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DC120006

Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF section 14 of the *Development Charges Act*, 1997, S.O. 1997, c. 27

Appellant:	Building Industry and Land Development Association
Appellant:	Calloway REIT
Appellant:	Embee-Jovic Development Group
Appellant:	Hamilton Halton Home Builders' Association; and others
Subject:	Development Charges By-law No. 48-12
Municipality:	Regional Municipality of Halton
OMB Case No.:	DC120006
OMB File No.:	DC120006

IN THE MATTER OF section 14 of the *Development Charges Act*, 1997, S.O. 1997, c. 27

Appellant:	Silwell Developments Limited
Subject:	Development Charges By-law No. 49-12
Municipality:	Regional Municipality of Halton
OMB Case No.:	DC120006
OMB File No.:	DC120007

APPEARANCES:

Parties	**Counsel**
Regional Municipality of Halton	R. Doumani J. Johnson
The Building Industry and Land Development Association	L. Townsend J. Meader
Milton Phase 3 Landowners Group Inc.	M. Noskiewicz
Silwell Developments Limited	R. Howe
Embee-Jovic Development Group Embee Properties Limited	D. Wood

Calloway REIT	D. Wood
SmartCentres Limited	D. Wood
Hamilton Halton Home Builders' Association	S. Rogers

MEMORANDUM OF ORAL DECISIONS OF THE BOARD ON A NUMBER OF MOTIONS DELIVERED BY S. W. LEE AND K. HUSSEY

[1] There are two sets of motions before this panel.

[2] The first set deals with the Region of Halton's (the "Region") request to strike out grounds 10, 14 & 15 of the draft procedural order. Building Industry and Land Development Association ("BILD") and Milton Phase 3 Landowners Group Inc. ("MP3") jointly resist the Region's request. On a related front, BILD and MP3 jointly request the Ontairo Municipal Board (the "Board") to direct that these three issues form the first phase of the hearing. They are of the view that these are threshold issues which will go to the root of the development charges (DC charges) under the *Development Charges Act* S.O. 1997 c.22 (the "Act"). It is their contention that the outcome of such a phased hearing would have broad implications for the rest of the issues which essentially are, in their view, quantum disputes. To organise the hearing along such a configuration, in their view, is not only fitting and expedient, but necessary, in light of what they perceive as the central flaws in the Region's underlying assumption.

[3] The second sets of motions made by the Region are motions to dismiss the appeals of Silwell Developments Limited ("Silwell Appeal") and the appeals by Embee Properties Limited and Embee-Jovic Development Group ("Embee Appeal"). Essentially, the thesis of the Region's position is that if we were to entertain the appeals, the Board would land in a jurisdictional quandary in light of the binding nature of the *Places to Grow Act*.

MOTION TO STRIKE ISSUES 10, 14 &15

[4] The first set of appeals focuses on the question as to what constitutes the proper subject matters before the Board and whether they are sufficient grounds to be included

in the issues list. The test for dismissal without a hearing is found in s.16 (5) of the Act. The section states:

> (5) Despite subsection (1), the Ontario Municipal Board may, where it is of the opinion that the objection to the by-law set out in the notice of appeal is insufficient, dismiss the appeal without holding a full hearing after notifying the appellant and giving the appellant an opportunity to make representations as to the merits of the appeal. 1997, c. 27, s. 16 (5).

[5] The sufficiency test in the last mentioned provision obligates the Board to ask the question whether the issues are material and relevant in the sense that the DC charges in question appropriately and properly provide for the growth-related capital expenditures from new development. To deploy a ready-made and somewhat hackneyed coinage: the test is whether the impugned questions raise triable issues. The test does not require the Board to go as far as to determine merits. That determination should be left to the hearing.

[6] Ground 15 states:

> 15. Are there other capital costs included in the Charge that should be reduced to adjust for capital grants, subsidies and other contributions made, or that the Region anticipates will be made in respect of the capital costs?

[7] Grounds 10 & 14 states:

> 10. Has the Region of Halton Council indicated that it intends to ensure that the increase in need for services identified in the Background Study will be met and that the Region has incurred or proposes to incur the capital costs included in the background Study?
>
> 14. Have the interest costs included in the capital costs for roads, water and waste water services been reduced to adjust for capital grants, subsidies and other contributions made, or that the Region anticipates will be made in respect of capital costs?

[8] The position of the Region is that it has fully complied with the paragraph 5(1) of the *Development Charges Act*, 1997. The grounds raised under these headings touch upon the questions of additional funding contributions, early payments and interests for borrowing for capital costs. It is the contention of counsel for the Region that they should not be considered by the Board at all. The thesis is that they belong to the domain of the discretion of council in terms of financial planning and financial priority of the Region.

[9] In fact, the strongly-held view by the Region is that BILD and MP3 have in effect co-mingled (or "conflated", as counsel for the Region has so described) the

development charge process with the municipal finance process. The Region steadfastly insists that this hearing should only focus on what it perceives as questions of development charges in the purest sense. In its view, this hearing is not about an application before the Board pursuant to s. 63 of the *Ontario Municipal Board Act*. The former is a proper subject of appeals and is before us. The latter, in the Region's view, is beyond the reach of the Board at these proceedings.

[10] Before the Board hastens to strike these issues on that basis, it must inquire whether there is a possible or probable nexus between additional funding contribution, pre-payments and interest costs for the increased costs of services and the imposition of the DC charges. In other words, whether there is a linkage and if so, would there be ensuing implications? Section 5 of the Act states:

> 5. (1) The following is the method that must be used, in developing a development charge by-law, to determine the development charges that may be imposed:
>
> 7. The capital costs necessary to provide the increased services must be estimated. The capital costs must be reduced by the reductions set out in subsection (2). What is included as a capital cost is set out in subsection (3). How the capital costs are estimated may be governed by the regulations.
>
> (2) The capital costs, determined under paragraph 7 of subsection (1), must be reduced, in accordance with the regulations, to adjust for capital grants, subsidies and other contributions made to a municipality or that the council of the municipality anticipates will be made in respect of the capital costs. 1997, c. 27, s. 5 (2).

[11] Jennette Gillezeau, an economist with the expertise in the area of development charges, indicates in her filed affidavit that it is her view that the anticipated additional funding contributions for both the 2012 to 2015 period and the 2016 to 2020 period, as well as the early payment in water wastewater, should be deducted from the capital costs estimates. She maintains that the above legislative provisions in the Act demand a proper accounting. The key wordings indicate a required deduction for "contributions". It is therefore her view that Issue15 is an issue alive and worthy of adjudication.

[12] As for Issues 10 and 14, it is her view that s. 5(1)3, of the Act would be engaged. That provision states:

> 3. The estimate under paragraph 2 may include an increase in need only if the council of the municipality has indicated that it intends to ensure that such an increase in need will be met. The determination as to whether a council has indicated such an intention may be governed by the regulations.

[13] In her affidavit, she indicates that the Region had intended only the developers, and not the Region, to incur the capital costs in its DC calculation. In addition, she alleges that the Region has improperly included interest costs in its DC calculation that it does not intend to incur. In support of that proposition, a fair amount of details, both in the process and quantum, are provided in her affidavit. Her view is that s. 5(1)3 of the Act has been offended.

[14] Without delving into any greater detail, it is clear to this panel that the Board should not from the outset strike these issues from the list in a summary fashion. On one hand, the Region invites the Board to consider the funding of capital cost requirements and the consideration of DC charges in splendid isolation. On the other hand, BILD and MP3 invite the Board to find the Region's process, practice and conceptual formulations as comingling the two spheres. They request the Board not to accept the Region's assumptions slavishly. Instead, they want the Board to treat these two conceptual spheres fashioned by the Region as one singularity. As a corollary, they demand and insist on proper accounting of the requisite numbers.

[15] In this panel's view, it is difficult to come to any conclusion, let alone to dismiss these grounds at this stage without a fulsome mastery of the budget and business plan, the DC background study and an in-depth analysis of the applicable legislative provisions and rules in light of the evidence. Our view is that it is important to engage these questions by allowing the two sides to delineate to the Board not only the DC charges, but also the alleged contributions. In so doing, the Board would be in a position to assess how all of these would resonate and interplay in light of the provisions of the Act. Another point that is worthy of note: unlike some other legislation in the municipal field, this Act is not a hastily or crudely crafted *oeuvre.* Concepts and ideas are subtly but firmly embedded and they inter-relate with razor-sharp precision. Last but not the least, the Board should be allowed to sniff out the audit trails from this vast bed of resources and assess the internal consistency of the various sets of assumptions. It is infinitely wiser to put these matters under the glaring sunlight. Conversely, it is infinitely reckless to dismiss these concerns insouciantly or too readily.

[16] In short, it is our conclusion that issues 10, 14 & 15 are material and relevant. They are triable issues that are worthy of a full airing at a hearing.

THRESHOLD ISSUES

[17] As for the question of whether they should be adjudicated as Phase 1 of the hearing, the Board makes the following findings:

[18] The Board shall weigh the balance of convenience and the probable ensuing prejudice. The Board agrees that these issues are properly characterised as threshold issues as they represent BILD and MP3's frontal attack on the DC by-laws as an entity based on what the latter consider as flawed assumptions and questionable premises. Whether or not the Board would come to the conclusion as desired by BILD & MP3, adjudicating these issues in advance would be a more efficient way to deal with the hearing. For one thing, the outcome of the adjudication of these issues can be inexorably devastating to the by-laws. The Board agrees that the converse cannot be said of the other issues, which deal with matters of quantum. The Board also agrees that the threshold issues can be addressed initially, discreetly and without duplication of evidence in subsequent phases. Once the Board has made a decision on these issues, the implications can be ascertained before the next phase of hearings is to proceed. To organize the hearing along such a configuration is not only fitting and expedient, but necessary.

[19] In short, this panel concludes that these issues should constitute the First Phase of these proceedings.

Silwell Appeals & Embee-Jovic's/ Embee Properties' Appeal (the "Embee") Appeal

[20] The Region alleges that the relief as requested by these appeals would result in a decision by this Board that will conflict with the Growth Plan or the Region's Official Plan. The basis of this theory is that the recent Regional Official Plan amendment, ROPA 37, has been approved in part by the Board in the Growth Plan conformity hearings. Sections of this approved instrument, in the Region's view, has brought into effect and defined the Built-up Area and the Built Boundary.

[21] In the Region's view, the ROPA 37 Built Boundary line is consistent with the Built Boundary line depicted in the general DC by-law and in the recovery DC by-law. As such, the Region draws an important conclusion: the Built Boundary set in these DC by-

laws are therefore immutable, any decisions of the Board that does not adhere to the conceptual parameter of the Built Boundary line in the DC by-laws would breach s. 3(5)(b) of the *Planning Act* in that the decision would violate the Growth Plan.

[22] In the opinion of the counsel for the Region, any such decisions made by the Board that do not adhere to the Built Boundary would be rendered *void ab initio.* Similarly, the granting of reliefs as sought by these two appellants would not conform to an official plan in effect. In the Region's view, that would also violate s. 24(1) of the *Planning Act.*

[23] In the Region's concept, the general DC by-law divides the Region into two areas: the Built Boundary and Greenfield Area. The DC rate for the area within the Built Boundary is made more favourable than the rate for Greenfield Area in that the former rate is lower than the latter's rate. The recovery by-law imposes DC on a portion of the Greenfield Area.

[24] The Region wants to dismiss these appeals without a hearing along the following logic. Because Silwell objects to the fact that the lands it owns south of Dundas Street is being treated unfavourably in the DC charges, it is in effect requesting the Board to expand the Built Boundary line in the general by-law and change the Built Boundary line in the recovery DC by-law. Similarly, in the Region's view, Embee's appeal is equally flawed. Embee objects to its residential lands in Alton being characterised as Greenfield. It insists it should not be designated as Greenfield, but is in fact an infill development. In the Region's view, Embee in effect is inviting the Board to expand the Built Boundary of the by-laws.

[25] The Board's analysis can be stated as follows:

[26] Firstly, the Board must not lose sight of its focus in that the only issue we should fasten on relentlessly in these motions is whether there are triable issues in the appeals. In order for the Board to come to the conclusion that the appeals should be summarily dismissed, this panel requires something that would demonstratively show that the grounds of appeals are neither relevant, nor material. As the Board will show below, the grounds of appeal of both of these appellants have not manifested anything so insufficient that should cause such an initial alarm.

[27] Secondly, one of the affidavits filed on behalf of Silwell is that of Lindsay Dale-Harris, a land use planner. Among the various opinions proffered against dismissal, she indicates that the Growth Plan has not provided for directions regarding the use of DC charges to achieve its objectives. She makes a point that Silwell is not suggesting that the Built Boundary line should not be used for land use purposes. Far from it. Silwell does not wish for and cannot influence planning policies through these appeals. She also questions whether the technique of using a lower water and waste-water for the Built Boundary area in preference to the Greenfield area may even be a disincentive to development at higher densities, an objective which the Region considers as paramount to the Growth Plan. To the Board, all such misgivings portray a vivid picture that the question of conformity is not only alive, but more nuanced, more complex, and require a more studied analysis than that presented by the Region. In our view, simple syllogistic gymnastics do not suffice. At this very stage, given the scant acquaintance of the evidence involved, the Board cannot say whether there is nonconformity. However, this panel is convinced that the line of reasoning upon which the Region invites the Board to follow is a touch too simplistic. Mr. Justice Oliver Wendell Holmes on more than one occasion admonished against a leapfrog to conclusion by simple hair-splitting and deductive reasoning. "The soul of the law," he once remarked, "is not logic, but experience."

[28] Thirdly, Mr. Wood, on behalf of his client, has alerted this panel that amongst the grounds on which Embee relies is the proper "attribution" of costs. Is it fair and reasonable for the Region, he asks, to cumulate all eligible costs in five geographically dispersed Greenfield areas and attribute all these costs of development in all of these areas? Does such an approach properly attribute the need for such services? In fact, he questions the approach as to whether the policy intention of aligning development which requires significant funding with higher development charges is fair and reasonable and has been carried out in accordance with the Act. The affidavits of Rowan Faludi, a planner and Karl Gonnsen, an experienced engineering consultant, provide ample detail supporting the concerns raised. These concerns are triable issues to which a DC hearing of this nature must countenance. To dismiss them without a hearing would make any challenge an impossibly arduous and complicated task. It is important to state the obvious: the DC system does allow the potential payers to mount a challenge based

on the rules of the Act. The task should not be riddled with ritualistic requirements or insuperable impediments.

[29] In short, the Board denies the request for these two appeals to be dismissed without a hearing. The Board also orders the issues as delineated on p. 66 and p. 67 of Exhibit 11 be added to the procedure issues list.

[30] The Board observes parenthetically that the impact of Silwell and Embee on the entire DC regime under the current by-laws is limited in the sense that they are the only challengers to the preferential treatments along the Built Boundary line. Both will go away if the quantum remedies are attended to, in part, if not in whole. Unlike the situation with BILD and MP3, neither is interested in the remedies enlarged beyond their properties. To say that the situation is ripe for mediation is to state the obvious and this panel hopes that the parties will take heed.

"S. W. Lee"

S. W. LEE
ASSOCIATE CHAIR

"K. Hussey"

K. HUSSEY
VICE-CHAIR