Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement local

ISSUE DATE: October 09, 2019 **CASE NO(S).:** DC140031

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PROCEEDING COMMENCED UNDER subsection 14 of the *Development Charges Act*, 1997, S.O. 1997, c. 27, as amended

Appellant:	2006536 Ontario Inc.
Appellant:	Alyange Holdings Inc.
Appellant:	North American Development Group and Osmington Inc.
Subject:	Development Charges By-law No. 2014-108
Municipality:	City of Barrie
OMB Case No.:	DC140031
OMB File No.:	DC140031
OMB Case Name:	2006536 Ontario Inc. v. City of Barrie (City)

Heard: August 28 to September 1, 2017 in Barrie, Ontario

APPEARANCES:

Parties	**Counsel**
City of Barrie	B. Engell, J. Meader
North American Development Group and Osmington Inc.	P. Harrington
2006536 Ontario Inc.	R.A. Biggart

DECISION DELIVERED BY STEFAN KRZECZUNOWICZ AND ORDER OF THE TRIBUNAL

[1] This was an appeal of the City of Barrie's Development Charges By-law No. 2014-108 (the "DC By-Law") by North American Development Group and Osmington Inc. ("North American") and 2006536 Ontario Inc. The appeal was filed under section 14 of the *Development Charges Act 1997* (the "DCA").

[2] At the outset, and at the parties' request, the Tribunal split the hearing into two phases. Phase 1 would address issues related to the development charge calculations that underpin the DC By-Law and would engage evidence given only by the City of Barrie (the "City") and North American. Issues relating to DC By-Law rules would be addressed later in Phase 2. This decision relates only to Phase 1.

BACKGROUND

[3] The City is a single tier municipality located on the western shore of Lake Simcoe and north of the Greater Toronto Area. It has grown rapidly in recent years and this rapid growth is anticipated to continue. The City is designated as an Urban Growth Centre under the Provincial Growth Plan for the Greater Golden Horseshoe 2017 (the "Growth Plan"). In 2014, at the time the DC By-law was prepared, the City was required under the Growth Plan to plan to achieve population and employment targets of 210,000 and 101,000 respectively by 2031.[1]

[4] In order to prepare for growth, the City in 2010 annexed 2,293 hectares of land to the south that had previously been part of the Town of Innisfil (the annexed lands). Two Secondary Plans (Salem and Hewitts) were subsequently approved to map out future land uses in the annexed lands.

[5] Under section 2 of the DCA, municipalities may by by-law impose development charges to pay for increased capital costs required because of increased needs for services arising from development ("growth-related capital costs"). The City's DC By-law

[1] The population target of 210,000 is a measure of "total" population that includes an estimate of Census net under-coverage. The equivalent "Census" population is 202,000. Both measures of population are used interchangeably in the many documents submitted into evidence.

was passed in August 2014. The area to which the by-law applies includes the City as it existed before 2010 (“Old Barrie”) as well as the annexed lands.

[6] The development charges imposed by the DC By-law are based on a Background Study released in June 2014 pursuant to section 10 of the DCA (the “2014 Background Study”). The 2014 Background Study assumed that, of the 202,000 planned (Census) population of the City in 2031, 39,200 would be in the annexed lands. Build out of the annexed lands was assumed to take place in 2034, when the annexed lands were anticipated to contain 45,900 people.

[7] The development charges in the 2014 Background Study were based on three time horizons:

a. 2014-2023 for discounted services;
b. 2014-2031 for non-discounted services; and
c. 2014 to “build out” for services in the annexed lands.

[8] The following chronology is relevant to understanding the disagreements about how the development charges were calculated in the 2014 Background Study:

a. The 2014 Background Study was undertaken by the firm Watson and Associates. In several instances, the study drew on inputs and assumptions used in similar background studies prepared by the same firm in 2008 and 2012.

b. The 2014 Background Study was the first study to include growth-related capital costs associated with extending services to the annexed lands.

c. Among the many master servicing plans used to develop the growth-related capital plan in the 2014 Background Study were: a 2014

Transportation Master Plan; a 2013 Water Supply Master Plan; and a 2013 Wastewater Treatment Master Plan.

d. The 2014 Background Study was prepared in tandem with a Fiscal Impact Analysis which was published in February 2014. The general purpose of the Fiscal Impact Analysis was to analyze whether the City could afford the infrastructure identified in the master plans for the annexed lands in light of its budget and debt targets. The analysis developed four scenarios that tested the effects of different arrangements for funding this infrastructure. A Memorandum of Understanding between the City and developers in the annexed lands in respect of many of these arrangements was signed in May 2014.

e. Scenario 4 in the Fiscal Impact Analysis, which included delaying a number of road projects identified in the Transportation Master Plan, eventually served as the basis of the growth-related capital program used to determine the development charges in the 2014 Background Study.

f. A memo correcting errors in the 2014 Background Study was issued on July 17, 2014. On July 22, 2014, an Addendum to the 2014 Background Study, which included adjustments to the calculated development charges, was released. The development charges ultimately imposed by the DC By-law were based on those set out in the Addendum.

ISSUES AND WITNESSES

[9] The issues in this appeal are well defined and each is discussed in turn below. Where appropriate, this decision treats closely related issues as a single issue.

[10] The Tribunal heard from two experts in municipal finance and development charges: Gary Scandlan, author of the 2014 Background Study; and Daryl Keleher, who was retained by North American to peer review the study. It is the Tribunal's firm view that the qualifications of the experts were unimpeachable; both are highly respected municipal finance consultants with many years' experience in development charge matters. Moreover, their divergent positions on the issues came from sincere attempts to apply the provisions of the DCA to the local context in the City. Their credibility was never at issue.

[11] That said, the issues to be adjudicated often engaged matters outside Messrs. Scandlan and Keleher's expertise: the purpose and cost of components of water and wastewater treatment plants; the replacement cost of roads; and the capacity of roads to accommodate traffic. Neither Mr. Scandlan nor Mr. Keleher are civil engineers. Their ability to provide expert opinion evidence on these substantive matters was therefore limited. The lack of engineering evidence influenced the Tribunal's findings on many of the issues.

ISSUES 1A AND 1B – BENEFIT TO EXISTING WATER AND WASTEWATER TREATMENT PLANTS

[12] The DCA prescribes a methodology for determining development charges. Section 5(1) 6 of the DCA effectively prohibits the charges from being used to fund capital costs associated with an increase in need for service that would "benefit existing development" ("BTE"). Neither the DCA nor its associated Regulation provides further direction on how to establish the BTE.

[13] A key issue in this appeal is whether the City appropriately determined the BTE for a new Surface Water Treatment Plant ("Water Plant") and a Water Pollution Control Plant expansion ("Wastewater Plant"). The plants were substantial components of the growth-related capital program in the 2014 Background Study.

Water Plant

[14] The disagreement over the BTE for the Water Plant centres on the need and purpose of the plant. Mr. Scandlan's view was that the plant is mainly needed to meet the additional water demand in the City generated by growth and development. Mr. Keleher's view was that a substantial part of the plant cost is a BTE because it addresses pre-existing deficiencies in the water system or is otherwise unrelated to the forecast development.

[15] The current water supply in the City comes from groundwater sources via wells organized in five major pressure zones. The 2013 Water Master Plan established the "firm production capacity" of the City's then existing water system at 81,303 cubic metres per day ("m^3/day"). The "maximum day demand" was calculated at 80,414 m^3/day. In other words, the existing system was operating at very near capacity in 2013. The new plant was planned to create an additional 60,000 m^3/day by taking water from Lake Simcoe. The additional capacity will largely serve development within the annexed lands.

[16] The master plan also identified a need for additional capacity (2,000 m^3/day), over and above the 60,000 m^3/day, within the annexed lands before 2031.

[17] The 2008 Background Study identified the Water Plant as a future project, with a total cost of $142 million, of which $62.7 million or 44% was identified as benefitting growth in the time horizon covered by the development charge (2008-2023). According to Mr. Scandlan, the remaining 56% of the cost was excluded from the charge as a "post-period benefit", that is a cost that would benefit development beyond the ten year time horizon.

[18] A BTE of 5%, or $3.14 million of the $62.7 million "in-period" cost, was identified. According to Mr. Scandlan, the BTE was intended to reflect the cost of repairs to existing linear infrastructure and changes to Provincial standards that were unrelated to expanding plant capacity. The vast majority of the plant costs—95%—were considered

to be related to creating the “growth-related” capacity and, as such, were treated as eligible for development charge funding.

[19] The Water Plant was built in 2011 and 2012. The cost of the facility was debt-financed through two debentures: one issued in 2011 for $74 million; the other in 2012 for $69.6 million. The debenture terms were 40 years; the payments were semi-annual.

[20] The 2012 Background Study included the cost of the debt in the development charge calculations. The total cost of the plant—now including principal and interest payments—increased from $142 million to $267 million. *No BTE was identified.* However, the post-period benefit was increased from 56% to 58%. Mr. Scandlan stated that much of this post-period benefit related to development in the annexed lands, which was not accounted for in the 2008 and 2012 studies.

[21] From 2011 to 2014 the City funded a portion of the Water Plant cost from the water development charge reserve fund and a portion from water rate revenue. The total water rate revenue funding over this period amounted to $13.8 million.

[22] Like the 2012 Background Study, the 2014 Background Study included the Water Plant debt in the calculation of the water development charge. The debt payments were “discounted”, that is restated in current dollars. The study also included $1 million in plant costs that had yet to be incurred and introduced $7.7 million in costs to re-rate the plant before 2031 to address the 2,000 m^3/day shortfall in the annexed lands.

[23] *No BTE was identified for the Water Plant in the 2014 Background Study*. According to Mr. Scandlan, this was justified on the basis that the 5% BTE originally identified in 2008 had, by 2014, been paid for through the $13.8 million in water rate revenue used to fund the project between 2011 and 2014.

Wastewater Plant

[24] The City has operated a Wastewater Plant for many years. In 2011, the rated capacity of the plant (57,100 m^3/day) was expanded by 18,900 m^3/day. The residual capacity of the plant after the expansion was determined to be 54,026 m^3/day.

[25] As with the Water Plant, the parties disagree on the need and purpose of the expansion. Mr. Scandlan was of the view that the expansion was capacity-driven. According to Mr. Keleher, there are costs associated with the expansion that should have been treated as a BTE.

[26] The 2008 Background Study identified the total cost of the expansion to be $115 million, of which $69 million was deemed to relate to growth in Old Barrie over the ten year period 2008-2023. Of this cost, $54.8 million was associated with expanding the main plant and $14.0 million was associated with building a biosolids facility. The study assigned a 10% BTE, or $6.9 million, to the in-period cost to reflect costs associated with refurbishing the existing plant.

[27] The 2012 Background Study updated the project costs to account for debentures issued in 2011 and to be issued in 2012 and 2013. Only 40% of the total cost was included in the development charge; the remaining 60% was treated as a post-period benefit, that is benefit associated with development in the annexed lands.

[28] As with the Water Plant, from 2011 to 2014 the City funded a portion of the plant costs from the wastewater development charge reserve fund and a portion from wastewater rate revenue. The total wastewater rate revenue funding over this period amounted to $11.3 million.

[29] The 2014 Background Study included $123 million associated with the Wastewater Plant in the development charge. Mr. Scandlan testified that this represents the capital costs related to growth in Old Barrie and the annexed lands to 2031.

[30] *No BTE was identified for the Wastewater Plant in the 2014 Background Study*. As with the Water Plant, Mr. Scandlan stated that the study assumed that the entire 10% BTE share of the project had been paid for through the $11.3 million in wastewater rate revenue used to fund the project between 2011 and 2014.

Expert Opinion

[31] Mr. Keleher was of the view that the BTEs attributed to the new Water Plant (5%) and Wastewater Plant expansion (10%) are too low. He felt they do not reflect the actual benefits to existing City residents brought about by the works. Nor do they reflect the City's historical practice of charging existing residents a share of the costs through the utility rates that is substantially greater than the BTEs.

[32] Based on his reading of the 2013 Water Master Plan, and an earlier Water System Class EA published in 2000, Mr. Keleher asserted that the Water Plant is, in part, addressing matters that are unrelated to development, including the security of the City's water supply, the peak demand on summer days, and the quality of existing wells. He noted that part of the benefitting area of the plant is Old Barrie, outside the annexed lands. Moreover, he was of the opinion that City staff were aware that the plant had a substantial BTE—he introduced an article from the *Barrie Advance* newspaper of June 21, 2011, which quoted a City engineer speaking about the plant being needed for system security and the City's plan to use water rate revenue to pay for the plant costs. He highlighted arrangements that were made by the City to fund a substantial portion of the initial costs from water rates between 2011 and 2014 and City Budget and Business Plans from 2008 that indicated that water rates would need to increase to cover increased plant costs. Mr. Keleher also pointed to water development charge reserve funds statements which show that a portion of the plant costs, equivalent to what the 2008 Study excluded from the development charge (i.e. 56% of the costs according to the 2011 plan), was being funded from the water rates.

[33] Mr. Keleher did not rely on similar evidence from master plans to justify a BTE for the Wastewater Plant that was higher than the 10% used in the background studies.

[34] Mr. Keleher concluded that because the BTEs assigned to the plants are too low the water and wastewater development charges in the DC By-law are too high. Moreover, the City has been funding the plants as if the BTEs were much higher—evidence, in his opinion, that the background studies contradict the City's thinking on the distribution of the benefits of the plants.

[35] Mr. Scandlan saw no contradiction. He claimed that the $13.8 million in water rate revenue and $11.3 million in wastewater rate revenue was "borrowed" from the rate supported budget in order to pay for growth-related capital costs that were to be incurred in advance of the development they were to benefit. In essence, the revenue was treated as a loan that was to be paid to existing rate payers by future development. Mr. Scandlan acknowledged that the City's financial documents are not transparent about this interim funding arrangement. He also regretted that the BTEs and post-period benefits of the plants were not set out clearly in successive background studies. However, he remained firm in his view that the BTEs were correct, that by "writing off" the loan the City has effectively funded the BTE, and that the development charges imposed under the DC By-law were properly calculated.

Disposition

[36] The legislation provides no specific direction on how to determine BTE. For water and wastewater treatment plants, BTE typically reflects the extent to which capital spending addresses either the repair, rehabilitation, and replacement of facilities, or pre-existing deficiencies in service delivery. Investments related to expanding plant capacity are generally treated as growth-related and eligible for development charge funding. Both experts agree on these general principles.

[37] Their disagreement centres on whether the costs included in the development charge are in fact capacity-related. In the Tribunal's mind, answering this question requires expert knowledge of the cost of components of the plants and their purpose. As noted earlier, Messrs. Scanlan and Keleher lack this expertise. The following findings

concerning the Water and Wastewater Plant BTEs must therefore be tempered by this constraint.

[38] Section 2(1) of the DCA states that development charges may fund increased capital costs associated with increased needs for services. In 2013 the City was planning for significant growth and its water system was operating at near maximum capacity. The Water Plant increased that capacity by 76%. The Wastewater Plant also substantially increased system capacity (seemingly by 25%). The Tribunal heard no evidence to suggest that the additional capacity of the plant was driven by anything other than the demands of growth. It follows generally that a substantial part of the plant costs related directly to creating that capacity. As such, Mr. Scandlan's basic premise—that the costs are largely growth-related—holds water. Moreover, North American's submission that BTEs of 56% and 40% should apply to the Water and Wastewater Plant costs needs to be substantiated by rigorous analysis.[2] It is the Tribunal's view that no such analysis was provided at the hearing.

[39] Are the BTEs of 5% and 10% justified? It is worth restating here that Mr. Scandlan testified that there were elements of the plants that represented rehabilitation of existing infrastructure and addressed health and safety standards in the existing plants that were deficient. The *rationale* for the BTE was therefore sound. It is only the quantum of the BTE that was seriously challenged.

[40] In this respect, the Tribunal finds Mr. Keleher's misgivings about the amount of Water Plant BTE, albeit informed by his experience in reading master plans, to be somewhat speculative. In reading the relevant sections of the Class EA of 2000 and master plan of 2013, the Tribunal is not persuaded that the plans show the need for the plant to be driven largely by system security, peak summer demand, and existing water quality concerns. If anything, the plans indicate that such benefits are ancillary to the primary need to expand the plant in the face of a growing city. Moreover, the Tribunal cannot be certain which of these ancillary benefits were realized in the actual plant that

[2] It is noted that Mr. Keleher only recommended that the BTE for the Water Plant be between 5% and 56% in his evidence in chief.

was constructed. This is especially true of the ancillary benefits identified in the Class EA, which predates construction by a decade and on which Mr. Keleher placed considerable weight. Indeed, on Mr. Keleher's cross-examination, it was demonstrated that the issue of peak summer demand was likely being dealt with outside the scope of the plant project.

[41] Importantly, the Tribunal was not provided with evidence that set out the cost of the ancillary benefits of the Water Plant.

[42] Mr. Keleher's observation that part of the benefitting area of the Water Plant is in Old Barrie does little to advance the notion that the benefit of the plant is for existing residents. Old Barrie is, after all, planning for significant intensification and redevelopment.

[43] The Tribunal assigns little weight to the *Barrie Advance* article of 2011 as it is largely hearsay.

[44] Ultimately, with no evidence from an engineer to call into question the BTE assumption for the Water Plant in the 2014 Background Study, the Tribunal cannot rely on Mr. Keleher's interpretation of what are, by his own admission, engineering reports that falls outside his area of expertise.

[45] Mr. Keleher's case for a higher BTE is even weaker in respect of the Wastewater Plant. Like the Water Plant, the Tribunal's view is that Mr. Keleher's concerns never rise above the level of suspicion that the 10% is too low. However, in this case there is no Class EA to support his testimony. Mr. Keleher's suspicion rests mainly on Council's funding/financing arrangements in the years leading up to the 2014 Background Study.

[46] On this matter, the Tribunal is not persuaded by Mr. Keleher's assertion that the City intended to fund the plants in a way that differed from the development charge background studies. As early as 2006, City staff were aware that development charge revenue would be insufficient to fund growth-related capital at the end of 2009 (for

wastewater) and the end of 2015 (for water). As a result, user fees (i.e. water rates) and debenture financing would be needed to “make up” the shortfall until the shortfall was “eliminated” by 2026.[3]

[47] City staff reports from this period do not state whether the additional user fee revenue would be treated as internal borrowing to fund growth-related costs, as the City claimed, or funds for non-growth-related costs, such as BTE, as claimed by Mr. Keleher.

[48] Development charge reserve fund statements from subsequent years show that draws were made from the reserve funds to pay for 60% of the Wastewater Plant and 44% of the Water Plant. These draws were roughly equivalent to the growth-related “in-period” capital costs of the facilities.

[49] According to Mr. Keleher, the City committed itself to funding the majority of Water and Wastewater Plant costs through non-development charge sources and without reference to the background studies. The Tribunal cannot agree. The financial documents indicate that the City *financed* (i.e. raised the money for) the post-period and BTE plant costs from the rates. They do not demonstrate that the City intended to have development *fund* (i.e. ultimately pay for) the BTE.

[50] The background studies excluded substantial post-period benefit costs from the development charge calculations. Although not always explicitly identified as a post-period benefit, there is no indication that these costs were ever to be treated as a BTE and, as such, to be paid for by non-development charge revenue. Mr. Scandlan acknowledged the lack of transparency in the City’s financial documents and successive development charges background studies. However, the fact that appropriate and transparent mechanisms were not put into place to identify how the plants was being funded and financed, or that rate payers would ultimately pay for a portion of costs that the City originally intended to pay for through development charges, does not mean that the BTE established in the development charge studies was incorrect.

[3] The key documents are staff reports in Exhibits 13a and 13b.

[51] Contrary to Mr. Keleher's claim, the City's Budget and Business Plans do not demonstrate that the City is treating part of the plant costs as non-development charge eligible. They simply show that user rate increases are needed to pay for costs arising from the plant. There is good reason to believe that these increases were needed to finance debt repayments on an interim basis until such time as development charge revenue began to accumulate. Again, mere suspicion by Mr. Keleher that the City believed it was funding BTE doesn't mean there was such a belief or that that belief was grounded in the reality that the plant was fundamentally creating capacity for new users.

[52] Moreover, there is no way of telling how much of the user rate increases are directly related to these growth-related capital expenditures and how much are related to other matters (e.g. the need to move to full cost recovery rates; the need to address Provincial standards; or the need to build capital reserves).

[53] Mr. Keleher is certainly correct in saying that the City cannot charge developers for any portion of the Water Plant cost that was paid for by user rate payers over and above that represented by the 5% BTE share. However, that does not seem to have occurred. Instead, developers are only paying a portion of the debt on the plant (see Exhibit 15c). The Tribunal is satisfied that the portion that has been left out ($16 million) is higher than what the BTE of 5% would be.

[54] It is noted that the capital and operating cost impact analysis in the 2014 Background Study refers back to the Fiscal Impact Analysis and the Fiscal Impact Analysis treats the BTE in the same way as the background studies. These links were confirmed by Mr. Scandlan when questioned by the Tribunal.

[55] Altogether, the Tribunal finds that the financial documents indicate that the City, faced with the need to pay for growth-related costs it could not charge developers in the 5 years covered by one development charge by-law, chose to interim finance the costs from the rates.

[56] No long-term plan was put into place to deal with these funding shortfalls or to distinguish what portion of the rate funding may or may not have been BTE shares. Nevertheless, the Tribunal is satisfied that the decision to “write off” the rate payments as the BTE contribution in the 2014 Background Study ensured that the development charges imposed by the by-law did not include costs that were ineligible for development charge funding by virtue of being a BTE.

[57] Were the BTEs that were identified deducted from the charge in a manner consistent with the DCA? The evidence before the Tribunal is that the City has undertaken and approved, through its background studies, capital forecasts that identify a 5% BTE for the Water Plant and 10% BTE for the Wastewater Plant, that the City has long recognized that it would not have sufficient development charge funds to pay for the growth-related plant costs at the time they were incurred, that it would need to debt finance these costs, and that user rate revenue would be needed to cover any shortfall. The Tribunal heard no credible evidence that the City recognized that there was a large component of the project that was not ultimately to be funded from development charges. Indeed the background studies and Fiscal Impact Analysis, taken as a collective whole, were clear that they would not be funded in this manner. The fact that user rate payers ultimately overpaid, and the fact that the City does not seem to have had a long-term plan for dealing with interim financing for the post-period benefit shares of these important projects is also regrettable, but these do not in and of themselves constitute a violation of the DCA with respect to BTE.

[58] The Tribunal is satisfied that, at least in the case of the Water Plant, the BTE share has been excluded from the development charge calculation in the 2014 Background Study. The 2008 established a BTE for the Water Plant project of 5%. Mr. Scandlan testified that this BTE was maintained for the project in the 2012 Background Study, the Financial Impact Analysis, and the 2014 Background Study. The total (discounted to 2014) cost of the project is shown in Exhibit 15c at $118 million; 5% of $118 million is $6 million. The debt payments left out of the 2014 Background Study of $16 million exceed this $6 million. Therefore, the BTE share of 5% has not been included in the calculation of the rate in the DC By-law.

[59] The same is true for the Wastewater Plant. The Tribunal is satisfied that the debt payments left out the development charge calculation and funded from the utility rates, $11.3 million, exceeds the BTE. The BTE share of 10% has not been included in the calculation of the rate in the DC By-law.

ISSUE 5 – ROADS AND RELATED LEVEL OF SERVICE

[60] Under section 5(1) 4 of the DCA development charges may not be used to pay for an increase in service level above the service level that has been provided in the 10 year period immediately preceding the preparation of a background study. In this way, the 10 year historical average service level limits the development charge funding for each service.

[61] Section 4(1) of the associated Regulation requires that in determining service levels both the quantity and quality of service be accounted for. The quality measure is to be reflected by the replacement cost of capital assets.

[62] The experts agree that the methodology used to determine the historical average service level for the Roads and Related (or Roads) service in the 2014 Background Study meets the requirement of the legislation. An inventory of Roads capital assets for the last 10 years was compiled (the quantity measure). The replacement cost for each asset, or asset type, was also provided (the quality measure). Both were used to establish a “Maximum Ceiling Level of Service” or development charge funding limit.

[63] The 2014 Background Study determined the Roads level of service ceiling to be $478 million, $114 million less than the growth-related capital costs of $592 million included in the development charge calculation.

[64] The central disagreement is whether the level of service ceiling was correctly calculated in the Study. Mr. Scandlan claimed that the replacement cost used for the road segments themselves ($1.27 million per lane km) was an error and the resulting level of service ceiling was too low. Mr. Keleher argued that the replacement cost and

level of service ceiling were correct and that $114 million in costs should therefore be removed from the development charge.

Disposition

[65] The Tribunal finds that the Roads level of service was incorrectly calculated in the 2014 Background Study for the following reasons:

a. The Tribunal finds that, as a general rule, there should be a nexus between increased needs and associated capital costs identified in a master plan and those included in a development charge background study. Yet Exhibits 5a and 5b demonstrate that the replacement costs for future roads used in the 2014 Transportation Master Plan are generally higher than what was used in the 2014 Background Study.

b. The Tribunal was not persuaded by Mr. Keleher's analysis of Transportation Master Plan data to justify the replacement cost used in the 2014 Background Study. While his use of a weighted average approach for replacement costs is appropriate, his exclusion of selected road segments in his analysis skewed the weighting in favour of lower cost segments in a manner that was not supported by engineering analysis of the existing road inventory or the growth-related capital program.

c. The replacement cost used in the 2014 Background Study does not provide for land acquisition. To the extent that land is an eligible capital cost under section 5(3) 2 of the DCA, and that land acquisition comprises about 19% of the growth-related capital program, the Tribunal finds that the replacement cost used in the Study was deficient.

d. Both experts testified that a Roads development charge is rarely constrained by the “ceiling” established by a level of service calculated using a replacement cost approach. Generally, the reason is straightforward—municipalities cannot expand road networks at the same rate as population and/or job growth. The Tribunal is not persuaded by Mr. Keleher’s reasons for why Barrie might be unusual in this respect: that the City may be underserviced by roads; and that it is a self-contained urban area so the amount of roads per capita is relatively low. There was in fact no compelling evidence provided to the Tribunal to suggest that Barrie’s road network is markedly different from any other mid-size city in Ontario; at least to the extent that, by a level of service measure based on replacement cost, it needs to construct roads that would result in its 10 year historical average level of service being exceeded by 24% by 2031 ($114 million/$478 million = 24%).

[66] The Tribunal is mindful that the Addendum to the 2014 Background Study included another quality service level measure—vehicle average speed—to justify the Roads development charge. The Regulation is clear: the replacement cost approach *must* be the quality measure used to determine the historical average level of service in a background study. As such, the Tribunal finds that the Addendum study did not comply with the requirements of the legislation on this issue.

[67] In reaching this conclusion, the Tribunal notes that the Regulation is permissive about the quantity measures that could be used to determine the level of service. The Addendum’s use of “lane kilometres per capita” to measure the Roads service level, which Mr. Scandlan testified was a quantity measure, does not therefore fall foul of the legislation.

[68] In closing, the Tribunal is ultimately responsible for determining whether the Roads development charge imposed by the DC By-law conforms to the legislation. In this case, the evidence presented at the hearing demonstrates that the replacement

cost used for roads in the 2014 Background Study was too low. Using a higher, more correct figure would not result in the 10 year historical average level of service being exceeded over the period to 2031. As such, the Tribunal finds that the Roads development charge was correctly calculated and would not result in development in Barrie paying more than its fair share of growth-related capital.

ISSUES 6 AND 7 – ROADS AND RELATED POST PERIOD BENEFIT

[69] Section 5(1) 2 of the DCA requires that, in calculating development charges, "the increase in the need for service attributable to the anticipated development must be estimated for each service to which the development charge by-law would relate." Sections 5(1) 4 and 5(1) 5 require that the increase in need:

a. Must not relate to a time beyond the planning horizon covered in the background study—in the case of the Roads service, 2031.

b. Must be reduced to account for excess capacity, other than excess capacity the City has indicated an intention would be paid for by new development.

[70] As noted earlier, the 2014 Background Study identified a "post-period benefit" where there are growth-related capital costs that would benefit development beyond the planning horizon used to set the development charge. The post-period benefit costs were excluded from the development charge calculation.

[71] The 2014 Background Study identified $55 million in post-period benefit costs for the Roads service. This represents about 6% of the total cost of the Roads growth-related capital program ($969 million), about 9% of the total cost included in the development charge calculation ($592 million), and about 20% of the cost of the annexed lands roads costs.

[72] Mr. Scandlan claimed that the $55 million represents capacity in the roads proposed for the annexed lands that would be available to service growth after 2031. The $55 million was established in consultation with City staff and representatives of landowners in the annexed lands. It was not assigned to individual roads projects in the annexed lands; rather it was subtracted from the total costs brought forward to the development charge calculation.

[73] Mr. Keleher's opinion was that the post-period benefit costs for the Roads service are too low. He noted that several road projects in the growth-related capital program are located in Old Barrie and are proposed to be completed towards the end of the planning horizon; between 2024 and 2031. In his view, it seems unlikely that these roads would be fully utilized by 2031. Mr. Keleher also noted that the provision for land acquisition in pre-2031 road projects appear to be for post-2031 infrastructure. All told, Mr. Keleher's opinion was that such land, together with any capacity in late-term roads should, under the DCA, be treated as a post-period benefit and be ineligible for development charge funding.

[74] The Tribunal does not agree with Mr. Keleher, noting that:

a. There is little evidence to show that the 2014 Transportation Master Plan, in assessing roads needs to 2031, planned for there to be significant excess capacity *in the road network* serving either Old Barrie, or the annexed lands, or the City as a whole.

b. That is not to say that there might be excess capacity on *individual road segments*, particularly on those completed in the years just before 2031. However, the Tribunal did not hear any engineering analysis to demonstrate where or whether such excess capacity might exist.

c. Nor was the Tribunal presented with any evidence to demonstrate how Old Barrie would grow after 2031, what roads needs might be

required to service that growth, and whether those roads needs correlate to any excess capacity that might exist in 2031. There is therefore little basis on which to conclude that excess land that is acquired on pre-2031 road segments is anything other than normal, prudent planning for road rights of way.

d. The same cannot be said for the annexed lands. Here, the Tribunal was provided with information to show that build out of the annexed lands was assumed, under the 2014 Background Study, to be in 2034 when the population was set to reach 45,900. It is noted that population growth in the annexed lands between 2031 and in 2034 was forecast, at the time of the 2014 Background Study, to be about 6,700, or about 15% of the total population of 45,900. There is therefore a reasonable correlation between the post-period growth assumed by the study (15%) and the post-period benefit of the roads in the annexed lands (20%).

e. Finally, it is noted that several road projects which had been identified in the Transportation Master Plan as being needed before 2031 were left out of the growth-related capital program (per the Fiscal Impact Analysis).

[75] The Tribunal also notes that the method prescribed by the DCA to be used to calculate development charges requires that the calculation be done on a *service* basis. In this case, the Tribunal has already found that, on a service-wide basis, the growth-related capital costs included in the Roads charge would not result in a service level increase above the 10 year historical average. There is little evidence to suggest that the Roads program approved by Council is predicated on there being excess capacity in the road network in 2031, especially in Old Barrie. In any case, excess capacity on an individual road segment does not necessarily mean the benefit of the network (service) improvements is a post-period.

[76] In this respect, the Tribunal is of the view that Mr. Keleher conflates *use* with *need*. The DCA requires that development charges only pay for increased needs over the planning period. The increased need for roads constructed shortly before 2031 is triggered by growth before 2031. The individual road requirements will contribute to the level of service provided by the entire road network and the level of service funded by development charges will not exceed the 10 year historical average. The fact that some roads may not be used to their full capacity does not, in the Tribunal's view, lessen either the need for these roads or the benefit they provide to the overall road network.

[77] As counsel for the City pointed out—it would be impractical for the City to build half a road, even if only half a road was needed to alleviate congestion. The increased need is for a whole road, even if it is only half used.

[78] Mr. Keleher's proposed approach to the Roads post-period benefit would have the City calculate the projected capacity of each road segment in 2031 and treat any unused capacity as a post-period benefit. However, Mr. Keleher acknowledged that such an approach would be unusual in a development charge background study. Moreover, in the Tribunal's view, such an approach:

a. Might well be inconsistent with the Transportation Master Plan, which appears to plan the road network to meet the needs of 2031 population and employment targets, even if that means there is excess capacity on some road segments by that time. The Tribunal acknowledges that confirmation of this finding would require engineering analysis.

b. Is almost certainly inconsistent with the treatment of "committed" excess capacity in the existing road network under the 2014 Background Study. In this regard, the study does not include the cost of such excess capacity in the development charge calculations even though it could do so, and probably should do so, under Mr.

Keleher's proposed approach. However, such an approach is both impractical and, in the Tribunal's view, unnecessary.

c. By way of example, the Tribunal is not persuaded that the DCA anticipates that development in 2032 be charged for a portion of the cost of a road built and funded in 2031. Likewise, under the 2014 Background Study, development in 2015 does not need to be charged for a portion of a road built and funded in 2014.

[79] For these reasons, the Tribunal finds that no adjustment to the Roads post-period benefit is required and the approach used in the 2014 Background Study satisfies the provisions of the DCA.

ISSUE 8 – LAND ACQUISITION

[80] Section 5(1) 2 of the DCA requires that, in calculating development charges, "the increase in the need for service attributable to the anticipated development must be estimated for each service to which the development charge by-law would relate."

[81] The growth-related capital program in the 2014 Background Study includes a provision of approximately $180 million to acquire 165 acres of land for roads and related works to 2031. The provision assumes that land for roads would be dedicated to the City at rates of 50% for commercial development, 25% for residential development, and 15% for industrial development. These dedication rates are consistent with the Transportation Master Plan.

[82] Mr. Scandlan's view was that the land acquisition provision, being rooted in the Transportation Master Plan, is appropriate. He noted that actual costs incurred by the City for engineering projects between 2012 and 2016 indicate that, if anything, the assumed dedication rates are too low (see Exhibit 2, Tab 38).

[83] Mr. Keleher claimed that the provision for land acquisition is too high, because it overestimates the amount of land needed to be funded by the City.

[84] He noted that the amount of land to be purchased is much higher than the historical trend and has increased in recent years. For example, the 2014 Background Study assumed that 42.7 acres of land would be needed in the first five years of the development forecast and the 2012 Background Study assumed only 24.2 acres over the equivalent period. Actual City records show that between 2012 and 2016 the City only purchased 2.1 acres at a cost of $3.1 million.

[85] Mr. Keleher also questioned whether the dedication rates assumed in the Transportation Master Plan appropriately considered the differences in constructing roads in Old Barrie, which is largely urbanized, and the annexed lands, which are largely rural. He noted that about 150 acres of the total 165 acre land need relates to road projects in the annexed lands. It seemed to Mr. Keleher that there is a disconnect between the land acquisition requirements being planned for and actual requirements.

[86] According to Mr. Keleher, there has been insufficient analysis of the land dedication rates used in the Transportation Master Plan and Background Studies. His view was that if the City does not actually need to purchase land at the rate assumed then the costs of such purchases should not be in the development charge calculations.

[87] The Tribunal does not agree, for the following reasons:

a. Although the land requirement was increased in the 2014 Background Study, the requirement as a percentage of the Roads growth-related capital program was effectively the same as in the 2008 and 2012 Background Studies (anywhere between 18% and 20%).

b. The Tribunal is not persuaded that section 5(1) 2 of the DCA limits Council's authority to determine what is needed to service

development. The provisions in section 5 of the Act have the effect of limiting only how much of the increased need for service can be funded from development charges (through, for example, the level of service ceiling; the BTE; and the 10% reduction in growth-related capital costs). The provisions do not, in the Tribunal's view, fetter Council's power to make decisions on what infrastructure is required to meet the increased servicing needs of the future community even if those servicing needs differ from past needs.

c. In this case, the need for land for roads was established through a comprehensive Transportation Master Plan, not the 2014 Background Study. Council expressed its intent to meet this need by approving the master plan. It also expressed its intent to fund part of the need through development charges by approving the Study and the DC By-law.

d. To accede to North American's request that the City and Appellants be directed to reestablish the land purchase requirements would therefore be: unreasonable, to the extent that the Tribunal would be substituting a thorough master planning process with Mr. Keleher's assertion, unsupported by engineering analysis, that historical trends should determine future needs; and unjustified, because the Tribunal is not explicitly empowered under the DCA to overrule Council's decisions on whether and how to provide a service.

[88] Finally, though somewhat tangentially, the DCA provides a remedy should the City over-collect development charges over the five year term of the DC By-law. In such a case, the development charge reserve fund will be in a surplus position (all other things being equal) and the surplus may have to be deducted from future rate calculations.

[89] In short, the Tribunal finds that the land acquisition costs included in the 2014 Background Study do not violate the provisions of the DCA.

ONUS

[90] Throughout its reasoning, the Tribunal has been mindful of the onus on the Appellant to demonstrate that the development charges in the DC By-law were not established according to the strictures of the DCA. Merely raising suspicion that there is a problem with the calculations is insufficient to amend the charge. A hearing is an event at which issues are to be adjudicated and parties to a hearing, who do not always participate voluntarily (unlike an arbitration or mediation proceeding), are entitled to the just, most expeditious, and cost-effective determination of those issues. Closure, while not always possible, is the preferred outcome.

[91] The Tribunal accepts that it has the authority to order the parties to continue to resolve issues, including seeking further expert evidence to resolve the issues. However, the Tribunal is not persuaded that such a course of action is appropriate in this case. In this appeal, the evidence to support the Appellant's case relied heavily on the testimony of Mr. Keleher, whose knowledge of the DCA and development charge calculations was of the highest order but whose expertise was limited on substantive engineering matters. In the Tribunal's view, there is insufficient basis to direct the parties to further investigate the development charge calculations that would lead either to specific changes to the rates passed by Council or to a second hearing on the issues.[4]

[92] There is, of course, another onus, one that is spelled out in section 10(2) b) of the DCA: that the background study on which the development charge rates are based must include the calculations under paragraphs 2 to 8 of subsection 5(1) for each service to which the development charge by-law would relate. The Tribunal's view is

[4] This finding is consistent with the Ontario Municipal Board's ruling in Waterloo Region Homebuilders' Association v. City of Kitchener, 2006 (OMB File No. D040038), where the Member, while ordering that development charge rates be recalculated by the parties, did so based on a wide range of expert testimony and according to very specific directives.

that this provision requires that the study set out a clear and complete methodology and assumptions that justify the rates in the by-law.

[93] Mr. Scandlan acknowledged errors in the 2014 Background Study. However, the Tribunal finds that these errors did not rise to the level that would violate section 10(2) b). Importantly, the errors also did not result in development paying more development charges than what the legislation allows. As such, the principle of section 2(1) of the DCA—that development charges be used only to pay for growth-related capital costs—was upheld by the DC By-law.

ORDER

[94] The Board orders the appeal is dismissed in part and only in relation to issues related to the calculation of the development charges, that is to say Issues 1A, 1B, 5, 6, 7, and 8.

[95] The Member is no longer seized of Phase 2 of this hearing.

"Stefan Krzeczunowicz"

STEFAN KRZECZUNOWICZ
MEMBER