

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



ISSUE DATE: August 27, 2018

CASE NO(S): MM160054

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 subsection 71(a) of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, as amended

Request By: J. Stollar Construction Ltd. and The Orsi Land Group
Request For: For an Order Declaring By-law 2015-151 of the Town of Kawartha Lakes concerning the northwest sanitary sewer works, to be considered unlawful and invalid
OMB Case No.: MM160054
OMB File No.: MM160054
OMB Case Name: J. Stollar Construction Ltd. and The Orsi Land Group v. Kawartha Lakes (City)

Heard: July 6, 2017 in Toronto, Ontario

APPEARANCES:

Parties

Counsel

City of Kawartha Lakes (the “City”)	Stephen D’Agostino Denitza Koev
J. Stollar Construction Limited (“Stollar”)	Kim Mullin
The Orsi Land Group (“Orsi”)	David S. White
Mason Homes Limited (“Mason”)	Gordon Petch

DECISION DELIVERED BY DAVID L. LANTHIER AND M. A. SILLS AND ORDER OF THE TRIBUNAL

INTRODUCTION AND BACKGROUND

[1] A motion, dated May 8, 2017 (the “Motion”) is before the Tribunal in relation to the original Application brought by Orsi and Stollar as Applicants, and the City as Respondent. In that Application the Applicants seek an order from the Tribunal:

- (a) declaring that the City’s Capital Charge By-law No. 2015-151 (the “Capital Charge By-law” or the “By-law”) imposing sanitary sewer charges to identified users of specific works referred to as the Northwest Trunk Sanitary Sewer Works, (the “Works”) is unlawful and therefore invalid; and
- (b) declaring that the construction of the Works by the City, was, and is, also unlawful and therefore invalid.

[2] The City, as the moving party on the Motion, is asking the Tribunal to provide directions on the issue of jurisdiction to determine whether the Tribunal does, or does not, have the authority to grant the relief sought in the Application.

[3] Orsi and Stollar appear to oppose the Motion. Mason has not made submissions on the hearing of the Motion but has advised the Tribunal that it supports the Applicant’s position in response to the Motion. Dunster Investments Inc. did not respond to the Motion.

[4] Also before the Tribunal is a second procedural motion brought by Orsi and Stollar to have Mr. Juan Rojas, on behalf of the City, produced for examinations relative to the City’s Motion, and the motion adjourned pending such examination, or alternatively striking the Affidavit of Judy Currins. The Tribunal in this Decision will first deal with the primary Motion and then address the second procedural motion separately.

TRANSITION - LPATA

[5] The hearing of the Motion was conducted by the Ontario Municipal Board (“Board”) on the date indicated above. However, on April 3, 2018, the *Local Planning Appeal Tribunal Act, 2017* (“LPATA”) was proclaimed in force, which provides that the Board will be continued as the Local Planning Appeal Tribunal (the “Tribunal”). As this Decision and Order are now issued subsequent to the proclamation of the LPATA, it is a Decision and Order issued by the Tribunal that determines the adjudication of the Motion as it was heard before the Board. Any reference to the Board in the remainder of this Decision is therefore deemed to also be a reference to the Tribunal as it has continued to deal with this matter pursuant to s. 2(1) of the LPATA and now issues this Decision and Order.

[6] As well, for the purpose of this Decision, under the transitional provisions contained in the legislation, the Application as initially brought before the Board, and the related Motion, is considered to be a “legacy file” and subject to the application of the legislation as it existed prior to April 3, 2018. Accordingly the *Ontario Municipal Board Act* (“OMB Act”), which was the primary act of legislation relevant to issues relating to the jurisdiction of the Board, governs the analysis and adjudication of this Motion.

FACTUAL BACKGROUND

[7] The basic underlying facts relating to the Application and the Motion are not substantially in dispute:

- (a) The Works were constructed both inside, and outside, of two development plan areas and service both developed, and undeveloped, lands. An environmental assessment was completed and approved.
- (b) On April 12, 2011, Council for the City endorsed the use of a capital charge to recover the cost of the Works once the Works were completed.

- (c) The approval for the construction of the Works was granted by Council on June 2, 2011 and construction of the Works commenced in July 2011 and were completed and commissioned in May of 2015.
- (d) The City Council passed the Capital Charge By-law, No. 2015-151, on August 11, 2015 pursuant to section 391 of the *Municipal Act, 2001* ("*Municipal Act*").
- (e) The Applicants commenced the Application on June 14, 2016. The Applicants take the position that the Works should not have been excluded from the City-wide development charges by-law and the cost of the Works should have been recovered through development charges.
- (f) The basis for this position relates to the provisions of the City's Official Plan, inclusive of the prior Lindsay Official Plan, which require that the City recover all growth-related capital costs through development charges and that the design and construction of the Works under the Official Plan are to be the responsibility of the proponents of the development.

[8] For the purposes of this Decision, an assumption will be made that the passage of the Capital Charge By-law did not, and does not, conform to the City's Official Plan. It is stressed that this is not a finding of the Board, and of course the Board would not make this determination until the hearing of the Application on the merits. This contrived assumption is made only to facilitate the analysis of the submissions and the arguments as to the law, all of which are predicated on this assumption that the Applicants would persuade the Board to find that the Capital Charge By-law did not conform with the Official Plan and therefore is not in compliance with section 24(1) of the *Planning Act*. It is this as-yet undetermined assertion, based upon paragraphs 5 to 22 of the Applicants' Factum, which would support the Applicants' request for a declaration of invalidity of the Capital Charge By-law and the Works. The issue, as set out below, is whether the Board has the jurisdiction to make that determination and grant the requested remedies.

THE ISSUES AND THE POSITION OF THE PARTIES

The Issues

[9] The primary issue before the Board is a narrow one of jurisdiction and whether the Board has the authority to make a declaratory Order declaring the Works, and the Capital Charge By-law that was passed to recover the cost of the Works, unlawful and therefore invalid. Based upon the evidence and the submissions from the parties the jurisdictional issue can be further compartmentalized as follows:

- (a) Does the Board have the power to make findings with respect to contraventions of section 24(1) of the *Planning Act*, which prohibits the undertaking of any public works, and any by-law of a municipality passed for such purpose, which does not conform to an official plan?
- (b) Do the subsections of section 71 of the *OMB Act* setting out the jurisdiction and powers of the Board, as they must be applied, and as they relate to the Board's substantive jurisdiction and powers to hear matters respecting public utilities, and fees charged for such utilities, provide the Board with jurisdiction to grant the remedy sought by the Applicants? Specifically under section 71(c) does the Board have the jurisdiction to declare the Capital Charge By-law, and the Works, unlawful, and grant the declaratory order sought by the Applicants because the tolls charged are unlawful? Relatedly, what impact does section 399 of the *Municipal Act* have on the application of section 71(c)?
- (c) Do the general jurisdiction and powers granted under sections 34 to 39 of the *OMB Act* include either the direct, or ancillary, power to determine and declare that the Capital Charge By-law, and the Works, are invalid and void?
- (d) Finally, is the form of relief sought by the Applicants determinative of the issue of jurisdiction? If the Board determines that it has no jurisdiction to

provide the remedy sought, does it still have jurisdiction to determine the issue of conformity of the Capital Charge By-law to the Official Plan and thus the issue of the invalidity of the By-law or the Works and consider alternative remedies?

The City's Position

[10] The City takes the position that the Board has not been granted the specific statutory authority to make declarations in the manner requested by the Applicants and therefore it has no jurisdiction in the Application. In submissions, the City has categorized the Applicants' request for the declaratory relief as "the Main Event" of the Application, as opposed to a request for declarations as "crafted remedies" that are ancillary to the jurisdiction elsewhere granted to the Board by statute. Applying the often-used description of the Board as a "creature of statute" that has no inherent jurisdiction save and except for that which has been granted by legislation, the City submits that there is no statute that grants the Board the power to declare a by-law unlawful. The consideration of official plan conformity under section 24(1) of the *Planning Act*, by the Board, does not itself grant the power to make declarations that the By-law is unlawful or invalid. The City submits that this power rests only with the Court. Further, the City argues that the general jurisdiction and ancillary powers granted under the *OMB Act* also do not include the power to make declarations, particularly those which would determine the validity of a municipal by-law. The City submits that the Board cannot determine the issue of conformity and then grant the Applicants' requested alternative remedies. The City asks that the Application be struck as being beyond the jurisdiction of the Board.

The Applicants' Position

[11] The Applicants, supported by Mason, take the position that section 24(1) of the *Planning Act* is the operative section that causes the Capital Charge By-law and the Works to be unlawful. This is based on their argument that the Lindsay Official Plan requires all growth-related capital costs to be recovered through development charges and not through a capital charge by-law and that the Works were therefore the

responsibility of the developer who is required to cover the development costs attributable to that development project.

[12] On that basis, the Applicants assert that the wording of section 71 of the *OMB Act*, and those identified powers granted to the Board regarding public utilities, expressly include the statutory power to determine the legality of a by-law that relates to charges relating to public utilities. As well, the ancillary powers in sections 34 to 39 include the power to determine a question of law and, it is argued, specifically whether the Capital Charge By-law and the Works are, or are not, unlawful. The Applicants argue that based upon the wording of section 399 of the *Municipal Act*, and principles of statutory interpretation, the Board's jurisdiction is not constrained as the City asserts and in fact expressly grants to the Board the power to determine that the capital charges are unlawful and can provide the remedy requested. The Applicants submit that the Board is the most appropriate forum to decide the issues at hand and can decide the issue of conformity of the By-law to the City's Official Plan. Given the subject matter and the fact that the Board has the ability to fashion alternate remedies under the *OMB Act*, the Board can remedy the contravention arising from the passage of the Capital Charge By-law and the Works enabled by that By-law by making such orders requested by the Applicants.

DETERMINATION OF JURISDICTION – AUTHORITY OF THE TRIBUNAL

[13] Before addressing the legislative framework and the analysis of the issues, it is helpful to review the underlying authority of the Tribunal to deal with issues relating to jurisdiction.

[14] The Ontario Court of Appeal, in the decision of *Goldlist Properties Inc. v. City of Toronto*, 2003 CarswellOnt 3965 appealing a decision of the Ontario Divisional Court, addressed the specific issue of whether the Board has jurisdiction to determine the question of its own jurisdiction under the powers granted to it by the legislature. The Board's ability to determine its own jurisdiction was challenged. In relation to this issue

the Court considered the prior decision of the Court in *Hydro One Networks Inc., Re* (2002), 64 O.R. (3d) 703 (referred to in the decision as “*Ottawa (City)*”).

[15] The Court in *Ottawa (City)* stated:

[23] It is now settled that while the decisions of administrative tribunals lack the force of *res judicata*, nevertheless tribunals may embark upon an examination of the boundaries of their jurisdiction.....

[16] The Court concluded that the tribunal had the jurisdiction to decide the boundaries of its own jurisdiction but, also, could seek the assistance of the Divisional Court on such a question as a stated case. The Court made a clear distinction between the Board’s ability to determine the validity of a by-law (in that case, adopting an official plan) “for all purposes” and the Board’s ability to do so “only for the purpose of deciding the Board’s jurisdiction.

[17] The Court then went on to review a number of other decisions, and within that analysis, provided guidance as to circumstances where a tribunal is entitled to consider and determine issues of law and deal with the matter of the validity of a by-law, as incidental to its administrative functions, including determinations relating to the parameters of its jurisdiction. Referring to that approach, and section 35 of the OMB Act which grants the Board the “authority to hear and determine all questions of law or of fact”, the Court succinctly stated as follows:

[23] With respect to s. 35, we think it is implicit that one matter within the Board's jurisdiction to decide in a proceeding, for the purpose of carrying out its mandate, is the scope of its jurisdiction in that proceeding. We have indicated that its power in this regard is not exclusive. Nor is it final. We shall, in the next part of these reasons, address the question of the standard of appellate review of the Board's decisions on its own jurisdiction.

[18] The Board accordingly has the ability to determine whether, as a matter of law, the Board has jurisdiction to provide the relief and orders sought by the Applicants relating to the validity of the Capital Charge By-law, and the Works initiated pursuant to the By-law.

LEGISLATIVE FRAMEWORK

[19] For the purposes of analysis, it is helpful to set out the applicable sections of the legislation relevant to the Motion.

[20] Section 24(1) of the *Planning Act* is relied upon by the Applicants in support of their position that the Capital Charge By-law and the Works are unlawful:

Public works and by-laws to conform with plan

s. 24. (1) Despite any other general or special Act, where an official plan is in effect, no public work shall be undertaken and, except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith.

Pending amendments

(2) If a council or a planning board has adopted an amendment to an official plan, the council of any municipality or the planning board of any planning area to which the plan or any part of the plan applies may, before the amendment to the official plan comes into effect, pass a by-law that does not conform with the official plan but will conform with it if the amendment comes into effect.

Same

- (2.1) A by-law referred to in subsection (2),
- (a) shall be conclusively deemed to have conformed with the official plan on and after the day the by-law was passed, if the amendment to the official plan comes into effect; and
 - (b) is of no force and effect, if the amendment to the official plan does not come into effect.

Preliminary steps that may be taken where proposed public work would not conform with official plan

(3) Despite subsections (1) and (2), the council of a municipality may take into consideration the undertaking of a public work that does not conform with the official plan and for that purpose the council may apply for any approval that may be required for the work, carry out any investigations, obtain any reports or take other preliminary steps incidental to and reasonably necessary for the undertaking of the work, but nothing in this subsection authorizes the actual undertaking of any public work that does not conform with an official plan.

Deemed conformity

(4) If a by-law is passed under section 34 by the council of a municipality or a planning board in a planning area in which an official plan is in effect and, within the time limited for appeal no appeal is taken or an appeal is taken and the appeal is withdrawn or dismissed or the by-law is amended by the Municipal Board or as directed by the Board, the by-law shall be conclusively deemed to be in conformity with the official plan, except, if the by-law is passed in the circumstances mentioned in subsection (2),

the by-law shall be conclusively deemed to be in conformity with the official plan on and after the day the by-law was passed, if the amendment to the official plan comes into effect.

[21] Under Part V of the *OMB Act*, s. 71 applies with respect to the jurisdiction expressly granted to the Board as it relates to public utilities:

Jurisdiction of Board

:

s. 71. The Board has jurisdiction and power,

Railway and Utility matters

- a) to inquire into, hear and determine any applications made, proceedings instituted and matters brought before it under the provisions of any general or special Act relating to railways or public utilities or any of them where by such Act any jurisdiction or power is for such purpose conferred on the Board;

Complaints of breach of railway or utility statutes, orders, agreements, etc.

- b) to hear and determine any application with respect to any railway or public utility, its construction, maintenance or operation by reason of the contravening or failure to comply on the part of any person, firm, company, corporation or municipality of or with the requirements of this or any other general or special Act, or of any regulation, rule, by-law or order made thereunder, or of any agreement entered into in relation to such railway or public utility, its construction, maintenance or operation;

Railway and public utility rates and tolls

- c) to hear and determine any application with respect to any tolls charged by any person, firm, company, corporation or municipality operating a railway or public utility in excess of those approved or prescribed by lawful authority, or which are otherwise unlawful, unfair or unjust.

[22] Sections 34 to 39, within Part III of the *OMB Act*, are the key provisions which set out the general jurisdiction and ancillary powers granted to the Board:

PART III

GENERAL JURISDICTION AND POWERS

Board to have powers of court of record and a seal

s. 34. The Board for all purposes of this Act has all the powers of a court of record and shall have an official seal which shall be judicially noticed.

Power to determine law and fact

s. 35. The Board, as to all matters within its jurisdiction under this Act, has authority to hear and determine all questions of law or of fact.

Jurisdiction exclusive

s. 36. The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other general or special Act.

General jurisdiction and powers

s. 37. The Board has jurisdiction and power,

- a) to hear and determine all applications made, proceedings instituted and matters brought before it under this Act or any other general or special Act and for such purpose to make such orders, rules and regulations, give such directions, issue such certificates and otherwise do and perform all such acts, matters, deeds and things, as may be necessary or incidental to the exercise of the powers conferred upon the Board under such Act;
- b) to perform such other functions and duties as are now or hereafter conferred upon or assigned to the Board by statute or under statutory authority;
- c) to order and require or forbid, forthwith or within any specified time and in any manner prescribed by the Board, the doing of any act, matter or thing or the omission or abstention from doing or continuance of any act, matter or thing, which any person, firm, company, corporation or municipality is or may be required to do or omit to be done or to abstain from doing or continuing under this or any other general or special Act, or under any order of the Board or any regulation, rule, by-law or direction made or given under any such Act or order or under any agreement entered into by such person, firm, company, corporation or municipality;
- d) to make, give or issue or refuse to make, give or issue any order, directions, regulation, rule, permission, approval, certificate or direction, which it has power to make, give or issue.
- e) despite the Statutory Powers Procedure Act, to hold hearings or other proceedings by a conference telephone call or any other electronic or automated means, subject to any rules made by the Board under section 91 regulating their use.

....

Powers of Superior Court of Justice exercisable by Board

s. 38. The Board, for the due exercise of its jurisdiction and powers and otherwise for carrying into effect the provisions of this or any other general or special Act, has all such powers, rights and privileges as are vested in the Superior Court of Justice with respect to the amendment of

proceedings, addition or substitution of parties, attendance and examination of witnesses, production and inspection of documents, entry on and inspection of property, enforcement of its orders and all other matters necessary or proper therefor.

Jurisdiction under letters patent

s. 39. Where, by the provisions of any letters patent or supplementary letters patent of any corporation, heretofore or hereafter issued under the Corporations Act or any other general or special Act, any jurisdiction is conferred upon the Board or it is provided that any matter in any way may be referred to the Board with respect thereto, it has power to inquire into, hear and determine all matters and things necessary or incidental to the due exercise of such jurisdiction and reference and to make and give orders, directions, regulations, rules, permissions, approvals, sanctions and certificates as to the Board may seem proper.

[23] Sections 57 and 59 of the *OMB Act* have also been cited in argument as indicative of the fact that the Board has no power to declare a by-law invalid:

Approval to be withheld where litigation pending

s. 57. The Board shall not grant or issue any approval or certificate under this or any other general or special Act in respect of any municipal affair or matter, while the same or the validity thereof is called in question in any pending action or proceeding or by which it is sought to quash any by-law of a municipality relating thereto. R.S.O. 1990, c. O.28, s. 57.

Validation of by-laws and debentures

s. 59 (1) In any case where either prior or subsequent to the issue and sale of any debentures issued or to be issued by a municipality, application is made to the Board for its approval of any by-law authorizing the issue of such debentures, and of the debentures, the Board may approve the by-law and certify the validity of the debentures, despite any omission, illegality, invalidity or irregularity in the by-law or debentures or in any of the proceedings relating or incidental thereto occurring, had or taken prior or subsequent to the final passing of the by-law or issue of the debentures.

No approval if by-law quashed, etc.

(2) The Board shall not approve any by-law of a municipality or certify the validity of any debentures issued thereunder if the validity thereof is being questioned in any pending litigation or such by-law has been set aside, quashed or declared to be invalid by any court.

[24] Section 399 of the *Municipal Act* is the section relied upon by the City as further authority for the limitations of the Board in declaring the Capital Charge By-law and the Works as unlawful:

No application to O.M.B.

s. 399. If a municipality or local board has imposed fees or charges under any Act, no application shall be made to the Ontario Municipal Board under clause 71 (c) of the *Ontario Municipal Board Act* on the grounds the fees or charges are unfair or unjust.

DISCUSSION AND ANALYSIS**ISSUE 1 – DOES S. 24(1) OF THE *PLANNING ACT* PROVIDE THE BOARD WITH THE POWER TO MAKE FINDINGS WITH RESPECT TO THE CONFORMITY AND VALIDITY OF THE BY-LAW WITH THE CITY’S OFFICIAL PLAN, AND TO THEN GRANT THE REQUESTED DECLARATORY ORDERS OF INVALIDITY.**

[25] Section 24(1) of the *Planning Act* is clear in prohibiting a municipality from undertaking any public work, or passing a by-law in relation to such public work, unless it conforms to the applicable official plan. The exceptions in s. 24(2) and (4) relate to circumstances where there is a pending official plan amendment or a by-law is passed under s. 34 and there is deemed conformity. To underscore the requirement for conformity, s. 24(3) states that the municipality may take preliminary and preparatory steps that are necessary or incidental to the undertaking of the intended public work but despite the ability to take such preliminary steps, this does not authorize “the actual undertaking of any public work that does not conform to an official plan”.

[26] “Public work” is defined, under the *Planning Act*, to mean any improvement of a structural nature and includes sanitary sewer services. There is no dispute, and the Board finds, for the purposes of this Motion, that the Works which are the subject matter of the Application, and which were completed by May of 2015, constitute Public work. (The Board would also agree, and find, that the Works are also a “public utility” as defined in the *OMB Act*.)

[27] If, in theory, the City has passed a municipal by-law approving the construction and/or funding of public works that was not in conformity with the City’s Official Plan, and therefore contravenes s. 24(1) of the *Planning Act*, does the Board possess jurisdiction to hear the Application and make findings on matters of non-conformity and

the possible contravention of that section, and from that, a finding that the By-law is unlawful and invalid?

[28] Part III of the *Planning Act* is essentially composed of two parts. Sections 16 through 23 govern various aspects of official plans relating to their required content, the preparation, adoption, approval and amendment processes for official plans. Integral to these sections are the sub-sections which grant jurisdiction to the Board for the adjudication of appeals relating to official plans.

[29] In contrast, sections 24 to 27 of Part III are the legislative provisions that might be referred to as housekeeping matters, which dictate the requirements for review and conformity exercises by a municipality, and direct the manner in which official plans are to have legal effect and significance in a municipality to preserve the fundamental hierarchy of municipal planning policies. These sections require all zoning by-laws, other zoning by-laws, land acquisitions, and public works to conform to the official plans. These sections also include administrative directives requiring updates to official plans, public consultation processes, conformity exercises and the updating of zoning by-laws.

[30] Nothing in sections 24 to 27, including section 24(1), grants the Board jurisdiction to adjudicate any issues or disputes arising in regards to the framework of the planning hierarchy.

[31] Notwithstanding the absence of any such specific jurisdiction granted to the Board in section 24(1) regarding the hierarchy of planning laws and policies, the question remains as to whether the Board may, in the course of performing its designated administrative functions and its public interest mandate, still consider evidence and make findings in relation to non-conformity of zoning-by-laws, by-laws or public works to the official plan.

[32] The Court has generally determined that the Board does possess a broad public interest mandate such that it is required, on any matter over which it has been granted jurisdiction, to conduct a proper inquiry and give full consideration and weight to all

matters which it is called upon to determine and when required, “such larger considerations of administrative policy” and its public interest mandate. As such, it is conceivable that in the determination of issues before it within appeals under sections 17 to 23, (or other appeals under the *Planning Act*), the Board could be required to make findings with respect to a failure on the part of the municipality to ensure that its public works conform to its official plan. In such instances the Board has the jurisdiction to make such findings under section 24(1) of the *Planning Act*.

[33] However, whatever ability the Board might possess to consider and determine issues of conformity in relation to public works, ancillary to the hearing of official plan appeals within its jurisdiction, such ability clearly does not include the specific, and quite different, power to hear and determine an appeal challenging the validity of a by-law to recover costs associated with such public works, and specifically a capital cost by-law passed by a municipality, or a by-law to authorize public works. The Applicants’ appeals now before the Board clearly do not challenge the validity of the Official Plan, but rather, challenge the validity of a separate and independent Capital Charge By-law passed by the City under the *Municipal Act*, based upon a lack of conformity of that By-law with the Official Plan. The Board has not been directed to any legislative authority which provides the Board with jurisdiction over such a challenge of the City’s Capital Charge By-law, either in the *Planning Act*, the *Municipal Act*, or any other Act, nor is it aware of any such empowering provision.

[34] In the absence of such authority the Board must thus conclude that there is no provision of any general or special Act which confers on the Board the separate and distinct jurisdiction to determine the validity of a by-law to recover costs associated with public works, or specifically the Capital Charge By-law passed by the City, or a by-law to authorize public works, because the by-law does not conform to the governing official plan.

ISSUE 2 – DOES S. 71 OF THE OMB ACT GRANT JURISDICTION TO DECLARE THE CAPITAL CHARGE BY-LAW AND THE WORKS UNLAWFUL AND INVALID.

[35] The Applicants rely upon section 71 of the OMB Act and argue that the three subsections in this section sufficiently provide the Board with jurisdiction to declare the Capital Charge By-law unlawful and invalid. Section 71 of the OMB Act, within Part V dealing with “Railway and utilities Jurisdiction” grants jurisdiction and power to the Board under three separate subsections. Of the three subsections, the Applicant’s submissions are primarily reliant upon section 71(c) but all three sub-sections have been argued and considered.

[36] In argument, the Applicants assert that for the purposes of considering section 71 of the OMB Act, the Works have the status of a “public utility” as it is referenced in section 71(c) and referred to in the Municipal Act. As indicated, the Board would agree with this submission.

Section 71(a) of the OMB Act

[37] Section 71(a) of the OMB Act grants the Board jurisdiction and power to hear and determine any application made *“under the provisions of any general or special Act relating to...public utilities...where by such Act any jurisdiction or power is for such purpose conferred.”*

[38] The Board has concluded there is no provision of any general or special Act that specifically confers the jurisdiction or power to the Board to hear and determine an application challenging the validity of a by-law to recover costs associated with public utilities, or specifically, a capital charge by-law passed by a municipality, or a by-law to authorize public utilities, on the grounds that the by-law does not conform to the governing official plan. This subsection accordingly cannot be accepted as conferring jurisdiction upon the Board to grant the requested relief, simply because the Capital Charge By-law relates to a public utility.

[39] The Board accepts the submissions of the City that in the broader context of section 71 of the OMB Act, the fact that the Applicants' Application relates to a "public utility", and that the Board may have jurisdiction to determine an application relating to public utilities (where a general or specific act so indicates), is not sufficient to vest the Board with the jurisdiction to declare a by-law to be unlawful and quash the by-law.

[40] The Board recognizes that the Ontario Superior Court of Justice, in contrast, does have jurisdiction to deal with applications relating to public utilities. The Court clearly also has the power to make declarations pursuant to section 97 of the *Courts of Justice Act* and the power to quash a municipal by-law pursuant to sections 57 and 59(2) of the Municipal Act.

[41] The Board finds that subsection 71(a) of the OMB Act provides no authority to inquire into, hear and determine such an application and provide the relief sought by the Applicants.

Section 71(b) of the OMB Act

[42] Section 71(b) grants the Board the jurisdiction and power to hear and determine any application with respect to a public utility (or its construction, maintenance or operation) "*by reason of the contravening or failure to comply on the part of any...municipality of, or with, the requirements of this or any other general or special Act, or of any...by-law...in relation to such...public utility, its construction, maintenance or operation*".

[43] The Applicants submit that since the Board has jurisdiction to hear an application regarding the construction of a public utility, and since their application relates to a Capital Charge By-law that deals specifically with the construction and recovery of costs associated with a public utility, the Board therefore has the jurisdiction to hear and determine the Applicants request to declare that Capital Charge By-law and the constructed Works as unlawful.

[44] The Board does not agree.

[45] As indicated, for the purposes of considering the applicability of section 71(b) as granting jurisdiction, the Board will assume, for the sake of analysis, that the Applicants could establish that the City has failed to comply with section 24(1) of the *Planning Act* because it has passed a by-law in relation to the construction of a public utility which does not conform to the City's Official Plan.

[46] On that assumption, section 71(b) might arguably grant the Board the jurisdiction and power to "*hear and determine*" an application in relation to such public utility, and its construction, based upon the municipality's failure to comply with section 24(1) because the funding of the construction of the public utility does not conform to the Official Plan. As such, pursuant to section 71(b) the single and limited issue of conformity with the Official Plan, under this section, could presumably be the subject matter of some type of application to the Board, and this limited issue of conformity with the Official Plan could be determined by the Board.

[47] There is however, a significant disconnect between the power and jurisdiction of the Board to hear and determine such an issue of non-conformity and the power and jurisdiction of the Board to actually declare the Capital Charge By-law, and the Works, unlawful and invalid (which is the relief claimed in the Applicants' Application as it is framed). The Applicants' Application does not merely seek to have the Board hear and determine that issue of conformity with the Official Plan. It explicitly asks that the Board declare the By-law and the Works to be unlawful and invalid. That requested remedy, as the City argues, is the "main event". That request goes well beyond the form of application over which the Board is granted jurisdiction under section 71(b) of the *OMB Act*.

[48] The Board has considered, and accepts, the submission of the City that subsection 71(b) more properly relates to disputes involving the neglect or contravention on the part of a municipality or public utility company of a contractual or statutory duty regarding the construction, maintenance or operation of a public utility.

The City argues that such cases, as they were submitted to the Board, are instructive by illustrating the circumstances where subsection 71(b) does result in the Board's jurisdiction over the proceeding, which are distinguishable from proceedings, such as this one initiated by the Applicants, which requests that the Board determine the validity of an entire capital charges by-law and the Works constructed under that by-law.

[49] In the case of *The Town of Waterloo v. The City of Kitchener*, (1945, CarswellOnt 12), the Ontario Supreme Court High Court of Justice considered a point of law as to whether the Board had jurisdiction over a dispute between the two municipalities over operating charges for a railway, and the acquisition of a railway by one of the municipalities pursuant to the terms of a private and voluntary agreement. The proceeding included a request for declaratory relief. The Court considered the predecessor section to section 71(b) and whether this section vested the Board with the authority to deal with such issues in dispute and grant such a declaration.

[50] The Court cited a prior decision, *Re Toronto R.W. Co. and City of Toronto*, (1918) 44 O.L.R. 381, in which the Court stated that the only authority of a strictly judicial character conferred upon the Board was that of construing contracts for the purpose of exercising the administrative powers that the Board possessed through the empowering legislation. The Court concluded that the Board otherwise had no jurisdiction to try and dispose of issues that were properly vested with the Court, (notwithstanding the fact that they related to "railways or public utilities"). The Court said, on page 4:

The relief which the plaintiff seeks is beyond the sphere of the jurisdiction of the Board, because it does not come within the scope of the administrative function of the Board. The matter in issue is strictly a judicial matter involving the interpretation of a private and voluntary agreement between the parties and the granting of the appropriate relief if that agreement has been breached by either of them.

[51] While this proceeding before the Board is not one that involves a contractual issue between two municipalities it does relate to a matter that is similarly beyond the scope of the administrative function of the Board because it relates directly to the question of the validity of a municipal by-law over which the Board has not been granted

jurisdiction. The fact that the subject matter of the proceeding is a “public utility” and the Applicants raise the issue of the City’s failure to comply with a requirement of an Act (ie. section 24(1) of the *Planning Act*) is not enough to grant the Board jurisdiction and powers under section 71(b) to declare the Capital Charge By-law as unlawful and invalid.

[52] There is no provision of the *OMB Act*, or any other Act, that grants jurisdiction or power to the Board to determine the validity of the whole of a municipal by-law passed to recover costs associated with public works, (and specifically, a capital charge by-law enacted under the *Municipal Act*) or the validity of a by-law to authorize the construction of such public works even if it *were* established that the by-law did not conform to the governing official plan. Upon the other statutory provisions referred to herein, such powers to make declaratory orders and quash municipal by-laws have been reserved to the Courts. Section 71(b) does not vest jurisdiction with the Board, simply because the By-law challenged by the Applicants, relates to a public utility.

[53] Accordingly, the Board finds that it has no authority to inquire into, hear and determine such an application, by virtue of the operation of subsection 71(b).

Section 71(c) of the *OMB Act*

Preliminary

[54] The Applicants assert that the primary basis for the jurisdiction of the Board to provide the relief sought, is subsection 71(c) of the *OMB Act*. This subsection provides that the Board has jurisdiction and power to “*hear and determine any application with respect to any tolls charged by any...municipality operating a...public utility in excess of those approved or prescribed by lawful authority, or which are otherwise unlawful, unfair or unjust.*”

[55] The issue then is whether the Application as it is before the Board does, or does not, relate to “tolls charged in relation to a public utility” as asserted by the Applicants. As it is drafted, s. 71(c) grants jurisdiction over two categories of public utility tolls: (a)

excessive “tolls” charged in relation to a public utility and, (b) public utility tolls which are unlawful, unfair or unjust.

[56] For the reasons that follow the Board finds that Applicants cannot rely upon section 71(c) to support their argument that the Board has jurisdiction to determine the validity of the Capital Charge By-law based on an assertion that it relates to unlawful tolls.

“Excessive Tolls”

[57] As to the first of the two categories of tolls referred to in s. 71(c) (and leaving aside, for the moment, the issue of the definition of “toll”) based on the evidence, and the circumstances leading to the Application, the Applicants clearly do not assert that the charges for the installation of the Works, as public utilities, are “excessive” in the sense that the charges for public utilities are quantitatively “*in excess of those approved or prescribed*”. They assert that the cost of the Works should have been recovered through development charges instead of capital charges pursuant to the Municipal Act.

[58] As a result, the first category of tolls which are “*in excess of those approved or prescribed by lawful authority*”, set out in section 71(c), over which the Board has jurisdiction, does not apply, and is not relevant to the Applicants’ Application.

[59] This leaves the second category of public utility tolls “*...which are otherwise unlawful, unfair or unjust*”.

“Unlawful Tolls”

[60] The Applicants submit that s.71(c) must be read in conjunction with section 399 of the *Municipal Act* which expressly prevents any such application being brought to the Board on the grounds that the subject fees or charges are “unfair or unjust”. The Applicants assert that by omission the Legislature has thus clearly directed that the

Board retains jurisdiction to hear and determine applications which claim that toll charges for a public utility are “*unlawful*”, which is the third term used in section 71(c).

[61] The Applicants have referred to a number of authorities relating to statutory interpretation in support of this submission that the exclusion of the word “unlawful” is deliberate and must therefore be given meaning. The Board does not take issue with these authorities or disagree with the Applicants’ submission that by its plain reading, section 399 of the *Municipal Act* would limit, but still permit, the Board’s jurisdiction to applications which allege that tolls imposed by the municipality are “unlawful”. This reading and interpretation of that section has been borne out, as the Applicants submit in argument, by the amendments under Bill 139, as they were proposed when the Motion was heard, which retain this wording.

[62] This does not however necessarily lead to a conclusion that the Board therefore has the power to declare the Capital Charges By-law authorized by the *Municipal Act*, and the completed Works, unlawful and invalid simply because they are arguably related to unlawful “tolls charged” for public utilities. The matter of whether the capital charge by-law would involve “tolls”, as referred to in the *OMB Act* remains to be determined, as does the question of whether the Application truly relates to such tolls.

Statutory Interpretation – “unlawful toll” and “unlawful fee or charge”

[63] Dealing first with the use of the word “tolls”, section 71(c) of the *OMB Act* makes reference to “*tolls charged...by any...municipality....operating a...public utility*” and not to “fees and charges” charged by a municipality. The *OMB Act* provides no definition of “tolls”. Neither does the *Municipal Act* or the *Public Utilities Act*, provide such a definition, as they existed before the *Municipal Act, 2001* was enacted. The only references to tolls within the *Municipal Act*, are limited to the provisions relating to highway tolls.

[64] In contrast to “tolls”, “*fee or charge*” is defined in the *Municipal Act*. In the definition section of Part XII of that Act, “*fee or charge*” is defined as follows:

fee or charge” means, in relation to a municipality, a fee or charge imposed by the municipality under sections 9, 10 and 11 and, in relation to a local board, a fee or charge imposed by the local board under subsection 391 (1.1);

Sections 9, 10 and 11 are the key sections of the *Municipal Act* which identify the municipal powers and spheres of jurisdiction granted to municipalities in Ontario.

[65] The Capital Charge By-law passed by the City under section 391, in Part XII, of the *Municipal Act* was specifically identified as a financing by-law to impose sanitary sewer charges to recover the cost of the Works.

[66] Section 399 of the *Municipal Act*, (also in Part XII) which is the section that limits the authority of the Board with respect to applications under section 71(c), makes no reference to tolls and only to “fees and charges”. The prohibition does however specifically states that no application shall be made “...*to the Ontario Municipal Board under clause 71(c) of the Ontario Municipal Board Act on the grounds the fees or charges are unfair or unjust.*” (Emphasis Added)

[67] Applying a basic analysis of the above wording, given the manner in which section 399 of the *Municipal Act* is connected directly to section 71(c) of the *OMB Act*, from the perspective of definitive subject matter there would appear to be a terminology disconnect between the two sections, in that one refers to “tolls”, and the other to “fees and charges”.

[68] Does this inconsistency give rise to a conflict in the statutory interpretation of differing terminology? It is the view of the Board that there is no inconsistency given the very definite cross-referencing to applications under section 71(c) of the *OMB Act*. It may be assumed that although section 71(c) makes reference only to applications relating to “*tolls charged*” and not to “*fees or charges*” that it was nevertheless intended that section 399 of the *Municipal Act* operate to permit applications related to unlawful public utility “fees or charges” or public utility “tolls” as those terms may be used interchangeably.

[69] In their submissions to the Board both parties in this Motion have cited the basic “plain meaning” rule of statutory interpretation in support of their respective positions. They each, however, focus on the plain meaning of two different aspects of the sections at play.

[70] As indicated, the Applicants argue that upon the plain wording of section 399 of the *Municipal Act*, by excluding the Board’s jurisdiction over “fees or charges” that are “unfair or unjust”, the legislature has therefore expressly preserved the jurisdiction of the Board over “fees or charges” that are “unlawful”. The Board has accepted this argument as reasonable and the Board finds that it has retained jurisdiction over unlawful “fees or charges” as those terms are understood to be consistent with the reference to “tolls” in section 71(c).

[71] The next question is whether sanitary sewer charges imposed under a *Municipal Act* capital charge by-law to finance works, under section 391, such as the By-law passed by the City, are to be considered “tolls”.

Are the Fees or Charges payable under the Capital Charge By-law Considered “Tolls”?

[72] The City refers to the Oxford English Dictionary’s definition of a toll as “a charge or payment for provision of a service” to a user. In the context of provisions relating to toll highways, a toll, as it is provided for in the *Municipal Act*, is commonly understood to be a timed fee-for-use such that a driver pays the toll each time the highway is used, or pays a toll for the privilege of ongoing use.

[73] On its face, this definition of a toll does not really conflict with the definition of a “fee or charge” as defined in the *Municipal Act* and as it is referred to in section 391 of Part XII of that Act (under which provision the City passed the Capital Charge By-law) as relating to fees or charges for services provided by a municipality. A review of the Capital Cost By-law (Exhibit JJ to the Affidavit of Martyn Stollar) confirms that the “Sanitary Sewer Charge” is to be charged to all “Benefiting Owners”, as defined.

[74] Section 3.0 of the By-law provides that “*The Benefiting Owners are deemed to derive a Benefit from the Northwest Sanitary Sewer Works*”. The Benefiting Owners are required to pay that Sanitary Sewer Charge upon the event of a “*Development Permission*” which is identified as being either the creation of a residential lot, the issuance of a building permit or the connection to the Works in the manner set out in the By-law. The By-law provides that the Benefiting Owners may pre-pay the Charge either as a commuted charge or as in annual installments.

[75] Upon the basics of the definition of a toll, as the Capital Charge By-law is drafted and enacted, there is a service or benefit being provided by the City to users who benefit from such service or benefit, and the By-law sets out the form and manner of the charges paid by each landowner to the City for such service or benefit. This meets the commonly understood meaning and definition of a “toll”.

[76] The Board would accordingly conclude that the fees and charges payable under the Capital Charge By-law would be categorized as “tolls”.

The Form and Substance of the Capital Charge By-law

[77] Although the Board has found that the amounts charged under the Capital Charge By-law would constitute tolls and therefore might potentially represent the subject-matter of an application under section 71(c) of the *OMB Act* the Board must still determine whether it has the jurisdiction to consider the Application as it is before the Board, and whether it may have the ability to grant the remedies sought in the Application, under section 71(c) of the *OMB Act*.

[78] The focus of the City’s submission as to the plain wording of section 71(c) is not on whether the jurisdiction granted under that section relates to “tolls” or “fees or charges” but rather on the plain meaning of tolls or fees or charges to the extent that they are simply the actual defined amounts charged for the provision of a service or activity to a user by the municipality. The subject matter of section 71(c), argues the City, is the unlawful “amount charged” as the “toll” and not the entire by-law under which

the toll is charged. The City submits that this section of the statute does not imbue the Board with the authority to deal with the lawfulness of an entire By-law under which a toll is charged but only to the possible legality of the amount of “any tolls charged” by a municipality.

[79] It is the City’s position, on that basis, that the Applicants’ Application is not really about the specific unlawful nature of tolls charged by the City under section 71(c) of the *OMB Act*. The Application, submits the City, is instead focused on the unlawful nature of the financing By-law, in its entirety, which the Applicants claim should not have been passed by Council to finance the Works. The Works, as asserted in the Application, should have been financed through development charges in accordance with the original Lindsay Official Plan and the City’s Official Plan and not through the Capital Charge By-law. It is the form and substance of the By-law itself which is objectionable – not the specific “tolls” payable under the By-law.

[80] The City’s submission in this regard, has merit. It is clear to the Board that the Capital Cost By-law is a financing by-law passed by Council for the City under section 391 of the *Municipal Act* – Recital 4 of the By-law states precisely that, and confirms that the By-law is passed “*to impose a Sanitary Sewer Charge upon persons that derive or will derive a benefit from the construction of sanitary sewer works sufficient to pay all or such portion of the Costs of the works as Council deems appropriate.*” (Emphasis added).

[81] Section 2.00 of the By-law states as follows:

Section 2.00: Financing

2.01 For the purpose of paying for part or all of the cost of the Northwest Sanitary Sewer Works, the City Treasurer is authorized to take all necessary steps required to finance the cost of the Northwest Sanitary Sewer Works including the issuing of debentures and/or borrowing and certifications as may be required or permitted by law.

[82] Section 3.01 then states that: “*The Sanitary Sewer Charge shall be payable by the Benefiting Owners to the City in accordance with this By-law.*”

[83] The Board would accordingly conclude that the Capital Charge By-law is a financing by-law passed under section 391, and Part XII of the *Municipal Act*, expressly designed to finance, and recover the cost of, the construction of the Works through the charging of fees or charges, or tolls, as “Sanitary Sewer Charges” to all the Benefiting Owners owning land identified in the Schedules in accordance with formulas set out in the By-law.

[84] The Board is of the view that this conclusion can be further supported by the application of the “modern” and holistic principles of statutory interpretation which the Applicants cite in support of their submissions in relation to section 71(c) of the *OMB Act* and section 399 of the *Municipal Act*. This principle of statutory interpretation acknowledges that the plain meaning of words in a statute should govern and that legislatures are presumed to always say what they mean, and mean what they say. However, the Courts have further determined that where there is uncertainty regarding the plain wording of a section, the underlying purpose of an Act should be examined and the words of the statute must be considered in their entire context, looking not just to the ordinary and grammatical meaning of the wording but also to the object of the Act and the legislature’s intention.

[85] In applying these modern principles of statutory interpretation to the wording of section 71(c) of the *OMB Act*, as it is impacted by section 399 of the *Municipal Act*, the Board is further satisfied that it is not granted jurisdiction to determine the lawful nature of entire By-laws by that section as the Applicants would argue. The object of those pertinent sections of the *OMB Act* is to identify those issues and subject matter over which the Board has jurisdiction. The object of those pertinent sections of the *Municipal Act* is to identify those issues and subject matter over which a municipality has jurisdiction.

[86] Neither of these Acts, in their collective and individual contexts, would suggest an intention on the part of the legislature to grant the Board the jurisdiction to review and determine the validity of a municipal financing by-law passed by a municipality under the *Municipal Act* because that by-law included methodology for the collection of tolls

relating to the supply of a public utility. Upon the authorities and analysis discussed elsewhere in this Decision, the Board does not possess the independent power to determine the validity of a municipal by-law.

[87] The Board, in considering the entire context of the *OMB Act* and the *Municipal Act*, and the real object of Part XII of the *Municipal Act* and the legislature's intention in granting the Board jurisdiction, under section 71(c) of the *OMB Act*, over "unlawful tolls", must therefore conclude, based on the analysis set out herein, that the legislature did not intend to extend powers to the Board to make determinations relating to the validity of a capital charge by-law passed by a municipality under section 391 of the *Municipal Act*. Had the legislature intended the Board to have jurisdiction over the legal validity of a capital charge by-law passed by a municipality under Part XII of the *Municipal Act*, it would have plainly stated this.

[88] The Board accordingly agrees with the submission of the City, and finds, that the wording of section 71(c) applies to tolls that are charged and not the entire by-law under which a toll may be charged by a municipality.

What is the True Nature of the Application and the Alleged Failing and Unlawful Actions of the City As Asserted by the Applicants

[89] The final step in the analysis of the Application and the asserted jurisdiction of the Board under section 71(c) of the *OMB Act* requires an examination of the Application and a determination of the nature of the purported unlawful conduct of the City.

[90] The Board has carefully considered the form and content of the Application before the Board, and the nature of the relief sought from the Board, by the Applicants. The Board finds that the subject matter of the Application is not unlawful "tolls" as they are identified in section 71(c) of the *OMB Act*, but instead the alleged unlawful validity of the financing by-law passed by the City pursuant to the *Municipal Act*, which provides for the collection of the cost of the Works in a manner which the Applicants assert is

contrary to the City's Official Plan. At its heart, the Application relates to the lawful nature of the By-law and not to "tolls", as they are referred to in section 71(c) of the *OMB Act*.

[91] It is the Board's finding that notwithstanding the proffered nexus between the application and the unlawful conduct of the City, the true character of the purported failing of the City as alleged by the Applicants, is not with respect to unlawful "tolls" themselves that have been charged for a public utility. The position of the Applicants is not that the "tolls" themselves are unlawful. The Applicants clearly do not ask that the Board hear and determine whether the tolls, in the sense of the quantum of fees or usage charges for the provision of a public utility to a user, are unlawful.

[92] Instead the true failing of the City, being asserted by the Applicants, relates to the larger policy issue of the method, or the manner, in which the City is recovering the cost of completing the Works. Practically the Applicants are placing a policy issue before the Board that the Works, and the manner in which the City has elected to recover the cost of installing the Works, fails to conform to the Official Plan. In order for the Application to succeed, the Board would be required to find that the City's Capital Charge By-law, and the Works themselves, do not conform to the official plans and are therefore unlawful and declare that the By-law and the Works are invalid. It is this nonconformity of the By-law which the Applicants allege is unlawful. The unlawful subject matter is clearly not the tolls themselves.

[93] As the Application is brought, it is the propriety of the City in passing such a By-law, and thus the fundamental validity of the whole By-law, and the Works constructed through such By-law, which the Applicants are opposing. The subject matter of the Application is clearly a by-law unrelated to planning by-laws enacted pursuant the *Planning Act*, and instead relates to financing under Part XII of the *Municipal Act* and the recovery of costs associated with the identified Works. The Applicants require the Board to make a finding of law in relation to the validity of the City's Capital Works By-law, which it cannot do.

The Remedy and Relief Sought by the Applicants

[94] This distinction is also of significance because the remedy and relief sought by the Applicants is very much intended to be responsive to the alleged unlawful nature of the Capital Charge By-law and the unlawful nature of the Works, and not the specific “toll” itself. The Applicants pointedly request that upon determining that the City’s Capital Charge By-law and Works fail to comply with section 24(1) of the *Planning Act*, and are therefore unlawful, the Board must issue a declaration that they are invalid.

[95] This remedy is different from any remedy that the Board might provide in a successful application relating to excessive or unlawfully charged tolls under section 71(c) of the *Planning Act*.

[96] In regards to the matter of the remedy, the Board must agree with the City that the Applicants’ request for a declaration of invalidity with respect to the Capital Charge By-law and the Works are an integral part, if not the most significant part, of the Application and the determination of whether the Board has jurisdiction. Section 71(c) of the *OMB Act* does not provide the Board with jurisdiction to make such a declaration of invalidity.

[97] Finally, the Board cannot accept the Applicants’ argument that section 71(c) is rendered superfluous when read in light of section 399 of the *Municipal Act*, if it is not interpreted in such a way as to grant the Board jurisdiction over the Applicant’s Applications, which relate to an allegedly “unlawful” Capital Charges By-law.

[98] It is the Board’s view that this argument mistakenly fails to recognize that the Board would have some other role to play in considering a question of whether a municipality, through its public utilities, has improperly charged a ratepayer tolls and charges which exceed approved amounts and thus may be unlawful. There might be circumstances where a municipality may have improperly charged amounts for the provision of public utilities which are beyond those which have been approved and

which may therefore be “unlawful” (as opposed to unfair or unjust) and which require a hearing and determination under the authority of section 71(c) of the *OMB Act*. The Board cannot conclude, on this reasoning, that the Board, and only the Board, has the jurisdiction to determine the issues in the Application and grant the requested relief.

[99] Returning to the question of statutory interpretation referred to above, the intent of Part XII of the *Municipal Act*, was to grant a municipality with the authority to pass by-laws relating to fees and services (which by definition may also be charges), and in granting such significant autonomous authority to a municipality to make financial decisions regarding the provision of services or activities provided limitations and restrictions were imposed elsewhere in Part XII. Oversight for such financial decisions, and the legality of by-laws passed to implement such decisions, was not granted to the Board through any right of appeal. The underlying purpose of the *Municipal Act, 2001* was to create the revised framework for governance of municipal affairs by Ontario municipalities granting “spheres of jurisdiction” and specific jurisdiction over identified subject matter. Given these larger and significant purposes of the *Municipal Act*, in defining powers and authority granted to municipalities, including its financial affairs, the Board cannot conclude that section 71(c) of the *OMB Act* as it relates to unlawful tolls can be interpreted to have extended powers to determine the validity of capital charge by-laws such as the one passed by the City.

The Applicants’ Authorities

[100] The Applicants refer the Board to the decision of the Board in *Taylor v. Kingston (Township)*, (1986), 33 MPLR 14 (“Taylor Decision”) in support of its argument that section 71(c) of the *OMB Act* allows the Board to inquire into the fairness and justice of the City’s overall administrative and functional practices in relation to public utility charges and thus permits a hearing of the issues before the Board.

[101] The Board has reviewed the Taylor Decision and due to the unique facts of that case, and the manner in which that proceeding was commenced, the Board is not of the view that this approach is of assistance given the nature of the Application that is before

the Board in this case. It is noted that in the Taylor Decision the alleged offending conduct of the Municipality relating to utility charges (described in paragraphs 8, 9 and 10) was easily characterized as falling within the subject matter of excessive or unlawful tolls being charged by a municipality as identified in section 71(c) of the *OMB Act*. For the reasons indicated, the Board finds that offending conduct of the City, as alleged by the Applicants in this proceeding, is substantially different from that described in the Taylor Decision.

ISSUE 3 –DO THE GENERAL POWERS GRANTED BY SECTION 34 TO 39 OF THE OMB ACT PROVIDE THE BOARD WITH JURISDICTION AND THE DIRECT OR ANCILLARY POWER TO DETERMINE, AND THEN DECLARE, THAT THE CAPITAL CHARGE BY-LAW AND THE WORKS ARE INVALID AND VOID

[102] The City submits that the Board, first, under its general ancillary powers, does not possess jurisdiction to determine that the Capital Charge By-law or the Works are unlawful and therefore invalid as claimed in the Application. The City further submits that neither does the Board have the ability, under those sections, to declare the Works unlawful and invalid. The City asserts that the powers of the Board to approve, or not approve, zoning by-laws under appeal to the Board, is separate and distinct from the power to declare another municipal, non-planning, by-law is invalid or void.

[103] The Applicants argue that the Board's general ancillary powers do allow it to determine questions of law and whether by-laws, in circumstances such as those that exist in this Application, do, or do not, conform to the official plan. If the Board finds that there is non-conformity, the Applicants submit that the Board then has the ability to craft the relief to address the lack of conformity with the official plan, including sending the Capital Charge By-law back to the City to be amended or repealed and replaced.

[104] Referring to paragraph [1] of this Decision, it is noted that in the Application, as it is before the Board, the Applicants specifically seek declaratory orders as indicated.

[105] In regards to the powers to determine questions of law or to make findings as to the validity of a by-law it is Board's view that it has been fairly well established by the Appeal Courts that while the Board may have the ability make a decision on a question of law as part of its administrative functions, the separate and distinct ability of the Board to declare a by-law invalid or void (and also to direct that works must, or must not, be undertaken by a municipality in a specific manner) is beyond its jurisdiction and powers.

[106] The Board has reviewed and considered the submissions of the parties, and the authorities they have submitted in support of their respective positions.

[107] Though there are a number of authorities on these issues, the Board firstly relies upon the decision of the Divisional Court, as it was dealt with, upon appeal, by the Ontario Court of Appeal in *Toronto (City) v. Goldlist Properties Inc.* [2003] OJ No. 3931, (already cited in this Decision). The Ontario Court of Appeal squarely addressed the question of the jurisdiction of the Board to rule on the legality or validity of a municipal by-law. The Court, in the decision, reviewed the Divisional Court's ruling and a number of other decisions. The Court in paragraph 15, and again in paragraph 34 (citing the Ontario Court of Appeal decision of *North York (Township), Re*, [1960] O.R. 374), stated as follows:

We stress that the Board does not have a free-standing jurisdiction, as a court does, to determine that a by-law is invalid. Its power is confined to making decisions necessarily incidental to carrying out its responsibilities under s. 17 of the *Planning Act*.

The [*North York Twp.*] decision is much-cited for a statement in the reasons...that "the Board has no power to deal with the validity or otherwise of a by-law.

In reviewing the Court's prior decision of *North York Twp.* the Court of Appeal, in *Goldlist*, cited above, stated that:

This appears to draw the distinction between the Board dealing with the validity of a by-law as a free-standing issue, which it cannot do, and making a decision on a question of law as incidental to its administrative functions, which it can do.

This is consistent with the Court's conclusions in the decision of *Re Toronto R.W. Co. and City of Toronto* cited above. Specifically the Board must conclude that, following the reasoning of the Court here, the Board's power is additionally confined to making decisions necessarily incidental to carrying out its responsibilities to deal with zoning by-law appeals under section 34 of the *Planning Act*.

[108] The Board has carefully considered the Applicants' argument that the case law is illustrative of the ability of the Board to make determinations of law, including the question of the validity of a by-law. The Applicants refer to the decision of the Board, *Greater Ottawa Home Builders Assn. v. Ottawa (City)* [2013] OMBD No. 200 (the "*Ottawa Decision*") specifically in support of their argument that the question of the validity of a by-law, in the context of the *Planning Act*, falls within the specialized expertise of the Board.

[109] In the *Ottawa Decision*, the Board was required to rule on a motion arising from a number of appeals of a zoning by-law passed by the City of Ottawa, which addressed various zoning matters relating to new homebuilding. The appeals contained numerous objections which were intertwined with policy considerations and concerns as to whether certain provisions were appropriate and objections as to the jurisdiction of the City of Ottawa to adopt certain zoning standards, much of which revolved around the question of whether the City of Ottawa's zoning performance standards addressed matters of "design", (which was properly within the realm of site control) or matters of "character" and use. Ultimately the Board found that certain provisions of the subject zoning by-law were within the City's zoning authority, but that others were beyond the jurisdiction of the City and sent the by-law back to Council for reconsideration. A motion for leave to appeal was denied.

[110] The Board is of the view that the *Ottawa Decision* does not represent a persuasive example of the ability of the Board, with its specialized expertise, to make determinations as to the validity of a municipal financing by-law and grant the remedy sought by the Applicants. In the context of appeals before the Board under sections

34(11) or 34(19) of the *Planning Act*, the Board is indeed called upon to apply its specialized knowledge and focus on planning and development matters arising from the vast body of provincial and municipal planning legislation, policies and guidelines. It is also expressly empowered, pursuant to section 34(26) to dismiss or deny the appeal, in whole or in part, and repeal the by-law in whole or in part, or to amend the by-law in accordance with the Board's order. In the course of administering such permitted powers and performing its administrative functions relative to zoning by-law appeals, the Board may, in the process, be required to make determinations of law, and to make determinations related to the authority of the municipal council to impose certain provisions within the zoning by-law. Such powers and processes, including the repeal or amendment of the zoning by-law are clearly demarcated in the planning appeal processes under the *Planning Act*.

[111] The Applicants are not asking the Board, in their Applications, to perform such permitted functions or undertake such planning processes. The Applicants are instead requesting that the Board declare a Capital Charge By-law, and the works authorized by the By-law, to be invalid. Despite the fact that the root basis for the Application is the alleged matter of nonconformity of the Capital Charge By-law with the City's Official Plan this does not cause the Application to be brought within the clearly permitted framework of powers exercised by the Board under the sections of the *Planning Act* such as section 34(26). Despite the specialized expertise of the Board to consider matters of conformity of zoning by-laws and planning instruments to a municipality's official plans, the extraordinary remedy requested by the Applicants relates to a very different Capital Charge By-law passed by the City pursuant to section 391 of the *Municipal Act* over which the Board has no jurisdiction for appeals. Challenges to such by-laws must be brought before the Ontario Superior Court of Justice. The Court would certainly possess the power to consider and determine the underlying issue of whether the City's Capital Charge By-law, as a non-*Planning Act* by-law passed pursuant to the *Municipal Act*, fails to conform to the Official Plan pursuant to section 24(1) of the *Planning Act*.

[112] The Applicants' have argued that the ancillary powers of the Board under section 37 of the *OMB Act* are sufficient, and can stand alone to allow the Board to fashion a remedy if the Board determines that the Capital Charge By-law does conform to the Official Plan. The Board cannot agree.

[113] The Board has considered, and agrees with, the City's submissions regarding the construction of section 37 of the *OMB Act* which set out the general powers of the Board. Of significance is the absence of any wording in any of the subsections of section 37 which provides the Board with the authority to make declarations of invalidity or to quash invalid or unlawful by-laws passed by a municipality. The power to make orders of this nature is significant, and clear and unequivocal wording would be required to grant such power to the Board and permit the orders requested by the Applicant. The Board has not been granted express ancillary power to make declarations, and the ancillary powers which it does possess are exactly that – the powers to make such orders, directions, approvals, regulation and certificates which are ancillary to the performance of its permitted functions. Those permitted functions do not include the determination of validity of a Capital Charge By-law, or the ability to issue a declaration that serves to invalidate and quash that By-law, which are functions reserved to the Courts.

[114] Neither is there anything contained in sections 38 or 39 to support the Applicants' requested relief on this Motion.

[115] As well, there are the provisions in sections 57 and 59(2). The Board has considered, and agrees with, the City's submission that this delineation of powers between the Court and the Board in regards to invalid by-laws is supported by sections 57 and 59(2) of the *OMB Act* which provide that the Board is expressly prevented from completing certain functions if there is a pending action or proceeding before the Court which seeks to quash, or declare invalid, a municipal by-law.

[116] The Board finds that this rather clear delineation of powers between the Board and the Courts relating to applications to quash a municipal by-law or make

determinations of validity of by-laws, has been consistently adopted and applied by the Board, and it must do so in this case, as well.

ISSUE 4 – DOES THE FORM OF RELIEF SOUGHT BY THE APPLICANTS PREVENT THE BOARD FROM GRANTING ALTERNATIVELY TAILORED REMEDIES OR THE DETERMINATION OF THE SINGLE ISSUE OF CONFORMITY?

[117] This fourth issue is, in some respects, connected to Issue 1 as discussed above as it relates to the ability of the Board to craft relief and tailor remedies.

[118] The Applicants assert that the power to grant partial relief or relief other than that which has been requested, and tailor the remedy, is based upon section 88 of the *OMB Act*. The alternate remedies suggested by the Applicants would include: the amendment of the Capital Charge By-law by the Board; the return of the By-law back to the City for amendment; or the issuance of a finding that the cost of the Works should be incorporated into the 2014 City-wide Development Charges By-law. The Applicants further submit that even if the Board determines that it has no jurisdiction to provide the remedy sought, it still possesses the jurisdiction to determine the limited question of whether the Capital Charge By-law is invalid because it fails to conform to the Official Plan, and that this should not bar the Application.

[119] The Board recognizes the powers granted to it under section 88 but is of the view that these powers do not alter the determinations and findings of the Board based on the analysis outlined above. Despite the ability of the Board to tailor a remedy, this unfortunately cannot change the nature of the Capital Charge By-law as a by-law passed by the City Council under section 391 of the *Municipal Act*, and the fact that the Board is granted no jurisdictional powers to adjudicate issues relating the validity of such a municipal by-law.

[120] Certainly there is no power to quash such a by-law granted to the Board as this remains exclusively within the domain of the Courts. The Board is unable to accept the extended assertion of the Applicants that the Board's unfettered jurisdiction to craft relief

would empower the Board to direct the City to amend its By-law or dictate the manner in which the City's financial planning and cost recovery and capital cost decisions are made by Council or staff. Each of the suggested alternate crafted remedies would amount to the intervention, on the part of the Board, in the financial planning and decision making of Council with respect to its public works infrastructure.

[121] As for the Applicants' submissions suggesting that the Board could determine the single question of whether the Capital Charge By-law conforms to the Official Plan, the Board is not of the view that this is appropriate.

[122] As indicated above section 24(1) of the *Planning Act*, does give rise to the issue of conformity of the By-law, but unlike other parts of that Act, the Board is granted no jurisdiction over appeals of such issues. Section 24(1) can be distinguished from the jurisdiction granted to the Board to consider issues relating to the conformity of zoning by-laws with a municipality's official plan.

[123] As well, given the form and substance of the Application brought by the Applicants, and the analysis and findings of the Board on the preceding issues, the Board is of the view that to undertake only the review and determination of the issue of whether the By-law conforms to the Official Plan, would not constitute a proper exercise of the Board's administrative functions. Given the Board's clear inability to impose the type of judicial remedy that would give any practical effect to such a determination of non-conformity, the exercise would not represent an efficient use of the Board's resources. The question also arises as to whether the Board's determination of that singular issue would be binding upon the subsequent adjudication of the issue of invalidity by the Court were an application brought to challenge the validity of the By-law and quash the By-law based on non-conformity to the Official Plan.

[124] Given the exclusive powers of the Court to grant the Applicants' requested remedy, there would be neither a benefit, nor a reason, to bifurcate the adjudication of the issue of conformity for determination by the Board from the other issues raised, and remedies sought, by the Applicant, which are within the exclusive ambit of the Court,

which also has the ability to determine the underlying question of whether the Capital Charge By-law conforms to the Official Plan.

[125] Finally, the Board has also considered the submissions of the Applicants relating to the possibility of consolidation of this proceeding with another case before the Board and the asserted public interest in having the Board accept jurisdiction. In light of the analysis and findings on the matter of the Board's jurisdiction in this proceeding, this possibility of consolidation is itself insufficient to persuade the Board that it should accept jurisdiction.

SUMMARY OF FINDINGS RE: JURISDICTION

[126] For all of the reasons given, and upon the analysis and findings as set out in this Decision, the Board finds that it does not have jurisdiction to adjudicate and grant relief to the Applicants pursuant to the Application filed with the Board.

THE APPLICANTS' PROCEDURAL MOTION FOR AN ORDER PERMITTING EXAMINATION OF A WITNESS

[127] The Applicants have also brought a motion seeking to have Mr. Juan Rojas produced to be examined for the purposes of the jurisdictional motion on matters raised in the Affidavit of Judy Currins ("Currins Affidavit"). This procedural motion requests that the jurisdictional Motion be adjourned to permit such examination or alternatively that the Currins Affidavit be struck.

[128] For the following reasons, the Applicants' motion is denied.

[129] The Board finds that the City, as a municipal entity, was acting properly, and in accordance with ordinary practice by having one of its employees execute the Affidavit. In any proceeding involving a corporate entity, including a municipal body, it is the right of the party to determine which representative will be in the best position to swear an affidavit in support of a motion or attend for oral examinations for discovery on behalf of

that entity. No one person necessarily may have direct knowledge of all matters which are relevant to the proceeding or raised within the Affidavit. Procedurally the Affiant may make statements based upon information from other sources provided that the source is identified. Requesting an undertaking from the Affiant to make inquiries from sources within the control of the party and provide answers and information not personally known to the Affiant is permitted and regularly expected.

[130] Under the *Rules of Civil Procedure*, if the representative Affiant produced by a party for cross-examination on his or her affidavit cannot reasonably answer questions put to the Affiant and provide complete and accurate information relating to the affidavit filed, the examining party may object and bring a motion to compel production of another witness.

[131] The Board has carefully reviewed the transcript of the Cross-examination of Judy Currins conducted on June 23, 2017 (the "Transcript"). Upon a review of the Transcript the Board does not find that this is not a situation where a person produced on an examination was incapable of providing the information relevant to the issues before the trier of fact thus requiring an alternative representative of a corporate body to be ordered produced for examination. The Board does not conclude that there is anything regarding the Currins Affidavit, or the cross-examination of Ms. Currins, that warrants an order that Mr. Rojas be produced for the purposes of the jurisdictional Motion.

[132] In reviewing the Transcript it is noted that on a number of occasions questions were asked of Ms. Currins as to the source of her information, and she responded. More than once, Ms. Currins confirmed that the source of her information was Mr. Rojas. The Applicants had every opportunity to ask for clarification in the form of undertakings on any statements as contained within the four corners of the Affidavit which might have allowed the Applicants to secure whatever additional information they thought was relevant to the Motion before the Board. No such undertakings were requested and refused.

[133] The Board has also reviewed the Currins Affidavit. The Board finds that there is nothing objectionable regarding the form of the Currins Affidavit, as suggested by the Applicants and agrees with the submissions as set out in paragraphs 9 through 14 of the City's Notice of Response to Motion. Ms. Currins was not limited to matters of personal knowledge only in swearing her Affidavit. The Affidavit properly identifies the source of information not within the personal knowledge of Ms. Currins as provided for in Rule 39.01(4) of the *Rules of Civil Procedure*. The Applicants do not have the automatic right to go beyond the Affidavit filed on the Motion, to examine every person who may have provided information on behalf of the City to Ms. Currins and which was set out in her Affidavit.

[134] Furthermore, nothing prevented the Applicants from requesting undertakings on the cross-examination, or, for that matter, outside of the cross-examination process, but this was not done, as confirmed in the Affidavit of Angela Hatzipantelis. The Board accepts the City's submission as set out in paragraphs 17 and 22 of its Notice of Response to Motion that no requests have been made from the City to seek clarification and that in a number of instances, the factual information is immaterial to the determination of the issues before the Board on this Motion.

[135] Specifically, the Board is not persuaded that the examination of Mr. Rojas is necessary on any of the facts and evidence before the Board on the Motion and agrees with the City that there are no engineering opinions or controversial facts that are necessary or relevant to the issues before the Board on the jurisdiction Motion that would warrant having an examination of Mr. Rojas before hearing this Motion.

[136] The matters that were covered in Ms. Currins's cross-examination regarding the correction of dates and other matters relating to the By-law also do not, and did not, give rise to any significant or complex contradictions in the evidence relevant to this Motion. Neither are there issues of credibility relating to Mr. Rojas's or Ms. Currins's evidence, particularly as their testimony might relate to any of these facts are material to the determination of the jurisdictional Motion.

[137] Additional information from Mr. Rojas might possibly have been pertinent to the hearing of the Application that would have been before the Board, but for the findings of the Board on the issue of jurisdiction. The Board notes, in the email of June 6, 2017, that Mr. D'Agostino specifically indicates that if the examination of Mr. Rojas is meant to go to the merits of the Application then certainly the matter of further examinations or factual inquiries could be addressed after this Motion was heard.

[138] For the reasons indicated the Applicant's motion for an order permitting the examination of Mr. Rojas by the Applicants, and adjourning the Motion, or alternatively striking the Currins Affidavit, is accordingly denied.

ORDERS

[139] The City's motion is granted. The determinations as to the unlawful and invalid nature of the Capital Charge By-law and the Works as set out in paragraphs 2 and 3 of the "Relief Sought" on page 2 of the Applicants' Application dated June 14, 2016 are hereby determined to be beyond the jurisdiction of the Board. The related requests to the Board as contained in paragraphs 1 and 4 of the "Relief Sought" are thus inapplicable and are struck.

[140] The Applicant's motion for production of a witness for examination and/or striking the Currins Affidavit filed in support of this Motion by the City, is dismissed.

"David L. Lanthier"

DAVID L. LANTHIER
MEMBER

"M.A. Sills"

M.A. SILLS
MEMBER

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Local Planning Appeal Tribunal

A constituent tribunal of Environment and Land Tribunals Ontario
Website: www.elto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248