FINANCING OF MUNICIPAL INFRASTRUCTURE AND SERVICES - DEVELOPMENT CHARGES AND COST SHARING ARRANGEMENTS

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I. INTRODUCTION

At a previous Lorman Seminar (Zoning and Land Use in Ontario - September 23, 2003), we presented a paper on the financing of municipal services and infrastructure. The intervening two years have featured some interesting events, most notably the development charge by-law "season", which occurs approximately every five years (as a result of Section 9(1) of the *Development Charges Act, 1997* S.O. 1997, c.27 [the "1997 DCA"], which limits the term of a development charge by-law to five years). Many of the same issues remain front and centre because there remains no shortage of disagreement – between municipalities and landowners and among neighbouring landowners – over who should pay (and how much and when) for the municipal infrastructure and services that most accept should be in place before development can proceed.

This paper will update a variety of issues related to this topic, including:

- recent case law which appears to have settled the issue of transition from lot levies to development charges;

- the contents of development charge by-laws, and how municipalities determine the quantum of their charges;
- the issue of transition to increased development charge rates; and
- cost-sharing agreements.

II. SETTLING THE ISSUE OF TRANSITION FROM LOT LEVIES TO DEVELOPMENT CHARGES

Prior to the enactment of the *Development Charges Act*, R.S.O. 1990, c. D.9, in 1989 (the "Old DCA"), many municipalities entered into agreements with developers for the payment of capital contributions towards infrastructure and servicing costs in the form of lot levies. The most common method of requiring payment was by imposing lot levies as a condition of subdivision approval, pursuant to a general provision in the *Planning Act* which permitted an approval authority to "impose such conditions to the approval of a plan of subdivision as in his opinion are advisable". (See, e.g., Subsection 36(5), *Planning Act*, R.S.O. 1980, c.379.) The *Planning Act* did not provide details for the calculation of lot levies, which generated significant case law.[1] For example, in the absence of any specific legislative rules, there were debates before the Ontario Municipal Board (the "Board") and the courts as to whether a municipality could adopt a uniform

[1] See, for example, *Re Mills and York (Regional Municipality) Land Division Committee* (1975), 9 O.R. (2d) 349 (Div. Ct.), *Re Pinetree Development Co. Ltd. and Minister of Housing* (1977), 14 O.R. (2d) 687 (Div. Ct.), *Mod-Aire Homes Ltd. v. Bradford (Town)* (1985), 18 O.M.B.R. 189 (Lt.-Gov. in Council), and *Mod-Aire Homes Ltd. v. Bradford (Town)* (1989), 23 O.M.B.R. 263, leave to appeal to Divisional Court refused, 72 O.R. (2d) 683.

levy policy (wherein levy amounts would be established pursuant to a policy, and the applied uniformly across the municipality, as opposed to levies begin established and applied on a site-by-site basis). There were also debates about the extent of services that could be the subject of lot levies (e.g., developers often argued that levies should be restricted to "hard" services such as roads, water and sewer services, whereas municipalities sought to collect levies for "soft" services such as libraries, community facilities and town halls).

The Old DCA introduced a new system whereby municipalities would no longer impose lot levies as a condition of subdivision approval under the *Planning Act*. Instead, municipalities could collect development charges pursuant to by-laws passed under the authority of, and subject to the rules set forth in, the Old DCA. This new system necessitated a mechanism for transition.

Section 14 of the Old DCA required municipalities to give a credit to a landowner for charges paid or services provided under a prior subdivision or consent agreement under the *Planning Act*. Section 14 also generally provided that a prior agreement between a municipality and a landowner was to prevail over a development charge by-law to the extent of any conflict.

Ontario Regulation 82/98 (the "Regulation"), passed under the 1997 DCA, sought to crystallize the credits available under Section 14 of the Old DCA. Section 17 of the Regulation provided that a landowner could apply for recognition of a credit given or required to be given under Section 14 of the Old DCA. The Regulation imposed a deadline of March 1, 1999 for filing such a credit claim. Ontario Regulation 439/99 extended this deadline to October 31, 1999. Section 17 of the Regulation also continued to generally provide that the provisions of a prior agreement are to prevail over a development charge by-law to the extent of any conflict.

In our previous paper, we discussed decisions by the Board and the Ontario Divisional Court regarding these transition provisions.[2] A consistent issue had been how to interpret the transition provisions in light of efforts by municipalities, through their development charge by-laws, to "top up" the capital contributions previously paid by developers under subdivision agreements in the form of lot levies. In many of these cases, the contrasting positions of the municipality and the developers were as follows:

- The municipality took the position that it had to recognize a credit for the amount of any lot levy previously paid, but that it was entitled to collect a "top up" equal to the difference between its current development charge and the previously paid lot levy (e.g., if the developer had previously paid a $1,000 per unit lot levy at the subdivision registration stage and the municipality's development charge by-law now called for a $2,000 per unit charge at the

[2] See, for example, *Innisfil (Township) Development Charges by-law 021/94 (Re)*, [1998] O.M.B.D. No. 71, *Hammerson Canada Inc. v. Peel (Regional Municipality)*, [2001] O.J. No. 2468 (C.A.) and the Mississauga/Peel and Burlington/Halton Board decisions, [2001] O.M.B.D. No. 1020 and [2002] O.M.B.D. No. 389, respectively, which were appealed to Divisional Court (28 M.P.L.R. (3d) 1, [2002] O.J. No. 1015).

building permit stage, the municipality could collect a further $1,000 per unit at the building permit stage).

- The developers took the position that the lot levies paid under their subdivision agreements were intended to be a full and final payment of their levies or capital contributions, and that a requirement for a further payment under the municipality's development charge by-law would be in conflict with their subdivision agreements (e.g., in the example noted above, a further $1,000 per unit payment would not be required at the building permit stage).

Since our previous Lorman paper, the Court of Appeal released its decision regarding the Mississauga/Peel and Burlington/Halton Board decisions, which had been the subject of one Divisional Court decision (see footnote 2).[3]

The agreements at issue before the Court of Appeal had specifically addressed capital contributions and the Board, in two separate decisions, had found, to varying degrees, that the municipality's attempt to impose further charges through its development charge by-law represented a conflict with the pre-existing lot levy agreements. In such instances, the Board gave the landowner a credit equal to the full amount of the development charge otherwise payable, on the basis that the Regulation provided that the pre-existing agreement was to prevail over the development charge by-

[3] *Mississauga (City) v. Erin Mills Corp.* (2004), 71 O.R. (3d) 297, [2004] O.J. No. 2690 (C.A.).

law to the extent of any conflict. On appeal, the Divisional Court substantially reversed the Board decisions. The landowners sought leave to appeal, which was granted in 2003.

The Court of Appeal first adopted the test for conflict from *Hammerson*, *supra*, n.2, which is that a prior agreement, properly interpreted, must preclude the infrastructure charge which the development charge by-law seeks to impose. Second, in examining the individual agreements under appeal, the Court found that only one agreement met this conflict test. The language in this agreement provided that, "Capital Contributions will not be required with respect to the redevelopment and/or new development of commercial and/or industrial lands". The Court held that this contract "must reasonably be read as exempting the developer from future cost contributions".

Other agreements before the Court contained language providing for full payment of capital contributions upon execution of the agreement, with any adjustments to the amount of the payment owing to be made before the municipality released the plan of subdivision for registration. Even though the municipality had already released the plan for registration (and thereby ended the time period within which the municipality could vary the amount of the capital contributions), the Court of Appeal found that this language did not preclude future payments towards infrastructure costs. As such, the Court of Appeal found there was no conflict with the development charge by-law, which imposed new and higher charges than the old lot levy agreements, and allowed the municipality to charge the increased amounts.

Given the October 31, 1999 deadline for credit applications, these decisions may be of limited future application. Nonetheless, the decisions raised interesting legal issues, including the meaning of "conflict" in the context of municipal agreements and by-laws and the extent to which pre-existing contracts can be supplanted by subsequent legislative enactments.

III. CONTENTS OF NEW DEVELOPMENT CHARGE BY-LAWS

1. Introduction

The most recent development charge by-law season marked the second opportunity for most municipalities to pass development charge by-laws under the 1997 DCA. While the basic structure of most by-laws remains largely unchanged, municipalities appear to have become more experienced in the completion of the requisite background studies and appear to have made more concerted efforts to resist reductions to the new charges.

2. Rules Governing the Establishment and Calculation of Development Charges

As noted earlier, whereas the *Planning Act* provided no details or rules governing the establishment and calculation of lot levies, the Old DCA (and now the 1997 DCA), sets forth specific provisions and rules governing the establishment of charges under a development charge by-law. A municipality must abide by these provisions and rules in establishing and calculating its charges, and a landowner seeking to challenge the quantum of the charges (e.g., through an appeal of the development charge by-law) must, generally speaking, identify problems, flaws or concerns in the municipality's application of those provisions and rules.

While the following is not an exhaustive list of the provisions and rules in the 1997 DCA, set forth below is a summary of the main provisions and rules that a municipality must follow in establishing charges under a development charge by-law:

- <u>Power To Impose Developments Charges</u> - A municipal council 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" (Section 2(1)).

- <u>Eligible Capital Costs</u> – Capital costs that are eligible for inclusion in the development charge are: land acquisition costs; land improvement costs; building acquisition, construction or improvement costs; facility acquisition, construction or improvement costs; study costs or interest costs in connection with any of the foregoing; and costs of the required development charge background study (Section 5(3)). Capital costs must be reduced to adjust for capital grants, subsidies and contributions made to a municipality (Section 6, Regulation 82/98).

- <u>Uniform and/or Area – Specific By-laws Allowed</u> – A development charge by-law may apply to the entire municipality or only part of it (Section 2(7)). More then one development charge by-law may apply to the same area (Section 2(8)).

- Ineligible Services – Development charges are prohibited in respect of the following services: cultural or entertainment facilities (including museums, theatres and art galleries, but not including public libraries), tourism facilities (including convention centres), acquisition of land for parks, hospitals, waste management services, municipal headquarters, and other services prescribed by regulation (Section 2(4)). Regulation 82/98 provides that "land for parks" includes land for woodlots and ESA's (land that is acquired because it is environmentally sensitive), but does not include land for an enclosed structure used throughout the year for public recreation. Accordingly, development charges cannot be imposed for woodlots and ESA's, but can be imposed for land necessary for an enclosed structure used throughout the year for public recreation.

- Development charges may not address "local services" – Development charge by-laws may not impose development charges with respect to local services (Section 2(5)). "Local services" are services related to a plan of subdivision or within the area to which the plan relates (Section 59(2)). Under the Old DCA, local services were referred to more narrowly as services "within a plan of subdivision". Given the broader reference to local services under the 1997 DCA ("related to a plan of subdivision or within the area to which the plan relates"), there is more latitude for a municipality to determine what constitutes a local service. The implications of this are discussed later in the paper, under the topic of Cost-Sharing Agreements.

- <u>Exemption for Industrial Development</u> - Expansions of existing industrial buildings up to a maximum of 50% of the gross floor area of the building are exempt from development charges (Section 4).

- <u>10% Discount for "Soft" Services</u> – The following "hard" services may be fully funded by development charges: water, waste water, storm water, roads, hydro, police and fire protection services (Section 5(5)). The capital cost of all other services (i.e., "soft services") must be reduced by 10% in the calculation of the development charge (paragraph 8 of Section 5(1)).

- <u>Calculation of the Charge</u> – A municipality must use the following method to calculate the amount of the development charge that may be imposed:

    (i) <u>Estimate of Development</u> – Estimate the anticipated amount, type and location of development for which development charges can be imposed (paragraph 1 of Section 5(1)).

    (ii) <u>Estimate Increased Servicing Needs</u> – Estimate the increase and the need for service attributable to the anticipated development for each service to which the development charge by-law would relate (paragraph 2 of Section 5(1)).

    (iii) <u>Council Intent to Meet the Need</u> – An estimated increased servicing need may only be included in the calculation of the charge if the municipal council has indicated that it intends to insure that such an increase in need will be met (by way of an improved official plan policy, capital forecast or "similar expression of the intention of the council") (paragraph 3 of Section 5(1), Section 3 of Regulation 82/98).

(iv) Average Service Levels – The service level for each service must not exceed the average level of that service provided in the municipality over the preceding ten year period (paragraph 4 of Section 5(1), Section 4 of Regulation 82/98).

(v) Uncommitted Excess Capacity Reduction – The increase in the need for services attributable to the anticipated development must be reduced by the part of the increase that can be met using the municipality's excess capacity, other then excess capacity that the council has indicated an intention would be paid for by new development (paragraph 5 of Section 5(1), Section 5 of Regulation 82/98).

(vi) Reduction of Charge to the Extent New Services Benefit Existing Development – The increase in the need for service must be reduced by the extent to which the increase in service would benefit existing development (paragraph 6 of Section 5(1)).

(vii) Cost Estimates – The capital costs necessary to provide the increased services must be estimated (paragraph 7 of Section 5(1)). As noted earlier, with the exception of the "hard" services identified in Section 5(5), the estimated capital costs must be reduced by 10% (paragraph 8 of Section 5(1)).

(viii) Rules – Rules must be developed to determine if a development is payable in any particular case and to determine the amount of the charge, subject to the following limitations:

- the total of the development charges must be less then or equal to the capital costs for the services.
- the development charges for any particular type of development must not exceed the capital costs attributable to that type of development. However, the amount of the development charge for a particular development is not limited to the costs attributable to that particular development.
- the shortfall from exemptions granted to any type of development, the phasing in of a development charge or the discounting of the development charge for a type of development may not be made up through higher development charges on other development. This shortfall must be made up through other revenue sources.

The rules may provide for full or partial exemption 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 (paragraphs 9 and 10 of Section 5(1), Section 5(6)).

(ix) Contents of the Development Charge By-law – Development charge by-law must set out the following:

1. the rules to determine if the development charge is payable in any particular case and to determine the amount of the charge.

2. an express statement indicating how any exemptions, phasing and indexing of development charges are provided for.

3. how the rules referred to in item 1 apply to redevelopment of land.

4. the area of the municipality to which the by-law applies.

(x) Mandatory Development Charge Background Study – Before passing a development charge by-law, the municipality must complete a development charge background study. The study must calculate the charge in accordance with the methodology set out in the 1997 DCA. It must also include an examination of the long term capital and operating costs for the capital infrastructure required for each service and such other information as may be prescribed (Section 10, Section 8 of Regulation 82/98).

(xi) Appeals of Development Charge By-laws – Any person may appeal a development charge by-law to the Board within 40 days after the day the by-law is passed (Sections 13 and 14). The Board may dismiss the appeal in whole or in part, or order the repeal or amendment of the by-law. However, the Board may not order the amendment of the by-law so as to:

- increase the amount of a development charge that will be payable in any particular case;
- remove, or reduce the scope of, an exemption;
- change a provision for the phasing in of development charges in such a way as to make a charge or part of a charge payable earlier; or
- change the date the by-law will expire.

In *Whiteley v. Guelph (City)* (1999), 14 M.P.L.R. (3rd) 146 (O.M.B.), the Board considered the issue of the scope of an appeal of a development charge by-law. The Board found that, under the 1997 DCA, the scope was that of an appeal and not that of an enquiry as under Section 63 of the *Ontario Municipal Board Act*. As such, the Board must consider whether a municipality has acted "fairly and reasonably, within its powers, in accordance with the process set out in the *Act*." In particular, the Board should not substitute its policy choices for the policy choices of a municipality.

3. Residential Charges

Recent development charge by-laws enacted by some municipalities contain significant increases in the amount of residential development charges.[4] This would appear to reflect efforts by municipalities to more fully attribute the cost of new infrastructure and services to growth. For example, in many cases, the attribution of the benefit of such new infrastructure to existing development or to post-period growth appears to have been reduced from levels in previous background studies.

Some examples of the increases in residential charges include:

- in Brampton, the charge for single and semi-detached units increased from $8,231.52 to $14,942.90 per unit;
- in Ajax, the charge for single and semi-detached units increased from $5,932.00 to $7,709.00 per unit;
- in Milton, the charge for single-detached units generally increased from $6,509.00 to $8,189.00 per unit;

[4] Not every municipality increased the residential charge. For example, in the Town of Markham, the town-wide charge for single and semi-detached units and townhouses decreased, while the town-wide charge for apartments increased only slightly.

- in Oakville, the charge for single and semi-detached units generally increased from $8,058.00 to $9,620.00 per unit; and
- in Newmarket, the charge for single-detached units increased from $5,329.00 to $6,989.45 per unit.

4. Non-Residential Charges

A historic policy choice of many municipalities has been to discount non-residential development charges in an effort to promote job growth in the municipality and to increase the tax assessment base. New development charge by-laws adopted by some municipalities continue this policy choice. For example, the City of Toronto and the Region of Durham are not imposing a development charge for industrial and institutional uses. However, other municipalities eliminated the practice of significantly discounting the non-residential charge, with some municipalities charging the full cost and some instituting partial discounts.

While many municipalities continue to discount for other non-residential uses, the development charge by-laws of most municipalities do not now discount for retail development. For example, while Durham has "waived" its development charge for industrial and institutional uses, it continues to impose a development charge for retail ($2.91 per square foot, increased from $1.73 per square foot under its previous by-law). Toronto has phased in a new charge on retail development (increasing to $6.77 per square foot as of July 1, 2005). In Ottawa, the new development charge by-law resulted in charges of $3.95 per square foot for certain non-residential uses, such as office, and $6.95 per square foot for all other non-residential uses (such as commercial and institutional). Other municipalities that impose a separate, increased charge on retail non-residential development include Ajax, Mississauga, Whitby, York, Peel, Halton, Richmond Hill and Brampton.

Analysts have suggested three reasons for this approach. First, municipalities believe an increased development charge will not act as a disincentive to retail development. Second, many municipalities do not place the same emphasis on the "value" of employment generated by retail development versus other non-residential development. Third, some analysts have suggested that retail generates more vehicular trips than other types of non-residential development and, as such, requires more road infrastructure.

IV. WILL MUNICIPALITIES ALLOW TRANSITION BETWEEN DEVELOPMENT CHARGE BY-LAWS?

Historically, some municipalities have instituted transition provisions in their development charge by-laws to allow landowners with in-stream planning applications to receive the benefit of the existing (and usually lower) development charges. Many municipalities now resist such transition provisions. For example, in the City of Brampton, the staff report recommended against such a transition because it would not be "financially prudent to allow further pressures on the City's development charge system", especially given the large increase in the amount of the charge. Burlington, Oakville, Vaughan, and Milton are other examples of municipalities that refused to provide transition provisions.

Some landowners have included the lack of such transition provisions as a ground for appealing a development charge by-law. However, the case law on development charge by-law appeals (including *Whiteley v. Guelph*, noted earlier) would suggest that this argument could be difficult to sustain on an appeal. There is no legislative requirement for such transition provisions and, absent special circumstances, it may be difficult to establish that a municipality's policy choice to not include transition provisions in a development charge by-law was unfair or unreasonable.

Given that a number of municipalities provide limited or no transition provisions in their current development charge by-laws and that this may remain a common practice when municipalities next review their development charge by-laws, any opportunity to avoid a new, increased charge would be beneficial for landowners or developers caught by an increased charge. The complaint procedure may allow such an opportunity, albeit in narrow circumstances.

Section 20(1) of the 1997 DCA provides as follows:

> 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,
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> (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.

Under Section 22, a complainant may appeal the decision of the council of the municipality to the Board.

In *Re Sudbury Development Charges By-law 91-150*,[5] a number of persons filed complaints under the Old DCA where the municipality had increased development charge rates by amending its by-law. The by-law had provided that the development charge was calculated on the date a building permit is issued. Each complainant's fact situation was somewhat different, but all had applied for a building permit prior to the rate increase but, because of various delays, did not have a building permit issued until after the rate increase came into effect. The complainants alleged that the delays had resulted from the failure of municipal staff to inform them of the impending by-law or from delays by staff in processing the permit applications. Notwithstanding these allegations, the municipality required all complainants to pay development charges at the increased rate.

On appeal, the Board held that for the complainants to succeed, they would have to demonstrate that there was an error in the application of the development charge by-

[5] [1993] O.M.B.D. No. 1809, 30 O.M.B.R. 210.

law.[6] The Board developed a two-pronged test to determine the circumstances under which a complainant could be successful in avoiding the payment of a development charge at an increased rate, notwithstanding that a building permit had not been issued until after the increase took effect:

> 1. Applicants must have acted in such a way that they have taken all possible steps that were within their power in a timely fashion.
>
> 2. There must be an error on the part of the municipal official.

The Board upheld most of the development charges imposed by the municipality but allowed three complaints. The Board found that these three instances resulted from errors made by municipal officials that were not correctable by the complainants.

There is case law from British Columbia to support this argument. In *Coho Creek Estates Ltd. v. Maple Ridge*,[7] the B.C. Court of Appeal addressed a similar fact situation. In that case, the municipality had amended its development charge by-law to increase the rate of the charge <u>after</u> a landowner had filed a complete building permit application, but prior to the issuance of the permit. (The British Columbia legislation provided that the

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[6] Under the Old DCA, Section 8(1) provided grounds for a complaint that were similar to the grounds now set out in Section 20(1) the 1997 DCA.

[7] [1996] B.C.J. No. 1442.

development charge must be paid at the time of the issuance of a building permit, but did not provide when the charge should be calculated.) Unlike in Ontario, the legislation did not provide for a complaint procedure and the landowner sued the municipality for recovery of the increased amount of the development charge. The court ruled that:

1. there is a difference between the time that the development charge is assessed and the time that it is paid; and

2. while the development charge is not payable until the issuance of the building permit, it should be assessed at the time of the filing of the complete building permit application to protect landowners from the uncertainty caused by the possibility of increased charges after a building permit application.

The B.C. Court of Appeal upheld the trial judge's decision that the landowner was liable for the lower charges.

Section 26 of the 1997 DCA similarly provides for when a development charge is payable, but is silent on when the development charge is to be assessed or calculated. An argument could be made that the interpretation adopted by the British Columbia courts in *Coho Creek Estates* respecting the timing for the assessment of development charges could be applied to development charges payable pursuant to a development charge by-law in Ontario. However, it should be noted that many development charge by-laws in Ontario specifically provide a date for the calculation of development charges, which is not precluded by the 1997 DCA, and so it is unclear whether the Board hearing a complaint would adopt the analysis from *Coho Creek Estates*.

V. COST-SHARING

1. Front Ending Agreements

Where adjacent parcels of land owned by different persons are developed, it is usually more efficient (and often necessary) to address servicing and infrastructure issues on a comprehensive basis. This often leads to landowners entering into cost sharing agreements. For example, this is often the case when a group of landowners are co-operating with one another to secure planning approvals for a newly developing area within a municipality (e.g., a new Secondary Plan area or urban area expansion).

Section 44 of the 1997 DCA provides that a municipality may enter into a form of Cost Sharing Agreement (called a "Front-Ending Agreement") that:

(i) relates to the provision of services for which there will be an increased need as a result of development and applies to work that will benefit an area to which the development charge by-law relates;

(ii) provides for one or more parties to the agreement to fund the costs of the work; and

(iii) provides that persons who, in the future, develop land within the defined area pay an amount to reimburse some part of the costs of the work.

Section 44(2) of the 1997 DCA provides that a Front-Ending Agreement can only apply to certain hard services covered by the development charge by-law. Section 44(3) provides that a person who is not a party to the agreement may only be required to pay a reimbursement amount if the person develops land and a development charge could be imposed for the development under the Act. In other words, it is intended that the parties to the agreement who initially fund the costs of the work (i.e., the "front-enders") will be reimbursed with development charges paid by landowners who are not party to the agreement but subsequently develop land within the defined area. A Front-Ending Agreement may also provide for "tiering", whereby landowners who reimburse part of the costs of the work borne by the front-enders may be themselves reimbursed by parties who later develop within the defined area – i.e., each subsequent owner joins in the front-ending burden (Section 44(4)).

A Front-Ending Agreement could be required in a situation where the cost of the initial services required in a newly developing area exceeds the development charges that will be collected from the initial, front-ending landowners. A simple example would be as follows:

- A $1 million road is required solely as a result of anticipated growth in a new Secondary Plan area.

- The road component of the development charges anticipated to be collected from all developers in the area will be $1 million, but the initial, front-ending developers will only be paying $500,000 in road development charges.

- The front-ending developers could enter into a Front-Ending Agreement with the municipality, whereby they fund the full $1 million road cost, they get a $500,000 credit against the road charges they would have otherwise paid (pursuant to the credit provisions in Section 38 of the 1997 DCA), and they get reimbursed $500,000 through the road development charges paid as further landowners develop within the area.

Notwithstanding the apparent logic of a Front-Ending Agreement as noted above, the restriction on services covered, the public notice requirements (under Section 46) and the potential for appeals (under Section 48) appear to have discouraged the use of Front-Ending Agreements.

2. Local Services

Cost sharing agreements for "local services", to which the municipality is not necessarily a party, are often entered into by landowners in conjunction with or as a condition or their subdivision approvals. In practice, landowners will often voluntarily include services that might be seen as non-local services.

In 1999, the Board (in Decision/Order No. 1862) approved the following Official Plan policy for a new Secondary Plan area in Brampton:

> "In addition to Development Charges, the City, where and as appropriate, shall require the use of area-specific development charge by-laws or front-ending agreements under *the Development Charges Act*, Developer Cost Sharing Agreements or other suitable arrangements, among landowners, in order to implement development of the secondary plan area and fairly allocate related costs of development. Developer Cost Sharing Agreements may encompass the whole or part of the secondary plan area and may only deal with:
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> - local services as permitted in Section 59(2) of the Development Charges Act, 1997; or
> - matters to which the parties voluntarily agree; or
> - other matters permitted by law."

Under the Old DCA, development charges were not permitted for a variety of local services. Subsection 3(7) prohibited development charges with respect to:

(i) local services installed at the expense of the owner within a plan of subdivision as a condition of subdivision approval under the *Planning Act*;

(ii) local services installed at the expense of the owner as a condition of a consent approval under the *Planning Act*; and

(iii) local connections to watermains, sanitary sewers and storm drainage facilities installed at the expense of the owner.

Section 45 of the Old DCA also prohibited a municipality from entering into a subdivision or consent agreement that imposes a charge related to a development, except for a charge for local services (again, defined narrowly as being within a plan of subdivision).

A recent Divisional Court decision, [*Eastpine Kennedy-Steeles Ltd. v. Markham (Town)*, [2004] O.J. No. 644 (Div. Ct.)] found that the restriction in Section 45 of the Old DCA did not limit a municipality's jurisdiction to recover certain expenditures for infrastructure from benefiting landowners. A front-ending landowner had constructed certain roads and over-sized storm sewers and waste management facilities. The municipality attempted to include a condition in a subdivision agreement that required a benefiting landowner to pay its proportionate share. The Board had held that the provision in the subdivision agreement was invalid, but imposed a new obligation on the benefiting landowner pursuant to a subdivision condition pursuant to subsection 51(25) of the *Planning Act* to pay for those services from which it directly benefited (totalling over $550,000).

The Divisional Court upheld the Board decision, noting that Section 45 of the Old DCA prevents the imposition of a charge by way of agreement, <u>but not</u> by way of direct condition. The Court concluded that a contrary interpretation would have given the benefiting landowner "an unfair windfall" at the expense of the front-ending landowner.

As noted earlier, the 1997 DCA modifies the approach to local services. A municipality is generally prohibited from imposing, directly or indirectly, a charge related to a development, or a requirement to construct a service related to development, by way of a subdivision or consent condition or agreement. Accordingly, the Divisional Court's finding in *Eastpine* – that a charge could not be imposed by agreement, but could be imposed by direct condition – would no longer seem to apply under the 1997 DCA.

However, the 1997 DCA has expanded the scope of local services. Section 59(2) of the 1997 DCA provides that a municipality may impose a condition or agreement under Section 51 or 53 of the *Planning Act* to provide for:

- local services, related to a plan of subdivision or within the area to which the plan relates, to be installed or paid for by the owner as a condition of subdivision approval; or

- local services to be installed or paid for by the owner as a condition of approval of a consent.

This represents a change from the Old DCA and allows the imposition of subdivision or consent conditions or agreements which require an owner either to install or pay for services that are not within the owner's plan of subdivision, but which are "related to the plan of subdivision or within the area to which the plan relates". The clear intention, it would seem, was to expand the scope of local services, and hence expand the ability to require cost sharing of certain services pursuant to a *Planning Act* approval.

One Board decision found that this section applies to off-site services (external to the plan under consideration) that benefit the subdivision.[8] A second Board decision found that the 1997 DCA provides statutory authority to impose a condition that requires

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[8] See *Marinucci v. Richmond Hill (Town)* (1999), 1 M.P.L.R. (3rd) 105 (O.M.B.)

the cost sharing of local services beyond the limitations of a severed parcel on a consent application ("the wording is local services, not local on-site services").[9]

3. Other Cost-Sharing Disputes between Landowners

A consistent theme in the *Eastpine*, *Marinucci* and *New Tecumseh* decisions, and other Board decisions noted in our previous Lorman paper, is that there should be equitable cost sharing of municipal services as between landowners of a developing area.

In limited circumstances, a municipality may be able to use its site plan control powers under the *Planning Act* to achieve this equitable cost sharing.

One such case involved an attempt by the Town of Markham to require payment for a portion of the costs of a road fronting the landowner's property (and which provided access to it) as a condition of site plan approval. The road had been constructed by another landowner (located directly across the street) at its own expense, and the Town sought to impose a condition of site plan approval to reimburse the constructing landowner for a proportional amount of the construction costs.

In *Burger King Restaurants of Canada Inc. v. Markham (Town)*, [2000] O.M.B.D. No. 774, Burger King's counsel argued that the condition was not authorized by Section 41(7) of the *Planning Act* and that it involved an issue of front-end financing that could

[9] See *New Tecumseh (Town) v. Delcem Investments Ltd.* (1999), 39 O.M.B.R. 79.

not be charged under the 1997 DCA. The Board rejected Burger King's submissions and upheld the site plan condition.

The Board adopted a liberal interpretation of the matters listed in Section 41(7) and found that the proposed condition "relates" to highway widenings (41(7)(a)1.) and "facilities to provide access to and from the land" (41(7)(a)2.). The Board distinguished this case from a situation "where a municipality attempts to exact from a developer financial contribution for facilities off site or for payment of facilities that hardly benefit the subject site". Instead, the Board found that the recently built road "gives the site an access without which site plan approval would have been highly doubtful".

The Board also acknowledged that municipalities may find themselves in situations where it is difficult to include charges for particular infrastructure pursuant to the 1997 DCA:

> "Woebetide the day when a developer cannot oversize a service pipe or a road and has to await for all beneficiaries to arrive at the scene at the same time."

A more recent case before the courts suggests that, in situations where there is no other remedy (e.g., no contractual claim, and no ability to secure cost-sharing through the planning approvals process), a front-ending landowner may nonetheless be able to seek a cost-sharing reimbursement from a subsequent, benefiting landowner through an unjust enrichment claim. In *Conrad v. Feldbar Construction Co.* (2004), 27 O.P.R. (4^{th}) 153, the Ontario Superior Court of Justice adjudicated a dispute between three parties (Conrad, Feldbar and Mayco) who were among a group of developers owning adjacent parcels of land awaiting redevelopment. The area required an east-west arterial road to be constructed and, as such, the local municipality imposed a condition of development approval requiring the construction of this road. A group of developers in the area negotiated a cost-sharing agreement for the construction of the road, but one of the parties (Conrad) refused to sign the cost-sharing agreement, apparently at the last minute. The other landowners revised the cost-sharing agreement to account for Conrad's refusal to sign.

Conrad and Feldbar held lands as tenants-in-common. The Conrad/Feldbar lands were sold subsequent to the execution of the cost-sharing agreement, and Feldbar, as well as an adjoining landowner (Mayco), applied for a reimbursement from Conrad of expenses related to the building of the east-west arterial road. The Court ruled that Conrad was responsible to both Feldbar and Mayco for what would have been Conrad's share of the costs of the arterial road had Conrad actually signed the cost-sharing agreement.

The claim for reimbursement by Feldbar was based on a partition and sale allocation analysis because Conrad and Feldbar had been tenants-in-common. However, the Mayco claim was argued on the basis of the equitable principle of unjust enrichment. Using this principle, the Court found that Mayco had established:

- the value of a benefit conferred upon Conrad;
- a corresponding deprivation to Mayco; and

- the absence of a juristic reason for the benefit.

The potential implication of this decision is that a landowner who does not enter into a cost-sharing agreement for municipal infrastructure and services could still be found liable for the cost of such improvements in accordance with the cost-sharing formula from the very agreement that it refused to sign. There were some potentially distinguishing facts: the Court suggests that there was “some evidence” that Conrad refused to sign the cost-sharing agreements for reasons other than the monetary arrangement relating to the cost of the road, and that Conrad may have actually discussed paying his fair share of the cost of the road with his own lawyer. However, this still raises the suggestion that a party who enters into negotiations for cost-sharing somehow might become bound by that agreement regardless of whether that party ever enters into the agreement.

It also remains to be seen how far this analysis could extend. For example, could the principle of unjust enrichment be used to force a landowner who never participated in the negotiation process for cost-sharing to nonetheless share in the capital expenditures of neighbouring landowners? Such a result might at first blush seem odd from the perspective of contractual interpretation. However, if one considers the issue not as one of contractual interpretation, but rather as one of ensuring (as a matter of good planning and fairness) that the costs of certain services be equitably shared among benefiting landowners, the result is not so surprising.