

LEGAL BRIEF RESPECTING PROPERTY TAX EXEMPTION

I. INTRODUCTION

1. Pursuant to section 285 of the *Municipal Government Act*, RSA 2000 (“MGA”), all property, except linear property and the property listed in section 298 of the MGA, must be assessed on an annual basis. Unless a property fits specifically within section 298 of the MGA, it must be assessed annually.

285 Each municipality must prepare annually an assessment for each property in the municipality, except linear property and the property listed in section 298.

2. Pursuant to the provisions set out in the MGA, the duty of assessors in preparing an annual property assessment is to prepare an assessment that is fair and equitable. The MGA states as follows:

289(1) Assessments for all property in a municipality, other than linear property, must be prepared by the assessor appointed by the municipality.

293(1) In preparing an assessment, the assessor must, in a fair and equitable manner,

- (a) apply the valuation standards set out in the regulations, and
- (b) follow the procedures set out in the regulations.

II. EXEMPTION FROM TAXATION

3. Although the MGA directs that all property must be assessed annually, the MGA further provides for specific exemption from taxation if the express statutory requirements are met. The primary section in the MGA dealing with exemption from taxation is section 362, which lists a variety of property types that may qualify for tax exemption. Section 362 states as follows:

Exemptions for Government, churches and other bodies

362(1) The following are exempt from taxation under this Division:

- (a) any interest held by the Crown in right of Alberta or Canada in property;
- (b) property held by a municipality, except the following:
 - (i) property from which the municipality earns revenue and which is not operated as a public benefit;

- (ii) property that is operated as a public benefit but that has annual revenue that exceeds the annual operating costs;
 - (iii) an electric power system;
 - (iv) a telecommunications system;
 - (v) a natural gas or propane system located in a hamlet, village, summer village, town or city or in a school district that is authorized under the *School Act* to impose taxes and has a population in excess of 500 people;
- (c) property, other than a student dormitory, used in connection with school purposes and held by
- (i) the board of trustees of a school district, school division or regional division,
 - (i.1) the Regional authority for a Francophone Education Region established under the *School Act*,
 - (i.2) the operator of a charter school established under the *School Act*, or
 - (ii) the operator of a private school registered under the *School Act*;
- (d) property, other than a student dormitory, used in connection with educational purposes and held by any of the following:
- (i) the board of governors of a university, technical institute or public college under the *Post-secondary Learning Act*;
 - (ii) the governing body of an educational institution affiliated with a university under the *Post-secondary Learning Act*;
 - (iii) a students association or graduate students association of a university under the *Post-secondary Learning Act*;
 - (iv) a students association of a technical institute or public college under the *Post-secondary Learning Act*;
 - (v) the board of governors of the Banff Centre under the *Post-secondary Learning Act*;
- (e) property, other than a student dormitory, used in connection with hospital purposes and held by a hospital board that receives financial assistance from the Crown;
- (f) property held by a regional services commission;
- (g) repealed by RSA 2000;

- (g.1) property used in connection with health region purposes and held by a health region under the *Regional Health Authorities Act* that receives financial assistance from the Crown under any Act;
- (h) property used in connection with nursing home purposes and held by a nursing home administered under the *Nursing Homes Act*;
- (i) repealed 1998 c24 s29;
- (j) property used in connection with library purposes and held by a library board established under the *Libraries Act*;
- (k) property held by a religious body and used chiefly for divine service, public worship or religious education and any parcel of land that is held by the religious body and used only as a parking area in connection with those purposes;
- (l) property consisting of any of the following:
 - (i) a parcel of land, to a maximum of 10 hectares, that is used as a cemetery as defined in the *Cemeteries Act*;
 - (ii) any additional land that has been conveyed by the owner of the cemetery to individuals to be used as burial sites;
 - (iii) any improvement on land described in subclause (i) or (ii) that is used for burial purposes;
- (m) property held by
 - (i) a foundation constituted under the *Senior Citizens Housing Act*, RSA 1980 cS-13, before July 1, 1994, or
 - (ii) a management body established under the *Alberta Housing Act*,
and used to provide senior citizens with lodge accommodation as defined in the *Alberta Housing Act*;
- (n) property that is
 - (i) owned by a municipality and held by a non-profit organization in an official capacity on behalf of the municipality,
 - (ii) held by a non-profit organization and used solely for community games, sports, athletics or recreation for the benefit of the general public,
 - (iii) used for a charitable or benevolent purpose that is for the benefit of the general public, and owned by
 - (A) the Crown in right of Alberta or Canada, a municipality or any other body that is exempt from

taxation under this Division and held by a non-profit organization, or

(B) by a non-profit organization,

(iv) held by a non-profit organization and used to provide senior citizens with lodge accommodation as defined in the *Alberta Housing Act*, or

(v) held by and used in connection with a society as defined in the *Agricultural Societies Act* or with a community association as defined in the regulations,

and that meets the qualifications and conditions in the regulations and any other property that is described and that meets the qualifications and conditions in the regulations;

(o) property

(i) owned by a municipality and used solely for the operation of an airport by the municipality, or

(ii) held under a lease, licence or permit from a municipality and used solely for the operation of an airport by the lessee, licensee or permittee;

(p) a municipal seed cleaning plant constructed under an agreement authorized by section 7 of the *Agricultural Service Board Act*, to the extent of 2/3 of the assessment prepared under Part 9 for the plant, but not including the land attributable to the plant.

(2) Except for properties described in subsection (1)(n)(i), (ii) or (iv), a council may by bylaw make any property that is exempt from taxation under subsection (1)(n) subject to taxation under this Division to any extent the council considers appropriate.

III. NON-PROFIT ORGANIZATIONS – “HELD BY”

4. Listed among the various types of properties that may qualify for tax exemption, are the exemptions that apply to non-profit organizations, which are set out in section 361(1)(n) of the MGA and its subsections, *supra*.

5. In addition to meeting the requirements set out in section 362(1)(n) of the MGA, non-profit organizations must also satisfy the accompanying and additional requirements prescribed in the *Community Organization Property Tax Exemption Regulation*, A.R. 281/98 (“COPTER”), in order to be entitled to exemption from taxation.

6. Under COPTER, one of the primary conditions that must be met in order to qualify for exemption is that the property must be “held by” the non-profit organization. Section 5 of COPTER states that when property is required to be held by a non-profit organization, the property is not exempt unless:

(a) the organization, society or association is the owner of the property and the property is not subject to a lease, license or permit, or

(b) the organization, society or association holds the property under a lease, license or permit.

7. The meaning of “held by” has recently been settled by the Municipal Government Board in MGB 090/08 *The Good Samaritan Society v. Town of Pincher Creek*, which decision was delivered after receiving direction from the Court of Appeal in *Pincher Creek (Town) v. Alberta (Municipal Government Board)*, 2007 ABCA 360, 41 M.P.L.R (4th) 194. The background of this case began when the Municipal Government Board delivered decision 069/05 where it found that Vista Village, a senior citizen care facility located in Pincher Creek and owned by the Good Samaritan Society, was exempt under section 362(1)(g.1) of the MGA because it felt that the property was “held by” the health authority based on the degree of control the authority possessed. This decision was appealed to the Court of Queen’s Bench, where the Board decision was quashed and remitted back to the Municipal Government Board for rehearing. The decision of the Court of Queen’s Bench to quash the Board decision was then appealed to the Court of Appeal. The Court of Appeal agreed with the lower Court’s decision to remit the matter back to the Board. The Court of Appeal stated at paragraph 13 of its decision that:

The MGB failed to draw any distinction between the word control and physical control. It cannot be said on any reasonable interpretation of the relationship between the Health Region and Vista Villages, including a review of their agreement, that the health region is in physical control over the property.

Pincher Creek (Town) v. Alberta (Municipal Government Board),
2007 ABCA 360

8. The Board, in its decision which followed the direction of the Court of Appeal, confirmed that the meaning of “held by” is restricted to physical control. At paragraph 82 of decision 090/08 it stated as follows:

The MGB finds that “held by” has a very specific meaning that includes ownership, lease, license, permit, or other physical control. The Agreement does not constitute physical control and therefore the exemption is not permitted under this category. The MGB finds that the Courts have been clear that “held by” is restricted to physical control. In *University of Alberta v. Edmonton (City)* the court found that “held by” requires physical control of the property at issue. Physical control was also held as required in *Cypress (County) v. Alberta (Municipal Government Board)* and in *Irrigation Control Power Co-operative Ltd. v. Warner (County) No. 5*.

The Good Samaritan Society v. Town of Pincher Creek, MGB 090/08

9. Therefore, in order to satisfy the legislative requirements for exemption from taxation, the organization, society or association must have physical control over the subject property.

IV. CALCULATING EXEMPTIONS – TIME & SPACE

10. In determining whether a property is exempt from taxation, and in calculating the extent of the exemption, the first consideration is the use of the property. The use of the property determines whether the property is exempt and what further requirements must then also be satisfied.

11. In calculating exemptions, there are circumstances when a property is completely exempt from taxation and there are also circumstances when a property is partially exempt from taxation. Case law has confirmed that both the MGA and the regulations contemplate apportionment of an exemption for space and time used. The MGA provides the municipality with the ability to exempt a portion of a property, and tax the remainder of the property.

12. Sections 367 and 368 of the MGA deal with apportionment of an exemption and state as follows:

Property that is partly exempt and partly taxable

367 A property may contain one or more parts that are exempt from taxation under this Division, but the taxes that are imposed against the taxable part of the property under this Division are recoverable against the entire property.

Changes in taxable status of property

368(1) An exempt property or part of an exempt property becomes taxable if

- (a) the use of the property changes to one that does not qualify for the exemption, or
- (b) the occupant of the property changes to one who does not qualify for the exemption.

(2) A taxable property or part of a taxable property becomes exempt if

- (a) the use of the property changes to one that qualifies for the exemption, or
- (b) the occupant of the property changes to one who qualifies for the exemption.

13. In determining whether a property qualifies for exemption, the Courts have directed municipalities to look at both the amount of physical space and the amount of time that the property is used for an exempt purpose. The leading case respecting

14. The Court held that the right to an exemption includes the right to a partial exemption where the property is used for exempt purposes part of the time, and the Board made an error of law in denying the entire exemption where the property is used for exempt purposes part of the time. The Court further confirmed that the MGA and regulations thereunder contemplate apportionment. The Court of Queen's Bench sent the matter back to the board for a hearing *de novo* (a new hearing).

15. In regards to apportionment of space and time, the Court concluded in its decision as follows:

20 Section 367 of the Act states "a property may contain **one or more parts** that are exempt from taxation under this division". Section 368 refers to "**an exempt property or part of an exempt property**" and "a taxable property or **part of a taxable property**".

21 Regulation 125/95 was promulgated under the Act; it pertains to nonprofit organization tax exemptions. Section 2 of this Regulation states that an "exemption ...may apply to a) whole of a property or b) **part of a property** that is chiefly used for the purposes that qualify for the exemption". Section 3 of the Regulation refers to "property or **part of a property**". Section 6(2) contains the same reference.

22 Counsel for the City urged the Court to interpret the phrase "part of a property" as meaning only a physical part. Therefore, an exemption for part of a property would apply only if that physical part was never used for non-exempt purposes, no matter how briefly.

23 Nothing in the Act, Regulation or logic mandates a mere physical interpretation of the phrases "part of a property". Time of usage may also fall within the phrase, so that the exemption may apply to a property which is entirely used for non-exempt purposes part of the time; see *Royal Canadian Legion Norwood (Alberta) Branch 178 v. Edmonton (City)*, [1992] 6 W.W.R. 265 (Alta. Q.B.). While Justice Gallant considered predecessor and therefore different legislation in that case than we do in this, his approach to the word "chiefly" is equally applicable to the current phrase "part of a property". He stated at 271:

The word "chiefly" means "for the most part". It is slightly ambiguous because it could define the time element or the space element. In the end result, I do not think it matters which of the two elements it defines.

24 The Applicant noted that the Board had allowed such an interpretation in at least one other case decided contemporaneously with this: see *The Victoria Soccer Club v. The City of Edmonton*, MGB 170/96, where the exemption was allowed although part of the soccer club premises were, at certain times, rented out to generate revenue. This inconsistent interpretation by the Board, while not

strictly relevant to this decision, evidences the uncertainty which the Board itself had over its interpretation.

25 The use of the word “solely” in the subsection must be interpreted to mean that if part of the building, part of the time is solely used for community games, sports, athletics and recreation, the exemption is made out. There is no other interpretation which gives meaning to the above statutory exemptions of “part of a property”.

Ukrainian Youth Unity of General Roman Schuchewych-Chuprynka v. Edmonton (City)
[1997] A.J. No. 921

16. Confirmation that exemptions are based on time and space is further evidenced in MGB 189/01 *Edmonton Investors Group Ltd. v. Edmonton (City)*. In its decision the Board confirmed that “*The apportionment of the Skyreach Centre assessment to the Oilers Hockey Club must be based on accurate use and occupancy time periods....The parties agreed that the time of use and occupancy should be the basis of any apportionment.*”

Edmonton Investors Group Ltd. v. Edmonton (City) MGB 189/01

17. The approach of the City of Edmonton in calculating exemption based on time and space is consistent with the Court’s interpretation of same. Information is provided by the property owner which indicates how the space is used and the time the space is used for. A full analysis is then performed based on the time and space model, and the exemption is calculated accordingly.

18. In considering the amount of physical space used to calculate exemption the City of Edmonton has adopted a policy of using gross area rather than leasable area to calculate both taxable and exempt percentages. The City of Edmonton adopted this policy because it was found that the reporting of leasable space can be subjective and inconsistent. Using gross area allows the City of Edmonton to calculate exemption percentages in a fair and equitable and consistent manner for all building types.

In addition, if the City of Edmonton calculated the exemption based on leasable space in a multi tenant property where some tenants are exempt and some tenants are not exempt, this would have the effect of exempting common areas, including such areas as washrooms and entrances, which are not being used for an exempt purpose.

Instead, when an organization applies and qualifies for an exemption, the area that the organization actually occupies (called usable area) is then divided into the total gross area of the building to derive an exemption percentage. This ensures that common areas are not factored into the exemption.

The City of Edmonton calculates gross area by determining the total constructed area of the building. This includes areas such as basements, mechanical equipment floors, penthouses, common areas, hallways, lobbies, stairs, washrooms and elevators.

The reasons for using this methodology are as follows:

- Leasable space is only reported for a small percentage of building types.
- Leasable space is not measured consistently, i.e. different standards of BOMA may be used.
- Not all leased space is reported, e.g. exemption requests received for space not reported on a rent roll.
- When a business with multiple buildings spans several tax roll accounts, often only one rent roll is submitted for the business, making it difficult to determine the total leasable area of a specific property in order to calculate the exemption that would apply to the one specific property.
- The amount of leasable space in some buildings changes on a yearly basis.
- The amount of leasable space may not be available for owner-occupied properties.

By using a standard methodology to calculate space percentages for purposes of applying exempt or taxable portions, there can be no perceived favoritism for any one building type.

V. **“USED CHIEFLY” - CONSTRUCTION**

19. The Court has recently confirmed the interpretation of the words “used chiefly” as it relates to calculating exemptions. In *Edmonton (City) v. North Pointe Community Church* [2008] A.J. 150, the Court confirmed that exemption is based upon the actual use of the property, and that even where the intended use of a property is clear, incomplete improvements to the property do not meet the use requirements of the exemption. This case involved a taxpayer constructing a church on 3.19 hectares of its 5.19 hectare parcel of land. Construction commenced in May 2005, but weekly religious services did not commence until July 16, 2006. The Municipal Government Board found that the entire 3.19 hectares was exempt for all of the 2005 tax year because, as of November 2005, the church structure was closed in and there was no doubt it was intended to be used for public worship. The Court of Queen’s Bench quashed the decision of the MGB.

20. The Court found that the decision of the MGB to exempt the property from taxation for the period during which the building was still under construction, and was largely unused, was unreasonable. According to the Court, the words “used chiefly” in the MGA could not reasonably be interpreted to include a prospective or intended use. The Court stated as follows:

In my view, the term “used” is not ambiguous. Intention to use does not equate to use. Further, I find that “used chiefly” in the MGA cannot be reasonably interpreted as including intended use. I note that nowhere in the MGA is the term “used” qualified by “actually” or similar adverb. However the MGA does contain a number of provisions where property is described as “intended for or used”. I conclude that had the Legislature wished to encompass intended use in s. 362(1)(k) of the MGA, it would have included similar wording. There is nothing in the MGA to suggest a different conclusion.

...

There is nothing in the exempting provision or any reasonable interpretation of it that somehow makes the intent of the religious body or stage of construction of the building relevant to the applicability of the exemption, except to the extent that a certain level of completion facilitates actual use.

Edmonton (City) v. North Pointe Community Church [2008] A.J. 150

VI. RESTRICTED

21. Pursuant to section 7 of COPTER, if individuals are restricted from using the property on any basis including race, culture, ethnic origin, religion, ownership of property, the requirement to pay fees (other than minor entrance or service fees), or the requirement to become a member of the organization, the property may not qualify for an exemption. The application of section 7 of COPTER is very fact specific, and each application or request for an exemption must be carefully reviewed in order to determine compliance with the MGA and COPTER.

22. Section 7 of COPTER specifically states as follows:

Meaning of restricted

7(1) In this Regulation, a reference to the use of property being restricted means, subject to subsections (2) and (3), that individuals are restricted from using the property on any basis, including a restriction based on

- (a) race, culture, ethnic origin or religious belief,
- (b) the ownership of property,
- (c) the requirement to pay fees of any kind, other than minor entrance or service fees, or
- (d) the requirement to become a member of an organization.

(2) The requirement to become a member of an organization does not make the use of the property restricted so long as

- (a) membership in the organization is not restricted on any basis, other than the requirement to fill out an application and pay a minor membership fee, and
- (b) membership occurs within a short period of time after any application or minor fee requirement is satisfied.

(3) Not permitting an individual to use a property for safety or liability reasons or because the individual's use of the property would contravene a law does not make the use of the property restricted.

VII. LIQUOR LICENSE

23. Pursuant to both the provisions of the MGA and COPTER, holding a certain class of liquor license can preclude an organization from exemption. Section 365 of the MGA states as follows:

365(1) Property that is licensed under the *Gaming and Liquor Act* is not exempt from taxation under this Division, despite sections 351(1)(b) and 361 to 364 and any other Act.

(2) Despite subsection (1), property listed in section 362(1)(n) in respect of which a license that is specified in the regulations has been issued is exempt from taxation under this Division.

24. Section 8 of COPTER states as follows:

Gaming and liquor licences

8(1) For the purposes of section 365(2) of the Act, property described in section 362(1)(n) of the Act and Part 3 of this Regulation in respect of which a bingo licence, casino licence, pull ticket licence, Class C liquor licence or a special event licence is issued under the Gaming and Liquor Regulation (AR 143/96) is exempt from taxation if the requirements of section 362(1)(n) and this Regulation in respect of the property are met.

(2) Despite subsection (1), property in respect of which a bingo facility licence or casino facility licence is issued is not exempt from taxation.

25. In summary, a non-profit organization exempt under section 362(1)(n) of the Act can remain exempt so long as it holds a Class C liquor licence, which licence permits the sale and consumption of liquor in premises not open to the public and the use of which is restricted to members.

VIII. COUNCIL POWERS

26. Pursuant to section 347(1) of the MGA, council has ability to cancel, reduce, refund or defer taxes. Section 347(1) of the MGA states as follows:

If a council considers it equitable to do so, it may, generally or with respect to a particular taxable property or business or a class of taxable property or business, do one or more of the following, with or without conditions:

(a) cancel or reduce tax arrears:

(b) defer the collection of a tax.

27. Council has further powers under section 364 of the MGA to grant an exemption from tax by bylaw when it considers it appropriate to do so. Section 364 states as follows:

364(1) A council may by bylaw exempt from taxation under this Division property held by a non-profit organization.

(1.1) A council may by bylaw exempt from taxation under this Division machinery and equipment used for manufacturing or processing.

(2) Property is exempt under this section to any extent the council considers appropriate.

28. On September 1, 1998, City Council passed the *Tax Adjustments and Rebate Criteria* whereby Council may refund property taxes for the following reasons:

- a. Errors in Fact
- b. Errors in Judgment
- c. Buildings Destroyed by Fire or Acts of God
- d. Buildings Voluntarily Demolished
- e. Other circumstances as determined by Council on an individual basis.

29. On February 25, 2009, the City of Edmonton adopted Policy Number C543 *Retroactive Municipal Tax Refunds* (the "Policy") which allows properties that do not otherwise qualify for exemption while under construction to apply for a refund of the municipal portion of their property taxes. The decision whether to refund taxes remains in City Council's discretion, so this is not something that the ARB can order, nor is it something that the Assessment Branch can simply agree to. The purpose of this Policy is to guide City Council's discretionary power to grant a retroactive tax refund for the construction period for properties that become exempt on completion, and to ensure that such requests are dealt with in a consistent manner.

30. Pursuant to the Policy, the refund period commences at the time building foundations are laid, for any period of construction in the current year and to a maximum not exceeding the previous two years. The refund is then paid at the completion of building construction and applied to the current tax roll.