

## RECORD OF PROCEEDING

### CORPORATE SERVICES COMMITTEE

convening as a Tribunal under section 26 of Part IV of By-law C.P.-1473-212 and pursuant to By-law A.-6361-177 that would delegate the hearing to the Corporate Services Committee from the Board of Control, to hear a complaint from Junction Climbing Centre Inc. in respect of the development charge imposed by The Corporation of the City of London in connection with development on the land known as 1030 Elias Street.

September 9, 2014 – 2:00 PM  
Committee Room #5  
London City Hall

### PRESENT

Mayor J. Baechler, Chair  
Councillor J.P. Bryant, Tribunal Member  
Councillor B. Polhill, Tribunal Member  
Councillor H.L. Usher, Tribunal Member  
L. Rowe, Registrar  
J.P. Barber, City Solicitor  
P. Christiaans, Director, Development Finance  
N. Hall, Solicitor II  
P. Kokkoros, Deputy Chief Building Official  
G. Kotsifas, Managing Director, Development and Compliance Services and Chief Building Official  
J. Kudelka, Complainant  
A. Ferreira, Patton Cormier & Associates, Complainant's Agent

### CALL TO ORDER

The Chair called the Tribunal to order at 2:01 PM on September 9, 2014.

### DECLARATIONS OF PECUNIARY INTEREST

None.

### HEARING

Hearing before the Corporate Services Committee (CSC), convening as a Tribunal, with respect to the development charge imposed by The Corporation of the City of London in connection with development on the land known as 1030 Elias Street.

#### 1. Preliminary and Interlocutory Matters:

The Chair provided a brief overview and explanation of the Hearing process.

G. Kotsifas, Managing Director, Development and Compliance Services and Chief Building Official; P. Kokkoros, Deputy Chief Building Official; P. Christiaans, Director, Development Finance; J.P. Barber, City Solicitor and N. Hall, Solicitor II appeared on behalf of the City of London. A. Ferreira, Patton Cormier & Associates and J. Kudelka, Junction Climbing Centre Inc, appeared on behalf of Junction Climbing Centre Inc.

#### 2. Summary of the Evidence Received by the Tribunal:

The following attached documents were submitted as Exhibits at the Hearing:

Exhibit #1: Notice of Hearing dated August 15, 2014

Exhibit #2: Written complaint from Junction Climbing Centre Inc., submitted by A. Ferreira, Patton Cormier & Associates, lawyers for the Junction Climbing Centre Inc., date stamped in the City Clerk's Office on May 16, 2014;

Exhibit #3: Staff report dated September 9, 2014, from the Managing Director, Development and Compliance Services & Chief Building Official;

Exhibit #4: Undated submission by A. Ferreira, Patton Cormier & Associates, made at the Tribunal hearing on September 9, 2014, entitled “Junction Climbing Centre Inc. – Submissions to the Corporate Services Committee”;

Exhibit #5 Undated submission by P. Kokkoros, Deputy Chief Building Official, made at the Tribunal hearing on September 9, 2014, entitled “1030 Elias Street – Redevelopment – Permit History”; and

Exhibit #6: PowerPoint presentation made at the Tribunal hearing on September 9, 2014, by P. Kokkoros, Deputy Chief Building Official, entitled “Development Charges Complaint – 1030 Elias Street Redevelopment”.

Councillor Usher requested clarification as to why Mayor Baechler was chairing the Tribunal. He was advised by the Registrar that as the Mayor is Chair of the Corporate Services Committee and, in turn, the Corporate Services Committee serves as the Tribunal to hear complaints under the Development Charges By-law, the Mayor also, in turn, serves as Chair of the Tribunal.

A. Ferreira submitted an undated submission entitled “Junction Climbing Centre Inc. – Submissions to the Corporate Services Committee” as Exhibit # 4. She noted that interior renovations were required to convert an industrial use to an indoor rock climbing gym and \$111,816.04 in development charges were imposed and paid under protest at the time of obtaining the necessary building permit. A complaint under the Development Charges By-law was subsequently made and that is why the hearing is being conducted today.

Ms. Ferreira indicated that development charges need not and should not be automatically imposed, that each complaint should be considered on its own unique set of facts. She also stated that the Development Charges By-law should not be applied in an overly technical manner and that reductions or waivers of development charges should be granted by the City, where appropriate, as the City has done in the past.

Ms. Ferreira noted that the new Development Charges By-law which came into effect on August 4, 2014 remedied certain inequities under the previous By-law. She further stated that it was the understanding of Junction Climbing Centre Inc. that had it applied for its building permit after the new Development Charges By-law came into effect, it would have paid a development charge of approximately \$5000.00, rather than the \$111,816.04 it actually paid, with the latter amount representing almost one-fifth of the gym’s budget. Ms. Ferreira indicated that while Counsel for Junction Climbing Centre Inc. had requested Mr. Kokkoros or Ms. Hall to confirm that calculation, no confirmation has been received as yet. However, the City Clerk has confirmed that there are no other “pending” complaints under the previous By-law, so a decision to reduce the development charge in this case would not open the floodgates for other complaints.

Ms. Ferreira pointed out that her client, Mr. Kudelka, has always been vocal about his opposition to the Development Charges By-law and made representation to the City to that effect, including to P. Christiaans, Director, Development Finance. Ultimately changes were made to the City’s Development Charges By-law and the inequity was remedied. However, as her client had to proceed with obtaining a building permit, he had to pay the development charges that were imposed at the time, under duress.

Ms. Ferreira indicated that the nature of the development poses an equally compelling reason for reducing the development charges that were imposed, stating that the purpose of development charges, pursuant to section 2 of the *Development Charges Act*, is to pay for increased capital costs required because of increased needs for services arising from development. She noted that in this case the following facts must be considered by the Committee:

- a) The “development” by Junction Climbing Centre involved interior renovations of an existing building. This building may otherwise be sitting vacant.
- b) No additional floor space has been created. The building’s footprint has not been enlarged. There have been no structural changes.
- c) There will be no increased capital costs to the City arising from this development.

- d) There will be no increased need for municipal services arising from this development.
- e) The previous industrial use, a steel manufacturing facility, created a higher demand on City services than the climbing gym in the form of heavy truck traffic and increased water usage.
- f) There is no greater impact on sanitary flows, water usage, fire, police, or storm water management as a result of this development.

Ms. Ferreira added that indoor rock climbing is a popular recreational activity that requires a unique type of building, not easily found in traditional commercial areas, and that industrial buildings are particularly suited to this type of facility, so her client decided to use an industrial building that would have otherwise remained vacant.

Ms. Ferreira noted that the Junction Climbing Centre is currently the only climbing gym in the City of London and that it offers its members premium equipment, leagues and training. She also indicated that there are three climbing competitions that are scheduled to take place at this facility, which will attract competitors from across Ontario. Ms. Ferreira emphasized that small businesses such as the Climbing Centre should be supported and welcomed to the City of London.

Ms. Ferreira requested that the development charge be reduced to \$14,373.86, which she feels is more than fair and reasonable in the circumstances, and accounts for the additional washrooms, party room and maintenance room, totaling 887 sq.ft. (82.4 m<sup>2</sup>). This is particularly so given that only approximately \$5000.00 would have been payable under the new Development Charges By-law.

Ms. Ferreira concluded by saying that the business is going well, the client has had an excellent response, and there are many people wanting to sign up for training sessions. She noted that her client has only been able to develop half of the space being leased, and that the other half of the space is just sitting there. If the development charges were reduced, then those monies could go back into the business to expand the gym, thereby enabling it to host larger competitions and better represent the City of London.

Councillor Usher enquired when the development charges were paid. Ms. Ferreira advised that payment was made at the time the building permit was issued.

Councillor Usher further enquired if, at that time, the client was aware of the current Development Charges By-law being under review and that changes may be forthcoming. Ms. Ferreira advised that her client was aware that the By-law was under review, that there may be changes, but that there were no promises or assurances as to what changes, if any, would be forthcoming. She further stated that because of business reasons, her client had to proceed at that time as he was paying rent for the space.

Councillor Polhill enquired if, when the new By-law was coming out, was there any indication of what the reduction would be. Mr. Kudelka indicated that he knew the By-law was under review and that there was a proposal being made to the Municipal Council, but that there were no guarantees as to the outcome of the Municipal Council's consideration of the matter. Mr. Kudelka further stated that he was aware of the direction staff were hopeful it would take, but that there were no guarantees as to the outcome.

Councillor Polhill noted that Mr. Kudelka had no guarantees, but he had to proceed with the project.

Mayor Baechler enquired if Ms. Ferreira was advising that the \$111,816.04 was not correctly determined because a credit was not being appealed. Ms. Ferreira indicated that staff have worked within the allowable grounds within the By-law, but that there is an error due to the unfairness because of the timing of the development. She confirmed that they were not suggesting that there was a mechanical or mathematical error in the calculation.

Councillor Bryant indicated she could not see an error in the application of the Development Charges By-law. Ms. Ferreira reiterated her view that the By-law does not need to be applied in an overly technical manner and could be applied

considering the unusual circumstances and further, should not be applied in an overly technical manner.

Councillor Usher indicated that he required additional clarity that he has to look at the By-law at the “point in time” and that the calculation was made correctly, and that the development charges were paid in protest. Ms. Ferreira indicated it was important to note the overly technical manner in which the former By-law was applied as this is an important consideration towards a decision to reduce the charge. She also noted that it was important to consider if there was an increased demand on services. Ms. Ferreira indicated that the use did not create any additional strain on existing services which means that the development charge was extremely high and not warranted. She also noted that building permits are not issued until the development charges are paid, so her client paid the development charges in order to get the building permit. However, paying the development charges should not be seen as agreeing with them. Her client only paid them in order to get the building permit and retained the right to protest the development charges.

Councillor Usher indicated that he could only consider if there was an incorrect calculation. Ms. Ferreira responded by indicating that if you look at this as simply a mathematical task, there is no error in calculation. However, there is an error in this case in that there is some discretion in terms of applicability considering demand on services.

Mr. Kokkoros provided a written submission entitled “1030 Elias Street – Redevelopment – Permit History” (Exhibit #5) and recited the contents of that submission. He also provided a hard copy of his PowerPoint presentation entitled “Development Charges Complaint – 1030 Elias Street Redevelopment” (Exhibit #6).

Mr. Kokkoros, made his presentation, stating the following:

- under the Ontario Building Code, a change of use is required when there is a change of occupancy and as such, development charges are applied when there is a change in use from industrial to commercial;
- the Development Charges By-law applicable at the time provides for the following “Grounds of Complaint”:
  - 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 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 this by-law.

Mr. Kokkoros advised of the determination of the validity of the grounds of complaint provided by the complainant, as per s. 27 as follows:

- The amount of development charges was incorrectly determined. This is valid as a ground of complaint as per s.27(a).
- The building was previously used for industrial purposes as a steel manufacturing and assembly plant. This is a statement of fact; not disputed; not a valid ground of complaint.
- The Climbing Centre will not create an increased need for services. This is not a valid ground of complaint.
- The interior alterations to the building will not result in additional floor space. The development charges are not based on additional floor space; this is not a valid ground of complaint.
- The amount of development charges is neither fair nor reasonable in the circumstances. This is a statement of opinion, not a valid ground of complaint.

Mr. Kokkoros indicated that section 4 of the Development Charges By-law states that “The owner of any land in the City of London who develops or redevelops the land or any building or structure thereon shall, at the time mentioned in section 5, pay Development Charges to the Corporation calculated in accordance with the applicable rate or rates in section 6, 7, 8 and 9 hereof.” He also indicated that in accordance with the By-law, development “means the construction, erection or placing of one 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 changing the size or usability thereof, and includes all enlargement of existing development which creates new dwelling units or additional non-residential space and includes work that requires a change of use building permit as per Section 10 of the *Ontario Building Code*; and “redevelopment has a corresponding meaning;”.

Mr. Kokkoros further advised that the conversion of an industrial use to an assembly use requires a change of use permit, which is clear from Table 1.3.1.4 of the *Ontario Building Code*. He stated that as indicated previously, there is clearly only one valid ground of complaint, being whether or not the amount of the development charge was correctly determined. He went on to explain how the calculation was made, as detailed in the slide of his PowerPoint presentation entitled "How were the Development Charges Determined?" (Exhibit #6).

Mr. Kokkoros then spoke to the matter of redevelopment and the impact on municipal services. He indicated that the complainant's letter makes no mention of what resolution is being sought. For example 50% of the assessment of development charges or full exemption. Mr. Kokkoros directed the attention of the Tribunal members to the section of his staff report entitled "DC Exemptions as per the DC By-law in effect" and indicated that staff have applied and administered the By-law correctly and to uphold the complaint would set a dangerous precedent. Mr. Kokkoros encouraged the Tribunal to consider if the development charges had been correctly calculated, if there was any credit available, and if there was any error in the application of the By-law. He stated his belief that the grounds for the complaint are not valid and the development charges were correctly calculated, and respectfully requested that the complaint be dismissed.

Councillor Polhill enquired if the development charges were paid at the time of the issuance of the building permit and was advised by Mr. Kokkoros that this was the case.

Councillor Polhill further enquired about what the Order to Comply was for and was advised by Mr. Kokkoros that that matter was not within the mandate of this Tribunal, but that it related to a *Building Code* infraction. He further indicated that that matter was noted on the Permit History (Exhibit #5) so that the Tribunal could see the building permit history.

Councillor Polhill enquired if the development charges were refunded when the earlier building permit was revoked and was advised by Mr. Kokkoros that the charges were refunded.

Councillor Usher enquired why the development charges paid in 2014 were significantly less than those originally paid in 2013 and was advised by Mr. Kokkoros that the original permit was for approximately 1502 m<sup>2</sup>, while the second permit was only for 641 m<sup>2</sup>. Councillor Usher then asked if the floor plan had changed and was advised by Mr. Kokkoros that the scope of work was reduced from 1502 m<sup>2</sup> to 641 m<sup>2</sup>, which resulted in a reduction in the development charges.

Councillor Usher stated that we had an industrial building which was not subject to development charges at the time, but now that the use has been changed, development charges are now applicable. He asked for an explanation as to how you can go from no development charges being applicable to owing development charges. He was advised by Mr. Kokkoros that that comes from the Development Charges By-law that was in effect at the time, and also referred Councillor Usher to Table 1.3.1.4 of the *Ontario Building Code*.

Councillor Usher further enquired if an industrial building paid development charges and there was a new use, would any development charges be payable between the old development charges and the new development charges? Mr. Kokkoros advised that the Development Charges By-law has formulae for applying development charges. He noted that section 14 discussed what happens when there is conversion from one form on non-residential use to another form of non-residential use. He also noted that in this case it was considered as "development", not previous use. Mr. Christiaans indicated that under the City's By-law in effect at the time of the building permit issuance, there was no provision for a credit against the higher commercial charge applicable at the time. However, with the new By-law that came into effect in August, there is a conversion credit available, irrespective if there was no development charge that was initially payable. He further stated that the By-law was applied correctly.

Councillor Usher stated that at the time the application was made the development charges were applied as if it were a new building from scratch and in accordance with the By-law. He asked if the owner was aware of this. Mr. Christiaans indicated that the City was having discussions with the applicant between the timing of the two permits, but is not exactly sure of the timing of the discussions with Mr. Pedulka and he believes that Mr. Pedulka was aware there was a chance that the new By-law may bring the development charges down. Mr. Kokkoros again drew the Tribunal's attention to Exhibit

#5 and indicated that it was made very clear to the proponent that he understood the situation regarding development charges and it was the proponent's position that he could not wait for the new By-law to get the permit issued.

Councillor Usher asked if any promises were made to the proponent and was advised by Mr. Kokkoros that it wasn't possible to make promises as there is no provision in the By-law for retroactivity.

Councillor Bryant asked if the City would be in a position to make any deductions or waivers and if there is any deductions that could be made that had been made on other projects. Mr. Kokkoros cautioned against the use of deductions or waivers as the By-law is not discretionary and the Development Charges By-law has to be strictly enforced as passed and approved by Council. He noted that credits can only be granted in accordance with the Development Charges By-law. Councillor Bryant further asked if Mr. Kokkoros could think of any legal deductions or waivers within the By-law that could be applied in this instance and was advised by Mr. Kokkoros that if there were, staff would have considered those and that there is nothing available for this particular redevelopment.

Councillor Polhill asked if the industrial credit is in the By-law or if it is gone and was advised by Mr. Kokkoros that the current By-law introduces a new industrial development charge rate, whereas previous By-laws did not include an industrial rate. Councillor Polhill indicated that if there was an industrial building and they kept using the industrial building for industrial purposes, but installed 25 washrooms and created all kinds of traffic then no development charges would have been payable under the previous By-law. Mr. Kokkoros indicated yes, that would have been the case because the Municipal Council decided that development charges would not apply to industrial purposes.

The Chair asked Ms. Ferreira if there was any further oral evidence or submissions in reply to any new issues raised by the submission made by the Civic Administration.

Ms. Ferreira indicated there were a couple of points she would like to make. First, with respect to the position by Mr. Kokkoros, she indicated concern with the overly technical application of the by-law and the same approach to the complaint letter. She noted that when the grounds of appeal were set out, those grounds constituted their reasons, including technical and other general arguments. Secondly, she indicated her intention to touch quickly on Mr. Kokkoros' point that the *Development Charges Act* specifically states that the amount of the development charge for development need not be limited to any increase in capital costs. This is an important point as, again, the development charges are not mandatory.

The Chair asked if there was a need to go in camera for the purpose of receiving legal advice and it was determined there was no need to do so.

Councillor Bryant indicated that it is unfortunate that staff don't have any credits or reductions they can apply in this instance, to which Ms. Ferreira responded that the By-law has some discretion to reduce or waive a charge when appropriate. She further indicated that staff have strictly applied the By-law, which is fine but this has resulted in a very unjust and unfair situation. Ms. Ferreira added that the Building Permit History (Exhibit #5) demonstrates the urgency that the business had to open and that they are in the position that they are in today because of that urgency. She explained that the \$14,373.16 they are suggesting constitute the development charges represents an area based upon the renovations, the majority of which are climbing walls, plus washrooms, a party room and a maintenance room. Ms. Ferreira indicated that it would be fair to approve that area as being subject to the development charges, but the other unfinished area is not a conversion. She emphasized that the client has been cooperative and wants to work with the City and feels this would be a fair outcome. She noted the rate used was the commercial rate applicable under the previous By-law.

Mayor Baechler noted that when looking at Part IV of the Development Charges By-law, the Municipal Council shall make the determination and the Committee shall make a recommendation to the Municipal Council as soon as practical. She noted the Tribunal has heard the complaint and there has been a degree of discussion about the interpretation of the degree of discretion. Mr. Barber indicated that there is no equitable discretion in that the Committee and Council have to impose a just and fair result. He stated that his advice has consistently been that the development charges have to have been incorrect based upon Ontario Municipal Board jurisprudence in order to necessitate a decision other than to dismiss a complaint. He added that you are restricted to your

consideration of the gross floor area that has been cut in half, and you have heard from both the City and the complainant on this matter. The question is what is the floor space? Mr. Kokkoros advises it is 641 m<sup>2</sup>. In order to confirm that the Tribunal has to be satisfied 82.4 m<sup>2</sup> is the correct floor space, and not Mr. Kokkoros' number.

Councillor Polhill questioned if there was any justifiable change, when only washrooms, a party room and maintenance room occupied the floor space, as the rest of the use was in the air and not on the floor space. He also noted that the use did not make any further demand on City services and that there was actually less traffic and a cleaner use. He acknowledged that you have to pay development charges, but noted that the rules regarding the development charges changed only three months later.

Councillor Polhill proposed that \$14,373.86 be the applicable development charges. There was support by other Tribunal members for that proposal.

Councillor Bryant asks if there is a time limit to come forward with a complaint of this nature and was advised by Mr. Kokkoros that he believed the time limit for such a complaint to be filed is 90 days from the date the fees are paid. Councillor Bryant asked if the complaint was received within the time limit and was advised that it was.

Councillor Polhill enquired why the development charges were adjusted for the church on Blackfriars Street. Mr. Kotsifas advised that each case has to be considered based upon its own merit.

Councillor Bryant enquired if questions could be asked of staff after the Tribunal. Mr. Barber indicated that there would be deliberation at Council and there is the potential for questions beyond the information contained in the Record of Proceedings. However, in terms of approaching staff outside the Council meeting, it would be improper not only because of closed meeting provisions, but also to the extent that if someone wanted to take a different position that could be raised at Council.

Councillor Bryant raised one more point of clarification, asking how the development charge went from over \$200,000, down to \$111,816.04; was that due to use and design. Mr. Kokkoros indicated that the development charge rate that was applied was the same in both cases, but the floor space was reduced from 1560 m<sup>2</sup> to 641 m<sup>2</sup>.

The Chair indicated that the Tribunal recognizes the difficult situation and assured the complainant that they take their responsibility in considering the complaint seriously and have weighed the merits of what has been done and what is being sought. That is why the Tribunal has asked a lot of questions and if there had been an error in the calculation the Chair would be seeking a rectification of that error. The motion before the Tribunal acknowledges that staff have applied the development charges in accordance with the rules and there is no wiggle room.

The Chair then called for a decision with respect to the complaint.

**RECOMMENDATION:**

That after convening as a Tribunal under section 26 of Part IV of By-law C.P.-1473-212, and pursuant to By-law A.-6361-177 that would delegate the hearing to the Corporate Services Committee from the Board of Control, to hear a complaint from Junction Climbing Centre Inc. regarding the development charge imposed by The Corporation of the City of London in connection with development on the land known as 1030 Elias Street, as detailed in the Record of Proceedings, the complaint BE DISMISSED on the basis that the Tribunal finds that the development charge was properly imposed in accordance with the applicable by-law.

**ADJOURNMENT**

The Tribunal adjourned at 3:26 PM.