Edmonton Composite Assessment Review Board

Citation: Altus Group v The City of Edmonton, 2013 ECARB 00660

Assessment Roll Number: 9984373
Municipal Address: 1704 88 STREET SW
Assessment Year: 2013
Assessment Type: Annual New

Between:

Altus Group

Complainant

and

The City of Edmonton, Assessment and Taxation Branch

Respondent

DECISION OF
Petra Hagemann, Presiding Officer
Martha Miller, Board Member
Mary Sheldon, Board Member

Procedural Matters

[1] Upon questioning by the Presiding Officer, the parties did not object to the composition of the Board. In addition, the Board Members indicated no bias with respect to this file.

[2] All witnesses were either sworn in or affirmed according to each person's preference.

Background

[3] The subject property, built between 2003 and 2006 and known as Summerside Residents Association (RA), is a Community Recreational Facility located at 1704-88 Street, SW, in the Summerside subdivision in the City of Edmonton. The land size is 1,803,386 sq ft or 41.4 acres. The property encompasses a 29.72 acre lake, parkland, a clubhouse, boathouse, tennis courts, basketball court, children's playground and a beach. The clubhouse has a gross building area of 5,932 square feet (sq ft). The 2013 assessment of the subject is $6,811,500, and a 0% tax exemption was applied to it by the City.

Issue

[4] Several issues were outlined on the complaint form, however the primary issue is:

Should the subject be exempt from taxation?

The Complainant argued that the subject property is assessed in contravention of Section 362 of the *Municipal Government Act* and the *Community Organization Property Tax Exemption Regulation.*

Legislation

[5] **The *Municipal Government Act*, RSA 2000, c M-26 (MGA), reads:**

Exemptions for Government, churches and other bodies

s. 362(1) The following are exempt from taxation under this Division:

(n) property that...

meets the qualifications and conditions in the regulations and any other property that is described and that meets the qualifications and conditions in the regulations.

...

Exemptions granted by bylaw

364(1) A council may by bylaw exempt from taxation under this Division property held by a non-profit organization.

(1.1) A council may by bylaw exempt from taxation under this Division machinery and equipment used for manufacturing or processing.

(2)Property is exempt under this section to any extent the council considers appropriate.

...

Regulations

s. 370 The Minister may make regulations

...

(c) describing other property that is exempt from taxation pursuant to section 362(1)(n), and respecting the qualifications and conditions required for the purposes of section 362(1)(n);

[6] **The *Community Organization Property Tax Exemption Regulation*, Alta Reg 281/1998 (COPTER), reads:**

Holding Property

s. 5 When section 362(1)(n)(i) to (v) of the Act or Part 3 of this Regulation requires property to be held by a non-profit organization, a society as defined in the *Agricultural Societies Act* or a community association for the property to be exempt from taxation, the property is not exempt unless

(a) the organization, society or association is the owner of the property and the property is not subject to a lease, licence or permit, or

(b) the organization, society or association holds the property under a lease, licence or permit.

...

Meaning of Restricted

s. 7(1) In this Regulation, a reference to the use of property being restricted means, subject to subsections (2) and (3), that individuals are restricted from using the property on any basis, including a restriction based on

(a) race, culture, ethnic origin or religious belief,

(b) the ownership of property,

(c) the requirement to pay fees of any kind, other than minor entrance or service fees, or

(d) the requirement to become a member of an organization.

(2) The requirement to become a member of an organization does not make the use of the property restricted so long as

(a) membership in the organization is not restricted on any basis, other than the requirement to fill out an application and pay a minor membership fee, and

(b) membership occurs within a short period of time after any application or minor fee requirement is satisfied.

(3) Not permitting an individual to use a property for safety or liability reasons or because the individual's use of the property would contravene a law does not make the use of the property restricted.

...

Definitions

s. 13 In this Part,

...

(e.1) "residents association" means a non-profit organization that requires membership for residential property owners in a specific development area, that secures its membership fees by a caveat or encumbrance on each residential property title and that is established for the purpose of

(i) managing and maintaining the common property, facilities and amenities of the development area for the benefit of the residents of the development area,

(ii) enhancing the quality of life for residents of the development area or enhancing the programs, public facilities or services provided to the residents of the development area, or

(iii) providing non-profit sporting, educational, social, recreational or other activities to the residents of the development area;

Exemption for other property

s. 14 This Part describes property that is exempt from taxation under section 362(1)(n) of the Act that is not exempt under section 362(1)(n)(i) to (v) of the Act.

Property of residents association

s. 14.1(1) Property that is owned and held by and used in connection with a residents association is exempt from taxation.

(2) Despite subsection (1), the following property owned and held by and used in connection with a residents association is not exempt from taxation under section 362(1)(n) of the Act:

(a) property to the extent that it is used in the operation of a professional sports franchise;

(b) property if, for more than 40% of the time that the property is in use, the majority of those participating in the activities held on the property are 18 years of age or older;

(c) property if, for more than 30% of the time that the property is in use, the use of the property is restricted within the meaning of section 7 as modified by subsection (3).

(3) For the purposes of subsection (2)(c), limiting the participation in activities held on a property to persons of a certain age does not make the use of the property restricted.

Position of the Complainant

[7] The Complainant requested that the Board grant 100% tax exemption to the Summerside RA. In support of this request, the Complainant submitted the following documents: C-1(778 pages), a brief outlining issues, evidence and testimony; C-2, revised park and facility usage chart; C-3, map of subject lands within Summerside subdivision; and C-4 (104 pages), rebuttal document.

[8] The Complainant gave the Board a brief history of how in recent years RAs have been found to be exempt from taxation under 362(1)(n)(ii) of the MGA (C-1, pg 9-11). In past appeals the MGB has accepted that RAs are similar in nature to Community Associations and therefore to exempt these organizations is in the spirit and intent of the MGA. MGB 076/10 (C-1, pg 9) explains the purpose of these organizations and this analogy appears to have shaped the basis of the changes to COPTER. Subsequent to the changes to s. 13 and s. 14 of COPTER, the City of Calgary passed Bylaw 5M2013 in Feb 2013 to exempt RAs from property tax. The Complainant maintained that by not following Calgary's lead and explicitly exempting Residents Associations via bylaw, the City of Edmonton's interpretation of the legislation goes against many of the basic principles of statutory interpretation.

[9] During the hearing the Complainant withdrew the issue that the subject should be exempt from taxation pursuant to s. 362(1)(n)(ii) of the MGA (C-1, pages 17-20). The Complainant therefore focused his argument on the requirements outlined in COPTER.

[10] The Complainant informed the Board that Summerside RA is a not for profit company created by Carma[1] (now Brookfield Residential), the developer of the Summerside lands. The ownership of the property was transferred from Brookfield to Summerside RA March 10, 2011 (C-1, pg 75). The residents association manages the Summerside lands, amenities and programs and charges an annual fee to each member. Summerside RA (C-1, pg 75) is governed by a 9 member board of directors. Six of the directors are members of the Summerside RA and three directors, including the chair, are employees of Brookfield. The six member directors formulate policy, rules & regulations and hire staff to manage the lands and programs. Louise Challes, witness for the Complainant, explained that Brookfield has a vested interest in the successful

[1] Carma has changed its name to Brookfield. Both names are used in this decision depending on the context.

financial management of the association as it has loaned the organization in excess of $3 million dollars to build its amenities and operate the programs. Furthermore, it is a vital asset in marketing the remainder of Brookfield properties in Summerside. The Complainant referred the Board to the Summerside Residents Association Brochure, where it states:

> On or before the later of the date on which Carma has sold its last lands in the Summerside Lands, or the date upon which the association has repaid any loans owing to Carma, Carma intends to transfer to the Association the overall management of the Association and the operation of the Summerside Amenities (C-1, p 373).

The Brochure goes on to say that Carma will give financial support, operate, maintain and manage the Association until the Effective Date (transfer date). This is further outlined in the Articles of Association of Summerside Residents Association (C-1, pg 404).

[11] The Complainant argued that to be "exempt", the subject must and does meet the following criteria as set out in COPTER, (C-1, pg 6).

i. The subject property is owned, held and used in connection with a residents association.
ii. The subject is not used by a professional sports franchise.
iii. The majority of those using the facilities are under the age of 18 for at least 60% of the time.
iv. Membership is not limited by ownership of property.
v. The fees are not membership fees, but in any case are minor.
vi. There is no requirement within the development area for a member to become a member of another organization.
vii. There is no restriction placed on usage based on race, culture, ethnic origin or religious belief.

[12] (i) The Complainant referred the Board to COPTER s. 13(e.1) which states that a residents association is a non-profit organization established for the benefit of its members to enhance the quality of their lives by providing sporting, educational, social, recreational and other activities as well as maintaining the common areas of the association. Summerside Residents Association qualifies under this section of COPTER as is evidenced by the Lake Summerside leaflet (C-1, pg 360-367), the 2012 Program Guide (C-1, pg 119-130) and the original Summerside Residents Association Brochure, June 2000 (C-1, pg 368-493).

[13] (ii) The Complainant informed the Board that although the Summerside RA provides sports facilities for its members, and allows occasional usage by area schools, it is not used in the operation of a professional sports franchise

[14] (iii) The Complainant provided the Board with a revised 2012 and 2013 (Jan–Sept) Park Facility Usage Chart (C-2) indicating monthly usage by adults and children (members and guests), as well as the number of outdoor bookings and programs offered. The Complainant submitted that the proper interpretation of s. 14.1(2)(b) involved a calculation both of percentage of time and majority of participants based on age.

[15] He further submitted that the number of children under 18 (including members and guests) amounted to 46,902 which represented 62% of the 75,614 total numbers of people who made use of the Summerside facilities throughout the year. In the opinion of the Complainant, this is far in excess of the requirement of the above section of COPTER. This did not include

the 128 hall rentals which were mostly for children's birthday parties with an average 30 – 50 people per event. This also did not include the number of children and adults from the four school bookings during 2012.

[16] The Complainant discussed his understanding of s. 362(1)(n) of the MGA and s.14.1(1) of COPTER, which state that residents associations are exempt. However, s. 14.1(2)(c) prohibits the exemption if any of the restrictions as outlined in s. 7 apply.

[17] (iv) The Complainant advised the Board that membership in the Summerside RA is not restricted by ownership of property as per s. 7(1)(b) of COPTER. Membership includes owners of single- and multi-family homes, as well as some tenants and commercial property owners. Ownership of property in a specific development area is also mandated by s. 13(e.1) of COPTER (see paras 22-25).

[18] (v) In respect of s. 7(1)(c), the Complainant explained that an annual fee is allocated to each property by way of an encumbrance on title. This fee varies from approximately $400 to $800 depending on the location of the property (lake front, lake access, other) and cannot be increased beyond the yearly Consumer Price Index (CPI). This is outlined in schedule E of the Summerside Management Agreement between Carma and the Summerside RA (C-1, pg 415). The Complainant suggested that this fee should be considered "minor" when compared to 2011 City of Edmonton annual family recreation passes which ranged between $1,167 and $1,782 (C-1, pg 165). In addition, when one considers that if each member of a 4 member family used the facility only once per week, the fee would be less than $4.00 per day of usage. The Complainant submitted this was certainly still minor.

[19] (vi) The Complainant referred to s. 7(1)(d) of COPTER, dealing with restrictions based on "the requirement to become a member of an organization". The Complainant submitted that the correct way to interpret this section is to consider whether use is restricted *between* members that live within the development area. Although membership is reserved exclusively for owners and tenants who live in the Summerside development area, guests may attend with a member. Since the definition of "residents association" in s. 13(e.1) of COPTER states that membership in the RA is a requirement, the restriction in s. 7(1)(d) cannot logically have been intended to be based on RA membership. Therefore, in the Complainant's view, there is no restriction based on membership since members of the RA and guests do not have to be members of an additional organization in order to use the facility.

[20] (vii) The Complainant confirmed that the Summerside Residents Association does not restrict usage of its facilities based on race, culture, ethnic origin or religious belief (s. 7(1)(a)).

[21] The Complainant also noted that the only restrictions on use of the property and amenities of the RA were based on safety and hours of operation. Further safety restrictions address the use of motor boats on the lake, the consumption of alcohol, and the presence of animals on site (Rules and Regulations, C-1, pg 365-366).

[22] The Complainant argued that changes to COPTER were intended to give RAs the same treatment as Community Associations. COPTER defines RAs in s. 13(e.1) and s. 14.1 specifically exempts RAs. Section 14.1(2) limits the exemption and goes on to preclude exemption based on the restrictions outlined in s. 7. The Complainant maintains that these restrictions refer to the *community* the residents association represents. In the Complainant's view, this interpretation is supported by the letter from Steve White, Executive Director, Assessment Services Branch, Alberta Municipal Affairs, which states:

> With respect to your concern related to the application of section 7 of the regulation, the meaning of restricted should be interpreted and applied within the definition of "residents association", as defined in section 13(e.1). In other words, it is our view that a residents association would only be considered as restricting use if they do not permit use to all residents within the specific development area (C-1, pg 73).

[23] The Complainant also contends that the City's interpretation goes against many of the basic principles of statutory interpretation. Further, the Supreme Court of Canada provided guidance to the interpretation of tax legislation in *Quebec (Communaute urbaine) v Corp. Notre-Dame de Bon-Secours,* [1994] S.C.J. No. 78 at para 25:

a. The interpretation of tax legislation should follow the ordinary rules of interpretation;
b. A legislative provision should be given a strict or liberal interpretation depending on the purpose underlying it, and that purpose must be identified in light of the context of the statute, its objective and the legislative intent: this is the teleological approach;
c. The teleological approach will favour the taxpayer or the tax department depending solely on the legislative provision in question, and not on the existence of predetermined presumptions;
d. Substance should be given precedence over form to the extent that this is consistent with the wording and objective of the statue;
e. Only a reasonable doubt, not resolved by the ordinary rules of interpretation, will be settled by recourse to the residual presumption in favour of the taxpayer (C-1, pg 12-13).

[24] The Complainant, in referring to the presumption of coherence, noted that it is not likely that legislation would contain contradictions or inconsistencies. According to *Sullivan and Driedger on the Construction of Statutes*, 4th ed. p. 262:

> The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something towards accomplishing the intended goal (C-1, pg 640).

[25] COPTER 13(e.1) defines "residents associations" as requiring membership for property owners in a specific development area and securing its fees by a caveat. The Complainant suggested that, in consideration of the principles of statutory interpretation, it would be absurd to interpret s. 7 as prohibiting an exemption based on these very factors. The Complainant therefore interprets s. 7 as addressing whether use is restricted between members that live within the development area.

[26] In rebuttal the Complainant challenged the Respondent's statement that one of the reasons the 2012 appeal had been denied was that the subject property was not "held by" the Summerside Residents Association and therefore did not qualify for tax exempt status under s. 362(1)(n)(i) to (v) of the MGA (C-4, pg 4-5). The Complainant indicated that the property has been owned by the Summerside Residents Association since March 2011 (C-1, pg 75). Fee simple ownership in and of itself is conclusive evidence that the property is "held by" the RA. The Complainant referred the Board to s. 5 of COPTER, which explains that the property is not exempt unless "the organization, society or association is the owner of the property and the property is not subject to a lease, license or permit". The Complainant discussed *Cypress (County) v. Alberta (Municipal Government Board)* 2000 ABQB 897, in which the Court ruled

that the better interpretation of the word "held" should be the broad one meaning either owned or physically controlled. Further, in *The Good Samaritan Society v. Town of Pincher Creek* MGB 090/08, the MGB found that "held by" has a very specific meaning and includes ownership.

[27] With respect to the ownership of the property and the "held by" requirement in s. 14.1(2) of COPTER, the Complainant explained that since there is a significant shortfall in the funding of Summerside RA until the project nears completion, there will necessarily be a very close relationship between the Association and Brookfield. Without the direct financial and management support of Brookfield, the Summerside RA would not be viable and would be unable to maintain its amenities. It was also noted that Brookfield is not compensated for the management support that it provides to the RA except for their direct costs and out of pocket expenses.

[28] In conclusion, the Complainant stated that the property and amenities are owned and held by Summerside Residents Association, meet all the criteria as set out in s. 362(1)(n) of the MGA and ss. 5, 7, 13(e.1), and 14.1 of COPTER. As such, the property qualifies for tax exempt status.

[29] The Complainant requested the Board change the exemption from 0% to 100%.

Position of the Respondent

[30] The Respondent recommended the exemption percentage for the subject property remain at 0%. The Summerside Residents Association had applied for exempt tax status under COPTER, however the Respondent denied the exemption based on:

a) Section 14.1(1) – the property is not "held by" the RA; and

b) The use of the property is restricted as per s. 14.1(2)(c) and s. 7(1) (b) and (c).

[31] The Respondent submitted their brief in defense of the 0% tax exemption status (R-1, 323 pages).

[32] The Respondent referenced "Non-Profit Organizations" in the Exemption Brief (R-1, pg 114-125). Under COPTER one of the primary conditions is that a property must be "held by" a non-profit organization. Section 5(a) also states that the property is not exempt unless the organization (i.e. Summerside RA) is the owner and the property is not subject to a lease, license or permit.

[33] The Respondent reminded the Board of the restrictions placed upon the Summerside RA by the developer:

> Carma shall construct, develop and maintain on portions of the Summerside Lands, such improvements as Carma in its sole discretion shall determine and…Carma shall manage and operate the Association and the Summerside Amenities until such date (the "Effective Date") which is the later of:
>
> a) the date upon which Carma has sold its last lands within the Summerside Lands; or
>
> b) the date upon which all monies owed to Carma by the Association have been fully repaid to Carma (C-1, pg 379).

The Respondent further noted that Brookfield will prepare or approve the budget and hold the property through the appointment of directors. These restrictions, in the Respondent's view, suggest that the property is held by Brookfield and not the RA.

[34] The Respondent also addressed several Powers of Attorney granted to Carma Ltd. by Summerside RA (R-1, pg 64-102). These currently grant Brookfield the power to "exclusively effect dispositions of the land by sale, transfer, lease, mortgage or encumbrance" (R-1, pg 66). This, in the opinion of the Respondent, is evidence that Summerside is strictly controlled and "held by" Brookfield.

[35] The Respondent referred the Board to *Cypress (County) v. Alberta (Municipal Government Board)*, 2000 ABQB 807. The issue here was whether a ski hill was exempt from assessment because the Crown "held" the property as a provincial park pursuant to s. 298(1)(k) of the MGA. The Court concluded that "held by" requires ownership and physical control. The Court also concluded on the facts of this case that the Crown had effectively leased and/or licensed the subject property, and thus did not qualify for the exemption under s. 298(1)(k) (R-1, pg 243).

[36] The Respondent also referred to *Pincher Creek (Town) v. Alberta (Municipal Government Board,)* 2007 ABCA 360 (R-1, pg 249-253). The issue in this case was whether the property, an assisted seniors' living care facility, was exempt from taxation because it was "held by" the health authority. The Court found that the property could be considered "held by" the health authority under s. 362(1)(g.1) of the MGA only if they could show they physically controlled it. The requisite physical control could not be established, the Queen's Bench decision was upheld, and the matter was remitted to the MGB for re-hearing.

[37] The Respondent also argued that the Brochure, Management Agreement and Articles of Association were further evidence that Summerside lacked the physical control required under COPTER to establish the property is "held by" the RA. These agreements provide, among other things, that Brookfield will have the overall management and direction of the RA until the development is complete or Summerside's debt is paid in full.

[38] The Respondent discussed 2012 ECARB 1304 (R-1, pg 213), in which the Edmonton Composite Assessment Review Board (CARB) denied Summerside's application for exemption, finding it did not meet the requirement of s. 14.1(2)(b) of COPTER. The Board in 2012 found insufficient evidence had been provided by the Complainant to demonstrate that the majority of the users of the amenities were under 18 years of age at least 60% of the time.

[39] The Respondent noted that the Board in 2012 further denied exemption based on s. 7(1)(b) of COPTER, finding a restriction on the basis of ownership of property. The Respondent addressed the Summerside Residents Brochure (C-1, pg 280) and Articles of Association (C-1, pg 299). In the Respondent's view, these show that membership is contingent on residency and ownership in the Summerside development area. This, in the Respondent's opinion, is evidence that a restriction based on "ownership" has been made out, and the property therefore should not be exempt from taxation.

[40] The Respondent further suggested that the subject is restricted based on s. 7(1)(d) of COPTER. The Respondent argued that use of the property was restricted in that one must be a "member of an organization" to use the facilities (i.e. a member of Summerside RA). Many references are found in the Summerside RA brochure, Operations and Procedures Manual, Articles of Association, as well as their website and posted signs that the Summerside properties

and amenities are for the exclusive use of their members and guests and controlled gate access precludes non-residents from use of the facilities.

[41] Additionally, the Respondent argued the fees for 2012 had not been specified, and in any event were not minor as required by s. 7(1)(c) of COPTER. The Respondent also argued that the Complainant's evidence respecting the numbers and ages of users was weak, and did not meet the requirements of s. 14.1(2)(b) of COPTER.

[42] The Respondent advised the Board that the Complainant had failed to meet all the requirements of the MGA and COPTER. For example, the Complainant failed to prove that there were no leases, licenses or permits encumbering the subject property. Further, the Respondent's evidence suggests that Summerside RA is "held by" and controlled by Brookfield.

[43] In summary, the Respondent advised the Board that Summerside RA must satisfy all of the requirements of the MGA and COPTER before qualifying for exempt tax status. The Respondent therefore requested the Board maintain the 0% exemption.

Decision

[44] The decision of the Board is to grant 100% tax exempt status to Summerside Residents Association.

Reasons for the Decision

[45] The Board arrived at its decision by examining if and how the Summerside RA met each of the requirements as outlined in the MGA and COPTER in order to qualify for tax exempt status.

Does the subject property meet the conditions as set out in s. 13(e.1) of COPTER?

[46] The Board finds that the Summerside RA is a non-profit organization as evidenced by the Certificate of Incorporation under the Alberta Companies Act and the Corporate Registry search (C-1, pg 89; R-1, pg 57). Further, it is clear that membership is mandatory for all Summerside residents with the exclusion of a few communities not included in the "development area". An encumbrance is registered on the title of each property within the development area which assures the payment of annual fees to maintain the common property as shown in the Articles of Association (C-1, pg 365-376). The developer also created the RA to manage the property and facilities, as well as enhance the quality of life for the residents of this community. Much evidence and testimony by witnesses was presented by the Complainant to familiarize the Board with the numerous amenities and non-profit programs available at Summerside (C-1, pg 90-158). The Board is satisfied that Summerside RA has met the test as set out in s. 13(e.1).

Does the subject property meet the requirements for tax exempt status as set forth in s.14.1(2) of COPTER?

(a) Is the subject used in the operation of a sports franchise?

[47] The Board is satisfied that this is not the case as no evidence to the contrary was brought forward by either party.

(b) If for more than 40% of the time the property is in use, the majority participating in activities on the property are 18 years of age or older, the property is not exempt from taxation.

[48] The Board heard the Complainant and his witnesses explain that the majority of the users of the Summerside RA are and have been children and that most of their programs have been designed for children and families. The Board was satisfied that a great deal of effort had been taken to keep track of users and to differentiate between members, guests, adults and children.

[49] The Board carefully examined the Complainant's 2012 facility usage chart (Exhibit C-2). The total number of members from 12 to under 18, children under 12 and non-member children under 18 amounted to 46,902 for the entire year of 2012. The total number of all participants, including adult members and adult guests for 2012, was 75,614. Therefore 62% usage was by children under 18. These numbers do not include 925 attendees of programs for children under 18, or 128 hall rentals mostly for children's parties, nor does it include the participants of the schools that used the facilities at least four times during the year. The Board is satisfied that for 100% of the year the majority of the participants using the facilities of the subject were children under the age of 18.

[50] Implicit in the wording of s. 14.1(2)(b) of COPTER is a requirement that for at least 60% of the time the property is in use the majority of users must be under 18. The Board finds the wording of this section of COPTER creates an accounting problem and is rather convoluted and confusing since it requires the calculation of both a percentage of time the facility is used while tracking the age and percentage over time of users to determine how many in any given period were under 18. When analyzing 60% of the time, should the Board examine any 60% of the year the property was in use, or the most active 60% of the year? If we calculate 60% of the year, it translates to 7.2 months and if we take just the 7 months from April to October inclusive, which includes the 5 most active months, the percentage of use by children under 18 would be 62%. In other words, for more than 60% of the year the majority of users were under 18.

[51] With respect to the Respondent's submission that the Complainant's attendance figures are unreliable, the Board relies upon *Boardwalk Reit v. City of Edmonton*, 2008 ABCA 220, where it was noted that "the taxpayer need only act reasonably, not correctly" and "the taxpayer's information need only be substantially complete, not entirely complete" (at para 64). The Board, in analyzing the 2012 facility usage chart, finds that the Complainant made a reasonable effort to tabulate every person who entered the controlled premises of the subject. The numbers may not be 100% correct; however, the Board is satisfied that the usage as tabulated meets the legislative test.

Is the subject property for more than 30% of the time that it is in use, restricted within the meaning of s. 7(1) of COPTER on the basis of:

(a) Race, culture, ethnic origin or religious belief.

[52] The Board heard no evidence that there is a restriction based on the above criteria.

(b) Is the use of the subject restricted based on ownership of property?

[53] The Board understands that Summerside RA is for the exclusive use of its members and their guests. Property owners of single-family, multi-family, condominium units, multi-family rental projects and commercial developments within the Summerside development area are

automatically members of the Association as is evidenced by the encumbrance on the title of their properties.

[54] Indeed, the sole purpose of the Summerside RA is for the benefit of its owner-members. The Board agrees with the Complainant that the interpretation of tax legislation should follow the ordinary rules of interpretation (*Quebec (Communaute urbaine) v. Corp. Notre-Dame de Bon-Secours*). The underlying purpose must be identified in light of the context of the statute, its objective and the legislative intent. The Summerside RA is for the benefit of its members who own property, rent, or have businesses in the development area. It would be absurd to prohibit an exemption from taxation on the basis of "ownership" when ownership is a requirement under the definition of "residents association" in s. 13(e.1). If the restriction based on ownership were, for example, to refer to owning a recreation property or a private recreation club, or any other property in addition to owning a property in Summerside, then the denial of an exemption based on such additional "ownership" would be valid. However, such a denial would only be valid if the restriction applied for more than 30% of the time the property is in use (s. 14.1(2)(c)). That is not the case here. Therefore, the Board finds that the restriction based on "ownership" of property does not apply to the Summerside RA.

(c) Is the subject property restricted by the requirement to pay a fee in excess of what is considered a minor entrance or service fee?

[55] The Board is satisfied that the subject property is not restricted based on the requirement to pay a fee other than a minor entrance or service fee. The Board was persuaded by the Complainant's argument that the mandatory fees, which are secured by an encumbrance on title, are required to maintain the amenities and programs of the Association. These fees range from approximately $400 - $800 annually and cannot be increased by more than the CPI. These fees are minor when compared to the fees charged by the City of Edmonton for family recreation passes which range from $1,167 to $1,782. The Board was also persuaded by the Complainant's comments that, when consideration is given to a 4 member family where each member uses the facility only once per week, the fee would amount to less than $4.00 per day use. The Board finds the fee to be minor and therefore is not a restriction that would affect the tax exempt status of the subject.

(d) Are individuals restricted by a requirement to become a member of an organization?

[56] The Respondent referred to several CARB cases which cite this as one of the reasons tax exempt status had not been granted to Summerside RA in the past; however, this Board is of a different opinion. This restriction is similar to the "ownership" restriction discussed above.

[57] The Board agrees with the Complainant that the restrictions outlined in s. 7(1) of COPTER become an issue when they are applied *within the community* the residents association represents. The fact that citizens from outside the specific development may be restricted from using the property is irrelevant. The Board therefore agrees with Mr. Steve White, Executive Director, Assessment Services Branch, Alberta Municipal Affairs, who states in his letter of March 6, 2012:

> ...it is our view that a residents association would only be considered as restricting use if they do not permit use to all residents within the specific development area.

[58] The Board finds it absurd that the membership requirement, which forms part of the definition of "residents association" in COPTER, could also act to restrict this same association

from tax exempt status. This seems entirely contrary to the intent of the legislation. However, if a member was precluded from use of the Summerside RA because he is or is not member of, for example, a political, ethnic or sports organization, that would be a restriction as outlined in s. 7(1)(d). If such a restriction applied for more than 30% of the time the property is in use, exempt status would not apply. The Board therefore finds that the subject property is not restricted based on the requirement to become a member of an organization.

Section 7(3) of COPTER addresses restrictions on the use of a property for safety or liability reasons or to ensure that any use does not contravene the law.

[59] The Board finds that the use of the subject property carries some restrictions which are posted on signs on the property and outlined in the Summerside Rules and Regulations as well as the Operations Manual (C-1, pg 444-494). These rules and restrictions refer to guests, boat rentals, fishing, conduct on the premises etc., and are implemented for safety and liability reasons only.

Section 5(a) of COPTER provides that a property is not exempt unless the organization is the owner of the property and the property is not subject to a lease, licence or permit;

and

Section 14.1(1) of COPTER does not exempt the property from taxation unless the property is owned and held by and used in connection with a residents association.

[60] These sections are best looked at in conjunction with each other and require that the Complainant establish the following:

(a) That the property is owned and held by and used in connection with a residents association; and

(b) That the RA's property is not subject to a lease, licence or permit.

[61] The fact that Summerside owns and uses the property in connection with the RA was never really in dispute. What Summerside needed to establish was that it holds the property and that it is not subject to a lease, licence or permit.

[62] The Board accepts that the Summerside RA is the owner of the subject property as per the Land Title Certificate dated March 2011. Brookfield donated the lands to Summerside RA and loaned it funds for the construction and maintenance of the RA's amenities. As discussed in para 46, use in connection with the RA has also been established by the numerous programs available for RA members.

[63] Brookfield has also registered several powers of attorney that will remain on title until the effective date when it will remove itself completely from its involvement with the lands.

[64] The Board considered the Respondent's argument that the subject property is not "held by" Summerside RA but rather by Brookfield, as the developer exercises financial and management control over the Association. This, argued the Respondent, is evidenced by the significant loan owed to Brookfield and spelled out in the powers of attorney.

[65] The Board understands the Respondent's argument that the powers of attorney and other agreements are analogous to leases or licences and may suggest that the physical control required for the property to be considered "held by" the RA has not been proven. However, the Board does not find it reasonable to interpret these documents in such a manner. Section 5(a) does not include a restriction based on powers of attorney. Therefore, without something more, it is not reasonable to infer that these powers of attorney or other agreements are akin to a lease, licence or permit or that they were designed to give physical control of the property to the developer. The powers of attorney and other agreements are more like a form of security relating to a particular type of financing arrangement between Brookfield and the Summerside RA.

[66] The Board was provided with several cases by both parties with respect to the proper interpretation of the phrase "held by". The Board notes that there is no definition of the term in the legislation.

[67] Unlike the *Cypress* decision, where the judge ruled that there was a clear relinquishment of physical control and a lease had obviously been created, what the Board finds here, as mentioned, is more in the nature of a financing arrangement. The fact that Brookfield could hypothetically sell the property is more akin to the power a creditor typically exercises over a debtor: for example a bank may foreclose on a house when a mortgage is in default. The Board sees no reason why this arrangement should be interpreted as a relinquishment of physical control under the legislation.

[68] The Board understands that this arrangement gives Brookfield certain powers of disposition over the land, but it cannot be said that it amounts to a lease, licence or permit as outlined in s. 5(a), or that it establishes that the property is not "held by" the RA pursuant to s. 14.1(1). The Board also finds that Summerside RA does not compensate Brookfield in any manner other than to cover direct out of pocket expenses. Nor does Brookfield pay Summerside anything that may be construed as rent. In *Cypress*, Ski Hill was shown to be responsible for taxes and utilities, and the Operation and Lease Agreement in question used the term "rent" (at paras 53-54). This was a clear indication that the Crown had leased the land. The Minister also had to give Ski Hill 24 hours notice before it could enter the land. This all suggested the exclusivity and autonomy of Ski Hill's control. In other words, the Crown could not properly say that it "held" the property. That is not the case here. Given its possession of the property and its day to day control over it, Summerside clearly exercises physical control over the RA's lands.

[69] The Board also noted the comments of the Court of Appeal in *Pincher Creek (Town) v. Alberta (Municipal Government Board)* 2007 ABCA 360:

> It cannot be said on any reasonable interpretation of the relationship between the Health Region and Vista Villages, including a review of their agreement, that the Health Region is in physical control over the property (at para 13).

In this case the MGB had interpreted the meaning of "held by" broadly, finding that it may mean something other than ownership. The MGB concluded that "one can hold property by owning it, leasing it or by physically controlling it" (para 4). The Court of Appeal agreed with the reviewing judge that "the MGB erred by reducing the requisite physical control to a form of control arising through contract" (para 7). In other words, the MGB was incorrect to conclude that mere ownership without more was enough to constitute "held by". The judge further concluded that the MGB failed to draw any distinction between the word control and physical control. The control must relate to the physical property itself.

[70] The Board agrees that Summershide must establish something more than mere ownership in order to show the RA has physical control of the property. Summerside exercises day to day operations of the property and amenities including the provision of programs. The Board also heard evidence from a witness of the Complainant that resident directors of Summerside RA set policy rules and regulations and that the directors appointed from Brookfield abstain from those decisions.

[71] In the opinion of the Board the arrangement between Brookfield and Summerside RA does not give Brookside physical control over the property despite the existence of the powers of attorney and other agreements. The Board recognizes however that Brookfield has a financial interest in the project until the "effective date".

[72] In summary, the Board finds that Summerside RA meets all the legislative tests set out in the MGA and COPTER and therefore grants the Association 100% tax exempt status.

Dissenting Opinion

[73] There was no dissenting opinion.

Heard November 8, 2013; and January 21 and 22, 2014.

Dated this 19th day of February, 2014, at the City of Edmonton, Alberta.

Petra Hagemann, Presiding Officer

Appearances:

Chris Buchanan
Craig Beaton
Dawn Scott
Kerry Reimer
Louise Challes
for the Complainant

Moreen Skarsen
Tanya Smith
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.