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Assessment Review Board

Commission de révision de l'évaluation foncière

File No: WR 100568

Region Number:	03
Municipality:	City of Ottawa
Roll Number:	0614-300-810-08740-0000
Hearing Number:	294964
Application Number:	1966301

In the matter of Subsection 357.(8) of the *Municipal Act*, S.O. 2001, c. 25, as amended, and in the matter of an application with respect to taxation year 2006 on premises known municipally as 101 Kanata Avenue

BETWEEN: Invest Master Properties GP VIII Ltd.

Assessed Person/
Applicant

- and -

The City of Ottawa

Respondent

APPEARING: W. Burrows Q.C. - Counsel for the Assessed Person/Appellant

M. Thompson - Counsel for the Municipality
(Lang Michener LLP)

INTERIM DECISION OF THE ASSESSMENT REVIEW BOARD delivered by:

A. Fenus and R. D. Butterworth

This application came before the Assessment Review Board on November 25, 2010 in the City of Ottawa.

LEGISLATION

Subsection 357.(1)(g) of the *Municipal Act*, 2001, S.O. 2001, c. 25 (*Act*) states:

> ***357.(1) Cancellation, reduction, refund of taxes.*** *– Upon application to the treasurer of a local municipality made in accordance with this section, the local municipality may cancel, reduce or refund all or part of taxes levied on land in the year in respect of which the application is made if,*
>
> *(g) repairs or renovations to the land prevented the normal use of the land for a period of at least three months during the year.*

ISSUES

The Holiday Inn and Suites is a full service hotel located in the City of Ottawa at 101 Kanata Avenue. The hotel was constructed and opened in October of 1999 and consists of 152 hotel rooms, 5,000 square feet of meeting and banquet space, a swimming pool and fitness centre, and Graffiti's Restaurant.

For taxation year 2006, the subject property was assessed at $10,451,000 in the commercial property class and its value was determined using the income approach.

Taxes in 2006 were $442,555.04.

Between May 15, 2006 and December 31, 2006 the property had undergone substantial structural and interior repairs due to water penetration and exterior wall deterioration.

On February 6, 2007, the appellant filed an application for property tax relief under subsection 357.(1)(g) of the *Municipal Act* for the taxation year 2006. On August, 2, 2009, the City of Ottawa issued a refund of tax on the subject property to the appellant

in the amount of $4,040.45 in response to the application.

The City takes the position that the "normal use of the land" as contemplated by subsection 357.(1)(g) is that of renting hotel rooms. The refund is based upon the City's determination of the number of rooms which were actually out of commission for a period of three months. This is the City's standard procedure in response to applications of this nature. The appellant agrees that this is the correct amount if the City's interpretation of subsection 357.(1)(g) is determined by the Board to be correct.

The appellant takes the position that normal use of the land is the global hotel business, including room rental, food service and banquet operations; that while limited use of the land continued, the normal use of the land was prevented for a period in excess of three months. The appellant takes the position that because the subject property has been valued for assessment purposes using the income approach, the amount of tax refund should be based upon the projected decline in income as a result of the remedial work. The City agrees that hotel properties such as the subject property are valued for assessment purposes using the income approach, but submits that the refund claimed by the appellant is excessive and requests, in the event that the Board determines that the appellant's interpretation of subsection 357.(1)(g) is correct, that the parties return to the Board, if necessary, to make submissions on the correct amount of the tax refund. The Board heard only factual evidence from Kristine Dempster, Manager of the hotel.

The specific issues to be resolved are:

1. What is the meaning of the phrase "normal use of the land" as contemplated in subsection 357.(1)(g)? What is the normal use of the land in this appeal?

2. What is the meaning of the phrase "repairs or renovations to the land prevented the normal use of the land"? Was "normal use of the land" prevented, and if so, for

what period of time was "normal use of land" prevented?

INTERIM DECISION

The Board finds that:

1. The "normal use of the land" as contemplated in subsection 357.(1)(g) is the full hotel operation, that is, the revenue streams and cost centres attributed to all aspects of the full service hotel.

2. Repairs to the subject property prevented the "normal use of land" as described above for a period of at least three months during the taxation year 2006.

The parties are directed to provide the Board with the correct amount of tax refund, based upon the Board's findings (above) within three months of the date of release of this Interim Decision, failing which the Board will reconvene. This appeal relates to taxation year 2006, yet the appellant has used "projected" loss amounts. The Board prefers to use actual losses from the audited financial statements.

REASONS FOR DECISION

The Position of the Appellant

Mr. Burrows submitted that since the acceptable method for assessing the subject property is the income approach (which is not being disputed by the City), the tax refund should be based upon the loss of income attributable to the substantial repairs during the 2006 taxation year. The appellant believes that a refund in the amount of $126,673.77 would more accurately reflect the impact of the repairs on the subject property. This figure is calculated by multiplying the total taxes paid for the 2006

taxation year in the amount of $442,555.04 by 28.6% which represents the "projected" revenue loss and decreased volume in all cost centres of the subject property.

Mr. Burrows filed Exhibit 2 entitled "Expert Report Prepared for InnVest REIT" containing the description of the subject property and the nature of the repairs and renovations along with statements and appendices in respect to revenue loss, revenue prior to the construction, expected revenue without construction, and actual revenue for the year 2006 for the subject property.

Mr. Burrows introduced Ms. Kristine Dempster who has been the General Manager of the hotel since April 2000. Ms. Dempster testified as to the nature and extent of the repairs done in 2006. Following completion of an engineering study and report in 2005, major remedial work was undertaken between May 15, 2006 and January 22, 2007. While the hotel did not close during this period, the building was fully enclosed in scaffolding, rooms were closed on a rotational basis, depending upon where construction was occurring, and the hotel experienced a decline in room revenue and revenue related to its ancillary operations including food service and banquet service. Ms. Dempster explained in detail the manner in which a hotel measures revenue and costs based on various occupancy rates and described how each of these components impact on profitability. More importantly, she explained how "customer satisfaction" is a prime driving force for hotels in respect to return visits and customer recommendations to other potential customers. During the repairs, customer satisfaction rates "dropped from the mid nineties to the mid eighties percentile".

Ms. Dempster emphasized the hotel has consistently been in the top twenty category of customer satisfaction ratings in the world and number one in the area prior to the repair work being done. To date, it has recaptured that status, but during the repair work the expected revenue from all sources of services that the hotel offered had experienced a loss of approximately 28.6%. This revenue loss is based on an annualized market

share index calculation, "rev par penetration". This statistic compares the hotel to "any deemed competitive set" to arrive at a percentage figure that shows its market share compared to that of its competitors. A rating of above 100% would mean that the hotel had received more than its fair share of business. During the 2006 repair period the hotel had less than its usual market share. The calculation of the 28.6% loss is based upon an extrapolation of loss over expected revenues (had the repairs not occurred). In essence, the trending performance of revenue generation from past years was extrapolated to the loss period and this result was applied to the hotel's average increase from years prior to the repair work. This revenue penetration methodology compares "what is expected" to "what happened" from all sources of revenue.

Under cross-examination, Ms. Dempster stated that the hotel occupancy rate at the time of the repairs ranged between "the mid seventies to eighty percent" capacity and conceded that the main source of revenue or "profit centre" for the hotel is the actual renting of "guest rooms". She estimated that this revenue source accounted for some seventy percent of total revenue. She agreed that the hotel itself "never closed its doors", nor were the restaurant, the banquet halls, and other facilities closed during the repairs during 2006.

Mr. Burrows submitted that case law regarding subsection 357.(1)(g) does not give the City Treasurer broad discretionary powers to alter the means by which relief is statutorily given. The application for relief in this case falls within the scope of the legislation. Since significant repairs, lasting more than three months, had taken place (which is not disputed by the City), then relief must be given.

To support his submission, Mr. Burrows cited the following finding of Member Bryant in the case of *General Motors of Canada Limited v The City of St. Catharines* [ARB file WR 44830] at paragraph 27:

> *The Board's interpretation of the word "may" in subsection 442(7) is that the council must determine if the taxpayer qualifies under subsection 442(1)(g) and if the taxpayer does not qualify, council has the right to reject the application. Clearly, the word 'may' is not used to allow council to discriminate amongst qualified applications.*

Moreover, because the subject property has been valued for assessment purposes using the income approach, the amount of tax refund should be based upon the projected decline in income as a result of the remedial work. Mr. Burrows contended that "best efforts" have been made to reasonably calculate the loss of income resulting from the repairs.

Mr. Burrows stated that the test in the applicable legislation turns on the word "normal". The appellant takes the position that "the normal use of the land" is the "full service hotel" functions that are offered to customers, including room rentals, food services, and banquet operations and the income flow that results from use of these services. Surely this is the basis on which the assessment of the subject property has been evaluated --- the income approach to value would consider all of the revenue, not just one particular portion.

Mr. Burrows questioned the City's attempt to limit the refund based upon a section of the revenues for the subject property, namely the rental of rooms only. He contended that this restrictive way of using the word "normal" does not allow for a proper evaluation of the loss that has taken place at the hotel during the repairs and goes contrary to the intent of the legislation.

In respect to the time frame involved whereby repairs had been made to the subject property, Mr. Burrows contended that they took place over a period of time greater than three months, and this qualifies the appellant to receive relief. The manner by which the City has restricted this relief by using only a selected revenue source that was affected

entirely for at least three months is contrary to the intent of the legislation. He conceded that while limited use of the land continued, the normal use of the land, including all the revenue sources, was prevented for a period in excess of three months. The three month period is sufficient to trigger the relief based upon the normal use of the land, not restricted to only a part of the land exclusively, in this case, room occupancy. Again, the Treasurer does not have the broad discretion to select methodology that differs from that used in determining the assessment in the first place.

In closing, Mr. Burrows stated that "revenue" is the basis of income valuation, and as a result of repairs lasting at least three months the subject property experienced abnormal use and generated less actual and expected revenues than "normal". The appellant is entitled to relief based upon all the revenue sources generated during that repair period.

Mr. Burrows, in rebuttal, stated that he had nothing to do with the current civil action claim taken by the appellant and disputed that the proper forum for this tax refund matter is elsewhere as the City contends. As a rule of law, Mr. Burrows emphasised it is the plaintiff's responsibility to mitigate damages wherever possible, and this application is such a case "to recover what's available" by legal means in the proper forums. It is not a case of double recovery as may be implied by the City.

In the event that the Board determines that the respondent's interpretation of subsection 357.(1)(g) is correct, Mr. Burrows conceded that the parties need not return to the Board to make submissions on the correct amount of the tax refund.

The Position of the City of Ottawa

Mr. Thompson filed Exhibit 1 entitled "Book of Documents for the Respondent" consisting of the following documents:

1. Tab 1 – Amended Statement of Issues of the Complainant dated September 20, 2010

2. Tab 2 – Amended Response to Statement of Issues by the City of Ottawa dated September 30, 2010

3. Tab 3 – Letter dated February 6, 2007 from Deloitte & Touche LLP to Flo Williams at City of Ottawa

4. Tab 4 – Room Unavailability during renovations May 15 to December 31, 2006 Chart

5. Tab 5 – Letter dated August 21, 2009 from Ghislain Lamarche of the City of Ottawa to Innvest Master Properties GP VIII Ltd.

6. Tab 6 – Room Unavailability for minimum period of 90 days Chart

7. Tab 7 – *Chrysler Canada Ltd v. Municipal Property Assessment Corp. Region* No. 15 [2008] O.A.R.B.D. No. 263 [ARB WR #69677 (November 28, 2008)]

8. Tab 8 – General Motors of Canada Ltd v. St. Catherines (City) (*supra)*

9. Tab 9 – *Lanxess Inc. Sarnia (City)* 2009 Carswell Ont 8658 [ARB WR #76465 (September 4, 2009)]

Mr. Thompson submitted that "land" includes "building" for the purposes of subsection 357(1)(g) of the *Municipal Act.* The City contends that eligible property includes those portions of the "land/building" that were prevented from normal use for at least three months during the year in issue. The portions of the "land/building" that were not

prevented from their normal use for a period of at least three months during the year in issue do not qualify for a rebate under the legislation.

In this case, the triggering factor to allow a refund for the subject property was not the length or duration of the repairs, nor their extent or severity, nor the loss of revenue or comparative market share for the hotel, but the unavailability for a period of at least ninety days of hotel rooms within the subject property during the year of the repairs.

The City takes the position that "normal use of the land" as contemplated by subsection 357.(1)(g) is that of renting hotel rooms. The refund is based upon the City's determination of the number of rooms which were actually out of commission for a period of at least three months. This amounted to only eleven rooms. Although other rooms were unavailable for rent at various times throughout the nine months of repairs, none were unavailable for rent for periods of at least three months. Mr. Thompson maintained that this is the City's standard procedure in response to applications of this nature and it is consistent with an income approach to assessment since it deals with a loss of revenue resulting from an event, i.e., the repairs, which prevents the renting of hotel rooms within a specified time frame, i.e. at least three months. This is the trigger for relief.

Mr. Thompson cited specific paragraphs of three ARB decisions to support his submission that the City's interpretation of the wording of subsection 357.(1)(g) of the *Municipal Act* is correct. There is agreement among the parties that "land" includes "building" and that any part of any building could extend to individual rooms all within the "normal use of the land". Where the differences exist between the parties is in the interpretation of the specified prevention time frame and the use of the different methodologies to arrive at the different refunds.

Mr. Thompson argued that the subject property was not prevented from operating in its

"normal" manner. The hotel functions were not closed during the repair period and though a large number of rooms for rent were unavailable for periods of time, only a small portion was unavailable for a period of at least three months. Also, the overall rental revenues were still 70% of the total revenues, the same average as it was prior to the repair period. In fact, the 2006 actual income was just 16% lower than the 2005 actual income, not the exaggerated 28.62% stated by the appellant.

Mr. Thompson further commented that the appellant has undertaken a claim for damages against the parties who originally constructed the hotel and since the appellant was seeking damages for loss of profit, consequential economic loss, and loss of good will, then the proper forum to seek redress is with the courts and not with the City in respect to claiming an exaggerated refund of property taxes pursuant to subsection 357.(1)(g) of the *Municipal Act.*

In the event that the Board determines that the appellant's interpretation of subsection 357.(1)(g) is correct, then the parties may need to return to the Board to make submissions on the correct amount of the tax refund.

Analysis

What is the meaning of the phrase "the normal use of the land" as contemplated in subsection 357.(1)(g)?

The Board finds that "the normal use of the land" includes the global hotel operations.

The Board received no jurisprudence in respect to the subject property that is assessed on an income approach. The ARB cases submitted by the respondent deal with properties assessed under a cost approach where the factories' square foot dimensions are straightforwardly obtained and lend themselves to a simpler understanding and

application as to what constitutes "the normal use of the land". This subject property is a hotel which functions on various levels and derives its income from numerous sources: it rents rooms, it offers its room guests ancillary services like food, beverages, laundry and so forth, and it offers some of these services in the community, described by Ms. Dempster as the "local traffic".

All of these functions are critical for the profitable operation of a full service hotel. Its value is derived from its profitability, namely income. All income sources are important even though some components may generate more revenue than others. In *Chrysler* the Board differentiated the primary use of the land from the normal use of the land. This applies to the subject property with a primary function of room rental, supplemented by a wide variety of services, all generating additional revenue in varying proportions. The Board regards the respondent's position as too restrictive for properties valued for assessment purposes using the income approach. It may work well under a cost approach methodology, but not in an income approach situation.

The adjective "normal" is defined in *The Dictionary of Canadian Law (1991)* as: "usual, in contrast to exceptional" and in the *Google Dictionary (2009)* as: "conforming to a standard; usual, typical, or expected". *Black's Law Dictionary (9th Edition)* defines it as: "according to a regular pattern; natural. The term describes not just forces that are constantly and habitually operating but also forces that operate periodically or with some degree of frequency. In this sense, its common antonyms are *abnormal, unusual* and *extraordinary*."

The common word to describe normal is "usual" of which one of its synonyms is "natural". The Board has heard credible evidence to show that the subject property's "usual" revenue source is more than just the renting of hotel rooms as the respondents would have it. All of its revenue sources are vital components that comprise "the normal use of the land" even though each revenue source can stand on its own. This is by

virtue of it's being a part of the whole.

The Board agrees with the appellant that the usual or natural or "normal use of the land" is the global hotel operations. The Board takes a holistic approach in its determination to perceive the subject property as more than one major aspect of its operation. The net income flow is derived from all the revenue and cost centres and forms the basis of its assessment.

This may be contrasted with the findings in *Chrysler* and *General Motors* where only a portion of the factories was found to be functioning as the normal use of the land. The *raison d'être* is the "building of automobiles for retail sales" where the assessment of the subject property is based upon its ability to offer full services to its clientele for purposes of generating an income. The Board sees no inconsistency here because all properties were assessed using the traditional valuation models for their respective uses.

From a comparison of the building photograph at page 2 of Exhibit 2 (depicting the building appearance from May to December of 2006) with the building photograph at page 1 of Exhibit 2 (depicting the usual building appearance) it is clear to the Board that the use of the land during the repair period was abnormal in the extreme.

What is the meaning of the phrase "repairs or renovations to the land prevented the normal use of the land"? Was "normal use of the land" prevented, and if so, for what period of time was "normal use of land" prevented?

Subsection 357.(1)(g) of the *Municipal Act* differs from its predecessor subsection 442.(1)(g) in the *Municipal Act,* R.S.O. 1990 c. M. 45 (repealed on January 1, 2003) under which the *General Motors* decision was made. The change from:

> ***Subsection 442.(1)(g):***
> *in respect of real property which by reason of repairs or renovations could not be used for its normal use for the period of at least three months during the year*
>
> ***to subsection 357.(1)(g):***
> *repairs or renovations to the land prevented the normal use of the land for a period of at least three months during year.*

is striking. The use of the verb "prevented" as contrasted with the previous "could not be used" injects a definitive, activist, and strict restrictive connotation to this relief legislation. The Board views the phrase "repairs or renovations to the land prevented..." as the initial factor that triggers the quest for relief by an appellant for a subject property.

The general intent of subsection 357.(1) of the *Municipal Act* is straightforward. It is a means by which property owners may seek some relief from property taxes for their properties which have undergone some drastic or substantial change to their compositions or establishments. Relief is warranted under stipulated conditions: one is dimensional, the other is temporal.

In a subsection 357.(1)(g) application, repairs or renovations have somehow prevented the normal use of the land to such a degree that relief may be warranted, and this prevention must have been sustained for at least three months within a specified taxation year. The dimensional component is the repairs or renovations. The *Act* does not define nor specify the nature of these repairs or renovations in manners of their degree, quality, or quantity. The *Act* merely states that repairs or renovations have taken place. The temporal components are the specified periods, namely these repairs or renovations must be of duration of at least three months and occur within a specified tax year.

The existence of the two components per se does not automatically merit relief for the taxpayer. Relief is only warranted when the dimensional component affects the normal operations of the subject property for a period of at least three months within the specified tax year.

Hence, the operative word in this subsection is the past tense transitive verb "prevented". It is simply defined in *Black's Law Dictionary* (9th Edition) as: "to hinder or impede".

If repairs or renovations hindered or impeded the usual operations or functions of the subject property, then, the appellant may seek and may be granted relief from all or some portion of the property taxes.

Thus, three tests exist:

(1) Did repairs or renovations take place at the subject property?
(2) Did the repairs or renovations take place within a tax year for a period of at least three months, and
(3) Did the repairs or renovations prevent [i.e. hinder or impede] the subject property from operating in its usual fashion?

There is no dispute that repairs were undertaken at the hotel over a period of some nine months between May 2006 and January 2007. Hence, two tests have been satisfied. In regard to the third, the evidence is abundantly clear and the Board finds that during the period of repairs the regular pattern of the subject property had been significantly affected. The evidence demonstrates that the subject property had a regular pattern of high customer satisfaction ratings and low vacancy rates prior to the repairs being done. All functions of the hotel were affected to some degree. This resulted in losses in the hotel's various revenue centres. Undertaking the repair work changed this normal state

of affairs and pattern for the hotel. This resulted in a net loss year over end.

The Board is satisfied that the three tests were met, and the appellant is justified in requesting a refund of property taxes for the 2006 taxation year. As to the method and quantum, the Board at this stage relies on the parties to settle this matter. The parties are directed to provide the Board with the correct amount of tax refund, based upon the Board's findings (above) within three months of the date of release of this Interim Decision, failing which the Board will reconvene. This appeal relates to taxation year 2006, yet the appellant has used "projected" loss amounts. The Board prefers to use actual losses derived from an examination of from the audited financial statements.

"A. Fenus"
A. Fenus
Member

"R. D. Butterworth"
R. D. Butterworth
Vice-Chair

/lp
DECISION RELEASED ON: April 29, 2011