

Court of Queen's Bench of Alberta

Citation: Canada Lands Company CLC Limited v. Alberta (Municipal Government Board), 2008 ABQB 51

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Registry: Edmonton

In the Matter of The *Municipal Government Act*, R.S.A. 2000, c. M-26, as Amended;
And In The Matter of Board Orders: MGB 009/07 and MGB 010/07

Between:

Canada Lands Company CLC Limited

Applicant

- and -

The Municipal Government Board

Respondent

**Reasons for Judgment
of the
Honourable Mr. Justice R.P. Marceau**

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I. Introduction

[1] On October 13, 2005, the Respondent Municipal Government Board (MGB) rendered its decision (MGB 101/05) on an appeal from a review by the Assessment Review Board (ARB) of a 2003 municipal tax assessment of the former Griesbach military base, comprising four quarter-sections of land in northeast Edmonton. The Applicant Canada Lands Company CLC Limited (CLC), owner of the former military base, applied for judicial review of that decision. On April 21, 2006, I issued written Reasons (2006 ABQB 293) concluding that the MGB's decision that there was an assessment under appeal was reasonable and that the MGB was correct in finding that it was entitled to direct the City to correct the roll to reflect a description of the property consistent with s. 303 of the MGA and to apportion the assessment by quarter-sections. I quashed the MGB's decision as to the amount of the assessment and directing that it reconsider the assessment in light of my Reasons. However, I did not direct the manner in which the MGB was to carry out its reassessment, other than to indicate in the formal order arising from my Reasons that the rules of fairness and natural justice were to be observed.

[2] The MGB's reconsideration of the appeal of the 2003 assessment did not involve a new hearing, new evidence or further submissions. The panel wrote a new decision based solely on the record generated at the original hearing. After reconsidering its decision, the MGB issued MGB 009/07 on January 30, 2007, arriving at exactly the same assessment as in MGB 101/05; namely, \$52,489,000.

[3] On February 2, 2007, the MGB rendered a decision (MGB 010/07) on appeals from the decisions of the ARB relating to the 2004 and 2005 assessments of the same CLC lands.

[4] In the present application, CLC seeks judicial review of MGB 009/07 and MGB 010/07, involving the 2003, 2004 and 2005 assessment years. The grounds advanced for the application in relation to MGB 009/07 are that:

- A. The MGB disregarded or failed to comply with the directions set out in my decision in 2006 ABQB 293 and the resulting order.
- B. The MGB's decision was unreasonable in view of the evidence before the Board and my decision in 2006 ABQB 293.
- C. The MGB erred in law or jurisdiction in ignoring relevant evidence and taking into account irrelevant considerations.

[5] In terms of MGB 010/07, the grounds are essentially the same. CLC complains that the MGB based its decision on its decision in MGB 009/07, thereby repeating the errors made by it in that matter.

[6] My order quashing MGB 101/05 was not appealed by either party. Accordingly, this decision should be read in light of that previous decision. In particular, I will not repeat that portion of my analysis in which I concluded that the decisions of the MGB on the substantive aspects of the assessment were entitled to some deference and should be reviewed on a standard of reasonableness.

[7] I intend to deal first with two statements made by the MGB panel with respect to the 2003 assessment, as I believe it misconstrued part of my previous judgment and its reconsideration role. I will review the MGB's reconsideration of the 2003 assessment in MGB 009/07 and then, applying the principles set out for the 2003 assessment, I will review MGB order 010/07 dealing with the 2004 and 2005 assessment years.

II. MGB 009/07

A. Discretion of the MGB and Whether MGB 101/05 was Quashed

[8] In MGB 009/07, the MGB stated: "The ABQB (Alberta Court of Queen's Bench) has directed (via desk order) the MGB to use their discretion and reconsider certain issues of Board Order MGB 101/05."

[9] In fact, I directed in para. 3 of my formal order that the MGB "reconsider the assessment in light of the Reasons for Judgment." However, in para. 5 of that order, I left the MGB some discretion as to the manner in which it conducted its reconsideration of the assessment appeal. This allowed the MGB the option of conducting a full re-hearing, rendering its decision solely on the previous record or carrying out some form of partial re-hearing. The decision of the panel to not hear further evidence or further submissions and to render a new decision based solely on the record was within its discretion.

[10] The MGB took the position in MGB 009/07 that: "Board Order MGB 101/05 has not been struck down by the ABQB decision and is thus still in force."

[11] That is not entirely correct. As clearly stated in the formal order as entered, supported by my Reasons, the application for judicial review was dismissed with respect to amending the master account and apportioning the assessment over quarter-sections. That portion of the MGB's order was upheld and remains in force. However, the application for judicial review was allowed with respect to the amount of the assessment. As stated in para. 3 of the formal order: "Municipal Government Board Order MGB 101/05 is hereby set aside in that regard."

[12] The MGB, in its written argument in the present proceedings, conceded that it was wrong in stating that MGB 101/05 had not been struck down in terms of the assessment amount.

I agree with the MGB, however, that this error of law on the part of the MGB did not affect its ultimate decision in MGB 009/07, as it reconsidered all of the impugned sections of its previous order and did not re-address those aspects of its prior decision which had been upheld. In issuing the new order, MGB 009/07, it incorporated all of the unimpugned portions of MGB 101/05 by reference.

B. MGB's Approach to Reconsideration

[13] At p. 2 of its decision in MGB 009/07, the Board stated:

The MGB finds that although the original decisions [on issues 3, 5 and 7 in MGB 101/05] remain correct, matters raised in the ABQB decision have lead the MGB to conclude that the reasons provided to support those decisions were inadequate. In response to the ABQB decision, the MGB has decided to provide extended reasons through the use of this amendment.

[14] CLC takes issue with this statement, arguing that my decision to direct reconsideration of the assessment amount in light of my Reasons for Judgment was that the MGB's conclusions relating to the amount of the assessment were unreasonable on the evidence.

[15] The original hearing before the MGB was lengthy and the return was reflective of that. Implicit in my judicial review decision was that the MGB's conclusions were unreasonable on the basis of the evidence referred to in MGB 101/05 or to which my attention had otherwise been directed during the judicial review. However, it was open to the MGB, in reconsidering the assessment amount, to conclude that the original amount was appropriate given evidence from the original hearing before it which it had not referred to in MGB 101/05 and which had not been brought to my attention in the written or oral submissions of counsel on the first judicial review.

[16] I agree with the City that in theory it was open to the MGB, after reconsidering the evidence in light of my Reasons, to reach the same conclusion as it did before on the assessment amount, provided its decision was reasonable (*Larsen v. Edmonton (City)* (1982), 24 L.C.R. 364 at para. 6 (Alta. C.A.)).

[17] The City contends that this Court lacks the expertise of the MGB with respect to assessing property for the purpose of taxation. Accordingly I should not, and indeed cannot, tell the Board what methodology it should adopt or what conclusions it should reach. I agree with that statement, but only to the extent that the methodology employed by the MGB can be rationally justified. As indicated in *Law Society (New Brunswick) v. Ryan*, 2003 S.C.C. 20 at paras. 55 and 56, [2003] 1 S.C.R. 247, the question on a review based on a standard of reasonableness is whether the assessment "is supported by a tenable explanation, even if this explanation is not one that the reviewing court finds compelling." The reasons, as a whole, must be tenable as support for the decision.

C. Expanded Reasons of Board

[18] The following are the specific aspects of MGB 101/05 which I found were not reasonable or supported by a tenable explanation and for which the Board now gives expanded Reasons in MGB 009/07.

Issue 3: What is the highest and best use of the subject property?

[19] CLC took the position in MGB 101/05 that the land underlying the improvements on the subject property exceeded the capitalized value of the existing improved property and, therefore,

the highest and best use of the property was for redevelopment. Accordingly, the land should be valued as vacant land, which the parties agreed should be valued at \$36,422 per acre. It acknowledged that some of the improvements would continue to be used for a time and had value, but argued the revenues would only served to defray some holding costs. They would not provide an incentive to pay more than the vacant land value and, in any event, would be offset by the higher cost of retrofitting a brownfield site.

[20] The MGB in MGB 101/05 agreed with the City that the highest and best use for the subject property was not the same for each of its components. It found that the highest and best use for the excess and undeveloped land was for mixed-use residential development. The MGB accepted that vacant undeveloped residential lands, as well as the lands supporting the residential and non-residential improvements with limited or no utility, should be valued at the vacant land rate of \$36,422 per acre.

[21] The MGB accepted the assigning of an amount of land and its equivalent value in accordance with typical site/improvement ratio requirements of the improvement type.

[22] The MGB found that the highest and best use for the in-use non-residential and residential components was in their continued use along with a reasonable amount of land to support the improvements. It reasoned that an assessment based on market value must reflect the fee simple estate in the property and typical market conditions of similar properties. It considered CLC's evidence that a 10 to 15 year build-out period for redevelopment of the site should be assumed and noted that in the subject year there was evidence that existing residential and non-residential improvements on site were generating a cash flow. It expressed the view that improvements capable of generating a positive cash flow should be predicted to continue in use until the lands they occupy are required for their eventual use.

[23] I concluded in 2006 ABQB 293 that the MGB's decision on the highest and best use of the non-vacant land was unreasonable in view of its failure to address the evidence of two of the witnesses that a developer would not pay more for the Griesbach site than the market value of the vacant land and the evidence of the City's own witness that the highest and best use of the lands was for redevelopment.

[24] I also held that it was unreasonable for the MGB to treat occupancy of the military housing as a use that would continue in perpetuity. Further, I stated that:

There is no line of reasoning which supports the City's treatment of improvements at or near the end of their economic life, in a unique setting, where the lands will soon be vacant, as enhancing the value of the land so as to be comparable to developed land in an ordinary residential neighbourhood or industrial zone in the City. This is particularly so given there was an agreed on value for vacant land and considerable evidence presented of what additional value should be assigned the improvements themselves.

[25] By this I meant that it was unreasonable to determine the highest and best use of the individual components without taking into consideration the reality that the Griesbach property as a whole is slated for redevelopment and the effect that might have on market value. It was unreasonable to compare the subject property with developed land elsewhere in the City, which was not comparable. It was unreasonable to apply typical rental rates, vacancy rates, and expense rates from other residential zones rather than the actual income stream, vacancy rates, and expenses of this unique property. The resulting assessment reflects a fiction rather than market value of this unique property.

[26] The MGB's response in its amended Reasons in MGB 009/07 was that: "These [residential] improvements provide an income stream that supports redevelopment plans and thus contributes value to the land." It stressed that "... both parties acknowledged that the residential improvements with utility do produce an income, and the MGB holds that this income does enhance the value of the land." It pointed out that the condition date was December 31, 2002 and as of that date there were non-residential improvements in use. It suggested that fact should not be ignored simply because the buildings might cease to exist one day in the future. In the end result, it concluded that the highest and best use of the improvements with utility and supporting lands was their continued use. It noted that:

Although the Appellant supplied the MGB with evidence supporting the argument that the highest and best use of the entire site is redevelopment, the MGB found that the Respondent's evidence concerning highest and best use more correctly represents the physical condition and characteristics of the subject property as of December 31, 2002.

[27] The MGB mentioned having heard evidence from two expert witnesses, Mr. Daly and Mr. Caithness, but did not directly address their evidence that a developer would not pay more for the improvements than the vacant land value. In argument, however, it was pointed out that two expert appraisers from Altus Group, who were called by CLC, did assign some additional value to the improvements (approximately \$1.6 million in terms of the residential improvements in the northeast quarter). On that basis, I conclude it was not unreasonable for the MGB to find that income from the in-use improvements enhanced the value of the land and the highest and best use of the improvements and supporting land at the assessment date was their continued use.

[28] While it was not unreasonable for the MGB to conclude that different areas of the Griesbach property could have different highest and best uses, it was unreasonable not to consider whether the resulting assessment for the four quarter-sections was a realistic reflection of market value for this property; that is, "the amount that [this] property... might be expected to realize if it is sold on the open market by a willing seller to a willing buyer" (*MGA*, s. 1(1)).

[29] The evidence of Mr. Daly was relevant in that regard. As I noted in 2006 ABQB 293, Mr. Daly was asked if a private developer would pay in the order of \$54,000,000 (over \$80,000 per acre) for the Griesbach site (the amount determined by the ARB). He advised that Melcor would not have paid that kind of money for the site in 2002 and that it could not have competitively redeveloped the site if it had paid that purchase price. Mr. Caithness also testified that the

income from the existing military rental housing would not make a significant difference to the purchase price of the Griesbach site.

Issue 7: What is the contributory value of the residential rental housing stock?

Capitalization versus present value attribution

[30] The MGB approved capitalization of residential improvements with utility at nine percent. CLC advised in argument before me on 2006 ABQB 293 that it was prepared to accept a present value attribution calculated from the true income stream on the basis that the rented and available-for-rent residences would have a life of 10 years.

[31] I was under the impression in rendering my decision in 2006 ABQB 293 that the only evidence before the MGB in 101/05 on the appropriate approach to take in valuing the income stream was the present value approach. It was pointed out to me at the time that Mr. Druett, for CLC, had stated CLC anticipated being into redevelopment within five to twelve years. He thought they would start in one corner of the area in five years and be completed in ten to twelve years. He anticipated the rental stream would end within that period. As a result, I found that capitalizing on the basis of a long term or perpetual income stream was unreasonable.

[32] In MGB 009/07, the Board expressed the view that with a highest and best use of continued use for the in-use residential improvements, the capitalized approach to value was preferred. It conceded that the present value approach could be employed in assessing properties “with a near approaching definite economic end,” a deadline near enough, such as under five years, to limit the effect of wide changes in the market. The MGB noted there were no exact dates provided when redevelopment was to take place on the subject property. It stated that, “[a]s of the condition date of December 31, 2002 there was minimal evidence that supports the finding that the in-use residential improvements are nearing their economic end within a determinable period.” It added that the evidence before it suggested that redevelopment could take as long as 20 years from the date of the assessment’s first appeal.

[33] The MGB stated it had little evidence to support any alteration of the nine percent capitalization rate which it had applied. Further, it found the income would continue for a considerable amount of time to support the redevelopment efforts of the property. It concluded that the nine percent capitalization rate was fair and accurately depicted the characteristics of the residential income stream.

[34] It was pointed out to me in argument in the present judicial review hearing that the Board in MGB 101/05 had before it material by Altus Group proposing the capitalization approach. Further, that Mr. Druett conceded that development could take more than five to ten years and he could not put an end date on it.

[35] Given this evidence, I can no longer say there was no rational basis for the decision of the Board to reject the present value approach in favour of capitalizing the residential improvements with utility at nine percent.

Neighbouring comparables, excess land, rental rates and vacancy rates

[36] The MGB found that the contributory value of the existing residential housing stock should be equivalent to similar and comparable residential complexes within the neighbouring communities, but that the valuation must have regard to the fact the subject complexes were atypical in that they had fixed as well as competitive rental rates, were located on unsubdivided property, had an atypical vacancy rate, some were to be reused and some demolished, and the site itself required some environmental remediation.

[37] The MGB expressed the view that the City had given consideration to the atypical nature of the subject property and that the assigned vacancy rate of 15 percent, while somewhat arbitrary, reasonably recognized that the subject residential housing space was not conventional and not subject to the typical market forces that had produced a vacancy rate of two percent. It stated that to accept the actual 50 percent vacancy rate for the open market rentals would be to give consideration to business decisions that were not typical of other complex owners and would ignore there might be measures which could have alleviated the abnormal vacancy rate. The MGB advised that it was taking direction from *Matters Relating to Assessment and Taxation*, AR 289/99, a regulation under the *Alberta Municipal Government Act*, which mandated that assessments be based on typical market conditions for properties similar to the property being assessed.

[38] In 2006 ABQB 293, I concluded that the MGB's finding that "the contributory value of the subject's existing residential housing stock should be equivalent to similar and comparable residential complexes within the neighbouring communities" was not founded on the evidence. Neighbouring residential complexes were not comparable.

[39] I noted there was no evidence before the Board that the decreased rental rates charged in 2003 as compared to 2002 resulted in greater profit and no evidence which showed that CLC was not employing sound business principles in its attempt to lease the properties, particularly given that a residential property management company had been contracted.

[40] In MGB 009/07, the MGB found that the open market residential housing stock was being rented at market rates and was reacting typically in the market place. In accepting the 15 percent vacancy rate applied by the City, it reasoned that many of the vacant properties were DND units. As CLC continued to receive rent for those properties, the MGB concluded they should not be treated as vacant. The evidence provided by Westcorp indicated that of 695 residential units, 455 were designated as DND homes, 104 were being rented and 133 were vacant, suggesting an actual vacancy rate of 19.5 percent. The MGB noted that, after cross-examination during the original hearing before it, CLC's representative agreed the actual vacancy rate was closer to 20 percent.

[41] The MGB commented that there were management decisions behind why the residential units were being rented at market rates, and noted the Griesbach residential units were inferior to similar units in nearby communities, there was a possibility at any time of a 90-day eviction notice being served and the properties were surrounded by construction.

[42] In my view, it was reasonable for the MGB not to include the DND homes in the vacancy rate given that rent was being paid for those units. However, in view of the unique nature of this property, I continue to be of the view that it was not rational to use modelled residential rents and apply a typical vacancy allowance, notionally adjusted to 15 percent to supposedly account for the unique nature of the property, rather than to use the actual rents received and accept that the actual vacancy rate of about 19.5 percent was more accurate.

[43] The MGB attempted to rationalize its decision by suggesting that the increased vacancy rate for the Griesbach residential units must be attributable to the management decision to rent the properties at market rent. However, it did not consider that while lowering rent might have reduced the vacancy rate, there would have been a consequential decrease in the income received per unit. As I noted in my previous decision, rents were reduced the following year, but there was no evidence this led to greater profits. Nor was there evidence that showed CLC was not employing sound business principles in its attempt to lease the properties. In fact, Westcorps' management fee was based on a percent of gross income so it had an incentive to maximize overall income.

[44] The City pointed out in MGB 101/05 that the Griesbach residential units occupy considerably more land than other residential developments in the marketplace. It used what it found to be typical land to building ratios and assigned an additional value for the excess lands. It then applied a 20 percent allowance in recognition that the land was not subdivided.

[45] The MGB found that it was reasonable to assign a value to a typical amount of land area based on its land use zoning that was in keeping with the complexes' site development ratio. I agree, given that the excess lands were valued as vacant land and the CLC did not present an argument that the 20 percent allowance was unreasonable.

Operating expenses

[46] The Board in MGB 101/05 determined that use of a 35 percent operating expense allowance (as opposed to the 59 percent operating expenses claimed by CLC) was in line with the typical operating expenses of similar surrounding residential housing complexes. The MGB expressed its scepticism that the atypical characteristics of the subject units were the only contributors to the 59 percent operating expenses claimed by CLC.

[47] In MGB 009/07, the MGB added that the operating expenses recommended by the City incorporated the principles set out in s. 12 of the *Matters Relating to Assessment and Taxation Regulation*, which provided that an assessment based on market value must be prepared using mass appraisal, must be an estimate of the value of the fee simple estate in the property, and must reflect typical market conditions for properties similar to the property being assessed. It

indicated that, on closer inspection, it was apparent that “the actual operating expenses were comprised of certain line items that should not be included in the calculation of operating expenses.” It also noted there was an excess of money spent on signage and marketing, and commented that some of the expenses were not clearly identified. Therefore, the MGB could not be certain of what the actual operating expenses entailed.

[48] In my view, the instruction in s. 12 of *Matters Relating to Assessment and Taxation* that an assessment of property based on market value must reflect typical market conditions for properties similar to that property is of no assistance in a situation such as this, where there are no “typical market conditions for properties similar to that property.” The City assessors and the Board recognized there were no similar properties to this 640 acre block of land within the City. For the MGB to then say that “the use of a 35 percent operating expense allowance is in line with the typical operating expense of the surrounding similar residential housing complexes” goes against the evidence that there were no “surrounding similar residential housing complexes.” These are old houses near the end of their life, situated on a military base which is no longer used for military purposes.

[49] Furthermore, the MGB’s statement that the actual operating expenses included “certain line items that should not be included in the calculation of operating expenses” is not helpful on review without reference to what those line items were and how they were unreasonable in these unique circumstances. In addition, in the absence of evidence that the amount spent on signage and marketing was unreasonably high given the unique nature of the site, it was not reasonable for the MGB to conclude that these costs “effectively skewed the operating expenses higher.”

[50] The Board complained that some of the expenses were not clearly identified. However, the expenses were set out in an exhibit before the Board and a representative of Western Properties was there to offer any explanations that were required. It was not rational for the Board to reject evidence of the actual expenses because it did not understand what some of the expenses were since both the City and the Board could have sought clarification in that regard.

[51] Finally, the Board does not appear to have considered that when a DND rental unit was released to the rental pool, the unit was necessarily vacant for a time while it was being renovated and there would be a cost associated with renovation.

[52] I conclude, as I did before, that it was not rational for the Board to substitute a typical operating expense allowance for the actual operating expenses where there was no evidence that this property should have expenses typical of other City housing complexes, particularly given the evidence there were no “surrounding similar residential housing complexes.”

Improvements with no or limited utility

[53] In MGB 101/05, the MGB accepted a \$1,000 scrap value for each residential building with no utility.

[54] CLC argued before me in the first judicial review that there was no evidence to justify attribution of that amount. In 2006 ABQB 293, I concluded that as there was no evidentiary foundation for the assessment of scrap value, it could not stand the test of rationality.

[55] In MGB 009/07, the MGB wrote:

The Respondent assessor assigned a nominal value so that the assessment would recognize that the land was not vacant. The MGB understands the reasoning for this attribution, but finds that there is insufficient evidence supporting the value of \$1,000.

[56] The MGB chose not to alter the assessment as it would have little effect on the assessment as a whole.

[57] It is my understanding that 83 vacant residential units were each assigned the \$1,000 scrap value. I again conclude that it was not rational for the Board to accept an arbitrary figure unsupported by evidence. I agree that the scrap value assigned to the improvements without utility is relatively minor in comparison to the assessment as a whole. However, \$83,000 when combined with the \$32,000 in scrap value which the MGB accepted for the non-residential improvements without utility, is beyond the *de minimus* range and the assessment should not include those amounts.

Issue 5: What is the contributory value of the non-residential improvements (and value of the associated land)?

General

[58] The non-residential improvements with continuing utility were assessed using a cost approach, while a direct comparison approach was employed to establish the land value. The City attributed a land area of two times the gross floor area of each improvement, as required by MGB 007/04, the MGB order relating to the Griesbach site assessment for the previous year.

[59] The MGB in 101/05 found that the one to 20 year timeline for demolition of the improvements was too vague to render the buildings with utility valueless. It held that the highest and best use of the non-residential improvements and supporting land was their continued use. It accepted the two-for-one ratio as being in accordance with typical site/improvement ratio requirements of the improvement type.

[60] The Board found that the nominal rental rate charged for certain of the improvements was a business decision that could indicate that at some future point the buildings would be demolished. However, the evidence did not lead the MGB to conclude that demolition would occur shortly.

[61] In 2006 ABQB 293, I found that it was unreasonable on the evidence to assess the land beneath and around the in-use non-residential improvements as industrial land comparable to other industrial land in the City.

[62] In MGB 009/07, the Board held that, in terms of the 32 buildings that were disconnected from services and boarded up, there was reliable physical evidence that the buildings would be torn down shortly. As a result, it found the buildings should be assessed as having only scrap value. That decision is not questioned by either party, although the scrap value assigned is.

[63] The MGB stated that as the remaining non-residential buildings with utility were or could have been used, the fact that some were being rented for a nominal value was irrelevant as little evidence was adduced proving they had to be rented at such a low rate. Further, it commented that CLC had presented little evidence to suggest the cost approach values, costing manual or depreciation values used were in error.

[64] The MGB determined there was sufficient evidence before it to accept the two for one ratio, pointing to the Edmonton City Land Use Bylaw, S.410.4.1B, which noted that improvements in non-residential zoning should be allotted a maximum density of 2:1 land to improvement. The MGB commented that CLC had submitted little evidence that suggested a superior density ratio. While acknowledging the areas with non-residential improvements are not typical or comparable to other industrial lands in Edmonton, the MGB found that the City had adequately accounted for this fact by discounting the land value by 20 percent.

[65] In argument on the present judicial review, the City suggested that common sense dictates that if \$1.00 is the maximum income achievable for an improvement and it is not slated for re-use, a reasonable developer would demolish the improvement rather than carry the negative income stream that a \$1.00 rent produces. It suggested that the fact eight non-residential improvements on Griesbach have not been demolished is supportive of the argument that they have value.

[66] I am of the view that the MGB's decision in terms of the 2:1 ratio was reasonable given that CLC submitted little evidence to support a superior density. In any event, it was irrelevant given my view that it was unreasonable for the MGB to approve the City's approach of assessing the lands associated with the non-residential improvements at an industrial serviced land value rather than at the agreed vacant land value. While some of the non-residential improvements had some continuing utility as at the assessment date, clearly, no prospective purchaser (not that there were any) would pay industrial serviced land value for the lands given that the City of Edmonton Bylaw 12936, the "Griesbach Neighbourhood Area Structure Plan," contemplates that the Greisbach lands will have all non-residences removed and most, if not all, housing units removed. The lands will be redeveloped as a residential neighbourhood which might include some limited commercial facilities to support the neighbourhood.

[67] At the hearing, it became obvious that without a more detailed building by building analysis, I could not determine whether the cost approach yielded a reasonable assessment of

market value of the non-residential improvements. I invited counsel to make further written submissions dealing with each building, which they did.

[68] The non-residential improvements ranged from a building rented at a minimal rate and used for paintball mock war games, to a gym, which CLC concedes has ongoing utility. For assessment year 2003, the non-residential improvements generated a negative cash flow amounting to - \$719,801.

[69] In my view, it was unreasonable for the MGB to blindly apply the cost approach without considering the reality of the situation in terms of these non-residential improvements. If the application of a formula suitable for typical developments in the City yields a result that does not approach the price that an informed buyer would pay for a property, the formula must be discarded or modified to take into account the best evidence available as to market value. In this case, that evidence came only from CLC's experts, evidence that the MGB in its order with respect to the 2002 assessment reproached CLC for not providing.

[70] Mr. Druett for CLC gave evidence of the stages of development scheduled by CLC. He testified that CLC had a demolition program and that most of the demolition was being carried out in the first three to five years of development. He estimated CLC was 65 to 70 percent complete in its demolition program. He said that CLC is aggressively bearing in mind the need to deal with asbestos and other environmental issues.

[71] Mr. Daly of Melcor, a publicly traded real estate developer, stated that, in general, the buildings were not suitable for future use and are viewed as a liability. The areas of military activity were a particular concern as was the expense of demolishing buildings which have asbestos. His evidence was that a private developer would likely load the non-residential improvements in a truck and haul them away.

[72] Mr. Caithness, a former member of the MGB and currently western regional manager of real estate transactions for SNC Lavalin, a large publicly traded corporation, indicated that, from both an economic and management view, the improvements are at the end of their economic life and are more of a liability than an asset. He also said from a management perspective there was little incentive to aggressively market obsolete improvements because they become more of a headache than if left unoccupied.

[73] The City's witness, Mr. Thorgeirson, conceded that he could not identify the profile of a buyer who might spend the value assessed by the City knowing he would have to give up the buildings for redevelopment and knowing the negative cash flow being generated.

[74] It is difficult to reconcile this evidence with the MGB's finding that renting some buildings at a nominal rate was by implication a bad business decision on the part of CLC. Mr. Caithness stated that he was less concerned about how the non-residential improvements were assessed so long as the assessment reflected the real market value. I echo this statement in concluding that any formula used by the City should not be relied on exclusively if it yields what is an unrealistic market value. Unless there was actual evidence presented that the non-

residential buildings could have been leased for a greater amount at a new profit, the rent obtained should have been taken into consideration when determining market value.

[75] The City, in its submissions on this judicial review, submitted that CLC's argument is based solely on the owner's intentions. I agree that the owner's intentions are sometimes irrelevant. However, where the uncontradicted evidence is that no prudent real estate developer would have any other plan than to demolish the buildings as soon as possible and even the City assessor could not identify the profile of a purchaser who would pay the price arrived at by the cost approach, the MGB should have rejected or modified that approach in favour of an approach that would give a realistic value to temporarily useful buildings slated for demolition but able to produce some positive income in the interim period. Any other approach would not be rational.

[76] For example, L1, the former Brigadier Gault School (not the Griesbach School leased to the Public School Board), was leased to DND under a five-year lease expiring in 2008, with the possibility of extending that lease for a further five years. DND did not pay rent, but rather paid an amount for operating expenses. The lease to DND was not at arm's length. CLC's evidence was that the building likely would be demolished when DND ceases to use it, although it was admitted that, if the right proposal comes along, it might be retained. CLC suggested that it be assigned a nil value. The City assessed the building as having a value of \$1,603,974. It argues there was no evidence presented to the MGB that the nominal rate was the best that could be obtained. It also points to Mr. Druett's admission in cross-examination that under the terms of the sale from DND to CLC, CLC makes no payments until it is generating a positive cash flow.

[77] CLC argues there was no evidence the decision to lease at a nominal rate was not prudent. It points out that the City did not lead any evidence to suggest that a purchaser of the Griesbach site for redevelopment would actually be prepared to pay \$1,603,974 for the building, whereas CLC did lead evidence that a purchaser would not be prepared to pay anything for it above the land value. I also note there were no details given in evidence as to the formula which applies for payment from CLC to DND and whether a positive cash flow would be detrimental to CLC under this formula.

[78] In my view, this is an instance where the MGB should have realized that application of the cost approach did not yield a realistic value and should have modified the assessment accordingly.

[79] CLC does not take issue with the value assigned by the City to the C1 office. No further comment is necessary.

[80] CLC takes the position that C1B is part of C1 and that the parties agreed on the value for all of C1 for 2003. The City has agreed that C1B forms part of C1 and was valued as such.

[81] CLC maintains that it made a mistake in submitting that the H2 Gym should be valued at \$237,090, as that was the value attributed by the 2003 ARB to the land alone, with nothing attributed to the building due to the City of Edmonton's "economic encumbrance" under clause 3 of the Master Agreement entitling the City to block a third party's sale and rent the gym for

five years for \$1.00. However, it is prepared to live with that figure for the 2003 assessment but not the higher value placed on the building by the City and agreed to by the MGB. Until this supplementary argument, there had been no reference before me to the Master Agreement affecting the value of the gym. At the hearing before the MGB, Mr. Druett of CLC acknowledged this property is one of two properties having potential to be incorporated into the ultimate use of the area, but advised that it will likely be dedicated as part of the Municipal and School Reserve. CLC concedes that it has some future value but suggests the 2003 assessment should recognize that it is unlikely a buyer would pay the amount the City has valued this building at given it will be part of the Municipal and School Reserve and in the interim generates little income. CLC notes that the City itself placed a value of \$1 on the gym.

[82] I agree with CLC that the cost approach, while helpful, does not necessarily reflect the market value of this building and that it was unreasonable for the MGB to apply that approach without considering that a buyer would take into account the City's economic encumbrance and the eventual dedication of this building as part of the Reserve.

[83] CLC acknowledges that the H13 Sergeant's Mess/Band Building has some utility. The City assessed the building at \$550,626.00. It was leased to DND for a nominal amount and, apparently, is now leased to the Legion on a short-term basis. CLC says this building too is slated for eventual demolition. The City argues this submission is too vague. However, there was evidence offered by Mr. Druett that all of the non-residential improvements other than the Griesbach School, the Gym and L1, would be demolished within three to five years. In my view, it was unreasonable for the MGB to ignore this evidence and the fact the building is being rented for a nominal amount in the interim, as these factors are relevant in determining whether the cost approach truly reflects the market value of this building, particularly given there was no evidence of any demand for this type of building.

[84] I need not comment on H13B as CLC considers the assessed value of \$1,194 for this building to be insignificant.

[85] The City notes that the H18 Quarter Masters and Tech Store was observed to have utility and to be in use. It assessed the value of the building at \$205,094. The ARB arrived at a figure of \$166,028 by reducing the City's assessment by 20 percent for obsolescence. CLC accepted that value, but the MGB agreed with the City's assessment. H18 was leased to Evolution Paintball from June 2003 to February 2008 for \$3.52 per square foot plus operating costs. The MGB was of the view there was an indefinite demolition date of between one and 20 years from the assessment. However, as noted by CLC, Mr. Druett's uncontradicted evidence was that demolition would be completed within three to five years. He also testified that H18 had no tenant as at the assessment date. In my view, the MGB should have taken into consideration the intended demolition and the income this building was generating in determining whether the cost approach truly reflected its market value.

[86] The City assessed the value of the H19 Drill Hall at \$216,662.00. That figure was reduced to \$134,124.14 by the ARB. The MGB agreed with the higher value. CLC did not make any specific submissions with regard to this building. However, Mr. Druett's evidence about the

demolition plans applied to this building also. Again, I am of the view that the MGB should have taken this evidence into consideration in determining whether the cost approach realistically reflected market value.

Scrap Value

[87] The MGB in MGB 101/05 indicated that assigning a \$1,000 scrap value to the 32 non-residential improvements with no utility recognized that the services had been disconnected and their valuable components stripped but the buildings had not yet demolished.

[88] In 2006 ABQB 293, I commented that "... the scrap value assigned by the assessors is illustrative of a tendency on their part to use convenient formulae rather than relying on solid evidence of market value, thereby resulting in unreasonable fictional assessments," but noted CLC's statement in MGB 101/05 that "a thousand dollars on the building is not a hill we're going to die on..."

[89] In MGB 009/07, the MGB agreed with my comment but referred to the \$32,000 for scrap value of non-residential improvements without utility as a nominal amount. It decided that it would not alter the assessment by that amount, but did caution the City that further attempts to assess those buildings at \$1,000 scrap value without adequate evidence would not be accepted by the MGB.

[90] As with the value assigned the residential improvements without utility, I continue to find it was irrational of the MGB to accept the \$1,000 scrap value without evidence that that amount was indicative of the market value of the improvements.

D. Conclusions on MGB 009/07

[91] The Board's decision in MGB 009/07 is quashed as it relates to:

- (a) the value of the residential buildings in use;
- (b) the scrap value assigned to the residential and non-residential improvements without utility;
- (c) the value of the non-residential buildings, except for C1 and H13B
- (d) the value of the land under and around the non-residential buildings in use.

[92] These aspects of the decision are quashed as there is no reasoning by the MGB which logically could lead to the conclusion that the figures adopted by it reflect fair market value.

[93] The matter is returned to the MGB for reconsideration in accordance with these Reasons.

[94] The MGB has discretion as to whether it will hear any further evidence or further argument before reconsidering the matter in light of my Reasons.

III. MGB 010/07

[95] MGB Order 010/07 dealt with the same lands for the assessment years 2004/2005.

[96] The Board agreed with CLC that the highest and best use of the southeast quarter was redevelopment, in view of the fact it had undergone visible redevelopment between the 2004 and 2005 assessment years. Other than that variation and to reflect the change in use of some of the buildings and the change in value of the unimproved lands as agreed to by the parties, the MGB applied the same principles as in MGB 009/07 to the same facts.

[97] The City justified attributing \$1,000 in scrap value per unit to the residential buildings with no utility on the basis that CLC sold some of the residential buildings, which were removed from the site for use as cottages? The MGB accepted this justification in terms of both residential and non-residential improvements with no utility. CLC argues that there was no evidence as to any scrap value for non-residential improvements. They were not scavenged. Without such evidence, I find that it was unreasonable for the MGB to accept the \$1,000 amount for scrap value of the non-residential improvements without utility.

[98] For the same reasons as outlined in relation to my review of MGB 009/07, the MGB's decision in 010/07 is quashed as it relates to:

- (a) the value of the residential buildings in use (except in relation to the southeast quarter);
- (b) the value of the non-residential units to be scrapped;
- (c) the value of the non-residential buildings.
- (d) the value of the land under and around the non-residential buildings in use;

[99] The matter is returned to the MGB for reconsideration in accordance with these Reasons. The comments I made with respect to MGB 009/07 apply equally to this decision.

IV. Costs

[100] CLC has asked for solicitor and its own client costs. The City submits that costs should not be assessed against it regarding the Board's decision with respect to the 2003 assessment as it made no further representations before the MGB after the Board was directed to reconsider its decision. The MGB contends that, absent egregious conduct, a costs award should not be made

against an administrative tribunal and notes that any costs award can only be for the judicial review proceedings as it has exclusive jurisdiction to award costs for the Board proceedings. It contends that this is not a situation where solicitor and its own client costs is justified.

[101] The MGB argued only standard of review and costs on this judicial review. However, the situation here is unusual in that the MGB essentially re-wrote its first decision relating to the 2003 assessment but set the assessment at the same amount, which I have found it could not do if it had applied the directions given in my earlier judgment. In the circumstances, CLC is awarded costs of this application on a party and party basis against the MGB. The City did not appeal my earlier judgment and no costs are awarded against it.

Heard on the 29th day of August, 2007 to the 30th day of August, 2007.

Dated at the City of Edmonton, Alberta this 22nd day of January, 2008.

R.P. Marceau
J.C.Q.B.A.

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