

BOARD ORDER: MGB 109/00

IN THE MATTER OF THE "Municipal Government Act" being Chapter M-26.1 of the Statutes of Alberta 1994 (the Act).

AND IN THE MATTER OF AN APPEAL from a decision of the 1999 Assessment Review Board of the City of Calgary.

BETWEEN:

Newell Group on behalf of Hospitality Inns Ltd. - Appellant

- a n d -

City of Calgary - Respondent

BEFORE:

J. Church, Presiding Officer

W. Morgan, Member

D. Berezowski, Member

Upon notice being given to the affected parties, a hearing was held in the City of Calgary, in the Province of Alberta on January 7, 2000.

This is an appeal to the Municipal Government Board (Board) from a decision of the 1999 Assessment Review Board (ARB) of the City of Calgary with respect to property assessments entered in the assessment roll of the Respondent municipality as follows:

Roll No. 044 02560 9 1804 Crowchild Trail NW

Total Assessment: \$9,370,000

BACKGROUND

At the start of the appeal hearing for the subject property, the City of Calgary raised the issue of the Board's jurisdiction to hear the merits of the appeal as the complaint had been withdrawn before the ARB hearing was held.

The following is the sequence of events concerning this issue:

Newell Group filed a complaint against the 1999 property and business assessment for the subject property on or about May 6 and May 14, 1999 respectively. On June 23, 1999 the Newell Group and the City of Calgary assessor agreed to proceed to the ARB for hearing.

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On July 26, 1999, Newell Group received notice from the ARB to appear at a hearing on September 15, 1999 regarding the complaint against the property assessment. Complying with Alberta Regulation 55/99 Newell Group filed an issue statement and supporting documents on August 25, 1999. On September 8, 1999, the date the City was to comply with Alberta Regulation 55/99, Part 1, the assessor advised Newell Group that the complaint against the property assessment has been withdrawn and the City had no reason to comply with Alberta Regulation 55/99, Part 1(5)(2). On investigation, Newell Group found that they had inadvertently filed a withdrawal of the property assessment complaint on August 9, 1999. The ARB was immediately notified that an error had been made.

Newell Group appeared before the ARB on September 15 to present their complaint. The clerk of the ARB read into the record the Newell Group letter of complaint. The City then objected to the hearing in that the City held the complaint had been withdrawn and therefore there was nothing to hear. The ARB agreed with the City's position that they did not have the jurisdiction to hear the complaint and made the decision, "Denied, No Jurisdiction".

This decision was then appealed to the Board and the hearing of this issue as a preliminary matter was heard January 7, 2000.

At the end of the presentations, the Board requested both parties to submit to the Board and to exchange written arguments by January 14, 2000. Further, rebuttals to these arguments were to be exchanged and submitted to the Board by January 19, 2000. Both parties complied; however, the City in their rebuttal letter dated January 19, 2000 included new evidence that was not part of their original argument. The appellant objected to this evidence in a January 20, 2000 letter. After considering the matter of the new evidence, the Board took the position that this evidence was not part of the City's original argument and was outside of the Board's instructions. The Board did not consider this evidence in their deliberations.

ISSUES

1. When is a withdrawal really a withdrawal?
2. Can a taxpayer or his agent correct an error prior to an ARB complaint hearing?
3. Should an error of an agent deny the taxpayer the right of a complaint or appeal hearing?
4. Did the ARB properly deny its jurisdiction?
5. Is the ARB's decision "Denied, no Jurisdiction" a decision that can be made?
6. Does the Board have the jurisdiction to hear an appeal the ARB denied jurisdiction on.

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LEGISLATION

Alberta Regulation 55/99, Part 1, sets out in sections 4 and 5 the procedure to file documents and issue statements with the ARB and the Respondent for a complaint to be heard by the ARB.

Sections 9 and 10 direct how the Board can deal with new issues and evidence of an appeal that was not part of the complaint before the ARB.

(4) Subject to subsection (3), if a complainant does not comply with subsection (1), the complaint is invalid and the assessment review board must not hear the matter and the clerk of the assessment review board must so notify the complainant.

(5) If a complainant who files an issue statement does not comply with subsection (2) the clerk of the assessment review board may refuse to file the issue statement.

9(1) Unless all parties to an appeal consent, the Municipal Government Board must not on appeal hear and decide an issue that is not disclosed in that matter's statement of issues heard.

(2) Notwithstanding subsection (12), the Municipal Government Board may on its own initiative hear and decide an issue that is not disclosed in that matter's statement of issues heard if, in the opinion of the Municipal Government Board, it is necessary for determining a question of law or a question of jurisdiction.

(3) The Municipal Government Board must allow a reasonable amount of time for the parties to prepare to address any new issues heard on appeal under this section.

10(1) Unless all parties to an appeal consent, the Municipal Government Board must not on appeal hear any evidence that was not heard by the assessment review board.

(2) Notwithstanding subsection (1), the Municipal Government Board

(a) must on appeal hear evidence that was not heard by the assessment review board if

- (i) the evidence is disclosed by the party raising it to the other party and the Municipal Government Board at least 30 days before the appeal is heard,*
- (ii) any related evidence is disclosed by the other party to the first party and the Municipal Government Board at least 14 days before the appeal is heard, and*
- (iii) any evidence in rebuttal to the disclosure made under subclause (ii) is disclosed by the first party to the other party and the Municipal Government Board at least 7 days before the appeal is heard*

and

(b) may on appeal hear any evidence necessary to decide an issue before it.

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Municipal Government Act, Section 467(1) and (2) specifies what decisions the ARB can make.

467(1) An assessment review board may make any of the following decisions:

- (a) dismiss a complaint that was not made within the proper time or that does not comply with section 460(7);*
 - (b) make a change with respect to any matter referred to in section 460(5);*
 - (c) decide that no change to an assessment roll or tax roll is required.*
- (2) An assessment review board must not alter any assessment that is fair and equitable, taking into consideration assessments of similar property or businesses in the same municipality.*

Municipal Government Act, Section 488(1) that specifies the Municipal Government Board's jurisdiction and specifically section (c).

488(1) The Board has jurisdiction

- (c) to hear appeals from decisions of assessment review boards,*

Municipal Government Act, Section 499(1) as to the decisions the Municipal Government Board can make.

499(1) On concluding a hearing, the Board may make any of the following decisions:

- (a) dismiss a complaint or an appeal that was not made within the proper time;*
- (b) make a change with respect to any matter referred to in section 492(1), if the hearing relates to a complaint about an assessment for linear property;*
- (c) make a change to any equalized assessment, if the hearing relates to an equalized assessment;*
- (d) make any decision that the assessment review board could have made, if the hearing relates to the decision of an assessment review board;*
- (e) decide that no change to an equalized assessment or an assessment or tax roll is required.*

SUMMARY OF APPELLANT'S POSITION

The City was well aware of the Newell Group's intention to proceed with the complaint to the ARB. Pursuant to Alberta Regulation 55/99, Part 1, Newell Group filed an issue statement and supporting documents with the ARB and the City on August 25, 1999. On September 8, 1999, the assessor was informed the complaint against the property assessment was not withdrawn and Newell Group would make representation at the hearing as scheduled.

It is not conceivable the Newell Group would file documents on August 25, 1999 knowing the complaint had been withdrawn on August 9, 1999. The City was also aware of a number of hotel complaints Newell Group had already brought before the ARB, all with similar issues. Why would this complaint be withdrawn when the issues were the same/similar to other hotel complaints that have not been resolved, as the ARB had reserved its decision until all hotel complaints had been heard?

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There was nearly one month between August 9, 1999, the date the error was made, and September 8, 1999, the date the City contacted the Appellant, notwithstanding the complaint documents were in front of the assessor as of September 25, 1999, the date of filing the issue statement.

Newell Group did not receive any correspondence from the ARB to suggest that the hearing would not take place as scheduled. Newell Group appeared before the ARB on September 15, 1999 to present their complaint. The clerk of the ARB read into the record the letter of complaint. The City then objected to the hearing in that the City held the complaint had been withdrawn and therefore there was nothing to hear. The Board agreed with the City that the ARB did not have the jurisdiction to hear the complaint and rendered its decision verbally and subsequently in writing: Denied, no jurisdiction.

The ARB should not have rendered the decision they did. The Act in section 467 is very specific as to the decisions of the ARB can make. The decision to deny a complaint on the grounds the ARB does not have jurisdiction to hear the complaint is not an option open to the ARB according to section 467 of the Act. What is of importance is that the ARB did make a decision and put it in writing. The ARB should have proceeded with the hearing in accordance with the jurisdiction given to that Board in section 460 of the Act and then made their decision in accordance with section 467 of the same Act.

In the Act and the Assessment Complaints and Appeals Regulation, Alberta Regulation 55/99, there is no provision for the withdrawal of a complaint or appeal. Nowhere in Part II of the Act, Establishment and Functions of Assessment Review Board, is there direction to the complainant in the protocol for withdrawing a complaint. Part II addresses issues that include who can make a complaint and on what grounds, and the decision the ARB may make regarding the complaint brought before it.

Part 12 of the Act, the Establishment and Jurisdiction of the Municipal Government Board, addresses many issues including the Board having jurisdiction "to hear appeals from decisions of assessment review boards". Nowhere in Part 12 is there direction to the Appellant in the protocol for withdrawing an appeal.

Newell Group complied with Alberta Regulation 55/99 and filed a complaint in accordance with the Act and the Regulations. Newell Group did file a withdrawal of the subject property's property assessment in error. The City and the ARB were made aware of the error as soon as it was discovered and of Newell Group's intention to proceed with the hearing as scheduled. The ARB made the decision "Denied, no Jurisdiction" and that decision contravenes section 467 of the Act. The ARB should have proceeded with the hearing in accordance with the jurisdiction given to the Board in section 460 of the Act and then rendered a decision in accordance with section 467 of the Act. Newell Group has appealed the decision of the ARB to the Board and it is expected the Board will exercise its jurisdiction to hear the appeal in accordance with section

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488(1(c) of the Act and Alberta Regulation 55/99. The original complaint/appeal remains valid and the hearing should proceed. The right of a taxpayer to be heard must be preserved.

SUMMARY OF RESPONDENT'S POSITION

It is the opinion of the Respondent, City of Calgary, that the Board has no jurisdiction to hear the merits of this appeal as it was withdrawn on August 9, 1999. The Board must rely upon the letter of withdrawal by the agent for the property owner and uphold the decision of the ARB by dismissing this appeal.

During the hearing of the preliminary matters it was submitted by the Appellant that they had no intention of withdrawing their property assessment complaint. The City of Calgary's position is that this complaint was withdrawn and cannot be unwithdrawn. The withdrawal letter of August 9, 1999 clearly indicates that the intention of the agent for the property owner was to withdraw the complaint.

In the letter, Roll No. 044 02560 9 was clearly stated and this is the roll number of the property assessment, not the business assessment of the Hospitality Inn. This letter was forwarded to the ARB and copies to the property owner.

It is quite clear the complaint was withdrawn. Based on the letter the ARB withdrew the complaint and the assessor was notified. Thirty-one days later the Appellant sent a letter to the ARB revising their letter of August 9, 1999 to reflect the withdrawal of the business assessment complaint.

Upon review it is noted that this letter of withdrawal states the business assessment Roll No. 044 02560 9 0001 is hereby withdrawn. The City of Calgary would ask the Board to note that the letter of August 9, 1999 clearly states the property roll number while the September 9, 1999 letter clearly states business and gives a business roll number. If the City cannot rely upon the letter of August 9 and the signature of Gary Newell, then when can they rely upon any withdrawal? If it is accepted that a withdrawal can be undone 31 days after it was done, where does it stop? Does it stop after 32 days, after 332 days, or after three years? If the Board finds for the Appellant, there would never be any certainty to the complaint and appeal process. If the City withdraws an appeal to this Board that they did not intend to, they are silenced and have no further course of action. Similarly, if the City fails to file an appeal from a decision of the ARB they are also silenced and have no further cause of action. Both Appellant and Respondent must live with the consequences of their actions and some things cannot be undone. This withdrawal is one of them.

Regarding the contention that the ARB had no authority to make the decision it did, it is the City's position that all administrative tribunals have the authority to determine their jurisdiction. While it is not specifically outlined in the Act that an assessment review board may decide its jurisdiction, it need not be. The ARB must, before hearing and deciding on the merits of the case, first

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determine if it has the jurisdiction to decide the facts of the case. Failure of the ARB to determine its jurisdiction would result in an error that could be judicially reviewed. The actions of the ARB in this case were correct. The ARB could not hear the merits of this complaint as this complaint had been withdrawn.

Regarding the submission of the Appellant that this Board can hear the merits of this appeal it is the City's position that this is incorrect. The Assessment Complaints and Appeals Regulation, in section 9(2) gives this Board the authority to hear issues not heard at the ARB if it is necessary to determine a question of law or a question of jurisdiction. It is clear to the City that when read with section 9(1), the intent of this section of the regulation is to have all issues dealt with at the ARB except as defined in section 9(2). The City agrees that section 10(2) of the regulation allows for new evidence on appeal but feels that section 9 and 10 need to be read together. When that is done it is clear that only the issues heard at the ARB may be heard at the Board.

FINDINGS OF FACT

Upon hearing and considering the representations and the evidence of the parties shown on Appendix A and upon having read and considered the documents shown on Appendix B attached hereto, the Board finds the facts in the matter to be as follows:

1. Whether inadvertent or not, a complaint or appeal is terminated on the date it was withdrawn and cannot be reinstated unless it is re-filed within the time period to file a complaint.
2. There is no provision in either the Municipal Government Act or the Alberta Regulations pertaining to this matter.
3. Even though the agent made a mistake, the agent's actions bind the principal.
4. The ARB does not have jurisdiction to proceed with a complaint hearing when there is no complaint on the record because it was withdrawn.
5. The withdrawal leaves the ARB with no complaint to hear and no jurisdiction to proceed.
6. The Board can only hear appeals from decision of the ARB where the ARB had the jurisdiction to hear and decide on the matter.

In consideration of the above and having regard to the provisions of the Municipal Government Act, the Board makes the following decision, for the reasons set out below.

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DECISION

The appeal is denied - no jurisdiction.

It is so ordered.

REASONS

The definition of "withdrawn" in the Webster's dictionary is; to remove from consideration, to recall or remove.

The complaint of the property assessment for the Hospitality Inn was withdrawn by the Newell Group. This action may well have been done in error as argued by the Appellant, however, the complaint was withdrawn.

There is no mention in either the Municipal Government Act, the Regulations to the Act, or the Administrative Procedures Act relating to the application to reinstate a complaint or appeal after it has been withdrawn. For direction in the matter, the Board looked to Court cases with similar issues and found that there have been some cases that have dealt with this issue.

By letter of April 25, the Board requested comments from the parties regarding the two court cases the Board was considering in their deliberations. The City made no response, however Newell Group argued that the Board is not bound by the strict protocol of the Court and their decision making process and is master of its own principles. Further, Newell Group's circumstances are distinguishable from the circumstances in the two court cases.

The Board selected the particular court cases from a number of decisions, because in the Board's opinion both cases are very much on point. In this instance, because the pertaining legislation is silent on this issue, the only guidance the Board has is the decisions of other decision-making bodies on similar issues.

It certainly is easy to sympathize with the Appellant who did not intend to withdraw the appeal. The question is whether the fact that the Appellant made a simple error in withdrawing the appeal categorizes this as an error of fact on which the Board could reinstate the appeal. A complicating factor is that the ARB found it did not have jurisdiction.

The Board considered the following cases for some guidance.

Winnipeg (City) Assessor v. Winnipeg (City) Board of Revision [1993] M.J. No. 632 (Man. C.A.)

The Manitoba Court of Appeal addressed the issue of whether the Board of Revision lost jurisdiction to hear an assessment appeal that was withdrawn by the taxpayer.

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In this case, the parties before the hearing date of October, 1990 sent a letter asking that their applications be withdrawn. The Secretary of the Board withdrew the applications. In January, 1992 the taxpayers advised the Board that the appeals were withdrawn due to a misunderstanding and they wished to proceed on their original applications. The Board complied and set dates for the hearing.

The Court stated that the Manitoba legislation does not have a provision, which allows the Board to control the withdrawal of applications. The Court concluded that, "absent any limitation on a taxpayer's right to withdraw its application from the Board's consideration, the taxpayer's withdrawal leaves the Board with no application to hear and no jurisdiction to proceed. The appeal period is at an end unless the application can be reactivated within the statutory time period".

Baker v. Canada [199] T.C.J. No. 80 (Tax Court of Canada)

The Tax Court of Canada dealt with the issue of whether a withdrawal of an appeal could be reinstated if it was done in error.

In this case, an agent, who was the wife of the applicant, sent a letter withdrawing the applicant's appeal before the Tax Court. Subsequently, the agent took the position that the letter of withdrawal was due to a misunderstanding and that the applicant should not be prejudiced by this mistake.

The Court held that a litigant is bound by the action of counsel taken in the conduct of litigation. The agent had authority to act for the applicant. This is based on the implied authority which professional agents who are paid to conduct an appeal in the court have to bind their clients. The court stated that the result might be different if the agent were a friend professing no particular skill and assisting the applicant for no consideration. Consequently, in this case the Court concluded that the appeal was terminated by the agent. The Court concluded with the following warning about retaining agents: ". . . this case should serve as a minder to those who elect to act as professional agents before this court that by doing so they accept the responsibility to exercise an adequate degree of care to safeguard the interests of their client".

B'Nai N'Rith Upper Canada Lodge v. Regional Assessment Commissioner [1996] O.M.B.D. No. 1389 (Ont. Municipal Board).

The Ontario Municipal Board had occasion to deal with a similar situation. This was an appeal from a decision of the Ontario ARB to the Ontario Municipal Board. At the ARB hearing the agent verbally withdrew both complaints. No evidence or further submissions were given. The agent then subsequently submitted that he was in error and attempted to reinstate the appeal. The Board decided that since the withdrawal of complaint was made there was no complaint before

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the ARB. The Board determined that there was no review of the assessment and no determination made by the ARB.

In the Hospitality Inn's appeal, the Newell Group had the authority, under the principles of agency law, to bind its client. The Newell Group's actions bind the complainant because the Newell Group was authorized to act for the complainant. There was no indication that the Newell Group did not have the authority to bind the complaint. The Baker case stands for the proposition that even though the agent made a mistake the agent's actions bind the principle. Although the result may seem harsh, the Board's position is that once the appeal is withdrawn it cannot be reinstated unless it is re-filed within the time period to file a complaint.

No costs to either party.

Dated at the City of Edmonton, in the Province of Alberta, this 27th day of June 2000.

MUNICIPAL GOVERNMENT BOARD

J. Church, Presiding Officer

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APPENDIX "A"

APPEARANCES

NAME	CAPACITY
Randy Worthington	For the Appellant
Daryl Genereaux	For the Appellant
Kelly Hess	For the Respondent
Steve Cook	For the Respondent

APPENDIX "B"

DOCUMENTS RECEIVED AT THE HEARING AND CONSIDERED BY THE BOARD:

NO.	ITEM
Exhibit 1	August 9 Notice of Withdrawal
Exhibit 2	September 9 amended notice of Withdrawal
January 7 letter	Written argument by Newell Group
January 14 letter	City of Calgary written argument
January 17 letter	Newell Group rebuttal
January 19 letter	City of Calgary rebuttal
January 20 letter	Newell Group's letter of objection
May 16 letter	Newell Group's response to court decisions