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09-December-2019

To: The Mayor and Members of Council

Re: *The proposed 2019 Development Charges Background Study, the proposed new Development Charges By-Law, and the proposed Development Charges Assistance Policy*

And Re: **Staff Report EA2019-018**

The above-referenced staff Report (which appears as Item 14.1.1 on Council's December 10th Agenda) is recommending*, inter alia*, that Council now proceed with the adoption of:

> Firstly, a revised finalized version of the 2019 Development Charges Background Study prepared by Watson & Associates;
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> Secondly, a revised finalized version of the proposed new Development Charges By-Law ("DCB") that would take effect as of April 1, 2020 (replacing the 2015 DCB that would be repealed effective as of that same date); and
>
> Thirdly, a proposed Development Charges Assistance Policy.

Let me begin by pointing out that these revised versions of these documents[1] were made publicly available only in conjunction with the posting of Report EA2019-018 on the City's website on December 4th – being five (5) days ago.

Let me also point out what should be obvious to Council: Five days is not a sufficient period of time for anyone – be they members of the public or of Council – to absorb and review the details and analysis of as large (347 pages) or as technical a document as the Background Study (on which, of course, the DCB is itself based).[2] And I will certainly admit, with no sense of shame, that I myself have not yet complete this task.

Finally, let me point out what should be more obvious still:

> Given that the proposed new DCB would not take effect until April 1, 2020, there is no reason or justification for Council's choosing to ram through its adoption at its December 10th meeting.
>
> The more reasonable course would be to defer any action until the January Council meeting – which would afford both Councilors and the public an opportunity to absorb the documents and raise any questions and/or concerns to which such a review might

[1] as distinct from the draft versions that were previously circulated in October.

[2] If truth be told – and especially if past experience is any indicator – I would doubt that most members of Council have even managed to work their way through the entirely of the document, much less subject it to scrutiny and reflection.

give rise. No less to the point: It would allow for at least some of the more obvious corrections to these documents to be made prior to adopting them.

That being said, finding myself obliged to allow for the likelihood that Council will nevertheless choose to proceed with adoption on December 10th, I would offer the few preliminary (and somewhat generic) comments that I am in a position to render:

1. As Council is aware, both the 2014 DCB and the 2015 DCB (along with the Background Studies on which they were based) are currently under Appeal, and are still awaiting adjudication by the LPAT. The new Background Study that you are being asked to now adopt pre-supposes that there will be no changes to those prior DCBs and Background Studies – insofar as it bases both its carry-forward project-list and its DC Reserve Reconciliation on the assumption that the corresponding provisions in those prior documents will be upheld. For this reason alone, my company (along with others, I suspect) will have no choice but to appeal Council's adoption of the proposed Background Study and DCB that are now before it.

2. Beyond this, the vast majority of the issues and defects that had been identified in my company's prior correspondence and Notices of Appeal relating to the 2014 and 2015 DCBs continue to infect the current Background Study and proposed new DCB. Rather than restating them all herein and thereby encumbering your current Agenda, I would instead simply refer you to my company's *Notice of Appeal* dated January 3, 2016 (to which much of that prior correspondence is appended).[3]

3. I would further point out that, rather than correcting the defects that had been cited in relation to the earlier Background Studies, in many instances the current Study actually exacerbates them. One obvious example is the number of new residential units that are now projected as being created annually during the go-forward study period. As you will have noted (assuming that you've done the year-to-year comparisons), these projections have increased markedly from those relied-upon in the prior Studies. What you must appreciate is that this has occurred not only despite, <u>but actually because of</u>, the extreme shortfalls in previously-projected growth that actually occurred during the past four years. In essence, the Study has wed itself to the assumption that the lower the rate-of-growth in the recent (as well as the more distant) past, the higher it will necessarily be in the future.[4] In principle, of course, such an assumption is patently absurd. And in practice it becomes even more so, given the lack of capacity to produce such unprecedented numbers of new residential units.[5]

4. Those exaggerated growth projections, in turn, have resulted in the Background Study's having included in it projections and calculations numerous projects – many of them with

[3] Those of you who might be interested can presumably obtain a copy of that Notice of Appeal from the Clerk's Department.

[4] In some ways this echoes Samuel Johnson's famous dictum about second marriages as representing "the triumph of hope over experience". In this case, a long pattern of experience – combined with a realistic assessment of production capabilities, market demand, and the resources of the Building Department – would lead one to conclude that even if one were to cut those projections by 50% one could still be accused over being overly optimistic.

[5] You will likely be told that adopting these inflated rate-of-growth projections is required in order to conform to the population projections in the Growth Plan. This is not in fact the case. There are other alternatives available.

very high price tags – that there is no actual reason to believe will actually need to be undertaken during the go-forward study period. While in many categories their inclusion in the cost-numerator is offset by the increased size of the denominator over which they are distributed, there are no small number of instances in which that is not the case – the result being an unwarranted increase to the computed applicable charge. And there are equally instances in which the apportionment to Benefit to Existing (BTE) and Post-Period Benefit (PPB) ends up being distorted as a result of their premature inclusion in the study period's capital project list.

5. The approach taken in the final version of the Background Study and DCB is to adopt a uniform Non-Residential DC Rate for the categories of development that had previously been segregated in the 2015 Study as Commercial, Industrial and Institutional. The effect of doing so – indeed, the explicitly *intended* effect – was to reduce the DC Rates that would otherwise apply to commercial development by in effect transferring a portion of the computed financial burden that was shown in the draft version of the Study as being attributable to commercial development to industrial and institutional development.

6. Another new wrinkle emerges in the manner in which the DC Reserves have been maintained and reconciled – and therefore in how their balances are accordingly rolled-forward into the computation of the proposed new DC Rates. Rather than elaborating on this in detail at this time, I am appending hereto a copy of an LPAT Decision from 2019 that speaks to this issue (along with others that are pertinent to the matter at hand) directly.

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In the event that Council elects to defer consideration of these documents to its January meeting, time will be afforded for me (and others) to elaborate on, as well as supplement, the preliminary comments above. More to the point: It would afford an opportunity to engage both staff and Watson on many of these issues, with the hope that at least some of them could be resolved prior to further consideration by Council. For present purposes, however, given the time constraints associated with meeting Council's correspondence deadline, the foregoing will have to suffice.

Sincerely yours,

Marty Stollar

Martyn Stollar
Managing Director

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Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement local

Ontario

ISSUE DATE: June 11, 2019 **CASE NO(S).:** DC150017

The Ontario Municipal Board (the "OMB") is continued under the name Local Planning Appeal Tribunal (the "Tribunal"), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

PROCEEDING COMMENCED UNDER section 14 of the *Development Charges Act*, 1997, S.O. 1997, c. 27

Appellant:	Amacon Development (City Centre) Corp.
Appellant:	Fogerhill Equities Inc.
Subject:	Development Charges By-law No. 46-2015
Municipality:	Regional Municipality of Peel
OMB Case No.:	DC150017
OMB File No.:	DC150017
OMB Case Name:	Amacon Development (City Centre) Corp. v. Peel Regional Municipality)
Heard:	May 8 – 12 and October 3 – 6, 2017 in Brampton, Ontario and Written Submissions to December 18, 2017

APPEARANCES:

Parties	**Counsel**
Regional Municipality of Peel	P. DeMelo
Amacon Development (City Centre) Corp.	S. Rosenthal I. Banach

DECISION DELIVERED BY SUSAN de AVELLAR SCHILLER AND ORDER OF THE TRIBUNAL

BACKGROUND

[1] The Regional Municipality of Peel ("Region") adopted Development Charges By-law No. 46-2015 ("By-law"). The By-law was appealed to this Board by various interests. The Region engaged in extensive consultation and discussions with these various interests. By the time of the hearing of the merits, the only appeal that remained outstanding was that of Amacon Development (City Centre) Corp. ("Amacon"). This decision deals with the Amacon appeal.

LEGISLATION

[2] The *Development Charges Act* ("Act") is specific and precise. The Tribunal's role in deciding this appeal does not include analysis of the policy preference that may underlay a municipality's decision on the form and application of its By-law. For example, there may be a policy preference to encourage a particular sector and a wish to do so through discounted development charges. The policy preference remains that of the municipality. The Tribunal's role is simply to determine if the expression of that policy preference in the By-law and its application has met the requirements of the Act.

[3] Section 2(1) of the Act sets out the principle to guide the development of the By-law. This principle is often summarized as "growth pays for growth":

> The council of a municipality may by by-law impose development charges against land to pay for increased capital costs required because of increased needs for services arising from development of the area to which the by-law applies.

[4] If a cost is unrelated to an increased need that arises because of growth then it cannot be included in the By-law. If there is benefit to existing development, that benefit must be identified and deducted in the calculation of the By-law's charge. This is set out in section 5(1)6:

> The increase in the need for service must be reduced by the extent to which an increase in service to meet increased need would benefit existing development…

[5] Similarly, s. 5(1)4 requires that if there is a benefit that extends beyond the period permitted by the Act then that, too, must be identified and deducted in the calculation of the By-law's charge.

[6] Where a municipality has identified different types of development it may only impose a development charge on that type of development for the increased need that is generated by growth in that particular type of development. The Region recognizes two basic types of development: residential and non-residential. Having recognized different types of development, the Region is then constrained to ensure that the development charge applied to either category results solely from the increased need generated by growth in that category. Phrased another way: one category cannot subsidize the other category.

[7] A development charge by-law is forward looking in that it is based on projected growth. Identifying that projected growth requires a background study that must meet certain requirements that are set out in the Act. Central to the requirements of the background study is that it must analyze and set out clearly the basis for the proposed charges to ensure that they are for the increased service needs that are required by the anticipated growth within a specified category within the period. The study must be transparent in its analysis and its chosen methodology must support development charges that conform to the requirements of the Act.

ISSUES, ANALYSIS AND FINDINGS

[8] There is no dispute between the parties about the works to be undertaken or the costs of the works.

[9] The elements of this dispute may be grouped into two main issues:

1. Have the increased costs required by the increased need from growth been properly allocated between the residential and non-residential categories?

2. Have the proposed charges been based on an analysis that:

    i. included only the increased costs required because of increased needs of growth within the period; and

    ii. excluded benefits to existing development and benefits to the post-period?

Witnesses Heard

[10] The Tribunal heard from six witnesses whom the Tribunal qualified to provide independent expert opinion evidence in their respective fields. The Region called a land economist, a transportation planner and a professional engineer expert in water and wastewater matters. Amacon called a professional engineer expert in water and wastewater matters, a traffic engineer who is also a transportation planner, and a land economist who is also a land use planner.

Allocation between Categories

[11] Amacon contends that the allocation of costs between categories for some works and services, and some administrative practices, result in the residential category subsidizing the non-residential category contrary to the Act. Included in this topic are a service, known as Transhelp, to assist the physically disabled to reach various locations in the Region, paramedics, police, water and wastewater and administrative treatment of the reserve fund.

Transhelp:

[12] Transhelp is a service to assist the physically disabled to get to various locations in the Region. The Region acknowledges that Transhelp is a shared ride service and

describes the service as being the same as public transit with the same fares.

[13] Transhelp rides are not based on the purpose of the trip. Although Transhelp operates within the Region, it does not distinguish eligible riders by whether they are residents or non-residents or whether the purpose of the trip is recreational, commercial or personal. The service is available to the full population, including non-resident employees, yet Transhelp is attributed entirely to the residential category.

[14] The background study, required by the Act before a By-law may be adopted, contains no rationale or calculation that supports attributing Transhelp entirely to the residential category. Transhelp clearly benefits the non-residential employment sector and warrants a non-residential attribution.

[15] The Tribunal finds that attributing Transhelp entirely to the residential category constitutes a subsidy from residential to non-residential that is contrary to the Act. In the absence of appropriate analysis to justify allocation entirely to the residential sector, the Tribunal is persuaded that a reasonable basis for allocation is the ratio of the projected population to projected employment growth.

Paramedics:

[16] Paramedics respond to emergencies. Paramedics do not withhold service based on residential or employment status nor do they withhold emergency services until those in need identify themselves as either residents or employees. Like Transhelp, the Region attributes all the increased need for these services to the growth in the residential category.

[17] The Region’s justification for attributing all the increased need for these services to growth in the residential category is that this is a policy that has been in place for many years. If the Region’s policy preference is not to attribute any increases to the non-residential category, that is the Region’s business. Any shortfall that results from that policy cannot then be made up by placing all the development charges for

paramedics on the residential category.

[18] The Tribunal finds that attributing all increases in the need for paramedic services to the residential category constitutes a subsidy from residential to non-residential that is contrary to the Act. The Tribunal further finds that the appropriate attribution should be based on the ratio of the projected population to employment growth.

Police:

[19] The Region's police force serves Mississauga and Brampton. At the time of this hearing, Caledon was served separately by arrangement with the Ontario Provincial Police.

[20] The attribution for police is based on a weighted taxable assessment of real property. In summary, this approach uses the value of residential and non-residential real property, weighted to account for different tax rates and other assessment adjustments. The resulting data is exactly as its name implies: a ratio of the weighted residential taxable assessment to the weighted non-residential taxable assessment. The result is not the ratio of the projected growth in residential population to the projected growth in employment.

[21] The differences in the value of inputs to determine the weighted taxable assessment of residential real property *versus* the weighted taxable assessment of non-residential real property results in an oversized figure for the residential component by comparison to that of the non-residential.

[22] The Region's witness testified that this approach and resulting attribution was appropriate, based on his professional opinion that police services dealt overwhelmingly with residents. He acknowledged that the police deal with a broad range of matters from criminal to educational, responding to calls that may originate and/or arise from the needs of residents or business, but presented no data to support the suggestion that the

police services and calls were primarily for residents. Like paramedics and other first responders, police do not fail to answer a call or withhold service until they are satisfied that the police service in question is being provided solely to residents.

[23] The Region suggested the weighted taxable assessment approach simply provided a proxy to the attribution of services to the residential sector *versus* the employment sector. If it is a proxy, and the Tribunal is not persuaded that it is, then it is a particularly faulty proxy. With no identifiable equivalence to projected residential and employment growth, the weighted taxable assessment approach results in a subsidy from residential to non-residential that is contrary to the Act.

[24] The Tribunal finds that the appropriate methodology for determining the attribution between residential and non-residential is the ratio of the projected residential growth to the projected employment growth and not a weighted taxable assessment basis.

Water and Wastewater:

[25] Amacon is not challenging the total capital costs inclusive of both water and wastewater projects, excluding reserves and encumbrances. Amacon is also not challenging the assumptions used or the Region's flow, demand and design criteria. In this service as well, Amacon is challenging the allocation of costs between the residential and the non-residential sectors.

[26] The Region uses historic billings as the basis to project need into the future. It has done so as a policy matter for many years. This is the basis for the Region's attribution between the residential and the non-residential categories for development charges.

[27] The Region acknowledges that not all treated water is metred. Non-metred, and therefore non-revenue, treated water may be lost through various combinations of leaks, fighting fires, flushing water mains, and so on. The Region did not use historic

billings as the data basis to support the analysis of need for the capital plan in the Water and Wastewater Master Plan analysis. Here, the Region used historic flow data, not historic billings, to support the capital plan and applied an analysis of population and employment growth.

[28] The Tribunal is not persuaded that historic billings are able to identify needs arising from growth. Without that analysis, the Tribunal finds that the use of historic billings to set the attribution between residential and non-residential is contrary to the Act. The Tribunal is persuaded that historic flow data to which is applied the projected population and employment growth is an appropriate and reasonable basis to set development charges for water and wastewater.

Cash Flow and the Reserve Fund:

[29] For the analysis of this matter, the Tribunal will focus on two principal components of the reserve fund: residential and non-residential. These separate components respond to the requirements of the Act that each type of development pays only for the increase in needs generated by that type of development. The Act requires that the development charge that is calculated for each type of development must be exact in order to result in a zero balance for each type of development at the end of the period. Calculating the development charge to achieve a zero balance at the end of the period is one element to ensure that the development charges are attributed to the correct development type.

[30] Rather than keep each component separate, achieving a zero balance within each, the Region blends the closing balances for all types of development and achieves a zero closing balance overall. Doing so for administrative convenience is not the problem as long as the individual components reach a zero balance for purposes of the development charges. The problem arises in the fact that those individual components are not tracked separately. In fact, the Region’s witness suggested that blending the balances in the categories to achieve an overall zero balance reflected the fact that

capital works may have to be undertaken prior to the actual development occurring. With a higher balance in the residential component, blending the balances would act as an internal loan from the residential stream to the non-residential stream. That is what creates the problem.

[31] The Act makes no mention of one type of development lending its reserve fund monies to the reserve fund component of another type of development. In doing so, the development charges collected from, in this case residential, development effectively subsidizes the development charge of the non-residential development. That is contrary to the Act.

[32] Here, again, if the Region's policy is to accord a beneficial rate to one type of development, it may do so but not by overcharging another type of development. Shortfalls cannot be made up in that fashion.

[33] The Tribunal finds that the manner in which the calculations are done as a consequence of the blending of the funds has resulted in overcharging the residential component for the service needs created by growth in the residential sector.

Proper Exclusions

[34] The Act requires two key exclusions to ensure that only the costs for increased need required by growth within the period are charged. Benefits to existing development ("BTE") and post-period benefits ("PPB") must both be deducted. The analysis of both of these benefits, and their appropriate deduction, must be made in the background study that supports the particular By-law.

[35] Amacon takes the position that the requisite analysis and consequent deductions were not made for two elements of transportation services:

1. Road construction projects, including stand-alone intersections

2. Road and rail grade separations

Road Construction Projects:

[36] For road construction projects, the primary matter in dispute is the question of whether some elements of the road construction benefit existing development or whether all elements of road construction provide some level of BTE.

[37] A number of elements go into road construction projects. Some elements clearly occur in all road construction projects and include things like background studies and design work. Other elements may only occur in certain road projects, depending on the area and the particular needs or prevailing transportation policy preferences that are being applied. These might include matters from utilities, bridges, culverts and traffic signals to bicycle or multi-use paths, sidewalks and street lighting. Whether the project is a stripped down rural road segment or a fully dressed urban segment, there is always some resulting BTE.

[38] The Region tends to take a flat percentage and attribute that to BTE. Amacon does not take much issue with the flat percentage approach. The Tribunal accepts that a flat percentage approach reflects a common standard and is reasonable.

[39] The Tribunal is not persuaded that cherry-picking the elements against which the flat percentage is to be applied is either reasonable or reflects the actual BTE. For example, if a road construction project takes a rural segment and brings it to what would be recognized as more of an urban segment, both urban and rural residents who use the road benefit from all the elements of the road improvements. It is insufficient to say, as the Region does, that perhaps not all residents adjacent to the road want all the additional improvements.

[40] The Region, by its policies, has determined that certain elements should be included in a particular road project. If it is included in the road project, then it is appropriate to allocate a portion of the overall cost to BTE. The Tribunal is persuaded

that applying a BTE to construction only, and not to the total cost, does not comply with s. 5(1)6 of the Act.

Road and Rail Grade Separations:

[41] The Region has proposed two grade separations in the vicinity of King Street and Coleraine Drive. In both cases the Region has attributed the costs of these grade separations to the residential sector.

[42] The Region contends that the need for the grade separations results from increases in both vehicular and train traffic that leads to delays at the at-grade crossings. These delays hold up goods movement as well as creating potential delays for emergency services and first responders.

[43] To understand the issue, it is first necessary to understand the suggested cause of the need for the grade separations.

[44] The Region's transportation planner was clear that one of the elements of vehicular traffic was the growth in truck traffic, particularly goods movement that may be entering the Region from elsewhere. A second element of vehicular traffic increase was attributed to residential growth.

[45] There are no capacity improvements proposed for the roadway. This raises the very real question in the Tribunal's mind whether growth, expressed as an increase in the number of vehicles, is identified properly as an underlying need for the proposed grade separations.

[46] Train traffic on the rail line is expected to increase, particularly for commuter services. With an increase in train traffic, there may be some increases in the number of incidents where there is a delay at a level crossing. The delay was acknowledged as being minor where the train is a fast moving commuter train. Where the train is a slower moving freight train, that condition exists now. In reference to first responders, the

Region acknowledges that there are delays occasioned now if the crossing is necessary and it occurs at the time that a slow moving freight train is using the rail line.

[47] It is clear to the Tribunal that two elements are problematic here. The first is that the grade separations are allocated entirely to growth with no allocation to BTE, when clearly and unequivocally existing development would benefit from such grade separations.

[48] The second problem is the fact that the Region has made no allocation for any post-period benefit.

[49] Section 5(1)4 of the Act is clear. The estimate of costs attributable to anticipated development:

> …must not include an increase in the need for service that relates to a time after the 10-year period immediately following the preparation of the background study unless the service is set out in subsection (5).

[50] The Tribunal finds that the Region has failed to make appropriate deductions when determining the development charge payable for grade separations.

CONCLUSION

[51] Having considered all the evidence, the Tribunal finds that there are necessary reductions to the residential development charge resulting from allocations that do not comply with the Act and from the lack of appropriate deductions for benefits to existing development and for post-period benefits.

ORDER

[52] The Tribunal Orders that the appeal by Amacon Development (City Centre) Corp. is allowed and that:

1. By-law No. 46-2015 is amended to delete and replace Schedules “A” and

"B" with those tables set out in the witness statement of Rowan Faludi and in the replacement tables at Exhibit 3, Tab 1, Attachment 12.

2. Residential development charges paid under the current version of By-law No. 46-2015 are to be refunded in accordance with the Act.

"Susan de Avellar Schiller"

SUSAN de AVELLAR SCHILLER
VICE-CHAIR