M E M O R A N D U M

TO: **Gordon Petch**

FROM: **Zaid Sayeed**

DATE: **April 10, 2010**

RE: ***Onus on Municipality to Justify Development Charges***

Introduction to Development Charges

The *Development Charges Act, 1997* ("the Act"),[1] as amended, authorizes municipal authorities, by By-law (a "By-law"), to impose development charges against land "to pay for increased capital costs required because of increased needs for services arising from development"[2]. The Act does *not* require a particular methodology to be followed by a municipality in its calculation of a charge, but in section 5(1) sets out ground rules that must be followed when calculating a development charge.[3] Section 5(1) requires a variety of estimates to be prepared and manipulated in accordance with provided formulae and rules requiring and permitting

---

[1] *Development Charges Act*, S.O. 1997, c. 27.
[2] *Ibid*, s. 2(1)
[3] *1090504 Ontario Ltd. v. Kitchener (City)*, 53 O.M.B.R. 385, 28 M.P.L.R. (4th) 283, 2006 CarswellOnt 5262, at para. 24. (O.M.B.)

deductions, exclusions, limitations and other adjustments.[4] A municipality contemplating the enactment of a By-law is required by s.10 to produce a "development charge background study" (the "Study") which includes the above-mentioned estimates and calculations along with further information and distinctions.[5]

Justifying Development Charges

When a By-law, or the specific application of a charge, is appealed to the Ontario Municipal Board (the "Board"), the Board will examine the Study and the By-law, and "the municipality must be able to justify a charge and satisfy the Board on an appeal that the development triggers a need for services which results in increased capital costs."[6] While absolute precision is not fully required or expected, there must be a "nexus" between the Study and the ultimate By-law insofar as the charges intended to be imposed by the By-law must be supported by the underlying Study.[7] While the Act does not favor any specific complete methodology for the fact-finding and calculations involved in preparing s.5(1) estimates, municipalities should "strive to obtain the most accurate information available when preparing… background [studies] required for justification of a new development charge by-law."[8] Further, the issue of a Study's *bona fides*, separate from the issue of its accuracy, may be considered by the Board.[9]

As the Act does not provide a specific complete methodology by which the s.5(1) estimates in a

[4] ~~*Development Charges Act*, supra~~ note 1, s.5(1)
[5] *Development Charges Act*, supra note 1, s.10
[6] *London (City) Development Charges By-law C.P.-1413-215, Re*, 2000 CarswellOnt 6111, 41 O.M.B.R. 371 at para. 19. (O.M.B.)
[7] *Airport Self Storage Ltd. v. Durham (Regional Municipality)*, 2004 CarswellOnt 5552, 48 O.M.B.R. 414, 4 M.P.L.R. (4th) 305, at para. 34. (O.M.B.). Note that this case involved a complaint pursuant to the *Development Charges Act*, supra note 1, s. 20.
[8] *London (City), Re*, supra note 6, at para. 10.
[9] *Rehner v. West Lincoln (Township)*, O.M.B. Docket No. DC000026, 2000 CarswellOnt 6854, at para. 14. (O.M.B.)

study may be arrived at, municipalities are free to choose amongst different approaches to satisfy their statutory obligations. This autonomy has required the Board, on appeals of By-laws, to consider each Study's methodology separately against the requirements of the Act and accumulated jurisprudence. The Act does not clarify the standards by which the Studies and By-laws are to be judged, and the Board has looked to the history and purposes of the Act in an effort to determine the correct approach for a municipality.

The Legislative History of Development Charges

The Act is the current iteration of the Development Charges Act, 1989,[10] replacing the old "lot levy" system under which municipalities imposed charges for services. The "lot levy" system took the form of a variety of municipal charges throughout Ontario, relying for authority primarily upon the *Planning Act* (currently Section 51(25)),[11] which permitted the Minister of Municipal Affairs or his delegates to impose reasonable conditions on the approval of plans of subdivision. Due, in part, to the breadth of the empowering provision in the *Planning Act,* the lot levy system was rife with uncertainty with regard to the jurisdictional basis and ambit for charges. Issues of varying breadth and clarity flared up from time to time surrounding municipal powers, and conflicting decisions of the tribunal responsible in this area reflected some of the uncertainty of the situation.

The reasons of Lord Denning, in *PYX Granite Co. Ltd. v. Ministry of Housing & Local Government et al.*[12] provides the theoretical underpinnings of the first generation of "lot levy" cases. *PXY Granite* involved the appeal of conditions placed on development. The proposed

[10] *Development Charges Act, 1989,* S.O. 1989, c. 58.
[11] *Planning Act*, R.S.O. 1990, c. P.13, s.51(25).
[12] *PYX Granite Co. Ltd. v. Ministry of Housing & Local Government et al.*, [1958] 1 Q.B. 554. (C.A.)

developer questioned the validity of those conditions on the grounds that the planning authority had wrongly exercised its discretion. Lord Denning found that, to be valid, the conditions must "fairly and reasonably relate to the permitted development."

The judgment of Lord Denning was relied upon by Weatherston J. in *Mills v. York (Regional Municipality) Land Division Committee*,[13] whose oft-cited decision is the conceptual forbear to the Board's current treatment of conditions of draft approval for subdivision and consent approvals. In *Mills*, which related to conditions placed on consent pursuant to the *Planning Act*, Weatherston J. was unable find that "the condition imposing a severance fee was irrelevant to the considerations which the committee had to take into account, or extraneous, or such as no reasonable body would impose, or otherwise clearly beyond their statutory jurisdiction"[14] and found in favor of the land division committee.

The principles in *Mills* and *PYX Granite* were broadly applied to the "lot levy" cases, in that lot levies were permitted pursuant to the *Planning Act*, provided that they related to matters set out in that statute and fairly and reasonably related to the consequences of the proposed development. The jurisprudence in *Mills* was broadly applied and eventually consolidated into a four-part test[15] which was commonly applied to "lot levy" cases until, subsequent to the enactment of the first iteration of the Act, its application to development charge cases began to change. The four-part test involved a determination of whether the lot levy/development charge was necessary, equitable, reasonably applied, and relevant or, in other words, a consequence of

[13] *Mills v. York (Regional Municipality) Land Division Committee*, 60 D.L.R. (3d) 405, 9 O.R. (2d) 349, 1975 CarswellOnt 438. (Div. Ct.)
[14] *Ibid.*, para. 8.
[15] *Mod-Aire Homes Ltd. v. Georgina (Township)*, 17 O.M.B.R. 213, 1984 CarswellOnt 1829. (O.M.B.)

the development of the subdivision.[16]

Subsequent to the enactment of the 1989 Act, the same four-part test continued to be used by the Board as "a guideline for the Board to consider with regard to the application and interpretation of the Development Charges Act"[17] with a focus on the "reasonable" aspect of the test. This trend was modified in the late 1990's, when the Board, in *Whiteley*,[18] confirmed that its role was not to approve development charges but merely to consider them in the context of an appeal.[19] In an oft-cited paragraph, the Board set a precedent which has been increasingly cited and followed in subsequent appeals:

> When dealing with appeals, the Board should not substitute its policy choices for City Council's policy choices where the Board finds, based on the evidence, that City Council has acted fairly, reasonably, within its powers and in accordance with the process set out in the Act. If Council has done so, then the Board should dismiss any appeal and leave City Council's policy choices in place even if they are not the policy choices the Board itself would have made.[20]

The Board's decision in *Whiteley* has now been regularly upheld by numerous tribunals and the four-part test has been, largely, put to rest. In *Gibson*,[21] for example, the Board found as follows:

---

[16] *Tan-Gent Enterprises Ltd. v. Lindsay (Town) By-law 92-88*, 30 M.P.L.R. (2d) 196, 33 O.M.B.R. 216, at para. 10. (O.M.B.)
[17] *Kirshin, Re*, 13 M.P.L.R. (2d) 115, (sub nom. *Kirshin v. London (City)*) 28 O.M.B.R. 376, 1992 CarswellOnt 510 at para. 24. (O.M.B.).
[18] *Whiteley v. Guelph (City)*, 14 M.P.L.R. (3d) 146, 39 O.M.B.R. 444. (O.M.B.)
[19] *Ibid*., para. 97.
[20] *Ibid*, para. 101.
[21] *Gibson v. Innisfil (Township)*, 1998 CarswellOnt 6444, [1998] O.M.B.D. No. 71. (O.M.B.)

> The Board does not consider these tests relevant under the *DCA*. Those tests were helpful when there was a legislative vacuum on the matter, so as to provide some guideline as to the appropriateness of a lot levy or development charge. Under the *DCA*, there now exists a complete legislative scheme which must be interpreted and applied."[22]

The *Whiteley* approach itself has also been upheld in the Superior Court of Justice. In refusing leave to appeal, for example, in a case involving an educational development charge, the Divisional Court in *Orillia*[23] found as follows:

> The Board followed its longstanding jurisprudence governing its role in an appeal of an EDC by-law, asking if the decision and process of the school board were fair and reasonable and consistent with the school board's powers.[24]

As the statutory provisions for education development charges correspond very closely with the development charge provisions, the Board has consistently applied the same approach to both.[25]

Application of the *Whiteley* Approach

The *Whiteley* "fairly and reasonably" approach is now current law with respect to the appeal of Development Charges By-laws. It is important to note, however, that "fairly and reasonably within its powers and in accordance with the process set out in the Act" should **not** be an

---

[22] *Gibson*, *ibid*, para. 37.
[23] *Orillia (City) v. Simcoe (County) District School Board*, 2008 CarswellOnt 1809, 43 M.P.L.R. (4th) 305. (O.M.B.).
[24] *Orillia*, *ibid*., para. 6.
[25] *Orillia*, *ibid*., para. 26.

invitation for the Board to fetter its discretion with respect to the municipality's decision; the Board should insure that it exercises independent judgment about the soundness of the municipality's decision[26] in light of the evidence available to the municipality prior to the enactment of the By-law[27] and before the Board. Additionally, appeals brought before the Board still refers broadly to the issue of whether a Study has reasonably forecasted and calculated increased capital costs required because of the increased needs for services arising from development[28] in addition to an issue-by-issue analysis.

In light of the Act's failure to mandate a methodology for creation of s.5(1) estimates, the Board must undergo a case-by-case analysis of each justification, charge, study and By-law, and apply the *Whiteley* approach to each material element. A municipality may present expert reports and opinions to make out its case, whether or not they were included in the background study, as long as said evidence was available to them and considered prior to the enactment of the By-law.[29] Once the municipality has made out its case, the onus then shifts to the Appellant to demonstrate that the municipality's approach was *not* reasonable, fair or in accordance with the Act. While there is some caselaw that a municipality's initial onus may be satisfied quite easily[30], a municipality which relies on a *prima facie* case would be doing itself a disservice, as it will be more easily challenged by an Appellant.

To prove that a municipal council acted unreasonably, however, the Appellant is required to

---

[26] *Cherry Hill G.P. Ltd. v. Lincoln (Town)*, 2000 CarswellOnt 5425, 22 M.P.L.R. (3d) 157, 40 O.M.B.R. 493 at para. 2. (O.M.B.). Aff'd 106 A.C.W.S. (3d) 152 (Ont. Div. Ct.). Also see *Orillia*, *ibid*, para. 6.
[27] *Crenian Holdings Inc. v. Victoria Harbour (Village)*, 1995 CarswellOnt 5231, 32 O.M.B.R. 87, para. 8. (O.M.B.).
[28] *1090504 Ontario Ltd..*, *supra* note 3 at paras. 16 and 17.
[29] *Crenian*, *supra* note 27, para. 8.
[30] *Crenian*, *supra* note 27, para. 36.

produce "unassailable evidence"[31] to refute the municipality's facts and present its case as, on the balance, more compelling[32]. With respect to fairness, an Appellant's burden is higher, as a Board will tolerate a level of potential unfairness,[33] as long as it is convinced that the municipality's approach provides some reasonable advantage in terms of efficiency[34] and was in accordance with the Act.

It must be noted that, compared to a court of law, the Board is less consistent with respect to its findings and following precedent. While the Board has at times required mere fair and reasonable compliance with the Act[35], at other times it seems to have decided matters based on its preference for whose approach is *more* compelling to it.

In light of the above, it behooves a municipality to be as thorough as possible when formulating a Background Study to supports its bylaws. As no official standards have been set for a background study, a municipality may "define appropriate quantity… and quality standards… [but] the standards must be meaningful and defensible"[36] An appellant may challenge a by-law on the presentation of compelling evidence that the municipality's standards are meaningless or indefensible or in some other manner unreasonable or unfair. The manner in which an appellant does this may be as varied as the justifications put forth by the municipality. Municipalities, for example, have successfully argued that the following is reasonable:

---

[31] *Whiteley*, *supra* note 18, para 103. Also see *1090504 Ontario Ltd..*, *supra* note 3 at para. 24.
[32] *Crenian*, *supra* note 27 at para. 39
[33] *Cherry Hill G.P. Ltd. v. Lincoln (Town)*, 2001 CarswellOnt 2156, 22 M.P.L.R. (3d) 155, 106 A.C.W.S. (3d) 152 at para. 2. (Ont. Div. Ct.)
[34] *Ibid.*
[35] *1090504 Ontario Ltd.*, *supra* note 3 at para. 24.
[36] *Tangent*, *supra* note 16 at para. 52.

- a proposed new facility serves as a diversification in the manner of service provision, but does not increase the service level above a ten year average[37]
- an increase in the involvement of a subset of a population in a particular activity reasonably explains an increase in need[38]
- to determine usage, the predominate use of a facility is a more convincing standard than a fixed multiplier[39]
- the cost of replacing vehicles may be more reasonable for determining the cost of maintaining a service level standard than the cost of new vehicles[40]
- the relationship between growth and expenditure may not be a straight-line correlation[41]
- growth estimates are reasonable in light of firm proposals by developers[42]

Conclusion

The onus on a municipality to justify its charges will become an issue if a by-law is appealed.[43] In the event of an appeal, the evidence used by a municipality may become an issue. The task of the Board, to determine whether a municipality "acted fairly, reasonably, within its powers" is only assisted by evidence available at the time that the municipality "acted." In *Crenian*, it was held that the evidence available in "that period of time between the time the study was finalized and submitted to counsel and the passing of the by-law"[44] is relevant to an appeal proceeding before the Board; only such information may be used to satisfy the municipality's onus. The onus on a municipality, therefore, may be summarized as follows: A municipality must justify

[37] *Keating v. Elora (Village)*, 1997 CarswellOnt 6243, 35 O.M.B.R. 178. (O.M.B.)
[38] *1090504 Ontario Ltd.*, *supra* note 3.
[39] Ibid.
[40] Ibid.
[41] *Crenian*, *supra* note 27.
[42] Ibid.
[43] *Development Charges Act*, *supra* note 1, s. 14.
[44] *Crenian*, *supra* note 27, para. 9.

development charges to the Board by demonstrating that it acted fairly, reasonably, within its powers and in accordance with the Act in its reliance on the Study and enactment of the Bylaw and by using information available to it between the time the Study was finalized and the Bylaw was enacted.

TABLE OF CASES

1. *1090504 Ontario Ltd. v. Kitchener (City)*, 53 O.M.B.R. 385, 28 M.P.L.R. (4th) 283, 2006 CarswellOnt 5262. (O.M.B.)

2. *Airport Self Storage Ltd. v. Durham (Regional Municipality)*, 2004 CarswellOnt 5552, 48 O.M.B.R. 414, 4 M.P.L.R. (4th) 305. (O.M.B.).

3. *Cherry Hill G.P. Ltd. v. Lincoln (Town)*, 2000 CarswellOnt 5425, 22 M.P.L.R. (3d) 157, 40 O.M.B.R. 493. (O.M.B.). Aff'd 106 A.C.W.S. (3d) 152 (Ont. Div. Ct.).

4. *Cherry Hill G.P. Ltd. v. Lincoln (Town)*, 2001 CarswellOnt 2156, 22 M.P.L.R. (3d) 155, 106 A.C.W.S. (3d) 152 (Ont. Div. Ct.)

5. *Crenian Holdings Inc. v. Victoria Harbour (Village)*, 1995 CarswellOnt 5231, 32 O.M.B.R. 87. (O.M.B.).

6. *Gibson v. Innisfil (Township)*, 1998 CarswellOnt 6444, [1998] O.M.B.D. No. 71. (O.M.B.)

7. *Kirshin, Re*, 13 M.P.L.R. (2d) 115, (sub nom. *Kirshin v. London (City)*) 28 O.M.B.R. 376, 1992 CarswellOnt 510 (O.M.B.).

8. *London (City) Development Charges By-law C.P.-1413-215, Re*, 2000 CarswellOnt 6111, 41 O.M.B.R. 371 (O.M.B.)

9. *Mills v. York (Regional Municipality) Land Division Committee*, 60 D.L.R. (3d) 405, 9 O.R. (2d) 349, 1975 CarswellOnt 438. (Div. Ct.)

10. *Mod-Aire Homes Ltd. v. Georgina (Township)*, 17 O.M.B.R. 213, 1984 CarswellOnt 1829. (O.M.B.)

11. *Orillia (City) v. Simcoe (County) District School Board*, 2008 CarswellOnt 1809, 43 M.P.L.R. (4th) 305. (O.M.B.).

12. *PYX Granite Co. Ltd. v. Ministry of Housing & Local Government et al.*, [1958] 1 Q.B. 554. (C.A.)

13. *Rehner v. West Lincoln (Township)*, O.M.B. Docket No. DC000026, 2000 CarswellOnt 6854. (O.M.B.)

14. *Tan-Gent Enterprises Ltd. v. Lindsay (Town) By-law 92-88*, 30 M.P.L.R. (2d) 196, 33 O.M.B.R. 216, at para. 10. (O.M.B.)

15. *Whiteley v. Guelph (City)*, 14 M.P.L.R. (3d) 146, 39 O.M.B.R. 444. (O.M.B.)

16. *Keating v. Elora (Village)*, 1997 CarswellOnt 6243, 35 O.M.B.R. 178. (O.M.B.)

TABLE OF LEGISLATION

1. *Development Charges Act*, S.O. 1997, c. 27.
2. *Development Charges Act, 1989*, S.O. 1989, c. 58.
3. *Planning Act*, R.S.O. 1990, c. P.13.