601 Scottsdale Drive, City of Guelph

Development Charge Complaint Pursuant to Subsections 20(1)(a) and (c) of the Development Charges Act

DOCUMENT BOOK OF 601 SCOTTSDALE GP INC.

April 25, 2025

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THE CORPORATION OF THE CITY OF GUELPH

By-law Number (2024) – 20866, as amended by (2024) – 20997

A by-law for the imposition of Development Charges and to repeal By-law Number (2019) – 20372, as amended

This document represents a consolidation of By-laws (2024) – 20866 and (2024) – 20997, the originals, as filed with the City Clerk, are at all times to be regarded as binding and any differences here in are to be overruled by said originals

WHEREAS the City of Guelph will experience growth through development and re-development;

AND WHEREAS development and redevelopment require the provision of physical and other services by the City of Guelph;

AND WHEREAS Council desires to ensure that the capital cost of meeting growth-related demands for, or burden on, municipal services does not place an undue financial burden on the City of Guelph, its taxpayers, or its ratepayers;

AND WHEREAS subsection 2(1) of the *Development Charges Act, 1997* (the "Act") provides that the council of a municipality may by by-law impose development charges against land to pay for increased Capital Costs required because of increased needs for services arising from the development and redevelopment of land;

AND WHEREAS a development charges background study has been completed in accordance with the Act;

AND WHEREAS the Council of the Corporation of the City of Guelph has given notice of and held public meetings on the 17th day of October, 2023 in accordance with the Act and the regulations thereto;

AND WHEREAS Section 19 of the Act provides for amendments to be made to Development Charges by-laws;

AND WHEREAS subsections 19 (1.2) and 19 (1.3) of the Act permit a municipality to amend a Development Charges by-law, subject to conditions being met,

and exempt such amendments from the process for by-law amendments under subsection 19 (1) of the Act;

AND WHEREAS the Council of the City of Guelph, hereinafter referred to as the "City", enacted and passed By-law (2024)-20866 on January 16, 2024; and

AND WHEREAS on November 13, 2024, Council approved Staff Report 2024-410 thereby indicating that it intends to include the growth-related costs of studies, pursuant to paragraphs 5 and 6 of subsection 5 (3) of the Act, within the Development Charge calculation.

NOW THEREFORE THE COUNCIL OF THE CORPORATION OF THE CITY OF GUELPH ENACTS AS FOLLOWS:

1. INTERPRETATION

In this By-law, the following items shall have the corresponding meanings:

"Accessory Use" means a use that is naturally and normally incidental, subordinate in purpose or floor area, or both, to the principal use in a Building, but is not an Ancillary Dwelling.

"Act" means the *Development Charges Act, 1997,* S.O. 1997, c. 27, as amended, or any successor thereto;

"Additional Residential Dwelling Unit" means a Dwelling Unit that is self-contained, subordinate to and located within the same Building or on the same Lot as a primary Dwelling Unit.

"Affordable Residential Unit" has the meaning ascribed to this term in the Act and its regulations;

"Ancillary" means a use, Building that is incidental and/or subordinate to a main use, and is located on the same Lot as a main use;

"Apartment Building" means a Building consisting of three (3) or more Dwelling Units, where access to each unit is obtained through a common entrance or entrances from the street level and subsequently through a common hall or halls, includes Triplex and Fourplex dwellings, and "Apartment" means a Dwelling Unit in an Apartment Building;

"Attainable Residential Unit” has the meaning ascribed to this term in the Act and its regulations;

“Bedroom” means a habitable room larger than seven square metres, including a den, study or other similar area, but does not include a living room, dining room or kitchen;

“Board of Education” has the same meaning as “board” as set out in the *Education Act*, RSO 1990, c E.2, as amended, or any successor thereof;

“Building” means any structure or building as defined in the *Building Code* (O. Reg. 332/12 made under the *Building Code Act*, as amended, or any successor thereof) but does not include a vehicle;

“Building Code Act” means the *Building Code Act, 1992*, S.O. 1992, c 23, as amended, or any successor thereto;

“Cannabis” means:

(a) a cannabis plant;

(b) any part of a cannabis plant, including the phytocannabinoids produced by, or found in, such a plant regardless of whether that part has been processed or not;

(c) any substance or mixture of substances that contains or has on it any part of such a plant; and

(d) any substance that is identical to any phytocannabinoid produced by, or found in, such a plant, regardless of how the substance was obtained.

“Cannabis Plant” means a plant that belongs to the genus Cannabis.

“Cannabis Production Facilities” means a Building, or part thereof, designed, used, or intended to be used for one or more of the following: growing, production, processing, harvesting, testing, alteration, destruction, storage, packaging, shipment, or distribution of Cannabis where a license, permit or authorization has been issued under applicable federal law and does not include such Buildings as a greenhouse and agricultural Building associated with the use. It includes but is not limited to a Building or part thereof solely designed, used, or intended to be used for retail sales of Cannabis.

“Capital Costs” means the eligible inclusions as set out in Subsection 5(3) of the Act;

“City” means The Corporation of the City of Guelph or the geographic area of the municipality, as the context requires;

“Class” means a grouping of services combined to create a single service for the purposes of this By-law and as provided in Section 7 of the Act;

“Computer Establishment” means a Building used or designed or intended for use as a computer establishment as this term is defined in the Zoning By-law;

“Council” means the Council of The Corporation of the City of Guelph;

“Development” means the construction, erection, or placing of one (1) or more Buildings on land or the making of an addition or alteration to a Building that has the effect of increasing the size or usability thereof or any development requiring any of the actions described in section 3.4(a), and includes Redevelopment;

“Development Charge” means a charge imposed with respect to this By-law;

“Dwelling Unit” means a room or group of rooms occupied or designed to be occupied exclusively as an independent and separate self-contained housekeeping unit including a house;

“Duplex Dwelling” means a Building that is used for the purpose of two principal Dwelling Units functioning independently and configured in such a manner that the Dwelling Units are divided horizontally from one another, each of which has an independent entrance either directly to the outside or through a common vestibule, and does not include an attached Additional Residential Dwelling Unit;

“Existing Industrial Building” means a Building used for or in connection with,

(a) manufacturing, producing, processing, storing or distributing something;

(b) research or development in connection with manufacturing, producing or processing something if the research or development is at the site where the manufacturing, production or processing takes place;

(c) retail sales by a manufacturer, producer or processor of something they manufactured, if the retail sales are at the site where the manufacturing, production or processing takes place;

(d) storage by a manufacturer, producer or processor of something they manufactured, if the storage is at the site where the manufacturing, production, or processing takes place;

(e) office or administrative purposes, if they are,

(i) carried out with respect to manufacturing, producing, processing, storage or the distributing of something; and
(ii) in or attached to the Building used for that manufacturing, producing, or processing, storage or distribution;

provided that: (A) such Industrial Building or Buildings existed on a lot in the City of Guelph on March 1, 1998, or are industrial Building or Buildings constructed and occupied pursuant to site plan approval under section 41 of the Planning Act subsequent to March 1, 1998, for which full Development Charges were paid; and (B) an Existing Industrial Building shall not include a Retail Warehouse;

“Fourplex dwelling” means a Building consisting of four (4) Dwelling Units functioning independently, which are horizontally and/or vertically attached, which are entered from an independent entrance directly from the outdoors or from an internal entry vestibule and which share common facilities such as common amenity area, parking and driveways;

“Grade” means the average level of finished ground adjoining a Building at all exterior walls;

“Gross Floor Area” means:

(a) in the case of a Non-Residential Use Building, the total area of all Building floors above or below Grade measured between the outside surfaces of the exterior walls, and includes the floor area of a Mezzanine; or
(b) in the case of a mixed-use Building including both Residential Uses and Non-Residential Uses, the total area of the non-residential portion thereof including all Building floors above or below Grade measured between the outside surfaces of the exterior walls or between the outside surfaces of

exterior walls and the centre line of party walls dividing a Non-Residential Use and a Residential Use, and includes the floor area of a Mezzanine;

“Hospice” means a Building or portion of a mixed-use Building designed and intended to provide palliative care and emotional support to the terminally ill in a home or homelike setting so that quality of life is maintained, and family members may be active participants in care;

“Industrial Building” means lands, Buildings, or portions thereof, used, designed or intended for use for production, compounding, processing, packaging, crating, bottling, or assembly ("manufacturing") of raw goods or semi-processed goods or materials, research and development relating thereto, warehousing or bulk storage of goods, and includes office uses and the sale of commodities to the general public (if the retail sales are at the site where the manufacturing takes place) where such uses are accessory to an industrial use, and includes cannabis production facilities, but does not include the sale of commodities to the general public through a warehouse club or Retail Warehouse and does not include self-storage or mini-storage facilities;

“Institutional Development” means development of a Building deemed institutional as defined in the Act and/or the regulations thereunder;

“Interest Rate” means the annual rate of interest as set out in section 26.3 of the Act.

“Live/Work Unit” means a Building or part of a Building which contains both a Dwelling Unit and a Non-Residential Use which share a common wall or floor, and allows for direct access between the Dwelling Unit and Non-Residential Use;

“Local Board” has the same definition as “local board” as defined in the Act;

“Local Services” mean those services, facilities or things which are under the jurisdiction of the City that are related to a plan of subdivision or within the area to which the plan relates in respect of the lands under Sections 41, 51 or 53 of the *Planning Act*, R.S.O. 1990, c. P.13, as amended;

“Lodging House” means a Residential Use Building that is used or designed to provide five (5) or more Lodging Units, which may share common areas of the Building but do not function as a single housekeeping unit, for hire or gain directly or indirectly to persons.

“Lodging Unit” means a room or suite of rooms in a Building designed or intended to be used for sleeping and living accommodation which is not normally accessible to all residents of the Building, and which does not have the exclusive use of both a kitchen and a bathroom, and does not include an Apartment, Accessory Apartment, or a room or suite of rooms within a Special Care/Special Dwelling;

“Lot” means a parcel of land capable of being conveyed lawfully without any approval under the Planning Act or successor thereto which meets the minimum lot area requirements under the Zoning By-law;

“Mezzanine” means a storey that forms a partial level of a Building, such as a balcony;

“Multiple Dwelling” shall mean a Residential Use Building other than a Single Detached Unit, Semi-Detached Unit, Apartment Building, Stacked Townhouse and Special Care/Special Dwelling/Lodging Unit;

“Non-profit Housing Development” means development of a Building intended for use as residential premises as defined under the Act;

“Non-Residential Use” means land or Buildings of any kind whatsoever used or designed or intended for a use other than a Residential Use;

“Owner” means the owner of land or a person who has made application for an approval for the Development of land for which a Development Charge may be imposed;

“Parking Structure” means a Building intended primarily for the temporary parking of vehicles as an Accessory Use to a Non-Residential Use or a Building intended to provide parking as a commercial enterprise;

“Place of Worship” means that part of a Building that is exempt from taxation as a place of worship under the *Assessment Act*, R.S.O. 1990, c A.31, as amended, or any successor thereto;

“*Planning Act*” means the *Planning Act*, R.S.O. 1990, c. P.13, as amended, or any successor thereto;

“Prescribed” means prescribed pursuant to the regulations made under the Act;

“Redevelopment” means the construction, erection or placing of one or more Buildings on land where all or part of a Building has previously been demolished on such land, or changing the use of a Building from a Residential Use to a Non-Residential Use or from a Non-Residential Use to a Residential Use, or changing a Building from one form of Residential Use to another form of Residential Use or from one form of Non-Residential Use to another form of Non-Residential Use and including any development or redevelopment requiring any of the actions described in subsection 3.4(a) of this By-law;

“Rental Housing Development” means the residential housing development of a Building on a Lot with four or more Dwelling Units all of which are intended for use as rented residential premises;

“Research Establishment means land, Building or Buildings which is/are used for scientific research, tests or investigations, data collection and manipulation or technical development of information, products or devices for scientific application;

“Residential” or “Residential Use” means land or Buildings of any kind whatsoever used or designed or intended for use as living accommodations for one or more individuals, but does not include land or Buildings used or designed or intended for use as Short Term Accommodation;

“Retail Warehouse” means a Building used exclusively for the storage and/or distribution of goods destined for a retail or commercial market, and also includes self-storage facilities;

“Row Dwelling” means a Dwelling Unit within a Building containing three or more attached Dwelling Units in a single row, each of which Dwelling Unit has an independent entrance from the outside and is vertically separated from any abutting Dwelling Unit;

“Semi Detached Unit” means a Building that is divided vertically into two (2) separate Dwelling Units;

“Service” means a service designated in section 2.1, and “Services” shall have a corresponding meaning;

“Short Term Accommodation” means a Building used or designed or intended for use as a hotel or bed and breakfast as these terms are defined in the Zoning By-Law, and shall be classified as a Non-Residential Use;

“Single Detached Unit” means a free-standing, separate, detached Building consisting of one (1) Dwelling Unit;

“Special Care/Special Dwelling” means a Residential Use Building containing two (2) or more rooms or suites of rooms designed or intended to be used for sleeping and living accommodation that have a common entrance from street level:

a. Where the occupants have the right to use in common, halls, stairs, yards, common rooms and accessory Buildings;
b. Which may or may not have exclusive sanitary and/or culinary facilities;
c. That is designed to accommodate persons with specific needs, including, but not limited to, independent permanent living arrangements; and
d. Where support services such as meal preparation, grocery shopping, laundry, housekeeping, nursing, respite care and attendant services may be provided at various levels, and includes, but is not limited to, retirement houses, nursing homes, group homes (including correctional group homes) and hospices;

“Stacked Townhouse” means one (1) Building containing two (2) Townhouses divided horizontally; one atop the other; in a Building that is divided vertically into three (3) or more separate Dwelling Units;

“Townhouse” means a Dwelling Unit that is within a Building that is divided vertically into three (3) or more separate Dwelling Units and includes a Row Dwelling;

(a) “Back-to-Back Townhouse Dwelling” means a Building where each Dwelling Unit is divided vertically by common walls, including a common rear wall and common side wall, and has an independent entrance to the Dwelling Unit from the outside accessed through the front yard, side yard or exterior side yard and does not have a rear yard;

(b) “Cluster Townhouse” means a Townhouse situated on a Lot in such a way that at least one (1) Dwelling Unit does not have legal frontage on a public street;

(c) “On-Street Townhouse” means a Townhouse where each Dwelling Unit has legal frontage on a public street;

“Triplex dwelling” means a Building consisting of 3 Dwelling Units functioning independently, which are horizontally and/or vertically attached, which are entered from an independent entrance directly from the outdoors or from an internal entry vestibule and which share common facilities such as common amenity area, parking and driveways;

“University” means the University of Guelph established by *An Act to Incorporate the University of Guelph*, S.O, 1964, c. 120, as amended, or any successor thereto;

“University Land” means land vested in or leased to a publicly-assisted University which is intended to be occupied and used by the university; and

“Zoning By-Law” means City of Guelph By-law Number (1995)-14864, as amended, or any successor thereto.

2. DESIGNATION OF SERVICES/CLASS OF SERVICES

2.1 The categories of Services for which Development Charges are imposed under this By-law and related By-laws which provide the Schedule of Charges, are as follows:

i. Water Services;
ii. Wastewater Services;
iii. Stormwater Services;
iv. Services Related to a Highway;
v. Public Works (Facilities and Fleet);
vi. Fire Protection Services;
vii. Policing Services;
viii. Transit Services;
ix. Library Services;
x. Parks and Recreation Services;
xi. Ambulance Services;
xii. Public Health Services;
xiii. Long-Term Care Services; and

xiv. Waste Diversion Services.

2.2 The components of the Services/Class of Services designated in section 2.1 are described in Schedule A.

3. APPLICATION OF BY-LAW RULES

3.1 Development Charges shall be payable in the amounts set out in this By-law where:

(a) the lands are located in the area described in section 3.2; and

(b) the Development requires any of the approvals set out in section 3.4(a).

Area to Which By-law Applies:

3.2 Subject to section 3.3, this By-law applies to all lands in the City.

3.3. This By-law shall not apply to lands that are owned by and used for the purposes of:

(a) the City or a Local Board thereof;

(b) a Board of Education;

(c) a municipality, or a Local Board of the County of Wellington; or

(d) land vested in or leased to a university that receives regular and ongoing operating funds from the government for the purposes of post-secondary education is exempt from development charges imposed under the *Development Charges Act, 1997* if the development in respect of which development charges would otherwise be payable is intended to be occupied and used by the university.

Approvals for Development:

3.4.1 (a) Development Charges shall be imposed in accordance with this By-law on all Development which requires:

(i) the passing of a Zoning By-Law or of an amendment to a Zoning By-Law under section 34 of the *Planning Act*;

(ii) the approval of a minor variance under section 45 of the *Planning Act*;
(iii) a conveyance of land to which a by-law passed under subsection 50(7) of the *Planning Act* applies;
(iv) the approval of a plan of subdivision under section 51 of the *Planning Act*;
(v) a consent under section 53 of the *Planning Act*;
(vi) the approval of a description under section 9 of the *Condominium Act*, *1998,* SO 1998, c 19, as amended, or any successor thereto; or
(vii) the issuing of a permit under the *Building Code Act* in relation to a Building.

Rules with Respect to Exemptions for Intensification of Existing Housing or New Housing

3.4.2 (a) Notwithstanding the provisions of this By-law, Development Charges shall not be imposed with respect to:

(i) an enlargement to an existing Dwelling Unit;

(ii) the creation of additional Dwelling Units equal to the greater of one or 1% of the existing Dwelling Units in an existing Rental Housing Development containing four or more Dwelling Units or a prescribed Ancillary structure to the existing Residential Building;

(b) Notwithstanding the provisions of this By-law, Development Charges shall not be imposed with respect to the creation of any of the following in existing residential Dwelling Units:

(i) A second residential Dwelling Uit in an existing detached house, Semi-detached Unit or Rowhouse on a parcel of land on which Residential Use, other than an Ancillary Residential Use, is permitted, if all Buildings Ancillary to the existing detached house, Semi-detached house or Rowhouse cumulatively contain no more than one Dwelling Unit.

(i) A third residential Dwelling Unit in an existing detached house, Semi-detached house or Rowhouse on a parcel of land on which Residential

Use, other than an Ancillary Residential Use, is permitted, if no Building Ancillary to the existing detached house, semi-detached house or rowhouse contains any residential Dwelling Units.

(i) One Residential Unit in a Building Ancillary to an existing detached house, Semi-detached House or Rrowhouse on a parcel of urban residential land, if the existing detached house, semi-detached house or rowhouse contains no more than two residential Dwelling Units and no other Building ancillary to the existing detached house, semi-detached house or rowhouse contains any residential Dwelling Units.

(c) Notwithstanding the provisions of this By-law, Development Charges shall not be imposed with respect to the creation of any of the following in new residential Buildings:

(i) A second residential Dwelling Unit in a new detached house, Semi-detached house or Rowhouse on a parcel of land on which Residential Use, other than Ancillary Residential Use, is permitted, if all Buildings Ancillary to the new detached house, Semi-detached house or Rowhouse cumulatively will contain no more than one residential Dwelling Unit

(ii) A third residential Dwelling Unit in a new detached house, Semi-detached house or Rowhouse on a parcel of land on which Residential Use, other than Ancillary Residential Use, is permitted, if no Building Ancillary to the new detached house, Semi-detached house or Rowhouse contains any Residential Units

(iii) One Residential Dwelling Unit in a Building Ancillary to a new detached house, semi-detached house or rowhouse on a parcel of urban Residential land, if the new detached house, Semi-detached house or Rowhouse contains no more than two Residential Dwelling Units and no other Building Ancillary to the new detached house, Semi-detached house or Rowhouse contains any Rresidential Dwelling Units

(d) No more than one (1) Development Charge for each Service shall be imposed upon any Development to which this By-law applies even though two (2) or more of the actions described in section 3.4.1(a) are required for the Development.

(e) Despite section 3.4.2(c), if two (2) or more of the actions described in section 3.4.1(a) occur at different times, additional Development Charges shall be imposed if the subsequent action has the effect of increasing the need for Services.

Exemptions:

3.5.1 Notwithstanding the provisions of this By-law, Development Charges shall not be imposed with respect to:

(a) Development of University Land or Buildings;

(b) University Land if the development in respect of which development charges would otherwise be payable is intended to be occupied and used by the University, provided that, where only a part of such land, Buildings are so developed, then only that part shall be exempt from the Development Charges specified under this By-law;

(c) Development for a Place of Worship or for the purposes of a cemetery or burial site exempt from taxation under the *Assessment Act*;

(d) Development by a college established under the *Ontario Colleges of Applied Arts and Technology Act, 2002, S.O. 2002, c.8, Sched. F, as amended, or any successor thereto*;

(e) Development for temporary Non-Residential Uses permitted pursuant to section 39 of the *Planning Act* except that Development Charges shall be imposed in the event that the temporary Building becomes protracted by remaining erected or placed for a continuous period exceeding three years from the date that the Building permit is issued. The development charges required to be paid under this By-law shall become payable on the date the temporary Building becomes protracted;

(f) Development, solely for the purposes of creating or adding an Accessory Use or accessory structure not exceeding 10 square metres of Gross Floor Area;

(g) Development of or by a hospital receiving aid under the *Public Hospitals Act*, R.S.O. 1990, c P.40, as amended, or any successor thereto;

(h) The exempt portion of an enlargement of the Gross Floor Area of an Existing Industrial Building in accordance with section 4 of the Act, subject to section 3.5.2 of this by-law;

(i) Development of a Parking Structure

3.5.2 For the purposes of the exemption for the enlargement of Existing Industrial Buildings set out in section 3.5.1(h) of this By-law, the following provisions shall apply:

(a) there shall be an exemption from the payment of Development Charges for one or more enlargements of an Existing Industrial Building, up to a maximum of fifty per cent (50%) of the Gross Floor Area before the first enlargement for which an exemption from the payment of Development Charges was granted pursuant to the Act or under this section of the By-law or any predecessor hereto;

(b) Development Charges shall be imposed in the amounts set out in this By-law with respect to the amount of floor area of an enlargement that results in the Gross Floor Area of the Industrial Building being increased by greater than fifty per cent (50%) of the Gross Floor Area of the Existing Industrial Building; and,

(c) for greater clarity, Research Establishments and Computer Establishments are not industrial uses of land, Buildings under this By-law and do not qualify for the exemption under section 3.5.1(h).

<u>Discounts for Rental Housing (for profit):</u>

3.5.3 The Development Charges payable for Rental Housing Developments, where the Residential Dwelling Units are intended to be used as a rented residential premises will be reduced based on the number of bedrooms in each Dwelling Unit as follows:

(a) Three or more bedrooms – 25% reduction;

(b) Two bedrooms – 20% reduction; and

(c) All other bedroom quantities – 15% reduction

<u>Other Exemptions (Upon Proclamation):</u>

3.5.4 Once proclamation of the required amendments to the Act to allow the following exemptions to come into force is received by the Lieutenant Governor, the following shall be exempt from development charges:

(a) Affordable Residential Units; or

(b) Attainable Residential Units.

Amount of Charges:

Residential:

3.6 Where a Development Charge is imposed for Development of a Residential Use, the amount of the Development Charges shall be as set out in the appropriate "Residential" column of Schedule B of the Individual Service Charges By-law, for the Residential Uses, including any Dwelling Unit(s) accessory to a Non-Residential Use and, in the case of a mixed use Building, on the Residential Uses in the mixed use Building, including the Residential component of a Live/Work Unit, according to the type of Residential Dwelling Unit and calculated with respect to each of the Services according to the type of Residential Use.

Non-Residential:

3.7 Where a Development Charge is imposed for Development of a Non-Residential Use the amount of the Development Charges shall be as set out in the "Non-Residential" column of Schedule B of the Individual Service Charges By-law for the Non-Residential Uses, and in the case of a mixed-use Building, on the non-residential component of the mixed-use Building, including the non-residential component of a Live/Work unit, according to the type and gross floor area of the non-residential component.

Reduction of Development Charges for Redevelopment:

3.8 Despite any other provisions of this By-law, where a Building existing on land within 48 months prior to the date that a Development Charge becomes payable for a Redevelopment on the same land was, or is to be, demolished, in whole or in part, or converted from one principal use to another principal use on the same land, the Development Charges otherwise payable with respect to such Redevelopment shall be reduced by the following amounts:

(a) in the case of a Residential Use Building or in the case of Residential Uses in a mixed-use Building, an amount calculated by multiplying the applicable Development Charge under section 3.6 by the number, according to type, of Dwelling Units that have been or will be destroyed, demolished or converted to another principal use; and

(b) in the case of a Non-Residential Use Building or in the case of the Non-Residential Uses in a mixed-use Building, an amount calculated by multiplying the applicable Development Charge under sections 3.7 by the Gross Floor Area that has been or will be demolished or converted to another principal use;

provided that such amounts shall not exceed, in total, the amount of the Development Charge otherwise payable with respect to the Redevelopment. For greater certainty, any amount of the reductions set out above that exceed the amount of the Development Charge otherwise payable with respect to the Redevelopment shall be reduced to zero and shall not be transferred to any other Development or Redevelopment.

3.9 For the purposes of determining the 48-month period referred to in section 3.8, the date that a Building is deemed to be demolished shall be the earlier of:

(a) the date such Building was demolished, destroyed or rendered uninhabitable; or

(b) if the former Building was demolished pursuant to a demolition permit issued before it was destroyed or became uninhabitable, the date the demolition permit was issued.

3.10 The reduction of Development Charges referred to in section 3.8 does not apply where the demolished Building, or any part thereof, when originally constructed was exempt from the payment of Development Charges pursuant to this By-law, or any predecessor thereto.

<u>Time of Payment of Development Charges:</u>

3.12 Development Charges imposed under this By-law are calculated, payable, and collected upon issuance of a building permit for the Development.

3.13 Notwithstanding section 3.12 of this By-law development charges for Institutional and Rental Housing Development (where not otherwise exempt) are due and payable in six (6) equal annual instalments commencing with the first installment payable on the earlier of the date of the issuance of a permit under the *Building Code Act, 1992* authorizing occupation of the Building and the date the Building is first occupied, and continuing on the following five anniversaries of that date, with instalments accruing interest (calculated in accordance with Section 26.3 of the Act). The City may at the time of the first and each subsequent instalment payment require that the Owner enter into or provide such agreements, declarations, documents or things that the City requires to confirm that all of the Dwelling Units in the Rental Housing Development are intended to be used, are being used and/or continue to be intended to be used as rented residential premises.

Notwithstanding section 3.12, development charges for rental housing and institutional developments (where not otherwise exempt) are due and payable in six (6) equal annual payments commencing with the first installment payable on the date of occupancy, and each subsequent installment, including interest as provided in the City's Council approved D.C. Interest Policy # CS-2020-23, as may be revised from time to time.

3.14 Where the development of land results from the approval of a site plan or zoning by-law amendment application received on or after January 1, 2020, and the approval of the application occurred within two years prior to building permit issuance, the development charges under sections 3.6 and 3.7 shall be calculated on the rates set out in Schedule B of the Individual Service Charges By-law on the date of the planning application, including interest. Where both planning applications apply, development charges under sections 3.6 and 3.7 shall be calculated on the rates in effect on the day of the later planning application, including interest (calculated in accordance with Section 26.3 of the Act).

3.15 Despite sections 3.12 through 3.14, Council from time to time and at any time, may enter into agreements providing for all or any part of a development charge to be paid before or after it would otherwise be payable, in accordance with section 27 of the Act.

<u>Transition, Time of Payment:</u>

3.16 (a) If, at the time of issuance of a building permit or permits in regard to a lot or block on a plan of subdivision for which payments have been made to the City pursuant to a previous By-law, and:

(i) the type of Dwelling Unit for which the building permit or permits are being issued is different from that used for the calculation and payment under that By-law and;
(ii) there has been no change in the zoning affecting such lot or block; and
(iii) the Development Charges for the type of Dwelling Unit for which the building permit or permits are being issued were lesser at the time that payments were made pursuant to the previous By-law than for the type of Dwelling Unit used to calculate the payment,

an additional payment to the City is required for the Services paid for pursuant to the previous By-law, which additional payment, in regard to such different unit types, shall be the difference between the Development Charges for those Services in respect to the type of Dwelling Unit for which the building permit or permits are being issued, calculated as at the date of issuance of the building permit or permits, and the payment for those Services previously collected in regard thereto, adjusted in accordance with section 5 of this By-law.

(b) If, at the time of issuance of a building permit or permits in regard to a lot or block on a plan of subdivision for which payments have been made pursuant to a previous By-law, and:

(i) the total number of Dwelling Units of a particular type for which the building permit or permits have been or are being issued is greater, on a cumulative basis, than that used for the calculation and payment under the previous By-law; and
(ii) there has been no change in the zoning affecting such lot or block,

an additional payment to the City is required for the Services paid for pursuant to the previous By-law, which additional payment shall be calculated on the basis of the number of additional Dwelling Units at the rate for those Services prevailing at the date of issuance of the building permit or permits for such Dwelling Units.

(c) If, at the time of issuance of a building permit or permits in regard to a lot or block on a plan of subdivision for which payments have been made pursuant to a previous By-law, and:

(i) the type of Dwelling Unit for which the building permit or permits are being issued is different than that used for the calculation and payment under the previous By-law and;
(ii) there has been no change in the zoning affecting such lot or block; and
(iii) the payment made for the type of Dwelling Unit for which building permits or permits are being issued were greater at the time that payments were made pursuant to the previous By-law than for the type of Dwelling Unit used to calculate the payment,

a refund shall be paid by the City for the Services paid for pursuant to the previous By-law in regard to such different unit types, which refund shall be the difference between the payment previously collected by the City for the Services, adjusted in accordance with section 5 of this By-law to the date of issuance of the building permit or permits, and the Development Charges for those Services in respect to the type of Dwelling Unit for which building permits are being issued, calculated as at the date of issuance of the building permit or permits.

(d) If, at the time of issuance of a building permit or permits in regard to a lot or block on a plan of subdivision for which payments have been made pursuant to a previous By-law, and,

(i) the total number of Dwelling Units of a particular type for which the building permit or permits have been or are being issued is less, on a cumulative basis, than that used for the calculation and payment under the previous By-law, and

(ii) there has been no change in the zoning affecting such lot or block,

a refund shall be paid by the City for the Services paid for pursuant to section 3.12 of the previous By-law, which refund shall be calculated on the basis of the number of fewer Dwelling Units at the rate for those Services prevailing at the date of issuance of the building permit or permits for such Dwelling Units.

3.17 Despite sections 3.16 (c) and (d), a refund shall not exceed the amount of the payment actually made to the City for the Services under a previous By-law.

4. PAYMENT BY SERVICES

4.1 Despite the payment required under sections 3.12 to 3.15 Council may agree in accordance with the Act to allow a person to perform work that relates to a Service to which this By-law relates, and shall give the person a credit towards the Development Charge in accordance with that agreement.

4.2 The amount of the credit referred to in section 4.1 is the reasonable cost of doing the work as agreed by the City and the person to be given the credit.

4.3 Despite sections 4.1 and 4.2, no credit may be given for any part of the cost of work that relates to an increase in the level of service that exceeds the average level of service as calculated pursuant to the Act.

4.4 Any credit referred to in section 4.1 shall be given at such time, and in relation to such Service or Services as set out in the agreement, and as permitted under the Act.

4.5 Credits referred to in section 4.1 may be transferable by the City, subject to the terms of the agreement and as permitted under the Act.

5. INDEXING

Development Charges pursuant to this By-law shall be adjusted annually, without amendment to this By-law, commencing on the first anniversary date of this By-law coming into effect and on each anniversary date thereafter, in accordance with the index prescribed in O.Reg. 82/98 made under the Act, as per the Statistics Canada's Non-Residential Building Construction Price Index for the City of Toronto, as may be amended or replaced from time to time, for the most recent available data for the preceding quarter.

6. FRONT-ENDING AGREEMENTS

Council may authorize a front-ending agreement in accordance with the provisions of Part III of the Act, upon such terms as Council may require, in respect of the Development of land.

7. SCHEDULES

The following schedules shall form part of this By-law:

Schedule A : Components of Services/Class of Services Designated in Section 2.1
Schedule B: Individual Service Charges as provided in Supporting By-laws

8. CONFLICTS

7.1 Where the City and an Owner or former Owner have entered into an agreement with respect to a Development Charge or to provide a credit for the performance of work that relates to a Service to which this By-law or a previous By-law relates, for any land or Development within the area to which this By-law applies, and a conflict exists between the provisions of this By-law and such agreement, the provisions of the agreement shall prevail to the extent that there is a conflict.

7.2 Notwithstanding section 7.1, where a Development which is the subject of an agreement to which section 7.1 applies, is subsequently the subject of one or more of the actions described in section 3.4(a), an additional Development Charge in respect of the Development permitted by the action shall be calculated, payable and collected in accordance with the provisions of this By-law if the Development has the effect of increasing the need for Services, unless such agreement provides otherwise.

9. SEVERABILITY

If, for any reason, any provision of this By-law is held to be invalid, it is hereby declared to be the intention of Council that all the remainder of this By-law shall continue in full force and effect until repealed, re-enacted, amended or modified.

10. DATE BY-LAW IN FORCE

This By-law shall come into effect at 12:01 A.M. on **March 2, 2024**.

11. DATE BY-LAW EXPIRES

This By-law will expire at 12:01 A.M. on **March 2, 2034** unless it is repealed by Council at an earlier date.

12. EXISTING BY-LAW REPEALED

By-law Number (2019)-20372, as amended is hereby repealed as of the date and time of this By-law coming into effect.

13. DATE BY-LAW AMENDED

This By-law, as amended, shall come into force and effect on November 13, 2024.

PASSED this 16th day of January, 2024

_____
Cam Guthrie – Mayor

_____
Stephen O'Brien – General Manager/City Clerk

2

THE CORPORATION OF THE CITY OF GUELPH

By-law Number (2019)-20372

A by-law for the imposition of Development Charges and to repeal By-law Number (2014) – 19692

WHEREAS the City of Guelph will experience growth through development and re-development;

AND WHEREAS development and redevelopment require the provision of physical and other services by the City of Guelph;

AND WHEREAS Council desires to ensure that the capital cost of meeting growth-related demands for, or burden on, municipal services does not place an undue financial burden on the City of Guelph or its taxpayers;

AND WHEREAS subsection 2(1) of the *Development Charges Act, 1997* (the "Act") provides that the council of a municipality may by by-law impose development charges against land to pay for increased Capital Costs required because of increased needs for services arising from development of the area to which the by-law applies;

AND WHEREAS a development charges background study has been completed in accordance with the Act;

AND WHEREAS Council has given notice of and held public meetings on the 21st day of January, 2019 in accordance with the Act and the regulations made under it;

NOW THEREFORE THE COUNCIL OF THE CORPORATION OF THE CITY OF GUELPH ENACTS AS FOLLOWS:

1. INTERPRETATION

In this By-law, the following items shall have the corresponding meanings:

"Act" means the *Development Charges Act, 1997,* S.O. 1997, c. 27, as amended, or any successor thereto;

"Accessory Apartment" see the definition of "Dwelling Unit";

"Accessory Use" means a use that is subordinate, incidental and exclusively devoted to another use located on the same lot;

"Apartment" see the definition of "Dwelling Unit";

"Back-to-Back Townhouse Dwelling" see the definition of "Dwelling Unit";

"Board of Education" has the same meaning as "board" as set out in the *Education Act*, RSO 1990, c E.2, as amended, or any successor thereof;

"Building" means any structure or building as defined in the *Building Code* (O. Reg. 332/12 made under the Building Code Act, as amended, or any successor thereto) but does not include a vehicle;

"Building Code Act" means the *Building Code Act, 1992*, S.O. 1992, c. 23, as amended, or any successor thereto;

"Capital Costs" means costs incurred or proposed to be incurred by the City or a Local Board thereof directly or by others on behalf of, and as authorized by, the City or Local Board,

(a) to acquire land or an interest in land, including a leasehold interest,

(b) to improve land,

(c) to acquire, lease, construct or improve buildings and structures,

(d) to acquire, construct or improve facilities including,

(i) furniture and equipment other than computer equipment,
(ii) materials acquired for circulation, reference or information purposes by a library board as defined in the *Public Libraries Act*, R.S.O. 1990, c. P.44, as amended, or any successor thereto, and
(iii) rolling stock with an estimated useful life of seven years or more, and

(e) to undertake studies in connection with any of the matters referred to in clauses (a) to (d) above, including the development charge background study,

required for the provision of Services designated in this By-law within or outside the City, including interest on borrowing for those expenditures under clauses (a) to (e) above that are growth-related;

"City" means The Corporation of the City of Guelph or the geographic area of the municipality, as the context requires;

"Computer Establishment" means a building or structure used or designed or intended for use as a computer establishment as this term is defined in the Zoning By-Law and located in the B.1 (Industrial) Zone, B.2 (Industrial) Zone, or B.5 (Corporate Business Park) Zone or in any specialized B.1, B.2 or B.5 Zone under the Zoning By-Law;

"Council" means the Council of The Corporation of the City of Guelph;

"Development" means the construction, erection, or placing of one (1) or more buildings or structures on land or the making of an addition or alteration to a building or structure that has the effect of increasing the size or usability thereof or any development requiring any of the actions described in section 3.4(a), and includes Redevelopment;

"Development Charge" means a charge imposed with respect to this By-law;

"Discounted Services" means those Services described in section 2.1(b);

"Dwelling Unit" means a room or group of rooms occupied or designed to be occupied exclusively as an independent and separate self-contained housekeeping unit including a house;

(a) "Accessory Apartment" means a Dwelling Unit located within and subordinate to an existing Single Detached Dwelling, Semi-Detached Dwelling, Townhouse and a Multiple Attached Dwelling;

(b) "Apartment Building" means a Building consisting of three (3) or more Dwelling Units, where access to each unit is obtained through a common entrance or entrances from the street level and subsequently through a common hall or halls, and "Apartment" means a Dwelling Unit in an Apartment Building;

(c) "Garden Suite" means a Dwelling Unit which may be designed to be portable, and which is located on the same lot of, and fully detached from, an existing Dwelling Unit, such Garden Suite is clearly ancillary to the existing dwelling and shall be independently serviced with municipal water and sanitary services;

(d) "Link Dwelling" means two (2) Single Detached Dwellings sharing a common foundation wall below ground level, but does not include a Semi-Detached Dwelling;

(e) "Semi-Detached Dwelling" means a Building that is divided vertically into two (2) separate Dwelling Units;

(f) "Single Detached Dwelling" means a free-standing, separate, detached Building consisting of one (1) Dwelling Unit;

(g) "Townhouse" means a Building that is divided vertically into three (3) or more separate Dwelling Units and includes a row house;

a. "Back-to-Back Townhouse Dwelling" means a Building where each Dwelling Unit is divided vertically by common walls, including a common rear wall and common side wall, and has an independent entrance to the Dwelling Unit from

the outside accessed through the front yard, side yard or exterior side yard and does not have a rear yard;

b. "Cluster Townhouse" means a Townhouse situated on a Lot in such a way that at least one (1) Dwelling Unit does not have legal frontage on a public street;

c. "On-Street Townhouse" means a Townhouse where each Dwelling Unit is located on a separate lot and has legal frontage on a public street;

"Existing Industrial Building" means a Building used for or in connection with,

(a) manufacturing, producing, processing, storing or distributing something;

(b) research or development in connection with manufacturing, producing or processing something if the research or development is at the site where the manufacturing, production or processing takes place;

(c) retail sales by a manufacturer, producer or processor of something they manufactured, if the retail sales are at the site where the manufacturing, production or processing takes place;

(d) storage by a manufacturer, producer or processor of something they manufactured, , if the storage is at the site where the manufacturing, production, or processing takes place;

(e) office or administrative purposes, if they are,

(i) carried out with respect to manufacturing, producing, processing, storage or the distributing of something; and

(ii) in or attached to the building or structure used for that manufacturing, producing, or processing, storage or distribution;

provided that: (A) such industrial Building or Buildings existed on a lot in the City of Guelph on March 1, 1998, or are industrial Building or Buildings constructed and occupied pursuant to site plan approval under section 41 of the Planning Act subsequent to March 1, 1998, for which full Development Charges were paid; and (B) an Existing Industrial Building shall not include a Retail Warehouse;

"Garden Suite" see the definition of "Dwelling Unit";

"Grade" means the average level of finished ground adjoining a Building or structure at all exterior walls;

"Gross Floor Area" means:

(a) in the case of a Non-Residential Use Building, the total area of all Building floors above or below Grade measured between the outside surfaces of the exterior walls or between the outside surfaces of exterior walls, and includes the floor area of a Mezzanine; or

(b) in the case of a mixed-use Building including both Residential Uses and Non-Residential Uses, the total area of the non-residential portion thereof including all building floors above or below Grade measured between the outside surfaces of the exterior walls or between the outside surfaces of exterior walls and the centre line of party walls dividing a Non-Residential Use and a Residential Use, and includes the floor area of a Mezzanine;

"Live/Work Unit" means a Building or part of a Building which contains both a Dwelling Unit and a Non-Residential Use which share a common wall or floor, and allows for direct access between the Dwelling Unit and Non-Residential Use;

"Lodging House" means a Residential Use Building that is used or designed to provide five (5) or more Lodging Units, which may share common areas of the Building but do not appear to function as a single housekeeping unit, for hire or gain directly or indirectly to persons.

"Lodging Unit" means a room or suite of rooms in a Building designed or intended to be used for sleeping and living accommodation which is not normally accessible to all residents of the Building, and which does not have the exclusive use of both a kitchen and a bathroom, and does not include an Apartment, Accessory Apartment, or a room or suite of rooms within a Special Care/Special Dwelling;

"Local Board" has the same definition as "local board" as defined in the Act;

"Mezzanine" means a storey that forms a partial level of a building, such as a balcony

"Multiple Attached Dwelling" shall mean a Building other than a Single Detached Unit, Semi-Detached Unit, Apartment Building, Stacked Townhouse and Special Care/Special Dwelling/Lodging Unit

"Non-Discounted Services" means those Services described in section 2.1(a);

"Non-Residential Use" means land, Buildings or structures of any kind whatsoever used or designed or intended for a use other than a Residential Use;

"Owner" means the owner of land or a person who has made application for an approval for the Development of land for which a Development Charge may be imposed;

"Parking Structure" means a Building intended primarily for the temporary parking of vehicles as an Accessory Use to a Non-Residential Use or a Building intended to provide parking as a commercial enterprise.

"Place of Worship" means that part of a Building or structure that is exempt from taxation as a place of worship under the *Assessment Act*, R.S.O. 1990, c. A.31, as amended, or any successor thereto;

"Planning Act" means the *Planning Act,* R.S.O. 1990, c. P.13, as amended, or any successor thereto;

"Prescribed" means prescribed pursuant to the regulations made under the Act;

"Redevelopment" means the construction, erection or placing of one or more Buildings on land where all or part of a Building has previously been demolished on such land, or changing the use of a Building from a Residential Use to a Non-Residential Use or from a Non-Residential Use to a Residential Use, or changing a Building from one form of Residential Use to another form of Residential Use or from one form of Non-Residential Use to another form of Non-Residential Use and including any development or redevelopment requiring any of the actions described in section 3.4(a);

"Research Establishment means land, Building or Buildings which is/are used for scientific research, tests or investigations, data collection and manipulation or technical development of information, products or devices for scientific application;

"Residential Use" means land, Buildings or structures of any kind whatsoever used or designed or intended for use as living accommodations for one or more individuals, but does not include land, Buildings, or structures used or designed or intended for use as Short Term Accommodation;

"Retail Warehouse" means a Building used exclusively for the storage and/or distribution of goods destined for a retail or commercial market, and also includes self-storage facilities.

"Semi Detached Unit" see the definition of "Dwelling Unit"

"Service" means a service designated in section 2.1, and "Services" shall have a corresponding meaning;

"Short Term Accommodation" means a Building used or designed or intended for use as a hotel or bed and breakfast as these terms are defined in the Zoning By-Law;

"Single Detached Unit" see the definition of Dwelling Unit

"Special Care/Special Dwelling" means a Residential Use Building containing two (2) or more rooms or suites of rooms designed or intended to be used for sleeping and living accommodation that have a common entrance from street level:

a. Where the occupants have the right to use, in common, halls, stairs, yards, common rooms and accessory buildings;
b. Which may or may not have exclusive sanitary and/or culinary facilities;
c. That is designed to accommodate persons with specific needs, including, but not limited to, independent permanent living arrangements; and

d. Where support services such as meal preparation, grocery shopping, laundry, housekeeping, nursing, respite care and attendant services may be provided at various levels,

and includes, but is not limited to, retirement houses, nursing homes, group homes (including correctional group homes) and hospices;

"Stacked Townhouse" means one (1) Building or Structure containing two (2) Townhouses divided horizontally; one atop the other; in a building that is divided vertically into three (3) or more separate Dwelling Units.

"Townhouse" see the definition of "Dwelling Unit";

"University" means the University of Guelph established by *An Act to incorporate the University of Guelph*, S.O., 1964, c. 120, as amended, or any successor thereto;

"University Related Purposes" means those objects and purposes set out in section 3 of *An Act to incorporate the University of Guelph*, S.O. 1964, c. 120, as amended, or any successor thereto;

"Zoning By-Law" means City of Guelph By-law Number (1995)-14864, as amended, or any successor thereof.

2. DESIGNATION OF SERVICES

2.1 The two (2) categories of Services for which Development Charges are imposed under this By-law are as follows:

(a) Non-Discounted Services:

i. Water Services;
ii. Wastewater Services;
iii. Stormwater Services;
iv. Services related to a Highway and related (Facility and Vehicle/Equipment) Services;
v. Fire Protection Services;
vi. Police Services; and
vii. Transit Services

(b) Discounted Services:

i. Library Services;
ii. Indoor Recreation Services;
iii. Outdoor Recreation Services;
iv. Administration;
v. Ambulance Services;
vi. Provincial Offences Act Services;
vii. Health Services;
viii. Municipal Parking; and
ix. Waste Diversion Services

2.2 The components of the Services designated in section 2.1 are described in Schedule A.

3. APPLICATION OF BY-LAW RULES

3.1 Development Charges shall be payable in the amounts set out in this By-law where:

(a) the lands are located in the area described in section 3.2; and

(b) the Development requires any of the approvals set out in section 3.4(a).

Area to Which By-law Applies

3.2 Subject to section 3.3, this By-law applies to all lands in the City.

3.3. This By-law shall not apply to lands that are owned by and used for the purposes of:

(a) the City or a Local Board thereof;

(b) a Board of Education; or

(c) a municipality, or a Local Board of the County of Wellington.

Approvals for Development

3.4 (a) Development Charges shall be imposed in accordance with this By-law on all Development which requires:

(i) the passing of a Zoning By-Law or of an amendment to a Zoning By-Law under section 34 of the *Planning Act*;
(ii) the approval of a minor variance under section 45 of the *Planning Act*;
(iii) a conveyance of land to which a by-law passed under subsection 50(7) of the *Planning Act* applies;
(iv) the approval of a plan of subdivision under section 51 of the *Planning Act*;
(v) a consent under section 53 of the *Planning Act*;
(vi) the approval of a description under section 9 of the *Condominium Act, 1998,* SO 1998, c 19, as amended, or any successor thereto; or
(vii) the issuing of a permit under the *Building Code Act* in relation to a building or structure.

(b) Despite section 3.4(a) of this By-law, Development Charges shall not be imposed on Development that requires one of the actions described in section 3.4(a) if the only effect of the action is to:

(i) permit the enlargement of an existing Dwelling Unit;
(ii) permit the creation of up to two (2) additional Dwelling Units as Prescribed under section 2(3) of the Act, subject to the Prescribed restrictions, in Prescribed classes of existing residential buildings; or
(iii) permit the creation of a second dwelling, subject to the Prescribed restrictions, in Prescribed classes of new residential buildings.

(c) No more than one (1) Development Charge for each Service shall be imposed upon any Development to which this By-law applies even though two (2) or more of the actions described in section 3.4(a) are required for the Development.

(c) Despite section 3.4(c), if two (2) or more of the actions described in section 3.4(a) occur at different times, additional Development Charges shall be imposed if the subsequent action has the effect of increasing the need for Services.

Exemptions

3.5.1 Notwithstanding the provisions of this By-law, Development Charges shall not be imposed with respect to:

(a) Development of land, buildings or structures for University Related Purposes within the University defined area as set out in Schedule C;

(b) land, buildings or structures outside the defined area as set out in Schedule C, which are now owned directly or indirectly by the University or on behalf of the University or which may be acquired by the University and which are developed or occupied for University Related Purposes, provided that, where only a part of such land, buildings or structures are so developed, then only that part shall be exempt from the Development Charges specified under this By-law;

(c) Development for a Place of Worship or for the purposes of a cemetery or burial site exempt from taxation under the Assessment Act;

(d) Development by a college established under the *Ontario Colleges of Applied Arts and Technology Act, 2002*, S.O. 2002, c.8, Sched. F, as amended, or any successor thereto;

(e) Development for temporary Non-Residential Uses permitted pursuant to section 39 of the Planning Act;

(f) Development, solely for the purposes of creating or adding an Accessory Use or accessory structure not exceeding 10 square metres of Gross Floor Area;

(g) Development of or by a hospital receiving aid under the *Public Hospitals Act*, R.S.O. 1990, c. P.40, as amended, or any successor thereto;

(h) The exempt portion of an enlargement of the Gross Floor Area of an Existing Industrial Building in accordance with section 4 of the Act, subject to section 3.5.2 of this By-law;

(i) Development of a Parking Structure.

3.5.2 For the purposes of the exemption for the enlargement of Existing Industrial Buildings set out in section 3.5.1(h) of this By-law, the following provisions shall apply:

(a) there shall be an exemption from the payment of Development Charges for one or more enlargements of an Existing Industrial Building, up to a maximum of fifty per cent (50%) of the Gross Floor Area before the first enlargement for which an exemption from the payment of Development Charges was granted pursuant to the Act or under this section of the By-law or any predecessor hereto;

(b) Development Charges shall be imposed in the amounts set out in this By-law with respect to the amount of floor area of an enlargement that results in the Gross Floor Area of the industrial building being increased by greater than fifty per cent (50%) of the Gross Floor Area of the Existing Industrial Building; and,

(d) for greater clarity, Research Establishments and Computer Establishments are not industrial uses of land, buildings or structures under this By-law and do not qualify for the exemption under section 3.5.1(h).

Amount of Charges

Residential

3.6 Where a Development Charge is imposed for Development of a Residential Use, the amount of the Development Charges shall be as set out in the appropriate "Residential" column of Schedule B, for the Residential Uses, including any Dwelling Unit(s) accessory to a Non-Residential Use and, in the case of a mixed use building or structure, on the Residential Uses in the mixed use building or structure, including the residential component of a Live/Work Unit, according to the type of residential unit and calculated with respect to each of the Services according to the type of Residential Use.

Non-Residential

3.7 Where a Development Charge is imposed for Development of a Non-Residential Use, the amount of the Development Charge shall be as set out in the "Non-Residential" column of Schedule B for the Non-Residential Uses, and in the case of a mixed-use building, on the non-residential component of the mixed-use building, including the non-residential component of a Live/Work unit, according to the type and gross floor area of the non-residential component.

Reduction of Development Charges for Redevelopment

3.8 Despite any other provisions of this By-law, where a Building or structure existing on land within 48 months prior to the date that a Development Charge becomes payable for a Redevelopment on the same land was, or is to be, demolished, in whole or in part, or converted from one principal use to another principal use on the same land, the Development Charge otherwise payable with respect to such Redevelopment shall be reduced by the following amounts:

(a) in the case of a Residential Use Building or in the case of Residential Uses in a mixed-use Building, an amount calculated by multiplying the applicable Development Charge under section 3.6 by the number, according to type, of Dwelling Units that have been or will be destroyed, demolished or converted to another principal use; and

(b) in the case of a Non-Residential Use Building or in the case of the Non-Residential Uses in a mixed-use Building, an amount calculated by multiplying the applicable Development Charge under sections 3.7 by the Gross Floor Area that has been or will be demolished or converted to another principal use;

provided that such amounts shall not exceed, in total, the amount of the Development Charge otherwise payable with respect to the Redevelopment. For greater certainty, any amount of the reductions set out above that exceed the amount of the Development Charge otherwise payable with respect to the Redevelopment shall be reduced to zero and shall not be transferred to any other Development or Redevelopment.

3.9 For the purposes of determining the 48-month period referred to in section 3.8, the date that a Building is deemed to be demolished shall be the earlier of:

(a) the date such building or structure was demolished, destroyed or rendered uninhabitable; or

(b) if the former building or structure was demolished pursuant to a demolition permit issued before it was destroyed or became uninhabitable, the date the demolition permit was issued.

3.10 The reduction of Development Charges referred to in section 3.8 does not apply where the demolished Building, or any part thereof, when originally constructed was exempt from the payment of Development Charges pursuant to this By-law, or any predecessor thereto.

Time of Payment of Development Charges

3.11 Development Charges imposed under this By-law are calculated, payable, and collected upon issuance of a building permit for the Development.

3.12 Despite section 3.11, Council, from time to time and at any time, may enter into agreements providing for all or any part of a development charge to be paid before or after it would otherwise be payable, in accordance with section 27 of the Act.

Transition, Time of Payment:

3.13 (a) If, at the time of issuance of a building permit or permits in regard to a lot or block on a plan of subdivision for which payments have been made to the City pursuant to a previous By-law, and:

(i) the type of Dwelling Unit for which the building permit or permits are being issued is different from that used for the calculation and payment under that By-law; and
(ii) there has been no change in the zoning affecting such lot or block; and
(iii) the Development Charges for the type of Dwelling Unit for which the building permit or permits are being issued were lesser at the time that payments were made pursuant to the previous By-law than for the type of Dwelling Unit used to calculate the payment,

an additional payment to the City is required for the Services paid for pursuant to the previous By-law, which additional payment, in regard to such different unit types, shall be the difference between the Development Charges for those Services in respect to the type of Dwelling Unit for which the building permit or permits are being issued, calculated as at the date of issuance of the building permit or permits, and the payment for those Services previously collected in regard thereto, adjusted in accordance with section 5 of this By-law.

(b) If, at the time of issuance of a building permit or permits in regard to a lot or block on a plan of subdivision for which payments have been made pursuant to a previous By-law, and:

(i) the total number of Dwelling Units of a particular type for which the building permit or permits have been or are being issued is greater, on a cumulative basis, than that used for the calculation and payment under the previous By-law; and
(ii) there has been no change in the zoning affecting such lot or block,

an additional payment to the City is required for the Services paid for pursuant to the previous By-law, which additional payment shall be calculated on the basis of the number of additional Dwelling Units at the rate for those Services prevailing at the date of issuance of the building permit or permits for such Dwelling Units.

(c) If, at the time of issuance of a building permit or permits in regard to a lot or block on a plan of subdivision for which payments have been made pursuant to a previous By-law, and:

(i) the type of Dwelling Unit for which the building permit or permits are being issued is different than that used for the calculation and payment under the previous By-law; and
(ii) there has been no change in the zoning affecting such lot or block; and
(iii) the payment made for the type of Dwelling Unit for which building permits or permits are being issued were greater at the time that payments were made pursuant to the previous By-law than for the type of Dwelling Unit used to calculate the payment,

a refund shall be paid by the City for the Services paid for pursuant to the previous By-law in regard to such different unit types, which refund shall be the difference between the payment previously collected by the City for the Services, adjusted in accordance with section 5 of this By-law to the date of issuance of the building permit or permits, and the Development Charges for those Services in respect to the type of Dwelling Unit for which building permits are being issued, calculated as at the date of issuance of the building permit or permits.

(d) If, at the time of issuance of a building permit or permits in regard to a lot or block on a plan of subdivision for which payments have been made pursuant to a previous By-law, and

(i) the total number of Dwelling Units of a particular type for which the building permit or permits have been or are being issued is less, on a cumulative basis, than that used for the calculation and payment under the previous By-law, and
(ii) there has been no change in the zoning affecting such lot or block,

a refund shall be paid by the City for the Services paid for pursuant to section 3.11 of the previous By-law, which refund shall be calculated on the basis of the number of fewer Dwelling Units at the rate for those Services prevailing at the date of issuance of the building permit or permits for such Dwelling Units.

3.14 Despite sections 3.13 (c) and (d), a refund shall not exceed the amount of the payment actually made to the City for the Services under a previous By-law.

4. PAYMENT BY SERVICES

4.1 Despite the payment required under section 3.11, Council may agree in accordance with the Act to allow a person to perform work that relates to a Service to which this By-law relates, and shall give the person a credit towards the Development Charge in accordance with that agreement.

4.2 The amount of the credit referred to in section 4.1 is the reasonable cost of doing the work as agreed by the City and the person to be given the credit.

4.3 Despite sections 4.1 and 4.2, no credit may be given for any part of the cost of work that relates to an increase in the level of service that exceeds the average level of service as calculated pursuant to the Act.

4.4 Any credit referred to in section 4.1 shall be given at such time, and in relation to such Service or Services as set out in the agreement, and as permitted under the Act.

4.5 Credits referred to in section 4.1 may be transferable by the City, subject to the terms of the agreement and as permitted under the Act.

5. INDEXING

Development Charges pursuant to this By-law shall be adjusted annually, without amendment to this By-law, commencing on the first anniversary date of this By-law coming into effect and on each anniversary date thereafter, in accordance with the index prescribed in the applicable regulation made under the Act.

6. SCHEDULES

The following schedules shall form part of this By-law:

Schedule A	-	Components of Services Designated in Section 2.1
Schedule B	-	Residential and Non-Residential Development Charges
Schedule C	-	University of Guelph "Defined Areas"

7. CONFLICTS

7.1 Where the City and an Owner or former Owner have entered into an agreement with respect to a Development Charge or to provide a credit for the performance of work that relates to a Service to which this By-law or a previous By-law relates, for any land or Development within the area to which this By-law applies, and a conflict exists between the provisions of this By-law and such agreement, the provisions of the agreement shall prevail to the extent that there is a conflict.

7.2 Notwithstanding section 7.1, where a Development which is the subject of an agreement to which section 7.1 applies is subsequently the subject of one or more of the actions described in section 3.4(a), an additional Development Charge in respect of the Development permitted by the action shall be calculated, payable and collected in accordance with the provisions of this By-law if the Development has the effect of increasing the need for Services, unless such agreement provides otherwise.

8. SEVERABILITY

If, for any reason, any provision of this By-law is held to be invalid, it is hereby declared to be the intention of Council that all the remainder of this By-law shall continue in full force and effect until repealed, re-enacted, amended or modified.

9. DATE BY-LAW IN FORCE

This By-law shall come into effect at 12:01 A.M. on **March 2, 2019.**

10. DATE BY-LAW EXPIRES

This By-law will expire at 12:01 A.M. on **March 2, 2024** unless it is repealed by Council at an earlier date.

11. EXISTING BY-LAW REPEALED

By-law Number (2014)-19692 is hereby repealed as of the date and time of this By-law coming into effect.

PASSED this ELEVENTH day of February, 2019

Cam Guthrie - Mayor

Dylan McMahon– Deputy Clerk

3

An Act to incorporate the University of Guelph

Statues of Ontario, 1964

CHAPTER 120

as amended by

1965, Chapter 136.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

• • •

Objects and purposes of University

3. The objects and purposes of the University are,

(*a*) the advancement of learning and the dissemination of knowledge, including, without limiting the generality of the foregoing, the advancement of learning and the dissemination of knowledge respecting agriculture; and

(*b*) the intellectual, social, moral and physical development of its members and the betterment of society. 1964, c. 120. s, 3; 1965, c. 136, s. 1.

• • •

Tax exemption

19. The property vested in the University and any lands and premises leased to and occupied by the University are not liable to taxation for provincial, municipal or school purposes, and are exempt from every description of taxation so long as the same are actually used and occupied for the purposes of the University. 1964, c. 120, s. 19.

4

Ministry of Training, Colleges and Universities Act

R.S.O. 1990, CHAPTER M.19

CURRENT Consolidation period: December 16, 2024 - e-Laws currency date (April 17, 2025)

...

Exemption, development charges

6.1 (1) Land vested in or leased to a publicly-assisted university is exempt from development charges imposed under the *Development Charges Act, 1997* if the development in respect of which development charges would otherwise be payable is intended to be occupied and used by the university. 2020, c. 34, Sched. 10, s. 1; 2022, c. 22, Sched. 1, s. 4.

...

Same

(3) Nothing in this section limits the application of an exemption from development charges provided in any other Act with respect to a university described in subsection (1). 2020, c. 34, Sched. 10, s. 1.

5

UNIVERSITY OF GUELPH

-and-

601 SCOTTSDALE PHASE 2 GP INC., as general partner for and on behalf of 601 SCOTTSDALE PHASE 2 LP

LAND LEASE

Guelph

THIS LEASE, dated the 1 day of October, 2024, is made by the Landlord and Tenant named herein who, in consideration of the rents, covenants and agreements herein contained, agree as follows:

ARTICLE 1
BASIC TERMS, DEFINITIONS, INTERPRETATION

1.1 Summary of Basic Terms-

(a)	Landlord:	**UNIVERSITY OF GUELPH** Real Estate Division 150 Research Lane, Suite 310 Guelph, ON N1H 4T2 Email: kimber@uoguelph.ca With a copy to: VP Finance & Operations 50 Stone Road East, UC 4ffi Floor Guelph, ON N1G 2W1 Email: vpfo@uoguelph.ca
(b)	Tenant:	**601 SCOTTSDALE PHASE 2 GP INC., as general partner for and on behalf of 601 SCOTTSDALE PHASE 2 LP** Forum House at Brookfield Place 181 Bay Street, East Podium, Second Floor Toronto, ON M5J 2T3 Attention: Aly Damji Email: alyd@forumam.com
(c)	Term:	commencing October 1, 2024, and expiring on August 23, 2041, plus options and other potential modifications as set out in this Lease
(d)	Rental Commencement Date:	October 1, 2024
(e)	Use:	A student residence and ancillary uses operated by the Tenant for the sole benefit of students of the Landlord.

The terms set out above are intended to be only a summary of certain basic terms of this Lease. In the event of any inconsistency between such terms and the terms hereinafter set out in this Lease, the latter shall govern.

...

ARTICLE 3
CONSTRUCTION

3.1 Approval of Improvements

Subject to Section 3.8, no Improvements and no addition, change or alteration thereto, for which the total cost in each case is greater than $500,000.00, shall be commenced or constructed until Design Drawings therefor and working drawings in conformity with such Design Drawings have been approved in writing by the Landlord, such consent not to be unreasonably withheld, and deemed to have been given should the Landlord not respond within 15 business days after written request for approval. The Landlord shall acknowledge receipt of the Tenant's request within 10 business days.

3.2 Plan Review

When reviewing drawings submitted, the Landlord will consider the same in relation to the impact of the proposed Improvements on any other properties owned by the Landlord.

3.3 Completion of Improvements

All Improvements and all additions, changes or alterations thereto, shall be constructed:

(a) at the sole expense of the Tenant;

(b) in a good and workmanlike manner;

(c) materially in accordance with the Design Drawings and working drawings previously approved in writing by the Landlord;

(d) in a diligent manner and completed as expeditiously as possible;

(e) in accordance with all Applicable Laws;

(f) under the proper and diligent supervision of the Tenant's architect or other qualified professional or contractor; and

(g) subject to the reasonable regulation, supervision, control and inspection of the Landlord.

...

ARTICLE 5
PAYMENT OF IMPOSITIONS AND OPERATING COSTS

5.1 Payment of Impositions

During the Term hereof the Tenant will pay promptly when due the Impositions to the taxing authorities or other entities or Persons to whom the same must be paid.

5.2 Appeal of Taxes

The Landlord and Tenant acknowledge that the Building and Improvements are to be used and occupied for the Use. The Landlord will not object to the Tenant's efforts to obtain and maintain the property tax exemption of the Demised Land. In the event the Demised Land is determined to be taxable, the Tenant may pursue all avenues available to it to contest such determination, at its sole expense. Further, in the event of taxable assessments being imposed, the Tenant may appeal the imposition of any taxes, rates, duties, levies and assessments payable by it to the taxing authorities and may postpone payment thereof to the extent permitted by law if the Tenant is diligently proceeding with an appeal, provided that (i) such postponement does not render the Property, or any part thereof, subject to sale or forfeiture and does not render the Landlord liable to prosecution, penalty, fine or other liability, and (ii) upon final determination of such appeal, the Tenant promptly pays the amount determined to be payable.

•••

ARTICLE 7
REPAIRS AND MAINTENANCE

7.1 Operation of the Property

The Tenant hereby assumes the full and sole responsibility for the condition, operation, repair, replacement, maintenance and management of the Property.

7.2 Maintenance by Tenant

The Tenant shall at its sole cost, strictly in accordance with Design Drawings approved by the Landlord hereunder and subject at all times to reasonable wear and tear, repair, maintain, renew, rebuild, replace, paint, put and keep the Improvements and every part thereof, including the footings, foundation, structural columns, beams, structural subfloors, bearing walls, exterior walls, windows and roofs of the Buildings and the fences, driveways, sidewalks, parking areas, landscaping and lighting in such good order and condition as they would be kept by a careful and prudent owner of a similar first class project and shall promptly make all needed repairs, replacements, alterations, additions, changes, plantings, substitutions and improvements, ordinary or extraordinary, foreseen or unforeseen, structural or otherwise. The Landlord may enter the Property to view the condition thereof and the Tenant shall maintain and repair, in accordance with the foregoing, according to notice in writing from the Landlord. At the expiration or other termination of this Lease, the Tenant shall surrender and deliver up the Demised Land with the Improvements thereon in the condition that the same are required to be kept pursuant to the provisions hereof.

•••

ARTICLE 9
USE OF PROPERTY

9.1 Use

The Property shall be used, operated and maintained by the Tenant and any permitted subtenant (as hereinafter provided for) solely for the Use in a first class and reputable manner. For clarity, the permitted use of the Property is for a student residence and ancillary uses operated by the Tenant for the sole benefit of students of the Landlord. The Property may not be used for any other purpose whatsoever without the prior written approval of the Landlord, which approval may be unreasonably withheld.

...

15.9 No Partnership

The Landlord and the Tenant hereby expressly declare that it is neither their intention nor their agreement that this Lease or any arrangements between them shall constitute or be deemed to constitute the parties as partners, joint venturers or agents for each other.

...

15.12 No Partnership, etc.

Notwithstanding anything else contained in this Lease, at no time shall the Landlord be considered to be a partner, co-venturer, operator, manager, etc., of or with the Tenant or with respect to the operation of the student residences.

[Remainder of page intentionally left blank]

6

UNIVERSITY of GUELPH

OFFICE of THE VICE-PRESIDENT
FINANCE & OPERATIONS

August 4, 2023

To Whom It May Concern,

I am writing this letter to highlight the relationship that has been forged between the University of Guelph and Forum Asset Management. As a representative of the University, I am pleased to provide a strong endorsement of Forum Asset Management and the contributions they have made to the student housing situation in Guelph.

Forum Asset Management's ongoing involvement with the University of Guelph started with a ground lease arrangement, on which Forum renovated and transformed an antiquated hotel into a student residence. Forum Asset Management is committed to addressing the pressing need for student housing and has provided some alleviation to the ongoing housing challenges faced by our students.

As with our own student residences, we have found that the communal spaces, shared facilities, and focus on student experience that Forum has continuously emphasized in their student residence building, contribute to a sense of community and belonging for our students and assists them with developing socially and academically.

If you require any further information or would like to discuss this reference in more detail, please feel free to contact me.

Sincerely,

S. Rasheed

Sharmilla Rasheed
Vice President (Finance & Operations)

Office of the Vice President (Finance & Operations)
50 Stone Road East
Guelph, Ontario, Canada N1G 2W1
T 519-824-4120 x52586
vpfo@uoguelph.ca
uoguelph.ca

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UNIVERSITY of GUELPH

April 30, 2024

Aly Damji
Managing Partner
Forum Asset Management

RE: 601 Scottsdale Drive, Student Residence and Ancillary Uses

As the landlord of 601 Scottsdale Drive, the University of Guelph confirms the use of the property as per Article 9, Section 9.1 of the Land Lease, is as follows:

> *"The Property shall be used, operated, and maintained by the Tenant and any permitted subtenant (as hereinafter provided for) solely for the Use in a first class and reputable manner. For clarity, the permitted use of the Property is for a student residence and ancillary uses operated by the Tenant for the sole benefit of students of the Landlord. The Property may not be used for any other purpose whatsoever without the prior written approval of the Landlord, which approval may be unreasonably withheld."*

The student housing provided at 601 Scottsdale Drive supports the provision of student housing accommodation to University of Guelph students in the City of Guelph.

Sincerely,

S. Rasheed

Sharmilla Rasheed
Vice President (Finance and Operations)
University of Guelph

8

2022 ONCA 741
Ontario Court of Appeal

Stelmach Project Management Ltd. v. Kingston (City)

2022 CarswellOnt 15458, 2022 ONCA 741, 164 O.R. (3d) 442, 2022 A.C.W.S. 4307, 35 M.P.L.R. (6th) 1

Stelmach Project Management Ltd. and 1880551 Ontario Ltd. (Applicants / Appellant) and City of Kingston (Respondent / Respondent)

K. Feldman, M. Tulloch, B.W. Miller JJ.A.

Heard: March 4, 2022
Judgment: October 31, 2022
Docket: CA C69676

Proceedings: affirming *Stelmach Project Management Ltd. v. Kingston (City)* (2021), 20 M.P.L.R. (6th) 175, 2021 ONSC 43432021 CarswellOnt 9149, Sylvia Corthorn J. (Ont. S.C.J.)

Counsel: Michael S. Polowin, Jacob A. Polowin, for Appellant
Tony Fleming, for Respondent

***B.W. Miller J.A.*:**

1 New housing development brings with it the need for additional municipal infrastructure such as sewers, roads, emergency services, and recreational facilities. New infrastructure comes at a cost, and municipalities impose these costs on the developing landowners rather than spreading it among existing ratepayers. The legal power to impose fees and charges of this nature has been given to municipalities by provincial legislation, which also prescribes how this power can be exercised. This appeal concerns the legality of a by-law passed by the City of Kingston under the *Municipal Act, 2001*, S.O. 2001, c. 25, imposing charges for water and wastewater infrastructure on the appellant.

2 The appellant is a land developer who built and owns two multi-unit residential properties in the City of Kingston. It has either paid or is required to pay $410,000 in impost fees to the City to cover the City's capital costs associated with the installation of water and sewer infrastructure needed to service the two buildings. The City imposed the impost fees under By-law 2014-136 (the "Impost By-law"), which City council passed under the authority of s. 391 of the *Municipal Act, 2001*. The appellant challenged the legality of the Impost By-law on various grounds. The application judge rejected the appellant's arguments and upheld the Impost By-Law.

3 The appellant argued below that the Impost By-law was illegal because the City could only impose fees of this nature under the *Development Charges Act, 1997*, S.O. 1997, c. 27 ("*DCA*") and not under the *Municipal Act, 2001*. The application judge rejected this argument, and the appellant has raised a new argument on appeal: that because of the operation of the anti-circumvention provision in s. 15 of the *Municipal Act, 2001*, the City could only have passed the Impost By-law if it had provided the same procedural protections provided under the *DCA*, which it did not. The appellant argues that the City's compliance with s. 15 was imperfect. Notwithstanding that it provided the requisite studies, heard submissions, and followed the methodology set out in the *DCA*, the City did not provide the appellant with a right of appeal to the (then) Ontario Municipal Board. As rights of appeal to the OMB were controlled by legislation, not only did the City not provide this important procedural protection, it did not have the power to do so. Because the City did not comply with the requirements of s. 15(1), the appellant argues, the Impost By-law is illegal.

4 The appellant also renews its argument in the alternative that: (1) s. 394(1)(e) of the *Municipal Act, 2001* prohibits the City from imposing fees in respect of natural resources; (2) water and waste water are natural resources; (3) the Impost By-law therefore imposes a fee in respect of a natural resource; and (4) the Impost By-law is therefore illegal.

5 The appellant argues that as a consequence of the illegality of the Impost By-law, it is entitled to a remedy on the basis of unjust enrichment.

6 As I explain below, I do not agree that the application judge erred in her analysis. With respect to the appellant's new argument under s. 15(1), I would exercise this court's discretion to hear the argument, but nevertheless dismiss it. In what follows, in addition to providing a brief factual background, it will be necessary to set out in some detail the various statutory provisions at issue in this appeal before turning to the issues raised by the appellant.

Factual and legislative background

7 It is uncontroversial that at the time the Impost By-law was passed, the more common practice among municipalities in Ontario was to fund wastewater and sewer infrastructure through charges under the *DCA*. Indeed, that is now the City's current practice, although there is nothing in the record to indicate the reason for the change, and the City maintains that it has the authority to impose the fees under either statute. At the time the City passed the Impost By-law, it also passed a by-law under the *DCA* imposing a charge to cover anticipated capital costs related to specific services including police and fire protection, roads, parks and recreation, library, transit, affordable housing, and administration. In respect of the *DCA* By-law, the City provided the panoply of procedures required by the *DCA* including providing a background study, holding public consultations, and following the prescribed methodology for calculating the charge. The *DCA* also provides that the by-law must be renewed every 5 years, supported by a new background study, and providing for a right of appeal to the OMB.

8 With respect to the Impost By-law, the City relied on the same background study as it did for the *DCA* By-law, and followed all of the same procedures. The lone exception is that it could not provide a right of appeal to the OMB.

The relevant legislation

9 The application judge comprehensively surveyed the relevant statutes and legislative history at paragraphs 31-71 of her reasons, and for the more limited purposes of this appeal only some of that work need be repeated here.

10 The two statutes central to this appeal are the *Municipal Act, 2001* and the *Development Charges Act, 1997*. The two issues raised on this appeal relate to the interpretation and interrelationship of these two statutes. But because both statutes stand within an historical legislative context, it is necessary to consider some of the statutes and municipal practices that preceded them.

Lot Levies

11 Prior to statutory reform in the late 1980s, municipalities in Ontario commonly raised the necessary revenue for development related infrastructure by imposing "lot levies" on landowners who sought development approvals. These levies were established through contracts between municipalities and the landowners and were a condition to obtaining the development approval. As explained in *Mississauga (City) v. Erin Mills Corp.*, (2004), 71 O.R. (3d) 397 (C.A.), at para. 10, the lot levy regime left each municipality to implement its own policy "with a resulting diversity that caused confusion and dissatisfaction across the province."

12 Concurrent with the lot levy practice, municipalities also had the power, since at least 1949, to charge developing landowners for deferred benefits from water and sewage works: *Municipal Act*, S.O. 1949, c. 61, s. 11; compare *Municipal Act*, R.S.O. 1990, c. M.45, s. 221, which granted the municipality authority to impose fees to offset capital costs for sewage and water infrastructure.

The Development Charges Act, 1989 and amendments

13 The *Development Charges Act, 1989*, S.O. 1989, c. 58, was intended to replace the lot levy system. It was later amended as the *Development Charges Act, 1997*. This court explained the purpose of the new legislation in *Ontario Cancer Treatment and Research Foundation v. Ottawa (City)*, (1998), 38 O.R. (3d) 224 (C.A.), *per* Osborne J.A.:

> It was intended to bring uniformity and order into development -- growth-related municipal costs. The DCA replaced, among other things, the existing lot levy system. By late 1989 lot levies had increased substantially, as municipal corporations grappled with reduced grants and increased growth-related costs and it was thought, at a political level, that a new system had to be devised to permit municipalities to recover growth-related capital costs. The new system is set out in the DCA. The underlying economic philosophy of the DCA is that growth (development) should pay for the infrastructure costs that it generates. Such costs, generally speaking, should not be borne by existing residents.

14 Section 2 of the *DCA* provided the express authority for a municipality to impose development charges: John Mascarin and Paul De Francesca, *Annotated Land Development Agreements*, loose-leaf (2022 Release 3), (Toronto: Thomson Reuters Canada Ltd., 2000) at §: 6.5. It also prescribed the circumstances in which those charges can be imposed. Subsections 2(1) and (2) currently provide:

> **2** (1) The council of a municipality may by by-law impose development charges against land to pay for increased capital costs required because of increased needs for services arising from development of the area to which the by-law applies.
>
> (2) A development charge may be imposed only for development that requires,
>
> (a) the passing of a zoning by-law or of an amendment to a zoning by-law under section 34 of the *Planning Act*;
>
> (b) the approval of a minor variance under section 45 of the *Planning Act*;
>
> (c) a conveyance of land to which a by-law passed under subsection 50 (7) of the *Planning Act* applies;
>
> (d) the approval of a plan of subdivision under section 51 of the *Planning Act*;
>
> (e) a consent under section 53 of the *Planning Act*;
>
> (f) the approval of a description under section 9 of the *Condominium Act, 1998*; or
>
> (g) the issuing of a permit under the *Building Code Act, 1992* in relation to a building or structure.

15 Section 5 of the *DCA* sets out a method a municipal council must follow to determine the quantum of development charges that may be imposed, and the procedures that must be followed in developing the by-law. The method requires, for example, that council assess and calculate the increase in need for services attributable to the anticipated development (s. 5(1)(2)) that cannot be met using excess capacity (s. 5(1)(5)). With respect to procedure, council is required to complete a development charge background study before it passes a development charge by-law (s. 10(1)), make the study public, and hold a public meeting (s. 12). Section 14 provides a right of appeal of a development charge by-law to the Ontario Municipal Board, now the Ontario Land Tribunal.

16 The implementation of the *DCA* in 1989, did not, however, affect other tools municipalities possessed for raising revenue. Significantly, it made no changes to what was then s. 221 of the *Municipal Act*. As Robert Macaulay and Robert Doumani note in *Ontario Land Development: Legislation and Practice*, loose-leaf (1999 Release 3), (Scarborough, Ont.: Thomson Professional Publishing Canada, 1991) at §: 5.3, there is no reference to s. 221 of the *Municipal Act* in the *DCA* and the fact that a municipality could levy a special charge to pay for sewer and water works was not precluded by the *DCA*. They go on to note that "there cannot be two collections for the same purpose and if works are to be financed through this section of the *Municipal Act*, they ought not to be included within the growth demand of development charges."

Savings and Restructuring Act, 1996

17 In 1996, the *Municipal Act* was amended by means of the *Savings and Restructuring Act, 1996*, S.O. 1996, c. 1. That Act added s. 220.1, the predecessor to the current s. 391, which governs the imposition of fees and charges.

***Municipal Act, 2001* and subsequent amendments**

18 As this court explained in *Croplife Canada v. Toronto (City)*, (2005), 75 O.R. (3d) 357 (C.A.), leave to appeal ref'd, [2005] S.C.C.A. No. 329, the *Municipal Act, 2001* constituted a significant change in the province's approach to municipal powers, shifting from a prescriptive approach to a generous category or "sphere"-based approach, *per* Feldman J.A.:

> [6] The *Municipal Act, 2001* . . . was the first overhaul of the old Act and its predecessors in 150 years. The purpose of creating a new Act was to give municipalities "the tools they need to tackle the challenges of governing in the 21st century" (Ontario Legislative Assembly, *Official Report of Debates (Hansard)*, 53 (18 October 2001) at 1350 (Hon. Chris Hodgson)), including more authority, accountability and flexibility so that municipal governments would be able to deliver services as they saw fit.
>
> [7] One of the ways in which the new Act introduces more flexibility is by giving municipalities two kinds of powers. Part II of the new Act, for the first time, gives municipalities the power of a natural person (s. 8) and as well, ten broad "spheres of jurisdiction" (s. 11) within which municipal councils have wide discretion to enact by-laws. Part III of the new Act gives municipalities specifically defined by-law making powers, as under the old Act.

19 The broad "spheres of jurisdiction" are set out in Part II of the *Municipal Act, 2001*, headed "General Municipal Powers". Within this part, s. 10(2) confers on single-tier municipalities such as Kingston the general power to pass by-laws for 11 enumerated purposes considered necessary or desirable for the public good. Relevant to this appeal, these purposes include, in s. 10(2)(7), the power to pass by-laws in respect of services a municipality is authorized to provide.

20 Part III, headed "Specific Municipal Powers" sets out specific municipal powers to make by-laws addressing a litany of matters such as highways, transportation, waste management, public utilities, and health and safety. A frequent verbal formulation used in the drafting of these provisions has them begin with the statement "[w]ithout limiting sections 9, 10 and 11, a municipality may pass by-laws . . . " This convention suggests that these specific powers are, in a sense, elaborations or specifications of the more general "spheres of jurisdiction" catalogued in Part II. The general powers co-exist with specific powers which may restrict or enlarge the broad general powers in s. 10 or set out requirements or procedures to be followed in exercising those general powers: John Mascarin and Christopher J. Williams, *Ontario Municipal Act & Commentary*, 2023 ed. (Markham: LexisNexis Canada Inc., 2022) at pp. 41-42.

21 Section 15, included in Part II under the heading, "Restrictions Affecting Municipal Powers", codifies one aspect of the common law rule against circumvention:

> **Specific powers, by-laws under general powers**
>
> **15**(1) If a municipality has power to pass a by-law under section 9, 10 or 11 and also under a specific provision of this or any other Act, the power conferred by section 9, 10 or 11 is subject to any procedural requirements, including conditions, approvals and appeals, that apply to the power and any limits on the power contained in the specific provision. 2001, c. 25, s. 15 (1); 2006, c. 32, Sched. A, s. 11 (1).

22 Part XII, headed "Fees and Charges", defines "fee or charge" to include a fee or charge imposed under ss. 9, 10, and 11. It continues, under s. 391, the user fee provisions first enacted in s. 220.1 of the *Savings and Restructuring Act, 1996* and establishes that municipalities have the authority to impose fees and charges "[d]espite any Act." Section 391(d) provided the power to charge for deferred benefits from water and sewage capital works, expressly referencing sewage and water works:

> The council of a local municipality, in authorizing the construction of sewage works or water works, may be by-law impose a sewer rate or water works rate upon owners or occupants of land who derive or will or may derive a benefit therefrom sufficient to pay all or such portion of the capital costs of the works as the by-law may specify.

23 This deferred benefit provision was later replaced (by way of *The Municipal Statute Law Amendment Act, 2002*, S.O. 2002, c. 17) with s. 391(2), which read:

> **Deferred Benefit**
>
> (2) A fee or charge imposed under subsection (1) for capital costs related to sewage or water services or activities may be imposed on persons not receiving an immediate benefit from the services or activities but who will receive a benefit at some later point in time.

24 The express reference to "capital costs related to sewage or water services" was removed in amendments from the *Municipal Statute Law Amendment Act, 2006*, S.O. 2006, c. 32, which also added the introductory phrase "without limiting sections 9, 10 and 11". Thus, the version in effect at the time of the Impost By-law read:

> **By-laws re: fees and charges**
>
> **391** (1) Without limiting sections 9, 10 and 11, those sections authorize a municipality to impose fees or charges on persons,
>
> (a) for services or activities provided or done by or on behalf of it;
>
> . . .
>
> **Deferred benefit**
>
> (2) A fee or charge imposed for capital costs related to services or activities may be imposed on persons not receiving an immediate benefit from the services or activities but who will receive a benefit at some later point in time. 2006, c. 32, Sched. A, s. 163 (2).
>
> . . .
>
> **Conflict**
>
> (5) In the event of a conflict between a fee or charge by-law and this Act, other than this Part, or any other Act or regulation made under any other Act, the by-law prevails. 2006, c. 32, Sched. A, s. 163 (3).

25 Section 391 also provides express limits on the power of municipalities to impose fees and charges. Of relevance to this appeal is s. 394(1)(e):

> No fee or charge by-law shall impose a fee or charge that is based on, is in respect of or is computed by reference to,
>
> . . .
>
> (e) the generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources.

ISSUE ONE — The rule against circumvention

The application judge's reasons

26 The application judge held that the City was permitted to impose fees for the growth-related capital costs of water and sewer infrastructure under s. 10 of the *Municipal Act, 2001*, as specified in s. 391. Implicit in her reasons is that s. 391 is a determination or specification of the s. 10 power — specifying one aspect of what is included in the s. 10 power — rather than a freestanding source of power.

27 The application judge found that as the City had exercised its power under s. 10 to pass the Impost By-Law, it was required by s. 15(1) to observe the procedural requirements, if any, set out in "the specific provision (i.e. s. 391)." On her review of the

legislative scheme, the application judge concluded that there was no impediment to the City proceeding under the *Municipal Act, 2001*. That is, the City had the option of imposing the fees and charges under either the *Municipal Act, 2001* or the *DCA*, and validly proceeded under the former.

The appellant's argument on appeal

28 The appellant argues that the *DCA* provided specific by-law making powers, and accordingly, the City was required to use these instead of the general power under s. 10 of the *Municipal Act, 2001*. The appellant submits that it was an error for the application judge to have found otherwise. Case law establishes that municipalities ought not to rely on general by-law making powers to extend the express powers set out in specific provisions, or to circumvent restrictions expressly placed on the use of more specific by-law making powers: *R. v. Greenbaum*, [1993] 1 S.C.R. 674. The appellant also points to s. 15(1) of the *Municipal Act, 2001*, which codifies one aspect of the non-circumvention principle:

> **Specific powers, by-laws under general powers**
>
> **15** (1) If a municipality has power to pass a by-law under section 9, 10 or 11 and also under a specific provision of this or any other Act, the power conferred by section 9, 10 or 11 is subject to any procedural requirements, including conditions, approvals and appeals, that apply to the power and any limits on the power contained in the specific provision. 2001, c. 25, s. 15 (1); 2006, c. 32, Sched. A, s. 11 (1).

29 On appeal, the appellant adds the alternative argument that if the City were nevertheless entitled to rely on the general power from the *Municipal Act, 2001*, it would be required to import the procedural protections of the *DCA*. The corollary to this latter argument is that if the City failed to provide these protections, the Impost By-law would be illegal. The appellant extends the argument to the conclusion that because the City lacks the legal authority to provide all of the procedures provided by the *DCA* — namely that it cannot supply a right of appeal to the OMB (as it was) — s. 15(1) is a barrier to the use of the s. 10 power and the City is foreclosed from using the *Municipal Act, 2001* to impose fees and charges for the capital costs associated with sewer and water infrastructure. Regardless of the fact that it voluntarily adopted most if not all of the procedures required by the *DCA*, the City could not provide a right of appeal to the OMB, and therefore fell short, rendering the by-law illegal, and the City cannot fall back in the alternative on the general power under s. 10, as specified in s. 391.

Analysis

Dual legislative regimes

30 As I explain below, the application judge made no error in her interpretation and application of the *Municipal Act, 2001*. Her conclusion that the City has multiple sources of power to impose fees to recover capital costs and that it was not compelled to rely on the *DCA* is correct.

31 The appellants argued before the application judge that the City was compelled to use its power under the *DCA* because it is a more specific power than that provided by s. 10 of the *Municipal Act, 2001*. I do not agree that the application judge erred in rejecting this argument.

32 As the application judge explained, the power relied on by the City is the general power in s. 10 that was more fully specified by the legislation in s. 391(2) and s. 394. The City satisfied the requirements of these specific provisions. The City's reliance on ss. 10 and 391(2) is not like cases such as *Greenbaum* , in which a municipality fell back on a general power after failing to satisfy the requirements of a specific provision.

33 There is more than one statute that provides municipalities with the power to impose development fees. This has long been the case. The *DCA* replaced the lot levy system, but not the entire set of tools municipalities have traditionally used to fund infrastructure. That the *DCA* did not supplant the *Municipal Act, 2001* in this regard is evident from a close reading of the two statutes and their legislative histories.

34 First, as the legislative survey at the beginning of these reasons establishes, the use of the *Municipal Act, 2001* (and its predecessors) for imposing fees and charges for capital costs for sewer and water infrastructure has a long history. That survey amply demonstrates that the legislature contemplated and accepted recourse to either legislative regime.

35 The existence of dual regimes is particularly evident in the evolution of s. 391(2), especially in the version immediately preceding the current iteration which specifically referenced water and wastewater infrastructure before being replaced by the broad language of the current text that encompasses charges and fees to recoup *all* capital costs payable by a municipality.

36 It is also significant that by the time of the introduction of the *Municipal Act, 2001*, which broadened the powers of municipalities, the supremacy clause contained in the *DCA* had been removed, suggesting that the *Municipal Act, 2001* conferred power on municipalities to pass by-laws imposing fees or charges for capital costs payable by it for sewage and water services despite similar provisions in the *DCA*.

37 Furthermore, when regulations passed under the *Municipal Act, 2001* are considered, it is evident that the legislative scheme contemplated that a municipality could levy charges for capital costs for wastewater and sewer under either the *Municipal Act, 2001* or the *DCA*, and this could potentially create a situation where a municipality could impose the same fees twice, once under the *DCA* and once under the *Municipal Act, 2001*. *Fees and Charges*, O. Reg. 584/06, expressly addresses this possibility and prohibits a municipality from "double dipping":

> **Capital costs**
>
> **2.** (1) A municipality and a local board do not have power under the Act to impose fees or charges to obtain revenue to pay capital costs, if as a result of development charges by-laws or front-ending agreements under the Development Charges Act, 1997 or a predecessor of that Act that was passed or entered into before the imposition of the fees or charges, payments have been, will be or could be made to the municipality or local board to pay those costs. O. Reg. 584/06, s. 2 (1).

38 Third, the powers granted by the two statutes are different. Section 391 of the *Municipal Act, 2001* does not empower a municipality to impose taxes on land, while development charges under the *DCA* have been judicially recognized as a form of land tax. In *Greater Toronto Airports Authority v. Mississauga (City)*(2000), 50 O.R. (3d) 641, 192 D.L.R. (4th) 443 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 83, this court stated, at para. 22:

> The Development Charges Act authorizes municipalities to pass by-laws that would impose development charges against land whose development would increase the need for municipal services. A development charge is defined in the statute as "a charge imposed with respect to growth-related net capital costs against land" and thus is a form of tax on land. [Emphasis added.]

39 For these reasons, I do not agree with the appellant's argument that the City was compelled to use its power under the *DCA* in preference to the *Municipal Act, 2001*.

The s. 15/anti-circumvention argument

40 To recall, the appellant argues that the reference in s. 15(1) to "any other Act" refers, in the context of an impost by-law passed under s. 10 (and in conjunction with s. 391(2)), the *DCA*. The *DCA*, it argues, is an act that provides the same power to pass a by-law that is provided under s. 10, and does so under a more specific provision. Section 15(1), on the appellant's interpretation, therefore directs that the Impost By-law provide the same procedures set out in the *DCA*.

41 The appellant argues that because the City is unable to duplicate all of the procedures of the *DCA*, the Impost By-law fails to observe the requirements of s. 15(1) and is therefore illegal. The argument, to repeat, is not that the City could have provided the requisite procedural protections but failed to do so in this particular instance, but that it is impossible for the City to do so given the City's incapacity to provide the right of appeal to the OMB that is supplied under the *DCA*.

42 I do not agree with the appellant's interpretation of s. 15(1).

43 It is useful to reproduce the text of s. 15(1) here:

> **15** (1) If a municipality has power to pass a by-law under section 9, 10 or 11 *and also under a specific provision of this or any other Act*, the power conferred by section 9, 10 or 11 is subject to any procedural requirements, including conditions, approvals and appeals, that apply to the power and any limits on the power contained in the specific provision. 2001, c. 25, s. 15 (1); 2006, c. 32, Sched. A, s. 11 (1).

44 Statutory interpretation is a matter of ascertaining the intention of the enacting legislature. It requires attention to text, context, and purpose: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para 21; *Canada v. Cheema*, 2018 FCA 45, [2018] 4 F.C.R. 328, at para. 73. With respect to s. 15(1), the words used provide no particular difficulty, and the meaning of the section becomes clear when the broad legislative context — including the history canvassed above — is considered.

45 To recap, a municipality's power to pass an impost by-law under the *Municipal Act, 2001* comes from the general by-law making power in s. 10, as specified by the terms of Part XII of the Act, particularly ss. 391 and 394. In enacting an impost-bylaw under s. 10, a municipality must, by the operation of 15(1), observe all procedural requirements set out in ss. 391 and 394. What is less obvious is whether the words "or any other Act" in s. 15(1) must be interpreted as *also* requiring compliance with all of the procedural requirements of the *DCA* in addition to the specific provisions of Part XII. As explained below the answer must be no.

46 The s. 15(1) inquiry in this particular context can only be directed at the *Municipal Act, 2001* provisions. I say this for two reasons. The historical legislative context in which s. 15(1) was enacted demonstrates why the words "or any other Act" became necessary. Second, the presumption of coherence in statutory interpretation prevents the importing of the appeal provisions from the *DCA*.

47 First, the historical legislative context: the reference to "any other Act" in s. 15(1) has to be understood in the context of the statutory reform accomplished by the *Municipal Act, 2001*. Among the changes accomplished with the *Municipal Act, 2001* was to spin off several specific powers from it to new legislation such as the *Fluoridation Act*, R.S.O. 1990, c. F.22 and the *Fire Protection and Prevention Act, 1997*, S.O. 1997, c. 4: see *Croplife* at paras. 46-47. Section 15 may be triggered where a specific power is not contained in the *2001 Act*, but instead is found in related municipal legislation. The inclusion of the words "or any other Act" in s. 15 became necessary in 2001 when specific powers were transferred from the old *Municipal Act* to other legislation: see *Croplife* at paras. 46-47. [1]

48 The *DCA* stands on a different footing entirely. It pre-dates the *Municipal Act, 2001* and did not have its genesis in the old *Municipal Act*. The powers it confers are underived and unrelated to the powers conferred by the *Municipal Act, 2001* and its predecessors.

49 Second, the presumption of legislative coherence supports the view that the specific provisions of the *DCA* and Part XII of the *Municipal Act, 2001* are not interchangeable for s. 15 purposes. The coherence presumption is based on the proposition that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, and that each provision is capable of operating without coming into conflict with any other: Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Markham: LexisNexis Canada Inc., 2022) at p. 323.

50 Section 2 of the *DCA* does not confer the same power to pass a by-law that is provided under ss. 10 and 391. Section 391(2) permits a charge on a *person* receiving a defined benefit, while s. 2(1) of the *DCA* authorizes charges against *land*. As stated, the *DCA* power is a taxing power, while the power authorized by s. 10 and modified by s. 391 is not.

51 If the two regimes confer different by-law making power, then the specific provisions applicable to each regime should not be interpreted as interchangeable for s. 15 purposes, particularly if to do so results in inconsistency or conflict.

52 Reading the words "or any other Act" as requiring the appeal provisions of the *DCA* to be imported into the *Municipal Act, 2001* raises an inherent contradiction with respect to the mechanisms specifically chosen to review impost charges and development charges.

53 When the *Municipal Act, 2001* was enacted (and in 2014 when the impost by-law was passed) that Act contained a specific mechanism for reviewing fees and charges levied under s. 391. What was s. 399 of the *Municipal Act, 2001*[2] in combination with what was s. 71(c) of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, prevented applications[3] to the Ontario Municipal Board on the grounds that the fees or charges were unfair or unjust. Accordingly, there was a limited mechanism for reviewing fees and charges under the *Municipal Act, 2001*.[4]

54 Conversely, an appeal of a development charge by-law under the *DCA* permitted the OMB to consider whether the municipality acted fairly and reasonably, within its powers, in accordance with the process set out in that legislation: *Whiteley v. Guelph (City)* 1999 14 M.P.L.R. (3d) 146 (Ont. OMB), at para. 100.[5]

55 In sum, the legislature has set up what can best be described as separate and self-contained by-law making regimes; the two regimes address different juridical relations, provide for different powers, and expressly contemplate different mechanisms of review. Given these differences, the legislature could not have intended that both regimes would govern the procedures to be followed for passing an impost by-law. The specific provisions applicable to the by-law making powers under both statutes are capable of operating without coming into conflict with each other if the words of s. 15(1) are not interpreted as requiring the appeal provisions of the *DCA* to be applicable to impost by-laws.

56 Finally, I note that this interpretation does not frustrate the anti-circumvention purpose of s. 15(1). The anti-circumvention rule in s. 15(1) prohibits a municipality from using its general by-law making powers in s. 10 to circumvent specific provisions established to govern the enactment of by-laws addressing particular subject-matters. It is not intended to create a scenario where municipalities must evaluate which of two competing sets of specific powers affords the greater level of procedural protection. For these reasons, I reject the appellant's argument that the Impost By-law is illegal because it fails to observe the requirements of s. 15(1).

ISSUE 2 — the restrictions in s. 394(1)(e)

The application judge's reasons

57 The appellant argued that water and wastewater are a "natural resource" within the meaning of s. 394(1)(e) of the *Municipal Act, 2001*, and accordingly, the City was specifically prohibited from enacting the Impost By-law under sections 10 and 391(2). S. 394(1)(e) provides:

> No fee or charge by-law shall impose a fee or charge that is based on, in respect of or is computed by reference to, . . . the generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources.

58 Noting that the *Municipal Act, 2001* does not define "natural resources", the application judge sought to ascertain and apply the "ordinary meaning and grammatical sense" of the term. Two aspects of s. 394(1)(e) drew the application judge's attention: (1) the basis for the fee or charge (" . . . is based on, in respect of or, or computed by reference to"); and (2) the concepts of "generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources."

59 With respect to the first, the application judge found based on the evidence before her that the impost fees under the Impost By-Law were "calculated and charged based on the capital cost of installing water and sewer works infrastructure" and were "related specifically to the distribution and treatment systems for water and wastewater (i.e., not any of the activities listed in s. 394(1)(e))." The application judge concluded that the Impost By-law imposed a fee to recoup the costs of the construction of infrastructure and was not a metered fee for the use or transportation of any resource.

60 With respect to the second question, although the application judge accepted (in passing) that water is a natural resource for the purposes of the *Municipal Act, 2001*, given her conclusion above, she found it unnecessary to address the submission that wastewater constitutes a natural resource.

The appellant's argument on appeal

61 The appellant argued on appeal that the application judge's interpretation was erroneous. In particular, the application judge drew an artificial distinction between "transportation" of a natural resource, which cannot be the basis for an impost fee, and "distribution", which can. Similarly, the application judge drew an artificial distinction between "treatment" and "processing". The appellant argued that the distinction drawn by the application judge between charging for infrastructure that will transport a resource and charging for the actual use of that resource was artificial, and that even if the impost fees were not calculated "by reference to" the distribution/transportation of water, they were nevertheless charges that were "based on" or "in respect of" transportation and thus came within s. 394(1)(e).

Analysis

62 A key to interpreting s. 394(1)(e) is placing it in the broader context of s. 394(1) as a whole. Section 394(1) prevents municipalities from imposing fees and charges on transactions, income, and property interests that are unrelated to matters of municipal governance:

> **Restriction, fees and charges**
>
> **394** (1) No fee or charge by-law shall impose a fee or charge that is based on, is in respect of or is computed by reference to,
>
> (a) the income of a person, however it is earned or received, except that a municipality or local board may exempt, in whole or in part, any class of persons from all or part of a fee or charge on the basis of inability to pay;
>
> (b) the use, purchase or consumption by a person of property other than property belonging to or under the control of the municipality or local board that passes the by-law;
>
> (c) the use, consumption or purchase by a person of a service other than a service provided or performed by or on behalf of or paid for by the municipality or local board that passes the by-law;
>
> (d) the benefit received by a person from a service other than a service provided or performed by or on behalf of or paid for by the municipality or local board that passes the by-law; or
>
> (e) the generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources. 2001, c. 25, s. 394 (1); 2006, c. 32, Sched. A, s. 166.

63 In the only judicial consideration of s. 394(1) to date, specifically in the context of s. 394(1)(c) — addressing fees and charges based on consumption and purchase of services other than those provided by a municipality — the court characterized s. 394(1) as restricting "a municipality from imposing charges that are external to its relationships with its ratepayers, including (*a*) their income, (*b*) how a person uses property outside the municipality's control, (*d*) consideration of benefits received from a party other than the municipality, or (*e*) how natural resources are retrieved or processed by the ratepayer" and (c) "the use or consumption of services *not provided by the municipality*": *Nylene Canada Inc. v. Corporation of the Town of Arnprior*, 2017 ONSC 795, 136 O.R. (3d) 599, at paras. 43-44 (emphasis original).

64 The appellant argues that it is significant that s. 394(1)(e) is structured differently from the other four paragraphs, and should therefore be read differently. First, the appellant notes that ss. (c) and (d) expressly exclude services provided by municipalities, and s. (e) does not. Second, unlike all of the other subsections, s. (e) speaks of the generation, etc. of natural resources at large, rather than specifying generation, etc. "by a person". The appellant asks the court conclude that the difference in wording suggests that the legislature intended for the limits in (e) to apply to the transportation of natural resources by municipalities

and not just by third parties. As such, the appellant contends that the *Nylene* reading of s. 394(1) as restricting fees and charges based on transactions and other legal relations to which a municipality is not a party, ought not to include s. 394(1)(e).

65 I do not agree. Paragraphs (a)-(d) are part of the context in which s. 394(1)(e) must be interpreted and they inform the meaning of s. 394(1)(e). Section 394(1)(e) does not restrict a municipality from imposing fees and charges on land developers for the cost of providing infrastructure that transports water and wastewater for the benefit of its ratepayers. Were the appellant's argument accepted, it would also entail that the City would be enjoined from imposing water and wastewater user fees on ratepayers. This would be an absurd result.

66 It is not necessary to address the appellant's further argument that the application judge erred by not finding that the Impost By-law was "based on" or made "in respect of" transportation of a natural resource.

DISPOSITION

67 I would dismiss the appeal and award costs to the respondent in the amount of $17,500 including disbursements and HST.

***K. Feldman J.A.*:**

I agree.

***M. Tulloch J.A.*:**

I agree.

Appeal dismissed.

APPENDIX — Development Charges Act, 1997, S.O. 1997, c. 27

2 (1) The council of a municipality may by by-law impose development charges against land to pay for increased capital costs required because of increased needs for services arising from development of the area to which the by-law applies. 1997, c. 27, s. 2 (1).

(2) A development charge may be imposed only for development that requires,

(a) the passing of a zoning by-law or of an amendment to a zoning by-law under section 34 of the *Planning Act*;

(b) the approval of a minor variance under section 45 of the *Planning Act*;

(c) a conveyance of land to which a by-law passed under subsection 50 (7) of the *Planning Act* applies;

(d) the approval of a plan of subdivision under section 51 of the *Planning Act*;

(e) a consent under section 53 of the *Planning Act*;

(f) the approval of a description under section 9 of the *Condominium Act, 1998*; or

(g) the issuing of a permit under the *Building Code Act, 1992* in relation to a building or structure. 1997, c. 27, s. 2 (2); 2015, c. 26, s. 2 (1); 2015, c. 28, Sched. 1, s. 148.

5 (1) The following is the method that must be used, in developing a development charge by-law, to determine the development charges that may be imposed:

1. The anticipated amount, type and location of development, for which development charges can be imposed, must be estimated.

2. The increase in the need for service attributable to the anticipated development must be estimated for each service to which the development charge by-law would relate.

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

4. The estimate under paragraph 2 must not include an increase that would result in the level of service exceeding the average level of that service provided in the municipality over the 10-year period immediately preceding the preparation of the background study required under section 10. How the level of service and average level of service is determined may be governed by the regulations.

5. The increase in the need for service attributable to the anticipated development must be reduced by the part of that increase that can be met using the municipality's excess capacity, other than excess capacity that the council of the municipality has indicated an intention would be paid for by new development. How excess capacity is determined and how to determine whether a council has indicated an intention that excess capacity would be paid for by new development may be governed by the regulations.

6. The increase in the need for service must be reduced by the extent to which an increase in service to meet the increased need would benefit existing development. The extent to which an increase in service would benefit existing development may be governed by the regulations.

7. The capital costs necessary to provide the increased services must be estimated. The capital costs must be reduced by the reductions set out in subsection (2). What is included as a capital cost is set out in subsection (3). How the capital costs are estimated may be governed by the regulations.

8. Repealed: 2019, c. 9, Sched. 3, s. 3 (2).

9. Rules must be developed to determine if a development charge is payable in any particular case and to determine the amount of the charge, subject to the limitations set out in subsection (6).

10. The rules may provide for full or partial exemptions for types of development and for the phasing in of development charges. The rules may also provide for the indexing of development charges based on the prescribed index. 1997, c. 27, s. 5 (1); 2019, c. 9, Sched. 3, s. 3 (1, 2).

(2) The capital costs, determined under paragraph 7 of subsection (1), must be reduced, in accordance with the regulations, to adjust for capital grants, subsidies and other contributions made to a municipality or that the council of the municipality anticipates will be made in respect of the capital costs. 1997, c. 27, s. 5 (2).

10 (1) Before passing a development charge by-law, the council shall complete a development charge background study. 1997, c. 27, s. 10 (1).

12 (1) Before passing a development charge by-law, the council shall,

(a) hold at least one public meeting;

(b) give at least 20-days notice of the meeting or meetings in accordance with the regulations; and

(c) ensure that the proposed by-law and the background study are made available to the public at least two weeks prior to the meeting or, if there is more than one meeting, prior to the first meeting. 1997, c. 27, s. 12 (1).

14 Any person or organization may appeal a development charge by-law to the Ontario Land Tribunal by filing with the clerk of the municipality on or before the last day for appealing the by-law, a notice of appeal setting out the objection to the by-law and the reasons supporting the objection. 1997, c. 27, s. 14; 2021, c. 4, Sched. 6, s. 41 (1).

20 (1) A person required to pay a development charge, or the person's agent, may complain to the council of the municipality imposing the development charge that,

(a) the amount of the development charge was incorrectly determined;

(b) whether a credit is available to be used against the development charge, or the amount of the credit or the service with respect to which the credit was given, was incorrectly determined; or

(c) there was an error in the application of the development charge by-law. 1997, c. 27, s. 20 (1).

***Municipal Act*, 2001, S.O. 2001, c. 25**

10 (2) A single-tier municipality may pass by-laws respecting the following matters:

1. Governance structure of the municipality and its local boards.

2. Accountability and transparency of the municipality and its operations and of its local boards and their operations.

3. Financial management of the municipality and its local boards.

4. Public assets of the municipality acquired for the purpose of exercising its authority under this or any other Act.

5. Economic, social and environmental well-being of the municipality, including respecting climate change.

6. Health, safety and well-being of persons.

7. Services and things that the municipality is authorized to provide under subsection (1).

8. Protection of persons and property, including consumer protection.

9. Animals.

10. Structures, including fences and signs.

11. Business licensing. 2006, c. 32, Sched. A, s. 8; 2017, c. 10, Sched. 1, s. 1.

15 (1) If a municipality has power to pass a by-law under section 9, 10 or 11 and also under a specific provision of this or any other Act, the power conferred by section 9, 10 or 11 is subject to any procedural requirements, including conditions, approvals and appeals, that apply to the power and any limits on the power contained in the specific provision. 2001, c. 25, s. 15 (1); 2006, c. 32, Sched. A, s. 11 (1).

(4) Subsection (1) applies to limit the powers of a municipality despite the inclusion of the words "without limiting sections 9, 10 and 11" or any similar form of words in the specific provision. 2006, c. 32, Sched. A, s. 11 (4).

273 (1) Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality. 2001, c. 25, s. 273 (1).

390 In this Part,

"by-law" includes a resolution for the purpose of a local board; ("règlement municipal")

"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); ("droits ou redevances")

"local board" includes any prescribed body performing a public function and a school board but, for the purpose of passing by-laws imposing fees or charges under this Part, does not include a school board or hospital board; ("conseil local")

"person" includes a municipality and a local board and the Crown. ("personne") 2001, c. 25, s. 390; 2006, c. 32, Sched. A, s. 162.

391 (1) Without limiting sections 9, 10 and 11, those sections authorize a municipality to impose fees or charges on persons,

(a) for services or activities provided or done by or on behalf of it;

(b) for costs payable by it for services or activities provided or done by or on behalf of any other municipality or any local board; and

(c) for the use of its property including property under its control. 2006, c. 32, Sched. A, s. 163 (1).

(2) A fee or charge imposed for capital costs related to services or activities may be imposed on persons not receiving an immediate benefit from the services or activities but who will receive a benefit at some later point in time. 2006, c. 32, Sched. A, s. 163 (2).

(5) In the event of a conflict between a fee or charge by-law and this Act, other than this Part, or any other Act or regulation made under any other Act, the by-law prevails. 2006, c. 32, Sched. A, s. 163 (3).

394 (1) No fee or charge by-law shall impose a fee or charge that is based on, is in respect of or is computed by reference to,

(a) the income of a person, however it is earned or received, except that a municipality or local board may exempt, in whole or in part, any class of persons from all or part of a fee or charge on the basis of inability to pay;

(b) the use, purchase or consumption by a person of property other than property belonging to or under the control of the municipality or local board that passes the by-law;

(c) the use, consumption or purchase by a person of a service other than a service provided or performed by or on behalf of or paid for by the municipality or local board that passes the by-law;

(d) the benefit received by a person from a service other than a service provided or performed by or on behalf of or paid for by the municipality or local board that passes the by-law; or

(e) the generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources. 2001, c. 25, s. 394 (1); 2006, c. 32, Sched. A, s. 166.

474.10.16 (1) The Ontario Land Tribunal has jurisdiction and power,

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

(b) to hear and determine any application with respect to any tolls charged by any person, firm, company, corporation or municipality operating a public utility in excess of those approved or prescribed by lawful authority, or which are otherwise unlawful. 2021, c. 4, Sched. 6, s. 64 (7).

O. Reg. 584/06: FEES AND CHARGES

2. (1) A municipality and a local board do not have power under the Act to impose fees or charges to obtain revenue to pay capital costs, if as a result of development charges by-laws or front-ending agreements under the Development Charges Act, 1997 or a predecessor of that Act that was passed or entered into before the imposition of the fees or charges, payments have been, will be or could be made to the municipality or local board to pay those costs. O. Reg. 584/06, s. 2 (1).

(2) For the purpose of subsection (1),

"capital costs" has the same meaning as it has in the Development Charges Act, 1997; ("dépenses en immobilisations")

"payments" do not include amounts the municipality or local board has refunded or is required to refund under the *Development Charges Act, 1997*. ("paiements") O. Reg. 584/06, s. 2 (2).

Footnotes

1 The appellant has not directed the Court to any other example in the *Municipal Act, 2001* where the words "or any other Act" might possibly engage a parallel by-law making power under a separate statute.

2 Section 399 was repealed by s. 53 of Schedule 5 of the *Building Better Communities and Conserving Watersheds Act, 2017*, S.O. 2017, c. 23, which came into effect in 2018. The *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28 was repealed by s. 45 of Schedule 1 (the *Local Planning Appeal Tribunal Act, 2017*) of the *Building Better Communities and Conserving Watersheds Act, 2017*. What was s. 71(c) in the *OMB Act* became s. 30(1)(b) in the *Local Planning Appeal Tribunal Act, 2017*. The *Local Planning Appeal Tribunal Act, 2017* was revoked and replaced with a new statute in 2021 by the *Accelerating Access to Justice Act, 2021*, S.O. 2021, c. 4: see Schedule 6 s. 59(1). Schedule 6 set up what is now the Ontario Land Tribunal. That 2021 statute also made changes to a number of other statutes, including the *Municipal Act, 2001*, by adding "PART XVII.0.1 Ontario Land Tribunal — Jurisdiction And Powers". The substance of what was s. 71(c) in the *OMB Act* seems to now be found in in s. 474.10.16(1)(b) of Part XVII.0.1 of the *Municipal Act, 2001*: "The Ontario Land Tribunal has jurisdiction and power . . . to hear and determine any application with respect to any tolls charged by any person, firm, company, corporation or municipality operating a public utility in excess of those approved or prescribed by lawful authority, or which are otherwise unlawful." Persons charged impost fees would continue to be permitted to bring an application to the Ontario Land Tribunal to argue that the fees charged are unlawful.

3 By-laws could also be quashed in whole or in part for illegality pursuant to s. 273 of the *Municipal Act, 2001*.

4 The OMB and its successors have held that while it has the jurisdiction to determine unlawful fees and charges, its jurisdiction under s. 399 of the *Municipal Act, 2001* in combination with s. 71(c) of the *OMB Act* does not extend to determining the validity of a capital charge by-law passed by a municipality under section 391 of the *Municipal Act, 2001* for failure to comply with the City's Official Plan and the *Planning Act*, R.S.O. 1990, c. P.13: *J. Stollar Construction Ltd. and The Orsi Land Group v. Kawartha Lakes (City)*(2018), 2 O.M.T.R. 333 at paras. 85-89 (Ont. LPAT).

5 Section 20 of the *DCA* also provides a separate mechanism to permit a person required to pay a development charge to complain to council regarding the amount of the charge.

9

1998 CarswellOnt 495
Ontario Court of Appeal

Ontario Cancer Treatment & Research Foundation v. Ottawa (City)

1998 CarswellOnt 495, 106 O.A.C. 253, 157 D.L.R. (4th) 38, 38 O.R. (3d) 224, 45 M.P.L.R. (2d) 155, 77 A.C.W.S. (3d) 645

The Ontario Cancer Treatment and Research Foundation, Applicant (Respondent) and The Corporation of the City of Ottawa, The Regional Municipality of Ottawa-Carleton and The Hydro-Electric Commission of the City of Ottawa, Respondents (Appellant)

Finlayson, Osborne and Labrosse JJ.A.

Heard: September 4-5, 1997
Judgment: February 12, 1998
Docket: CA C22850

Proceedings: affirming (1995), 29 M.P.L.R. (2d) 112 (Ont. Gen. Div.)

Counsel: *Guy J. Pratte*, for the appellant.
Charles T. Hackland and *Wayne J. Brynaert*, for the respondent.

Finlayson J.A. **(dissenting):**

1 This is an appeal by the Hydro-Electric Commission of the City of Ottawa ("Ottawa Hydro") from the judgment of the Honourable Mr. Justice Binks of the Ontario Court (General Division). By that judgment, reported (1996), 29 M.P.L.R. (2d) 112 (Ont. Gen. Div.), Binks J. granted to the Ontario Cancer Treatment and Research Foundation (the "Foundation") a declaration exempting it from the obligation to pay, in relation to a development at 501 Smyth Road in the City of Ottawa, the Ottawa Hydro portion of development charges in the amount of $174,056 exacted pursuant to the *Development Charges Act*, R.S.O. 1990, c. D.9 (the *"Act"*) and Ottawa's By-Law 279-91 (the "Development Charges By-Law").

2 The development charge became payable upon the Foundation obtaining a building permit in the summer of 1993 for the expansion of a cancer treatment facility located at 501 Smyth Road, Ottawa. Neither the land nor the buildings located on the land are owned by the Foundation; rather, their registered owner is the Ottawa Health Sciences Centre Inc. The Foundation occupies the land as a tenant of the Health Sciences Centre.

3 On or about October 7, 1993, the Foundation and the City of Ottawa entered into a deferral agreement in relation to the development charge at issue. Pursuant to the terms of the agreement, the parties agreed that the development charge would not be payable until such time as its applicability to the Foundation (including the Ottawa Hydro component whose collection is the City's responsibility) had been lawfully determined.

4 Subsequently, the City of Ottawa provided to the Foundation a grant equivalent to the City's component of the development charge, thus avoiding the need for litigation. However, Ottawa Hydro decided to proceed with the contemplated litigation in respect of its separate and distinct component of the development charge.

5 Binks J. held that the development charge in question was, in essence, a tax and that the Foundation was exempted from the payment of the charge by reason of s. 16 of the *Cancer Act*, R.S.O. 1990, c. C.1 which provides, *inter alia*, that the Foundation is not subject to taxation in relation to its real and personal property.

6 The position of the appellant as set out in its factum is that:

(a) the Hydro component of the development charge is a regulatory charge, and not a tax;

(b) in any event, the *Development Charges Act* expressly overrides any tax exemption contained in the *Cancer Act*; and, in the further alternative;

(c) the Foundation, as tenant, cannot avail itself of the tax exemption provided in the *Cancer Act*.

Facts

7 Ottawa Hydro is a Hydro Electric Commission established under a by-law of the City of Ottawa in 1916. In accordance with the provisions of the then *Public Utilities Act* and the *Power Commission Act*, the City of Ottawa delegated to Ottawa Hydro all responsibility for the control and management of the construction, operation and maintenance of all works undertaken by the City for the distribution and supply of electrical power or energy.

8 Ontario Hydro is responsible for the generation and transmission of electricity to terminal stations jointly operated by Ottawa Hydro and Ontario Hydro. At this point, Ottawa Hydro purchases the electricity from Ontario Hydro at wholesale cost, and distributes it to local consumers of electricity.

9 Ottawa Hydro is responsible for establishing the rates (as opposed to" taxes", which Ottawa Hydro has no power to impose) charged to consumers for the supply of electricity and for making all decisions relating to expansions or improvements in its distribution network. The rates charged to its customers are Ottawa Hydro's primary source of revenue.

10 Prior to the enactment of the Development Charges By-Law, Ottawa Hydro prepared annual budgets based on its anticipated revenues and expenses, both operational and capital. With respect to the capital requirements related to its statutory obligation to supply its utility service, Ottawa Hydro was required to anticipate future land development and take the necessary steps to ensure that these areas were adequately serviced when they were ultimately developed. Thus Ottawa Hydro estimated the costs of the infrastructure required to service future developments and incorporated these costs into its annual budget.

11 Based on the data contained in its annual budget, and the province-wide rate-setting criteria established by Ontario Hydro, Ottawa Hydro calculated the rates it should charge to consumers of electricity in order to offset its expenses. Accordingly, that portion of Ottawa Hydro's incremental capital costs occasioned by new developments was, prior to the Development Charges By-Law in 1991, borne by all consumers of electricity in the form of a rate increase established by Ottawa Hydro.

12 The Foundation confirmed that it had always paid Ottawa Hydro's rates relating to its consumption of electricity which, prior to 1991, included the same type of capital costs now sought to be recovered through development charges.

13 While it remains within its power to defray growth-related capital costs by increasing the rates charged to all consumers, Ottawa Hydro's stated position is that it is more equitable to recover these costs, as nearly as possible, from those causing them to be incurred. Therefore, Ottawa Hydro elected to recover its growth-related capital costs by way of development charges, in lieu of assessing these costs against all of its consumers by way of general rate increases. The mechanism afforded by the *Act* was selected for this purpose.

14 Under the authority of the *Act*, the City of Ottawa enacted the Development Charges By-Law in 1991, which imposes a charge against land if the development of the land would increase the need for various services. The Development Charges By-Law distinguishes between two separate components of the development charge, the City of Ottawa component and the Ottawa Hydro component. The charges are set out as Schedules A and B respectively to the Development Charges By-Law.

15 The evidence before Binks J. was that Ottawa Hydro was exclusively responsible for the calculation of the hydro component of the development charge in Schedule B. Carl Kropp, the General Manager and Chief Engineer of Ottawa Hydro, asserted in affidavit testimony that in order to ensure that the Ottawa Hydro component of the development charges reflected accurately the capital costs which would be incurred by Ottawa Hydro in servicing new developments, it engaged in extensive

in-house analysis and relied heavily on the services of C.N. Watson and Associates Limited, a well respected consulting firm on the subject of development charges.

16 In calculating the development charge, Ottawa Hydro used only the capital costs occasioned by new development. The operating costs of servicing customers once the infrastructure is installed are specifically excluded and are charged through Ottawa Hydro's general rates, as approved by Ontario Hydro. The rationale is that on a system wide basis, the operating costs remain more or less constant, regardless of whether they are related to old or new infrastructure. Incremental capital costs, on the other hand, can be more readily attributed to the class of consumer who caused them. It submits that the inclusion of the Ottawa Hydro component in the development charges permits a fairer allocation of costs among Ottawa Hydro's customers on the basis of the rate-making principle known as" costcausality".

17 No issue was taken in this court or below as to the propriety of Ottawa creating a separate schedule limited to development charges for Ottawa Hydro nor with the charges themselves as being anything other than what is authorized by the *Act*. What the Foundation took exception to was the description given by Carl Kropp as to how the charges were arrived at. However, there is nothing to contradict his description and I am satisfied that there can be no argument that the charges embraced the following considerations:

(a) the new development's distance from the transformer station, measured in metres;

(b) the unit costs of the electrical distribution plant given in dollars/megawatt/metre; and,

(c) the magnitude of the new load, measured in kilowatts.

18 Ultimately, these calculations produced a comprehensive set of charges in relation to the capital costs to be incurred by Ottawa Hydro as a result of a new development. They were adopted by the City of Ottawa and incorporated into the Development Charges By-Law as Schedule B.

19 With regard to the development at issue, the Foundation has a service consisting of two main switches sized 1,600 A, 347/600V. Consequently, pursuant to Schedule B of the Development Charges By-Law, the development charges due and payable to Ottawa Hydro total $174,056.

20 Since the implementation of the Development Charges By-Law, Ottawa Hydro's capital expenditure budget has reflected anticipated revenues received from the development charges set out in Schedule B. Growth-related capital expenditures are offset by anticipated receipts from development charges such that the budget submitted to Ontario Hydro shows a lower capital requirement, thus reducing the level of the rates which would otherwise be charged to Ottawa Hydro's customers.

21 Although the City Treasurer is responsible for the collection of the Ottawa Hydro component of the development charge, the funds collected are maintained, on behalf of Ottawa Hydro, in a separate reserve fund (the" Development Charges Reserve Fund Ottawa Hydro"), which was established under By-Law 281/91. Pursuant to s. 18 of the Development Charges By-Law, the City Treasurer must release to Ottawa Hydro, when demanded by Ottawa Hydro, that portion of the reserve fund required to fund growthrelated capital costs. However, only those funds specifically required to fund a growth related project are released to Ottawa Hydro. Consequently, it is submitted, there is no danger that the funds collected on behalf of Ottawa Hydro will be used for any purpose other than to defray the costs of growth related capital expenditures necessary for the provision of hydro-electricity for completed projects.

Issue

22 Although, as indicated above, Ottawa Hydro raised three issues on appeal in its factum, the third ground was abandoned at the opening of argument. I have some difficulty with the proposition advanced by the second ground of appeal, namely that the general language of the *Act* can over ride the express exemption of the Foundation from taxation on real and personal property contained in s. 16 of the *Cancer Act*. However, if the trial judge was in error in treating the Ottawa Hydro component of the development charges as a tax rather than a rate or charge, this second issue becomes academic. The sole issue then becomes:

Did the learned trial judge err in holding that the Ottawa Hydro component of the development charge is properly characterized as" taxation" within the meaning of the Ontario *Cancer Act*?

Analysis

23 I have set out in some detail the facts relating to the manner in which the Ottawa Hydro development charges were determined because it is apparent to me, with great respect to the learned trial judge, that he misapprehended the evidence of Carl Kropp on this issue. While Kropp was cross-examined on his affidavit, I have not been shown where he altered his evidence in any material way. On its face, his testimony is no more than it purports to be, a straightforward description as to how the capital component of the electrical utility charges was determined for this specific new customer. The calculation of the capital cost of the installation of additional plant and equipment to provide this utility service is traditional to accepted methods of rate determination. On the face of this evidence, one can only conclude that the Ottawa Hydro component of the development charges to the Foundation was the incremental capital cost component of the electricity rate to the Foundation. As such, it is an addition to the rate base of Ontario Hydro and has no relation in law to a tax.

24 A feature of public utility regulation is the principle that utilities may not operate at a profit. Rather, one of the tenets of ratemaking is the provision of services at cost, a measurement which includes a reasonable rate of return reflecting the net capital requirements of the public utility. Public utility rates must be sufficient to meet current operating costs as well as costs to replace and acquire capital necessary for the service of the utility to consumers: see J. Bonbright et al., *Principles of Public Utility Rates* (Arlington: Public Utilities Reports, Inc., 1988) generally and particularly at pp.6 and 22.

25 The starting point for an analysis of the mechanics of ratemaking begins with the notion that public utilities, given their special status, must function within a standard of reasonableness in rate setting. See Bonbright, *supra* at ch. 10. The presumption which surfaces in the context of adjudication at rate hearings is that rates should reflect attempts at utility cost recovery. Public utilities strive not to operate beyond cost recovery, and rates to consumers are calculated in light of a public utility's rate base and specific return with respect to that rate base.

26 The rate base, simply stated, is the "amount of investment on which a regulated utility is entitled to a fair rate of return." See Canadian Institute of Resources Law, S.J. Bleckman, ed., *Canada Energy Law Service* vol. 1 (Scarborough: Carswell, August 1997) at 4-9. The amount of investment reflects the value of the utility's assets that are used to provide services. Scholarly attention has focused on the various components of a utility's assets which are included or excluded from the assets of the utility for the purposes of rate base calculation. The determination of rate base is guided by formulae present in the legislation that governs particular utilities, as in s. 19(3) of the *Ontario Energy Board Act* R.S.O. 1990, c. O.13, as amended, which provides that rate base includes a reasonable allowance for the cost of the property that is used or useful in serving the public less certain amounts, plus a reasonable allowance for working capital: see also *Edmonton (City) v. Northwestern Utilities Ltd.*, [1929] 2 D.L.R. 4 (S.C.C.) for a similar definition of rate base. It should be noted that the Ontario Energy Board has advisory powers with respect to Ontario Hydro, and the Board of Directors of Ontario Hydro establish electricity rates after considering the suggestions of the Ontario Energy Board, among other factors influencing their decision making process. As a result the determination of rate base, within the meaning of the *Ontario Energy Board Act*, is applicable for Ontario Hydro for purposes of rate setting.

27 From the above perhaps oversimplified account of rate making principles, it follows that these hydro charges are utility rates and not taxes. A public utility is only entitled to recover its costs in its rates, those costs including a reasonable rate of return on the utility's capital investments, and as such these rates are charges and not taxes. Taxes are of more general application and are intended to raise revenues: see Peter Hogg, *The Constitutional Law of Canada* (3rd ed. 1994), p. 30-16.1 and *infra*. Indeed, it has long been recognized that electrical utility rates cannot constitute taxes since they flow from the provinces' regulatory power over local works and undertakings set out in s. 92¶10 of the *ConstitutionAct, 1867*: see Hogg at p. 29-17. This is so notwithstanding that utility rates may be added to the municipal tax roll and collected as" taxes": see *Victoria & Grey Trust Co. v. North Bay (City)* (1984), 44 O.R. (2d) 795 (Ont. H.C.) at 799-800 and *Guaranty Trust Co. of Canada v. Quality Steels (Canada) Ltd.*, [1953] O.R. 434 (Ont. H.C.) at 444-445.

28 Unfortunately, the trial judge did not appreciate this legal background in his analysis. In his reasons he stated at p. 114:

> There was evidence by affidavit that the quantum of development charges was reached by a complicated formula. The development charges applicable to a new development are not based on the capital cost incurred in providing electricity to that development but instead by another method entirely and this calculation may not be the same as those utilized by other municipalities which have enacted development charge by-laws.
>
> The development charges paid by subscribers pursuant to the by-law are placed in a general fund and held in trust for Ottawa Hydro by the Municipality. Furthermore, there is no direct correlation between the development charges rendered on a project and the recovery of those specific charges by Ottawa Hydro.

29 The trial judge then canvassed the case law defining a" tax", and concluded that the Ottawa Hydro component of the development charges was a tax, and then summarily concluded that the Foundation was exempt from the development charges,

30 With great respect to the trial judge, the above quoted reasons do not reflect an analysis of the evidence as to how Schedule B was arrived at by Ottawa Hydro. The reasons reflect the generality of development charges authorized by the *Act*. Very clearly, the development charges determined by Ottawa Hydro in Schedule B are the incremental capital costs incurred by Ottawa Hydro in providing electricity to the Foundation. These charges are attributed directly to the Foundation as the incremental capital component of the utility rate for the delivery of electricity to it as a customer. In the result, the Foundation is billed when service commences at the blended rate of capital and commodity charges billed to equivalent users prior to the construction of its new facility. These incremental capital costs may be calculations based on historical costs but, as with all such rate making calculations, they become current and very real when they are collected from the Foundation through the mechanism provided by the Development Charges By-Law after the installation of the specific equipment that enables Ottawa Hydro to effect delivery to the Foundation of its utility service, namely electricity. To the extent that the above quoted reasons of the trial judge constitute a finding of fact as to how the development charges in issue were determined, they constitute palpable and overriding error.

31 With respect to the legal categorization of these charges as taxes, the trial judge relied, in part, on the judicial reasoning from *Ontario Home Builders' Assn. v. York (Region) Board of Education* in the Divisional Court (1993), 13 O.R. (3d) 493 (Ont. Div. Ct.) and in the Court of Appeal for Ontario (1994), 17 O.R. (3d) 103 (Ont. C.A.). This case was later heard and decided by the Supreme Court of Canada ([1996] 2 S.C.R. 929 (S.C.C.)). In this court, Foundation relies on the Divisional Court judgment ((1993), 13 O.R. (3d) 493 (Ont. Div. Ct.)) which concluded that the education development charge passed under a by-law enacted pursuant to Part III of the *Act* is a tax and falls squarely within the exemption provided to the foundation by s. 16 of the *Cancer Act*. The Divisional Court's characterization of these charges as a tax was undisturbed, indeed it was not discussed, in the later decisions of this court and the Supreme Court of Canada.

32 It is important to recognize that by the time *Home Builders'* reached the level of the Supreme Court of Canada, the parties had accepted the initial classification of the Divisional Court below that the education development charges were taxes. The Divisional Court concluded that they were indirect taxes and therefore *ultra vires* the province as contrary to s. 92¶2 of the *Constitution Act, 1867*. The Court of Appeal agreed that they were indirect taxes but reversed the Divisional Court because the taxes were ancilliary or adhesive to a regulatory scheme falling within provincial responsibility under one or more of s. 92¶9, ¶13 and¶ 16 of the *Constitution Act, 1867*.

33 By the time the matter reached the Supreme Court of Canada, the issue appeared to be framed as a constitutional argument as to whether they were indirect taxes (and thus *ultra vires* the legislative competence of the province) or direct taxes (and thus *intra vires*). The majority judgment was delivered by Iacobucci J. on behalf of himself and four members of the court. He held that the education development charges were indirect taxes and thus *ultra vires* provincial competence under s. 92¶2 of the *Constitution Act, 1867*. However, the education development charges scheme, composed of a related group of statutes governing land development in Ontario, were ultimately *intra vires* the province as ancillary to a valid regulatory scheme for the provision of educational facilities as a component of land use planning, pursuant to ss. 92¶9 (licenses to raise money), ¶13

(property and civil rights) and ¶16 (matters of a local nature) of the *Constitution Act, 1867*. In so holding, he made it clear that the justification for the imposition of these indirect taxes was that the educational development charges scheme is limited in scope and operates solely so as to defray the costs of regulation.

34 La Forest J., for the minority consisting of himself and three other judges, concurred in the result but held that the taxes were *intra vires* the province because they were taxes on land and therefore direct taxes.

35 The only reported discussion in *Home Builders'* respecting the threshold issue whether educational development charges imposed pursuant to Part III of the *Act* were taxes at all, took place in the Divisional Court before a panel consisting of O'Driscoll, White and McKeown JJ. That court was faced with an application, brought by the Ontario Home Builders' Association and others, to quash by-laws passed by the respondents, certain school boards, which imposed educational development charges. The case considered the constitutional validity of the impugned by-laws. To that extent, the case is not relevant. However, the Divisional Court's consideration of the scheme of imposing and calculating educational development charges is relevant because both the Court of Appeal and Supreme Court did not consider whether they were taxes *per se*, implicitly accepting the Divisional Court's conclusion on that point.

36 The majority reasons as to the characterization of the educational development charges were delivered by McKeown J. He made the following analysis of these charges pp. 497-499:

> Part III of the *Development Charges Act* gives schools boards the authority to pass by-laws that impose education development charges. Section 30 is the operative section and provides that an education development charge is imposed "against *land undergoing residential and commercial development*" (emphasis added) where the development will give rise to the need for new schools directly attributable to it. Section 29 of the *Development Charges Act* defines an education development charge as:
>
> > "education development charge" means a development charge imposed under a by-law passed under section 30 respecting growth-related net education capital costs incurred or proposed to be incurred by a board.
>
> Where residential and commercial development gives rise to a need for new schools directly attributable to land developments, this is known in s.29, Part III of the *Development Charges Act* as a "growth-related net education capital cost". "Growth-related net education capital cost" is calculated pursuant to a statutory and regulatory formula whereby the public or separate school board that wishes to impose an education development charge shall:
>
> > (1) estimate what new school facilities will be needed as a consequence of the development and the cost of these facilities;
> >
> > (2) calculate the amount chargeable to each new home so that it can be expressed and levied on a per-unit basis at the time each building permit is issued; and
> >
> > (3) submit a proposal for anticipated capital needs and an estimate of the education development charge to the Minister of Education for review and approval.
>
> Once the education development charge is approved by the Minister of Education, the board may pass the by-law pursuant to Part III of the Act. The municipality then becomes the collector of the charge pursuant to the *Development Charges Act* and the charge is payable on a per-unit basis when a building permit is issued (s. 35(3)). If two or more boards in the same area pass by-laws, then both charges must be paid when the permit is issued. An account is then established, or a joint account if two or more boards levied the charges and the money is deposited into that account. No money can be withdrawn from this account unless the actual project (as opposed to the estimate made in contemplation of the by-laws described above) is given final approval by the Minister of Education.
>
> Ontario Regulation 722/89 sets out the methodology that school boards must follow to ascertain their eligibility for education development charges and to calculate them. When a school board calculates a proposed education development

charge, it cannot include the capital costs associated with renovating schools for existing pupils or building schools for existing pupils currently accommodated in portables or bussed to distant schools. The projected capital costs must be based on the board's projection of the number of new pupils that it anticipates will be entitled to education within its jurisdiction as a result of the new development

37 McKeown J. further considered the nature of levies imposed by a province generally and held as follows at p. 505:

It is well understood that not every levy imposed by as a province is "taxation" within the meaning of s. 92(2). The distinction between "taxation" and "charge" is that the latter is money collected to defray the cost of specific services rather than to raise revenue for general purposes. As Peter Hogg concluded, in his book, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985), at p. 613:

> These charges are not necessarily taxes, and if they are not they need not be direct. They are not taxes if they can be supported as regulatory charges imposed under one of the province's regulatory powers ... These can be supported as regulatory charges if they are taken in payment for as a specific governmental service, and if they bear a reasonable relation to the cost of providing the service, whether it be the issue of a license ... the provision of a bridge, or the supply of water. These charges are not taxes because their purpose is to defray expenses, not to raise revenue.

38 The definition of "development charge" in Part I of the *Act* is virtually the same as that of "educational development charge" in Part III except that it is not restricted to education and refers to net capital costs that are incurred by the municipality or a local board thereof. The definitions are identical in that they permit the recovery as charges of "costs incurred or proposed to be incurred". Accordingly there appears to be no objection to having the municipality determine what actual costs are to be charged where such a determination is feasible. When the latter is done, it would appear from comments made as *obiter* by McKeown J. that the characterization of the charge may well be different. He stated at p. 506:

However, we should point out that, while everyone taking up residence in the new land development will use sewers and side-walks, not everyone will use the schools. It is not enough that every homeowner benefits indirectly through potential capital appreciation: *Howay v. Caradoc (Township)* (1991), 6 M.P.L.R. (2d) 70 (Ont. Gen. Div.) at p. 73. Furthermore, a review of Parts I and II of the *Development Charges Act* shows that the municipality is regulating the development industry, whereas in Part III of the Act, the municipality through its local school boards is levying a charge or tax and is making no attempt to regulate the schools. There is nothing in Part III, or the regulations passed pursuant thereto, regulating schools. The Act and regulations set out how to levy and calculate a charge, when the charge expires, and how to collect it.

39 McKeown J. further held that at p. 507:

While schools are an integral part of community life, they are no more services akin to sewers and waterlines than are courts and post offices. It is not useful to compare the construction of schools to the provision of direct municipal services that the community requires in order to function on as a daily basis. Schools are not like street lights that perform one function, a physical function. We no more view our schools in such a way than we do our criminal courts, hospitals or the town hall... While this charge may not be imposed to "raise revenue for general purposes" as conventionally understood, it is much closer in nature to as a tax for raising revenue than it is to as a charge to defray costs.

40 These comments can be taken to suggest that McKeown J. would not have made the same finding had he been faced with a levy for "direct municipal services". McKeown J. appeared prepared to accept that certain levies for municipal services may be properly characterized as charges. With this in mind, it appears that McKeown J. did not wish that the scope of his reasoning should extend to development charges generally. Rather, it suggests that the scope of his reasoning should not extend to the hydro component in the case in appeal because it is very much like those municipal services that are used by the community on a daily basis. In our case, the hydro component of the development charge comprises the cost to the development of two switches which are required for the operation of the Foundation; this is not an anticipated cost based on usual municipal requirements, but is as a determination of the actual needs of the development.

41 Moreover, McKeown J. concluded that the cases which held that a levy is a charge in the context of non-constitutional cases are not dispositive in constitutional cases. The present appeal is not as a constitutional case. As a result, the cases which concluded that a levy is as a charge, such as *Cariboo College v. Kamloops (City)* (1982), 18 M.P.L.R. 85 (B.C. S.C.), are still instructive.

42 In essence, the decision in this case will depend on the characterizations of the administration of the development charges regime in the City of Ottawa. The Foundation argues that this is an improper inquiry. It submits that the question of whether development charges constitute taxation must be answered by reviewing the legislative scheme that authorizes the passage of the operative by-law, not by considering the by-law itself. According to the Foundation, the appeal involves, in part, the characterization of the province wide enabling statute which authorizes the imposition of a scheme of taxation to raise revenue for capital construction of public works and facilities. If this is correct, the submission is that it is irrelevant how Ottawa calculates and administers its development charges program.

43 I think that the Foundation is wrong on this point. The question on appeal seeks to determine whether the Ottawa Hydro component is a charge or a tax. To do so, it is necessary to consider how the charge is measured and collected. This must be specific to the Development Charges By-Law of the City of Ottawa. The implication of this is that future litigation would arise whereby municipalities and hydro authorities are tested as to their particular administrative mechanisms in place. This may be so, but there are no constitutional impediments to what the City of Ottawa has done and the Foundation has not raised any objections to the decision of the City to isolate the hydro charges from the other development charges and set them out as Schedule B. Certainly the concept that Ottawa Hydro's ratepayers should be spared the incremental capital costs of providing service to new developments is fully within the spirit of the *Act*.

44 While I do not think that the fact that the Development Charges By-Law was passed under Part I of the *Act* as opposed to Part III has any significance to the outcome of this appeal, it is clear that the courts in *Home Builders'* were not dealing with electrical rates *per se*. It is also clear that, historically, utility rates have not been considered as taxes by the courts and we have not been referred to any authority which suggests that there is movement away from this traditional approach. I include in this observation, the *HomeBuilders'* case. In my opinion, the error in the judgment under appeal is that instead of analysing the evidence of Kropp as to how the Ottawa Hydro charges in Schedule B were arrived at, the trial judge looked at the scheme of the *Act* and the broad parameters therein set forth for the determination of development charges in general, without recognizing that within those parameters there could be levies or charges that were not taxes.

Disposition

45 For the reasons set out above, I would allow the appeal, set aside the judgment below and in its place substitute a judgment dismissing with costs the application by the Foundation for a declaration that it is not subject to the development charges set out in Schedule B to the Development Charges By-Law. Ottawa Hydro is entitled to its costs of this appeal.

Osborne J.A. **(Labrosse J.A. concurring):**

46 I have had the advantage of reading the reasons for judgment of my colleague Finlayson J.A. He has concluded the hydro component of the City of Ottawa's development charge is not a tax and that the exemption from taxation claimed by the respondent ("Cancer Foundation") provided by s. 16 of the *Cancer Act*, R.S.O. 1990, c. C.1 is thus not engaged. I have reached a different conclusion. In my view, Part I, Development Charges, ("DC") imposed under the *Development Charges Act*, R.S.O. 1990, c. D.9 (the "DCA"), are taxes that come within the ambit of s. 16 of the *Cancer Act*, with the result that the Cancer Foundation is exempt from this form of taxation. Thus, I think that the appeal should be dismissed. What follows are my reasons for reaching that conclusion.

Overview

47 I think that the central question is whether DCs imposed under Part I of the DCA constitute taxation. In my view, the answer to that question is, yes. I reach that conclusion on the basis of my analysis of the structure of the DCA and the City

of Ottawa by-law passed under the authority of that Act. I am supported in my conclusion by the Supreme Court of Canada's judgments in *New Mount Sinai Hospital v. Toronto (City)*, [1973] S.C.R. 541 (S.C.C.) and *Ontario Home Builders' Assn. v. York (Region) Board of Education*, [1996] 2 S.C.R. 929 (S.C.C.). I will refer in more detail to both cases later. For now, I note that in *Ontario Home Builders'* the Supreme Court of Canada unanimously agreed that education development charges ("EDC") (dealt with in Part III of the DCA) are taxes. The only difference of opinion within the Supreme Court of Canada was on the issue whether the EDC was a direct or indirect tax. I see no difference in substance, or principle, between EDCs and DCs for purposes of determining whether DCs are taxes.

48 In my opinion, it is the DCA scheme, not what the City of Ottawa, or Ottawa Hydro, does with the relevant DCs, or what the DCs replace, that is significant in the required analysis. The DCA contemplates a DC payment to cover all service areas listed in the municipal corporation's development charge by-law ("DCB"). The service area (electrical) provided by Ottawa Hydro is but one of the service areas listed in that by-law. The payment of a DC is triggered by a list of statutory development-related events, one of which is the issuance of a building permit. It is the payment of the DC, made under the authority of the DCA and in this case the City of Ottawa DCB, that I think must be considered to answer the question whether that payment is the payment of a tax for purposes of s. 16 of the *Cancer Act*.

49 My colleague has referred to some of the evidence that was before the motions judge, Binks J., and I will thus limit my references to the evidence to aspects of it that I think are important to give some reasonable factual context to my analysis. That analysis must begin with a consideration of the DCA.

The Development Charges Act

50 The applicable version of the DCA was given third reading on November 22, 1989 and proclaimed into force on November 23, 1989. It was intended to bring uniformity and order into development — growth-related municipal costs. The DCA replaced, among other things, the existing lot levy system. By late 1989 lot levies had increased substantially, as municipal corporations grappled with reduced grants and increased growth-related costs and it was thought, at a political level, that a new system had to be devised to permit municipalities to recover growth-related capital costs. The new system is set out in the DCA. The underlying economic philosophy of the DCA is that growth (development) should pay for the infrastructure costs that it generates. Such costs, generally speaking, should not be borne by existing residents. The purpose of DCs was described in this way by the Ontario Municipal Board in *A. Pigeau Construction, Re* (1993), 30 O.M.B.R. 210 (O.M.B.) at p. 223:

> If the Board looks at the purposes of development charges, it is to provide a pool of funds which allows the capital expenditures required by development to be borne by those people who will benefit from the services and not to impose the capital costs for developments on the whole of the municipality. The method by which the municipality has determined to collect these fees is that they are payable when a building permit is obtained. It is the building permit which triggers the collection of the taxes or charge. In most circumstances, this provides for an equitable collection of the development charge on the property.

51 The DCA is divided into four parts. Part I concerns the municipal DCs, which are of concern in this case, Part II front-end payments, Part III education development charges, and Part IV general provisions.

52 I set out below sections of the DCA that I think are relevant for the purposes of this appeal:

> 1. In this Act,
>
> "capital cost" means costs incurred or proposed to be incurred by a municipality or a local board thereof directly or under an agreement,
>
> (a) to acquire land or an interest in land,
>
> (b) to improve land,
>
> (c) to acquire, construct or improve buildings and structures,

(d) to acquire, construct or improve facilities including,

(i) rolling stock, furniture and equipment, and

(ii) materials acquired for circulation, reference or information purposes by a library board as defined in the *Public Libraries Act*, and

(e) to undertake studies in connection with any of the matters in clauses (a) to (d)

required for the provision of services designated in a development charge by-law within or outside the municipality, including interest on borrowing for those expenditures under clauses (a), (b), (c) and (d) that are growth-related;

"development charge" means a charge imposed with respect to growth-related net capital costs against land under a by-law passed under section 3;

"development charge by-law" means a by-law passed under section 3;

"growth-related net capital cost" means the portion of the net capital cost of services that is reasonably attributable to the need for such net capital cost that results or will result from development in all or a defined part of the municipality;

"local board" means a local board as defined in the *Municipal Affairs Act*, other than a board defined in subsection 30(b);

"net capital cost" means the capital cost less capital grants, subsidies and other contributions made to a municipality or that the council of the municipality anticipates will be made, including conveyances or payments under sections 42, 51 and 53 of the *Planning Act*, in respect of the capital cost;

"services" means services designated in a development charge by-law or in an agreement under section 2***I***, as applicable;

3. — (1) The council of a municipality may pass by-laws for the imposition of development charges against land if the development of the land would increase the need for services and the development requires,

(a) the passing of a zoning by-law or of an amendment thereto under section 34 of the *Planning Act*;

(b) the approval of a minor variance under section 45 of the *Planning Act*;

(c) a conveyance of land to which a by-law passed under subsection 50(7) of the *Planning Act* applies;

(d) the approval of a plan of subdivision under section 51 of the *Planning Act*;

(e) a consent under section 53 of the *Planning Act*;

(f) the approval of a description under section 50 of the *Condominium Act*; or

(g) the issuing of a permit under the *Building Code Act* in relation to a building or structure.

(3) A by-law passed under subsection (1) shall,

(a) designate those uses of land, buildings or structures upon which a development charge shall be imposed;

(b) designate the areas within which a development charge shall be imposed;

(c) establish the development charge, or the schedule of development charges, to be imposed in respect of the designated uses of land, buildings or structures; and

(d) designate services for which a development charge may be imposed.

(6) No land, except land owned by and used for the purposes of a board as defined in subsection 30 (6) or a municipality, is exempt from a development charge under a by-law passed under subsection (1) by reason only that it is exempt from taxation under section 3 of the *Assessment Act*.

9. — (1) A development charge is payable on the date a building permit is issued in relation to a building or structure on land to which a development charge applies.

(2) Despite any other Act, a municipality is not required to issue a building permit in relation to a building or structure on land to which a development charge applies unless the development charge has been paid.

11. A municipality that has passed a development charge by-law may register the by-law or a certified copy of it on the land to which it applies.

12. — (1) If the development charge or any part thereof imposed by a municipality, other than an upper tier municipality, remains unpaid after the due date, the amount unpaid shall be added to the tax roll and shall be collected as taxes.

(2) If the development charge or any part thereof imposed by an upper tier municipality remains unpaid after the due date, the treasurer of the upper tier municipality shall certify to the treasurer of the area municipality in which the land is located that the amount is unpaid and the amount unpaid shall be added to the tax roll of the area municipality and shall be collected as taxes.

16. — (1) Payments received by a municipality under this Part shall be maintained in a separate reserve fund or funds and shall be used only to meet growth-related net capital costs for which the development charge was imposed.

17. The treasurer of the municipality shall, in each year, on or before such date as council may direct, furnish to the council a statement in respect of each reserve fund established under section 16 containing the information prescribed.

19. The Lieutenant Governor in Council may make regulations,

(a) prescribing, for the purposes of section 3, the manner in which development charges shall be calculated;

(c) prescribing, for the purposes of section 3, those services for which development charges shall not be imposed;...

49. In the event of a conflict between this Act and any other general or specific Act, this Act prevails.

53 A DC is a charge imposed with respect to growth-related net capital costs under a municipal by-law passed under the authority of s. 3(1) of the DCA. Growth-related net capital costs is that part of "the net capital cost of services that result or will result from development."" Services" is not defined in the DCA or the regulations. I will return to the matter of municipal "services" when I consider the City of Ottawa's DCB. For now, I note that it is the growth-related capital cost of "services" identified in the municipality's DCB that attract DCs.

54 Under the authority provided in s. 3(1) of the DCA, the council of a municipality may pass by-laws providing for the imposition of DCs against land if the development of the land would increase the need for services, and if the development requires any one of the seven development-related steps set out in s. 3(1)(a) to (g). One development-related triggering event is the issuance of a building permit.

55 The collection of DCs is governed by ss. 9, 10 and 12 of the DCA. All that needs to be said about this subject is that a DC is payable when a building permit is issued for a development (such as the Cancer Foundation extension) on land to which the DC applies (s. 9(1)). The municipality is not required to issue a building permit until the applicable DC has been paid (s. 9(2)). A municipality that has passed a DCB may register it on the land to which it applies and if the DC, or any part of it, remains unpaid the unpaid DC is added to the tax roll and may be collected as taxes (ss. 11, 12(1) and (2)).

56 The municipal treasurer is responsible for collecting DCs and must annually provide the municipal council with a statement in respect of every DC reserve fund established under the DCA and the municipality's DCB.

57 Neither Part I of the DCA nor its Regulation 267, R.R.O. 1990, ("Regulation") set out in any detail way how DCs are to be calculated. Instead, the Regulation prescribes somewhat broad principles which must be followed in calculating DCs. Section 3(1) of the Regulation requires the municipality to base its calculation of DCs on the provision of services at standards no higher than the standards at which those services were provided at the time the by-law is passed or have been provided at any time in the preceding 10 years.

58 Section 4(1) of the Regulation requires that the calculation of DCs be based on growth-related net capital costs for a period not exceeding 10 years from the date that the DCB comes into force. Section 4(2) of the Regulation provides that DCs for water supply services, sanitary sewer services, storm drainage surfaces, transportation services, and waste disposal services may be based on estimated growth-related net capital costs for a period exceeding 10 years.

59 Under s. 16 of the DCA, DCs received by the municipality must be maintained in a separate reserve fund or funds. Section 16 provides that DCs can be used only to the meet growth-related net capital costs for which the DC was imposed. Section 12 of the Regulation requires the municipal treasurer to include in the information contained in his annual statement the amount of DCs that were refunded or "allocated to other services" (s. 12(4)). This suggests that a municipality may spend DCs, deposited as required in a reserved fund, in other service areas set out in the DCB. The municipality's flexibility depends upon the by-law. I will return to this subject shortly.

60 In summary, DCs are collected for the general public purpose of regulating and providing for the growth-related net capital costs assumed to be created by development. They are not collected to defray the specific capital costs attributable to a particular development. The hydro component of the City of Ottawa's DC, if paid by the Cancer Foundation would not necessarily be spent on paying capital costs attributable to the Cancer Foundation's expansion. The DCA allows for DCs to be imposed through the municipality's DCB on the basis of a prediction of growth-related net capital costs of future development. The prediction is based on a calculation not prescribed in the Act or its regulations, however, it will necessarily be somwhat imprecise and not directly site specific.

The City of Ottawa Development Charges Act By-law

61 On November 6, 1991, the City of Ottawa passed By-law 279-91, the City's DCB, under the authority of s. 3(1) of the DCA. The preamble in the by-law contained five recitals, two of which I think go to make clear the underlying assumption in the by-law is that "development" will increase the need for services:

> Whereas the Development Charges Act, 1989, S.O. 1989, c. 58 authorizes municipalities to pass by-laws for the imposition of charges against land or the development of the land would increase the need for services.
>
> And whereas development will increase the need for municipal services. [Emphasis added.]

62 This approach is consistent with the philosophy of the DCA — growth will increase municipal infrastructure costs and growth should pay for the capital costs that it generates. The Ottawa DCB follows the structure suggested by the DCA and its regulations. The by-law applies to all land in the City of Ottawa, apart from that land that is exempted by s. 11 of the by-law. It prohibits the development of land except in accordance with the by-law and provides that DCs collected under the by-law shall be used for 11 specified municipal and hydro-electric services. The services are:

> (a) fire stations, vehicles and equipment;
>
> (b) police facilities and equipment;
>
> (c) storm sewer systems;

(d) sanitary sewer systems;

(e) highways, including sidewalks;

(f) parkland development;

(g) community activity and sports and recreation facilities;

(h) library facilities;

(i) cultural facilities;

(j) services provided by Ottawa Hydro;

(k) administrative services in the corporation and Ottawa Hydro relating to the services referred to in subsections (a) to (j) above.

63 As is evident, "services provided by Ottawa Hydro" is but one of the listed service areas. The City of Ottawa's DCB provided that the method of calculation of the DC be in accordance with the" rates" set out in Schedules A and B annexed to the by-law (see By-law 279/91, ss. 3, 5 and 6). The by-law makes it clear that the DC payable is the total of the City of Ottawa's component of the DC, which includes all identified services, except hydro, plus the hydro component. Schedules A and B of the by-law set out how the applicable DC is to be calculated (Schedule A for the City of Ottawa services component, and Schedule B for the Ottawa Hydro service component).

64 The calculation of the City of Ottawa DC component for a residential development, set out in Schedule A, is based on habitable floor area. For example, construction of a single detached dwelling containing 102 square metres, or more, of habitable floor area required a DC payment of $2,242.00 in the April 1, 1992 to March 31, 1993 period. Schedule A ratchets the DC upward in each year of the 5-year life span of the by-law with the result that construction of the same single family detached dwelling required a DC payment of $3,417 in 1995. For a single or two-unit residential dwelling, the Ottawa Hydro component of the DC, set out in Schedule B, is a flat rate of $479.00 per unit. For a row dwelling, the Ottawa Hydro DC component is $335.00 per unit.

65 For a non-residential development, such as the Cancer Foundation building, Schedule A provides that the DC, referable to all services but Ottawa Hydro, is $16.15 per square metre of gross floor area. This part of the DC is not in issue became the City of Ottawa gave the Cancer Foundation a grant in an mount equal to the non-hydro component of the DC.

66 The hydro component of the DC for a development such as that undertaken by the Cancer Foundation is calculated on the basis of three identified criteria: the distance of the development from the transformer station, the unit cost of the electrical distribution plant, and the magnitude of the new load. Mr. Kropp, who gave evidence in this matter for Ottawa Hydro, stated that Ottawa Hydro resorted to averaging and predicting, consistent with the principles of rate making, in its calculation of all of the component elements of the Ottawa Hydro DC. Thus, two identical facilities, like the Cancer Foundation building, built with identical switches would attract the same DC, even though one of them was much further from the transformer station than the other. As Finlayson J.A. has correctly noted, no issue is taken with the calculation, or the method of calculation of the Ottawa Hydro component of the DC attracted by the Cancer Foundation's application for a building permit for its expansion. I refer to the calculation of DCs under the City of Ottawa's DCB only to note the capital cost assumptions that underlie the calculation of DCs and to explain that the growth-related capital costs are not truly site specific. As I have said, the DCA scheme assumes and predicts that development will give rise to growth-related municipal infrastructure costs in all of the service areas (including Ottawa Hydro) set out in the by-law.

67 Section 21(2) of the Ottawa DCB provides that DCs collected pursuant to the by-law shall be allocated in accordance with Schedule C, which is a part of the by-law. That Schedule provides a percentage allocation of DCs paid under the by-law. For example, under Schedule C for a building such as the Cancer Foundation building, 31.59 cents of each DC dollar would

be allocated to transportation, 11.60 cents to administration and 2.62 cents to libraries. Each of the 10 service areas is given a prescribed share of the DC dollar. This allocation will occur whether or not a particular development increases the need for transportation facilities, administration or libraries (or any of the other identified service areas).

68 The Ottawa Hydro service component is set apart in Schedule C of the by-law. The percentage allocation of all services except Ottawa Hydro totals 100% and is referred to in the schedule as "City subtotal." "Electrical," that is Ottawa Hydro, is separately allocated as 100%.

69 Section 17 of the Ottawa DCB requires the municipal treasurer to maintain a separate reserve fund for that part of the DC attributable to hydro-electric services as set out in Schedule B. The by-law makes no reference to a separate reserve fund or funds for the non-hydro part of the DC; however, Ottawa's municipal council passed two further by-laws on November 6, 1991, by-laws 280/91 and 281/91. By-law 281/91 is in the material. By-law 280/91 is not. By-law 281/91 provided that DCs deposited in the Ottawa Hydro reserve fund shall be used to pay DCs "... for the growth-related portion of net capital costs for which the development charges were imposed to the extent there exists a positive balance in the fund intended for that purpose."

70 By-law 280/91 (which I have reviewed since it is a public document) completes the DCA circle by creating a reserve fund for all other, that is non-hydro, services set out in Ottawa's main DCB, "segregated according to Schedule A attached hereto." Schedule A attached to By-law 280/91 contains the same breakdown of service elements that are in the City of Ottawa's main DCB.

71 In the final analysis, through its three November 6, 1991 by-laws, the City of Ottawa established two reserve funds, one for DCs related to all of the identified services elements except hydro, and the other for hydro.

Analysis

72 The appellant submits that the central issue is whether the hydro component of the DC imposed on the Cancer Foundation is properly characterized as taxation for purposes of s. 16 of the *Cancer Act*.

73 The appellant contends that the hydro component of the DC is a regulatory charge, not a tax. In support of its position, it points to the existence of the separate reserve fund for the hydro component of the DC and restrictions imposed by the by-law on the use of DCs in that reserve fund.

74 The appellant notes that the hydro component of the DCs can only be used for future growth and hydro-related net capital costs, not for a general public purpose. The appellant also looks to the manner in which Ottawa Hydro defrayed its capital costs before November 1991, when the City of Ottawa opted into the DCA scheme. The appellant submits that Ottawa Hydro has done no more than to choose to recoup its growth-related infrastructure costs by DCs, instead of by hydro rates. Since the capital component of the pre-DCA hydro rates (paid by all ratepayers) was not a tax, the appellant submits that the substitute — the hydro component of the DC — is not a tax. The appellant contends that these features of the DCA and the City of Ottawa DCB support its submission that the hydro component of the DC is a regulatory charge, not a tax.

75 I agree with the appellant that not every charge or levy imposed by the province constitutes taxation. I do not, however, agree that the question to be answered is whether payment of the hydro component of the DC constitutes payment of a tax. Moreover, I do not think that the limited use that can be made of the hydro component of the DC is determinative. This approach ignores the other service areas in the by-law and focuses the analysis entirely on the hydro component of the DC. As I have said, I think that the issue should be cast more broadly. I do not agree that since the hydro component of the DC became the substitute for the capital component of the pre-November 6, 1991 hydro rates, that it follows that the hydro part of the DC is a rate, not a tax. Indeed, because I frame the issue differently, I think that if there is to be a before and after comparison, it should focus on lot levies and DCs. DCs replaced lot levies; lot levies were a form of taxation. See *Palisade Properties (1985) Ltd. v. Surrey (District)* (1991), 5 M.P.L.R. (2d) 206 (B.C. S.C.) at 208 and *Sorokolit v. Peel (Regional Municipality)* (1977), 16 O.R. (2d) 607 (Ont. Div. Ct.) at 612. I do not, however, think that this analysis is productive. In my view, the DC scheme should be assessed for what it is, not on the basis of an assessment of what it replaced.

76 I turn first to consider the approach that I think should be taken to determine if the Cancer Foundation is entitled to the taxation exemption in s. 16 of the *Cancer Act*. In my opinion, it is the DCA in its entirety and all of Ottawa's DCB that must be assessed. The hydro component of the Ottawa DCB should not be excised from the DCA scheme to determine whether it alone is a tax. I find support for this analytical approach in the judgments of this court and the Supreme Court of Canada in *Ontario Home Builders'*, *supra*. In this court, [(1994), 17 O.R. (3d) 103 (Ont. C.A.)] Carthy J.A. concluded that EDCs were an element of the planning process and that they replaced lot levies imposed as a condition of subdivision approval under the *Planning Act*, R.S.O. 1990, c. P.13. In his analysis, he did not accept Ontario Home Builders' argument that he thought tended to isolate the construction of schools as the responsibility of the school boards from the municipality's responsibility to regulate land development. At p. 112, he said that this argument:

> ... overlooks the fact that we are testing provincial powers, not the powers of the school board. The constitutionality of the charges must be the same whether imposed directly by the province, by delegation to the municipality to exercise in tandem with land use control, or by a combined delegation, as here, to the school boards to impose charges, and to the municipality to collect them. Throughout, the ultimate control is retained by the Minister of Education. [Emphasis added.]

77 Carthy J.A.'s observations have application here. Like EDCs, the hydro component of the City of Ottawa DC is, nonetheless, a DC. It is, as Carthy J.A. put it, "the provincial powers" that must be tested, not the powers of Ottawa Hydro.

78 In the Supreme Court of Canada, writing for the majority Iacobucci J. accepted that EDCs are part of a comprehensive integrated scheme" ... namely, the entirety of planning, zoning, subdivision and development of land in the province." His analysis of the DCA supports my view that the entire DC scheme should be looked at to determine if the Cancer Foundation is entitled to the *Cancer Act* taxation exemption.

79 The DCA scheme manifestly was intended to apply throughout the province, in respect of those municipalities that chose to participate by passing a DCB. To narrow the focus of the review to one part of one municipality's DCB would lead to unacceptable fragmentation and instability since a component of one municipality's DC would be a tax in that municipality and not a tax in another depending upon the form of the municipality's by-law. More particularly, the precise construction undertaken by the Cancer Foundation would attract payment of the hydro component of the applicable DC in one municipality, but not in another, since the DC payment would be characterized as payment of a tax in one municipality, but not in another. My colleague accepts the prospect of this distortion. I do not. In my opinion, DCs are part of a comprehensive provincial scheme designed to permit participating municipalities to defray growth-related net capital costs. The payer of the DC makes one payment that covers the total DC for all service areas set out in the by-law.

80 It was the City of Ottawa, not Ottawa Hydro, that determined to pass a DCB and to include Ottawa Hydro as one of its 11 identified service areas. As a practical matter, Ottawa Hydro would not have been included as a service area had it not agreed. Nonetheless, it was the City of Ottawa's decision to pass a DCB and the City had the final say in what services would be listed in its by-law. Indeed, I question what standing Ottawa Hydro has on this appeal. It seems to me that it is the City of Ottawa that should be the appellant. However, since this issue has not been raised, I will proceed on the basis that Ottawa Hydro is the proper appellant.

81 Virtually all that distinguishes Ottawa Hydro from the 10 other service areas listed in the by-law is the provision requiring the hydro component of the DC to be deposited in a separate reserve fund that is not mingled with the DCs allocated to the other 10 selected service areas. But the fact remains that hydro is but one among 11 service areas set out in the by-law. I do not think that Ottawa Hydro can properly be isolated from the broader scheme (the DCA), or from the other service areas set out in the by-law. Either the whole DC (including its hydro component) is a tax, or it is not. The components are part of the whole and should not be divided for purposes of this analysis.

Is a DC a Charge or a Tax?

82 A tax is a compulsory levy imposed by law for a public purpose by a public body. See *Lawson v. Interior Fruit Committee*, [1931] S.C.R. 357 (S.C.C.). DCs fit within that definition, in my opinion. Nonetheless, it has been recognzied that many charges

also fit within the broad definition of a tax. In result, a further examination of the difference between a charge and a tax is required in the context of DCs imposed under the DCA.

83 The distinction between a charge and a tax was considered in *Powers of Ottawa & Rockcliffe Park to Levy Rates on Foreign Legations& High Commissioners' Residences, Re*, [1943] S.C.R. 208 (S.C.C.). In that case the Supreme Court of Canada had to consider whether the City of Ottawa could levy rates on real property used by foreign states as legations. Duff C.J.C. expressed the view that real property taxes could not be extracted from diplomatic representatives or the sovereign states that they represented. At p. 222, he distinguished real property taxes from charges such as licence fees, bridge tolls, stamp duties, water rates and electric rates that he accepted were charges which "... are taken in payment for specific services rendered directly to the particular individual who pays for them. ..." In La Forest, *The Allocation of Taxing Power Under the Canadian Constitution*, (1967), at p. 58, the author endorsed Duff C.J.C.'s analysis of the distinction between a charge and a tax.

84 A DC is paid by the developer/owner in a lump sum. The DC is not paid for particular services of which the owner/developer is the direct beneficiary. That is to say the DC imposed bears no relationship to the value to the developer of the capital expenditure that the DC is intended to defray. Whether the burden of the DC will be passed on to others will be dependent upon economic circumstances and is an issue which need not be discussed here. It is an issue which is relevant to the question whether a DC, if a tax, is an indirect tax or a direct tax.

85 The significance of restrictions on the use of special levy funds as a factor in determining whether a special levy was a tax was considered by the Supreme Court of Canada in *Mount Sinai*, *supra*. In that case, the City of Toronto, acting under the authority of *The City of Toronto Act, 1961-62 (Ont.)*, c. 171, ("*City of Toronto Act*") levied a special sewer charge against the hospital. The hospital applied for a declaration that it was exempt from this special sewer charge because public hospitals were exempt from taxation.

86 Section 1 of the *City of Toronto Act* gave the municipal council the authority to pass by-laws imposing a special levy on certain buildings where a building permit was issued for the erection or enlargement of a building after March 6, 1962. The levy was imposed to defray the capital costs of additional sanitary or storm sewer or water supply capacity" ... which, in the opinion of the Council, would not otherwise be required ..." The special levy was over and above all other rates and charges and was intended "... to pay for all or part of the cost of providing the additional capacity." Section 1(2) of the *City of Toronto Act* provided that the proceeds of the charges authorized by s. 1(1) could be used only for the purpose of paying for the identified increased capital costs. Section 1(3) gave the municipality authority to collect special levy as taxes if it remained unpaid.

87 The City of Toronto's by-law passed under the authority of the *City of Toronto Act* imposed a 20 cent per square foot of gross floor area special levy on the erection or enlargement of structures to which the special levy was applicable. The by-law provided a 3300 square foot deductible for purposes of calculating the applicable gross floor area. Mount Sinai, a public hospital, claimed to be exempt from the special levy on the basis of s. 3(7) of *The Assessment Act*, R.S.O. 1970, c. 32 ("*Assessment Act*"), which the hospital contended exempted it from taxation.

88 There were two issues in *Mount Sinai*. Was the special levy a tax and if it was did the *Assessment Act* taxation exemption apply to the hospital? A Weekly Court judge accepted that the special sewer levy was taxation, but did not accept the hospital's submission that it was entitled to the benefit of the *Assessment Act* exemption from taxation. Thus, he dismissed the application. The hospital's appeal to this court was dismissed. However, on the hospital's appeal to the Supreme Court of Canada, the appeal was allowed. The majority concluded that the special levy was a tax and that the hospital was entitled to the benefit of the *Assessment Act* exemption from taxation. Hall J. put it this way at p. 546:

> Section 3(7) of *The Assessment Act* is clear and unambiguous. Under it the hospital is exempt from taxation. The special sewer tax or levy here is a tax. [Emphasis added.]

89 In my view, although *Mount Sinai* had nothing to do with what we now know as a DC, the special sewer levy in issue in that case can be equated to DCs by analogy. The sewer levy was imposed on the assumption that certain kinds of development (the erection or enlargement of buildings) would necessitate sewer and water-related growth-related capital costs. The payment

of the levy, like DCs, was triggered by the issuance of a building permit. The levy had to be paid in a lump sum and if not paid could be collected as taxes. Similar provisions appear in the DCA. The relevant statute and by-law required the special levy funds to be used for the purpose for which they were collected. There are stark similarities throughout to what we now know as a DC. Thus, it is my view that *Mount Sinai* supports my conclusion that DCs are taxes.

90 The appellant's argument that DCs are not taxes because the funds collected are used to offset specified growth-related net capital costs was also considered by the Privy Council in *Esquimalt & Nanaimo Railway v. British Columbia (Attorney General)* (1949), [1950] A.C. 87 (British Columbia P.C.).

The Privy Council stated, at pp. 121-22:

> The legislature has thus thought it proper to divide the expense of what is a public sevice of the greatest importance to the province as a whole between the general body of taxpayers and those individuals who have a special interest in having their property protected. The levy has what are, undoubtedly, characteristics of taxation, in that it is imposed compulsorily by the State and is recoverable at the suit of the Crown. It is suggested, however, that there are two circusmtances which are sufficient to turn the levy into what is called a "service charge". They are, first, that the levy is on a defined class of interested individuals and, secondly, that the fund raised does not fall into the general mass of the proceeds of taxation but is applicable for a special and limited purpose. Neither of these considerations appears to their Lordships to have the weight which it is desired to attach to them. The fund is made up partly of the levy and partly by contributions from the taxes paid by the general body of taxpayers. This is no doubt a reasonable apportionment of the burden, for to impose the cost of services which are of general interest to the community as well as a particular interest to a class of individual exclusively on one or the other might well have seemed oppressive. The fact that in the circumstances the persons particularly interested are singled out and charged with a special contribution appears to their Lordships to be a natural arrangement. Nor is the fact that the levy is applicable for a special purpose of any real significance. Imposts of that character are common methods of taxation-taxation for the road fund in this country was a well-known example. The objects of the legislature in adopting such a form of tax may be various. But if it finds it convenient to do so the impost, if in other respects it has the character of a tax, does not thereby change its character. [Emphasis added.]

91 In my opinion, the fact that DCs generally, or the hydro component of the DC, must be used for a particular specified purpose does not support the conclusion that the Ottawa DC, or its hydro component, is not a tax.

92 This brings me to the Supreme Court of Canada's decision in *Ontario Home Builders', supra*. EDCs, provided for in Part III of the DCA, were in issue in that case. Whether EDCs were, or were not, taxes was clearly in issue before the Divisional Court, this court, and the Supreme Court of Canada. Throughout, Ontario Home Builders' contended that EDCs were indirect taxes and thus unconstitutional. The competing position was that EDCs were regulatory charges, not taxes and alternatively, if EDCs were taxes, they were direct taxes and, therefore, constitutional.

93 In *Ontario Home Builders'*, the Supreme Court of Canada determined that EDCs were taxes. The court was divided on the issue whether the EDC was a direct (per La Forest J.) or an indirect tax (per Iacobucci J.). The majority concluded that EDCs were indirect taxes, but nonetheless constitutionally justified because they were a novel form of taxation ancillary to a valid provincial regulatory scheme; the minority concluded that the EDCs were direct taxes and thus constitutional.

94 In his anotation to the Supreme Court of Canada's decision in *Ontario Home Builders'* (reported (1996), 35 M.P.L.R. (2d) 1 (S.C.C.)), John Mascarin commented on the majority and minority judgments in *Ontario Home Builders'* and concluded:

> The decision, which was anxiously awaited by the municipal sector, also means that municipal development charges, which are authorized under Part I of the *Development Charges Act*, cannot be constitutionally challenged. It appears clear that the reasoning of both the majority and minority decisions of the court with respect to the issues of direct/indirect taxation, and whether the charges are imposed pursuant to a provincial regulatory scheme, would be equally applicable, if not more so, to municipal development charges. [Emphasis added.]

95 In my opinion, EDCs are similar to DCs in a very substantial way. EDCs are taxes imposed to defray growth-related net capital costs of development in respect of schools. DCs are imposed to defray the growth-related net capital costs with respect to the particular service areas set out in the municipality's DCB. There is a distinct parallel between EDCs and DCs in the definition, the triggering development events, the process of implementing, the calculation, the collection, the identification of who pays, and the statutory controls on the spending of funds. In particular, EDCs must be deposited in a separate reserve fund and used only for growth-related capital costs in respect of schools. The hydro component of the City of Ottawa DC and the City's component must also be deposited in separate reserve funds. I can find no rational basis upon which to conclude that EDCs are taxes, as unanimously held by the Supreme Court of Canada in *Ontario Home Builders'*, but DCs are not. The fact that the analysis in *Ontario Homes Builders'* was undertaken in a contitutional conext does not, in my view, dilute the force of the Supreme Court of Canada's conclusion that EDCs are taxes.

96 For these reasons, I think that the City of Ottawa DC, including that part of it allocated to Ottawa Hydro, is a tax. Although I do not think that the Ottawa Hydro component of the DC should be separately analyzed, if that approach is required, I think that it too is a tax. In my opinion, the DC is a tax on development.[1]

97 I will now consider whether the *Cancer Act* taxation exemption applies.

Does S. 16 of the Cancer Act Exempt the Cancer Foundation from Paying the City of Ottawa Development Charge?

98 Section 16 of the *Cancer Act* provides that:

> The real and personal property, business and income of the Foundation is not subject to taxation for municipal or provincial purposes.

99 Section 3(6) of the DCA provides:

> No land, except land owned by and used for the purposes of a board as defined in subsection 30(6) or municipality, is exempt from a development charge under a by-law passed under subsection (1) by reason only that it is exempt from taxation under section 3 of the *Assessment Act*.

100 Section 49 of the DCA provides:

> In the event of a conflict between this Act and any other general or specific Act, this Act prevails.

101 The Cancer Foundation argues, and I agree, that s. 3(6) of the DCA and s. 16 of the *Cancer Act* are not inconsistent. Section 3(6) contemplates exemptions from development charges other than under the *Assessment Act*. The words "by reason only" in subsection 3(6) of the DCA support this conclusion. Thus, s. 3 of the *Assessment Act* does not on its own exempt land from a development charge. The Cancer Foundation does not claim its exemption from taxation through s. 3 of the *Assessment Act*. Section 3(6) of the DCA leaves it open to find an exemption on some other basis. The other basis in the circumstances of this case is the specific exemption established in s. 16 of the *Cancer Act*. As Cunningham J. put it in *Collège d'arts appliqués & de technologie La Cité collégiale v. Ottawa (City)* (1994), 20 O.R. (3d) 541 (Ont. Gen. Div.) at 546, "[h]owever, by the wording of s. 3(6) it is left open to find an exemption for other reasons and of course that other reason in the present case is s. 11 of the *Interpretation Act*." I agree. I would thus not give effect to this ground of appeal. In my view, s. 16 of the *Cancer Act* exempts the Cancer Foundation from paying the City of Ottawa DC, including its hydro component.

102 For these reasons, I would dismiss the appeal with costs.

Appeal dismissed.

Footnotes

1 In an article, "Financing Urban Growth Through Development Charges", 1991, 39 Can. Tax Journal, 1288 at 1300 Enid Slack and Richard Bird discussed development charges on the basis that they are taxes. The authors conclude that a development charge is "in

theory ... similar to a prepaid property tax." In *International Aviation Terminals (Vancouver) Ltd. v. Richmond (Township)* (1992), 9 M.P.L.R. (2d) 1 (B.C. C.A.), the B.C.C.A. noted that DCs were not taxes "as such", although the court accepted that DCs were indistinguishable from municipal or realty taxes. See also *Palisade Properties (1985) Ltd. v. Surrey (District)* (1991), 5 M.P.L.R. (2d) 206 (B.C. S.C.) where a by-law imposing a development charge was held to be a taxing by-law.