

Report to Planning & Environment Committee

To: Chair and Members
Corporate Services Committee
From: Scott Mathers, MPA, P. Eng
Deputy City Manager, Planning and Economic Development
Subject: Development Charge Complaint
2365 Innovation Drive
Date: November 28, 2022

Recommendation

That, on the recommendation of the Director, Building and Chief Building Official, the Development Charges complaint submitted by Mr. Neil M. Smiley of Fasken Martineau DuMoulin LLP, related to development at the property situated at 2365 Innovation Drive, **BE DISMISSED.**

Executive Summary

A building permit application was received on November 3, 2021, for the erection of a new laundry facility. A foundation permit was issued on September 22, 2022. A complaint letter from Mr. Neil M. Smiley of Fasken Martineau DuMoulin LLP with respect to Development Charges paid (hereinafter referred to as the 'Complaint'), was received on September 14, 2022, and is included in Appendix 'A' of this report.

The Development Charges were assessed by staff using the Commercial rate.

The aforementioned letter makes mention of various reasons as to why the requested Development Charges amount should be adjusted to reflect the Industrial Development Charge rate and not Commercial.

Linkage to the Corporate Strategic Plan

Growing our Economy

- London is a leader in Ontario for attracting new jobs and investments.

Leading in Public Service

- The City of London is trusted, open, and accountable in service of our community.
- Improve public accountability and transparency in decision making.

Analysis

1.0 Background Information

A complaint letter from Mr. Neil M. Smiley of Fasken Martineau DuMoulin LLP, on behalf of UniFirst Canada Ltd. (the "Complainant"), with respect to Development Charges paid for the erection of a new building was received on September 14, 2022, and is included in Appendix 'A' of this report.

The letter makes mention of various reasons as to why the requested Development Charges amount should be adjusted to reflect the Industrial Development Charge rate and not Commercial. In summary, the following reasons have been listed:

1. UniFirst operates as an Industrial launderer.
2. The building does not conform to the definition of 'Commercial Development'.
3. A Minor Variance was processed to conform to 'Light Industrial' zoning designation.
4. UniFirst provides services to industry and not the general public.

5. UniFirst is classified as an 'Industrial Launderer' under NAICS Code 812332 and SIC Code 7218.
6. The property is zoned for Industrial Uses and the Ontario Building Code classifies the building as 'Industrial'.
7. No retail activities by way of sale or rental to the public at the property.

A site plan depicting the proposed development is provided in Appendix 'B'.

The proposed building has a gross floor area of 5,875 sq.m and the development charges were calculated by staff at the Commercial development charge rate of \$322.19 per sq.m. The total development charge amount due was calculated at \$1,897,037.50.

2.0 Discussion and Considerations

Building Uses per the Development Charges By-law

In determining the appropriate development charge, it is important to determine the building's use. Part I, section 1 of the Development Charges By-law C.P.-1551-227 (the "DC By-law") provides the definitions of various building uses which are then used to determine the appropriate development charge rate for the proposed building. Industrial development is defined as:

"Industrial Development" is a building used for:

- a) *manufacturing, producing, fabricating, assembling, compounding or processing of raw materials, goods, component parts or ingredients where the physical condition of such materials, goods, parts or components is altered to produce a finished or semi-finished tangible product, or the packaging, crating, bottling, of semi-processed goods or materials, but not including any of these activities where they primarily serve retail purposes to the general public;*
- b) *storing or distributing something derived from the activities mentioned in a) above and for greater certainty, shall include the operation of a truck terminal, warehouse or depot and does not include self-storage warehousing for use by the general public or retail sales associated with the goods stored or distributed, or accessory storage of a Commercial Development;*
- c) *research or development in connection with activities mentioned in (a) above;*
- d) *retail sales of goods produced by activities mentioned in section a) at the site where the manufacturing, producing or processing from raw materials or semi-processed goods takes place and for greater certainty, includes the sale of goods or commodities to the general public where such sales are accessory or secondary to the Industrial use, and does not include the sale of goods or commodities to the general public through a warehouse club;*
- e) *office or administrative purposes, if they are carried out:*
 - i) *with respect to the activity mentioned in section (a), and*
 - ii) *in or attached to the building or structure used for activities mentioned in section a) and*
 - iii) *for greater certainty, shall include an office building located on the same property as, and used solely to support, the activities mentioned in section a);*
- f) *a business that stores and processes data for retrieval, license or sale to end users and are on lands zoned for Industrial uses; or*

g) businesses that develop computer software or hardware for license or sale to end users that are on lands zoned for Industrial uses; and

h) Industrial Use shall have the corresponding meaning;

Part I, section 1 of the DC By-law describes commercial development, in part, as:

“Commercial Development” *is a building used for:*

*b) Retail purposes including activities of offering foods, wares, merchandise, substances, articles or things for sale or rental directly to the public and includes offices and storage within the same building, which support, are in connection with, related or ancillary to such uses, or activities providing entertainment and recreation. **Retail purposes shall include but not be limited to:** conventional restaurants; fast food restaurants; night clubs, concert halls, theatres, cinemas, movie houses, and other entertainment related businesses; automotive fuel stations with or without service facilities; special automotive shops/vehicle repairs/collision services/car or truck washes; vehicle dealerships; commercial truck service establishments, regional shopping centres; community shopping centres; neighbourhood shopping centres, including more than two stores attached and under one ownership; department/discount stores; banks and similar financial institutions, including credit unions (excluding freestanding bank kiosks), money handling and cheque cashing facilities; warehouse clubs or retail warehouses; food stores, pharmacies, clothing stores, furniture stores, department stores, sporting goods stores, appliance stores, garden centres (but not a garden centre defined as exempt under section 35 of this By-law), government owned retail facilities, private daycare, private schools, private lodging and retirement homes, private recreational facilities, sports clubs, golf courses, skiing facilities, race tracks, gambling operations, funeral homes, motels, hotels, restaurants, theatres, facilities for motion picture, audio and video production and distribution, sound recording services, passenger stations and depots, dry cleaning establishments, **laundries**, establishments for commercial self-service uses, automotive recycling/wrecking yards, kennels. (emphasis added)*

The proposed building is to be used to launder materials that were not manufactured in the building. The definition of “Commercial Development” per the DC By-law includes laundries as part of the definition for commercial development. On this fact alone the “Commercial Development” definition is satisfied, and the commercial development charge rate would be applied.

Calculation of Development Charges: Other Considerations

Even if the laundries were not specifically listed, the definition of Commercial Development provides examples of uses and does not limit the types of uses included in that definition. This is reflected in the commercial development definition:

(b) “Retail purposes shall include but not be limited to:”

The definition does not provide all possible commercial development scenarios, but rather provides examples of uses.

Conversely, the definition for ‘Industrial Development’ is restrictive. This definition lists specific uses and does not provide for a “catch all” to reflect similar uses. It is restricted to only those uses listed.

Staff are of the opinion that the proposed use at 2365 Innovation Drive does not conform to the definition of ‘Industrial Development’ for the following reasons:

1. To be considered as an industrial development, the definition outlines that the physical condition of materials, goods, parts or components are altered to produce a finished or semi-finished tangible product.
2. There are no processes whereby raw materials will be physically altered to produce a finished or semi-finished tangible product.
3. The services provided are done so with respect to cleaning/processing items previously manufactured and as such, align with the use of a laundry as provided in the definition of Commercial development.

The proposed building is to be used to launder materials that were not manufactured in the building. There is no new product being manufactured or produced; therefore the industrial development definition is not satisfied.

The Development Charges By-law's Relationship to Other Legislation

It should be noted that the DC By-law is independent of any other legislation, other than the *Development Charges Act, 1997*, S.O. 1997, c. 27 (the "Act"). Unlike the O. Reg. 332/12 under the *Building Code Act, 1992*, S.O. 1992, c. 23 (the "Building Code") that references other 'applicable law', the DC By-law is not bound by any other by-laws or regulations.

The City of London's Zoning By-law may classify a property whereby industrial uses are permitted. However, under the 'Light Industrial' zone (section 40 of the Zoning By-law), as an example, the following uses are permitted:

*3) **LI3** The following are permitted uses in the LI3 Zone variation: a) Assembly halls; b) Commercial recreation establishments; c) Day care centres; d) Private clubs; e) Private parks.*

*4) **LI4** The following are permitted uses in the LI4 Zone variation: a) Any use permitted in the LI1 Zone variation; b) Automotive uses, restricted; c) Clinics; d) Convenience service establishments; e) Convenience stores; f) Day care centres; g) Financial institutions; h) Medical/dental offices; i) Personal service establishments; j) Restaurants.*

*5) **LI5** The following are permitted uses in the LI5 Zone variation: a) Hotels; b) Motels.*

The fact that the above uses are permitted in the light industrial zone, does not constitute their use to be classified as 'Industrial' under the DC By-law. For example, a restaurant or a daycare centre, as permitted above, are not Industrial uses under the DC By-law.

While it is appreciated that other regulations (not associated with the DC By-law) may classify the proposed building as an Industrial Laundry facility, it is the DC By-law alone that applies to calculating the charge. As previously stated, laundries fall under the Commercial Development definition and the applicable commercial rate was used to calculate the charge.

Development Charges By-law and Grounds for Complaints

Part IV, s.27 of the DC By-law provides the following grounds for a complaint:

7. Grounds of Complaint

An Owner may complain in writing to the Corporate Services Committee (with a copy provided to the Chief Building Official) upon such grounds as are established by and in accordance with the Development Charges Act in respect of the Development Charge imposed by the City:

- 1. that the amount of the Development Charge was incorrectly determined;*
- 2. 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*
- 3. that there was an error in the application of this By-law.*

In reviewing the three grounds above, it is staff's position that the amount of the development charge was correctly determined. Regarding item 1 noted above, the development charge rate used was that in effect at the time the permit was ready to be issued and was calculated in accordance with section 4 of the DC By-law and the Act. Regarding item 2, there was no credit due against the development charges. Staff are also of the opinion that there was no error in the application of the DC By-law itself addressing item 3.

Staff maintain that the development charge amount was properly determined under the DC By-law in force and effect at the time when the building permit was ready to be issued and therefore recommends dismissal of the complaint.

Conclusion

The letter submitted by the Complainant suggests that the development charge amount should be based on the Industrial use as opposed to the Commercial use of the new building to be erected at 2365 Innovation Drive.

The proposed use does not conform to the definition of Industrial development as per the DC By-law.

It is the Chief Building Official's opinion that the Development Charges were correctly determined, and that the Complaint should be dismissed.

The assistance provided by Aynsley Anderson, Solicitor II and Kyle Wilding, Manager Plans Examination, is acknowledged.

Prepared by: **Peter Kokkoros, P.Eng**
Director, Building and Chief Building Official
Planning and Economic Development

Submitted &
Recommended by: **Scott Mathers, MPA, P.Eng**
Deputy City Manager, Planning and Economic Development

APPENDIX "A"

Fasken Martineau DuMoulin LLP
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September 16, 2022
File No.: 218183.00967/11889

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By Email

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Attention: Corporate Services Committee c/o Najah Kishawi-Support Clerk nkishawi@london.ca

Dear Sirs/Madams:

Re: Letter of Complaint/Protest in respect of the Development Charges (City Services) being required by the City of London to be paid in connection with the issuance of Building Permit 21-030285 concerning the development of property owned by UniFirst Canada Ltd. located at 2365 Innovation Drive, City of London (the "Property")

We act on behalf of Unifirst Canada Ltd. ("UniFirst") in connection with its development of an industrial laundering and cleaning facility at the above-noted Property (the "Project"). Under a Customer Invoice dated Friday September 9, 2022, a copy of which is attached as Schedule A (the "Customer Invoice"), the City of London has invoiced UniFirst's contractor, Arco/Murray International Construction Company, ULC, for payments, including Development Charges, that it requires be paid prior to the issuance of a building permit arising from Building Permit Application No 21-030285 for the Project.

UniFirst does not agree with, and this letter shall serve as notice of Unifirst's complaint and protest ("Notice of Complaint") in respect of the imposition for the Project of a Development Charges Rates applicable to "Commercial Development" as defined under City of London By-law No. C.P. 1551-227 (the "DC By-Law"). It is UniFirst's respectful submission that its use of the Property should attract/invoke the Development Charges Rate for "Industrial Development" as provided for in the DC By-law. Accordingly, in accordance with Section 20 of the Development Charges Act, 1997 and Section 26 of the City of London's DC By-law, we hereby file, on behalf of UniFirst as "Complainant", the within Notice of Complaint to the City of London under Part IV of the DC By-law.

1. The Complainant: UniFirst Canada, Ltd.
2. Address of Service for Complainant: 3067 E. Commerce, San Antonio, TX 78220
Attention: Rick Montgomery Email: RMontgomery@unifirst.com
3. Grounds for Complaint: The amount of the development charge was incorrectly determined; and or there was an error in the application of the DC By-law as summarized below:

(i) UniFirst operates as an industrial launderer, whereby it will use the premises primarily for receiving from an industrial depot, bulk soiled uniforms and other industrial wear, which it industrially launders and has delivered for re-use to the industrial user. Other industrial processing occurs such as labelling and dyeing.

(ii) The building use proposed for the Project does NOT conform to the definition of a “Commercial Development” as set out in the DC By-law since it is not one of the listed uses in paragraph (a) of the definition of Commercial Development. The building will in no way be used for “retail purposes including....articles or things for sale or rental directly to the public...” as provided for in paragraph (b) of the said definition. There are absolutely no sales at retail of any product or service to the public and no transactions of any sort will be occurring in the premises of a nature contemplated by paragraph (a) or (b) of the definition of “Commercial Development”. Moreover, there will be no delivery to the general public from the facility.

(iii) While “laundries” is a listed purpose in paragraph (b) of the definition of “Commercial Development”, it needs to be read in the context of the paragraph it resides in, such that the retail purpose is “for sale or rental directly to the public”. The word “laundries” is intended to mean public-facing laundromats or similar operations serving the public, not industrial laundering facilities. UniFirst processed a Minor Zoning Variance for this Project to make this distinction of its use within its Light Industrial zoning designation.

(iv) Pursuant to the definition in the DC By-law of “Industrial Development”, paragraph (b): (a) UniFirst will receive raw materials and semi-processed goods (garments, mats, etc. manufactured by UniFirst and others) to the Property and process (wash, dye, label, etc.) and package these materials and goods to provide to industry (not the general public); and (b) UniFirst will also store and distribute such goods and materials which includes “operation of a truck terminal, warehouse”. Again, this does not include retail sale of goods to the public.

(v) UniFirst is classified as an “Industrial Launderer” under NAICS Code 812332 and SIC Code 7218. These are industrial classifications, not commercial.

(vi) The Property is zoned for “Industrial” uses not retail/commercial uses and the Building Occupancy classification of Group F, Division 2 is “Medium Hazard Industrial Occupancies” (per Building Code §9.10.2).

(vii) With no retail activity by way of sale or rental to the public intended to take place at the Property, it is discriminatory and prejudicial to impose, for the purposes of development charges payable under the DC-Law, a classification of “Commercial Development” in respect of the Project which will have the effect of increasing the applicable development charges by \$544,671, being the difference between the rate applicable to “Industrial Development” of \$1,352,366 and the rate applicable to “Commercial Development” of \$1,897,037.

Conclusion:

In light of the grounds cited above and such further grounds that may be asserted on the hearing of the complaint before the City of London’s Corporate Services Committee, City Council or on a further appeal, we respectfully submit that: (i) the amount of the Development Charge for the Project was incorrectly determined; and/or (ii) there was an error in the application of the DC By-law as set out in Section 20 of the Development Charges Act, 1997 and Section 27(1) and 27(2) in the DC By-law. The proposed use for an industrial laundering facility, not offering for sale or

rental directly to the public, is not properly characterized as a Commercial Development but more appropriately, should be classified as an Industrial Development for the purposes of calculating the applicable development charge under the DC By-law.

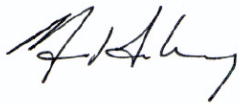
In order to continue with the Project and not cause any further delays, our client requires to urgently procure its building permit. Accordingly, it is contemporaneously paying under protest the amount of \$1,897,037 identified in its Customer Invoice in respect of Development Charges for the Project as it is of the view the applicable development charge amount should be \$1,352,366, being the development charge applicable to "Industrial Development". In dispute under this Notice of Complaint and being protested is the payment of the amount of \$544,671 under the Customer Invoice, which amount Unifirst requests be refunded as part of the determination of its complaint, together with interest as contemplated by Section 25 of the Development Charges Act, 1997.

In accordance with Section 20 of the Development Charges Act, 1997 and Section 30 of the DC By-law, we request that the City and/or its Corporate Services Committee hold a hearing into the within complaint, provide Unifirst (and the undersigned) notice of the hearing and an opportunity to make representations.

Please provide UniFirst and the undersigned with notice of any future proceedings in connection with this complaint.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP



Neil M. Smiley

NMS/kh

cc. Peter Kokkoros, Director, Building and Chief Building Official Building Division, Planning and Economic Development, City of London – pkokkoro@london.ca
Rick Montgomery, UniFirst Corporation – Rick_Montgomery@unifirst.com
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