, ought to have made a follow-up effort. Prominent mention of the *Boardwalk* case was made.

Also contained in the Respondent's legal brief is *Boardwalk REIT LLP. v. Edmonton (City)* [2008] ABCA No. 220 authored by Justice J.A. Côté. This is an exhaustive decision to which many pages could be devoted in analysis of its consequences for *MGA* s 295, an assessor's duty of fairness, the meaning of "necessary", and a host of other topics. Although the facts here are substantially different in that no information was provided in response to the request for information, or more properly, not provided until well after the assessment had been prepared, there are significant points from *Boardwalk* that have caused tribunals to tread very delicately in s 295 matters.

The Boardwalk decision restated the traditional *Municipal Government Board (MGB)* tests for application of 295(4), which evolved from *Amoco Canada* 2000 ABCA 252:

Conditions to Apply s 295(4)

Since the consequences of non-compliance with section 295 of the Act are quite onerous, the MGB has developed a set of guidelines with the assistance of Court direction to consider in determining whether subsection (4) can properly be invoked. The guidelines that have evolved through many previous decisions on this matter address the following questions.

1. Was the request for information made pursuant to section 295(1)?
2. Was the assessed party given proper notice of the request?
3. Was the request clear and did it identify the consequences of non-compliance?
4. Was the information requested necessary to prepare the assessment?
5. Did the assessed person comply with the request?

In addition, the case of ***Alberta (Minister of Municipal Affairs) v. Municipal Government Board*** further refined these guidelines to include whether the request was reasonable having regard for all of the circumstances, such as past practice, information available to the owner and information already available to the assessor.

* * * *

An examination of the assessor's letter in this case shows that the first three tests, dealing with technical requirements, would appear to have been met, and met with ease. Test 4, that of necessity, has been decided: hotel properties are horses of a different colour in comparison to the vast bulk of commercial properties and the methods used to prepare assessments. The differences are so striking that the hotel sector is accorded its own Valuation Guide. In particular, annual income and expenses, or rather their 3 year averages, play a site-specific role in assessment. Test 5, compliance, has been answered in the negative: although received eventually, the information was produced long after it was needed. As to past practice, requests for information are an annual chore, referred to as ARFIs, and surely come as no surprise to any owner of commercial property. Information available to the owner and information already available to the assessor – these tests seem to answer themselves in obvious fashion in the current situation: by mid year 2009, the owner would certainly have 2008 financial results and occupancy figures, and the assessor would not, unless the owner had acted to supply this information unbidden.

On first inspection, the assessor has done everything correctly, and even gone further than required in delivering duplicate requests for information to the front desks of the subjects.

As to the *Boardwalk* discussion of alternate means an assessor might acquire information, especially *MGA* s 294 backed up by s 296, it seems apparent that s 295 is appropriate for hotel properties in general: the gathering of information necessary to prepare an assessment.

Boardwalk devotes considerable attention to the topic of fairness, noting at paragraph 156: *The oldest rule of administrative law is to give a citizen notice of an alleged transgression or failing, before penalizing him or her or removing his or her office, property or liberty because of it.* And again at paragraph 178: *Besides, economy or efficiency does not trump everything in administrative law. Simple fairness entitles a citizen to speak to a government decision maker before that entity abrogates all of his or her rights.*

Certainly, here the citizen is afforded a forum, and a forum arranged at considerable expense of time and resources, in the shape of this jurisdictional hearing before any right of complaint is abrogated.

However, when one re-examines “whether the request was reasonable having regard for all of the circumstances, such as past practice”, the strong language of *Boardwalk* suggests the door should open to the corollary: whether the response was reasonable having regard for all of the circumstances, such as past practice. Where information has been made available in the past, but is absent in the present, it should perhaps be seen as an indication that the normal ARFI communication process has gone off the rails, a dropped call in more modern allusion. The Petry/Lethbridge decision concluded that the assessor should have made an extra effort, a phone call, to ensure ARFI returns from one owner holding 20% of a particular type of property in the municipality. Even to the statistically challenged, including this panel, an information gap covering 20% of an inventory would seem significant to the point that the assessments of the whole lot could be impacted, and even more so if that owner clustered his holdings at the high end or the low end of the market. Similarly, the absence of information from any one hotel might yield an inequitable result given the greater site-specific nature of hotel assessment. In such a case as well, it behooves the assessor to weigh the cost of a phone call or email against the possible benefits of more information, a more accurate assessment, and the avoidance of a 295 jurisdictional hearing. As Justice Côté headlined in *Boardwalk*, the “Aim of the Penalty is Compliance, not Punishment”.

In consideration of the above, the CARB allows the complaints to proceed to a merit hearing.

Dated at the City of Grande Prairie in the Province of Alberta, this 13th day of October, 2010.

J. Noonan

APPENDIX "A"

DOCUMENTS RECEIVED AND CONSIDERED BY THE MGB:

NO.	ITEM
1. Exhibit 1A Hrg B	City brief
2. Exhibit 2R Hrg. B	Altus response
3. Exhibit 3R	Altus legal brief
4. Exhibit 1A Hrg C	City brief
5. Exhibit 2R Hrg C	Altus response

APPENDIX 'B'

ORAL REPRESENTATIONS

PERSON APPEARING	CAPACITY
1. B. Ryan	Sr. Tax Consultant, Altus Group Ltd.
2. L. Jones	Assessor, City of Grande Prairie
3. S. Smith	Assessor, City of Grande Prairie