Edmonton Composite Assessment Review Board

Citation: Colliers International Realty Advisors Inc. v The City of Edmonton, 2012 ECARB 2359

Assessment Roll Number: 3009958
Municipal Address: 10245 102 Street NW
Assessment Year: 2012
Assessment Type: Annual New

Between:

The City of Edmonton, Assessment and Taxation Branch

Applicant

and

Colliers International Realty Advisors Inc.

Respondent

COSTS DECISION OF
Warren Garten, Presiding Officer
Lillian Lundgren, Board Member
Mary Sheldon, Board Member

Background

[1] The parties appeared before the Board on August 20, 2012 ("the merit hearing") with regard to the 2012 assessment of the subject property. During the course of that hearing, the Applicant requested that the Board dismiss the complaint filed by the Respondent. The Applicant argued that there was a lack of evidence in the Respondent's disclosure to satisfy the initial burden of proof. After a recess during that hearing, the Board issued a decision which dismissed the complaint filed by the Respondent and confirmed the 2012 assessment of the subject property. That decision to dismiss the Respondent's complaint was followed by a written order dated September 4, 2012 stating that the Respondent had failed to meet the initial burden of proof. The Applicant filed a written submission on August 22, 2012 applying for costs against the Respondent pursuant to section 468.1 of the *Municipal Government Act*, RSA 2000, c M-26 (MGA) and section 52(2) of the *Matters Relating to Assessment Complainants Regulation* A.R.310/2009 (MRAC).

Preliminary Matters

[2] The parties to the hearing did not indicate any objection to the composition of the Board. The members of the Board did not indicate any conflict of interest on this file.

[3] For ease of reference, the City of Edmonton, the Respondent in the merit hearing, will be referred to as the "Applicant" in this decision. Colliers International Realty Advisors Inc., agent for the Complainant in the merit hearing, will be referred to as the "Respondent" in this decision.

Issues

[4] The following issue was the basis of this cost hearing:

1. Should costs be awarded against the Respondent under Part 2 Schedule 3 MRAC for causing a hearing to proceed that had no reasonable chance of success, and if so, in what amount?

Legislation

[5] Section 468.1 of the MGA reads:

> 468.1 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.

[6] 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.

[7] 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

[8] The Applicant provided the Board with an information package and legal brief (C-1) as well as a copy of Schedule 3 MRAC (C-2).

[9] The Applicant commented that the Board's jurisdiction to award costs was contained in s. 468.1 MGA. 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 Part 2 of Schedule 3 MRAC. The Applicant noted that Part 1 of Schedule 3 MRAC did not apply in this case since it referred to categories of misbehavior.

[10] The Applicant noted that pursuant to Part 2 of Schedule 3 MRAC, if a composite assessment review 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 Part 3, against the party that unreasonably caused the hearing to proceed.

[11] The Applicant argued that the case presented by the Respondent in the merit hearing had no reasonable chance of success. In that regard, the Applicant directed the Board to the submission and disclosure of the Respondent in that merit hearing (C-1, pages 23-36). The Applicant argued that the Respondent's submission and disclosure contained only facts and no evidence to support the allegation that the assessment of the subject was incorrect. In particular, the Applicant pointed out that the Respondent had requested that a capitalization rate of 7.5% be used to determine the value of the subject rather than the 6.5% used by the municipality in preparing the assessment. The Applicant alleged that the Respondent had not provided evidence to support this request.

[12] The Applicant also noted that the Respondent had been informed by the Applicant before the commencement of the merit hearing that, should the merit hearing proceed, there would be an application made to dismiss the complaint based on a lack of evidence. The Applicant also noted that the Respondent had been informed that there would be an application for costs should the merit hearing proceed.

[13] The Applicant also drew the attention of the Board to the decision of the Board in the merit hearing (C-1, pages 19-22). The Applicant noted that the Board in that merit hearing had dismissed the Respondent's complaint on the basis that the disclosure submitted by the Respondent did not contain evidence to satisfy the initial burden of proof.

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

[15] The Applicant reviewed the provisions of s 52(2) MRAC and noted that a Board, in considering an award of costs, could consider whether the circumstances amounted to an abuse of the complaint process or whether the party applying for costs incurred additional or unnecessary expenses as a result of the abuse of the complaint process.

[16] With respect to s 52(2) MRAC, the Applicant noted that the language of the section was permissive, not mandatory. The Applicant argued that the Board could, in its discretion, consider as an abuse of the complaint process the fact that a party caused a matter that did not have a reasonable chance of success to proceed to a merit hearing. However, the Applicant argued it was not necessary for the Board to consider the factors in s 52(2) MRAC and that it was sufficient for an award of costs under Part 2 of Schedule 3 for the Board to determine that a party caused a matter that did not have a reasonable chance of success to proceed to a merit hearing. In the opinion of the Applicant, a finding by a Board of misconduct of a party under Part 1 of Schedule 3 would be more reflective of a finding of an abuse of the complaint process.

[17] In response to the Respondent's argument that there was insufficient market data or evidence, in particular sales of parkades, to support a request for a different capitalization rate for the subject, the Applicant noted that there were many other sources of information available to the Respondent to support a capitalization rate change request (C-1, page 2). For example, the Applicant suggested that the Respondent could have produced third party reports showing trending for capitalization rates year-to-year. The Applicant noted as well that, in the opinion of the Applicant, the onus or required burden of proof cannot be shifted to the defending party by an allegation without evidence to back up that allegation.

[18] With respect to the Respondent's argument that it would be inequitable for the Board to award costs against this Respondent for causing a matter to proceed that did not have a reasonable chance of success when other parties who have behaved in a similar fashion have

escaped a costs application by the municipality, the Applicant argued that there was no requirement in the legislation that costs applications be made in an equitable fashion.

[19] The Applicant also noted that the circumstances in this case were worse than the circumstances in the cost decisions presented as argument by the Respondent. In one of those cases, a party had not filed disclosure nor appeared at the merit hearing. In this case, the Applicant submitted that the Respondent had caused a hearing with no merit to proceed and that this behavior was more egregious and more wasteful of time and resources.

[20] With respect to the amount of costs to be imposed, the Applicant noted that since the assessment of the subject was just under 15 million dollars, the amount should be taken from the second column of Schedule 3. The Applicant formally requested the highest possible amounts under this column under Part 2. This would amount to $5,500 consisting of $4,000 for preparation and $1,500 for a half day hearing. However, the Applicant stated that it left the decision of the appropriate size of the cost award for the determination of the Board.

Position of the Respondent

[21] The Respondent provided the Board with a package of information and argument (R-1) to support the position that an award of costs was not appropriate in this case.

[22] The Respondent noted the "abuse of the complaint process" provision contained in s. 52(2) MRAC. The Respondent submitted to the Board that there had been no bad faith or malice in presenting its information and argument at the merit hearing and that therefore there had not been an abuse of the complaint process pursuant to this section. On the contrary, the Respondent argued that it had submitted a legitimate complaint and had submitted disclosure and explained its submission at the merit hearing and had a reasonable belief that the case would be successful.

[23] The Respondent stated that its position was that there were no sales in the market place of parkades comparable to the subject which would support an increase in the subject assessment over the previous year. In the merit hearing, the Respondent had contended that a significant year-over-year increase in the subject assessment was unwarranted since there had been little change in the overall market.

[24] In addition, the Respondent stated that the " rules of Court do not apply to Tribunal hearings and that there is no onus to PROVE anything, as it is a test of "a balance of probabilities" on which the onus is on a party to provide sufficiently convincing evidence to support a position." (R-1, page 4)

[25] The Respondent presented copies of Board orders in which applications for costs had been made due to an abuse of the complaint process (R-1, pages 5-6).

[26] The Respondent stated that Board Order 1914/2011P involved a scenario very similar to the within application, in that the application was based on the case having no reasonable chance of success. In that case the Board refused to award costs and the Respondent argued that this decision showed that a taxpayer had the right to question the assessment of a subject based on a significant and inconsistent increase in the assessment year-over-year.

[27] The Respondent also pointed the Board to Board Order CO0001/2012P. In that case, the Complainant had not provided any disclosure and had not appeared at the merit hearing. Costs were awarded in that case on the basis that the Complainant should have known that the case did

not have a reasonable chance of success. The Respondent submitted that the conduct of the complainant in that case was more egregious than the conduct of the Respondent in the within case,

[28] The Respondent provided a second line of argument to the Board and submitted that the Respondent was being treated inequitably. To support this argument, the Respondent provided details of seven Board orders. In each of these seven decisions, a Board had found that the Complainant had not met onus or the initial burden of proof. However, in each of these cases, the Applicant had not applied for an award of costs. The Respondent argued that this was inequitable treatment and that all taxpayers should be treated equally.

[29] The Respondent argued that a cost award in this situation would have a "chilling" effect on the rights of taxpayers to complain about increased assessments, especially when the arguments are made in good faith (R-1, page 4).

[30] The Respondent submitted that the amount of costs requested by the Applicant was excessive. The Respondent argued that it was unreasonable for a Board to award $5,500 costs for photocopying, a "generic" brief presented by the Applicant at the merit hearing and for a lawyer to attend a twenty minute merit hearing.

Decision

The decision of the Board is to grant the application for costs. The amount of $1,500 is to be paid by the Respondent to this application no later than January 31, 2013.

Reasons for the Decision

[31] The Board reviewed the Respondent's disclosure submitted at the merit hearing (C-1, pages 23-36). As well, the Board listened to the audio recording of that merit hearing. After this review, the Board is of the opinion that there was no information in the Respondent's disclosure package submitted at the merit hearing that amounted to evidence. The Board concludes that the only information presented by the Respondent in its disclosure and at the merit hearing amounted to facts. There was no evidence to support the allegation that the 2012 assessment of the subject was excessive, and in particular there was no evidence to support the allegation that the capitalization rate chosen by the municipality in calculating the assessment was incorrect.

[32] The Board notes the submission of the Respondent that there was no market data in the form of parking structure sales available to support the allegations and that market data would be required to derive a capitalization rate. The Board agrees with the submission of the Applicant that there were alternate methods open to the Respondent to determine whether or not the assessment was correct or incorrect or whether a capitalization rate was appropriate. However, the Respondent relied on the allegation that the assessment and the capitalization rate were incorrect and did not supply any evidence in support.

[33] Jurisprudence has shown that it is the responsibility of a complainant in a merit hearing to provide sufficient evidence that an assessment is incorrect to satisfy an initial burden of proof and shift the onus to the defending party. The Board agrees with the submission of the Applicant that the bar of that initial burden of proof may be low, but there must be some evidence to shift

the onus. The Board notes the decision of the Board in the merit hearing that the complaint was dismissed on the basis that the Complainant did not meet the initial burden of proof.

[34] The issue in this cost application is whether the case presented at the merit hearing by the Respondent had a reasonable chance of success. In the view of this Board, the Respondent's case did not have a reasonable chance of success as there was no evidence at all presented by the Respondent to show that the assessment or the capitalization rate was incorrect. Further, in the view of this Board, a year-over-year increase in an assessment is a fact and not evidence of an incorrect assessment. Similarly, in the view of this Board, a change in the capitalization rate used in the valuation of a property is a fact and not evidence of an incorrect assessment.

[35] The Board reviewed s 52(2) MRAC and notes the permissive language used. A Board may find in the circumstances that there was an abuse of the complaint process. In this case, this Board does not find an abuse of the complaint process.

[36] The Board is not persuaded by the submission of the Respondent that it would be inequitable to award costs in this case where there are other similar situations where the Applicant has not applied for costs. The Board notes that there is no requirement in the legislation that applications for costs must be applied equitably.

[37] With respect to the amount of costs to be awarded, the Board notes that the Applicant has asked for the full amount of $5,500 allowed in the regulations. The Board's decision to award $1,500 in costs is not meant to represent actual costs or expenses incurred by the Applicant. The Board was not provided with specific details of these amounts. In considering the circumstances in this case, the Board has determined that an award of $1,500 costs is appropriate as a penalty for causing a merit hearing to proceed that had no reasonable chance of success. That amount will forthwith be payable by the Respondent no later than January 31, 2013.

Heard commencing November 30, 2012.
Dated this 6 day of December, 2012, at the City of Edmonton, Alberta.

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Warren Garten, Presiding Officer

Appearances:

Cameron Ashmore
Brennen Tipton
for the Applicant

Stephen Cook
Greg Jobagy
for the Respondent

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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