Vacant Spaces: Challenges in the Economic Climate

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By Jeff Cowan

In the challenges facing landlords in the current economic and market conditions, the municipal tax treatment of vacant space is not to be forgotten as some relief available for the carrying costs of vacant space. The *Municipal Act, 2001* and the *City of Toronto Act, 2006* both require vacancy rebates to be provided for eligible commercial and industrial premises. Provided eligibility requirements are met, rebates of 30% of commercial class taxes, and 35% of industrial class taxes, are available upon application for a period of vacancy that exceeds 90 days. For a property to be eligible, the premises must not be used (except for heating, cooling, lighting or cleaning, or construction, repairs or renovation) for at least 90 days, and in the case of commercial premises, be capable of being leased (except for immediate occupation in the event of renovations) or unfit for occupation. For industrial properties, the vacant portions of the premises must be clearly delineated or separated by physical barriers from the rest of the premises, but need not be capable of being leased. Despite meeting these requirements, premises are not eligible for rebate if they are used for commercial or industrial activity on a seasonal basis; if they are leased to a tenant who is in possession of the leasehold interest throughout the period of time; or if the property is included in a subclass for vacant land.

Interim applications to the municipality can be filed for the first six months of the taxation year, and a final application must be filed by the last day of February of the next taxation year. Applications must be accompanied by prescribed information, and most municipalities require proof of lease termination, leases and any occupancy dates, as well as proof that premises are being offered to lease. The Municipal Property Assessment Corporation (MPAC) then supplies the municipality with the assessed value of the premises for purposes of calculating the rebates. If the property is the subject of an assessment appeal and the assessment on which the rebate was calculated is subsequently reduced, the municipality may recover any overpayment. The legislation encourages prompt processing by requiring interest on unpaid rebates to be paid by the later of November 30 of the taxation year for interim applications made prior to July 31, and June 30 of the next taxation year for final applications, or 120 days after the required information is supplied to the municipality, whichever is greater. The applicant may appeal the amount of the rebate, or the failure to process the application, to the Assessment Review Board within 120 days of the municipality's determination or submission of a complete application.

One issue that arises in vacancy applications is the treatment of fixturing periods for new tenants. Some municipalities, such as Toronto and Ottawa, treat this period as eligible for vacancy rebate, while others do not, on the theory that the property is not capable of being leased or the new tenant is in possession of the leasehold interest. Ironically, municipal legislation permits application for a full refund of taxes if repairs or renovations to the land prevented the normal use of the land for a period of at least three months during the year, except if the premises qualify for a vacancy rebate. Thus, if a period of time including a fixturing period lasts greater than 90 days, and the municipality takes the position that the property does not qualify for the vacancy period, an application under section 357 of the *Municipal Act, 2001* or s. 323 of the *City of Toronto Act, 2006* may result in a greater rebate than a vacancy rebate application. These applications also must be filed no later than the last day of February of the next taxation year. The Ministry of Finance is currently considering proposals to clarify this situation.

Care should therefore be taken to ensure that appropriate applications for the 2015 taxation year are made to the municipality no later than February 29, 2016.

Finally, chronic or unusual vacancy that exceeds MPAC's standardized vacancy allowances, usually 3-5%, may be a ground for appealing assessments that are based on an income capitalization valuation. In the case of former Target Canada premises, MPAC has already agreed to reductions resulting from Target's demise. The last date for appealing 2016 taxation year assessments is March 31, 2016.

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