

The Rise and Fall and Continued Rise of Development Charges

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The Rise

There is arguably no field in development as marked by controversy as the imposition of development charges. This form of revenue raising is complicated and has been the subject of much litigation before the Ontario Municipal Board (the “Board”) and the courts as municipalities and school boards square off against land owners/developers over who should pay for new infrastructure. Generally speaking, the former have had the benefit of the doubt as development charges have become a permanent and expensive fixture on the development landscape.

The Fall

There has been a lot of (court assisted) activity in the field of development charges recently. Most notably, the Ontario Divisional Court (the “Court”), in a decision released on 21 March 2011, refused to grant leave to appeal to the Town of Orangeville (the “Town”) from a decision of the Board dated 3 September 2010 (DC090049) rejecting the methodology for calculating development charges contained in the Town’s Development Charges By-law 78-2009 (the “By-law”).

Through the By-law, the Town proposed to move to a “gross population” methodology whereby development charges are determined solely on the population levels projected to live in new residences. Essentially this means that new development funds all new services.

The Town had previously relied on a “net population” methodology where development charges were determined in a more nuanced manner, determining servicing needs caused by new development by taking into account the future estimated decline in population levels in existing homes. That estimated decline is subtracted from the projected population in the new homes to arrive at the net population figure.

This distinction is best described by the Building Industry and Land Development Association (BILD) as the “use of households rather than population” in its advocacy efforts over development charges. It was BILD, through the Orangeville District Home Builders Association, that appealed the By-law to the Board.

The Court agreed with the finding of the Board that the gross population methodology “focuses only on the need for services and not on the *increase* in needs” whereas the criteria under the *Development Charges Act*, 1997 relates to the “*increase* in need for service attributable to the anticipated development” (s.5(1)) (emphasis added). As the Court put it:

“it is evident that development charges can only be imposed for increased capital costs arising from or caused by the increased need for services caused by development. The Board recognized that the Act is not concerned with the services that the development needs in isolation. A development charge may

only be imposed if the development results in an increase in the need for services in the broader context of the services already offered by the municipality”.

There were other issues raised by the Town in seeking leave from the Court, including the Board’s interpretation of the 10 year average level of services for the Town (this standard is established by the Act as a means of measuring the reasonableness of the proposed development charges) and the meaning of “excess capacity”. These other issues were addressed by the Court using the same response the Court provided regarding the issue of methodology.

This decision of the Court has already had an impact as some municipalities currently in their development charges review period (the Act provides that development charges by-laws expire 5 years after coming into force unless they are repealed earlier) are delaying the implementation of new methodologies to ensure they are “decision-proof”. Consequently, municipalities, school boards, developers and consultants will all have to carefully review the state of existing infrastructure and the statistics on (current) household sizes to assess the true increased need for services resulting from development.

If we examine this reasoning in the context of other recent Board decisions with respect to what development charges should be assessed for nursing homes (DC080008, 25 February 2010) it is clear that there are new and successful arguments to be used in limiting the rise and breadth of application of development charges. This may be further impacted by Provincial requirements to restrict growth to built up areas; compact growth may not be as expensive for new development.

The Continued Rise

Notwithstanding these recent decisions, municipalities and school boards continue to significantly increase the rate of development charges they impose on new development as the costs of land acquisition and infrastructure projects rises. As development charges by-laws come up for renewal some of these bodies are raising or proposing to raise development charges anywhere from 43% (Halton District School Board) to 79% (Simcoe County) to 145% (Town of Georgina) for various types of residential projects.

In a novel move, City of Guelph staff are using that City’s Development Charges Administration Pamphlet (the “Pamphlet”) to place the highest development charges rate on industrial building built on speculation. On this point the Pamphlet, which does not reflect the wording of Guelph’s Development Charges By-law (2009)- 18729, reads:

“In the case of development where the allowable uses under the Zoning By-law include commercial/institutional and industrial and where the nature of the business of future tenants is unknown, the commercial/institutional rate shall apply to the entire gross floor area. Once the units are sold or rented and the initial occupancy and business type can be determined, the development shall be reassessed as to the predominant use and the DCs adjusted accordingly”.

This firm is currently challenging that interpretation by staff on behalf of a client.

Conclusion

What does all of the above mean? Development charges continue to rise, making development more expensive, but the methodology behind the increased rates is being increasingly scrutinized and challenged. In certain cases, the result is that development is less expensive than it could otherwise have been had developers simply accepted the municipality’s interpretation and application of the development charge rates. Municipalities and school boards have to be cautious about their approach while land owners and developers have to remain vigilant in their review of development charges.

We will continue to monitor this matter and update again in a future issue. Please contact the writer should you require assistance in reviewing and understanding the development charges that may impact your project or in challenging development charges proposed to be imposed by a municipality or school board. ■