Edmonton Composite Assessment Review Board

Citation: COLLIERS INTERNATIONAL REALTY ADVISORS INC v The City of Edmonton, ECARB 2012-002258

Assessment Roll Number: 3217650
Municipal Address: 10815 JASPER AVENUE NW
Assessment Year: 2012
Assessment Type: Annual New

Between:

COLLIERS INTERNATIONAL REALTY ADVISORS INC

Complainant

and

The City of Edmonton, Assessment and Taxation Branch

Respondent

DECISION OF
John Noonan, Presiding Officer
Taras Luciw, Board Member
Tom Eapen, Board Member

Background

[1] The subject property is a 23,294 square foot vacant lot on the south side of Jasper Avenue at the corner of 108 Street in downtown Edmonton. The property is the former site of the Mayfair Hotel, now demolished. The three lots to the west of the subject comprise the balance of the block, are owned by the same group, and are also under assessment complaint. The same panel heard all of the complaints sequentially, considering very similar or identical evidence to that advanced for other vacant parcels near 107 Street and Jasper, again owned by the same group. The City's detail report for the subject property, dated July 27, 2012, found at page 11 of Exhibit R1, shows the subject zoning as MSC (Main Street Commercial) and effective zoning as RA9 (High Rise Apartment). The 2012 assessment was prepared using the replacement cost summary approach to value and the land calculation is based on market sales.

Preliminary Matters

[2] At the beginning of the Respondent's presentation, the Assessor presented a request to increase the assessment from $2,152,000 to $3,312,000. The request corrects an error in the effective zoning of RA9 (High Rise Apartment) assigned to the subject. [Note: The Board has chosen to deal with this request as a "preliminary matter", separate from the issues raised by the Complainant.]

Respondent's Position on Preliminary Matter

[3] The Respondent explained that in preparing the defense of the assessment, an error was discovered: rather than the assigned RA9 effective zoning, the subject should properly carry effective zoning CB2, Commercial Business. The zoning correction would see the subject land valued at $142.18 per sq.ft., after a 10% adjustment for the LRT easement affecting a small part of the subject. The current assessment, with the RA9 effective zoning, values the land at $92.39 per sq.ft.

[4] The Respondent's evidence package, Exhibit R1, was disclosed to the Complainant two weeks prior to the hearing. The title page stated that an increased assessment would be requested, and page 4 of the document repeated that an increase would be sought, "based on an error in the assessment parameters used by the City." Page 18 showed five City sales comparables and a chart with comments on the three sales advanced by the Complainant. This sales comparison material was the same as seen in eleven other hearings before the same panel. At the top of this sales comparison page, the subject's details were shown, specifically MSC zoning, RA9 effective zoning, 23,393 sq.ft. lot size, assessment of $2,152,000 or a per sq.ft. value of $92.39. Below these details, the "Request" particulars were shown; the differences being that effective zoning had changed to CB2, and the assessment amount to $3,312,000 or $142.18 per sq.ft. In the Comment section of this spreadsheet, it was advised that a "10% downward adjustment due to LRT easement has been applied". The Respondent freely acknowledged there was no other written explanation, but that an experienced agent and property owner would see the effective zoning change and understand the implication. To require a sentence spelling out this change would be a triumph of form over substance.

[5] The Respondent was not able to provide a history as to when the RA9 effective zoning became attached to the property, but advanced the opinion it might be a carryover from the days when the Mayfair Hotel still occupied the site. When the hotel was demolished, two things should have occurred: the three lots (Lots 44, 45, and 46 of Block 8) in the legal description of the property should have been separated for assessment purposes, and the zoning should have changed to match actual zoning. Neither of these happened, and the oversight was only caught when the property assessment was appealed this year.

[6] Included in the Respondent's evidence was a copy of the Annual Realty Assessment Notice for 2012. The notice identified the property type as "Land and improvement", land use as "912 Undeveloped multi-residential land" and the assessment class as "other residential". The detail report for the subject showed its study area as "Multires", zoning "MSC", and effective zoning "RA9". Found elsewhere in the evidence was a copy of a Land Titles document registered June 1, 2012. It showed a descriptive plan of consolidation involving the three subject lots as well as the three lots to the west, Lots 41, 42 and 43. [Note: the assessment complaints on those three lots, rolls 3217502, 10014938 and 10014937 were heard immediately following the subject complaint.] A copy of a City "Major Development Permit", printed August 6, 2009, showed that an application dated Dec 18, 2008 covering lots 41-46 had been approved. The "Scope of Permit" stated:

> To demolish an existing 5-storey building (Mayfair Hotel) and to construct a Mixed Use Building – Apartment House (471 dwelling units) with General Retail on the main floor and underground parkade. (Mayfair North)

Under "Permit Details" the site area was defined as 4290 sq.m. and the gross floor area 40,318 sq.m. Further, at page 75 of R1, the Respondent stated, "After a review of the assessment parameters, the City is requesting an increase to the 2012 assessment to $3,312,000.

[7] The Respondent reviewed the jurisdiction of the Board to increase an assessment, citing several Municipal Government Board decisions in the City's Law and Legislation brief. Although these decisions predated the changes to the *MGA* and the new *Matters Relating to Assessment Complaints Regulation* effective January 1, 2010, the same principles applied. Proper notice of the City's intent to seek an increase to the assessment had been supplied with the Respondent's disclosure of evidence. The Respondent also presented *AgPro v. Lacombe County*, 2006 ABQB 351, and distinguished the current circumstances from those at play in that case: procedural fairness had been accomplished here. The Respondent also referred to two recent QB decisions granting leave to appeal: *Edmonton East (Capilano) Shopping Centres Limited v. Edmonton (City)*, 2012 ABQB 445 and *Canadian Natural Resources Ltd v. Wood Buffalo (Regional Municipality)*, 2012 ABQB 177. The Respondent advised that in both cases *MGA* s 305 had been cited in granting leave to appeal, and the ability to change an assessment was still a live issue. However, in *Wood Buffalo* an assessment increase had been sought when there wasn't an error, and here the difference was the discovery of an error. In *Capilano*, leave to appeal had been granted regarding s. 305, but not on the grounds of notice. Notice was the issue in this proceeding.

Complainant's Position on Preliminary Matter

[8] The Complainant's rebuttal material contained excerpts of Edmonton Zoning Bylaw 12800, showing the permitted and discretionary uses in the RA9 High Rise Apartment Zone and the CB2 General Business Zone. It was noted that the RA9 zoning allowed far fewer types of development than the CB2 zoning. Attention was drawn to the Respondent's evidence (Exhibit R1), which contained another excerpt from the same bylaw, again showing permitted and discretionary uses in the JAMSC (Jasper Avenue Main Street Commercial Zone), the subject's actual zoning. The second permitted use was apartment housing. In the Complainant's view, it was preposterous of the City to argue the subject was a commercial property: it was to be developed as a high rise residential property with typical ground floor commercial uses. Why would the developer or the City remove the RA9 effective zoning?

[9] The Complainant advised that prior to the explanation provided by the assessor in the hearing; he was unable to determine from the Respondent's disclosure why an increase was being sought. Reference to an error in "parameters" gave no indication of the case to be met. The intent to seek an increase disclosed in the exchange of evidence was not appropriate notice. A taxpayer had a right to certainty, and while *MGA* s 305 allowed a change to an assessment, that ability to change expired December 31, 2011. Now, the City was attempting to raise an assessment in response to an appeal. Given that a complainant was allowed two months to file a complaint, without benefit of data from the City, it would be equitable to require 8 weeks notice of a request to increase an assessment.

[10] The Complainant noted he was not a lawyer, and raised the question of procedural fairness regarding comment on court cases. An invitation from the Board to seek counsel was declined, but the Complainant observed that in the *Army & Navy* case (MGB BO 112/02) featured in the City's Law and Legislation brief, page 32, the taxpayer was given notice that an increase was sought. Here, only the agent has been informed. Further, at page 33 of the brief,

"the proper disclosure and exchange rules with respect to each party's position must have been followed to ensure that the proceeding is fair and each party is fully aware of the other's case."

Rebuttal

[11] The Respondent commented on the issues raised by the Complainant. Regarding notice being sent to the taxpayer of an increase being sought, notice had been sent to the agent of the taxpayer. In the *Army & Navy* case, notice had been sent to the Complainant, also an agent. The agent is the Complainant as of the complaint filing. If the Complainant had been unclear as to why an increase was being sought, he could have contacted the City to ask.

Issues re: Preliminary Matter

[12] The Board considered two issues:

1. What constitutes, in time and nature, sufficient notice of seeking at the CARB an increase to an assessment?

2. Was the correction of the error cited truly an error?

Legislation

[13] The Municipal Government Act reads:

***Municipal Government Act*, RSA 2000, c M-26**

s 305(1) If it is discovered that there is an error, omission or misdescription in any of the information shown on the assessment roll,

(a) the assessor may correct the assessment roll for the current year only, and

(b) on correcting the roll, an amended assessment notice must be prepared and sent to the assessed person.

(5) If a complaint has been made under section 460 or 488 about an assessed property, the assessor must not correct or change the assessment roll in respect of that property until a decision of an assessment review board or the Municipal Government Board, as the case may be, has been rendered or the complaint has been withdrawn.

s 297(1) When preparing an assessment of property, the assessor must assign one or more of the following assessment classes to the property:

(a) class 1 - residential;

(b) class 2 - non-residential;

(c) class 3 - farm land;

(d) class 4 - machinery and equipment.

(2) A council may by bylaw

(a) divide class 1 into sub-classes on any basis it considers appropriate, and

(b) divide class 2 into the following sub-classes:

(i) vacant non-residential;

(ii) improved non-residential, and if the council does so, the assessor may assign one or more sub-classes to a property.

s 460(3) A complaint may be made only by an assessed person or a taxpayer.

(5) A complaint may be about any of the following matters, as shown on an assessment or tax notice:

(a) the description of a property or business;
(b) the name and mailing address of an assessed person or taxpayer;
(c) an assessment;
(d) an assessment class;
(e) an assessment sub-class;
(f) the type of property;
(g) the type of improvement;
(h) school support;
(i) whether the property is assessable;
(j) whether the property or business is exempt from taxation under Part 10.

[14] The Matters Relating to Assessment Complaints Regulation reads:

***Matters Relating to Assessment Complaints Regulation*, AR 310/2009**

s 8 (2) If a complaint is to be heard by a composite assessment review board, the following rules apply with respect to the disclosure of evidence:

(a) the complainant must, at least 42 days before the hearing date,
    (i) disclose to the respondent and the composite assessment review board the documentary evidence, a summary of the testimonial evidence, including a signed witness report for each witness, and any written argument that the complainant intends to present at the hearing in sufficient detail to allow the respondent to respond to or rebut the evidence at the hearing, and
(b) the respondent must, at least 14 days before the hearing date,
    (i) disclose to the complainant and the composite assessment review board the documentary evidence, a summary of the testimonial evidence, including a signed witness report for each witness, and any written argument that the respondent intends to present at the hearing in sufficient detail to allow the complainant to respond to or rebut the evidence at the hearing,
(c) the complainant must, at least 7 days before the hearing date, disclose to the respondent and the composite assessment review board the documentary evidence, a summary of the testimonial evidence, including a signed witness report for each witness, and any written argument that the complainant intends to present at the hearing in rebuttal to the disclosure made under clause (b) in sufficient detail to allow the respondent to respond to or rebut the evidence at the hearing.

Decision on Preliminary Matter

[15] The Board declines the request to increase the assessment.

Reasons

[16] The Board read with interest the *Capilano* decision, and sees parallels with the case at hand. Justice Michalyshyn distilled the Applicant's grounds for leave to appeal to three:

a) Did the CARB misinterpret or ignore s 305 of the *Municipal Government Act*, …(*MGA*)?

b) Does s 305(5) of the *MGA* prohibit an assessor from seeking an increase in an assessment from the ARB?

c) Does the CARB have jurisdiction to raise an assessment on a complaint and if so:

   i. Do the principles of fair and reasonable notice apply?
   ii. Is the assessor bound by a duty of fairness in seeking an increased assessment and if so what is the content of that duty?
   iii. What constitutes fair and reasonable notice and was that given in the within case?

[17] As the Board understands it, the Courts will explore the concept of whether *MGA* s 305 and s 460(3) are contradictory. Under the previous legislation, it was not uncommon to see a municipality seek an increase in assessment at the ARB or MGB level. Apparently, the situation is not so clear today and the Board awaits with interest the outcome of future proceedings. Although the parties made points referring to s 305 in their argument here, they did not raise these points to the level of issues in the Board's estimation. Neither were there points exactly as described in *Capilano* grounds (a) and (b), the grounds on which leave to appeal was granted. Rather the parties focused predominantly on fair and reasonable notice, very similar to the sub-issues in *Capilano* ground (c), the very ground on which leave was denied. Obviously, the Board would have an easier task if all the *Capilano* issues were settled, for they all have relevance here. Bereft of such guidance and left to its own devices, the Board proceeds with jaundiced eye, mindful of the potential sting of embarrassment when the pens of higher pay scales pronounce judgment.

[18] As the Board sees it, the very presence of s 305 in the *MGA* anticipates errors, omissions or misdescriptions in the assessment roll, and consequently assessment notices; and lays out a remedy. It would seem an administrative absurdity [under s 305(5)] to convene an assessment review board to hear a complaint from a taxpayer, consider only the complaint form issues identified, issue a decision and a revised assessment notice reflecting the decision, and then have the assessor issue an amended notice correcting errors discovered, and igniting another complaint. Efficiency would dictate that one hearing would deal with complaint issues and errors, omissions and misdescriptions.

[19] The Board disagrees with the Complainant's view that s 305(1)(a) allows corrections only until year end, the year prior to the taxation year. Rather, the ability to correct an assessment roll runs through the taxation year. Rather than canvass and parse numerous sections of the *Act*, the Board illustrates its thinking by turning to the physical condition and characteristics date for assessment purposes, December 31 of the year prior to the taxation year, coincidentally the same date the Complainant would see the roll frozen. Should a property be destroyed by fire between the end of working hours and midnight, New Year's Eve, the Complainant's logic would prevent the assessor recording such information January 2.

Preliminary Issue 1:
Was proper and sufficient notice given of seeking an increased assessment?

The Board considered three aspects of the notice in this case: timing, form and content.

[20] As *MGA* s 305(5) precludes an assessor correcting or changing the assessment roll during the complaint process, how is that assessor to give meaning to s 305(1) (a)? Even the absurd scenario outlined in paragraph 18 appears beyond the pale as an ARB decision finalizes the assessment for the year: that decision can be appealed, but only on a question of law or jurisdiction. It is clear to the Board that the legislation's intent is to settle an assessment at the ARB. *MRAC* specifies the timing of evidence disclosure in a complaint process, and the Board

sees no better guidance for the scenario where the assessor seeks to increase an assessment, correcting an error, omission or misdescription, when a complaint is in progress. The party alleging a wrong, the Complainant, is required to submit evidence to the other party and the ARB at least 42 days before the hearing date. The Board accepts the premise that the usual Respondent becomes a defacto Complainant in seeking an assessment increase at the ARB. Clearly, there is a glitch in the works, as simultaneous disclosure of both parties evidence isn't practical. In the real world, the Respondent may have gathered some preliminary material in response to a complaint being filed, but the real work begins on receipt of the Complainant's disclosure. This is when an error, omission or misdescription will be discovered, when the Respondent is assembling its own evidence in defense of the assessment and knowing the case to be met. The MRAC datelines apply: the appropriate time for the Respondent to declare intention to seek an increase in assessment is at least 14 days before the hearing date. Such was the case here.

[21] The form of the notice, as evidence disclosure to the agent of the taxpayer, does not trouble the Board. The *Act* and *Regulation* make numerous references to communication with the taxpayer or assessed person throughout the assessment/assessment complaint process. The agent is the authorized representative of the assessed person, with broad powers to act, and the Board expects that part of the agent's duty is to convey information to the assessed person.

[22] With regard to the content of the notice, the Board again turns to *MRAC*: "in sufficient detail to allow the complainant to respond to or rebut the evidence at the hearing." This language is used throughout the Regulation in describing the disclosure process before local and composite assessment review boards, and the MGB. The Respondent acknowledged that there wasn't a lot of detail supplied, but argued an experienced agent would understand the significance of a change in effective zoning. The Complainant stated he had no idea what the "change in parameters" meant. From these opposing ends of the spectrum, the Board would tend to lean closer to the Respondent's view. The Board would have preferred to see the courtesy of a written explanation as to the genesis of the RA9 incorrect effective zoning, and why the CB2 effective zoning was appropriate for the property. However, while the legislation frequently refers to fairness and reasonableness, "courtesy" doesn't appear in the *MGA* index. Whether the threshold of "sufficient detail…to respond to or rebut" has been met depends, to some extent, on the sophistication of the recipient. To answer this conundrum, the Board considers a "what if" scenario: had the recipient Complainant requested a postponement of the hearing on the grounds that the Respondent's disclosure wasn't understood, that more time was required to understand and respond, how likely would it be that such an application would be granted? The Board judges that the balance of probabilities would favour a negative response from an ARB panel to such a request, in this scenario. Consequently, the Board decides that the content of the notice is sufficient, if barely.

Preliminary Issue 2:
Was the correction of the error cited truly an error?

[23] The actual zoning of the subject is not at issue: Jasper Avenue Main Street Commercial. Within that zoning, high rise residential is a permitted use. To accommodate the proposed 427 unit apartment building, the developer is not required to apply for a zoning change, obviously, but has applied for and been granted a building permit. Although no apparent work has yet commenced on the site, the Board is satisfied that the intended use of the property is high rise residential. The Respondent advised in questions that the effective zoning would revert to RA9 at some time in the future, when such an apartment building had finished construction, or presumably, when the City was satisfied that such a development was far enough along to be

sure that the property would be a residential high rise. The Board understands that just because a building permit has been issued does not guarantee the property's ultimate development as permitted. However, the Board found instructive a Complainant comment during questions when the Board wondered if by finding the property residential this might provoke effort from other landowners to reduce their assessments by simply applying for a residential building permit. The Complainant ventured that any savings would be overwhelmed by the cost and effort involved in preparing a permit application.

[24] The 2012 Assessment Notice specifies the subject land use as "undeveloped multi-residential land" and the assessment class as "other residential". Presumably, the change to effective zoning would see the land use as undeveloped commercial land and the class as some variant of vacant non-residential. From the evidence before the Board, the information on the assessment notice is a better description of the property than what would accompany CB2 effective zoning. Further, it appears that eventually the City will view the property as developed multi-residential land, the "when" determined by policy rather than statute. The Board did not receive a convincing explanation, or even an unconvincing one, of what error attaches to calling a property "undeveloped" before it becomes "developed".

[25] Accordingly, the Board determines that the request for an assessment increase met or barely met the procedural requirements, but the reason deficient. The Assessment Notice accurately describes the subject property, and does not warrant an increase in assessment.

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Returning to the merits of the complaint:

Issue(s)

[26] At the hearing, the Board heard evidence and argument on the following issues:

1. Is the subject over-assessed in light of market sales evidence?
2. Is the subject equitably assessed?

Legislation

[27] The Municipal Government Act reads:

***Municipal Government Act*, RSA 2000, c M-26**

s 1(1)(n) "market value" means the amount that a property, as defined in section 284(1)(r), might be expected to realize if it is sold on the open market by a willing seller to a willing buyer;

s 467(1) An assessment review board may, with respect to any matter referred to in section 460(5), make a change to an assessment roll or tax roll or decide that no change is required.

s 467(3) An assessment review board must not alter any assessment that is fair and equitable, taking into consideration

a) the valuation and other standards set out in the regulations,
b) the procedures set out in the regulations, and
c) the assessments of similar property or businesses in the same municipality.

Position of the Complainant

[28] The subject assessment at $2,152,067 prior to rounding equates to a per sq.ft. value of $92.39. The Complainant presented three vacant land sales comparables that transacted in 2009 or 2010 at prices ranging from $69.16-$92.23 per sq.ft. with lot sizes ranging from 7,500 to 64,130 sq.ft. The three sales produced an average time-adjusted per sq.ft. value of $82.93. Recognizing economy of scale, a property of 20,000-30,000 sq.ft. like the subject should be valued at $80 per sq.ft.; applying $80 to the subject's 23,294 sq.ft. would produce an indicated value of $1,863,500 from this direct sales comparison approach. In response to questions from the Respondent, the Complainant conceded that the lowest sale value of the three, $69.16 per sq.ft., was attached to a 64,130 sq.ft. sale with numerous caveats on title (the Macdonald Hotel neighbouring properties), and another sale at 10044 105 Street had been found in a 2010 CARB decision to be a contaminated property. The third sale was at the corner of Jasper Avenue and 116 Street in the Oliver neighbourhood.

[29] The Complainant presented twelve equity comparables, most of approximately 7,500 sq.ft. From this group, a subset of six had no improvements, and their land only assessments averaged $29.58 per sq.ft. As these lands carried residential zoning, and the two examples of High Density Residential showed value close to $37 per sq.ft., it was reasonable to conclude that these comparables supported an equitable value of $40 per sq.ft. for the subject: $931,500.

[30] A list of comparable land assessments for other vacant downtown parcels held by the same ownership group demonstrated a range of per sq.ft. assessments from $44.52 - $157.83. A property at 10215 100 Avenue was highlighted, zoned RMU (Residential Mixed Use). This lot overlooked the river valley and was potentially the most valuable real estate, permitting high-rise residential development. This lot was vastly superior to all others for which the ownership group was filing assessment complaints. That property complaint had been "withdrawn to correction" with a $56 per sq.ft. assessment agreed. The same $56 per sq.ft. value applied to the subject would produce an equitable assessment of $1,304,000.

[31] In summary, the Complainant outlined three different value conclusions, but was not pursuing the lowest value suggested, derived from residential-zoned lots along 105 Street. A reduction to $1,863,500 was requested based on the sales comparables provided and the $80 per sq ft conclusion, or based on equity a value of $1,304,000.

[32] The Complainant's rebuttal evidence highlighted that the sales presented by the Respondent were dated, in all but one case four or five years before valuation date, and required time-adjustments of as much as 41%. Reference was made to a previous CARB decision relating to a 2010 assessment. That decision, contained in the City's evidence, had placed less weight on sales dating to 2006 and 2007. Two years later, the Respondent is still using such sales. The most recent sale presented by the Respondent, at $243.60 per sq.ft., was a clear outlier. It was observed that the purchaser owned adjacent parcels and was motivated to acquire this property to complete a land assembly for a proposed high-rise development. Further, that property carried a 2012 assessment of $84 per sq.ft.

Position of the Respondent

[33] The Respondent introduced five sales comparables, all with effective zoning CB2, that showed time-adjusted sales prices in a range of $116.57 - $243.60. The average of these sales was $161.52 per sq.ft., supportive of the subject's assessed value of $154.46 per sq.ft. The Respondent acknowledged in questions that the most recent and highest sale occurred January 2009, three sales dated to 2006 and the last transacted in August 2007.

[34] Four equity comparables on the north side of Jasper Ave at 107 Street demonstrated interior and corner lot values. Lots of just over 8000 sq.ft. and just over $13,000 value for paving carried assessments of $154.54 per sq.ft.; a corner lot was valued at $173.56 per sq.ft.

[35] In summary, the Respondent reviewed the sales and equity comparables presented by the Complainant in support of a reduced assessment, and found them lacking.

Decision

[36] The Board confirms the assessment at $2,152,000.

Reasons for the Decision

[37] As mentioned, the assessment equates to a value of $92.39 per sq.ft. In preliminary matters, the Board decided the subject was properly described as undeveloped residential. All of the sales comparables differ from the RA9 effective zoning of the subject, and while some of the Complainant's equity comparables are RMU (Residential Mixed Use) or HDR/DC2 (High Density Residential/Direct Control), the Board does not have sufficient information to qualify those properties as good comparables to the subject. The Board does not have sufficient compelling evidence to determine the subject has been treated unfairly or inequitably.

Heard commencing August 15, 2012.
Dated this 21st day of September, 2012, at the City of Edmonton, Alberta.

_____
John Noonan, Presiding Officer

Appearances:

Stephen Cook, Colliers International Realty Advisors Inc.
for the Complainant

Keivan Navidikasmaei, Assessor, City of Edmonton
Tanya Smith, Legal Counsel, City of Edmonton
for the Respondent