APPENDIX 'B'

Update Week 2004-35

Planning

Case Name:

Barrie (City) Development Charges By-law No. 99-172 (Re)

Bill Szilveszter has appealed to the Ontario Municipal Board under subsection 22(1) of the Development Charges Act, S.O. 1997 c.27 against a development charge imposed on a property municipally known as 97 Huronia Road, by the City of Barrie under the authority of By-law 99-172 O.M.B. File No. D030015

[2004] O.M.B.D. No. 804

File Nos. DC030015, D030015

Ontario Municipal Board

N.C. Jackson, Member

Oral decision: August 3, 2004.
Filed: August 18, 2004.

(5 paras.)

COUNSEL:

I.J. Rowe, for City of Barrie.

Bill Szilveszter, on his own behalf.

MEMORANDUM OF ORAL DECISION DELIVERED BY N.C. JACKSON AND ORDER OF THE BOARD:--

1 Bill Szilveszter is now completing construction on a new home on property located at 97 Huronia Road in the City of Barrie. He was required to pay a Development Charge fee of approximately $11,276.00 in June of 2003. He wrote a letter to Council prior to the payment questioning the justness of the requirement since there had been a house on the same property demolished in 1994. Mr. Szilveszter bought the vacant property in 2001 and assumed that in replacing the residential use of the property and not increasing useage, he would be exempt from paying the development charge. He made an Official Complaint in writing on March 31, 2003 respecting the application of the Development Charge By-law, in effect at the time of his building permit number 99-172, under section 20 of the Development Charges Act. He was granting a Hearing before City Council where his Complaint was dismissed. Under section 22 of the Development Charges Act he then appealed to this Board.

2 His evidence is direct - the premise of the Act is " the imposition of Development Charges is related to whether the development of the land increases the need for services". That language is set out in a recital to By-law 91-188, The Development Charge By-law in effect at the time of the Demolition. His Appeal materials also questioned whether he was delayed by Barrie Officials and whether an illness that had incapacitated him, was sufficient to warrant a remedy.

3 The Board has carefully considered the Appellants' evidence and that of the Municipality from Cameron Watson, a land economist who assisted in the preparation of the Barrie Development Charge By-laws and Development Charge By-laws across Ontario.

4 The Board appreciates the assumption made by the Appellant that he would not face a development charge but must dismiss his Appeal for the following reasons:

1. The Board has a more limited jurisdiction in an appeal on the complaint as to the Application of the By-law than on an Appeal as to the By-law itself. Section 20 of the Development Charges Act deals with 3 issues:

a) incorrect calculation
b) whether a credit is available or was incorrectly calculated
c) an error in the application of the By-law

By-law 99-172 specifically provides in section 11 for exemptions and in paragraph (g) an exemption for a redevelopment if no additional dwelling units are created within a time period of 60 months previous to the permit issuance. In this case the demolition was clearly some 8 years previous to the building permit.

The Board under a complaint under section 20 cannot amend the By-law as it might under an Appeal of the By-law itself.

2. The Board questioned Municipal representatives and witnesses as to the merits of the request. The Board is satisfied that Municipalities must by the enabling legislation, the Development Charges Act section 5(1)(5), con-

sider excess capacity before new Development Charge By-laws are considered and that must be every 5 years. A survey of other municipalities shows most with Development Charge By-laws provide a time limit for this type of exemption. Moreover section 5(6)(2) of the DCA makes it clear that it is not necessary that the amount of a development charge for a particular development be limited to the increase in capital costs, if any, that are attributable to that particular development.

3. The location of the sewer lateral was a concern for 3 months and resulted in some delay, but that relates more to his building permit and involved third parties as well as the City. The Appellant's illness was serious. However, the Appellant purchased the property after his serious illness and after a successful career in construction. Had there been personal compelling reasons related directly to the Development Charge, the Board was satisfied that corrective action could be taken. There are not on the Board's finding from the evidence.

5 The Appeal is dismissed and it is so Ordered.

N.C. JACKSON, Member

qp/e/qlcct

Indexed as:

London (City) By-law C.P. 1306-339 (Re)

IN THE MATTER OF Section 8(7) of the Development Charges Act, (S.O. 1989, c. 58)
AND IN THE MATTER OF an appeal by Michael Allen Kirshin against By-law C.P. 1306-339 of the Corporation of the City of London
IN THE MATTER OF Section 4(4) of the Development Charges Act, (S.O. 1989, c. 58)
AND IN THE MATTER OF an appeal by Michael Allen Kirshin against By-law C.P. 1306-339 of the Corporation of the City of London

[1992] O.M.B.D. No. 2087

File Nos. S 920050, S 920057

Ontario Municipal Board

M.A. Rosenberg

November 6, 1992

(11 pp.)

COUNSEL:

A.R. Patton, for Michael Allen Kirshin.
J.P. Barber, for City of London.

MEMORANDUM OF ORAL DECISION delivered by M.A. ROSENBERG and ORDER OF THE BOARD:--

Michael Kirshin is a builder of small residential units in the City of London. On April 5, 1989 Mr. Kirshin bought a tri-plex property located at 470 Hill Street in the City of London. The property is located about one mile from the City Hall in an older section of the City of London. Lot measures approximately 37 foot frontage by a depth of 197 feet. On April 5, 1989 the site contained a 100

year old tri-plex with somewhere between 1200 and 1400 square feet in size. The existing three dwelling units contained in total 3 kitchens, 3 washrooms and 5 bedrooms with apparently one parking space. The property is fully serviced with sanitary sewer, water and roads but has no storm sewer connection. At the time the owner purchased the property, 2 units were occupied and one unit was vacant. The property has been used as a tri-plex since at least 1949.

The owner wished to demolish the existing tri-plex and build a new tri-plex approximately 3,450 square feet in size. This has in fact been done. The three new units of the triplex will provide 3 kitchens, 3 washrooms, 6 bedrooms and 6 parking spaces located at the rear of the building. The net difference in the two structures are:

1) larger units,
2) one more bedroom,
3) five additional parking spaces, and
4) a new storm water drywell system was installed with regard to water run-off.

The owner applied in both 1989 and 1991 for a demolition permit and the City indicated that since the tri-plex was a legal non-conforming use, that a variance was necessary through the Committee of Adjustment process. The applicant obtained the Committee of Adjustment approval for the third dwelling unit on September 27, 1990. There was only one condition attached to the Committee of Adjustment's decision and that was that the applicant apply for and receive site plan approval under Section 40 of the Planning Act. Site plan approval was granted by the City of London through a Development Agreement dated September 26, 1991 which was entered into between the two parties. No other conditions were attached to the Committee of Adjustment approval i.e. such matters relating to dedication of roads, sanitary sewer, storm sewers or water-mains.

The existing tri-plex was demolished in October/November 1991 and a building permit was issued to the owner for permission to build a new tri-plex, on November 29, 1991. The City of London indicated to the owner that development charges of $8,769.00 were owed to the City and these had to be paid before a building permit was issued. The owner paid the development charges to the City of London under protest.

The owner then appealed to the Ontario Municipal Board under the Development Charges Act pursuant to Section 8(7) and Section 4(4) of the said Act. The City of London through By-law C.P.1306-339 passed a development charge by-law on November 24, 1991.

The owner argues that:

a) under Section 8(1) (d) of the Development Charges act that the City of London erred in the application of the development charge by-law to the subject property, and
b) under Section 4(11) of the Development Charges act that the Ontario Municipal Board should order an amendment to By-law C.P. 1306-339 to allow the owner of a property a credit for demolition if in fact three new units are replacing three existing units and there is no increase in the need for services.

The owner argues that the test under Section 3(1) of the Development Charges Act applies. Section 3(1) of the Development Charges Act is as follows:

> "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,

and then it sets out certain approvals under the Planning Act in items (a) through (g).

On the other hand the City of London argues that no previous credits for demolition were given in their old Development Charges By-law and no credits for demolition are given in the new Development Charges By-law C.P.1306-339. The status quo should be maintained. The new Development Charge By-law of the City of London also levies the same amounts for development charges as it did under the old by-law.

Michael Kirshin gave evidence before the Board on his own behalf. He said he has been a builder in the City of London since 1974 and builds mostly duplexes, tri-plexes and small residential units. Sometimes he renovates a property and sometimes he demolishes the property and rebuilds. Mr. Kirshin said that when he built the new tri-plex he put in a new private drain connection to the sanitary sewer and put in a new water-main and created six new parking spaces located at the rear of the building. He said that although he hasn't received his new assessment notice yet, that he anticipates at least a doubling of his taxes because of the larger tri-plex. He said that two of the older units were about 550 square feet in size each, and one unit was only 250 square feet in size. The new tri-plex is basically built on the same footprint as the old building but is of course much higher with larger units of 1100 to 1200 square feet each in size. Mr. Kirshin said that since he was replacing three old units with three new units that be should be allowed a credit for demolition because he has not increased the need for any additional services that the City might require. The site already has existing services and in fact, the City will be acquiring substantial additional revenue through increased assessment on the larger triplex.

Norman Edwards is the Chief Plan Examiner in the City of London's Building Department and he gave evidence before the Board on behalf of the City of London. Mr. Edwards said that under the old Development Charges By-law C.P.-1286-247 the only credit given to a developer related to a detached, single-family residence which has been razed by an act of God or accidental fire. The new Development Charges By-law C.P.1306-339 in clause 17, refers to a dwelling unit destroyed by a "force majeure" and sets out a one year time limit. This is the only credit given for replacement of a dwelling unit in the new By-law.

Mr. Edwards said the owner of the property was replacing a 1,200 square foot tri-plex with a 3,450 square foot tri-plex roughly three times the original size. The development charges were $2,923.00 per dwelling unit and the total of $8,769.00 was split evenly between the Urban Works Reserve Fund and the Capital Growth Reserve Fund.

Mr. Edwards said that when a house is demolished and rebuilt that this renews the life of a house and renews the demand for roads and services. He said every home has a certain life-span but he admitted he didn't know what that life-span was. Mr. Edwards could not refer to any studies which talked about life-spans of building structures. He said that City Council wanted to basically maintain the status quo and when the old Development Charges By-law was repealed, and replaced with the new Development Charges By-law that the new by-law basically reflected the old one. Levies were the same, no credit for demolition was given, except by the Act of God. He said the

new Development Charges By-law applied to the subject property because three new units were built.

Mr. Edwards admitted that he didn't have any information with regard to whether the three new units increased the need for City services. He also admitted that the Development Charges Act and the London Development Charges By-law talked about residential units, not the size of the units, the number of bedrooms, nor the number of occupants. Mr. Edwards also admitted that if an existing residential unit is increased in size from say 400 square feet to 1,000 square feet the development charge would not apply. Mr. Edwards also said that he didn't know the size of the sewer main or water mains or traffic capacity on Hill Street. He admitted on cross-examination that a new tri-plex may require less services because of such things as conservation of water through water saving devices installed in the home and/or a blue box program related to recycling of waste materials.

David Aston is a management consultant with the Coopers & Lybrand Consulting Group which prepared two reports for the City of London dealing with development charges. A preliminary report dated June 1991 and a final report dated September 1991 are all found in Exhibit 16. Mr. Aston said his company did a study for the City of London to look at growth related capital costs. He said some of the recommendations were adopted by City council and some of their recommendations were not adopted. He said that the basis of the Development Charges Act is that it is permissive and City Council had certain discretionary powers. He said his company looked at the City of London's five year capital forecast and tried to assess what portion of capital costs could be growth related. He said individual unit levies recommended went from a high of $17,000.00 per unit to roughly $8,000.00 per unit which is what his firm recommended. City Council didn't accept the $8,000.00 figure for unit levies but instead passed the by-law with a maximum unit levy of $5,257.00. This $5,257.00 figure was exactly the same as the unit levy under the old Development Charge By-law. He said a credit for demolition is in the discretion of council. His firm recommended that there be a credit for demolition but City Council didn't agree and didn't include a credit in it's by-law. He said his report took a global approach with regard to services throughout the City. Development charges apply to both the existing City and greenfield areas.

Mr. Aston said new dwelling units replacing existing dwelling units may create a demand for additional services but he admitted that he didn't do a study relating to the size of the units or bedroom counts. He said construction of a replacement unit doesn't trigger a capital works construction. He said his report concentrated on total demand for services over a period of time on a city-wide basis. Capital costs don't relate to any part of the City or to any one particular property. He said a broad brush approach was needed. Mr. Aston said that small units replaced by larger units will increase demand for services especially where more bedrooms are created. He said it is the cumulative effect that is important.

On cross-examination Mr. Aston admitted that Section 3(1) of the Development Charges Act talked about the increase in need for services and growth related. This is the threshold test in the Act. Mr. Aston still recommended today that there be a credit for demolition even though City Council passed a by-law maintaining the status quo. Mr. Aston said that the wording of the credit for demolition could be similar to a City of Kingston by-law which stated, and which is found in Exhibit 5 Section 4.3 as follows;

> "This by-law shall not apply to an owner who lawfully demolishes dwelling units or non-residential floor areas and replaces them with dwelling units or non-residential floor area, respectively, but any dwelling units or non-residential floor area created in excess of that which was demolished shall be subject to payment of development charges."

On a unit-for-unit basis there would be a credit for demolition. Mr. Aston also admitted that in any new structure there will be an increase in market value, an increase in assessment and more taxes will be paid to the City. Some of this increase in taxes could go to service costs related to the property.

Bob Puhach is the Assistant City Administrator for the City of London. Mr. Puhach said City Council in all its deliberations wanted to maintain the status quo and not give a credit for demolition. He said that he could not assess the financial impact of a demolition credit if one was given. He said a thorough study would be necessary. He said a demolition credit would generate less revenue to the city and have a negative impact on the tax base.

On cross-examination Mr. Puhach admitted that in any study that was done you would have to look at the impact of new tax dollars generated by new assessment on new buildings built on the property. He said the information relating to either loss or increase in revenue generated by demolition and rebuilding, was not looked at either by staff or City Council. He also admitted that City staff supported the recommendation to give a credit for demolition.

The Board has carefully weighed all the evidence and generally prefers the testimony of Mr. Kirshin and Mr. Aston. The Board was referred to the case of Mod-Aire Homes Ltd. v. Township of Georgina, a decision of the Board given on April 6, 1984, by Board members P.G. Wilkes and R. Chartier found at 17 Ontario Municipal Board Reports at page 213. On page 218, that panel of the Board said that in considering whether or not lot levies were appropriate, they looked at four tests. These four test were:

1) Is the lot levy relevant?
2) Is it necessary?
3) Is it reasonable?
4) Is it equitably applied?

In the case before this panel of the Board, the Board finds that these four tests are a guideline for the Board to consider with regard to the application and the interpretation of the Development Charges Act. They are appropriate in this case to determine whether a credit for demolition should be included in the City of London's Development Charges By-law C.P. 1306-339.

Here, the owner of the property, Mr. Kirshin is replacing a triplex with a tri-plex; three dwelling units with three dwelling units. The unit sizes are much larger and there is one extra bedroom and some additional parking provided on site but there is absolutely no evidence before the Board to show that three new tri-plexes would increase the need for additional services.

The threshold tests set out in Section 3(1) of the Development Charges Act has not been adequately addressed by the City of London. What is required is evidence from the City showing existing City services would be impacted by three new units replacing three old units. In this case the subject site is fully serviced and in fact the owner through a development agreement with the City under Section 40 of the Planning Act has upgraded certain services relating to storm-water man-

agement and water-mains. There is no evidence before the Board to indicate that any of the existing City services would have to be replaced or improved upon. In fact, there is evidence before the Board to show that there is a net gain in tax revenue to the City of London. A new tri-plex would generate significantly increased assessment and new taxes for the City. What is lacking is a complete analysis relating to demolition of old units and replacing them with new units in terms of capital costs for hard services and tax revenue generated by the increased assessment.

The City of London's Development Charges By-law talks in terms of "dwelling units" not in terms of square footage, number of bedrooms or number of occupants. In addition, the Board finds that both the City staff and the consultants, Coopers & Lybrand Group, recommended a credit for demolition. City Council in this case preferred to maintain the status quo.

The Board finds that based on the evidence, a credit for demolition is relevant, necessary, reasonable and equitable, and meets all of the four tests. Development charges and lot levies produce extra revenue for the City to offset the capital costs of hard services such as roads and sewers. The other side of the coin is that new development brings in new assessment and new taxes that help pay for these capital expenditures as well as current expenditures.

The Board also finds that in fact there is a significant social and public benefit produced by three larger tri-plexes replacing three smaller tri-plexes. Living accommodation for families is greatly enhanced. This is a benefit to the City of London.

There is no evidence before the Board to suggest that existing services are inadequate or insufficient or that a need for any new services exists. For instance, there is no evidence to suggest that existing sanitary sewers are overtaxed or that a new pollution treatment plant is needed. In addition there is no evidence relating to any strain on services such as water, storm drainage or roads. From the evidence it would appear that existing hard services are more than adequate to accommodate three larger tri-plexes which are replacing three smaller tri-plexes.

The Board also finds that Section 8(1)(d) of the Development Charges Act has not been met. Because there already is a clause in the by-law allowing for the replacement of units without a development charge, in some circumstances, the principle should also apply here. Hence, there was an error in the application of the Development Charges By-law. A credit for demolition should have been given to the owner by the City of London. The Board finds that London's Development Charges By-law is unreasonable and incomplete. A credit for demolition should be allowed in order to create equity.

In the result, both appeals are allowed under Section 8(7) and Section 4(4) of the Development charges Act.

The Board directs that;

1) By-law C.P.1306-339 be amended to include the Kingston clause for a credit for demolition as found in Exhibit 5. This clause is to be inserted and will read as follows;

'The by-law shall not apply to an owner who lawfully demolishes dwelling units or non-residential floor areas and replaces them with dwelling units or non-residential floor area, respectively, but any dwelling units or

non-residential floor area created in excess of that which was demolished shall be subject to payment of development charges.'

2) To clause 17 of C.P. 1306-339 will be added the words, "or accidental fire" after the words "force majeure".
3) Pursuant to Section 5(5) (a) of the Development Charges Act, a refund of $8,769.00 plus interest will be paid by the City of London to the owner, Michael Kirshin within 30 days of the date of the order of the Board.
4) In all other respects the appeals against By-law C.P. 1306-339 are dismissed.

The Board's order will issue when the by-law is amended in accordance with the Board's decision.

M.A. ROSENBERG, Member