

EVIDENCE TO ESTABLISH AGENCY

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The Municipal Government Board (MGB) has commented in two recent decisions on the law of agency relationships in the context of property assessment complaints.

In *OPB Realty Inc. v. Edmonton (City)* (MGB 011/08), the MGB addressed the degree of proof necessary to establish agency. The authorizing document in this case was a “Notice and Direction to Contractors” letter submitted by the property owner, OPB Realty Inc. The Assessment Review Board (ARB) determined that the Notice, which informed of the purchase of the subject property by OPB and directed all dealings respecting the property to be with a named agent, was too vague to establish agency, as it did not specifically address the issue of assessment appeals and was addressed to “contractors,” thus suggesting that it had to do with construction or maintenance of the property. The MGB, however, disagreed. The Board held that, although additional evidence submitted made it very clear that OPB had delegated responsibility for property assessment matters, the Notice was sufficient in itself to authorize the agent to deal with assessment complaints; it was not too vague in that it failed to specifically mention assessment appeals. This decision suggests that the failure to adduce evidence of specific authorization to deal with assessment appeals is not necessarily fatal to the finding of an agency relationship. A document granting authorization to deal with the property in general may be sufficient proof of agency.

Windermere Golf and Country Club v. Edmonton (City) (MGB 037/08) addressed the irrelevancy of the subjective intentions of parties to an agency agreement when they are contradicted by the parties’ actions. The subject property was a golf course owned by Windermere Golf and Country Club. After submitting a complaint to the ARB, Windermere signed and filed a Letter of Authority, authorizing CVG Canadian Valuation Group to negotiate with the City on its behalf and appointing CVG as its “exclusive agent...in relation to all matters of realty assessment and taxation” for its properties. Although both Windermere and CVG intended that their agency relationship was to exist solely for the purpose of filing secondary documents, and would terminate upon such event, neither the City nor the ARB was notified of this termination after the documents were filed. When CVG, intending to withdraw itself as agent, subsequently withdrew the forms it had filed on Windermere’s behalf, the ARB ruled that the entire complaint was withdrawn and dismissed the case. This finding was upheld on appeal to the MGB, where the Board affirmed that, despite Windermere’s intentions, it was clear to the ARB that CVG was appointed as Windermere’s agent and that it was to remain as agent until such authorization was revoked. Since this authority was neither revoked nor denied by either party, CVG was still authorized to act as Windermere’s agent when the withdrawal occurred. This decision illustrates that the intent of the parties to an agency agreement or their contractual or other relations, insofar as they are contradicted by their objective actions, are not relevant. What is relevant is the information actually communicated to a third party, such as the ARB or the City. This springs from a desire on the part of the

Board to protect parties to the litigation who are entitled to rely on the actions of a party whom they have been led to believe by a property owner has authority to act on the owner's behalf.

Copies of the Board decisions can be obtained by clicking on the links found on this page.

This article is intended to provide comments on recent legal developments and is not intended to give legal advice. You should seek legal advice on matters of concern to you.

MGB RE-HEARS EXEMPTION APPEAL ON ASSISTED LIVING FACILITY

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We initially reported in our February Case Commentary that the Court of Appeal directed the Municipal Government Board ("MGB") to re-hear an exemption appeal filed by the Good Samaritan Society on a senior's assisted living facility called Vista Village, located in the Town of Pincher Creek. The rehearing occurred in May and the Board issued its decision (MGB 090/08) on July 28th, 2008. The Board reversed its earlier decision to exempt Vista Village pursuant to s. 362(1)(g.1) as property held by a health authority. However it granted the facility a full exemption under s. 362(1)(iv)[property used to provide lodge accommodation for senior citizens, as defined in the Alberta Housing Act]. The following is a summary of MGB 090/08.

The Society argued that the facility was exempt from taxation under four sections: (i) section 362(1)(g.1) [property held by a health authority]; (ii) s. 362(1)(h) [nursing home]; (iii) s. 361(1)(n)(iii) [charitable or benevolent purpose]; and (iv) s.362(1)(n)(iv) [lodge accommodation as defined in the Alberta Housing Act].

Held by a Health Authority (s. 362(1)(g.1))

The Board's initial decision to exempt the facility solely under s. 362(1)(g.1) [held by a health authority] was based on the Board's reasoning that "held by" could mean something less than physical control. However, on re-hearing, the Board followed previous case law as confirmed by the Court of Appeal, that "held by" has a very specific meaning which includes "*ownership, lease, license, permit, or other physical control*". The Board determined the contract between the Health Authority and the Society did not place the Health Authority in physical control of the facility. The Board then took direction from the Court of Appeal to consider each exemption request made by the Society.

Nursing Home (s. 362(1)(h))

The Board found that the facility was not exempt under s. 362(1)(h), as it was not a nursing home that was listed as a nursing home approved under the Nursing Homes Act.

Charitable and Benevolent / COPTER (s. 362(1)(n)(iii))

As for an exemption under s. 362(1)(n)(iii), the parties agreed that it met the requirements of s. 10(a) and (b) COPTER as the Society's resources were devoted chiefly to the charitable and benevolent purpose for which the property is used. Whether the use of the property met all of the criteria turned on 2 issues – (1) whether the facility was beneficial to the general public and (2) whether s. 7 of COPTER was met. The Board found that to be considered beneficial to the general public or community “*does not require each member of a local community to be served equally.*” Therefore, Vista Village provided a benefit to the community in the same way than a homeless shelter or food bank was beneficial. In terms of the second issue, the Board found that the Society failed the s. 7 COPTER requirement as public access is restricted. Access to Vista Village requires a monthly rental for each unit which was not a “minor entrance or service fee”.

Lodge Accommodation (s. 362(1)(n)(iv))

Ultimately, the Board determined that the facility was exempt under s. 362(1)(n)(iv) property held by a non-profit organization (the Society) and used to provide senior citizens with lodge accommodations. As a Designated Assisted Living facility, the Board found Vista Village met the definition of “lodge accommodation” in s. 1(e) of the Alberta Housing Act. That definition stipulates a home for the use of seniors who are not capable or do not desire to maintain their own home. The requirement in s. 11 COPTER also was met, in that the rent for lodge accommodation was subsidized as defined in General Regulation AR 213/94. Although the General Regulation no longer contained a definition of “subsidized accommodations”, the Interpretation Act directed that the repealed definition was to be used. That meant that the Government of Alberta was required to subsidize the accommodations. While the Town argued the Government did not directly fund Vista Village, the Board accepted the Society's argument that the funds directed to Vista Village and paid by the health authority was sourced from the provincial government. The Board was persuaded by section 20 of the Regional Health Authority Act that the legislature intended the health authority to stand in place of the province when required.

A copy of the Board's decision (MGB 090/08) can be obtained by clicking the link on this page.

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**AG PRO AND LOUIS DREYFUS V. LACOMBE COUNTY, VULCAN COUNTY,
KNEEHILL COUNTY, MOUNTAIN VIEW COUNTY, FLAGSTAFF COUNTY,
AND M.D. OF ROCKY VIEW**

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The Municipal Government Board (MGB) recently clarified the meaning of the term “processing” in the context of the assessment of grain elevators. The main issue before the MGB in Order 053/08 was whether the high throughput grain terminals in the 6 municipalities should be assessed as “buildings and structures” or “machinery and equipment” under the *Municipal Government Act*. Section 284(1)(l) of the Act specifies that “machinery and equipment” has the meaning given to it in the regulations. “Machinery and equipment” is defined for the purposes of s. 284(1)(l) in the *Matters Relating to Assessment and Taxation Regulation* as “materials, devices, fittings, installations, appliances, apparatus and tanks other than tanks used exclusively for storage, including supporting foundations and footings and any other thing prescribed by the Minister that forms an integral part of an operational unit intended for or used in...(ii) processing.” The issue required the MGB to consider whether, based on the evidence before it, “processing” occurred in the subject elevators in the assessment year. If so, the improvements would be assessed as “machinery and equipment.”

Since the term “processing” is not defined in the Act, it fell to the Board to determine the correct interpretation of the term. The appellant property owners, Ag Pro Grain Management Services Ltd. and Louis Dreyfus Canada Ltd., submitted that “processing” in this context meant making the product more marketable, and cited the Federal Court decision in *Range Grain* as authority for this proposition. The Board, however, preferred the more robust definition presented by the Respondent municipalities, who argued that processing meant a change in nature or form of the grain, or a material transformation of the grain such that it is changed to flour or oil. This approach was more in line with the purpose of the Act in general, which is to ensure fair and equitable property assessment in Alberta, and the machinery and equipment scheme in particular, which is to encourage the building of manufacturing and processing facilities in Alberta through advantageous assessment and tax policies. The Board interpreted *Range Grain* to mean that processing should make a product more marketable, but the fact that an activity increases marketability does not necessarily make it processing.

The Board accepted the evidence of the municipalities’ witnesses that the various activities performed on the grain at the subject terminals – which included drying, cleaning, and blending the grain – did not constitute “processing” because, although they increased the marketability of the grain, they did not change the grain’s nature and form.

The core function of the subject elevators, which were licensed as “primary” not “process” elevators under the *Canada Grain Act*, was to receive grain from producers for storage or forwarding or both, not to process grain using manufacturing and processing equipment. The activities which occurred at the terminals were performed to *maintain* the quality of the grain, not to improve or change it. Since maintaining the grain is incidental to forwarding the grain, these activities were more accurately characterized as “grain handling” or “grain conditioning” rather than “processing.”

The Board also declined to accept the Appellants’ argument that the 4 Ag Pro concrete elevators suffered from functional obsolescence. This argument was based on the proposition that the concrete and steel elevators had the same utility. However since the concrete elevators cost more to construct this formed the basis for functional obsolescence. The Board accepted the testimony of the witnesses called by the municipalities that concrete terminals have a longer life and lower operating costs than steel elevators. This was supported by the testimony of the elevator operator who stated that steel elevators have problems with condensation, corrosion and heating, which are not encountered in concrete terminals. Relying on this evidence, the MGB found the concrete and steel elevators do not have equal utility.

The Board accepted the assessment recommendation put forward by the Municipalities.

Copies of the Board’s decision can be obtained by clicking on the link on this page.

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***CANADA LANDS V. CITY OF EDMONTON***

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In January of this year, the Alberta Court of Queen’s Bench issued a decision (2008 ABQB 51) sanctioning the Municipal Government Board (“MGB”) for failing to comply with directives issued by that court in the assessment of the former Griesbach military base.

The MGB’s initial decision on the assessment (MGB 101/05) was quashed by Justice R. P. Marceau in 2006 ABQB 293 on the grounds that the MGB had failed to properly use their discretion to conduct review of the evidence that would support a rationally justified assessment of the properties. The reason for uncertainty as to the valuation process

related to the unique nature of the Griesbach properties, which are deteriorating, specific-use buildings with no comparables within the municipality. It was the position of the City, supported by the MGB, that a standard analysis should be used to assess the value of the land in question. Canada Lands Company (“CLC”), the owner of the former military base, appealed the assessment by challenging the MGB’s failure to incorporate expert testimony as to the reduced value of the buildings.

The court directed the MGB to review their decision in light of the court’s guidance. The MGB then issued two new decisions (MGB 007/07 and MGB 010/07) which, according to Justice Marceau in his second judicial review decision, applied the same principles to the same facts to reach the same conclusion. By failing to incorporate the Court’s direction, the Court found that the MGB failed both in the initial hearing and in the re-hearing, as there was no reasoning by the MGB which could logically lead to the conclusion that the figures adopted by it reflect market value. The court quashed both decisions, returning the matter once again to the MGB for reconsideration.

CLC requested costs in the appeal, and was awarded the unusual measure of costs against the MGB itself. Ordinarily, costs would have been payable by the City if the property owner was successful on judicial review.

Essentially, the most recent Queen’s Bench decision on this matter highlights two important facets of the court’s interaction with the MGB. Firstly, the court has proven its unwillingness to support the MGB’s discretion regarding decisions made without reference to pertinent evidence or a reasonable methodology. Secondly, the awarding of costs against the MGB suggests that the court may enforce its decisions with deterrent measures if the MGB chooses to disregard the directions given by the Court.

A copy of Justice Marceau’s most recent decision on this matter is available by clicking on the link on this page.

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