Decision No.: PREC 0262 615-616/2014
Complaint IDs: 615 & 616
Roll Nos.: 540130 & 540155

REGIONAL ASSESSMENT REVIEW BOARD DECISION
HEARING DATE: August 26, 2014

PRESIDING OFFICER: Cathryn Duxbury
BOARD MEMBER: Al Knight
BOARD MEMBER: Bob Schnell

BETWEEN:

Southpointe Common Corp. & Southpointe Plaza Inc.

Complainants

-and-

The City of Red Deer

Respondent

This is a decision of the Central Alberta Regional Assessment Review Board from a preliminary hearing in respect of the following assessments:

ROLL NUMBER:	540130	540155
MUNICIPAL ADDRESS:	2004 50 Ave	200, 5001 19 Street
ASSESSMENT:	$49,540,900	$51,020,100
OWNER:	Southpointe Common Corp.	Southpointe Plaza Inc.

The preliminary hearing was heard by the Composite Assessment Review Board on the 26th day of August, 2014, at the City of Red Deer.

Appeared on behalf of the Complainants:	Susan Trylinski, Barrister & Solicitor Municipal Counsellors Counsel for the Complainant
Appeared on behalf of the Respondent:	Rob Kotchon, Assessment Coordinator / Analyst Anna Meckling, Assessor City of Red Deer, Revenue & Assessment Services

JURISDICTION AND PROCEDURE

[1] The Central Alberta Regional Assessment Review Board ("the Board") has been established in accordance with section 456 of the *Municipal Government Act,* R.S.A. 2000, c. M–26 ("the MGA").

[2] Neither party raised an objection to any Board member hearing the preliminary issues.

[3] No jurisdictional issues were raised by either party.

[4] On a point of procedure, the parties requested that the preliminary issues for Roll Numbers 540130 and 540155 be heard together because the issues and the submissions are identical for both. The Board agreed to the parties' request and proceeded to hear the preliminary issues. At the conclusion of the preliminary hearing the Board recessed to consider the parties' submissions. The hearing was called back to order later in the day and an oral decision delivered with a written decision with reasons to follow. This is the written decision with reasons.

BACKGROUND

[5] The subject properties are shopping centres located in the City of Red Deer. The Complainants filed a complaint in relation to the assessment of their respective properties and the hearings were scheduled to proceed on August 26 and 27, 2014. Prior to the commencement of the hearings, it was determined that a preliminary hearing was required.

ISSUES

[6] The following two issues were the subject of this preliminary hearing:

1. Should the Respondent be ordered to provide all of the addresses of the comparable properties referred to in their submission?
2. Should the Complainant's submission for the merit hearing be excluded because the Complainant failed to provide an estimate of the amount of time necessary to present their evidence?

POSITION OF THE PARTIES AND FINDINGS

1. Should the Respondent be ordered to provide all of the addresses of the comparable properties referred to in their submission?

Complainant's position:

[7] The Complainant advised the Board that the disclosure submitted by the Respondent refers to a number of properties that were used by the Respondent to determine the average contract rent per square foot that was applied to the different leasable areas within the subject property. The addresses of these properties were not provided. The Complainant takes the position that the Respondent must provide the addresses used to determine the average contract rent per square foot that was applied to the different leasable areas within the subject property so that the Complainant can properly challenge the comparability of these properties to the subject.

[8] In support of their position, the Complainant referred the Board to the Alberta Court of Appeal decision *Nortel Networks Inc. v. Calgary (City),* 2008 ABCA 370 ("*Nortel*"). The Complainant argued that their fact pattern is identical to that in *Nortel,* and referred the Board to the following passage from *Nortel* in particular:

> …In this case, the lack of disclosure effectively precluded Nortel either from tendering evidence through its own expert witness to explain why the alleged comparables were not in fact comparables, or from demonstrating the same through cross-examination. The Board received and relied upon critical evidence without requiring disclosure which would have permitted such evidence to be challenged and tested by the opposite party. While a board has considerable scope in determining what evidence is relevant for its purposes, it is not thereby entitled to deprive an opposite party of the means to effectively challenge such evidence. The question is not so much one of relevance, but one of procedural fairness. [*Nortel*, para. 19]

[9] Accordingly, the Complainant requested that the Respondent be directed to provide all of the addresses of the comparable properties referred to in their submission; an adjournment to permit the Respondent time to provide the addresses and the Complainant an opportunity to review and respond to the information; and a further direction that the Complainant be permitted to submit a rebuttal to the information.

[10] In response to the Respondent's claim that they provided everything asked of them, the Complainant referred the Board to the recent Alberta Court of Appeal decision *Canadian Natural Resources Limited v. Wood Buffalo (Regional Municipality),* 2014 ABCA 196. The Complainant argued that this case explains the central purpose of taxpayer information rights, and supports the Complainant's position that the Respondent cannot defend its failure to provide all of the relevant information in their possession simply by stating that they provided everything specifically asked of them.

[11] In response to the Respondent's concerns regarding the confidentiality of the information the Complainant seeks to obtain, counsel for the Complainant advised that the issue of confidentiality is dealt with in *Nortel* and that she would be prepared to agree to reasonable terms that would protect the confidentiality of the information. In particular, counsel for the Complainant agreed not to disclose the information to anyone other than the Complainant's lawyers and agents, and any consultants hired by those lawyers and agents. Counsel for the Complainant specifically agreed not to disclose the information to the Complainant owner of the subject property.

Respondent's position:

[12] The Respondent conceded that the addresses referred to by the Complainant were not provided. The Respondent explained that the reason behind not providing the addresses was to protect the confidentiality of the information supplied by property owners in response to the Respondent's requests for information. The Respondent argued that property owners will be less inclined to provide information if they know that their information may be disclosed to their competitors. The Respondent requires such information in order to determine fair and equitable market value assessments of property in the City of Red Deer.

[13] The Respondent noted that the Complainant submitted a request for information to the Respondent pursuant to sections 299 and 300 of the MGA, and the Respondent provided all of

the information specifically requested. The Respondent referred the Board to the wording of section 300(2) of the MGA which states, in part, that a municipality must comply with a request for information "if it is satisfied that necessary confidentiality will not be breached."

Board findings:
[14] Section 465(1) of the MGA states:

> 465(1) When, in the opinion of an assessment review board,
> (a) the attendance of a person is required, or
> (b) the production of a document or thing is required,
> the assessment review board may cause to be served on a person a notice to attend or a notice to attend and produce a document or thing.

[15] The facts described by the parties are identical to the facts in *Nortel,* and the Board is bound by that decision. Pursuant to s. 465(1) of the MGA, the Board orders the Respondent to provide all of the addresses of the comparable properties referred to in their submission.

[16] The Board also finds that exceptional circumstances exist such that, pursuant to section 15(1) of the *Matters Relating to Assessment Complaints Regulation,* AR 310/2009 ("MRAC"), a postponement of the merit hearing should be granted to permit the Respondent time to provide the addresses referred to and to permit the Complainant an opportunity to review and respond to the information.

2. Should the Complainant's submission for the merit hearing be excluded because the Complainant failed to provide an estimate of the amount of time necessary to present their evidence?

Complainant's position:
[17] The Complainant argued that there is no legal authority to suggest that a failure to provide an estimate of the amount of time necessary to present evidence with a disclosure package would result in a complete exclusion of a party's disclosure package from evidence at a merit hearing. The Complainant advised that having only just been provided with a copy of the CARB decisions relied on by the Respondent in support of their request, the Complainant had not had an opportunity to review them. In any event, the Complainant argued, such decisions are not binding on this Board.

[18] The Complainant also noted that an estimate of the amount of time required for the hearing was provided with the complaint form.

Respondent's position:
[19] The Respondent takes the position that because the Complainant failed to provide an estimate of the amount of time necessary to present their evidence when they submitted their disclosure package, the Complainant's entire disclosure package should be excluded from evidence at the merit hearing. The Respondent referred the Board to s. 8(2)(a)(ii) of MRAC, which states:

> 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,

> (ii) provide to the respondent and the composite assessment review board an estimate of the amount of time necessary to present the complainant's evidence.

[20] Because section 9(2) of MRAC states that "[a] composite assessment review board must not hear any evidence that has not been disclosed in accordance with s. 8", the Respondent argued that the Complainant's entire disclosure package should be excluded. In support of their position, the Respondent submitted the following three decisions: CARB 0262 550/2013, CARB CC/2013/01, and 2013 ECARB 00045.

Board findings:

[21] The Board acknowledges that the wording in section 8(2)(a)(ii) is mandatory but finds that the wording used must be read in the context of the principles of natural justice and procedural fairness. If the legislature intended to deprive a party of the right to be heard on the sole basis that the party failed to estimate the time needed to present their evidence, that intention would need to be stated in clear terms. Section 9(2) of MRAC states that:

> 9(2) A composite assessment review board must not hear any evidence that has not been disclosed in accordance with s. 8.

Section 9(2) of MRAC refers to evidence that has not been disclosed. An estimate of the amount of time necessary to present evidence is not evidence.

[22] Regarding the cases submitted by the Respondent in support of their position, the Board notes that it is not bound by decisions of other panels of this Board. That said, the Board has reviewed the decisions submitted by the Respondent and finds all three of them distinguishable.

> In CARB 0262 550/2013 the Board did grant an application to find the materials of a party inadmissible on the basis that there was a failure to provide an estimate of the amount of time necessary to present their evidence. However, the application was brought in the context of a preliminary matter to a preliminary hearing, not a merit hearing. The Board's decision did not prevent a complainant from exercising their statutory right to bring a complaint, as would be the effect if a similar order was granted in this case.
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> In CARB CC/2013/01, the fact that there was a failure by the Complainant to provide an estimate of the amount of time necessary to present their evidence as required by section 8(2)(a)(ii) of MRAC was secondary to the fact that the Complainant failed to comply with section 8(2)(a)(i). The Complainant in CARB CC/2013/01 submitted 107 pages of tax/assessment notices, pictures, and sales invoices relating to properties other than the subject properties, with no summary of the testimonial evidence or written argument provided to explain what use would be made of these documents at the hearing.
>
> 2013 ECARB 00045 did not involve an application to have a party's disclosure package excluded for failure to provide an estimate of time necessary to present evidence. As was the case in CARB CC/2013/01, in 2013 ECARB 00045 the main issue involved a failure by the Complainant to comply with section 8(2)(a)(i) of MRAC. In fact, the Complainant in 2013 ECARB 00045 filed no disclosure materials at all.

[23] The Board notes that there was no suggestion by the Respondent that they were somehow prejudiced by the failure of the Complainant to submit with their disclosure package an estimate of the time necessary to present their evidence. In any event, the Complainant provided an estimate of the time required for the hearing with the complaint form.

[24] The Board finds that the Complainant's submission for the merit hearing will not be excluded because the Complainant failed to provide an estimate of the amount of time necessary to present the Complainant's evidence with their disclosure package.

SUMMARY

[25] For the reasons noted above, the Board orders the following:

1. The Respondent must provide counsel for the Complainant all of the addresses of the comparable properties referred to in their submission on or before September 10, 2014, with a copy to the Clerk of the Board.
2. Counsel for the Complainant must not disclose the information provided by the Respondent in compliance with paragraph 1. above to anyone, including the Complainant owner of the subject property, other than to the Complainant's lawyers and agents, and any consultants hired by those lawyers and agents.
3. The Complainant must provide the Respondent with any written response to the information provided by the Respondent in compliance with paragraph 1. above on or before October 1, 2014, with a copy to the Clerk of the Board.
4. The merit hearing is postponed to October 27 and 28, 2014.
5. The Respondent's request to have the Complainant's submission for the merit hearing excluded as evidence is denied.

Dated at the City of Red Deer, in the Province of Alberta this 18th day of September, 2014 and signed on behalf of the Presiding Officer for all three panel members who agree that the content of this document adequately reflects the hearing, deliberations and decision of the Board.

Sonya Parsons, Board Officer, on behalf of
Cathryn Duxbury, Presiding Officer

This decision can be appealed to the Court of Queen's Bench on a question of law or jurisdiction. If you wish to appeal this decision you must follow the procedure found in section 470 of the *Municipal Government Act* which requires an application for leave to appeal to be filed and served within 30 days of being notified of the decision. Additional information may also be found at www.albertacourts.ab.ca.

APPENDIX "A"

Documents Presented at the Hearing
and considered by the Board

NO.		ITEM
1.	C-P-1	Letter from Susan Trylinski and enclosure (18 pages)
2.	C-P-2	Document starting "Table 3: Red Deer Comparable Listings" (1 page)
3.	R-P-1	E-mail from Anna Meckling and attachments (13 pages)

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Decision No. PREC 0262 615-616/2014			**Roll Nos. 540130 & 540155**	
Appeal Type	**Property Type**	**Property Sub-Type**	**Issue**	**Sub-Issue**
CARB	Jurisdictional/Procedural	Hearing Postponement/Adjournment (Types 1 to 6)		
CARB	Jurisdictional/Procedural	Information Exchange (Types 1 to 6)	Insufficient/No Response Request	