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

ISSUE DATE: August 07, 2020 **CASE NO(S).:** DC150005

The Ontario Municipal Board (the "OMB") is continued under the name Local Planning Appeal Tribunal (the "Tribunal"), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

PROCEEDING COMMENCED UNDER subsection 22(2) of the *Development Charges Act*, 1997, S.O. 1997, c. 27, as amended

Appellant:	Ocean Club Residences Inc.
Subject:	Complaint against a Development Charge imposed under the authority of Development Charges By-law No. 1347-2013
Property Address/Description:	2157 Lake Shore Boulevard West
Municipality:	City of Toronto
OMB Case No.:	DC150005
OMB File No.:	DC150005
OMB Case Name:	Ocean Club Residences Inc. v. Toronto (City)

PROCEEDING COMMENCED UNDER subsection 22(2) of the *Development Charges Act*, 1997, S.O. 1997, c. 27, as amended

Appellant:	Phantom Developments Inc.
Subject:	Complaint against a Development Charge imposed under the authority of Development Charges By-law No. 1347-2013
Property Address/Description:	2175 Lake Shore Boulevard West
Municipality:	City of Toronto
OMB Case No.:	DC150005
OMB File No.:	DC150006
OMB Case Name:	Phantom Developments Inc. v. Toronto (City)

PROCEEDING COMMENCED UNDER subsection 257.87(2) of the *Education Act*, R.S.O. 1990, c. E.2, as amended

Appellant:	Phantom Developments Inc.
Subject:	Complaint against an Education Development Charge imposed under the authority of Education Development Charges By-law No. 2013 No. 178

Property Address/Description:	2175 Lake Shore Boulevard West
Municipality:	City of Toronto
OMB Case No.:	DC150005
OMB File No.:	DC150007

PROCEEDING COMMENCED UNDER subsection 22(2) of the *Development Charges Act*, 1997, S.O. 1997, c. 27, as amended

Appellant (jointly):	B-Major Homes (Ontario) Inc., Empire Communities (2183) Lakeshore Blvd Ltd., Kingbird Developments Inc., and Monarch Waterview Development Limited
Subject:	Complaint against a Development Charge imposed under the authority of Development Charges By-law No. 1347-2013
Property Address/Description:	68 Marine Parade Drive, 2151-2153 Lakeshore Boulevard West, 2155 Lakeshore Boulevard West, 2161 Lakeshore Boulevard West, 2143 Lakeshore Boulevard West, 2147 Lakeshore Boulevard West, 2169 Lakeshore Boulevard West, 2171 Lakeshore Boulevard West, and 2183 Lakeshore Boulevard West
Municipality:	City of Toronto
OMB Case No.:	DC150005
OMB File No.:	DC160005
OMB Case Name:	B-Major Homes (Ontario) Inc. v. Toronto (City)

Heard:	May 6 to 10, May 14, and August 7, 2019 in Toronto, Ontario

APPEARANCES:

Parties	**Counsel**
Ocean Club Residences Inc., (“Ocean Club”)	Patrick Bakos
Phantom Developments Inc., (“Phantom”)	
B-Major Homes (Ontario) Inc., Empire Communities (2183), Lakeshore Blvd. Ltd., Kingbird Developments Inc., and Monarch Waterview Development Limited (the “Appellants Group”)	

collectively, (“the Appellants”)

City of Toronto (“City”)	Robert Robinson Wendy Walberg

DECISION DELIVERED BY DAVID L. LANTHIER AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] The multiple Appellants filed three appeals (“Appeals”) under section 20 of the *Development Charges Act, 1997* (“*DC Act*”) relating to development charges directed by the City as payable for a development on the Etobicoke Lake Ontario lakeshore. The Appeals were filed following the City’s failure to make a decision on the complaints filed by the Appellants under s. 22(2) of the *DC Act*. As explained below the matters raised in these Appeals are distilled down to two issues: (1) the alleged delay on the part of the City which the Appellants submit, affects the appropriate Development Charge (“DC”) rates charged by the City; and (2) the entitlement of the Appellants to the itemized Development Charge Credits (the “DC Credits”) for DC credit-eligible works undertaken by the Appellants.

PRE-HEARING MATTERS AND THE HEARING OF THE APPEALS

[2] A Pre-hearing Conference (“PHC”) was conducted by Vice-Chair Makuch and then-Member Rowe on October 20, 2016. The PHC Decision and Order of the Board, as it then was, was issued on November 23, 2016 which aptly summarized the background to the Appeals. The City advised the Board at the PHC that it intended to bring a motion to dismiss these appeals on the grounds that the Board did not have the jurisdiction to hear these matters.

[3] The focus of the motion was eventually confirmed by the City as the intent to narrow the issues to be adjudicated at the hearing rather than to dispose of all the Appeals. It was the City’s position that s. 20 of the *DC Act* did not permit an owner to challenge the decision of a municipality to refuse a DC credit. The City argued that the Board had no jurisdiction to compel the City to give a DC credit that did not exist in the

first place and since there was no DC credit provided for in the relevant agreement, the credit did not exist in the first place. The City submitted that under s. 20(1)(b) of the *DC Act* there is no basis for the complaint nor is it within the jurisdiction of the Board.

[4] The Board heard the motion on June 14, 2017 before Vice Chair Seaborn and the decision of the Board was issued on June 27, 2017, dismissing the motion. The Board determined that the issue raised by the City was a valid issue, but premature, and could only be effectively argued as part of submissions at the hearing, based on a full evidentiary record. The Board ruled that the Appellants were entitled to the benefit of a hearing before a determination could be made on the validity of the complaints which have been appealed

[5] The hearing was conducted over the course of six and a half days. The hearing was adjourned on Friday, May 10, 2019 and reconvened by telephone conference call on Tuesday, May 14, 2019 to hear the balance of the evidence that time did not permit during the prior week. The hearing was then adjourned on May 14, to August 7, 2019 for the purposes of receiving final argument.

[6] The Tribunal heard from nine witnesses. Other than those identified non-expert witnesses, each of the expert witnesses were qualified to provide expert opinion evidence in their respective identified areas of expertise. The witnesses were as follows:

For the Appellants:

1. Ryan Guetter – land use planning.

2. Gabriel DiMartino – non-expert witness – Vice-Present, Development Planning (Ocean Club Residences Inc) and President of Humber Bay Shores Landowners Group.

3. Daryl Keleher – municipal finance and development charges.

4. Koryun Shahbikian – municipal and civil engineering.

For the City:

1. Sabrina Salatino – land use planning.

2. Tim Crawford – non-expert witness – Deputy Chief Building Official.

3. Luigi Nicolucci – traffic and transportation planning.

4. Patrick Cheung – municipal engineering.

5. Robert Hatton – municipal finance (subject to the ruling of the Tribunal, during the hearing, with respect to exclusions relating to interpretation of guidelines, matters of weight).

ISSUES

[7] The issues in the Issues List contained in the Procedural Order governing the Appeals were set out in six items but essentially, as the evidence has been received, and as submissions and arguments have been advanced, the issues relating to the Appeals, as advanced by the Appellants, are two-fold:

1. The first issue is whether the City charged an improper, and higher, DC rate, as a result of various delays on the part of the City. The Appellants submit that the City's failure to act promptly and reasonably resulted in a delay in the execution of the Core Infrastructure Agreement ("CIA") and the lifting of the Holding symbol. This occurred 18 days after the new DC rates became effective. The Appellants submit that, but for the City's delay, the DC charges to two Appellants, Ocean Club and Phantom would have avoided the DCBL rate increase. The evidence and arguments relating to the delay focused on the timing of the lifting of the Holding "H" symbol of the Appellants' Lands and whether the City was required to hold a public meeting for lifting the Holding symbol. The City takes the position that there is no jurisdiction for the Tribunal to reduce the quantum of the DCs by reason of administrative delay on the part of the City. For ease of

reference, this issue/ground may be referred to as the “DC Rate Claim”.

2. The second issue is whether the Appellants are entitled to a number of DC Credits relating to the reasonable cost of the works undertaken or contributed by the Appellants which were DC Credit-eligible works. The Appellants claim that certain works, primarily related to road improvements, and as well, a storm sewer, were not local in nature to the Development under the provisions of the Local Service Guidelines but instead, were external works benefiting other nearby developments and the City’s capital works at large. In addition to other arguments, the City takes the position that the Tribunal does not have the jurisdiction to direct that a municipality must give a credit against DCs, a decision that the City argues is reserved exclusively to a municipality. For ease of reference, this issue/ground may be referred to as the “DC Credit Claim”.

[8] The City also raises an issue that the Complaints filed by B-Major Homes (Ontario) Inc. do not meet the statutory requirements for filing under s. 20 and should be dismissed outright. The issue raised is whether the Complaint has been filed, pursuant to s. 20(2) of the *DC Act*, within the required 90 days from the day the DCs were payable.

THE NATURE AND AMOUNTS OF THE CLAIMS

[9] Although the grounds and issues for the Appeals have been broadly grouped, the City has noted the specifics of the three Complaints as they were originally filed and the Appeals now before the Tribunal. The Ocean Club Complaint filed on May 28, 2014 is based on the two grounds outlined above, i.e.: (a) the City was at fault for delays in finalizing the CIA, such that Ocean Club was required to pay the DCs at the higher rates that were in effect after February 1, 2014; and (b) the City should have given Ocean Club a credit against the DCs payable due to the construction/cost coverage of certain infrastructure works. The Complaint filed by Phantom on July 31, 2014 is the same as the Ocean Club Complaint as set out above. The Complaint filed by the Appellants’ Group, on May 11, 2015 is based solely on Claims for DC Credits and does not raise

any issue regarding delay.

[10] The numerical details and calculations of the claims advanced by the Appellants have been summarized in Exhibits 2 and 3, prepared by the Appellants.

[11] With respect to the first issue, and claims, relating to the incorrect rates charged by the City, the Appellants' Claims are calculated as follows:

Amount improperly charged at higher DC rates	
By Ocean Club:	$ 6,428,804
By Phantom:	$ 4,713,357
Sub-Total	$11,142,161
Amounts claimed as payable under lower DC rates	
By Ocean Club:	$ 5,196,685
By Phantom:	$ 3,804,204
Sub-Total	$ 9,000,889
DIFFERENCE OWING TO APPELLANTS: ($11,142,161 - $9,000,889)	$ 2,141,272

[12] With respect to the second issue and ground relating to the DC Credits the Appellants' Claims are calculated and advanced as follows

Item:	DC Credit Claimed
Roads - Lake Shore Boulevard Improvements	
Relocation of Traffic Signals to Street B	$ 230,000
External Road Improvements - Lake Shore Blvd.	$ 295,638
Roads - Marine Parade Drive Improvements	
EB & WB Left Turn at Marine Parade/Lake Shore /Park Lawn Intersection	$ 250,000
External Road Improvements - Marine Parade	$ 47,815

Roads - Parklawn Road Improvements	
Park Lawn Road Improvements	$ 700,000
EB Left Turn Lane Gardiner Expwy Exit Ramp/Park Lawn	$ 350,000
Storm Sewer on Marine Parade Drive	$ 158,880
TOTAL OUTSTANDING DC CREDITS CLAIMED:	$2,032,333

[13] It was confirmed by the Parties that the mathematical calculations with respect to the DCs as charged to the Appellants and paid at the time of issuance of the building permits, are not disputed. Neither is there any challenge to the Appellants' calculations as set out above as they itemize and calculate the quantum of the DC Credits. The issues, of course, are whether the alternative (earlier) DC rates should have been applied, the entitlement of the Appellants to the lower DC rates and whether there are DC Credits available to the Appellants.

[14] As well, the Tribunal has been advised by the Appellants that if the decision is made that the City is required to provide the DC Credits, there is no need for the Tribunal to determine the apportionment of such DC Credits amongst the Appellants as there is agreement as to an internal formula for such division.

THE DEVELOPMENTS, CONTEXT AND WORKS

[15] The in-depth details of the various aspects of the development components on the conglomerate Lands owned/developed by the Appellants are not necessary for the purposes of this Decision but some overview and some details are relevant to the issues before the Tribunal.

[16] The large tract of lands (the "Lands") owned by the various owners and which give rise to the DC charges, and the Appeals, is situated south and east of the Gardiner Expressway (the "Gardiner") near the lakeshore area of Etobicoke north and west of Humber Bay Park East. The Lands are bounded by Lake Shore Boulevard West ("Lake

Shore") to the north and west and by Marine Parade Drive to the south and east (lakeside), which runs more-or-less parallel to Lake Shore. The Precinct Plan (Exhibit 10) identifies the configuration of the land uses and interior cross-streets between, and linking, Lake Shore and Marine Parade Drive. Marine Parade Drive, along the east side of the Lands curves westerly and crosses Lake Shore to become Park Lawn Road ("Park Lawn"). The primary exit from Lake Shore to the Gardiner is located to the northeast of the Lands.

[17] Both Lake Shore and Park Lawn are designated as major arterial roads. Marine Parade Drive is a collector road. Clearly, on the evidence, although portions of all three of these roads are immediately adjacent to the Development, all components of the municipal roadways are outside and physically external to the boundaries of the Development lands. The issue of whether they are somehow not to be considered external to the Development by virtue of other factors, for the purposes of considering the issue of the DC Credits, is addressed in this Decision.

EVENTS AND TIMELINES

[18] The following represents some of the key components of the timeline and chronology of various aspects of the Development's history in the context of the issues in these Appeals:

> **June 2010** – City Council authorizes the entering into, and execution of a CIA and approves the Precinct Plan for Humber Bay Shores development submitted on October 15, 2009.
>
> **December 12-14, 2012** – Mr. Keleher, on behalf of the Appellants, prepares his DC Credit report and submits it to the City.
>
> **November 1, 2013** – Development Charge By-law ("DCBL") No. 1347-2013, (Exhibit 1, Tab 18) which was passed by the City on October 11, 2013, with the related 2013 City DC Background Study comes into force and effect. The Parties agree that the 2008 City of Toronto Local Service Guidelines ("LSGs") (Exhibit 1,

Tab 44) remain as the “in-force” LSGs applicable to the Appellants’ Development, as they were in effect at the time of the 2012 request to the City and not the subsequent 2013 guidelines.

November 13, 2013 – Council first considers the status report and the lifting of the Holding symbol for Humber Bay Shores and directs issuance of notice pursuant to s. 36(4) of the *Planning Act* of the intention to lift.

November 21, 2013 – Mr. Keleher follows up to the Appellants’ request for the DC Credits submitted on December 12, 2012, with the City.

December 16-18, 2013 – City Council considers the Request for Direction Report regarding the applications for an Official Plan Amendment and Zoning By-law Amendment as well as the lifting of the “H” symbol on the subject lands.

December 23, 2014 – Over two years following the initial request for the DC Credits, the City provides its response correspondence denying all requests for DC Credits.

January 15, 2014 – Etobicoke-York Community Council approves the CIA, a precondition to the lifting of the Hold, and the lifting of the Holding symbol, and recommends City Council ratify the decision.

February 1, 2014 – The effective date that the City’s DC rates are subject to the first increase under the 2013 DCBL is reached, thus triggering the application of the higher DC rates for the Appellants.

February 18, 2014 – The CIA is finalized and executed by the City and the identified Appellants.

February 19, 2014 – Eighteen days after the new DC rates become effective, City Council finally considers and confirms the decision of the Community

Council ratifying the CIA and lifting the Holding symbol. With the CIA now finally approved, the Appellants are in a position to obtain the building permit.

March 7, 2014 – Ocean Club receives issuance of building permits for its portion of the Lands and pays the DC charges of $6,428,804 under protest.

July 2014 – Phantom receives issuance of its building permits for its portion of the Lands and pays the DC charges of $4,713,357 under protest.

EVIDENCE AND ANALYSIS – ISSUE 1 - THE APPROPRIATE DC RATE

The Applicable Legislation

[19] The starting point for the analysis of this ground/issue for the Appeals, is s. 26 of the *DC Act* which specifies when a DC is payable. Section 26(1) provides that a DC is payable for a development "…upon a building permit being issued for the development…" unless a municipal DCBL provides otherwise. If multiple permits are required for a development, the DCs are payable upon the first building permit being issued. If a development has multiple phases not constructed concurrently, and to be completed in different years, each phase is considered a separate development for the purposes of this section.

[20] Section 27 of the *DC Act* also provides that a municipality may enter into an agreement with a person required to pay a DC, providing for all or any part of the DC to be paid before or after the date it would otherwise be payable under the *DC Act* or a municipal DCBL.

[21] Section 415-8, paragraphs A and C, of the City's DCBL, mirror the provisions in s. 26 and 27 of the *DC Act*, and similarly provide that the DC charges are payable and collected as of the date a building permit is issued in respect of the building or structure, and that Council may enter into an agreement for alternate payment timing.

[22] For the purposes of the analysis of the Appellants' Claims, as they relate to delay, it is important to also examine, with some precision, the section of the *DC Act*

that applies with respect to Complaints and Appeals to the Tribunal. Section 20 is the governing section that determines the three grounds for any Complaint to Council, and any subsequent appeal to the Tribunal. It reads:

> **COMPLAINTS ABOUT DEVELOPMENT CHARGES**
>
> **Complaint to council of municipality**
>
> **20** (1) A person required to pay a development charge, or the person's agent, may complain to the council of the municipality imposing the development charge that,
>
> (a) the amount of the development charge was incorrectly determined;
>
> (b) whether a credit is available to be used against the development charge, or the amount of the credit or the service with respect to which the credit was given, was incorrectly determined; or
>
> (c) there was an error in the application of the development charge by-law.
>
> **Time limit**
>
> (2) A complaint may not be made under subsection (1) later than 90 days after the day the development charge, or any part of it, is payable.
>
> …..

[23] Section 21 sets out the first steps of the complaint process whereby a complainant may file a complaint to a municipal council which then has the power, under s. 21(d) to "…dismiss the complaint or rectify any incorrect determination or error that was the subject of the complaint."

[24] Sections 22 to 25 then apply with respect to the subsequent Appeal to the Tribunal of Council's decision or non-decision on the Complaint. The relevant portions of the *DC Act* read as follows:

> **Appeal of council's decision**
>
> **22** (1) A complainant may appeal the decision of the council of the municipality to the Ontario Municipal Board by filing with the clerk of the municipality, on or before the last day for appealing the decision, a notice of appeal setting out the reasons for the appeal.

> **Additional ground**
>
> (2) A complainant may also appeal to the Ontario Municipal Board if the council of the municipality does not deal with the complaint within 60 days after the complaint is made by filing with the clerk of the municipality a notice of appeal.
>
> …..
>
> **Powers of OMB**
>
> (4) After the hearing, the Ontario Municipal Board may do anything that could have been done by the council of the municipality under subsection 20 (6).
>
> …..
>
> **Refund if development charge reduced**
>
> **25** (1) If a development charge that has already been paid is reduced by the council of a municipality under section 20 or by the Ontario Municipal Board under section 24, the municipality shall immediately refund the overpayment. 1997, c. 27, s. 25 (1).

[25] As to the powers of the Tribunal on appeal under s. 20(4), since they are based upon what could have been done by Council, the Tribunal may thus "…dismiss the Complaint or rectify any incorrect determination or error that was the subject of the Complaint."

Appellants' Grounds – s. 20 of the *DC Act*

[26] It is understood that a fundamental premise of the Tribunal's jurisdiction as an administrative tribunal created by statute, is that it has no inherent jurisdiction. As succinctly enunciated in a number of decisions, including those submitted by the City, the Tribunal has only those powers, and may only discharge those functions, authorized by the statute which created it or those other statutes expressly conferring jurisdiction. The grounds for the Tribunal's jurisdiction, in these appeals, must therefore be found to exist within the confines of s. 20(1) of the *DC Act*.

[27] The Appellants' DC Rate Claim on behalf of Ocean Club and Phantom is advanced on the basis that the DC charges were "incorrectly determined" using the incorrect DCBL, as a result of the delay on the part of the City. Based on the Claims

advanced, and the issues, the Appellants' grounds in relation to the Rate Claim must be determined to fall within s. 20(1)(a) or (c) of the *DC Act*.

[28] The first of the three grounds under s. 20(1), as it is worded, focuses only on the "amount" of the DC being "incorrectly determined". In the Tribunal's view, to be incorrectly determined, the ground for the appeal could relate to such things as: errors in calculations; errors in the source information and figures used to calculate the DCs such as the units or the rates set out in the Schedules; errors arising when effecting changes to unit types or building envelopes; the applicability of an exemption provided for in the DCBL; reductions relating to demolition; or such other matter relating to the determination of the DCs based upon the provisions of the DCBL as it is applied to the building for which the DCs are payable.

[29] In this case, the Appellants do not take the position that there is any error in the calculation of the DCs or the application of the provisions of the DCBL in determining the DCs. The evidence and submissions advanced by the Appellants are based upon the fact that the *timing* of the calculation occurred after February 1, 2014 when the DC rates increased, and the Appellants' assertion that the delayed point in time at which the DCs were calculated was the fault of the City's delay and resulted in the higher rates being used instead of those in effect as of November 1, 2013.

[30] The City has not taken the position, nor introduced any evidence, to refute the fact that if building permits had been issued prior to February 1, 2014, the lower DC rates would have applied or the fact that the required execution of the CIA Agreement and removal of the Holding symbol prevented this from happening earlier. Both Ms. Salatino and Mr. Crawford frankly conceded this in their testimony.

[31] The Tribunal has heard much evidence relating to the timeline of ongoing discussions between the Appellants, their consultants, and members of City staff and Toronto Water in relation to aspects of the development, storm water services, sanitary sewer infrastructure analysis and methodology, and more specifically whether Toronto Water would, or would not, require storm water or sanitary sewer improvements as part of the CIA. Matters of timing also relate to the question of whether there were delays in

the approval of the CIA, and the release of the Holding symbol, when Council referred the approval/ratification to the local Etobicoke-York Community Council.

[32] While some aspects of the chronology of the dealings with the City are relevant to the second issue/grounds of the DC Credits, it is the Tribunal's view, upon the analysis and reasons that follow, that the sequence of events identified by the Appellants is ultimately irrelevant to the issue/ground of delay because delay, in and of itself, and however arising, is not, in the Tribunal's view, sufficient, nor a valid, ground upon which the Tribunal may direct that the DC rates to be applied under the *DC Act* should be at a lower rate and calculated at an earlier point in time, before the effective date of the new rates under the DCBL.

[33] It is the finding of the Tribunal, upon all of the evidence, that the Appellants' grounds for the DC Rate Claim are not related to the amount of the DCs being incorrectly determined but instead are based only on the delay and timing of the triggering event – which, on the evidence, is the date that the building permits were issued. The Appellants comparative calculations of the DCs in Exhibit 2, in support of its Claim for the difference, for each of the Ocean Club and the Phantom developments, are straightforward as the number of bedroom units, and the non-residential square metres are set out and the two sets of calculations are made. The only difference is the rates – those pre-Feb 1, 2014, and those as of Feb 1, 2014. The evidence, and the submissions, do not assert any miscalculated determination of the DCs, nor any misapplication of the provisions of the DCBL.

[34] It is clear to the Tribunal that the basis for the claim is not that the DC rates were incorrect nor that the DCBL was incorrectly applied when applying those DC rates to the number of units and determined non-residential area. From the evidence led, it is also clear that the claim is not based upon an assertion that the dates of the issuance of the building permits were incorrect.

[35] The singular basis for the Appellants' Rate Claim is the delayed point-in-time that the DC rates were applied.

[36] Based upon the evidence, and these findings, the Tribunal agrees with the submissions of the City that such grounds relating to delay only are not within the enumerated three grounds for a Complaint to a municipality or to the Tribunal, and that had the legislature intended to include such grounds as a basis for a Complaint to a council, or to the Tribunal, it could have done so. As the City has submitted, if the intent and purpose of s. 20(1) was to permit a challenge by an owner based on delay and the ground that the building permit ought to have been issued on an earlier date, the clear and specific inclusion of administrative delay as a ground for appeal could have been included, thereby conferring jurisdiction on the Tribunal.

[37] To the contrary, the manner in which the legislation has been drafted suggests that matters relating to the issuance and timing of issuance of building permits – the triggering event for the calculation of the DCs – are, in fact, expressly *not* within the jurisdiction of the Tribunal. The Tribunal agrees with the City's observation that s. 20 of the DC Act does not make any reference to any ability or opportunity to consider whether a building permit ought to have been issued on some earlier date.

[38] Of significance, in the Tribunal's view, is the fact that issues and dispute mechanisms relating to the issuance of building permits is governed wholly by the *Building Code Act* in Ontario. Under that Act, any applicant for a building permit may take steps to address disputes relating to the process before the Building Code Commission or, as the Act stipulates, file an appeal with the Ontario Superior Court of Justice. The Tribunal has no authority or jurisdiction in matters relating to building permits.

[39] The modern principle of statutory interpretation must govern. That is namely: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." In this case the Tribunal must conclude that the ordinary meaning of the text of s. 20(1)(a) refers to grounds relating to incorrect calculations and determinations and not to external triggering events as to when the DC charges are calculated, which is plainly stipulated elsewhere in the *DC Act*. On the assumption that

the legislature has constructed a coherent, coordinated plan for the effective organization and regulation of planning and development processes, the Tribunal must recognize two things. First: that elsewhere in the same legislation, s. 26 sets out the timing of the calculation and payment of the DC charges, without reference to a dispute resolution of that determining event. Second: that matters relating to the timing of issuing building permits and disputes relating to the issuing of building permits are intentionally dealt with under a separate Act, and is not within the jurisdiction of the Tribunal, but rather the Courts.

[40] The fact that the event triggering the date of determining and paying DCs (as set out in s. 26(1)) is a matter which is not included within the grounds in s. 20(1) of the *DC Act* is, in the Tribunal's view, highlighted by the impending change in the legislation referred to by the Appellants in closing submissions. As the Appellants have pointed out, sections 26.1 and 26.2 of the *DC Act*, amended by Bill 108, alter the time of calculating DCs to the time of submission of an application for site plan control or a zoning by-law amendment, effectively freezing a DC rate early in the development process. The Appellant argues that had this amendment been in place when the Appellants filed their applications they would not have been "at the mercy of the City staff's drawn out process of approving the CIA".

[41] The impact that the Bill 108 amendment might have had on the Appeals before the Tribunal is obvious, but also emphasizes the point that the manner in which the legislation has, on the facts of these Appeals, determined the point-in-time of calculating the DCs, clearly creates a cohesive and unambiguous framework. That framework: (a) identifies the point-in-time calculation as the date of issuance of the building permit; (b) reserved matters and disputes relating to the issuance of the building permit to an alternate Act and other forums; and (c) provides for identified grounds for complaint/appeal of DC determination and calculation which plainly exclude grounds relating to delays in the issuance of building permits.

[42] The written and oral evidence-in-chief of Mr. Kelleher, who was the only expert qualified in the field of DCs, did not include a firm opinion that a matter relating to delay

in the issuance of a building permit is an identified s. 20 ground for the Rate Claim. Although Mr. Kelleher generally opined that the delay in the applied rate might relate to charges that were “incorrectly determined”, more affirmatively he conceded that aside from the DC Credit Claim, the *amount* of the DCs charged by the City were correctly calculated.

[43] The Panel has considered the two authorities provided by the Appellants in support of their submission that the Tribunal’s ability to deal with the Rate Claim is not restricted but is unable to agree. The Tribunal in *Sherway Gate Development Corp. v. Toronto (City)*, 2013 CarswellOnt 8685, commented on the City’s responsibility for clear communication as to calculations of DCs payable under its DCBL and on the facts, this decision does not represent persuasive direction as to the permitted grounds under s. 20(1) or support the jurisdiction of the Tribunal to decide a delay claim and substitute a new triggering date for the calculation of the DCs under the *DC Act*. The Tribunal as well, does not consider the very peripheral *obiter* comments of the Member in the *Barrie (City) Development Charges By-law No. 99-172 (Re)*, [2004] O.M.B.D. No. 804, as indicating, in any substantive manner, that the door remains open to grant relief from calculated DC charges due to delay.

[44] With respect to the evidence introduced by the Appellants, the Tribunal finds that the evidence relating to administrative delay on the part of the City’s staff, including Toronto Water, or Council, fails to demonstrate, on the balance of probability, that as events unfolded in relation to the substantial aspects of the Appellants’ various developments on the Lands, that there was any defined event, or sequence of events, that would allow for a conclusive finding that, but for the actions of the City, the building permits would have been issued at an earlier date, and would have resulted in the application of the lower DC rates. The applications to amend the Zoning By-law to lift the Holding symbols were filed on September 15, 2008 and September 16, 2011 and no appeals were filed with respect to the absence of a decision on the lifting of the Holding.

[45] There is no question that the “back and forth” of events and discussions between the City and the Appellants and their consultants, and delays in moving to final approval

to lift the Holding provisions may not have progressed as quickly as they might have. There is certainly no evidence before the Tribunal of any intentional or bad faith actions on the part of the City calculated to delay the processes leading to the issuance of the permits and the crystallization of the DCs. Ultimately, in the overall chronology, it is the view of the Tribunal, from the evidence, that the Appellants' objections and frustrations with the limited delay (by 18 days) in the final steps of approval by the Community Council and Council do not result in circumstances that permit the Tribunal to provide the remedy that is sought, would effectively substitute a lower DC rate.

[46] Finally, the Tribunal does not disagree with the City, and is mindful of the fact, that the substitution of a lower DC rate might very well constitute an indirect endorsement of a "bonusing" or assistance, that is prohibited under the *City of Toronto Act* and represent a precedent for the granting of relief or assistance to a developer. That is however secondary to the finding of the Tribunal that it does not possess the jurisdiction to award the relief sought by the Appellants with respect to the Delay Claim.

[47] For all these reasons, the request in the Appeals of the Appellants Ocean Club and Phantom, that the Tribunal substitute the post-February 1, 2014 DC rates charged to those Appellants with the lower pre-February 1, 2014 DC rates, and that the City be directed to pay the refunds of $1,232,119.12 and $909,153.00 calculated on such a scenario, is denied. In that respect that aspect of the Appeals, of Ocean Club and Phantom, is dismissed.

EVIDENCE AND ANALYSIS – ISSUE 2 - DC CREDITS

The Applicable Legislation

[48] Dealing first with the legislation relating to the Tribunal's jurisdiction, unlike the Appellants' DC Rate Claim, their DC Credit Claim, and the issue of whether the amounts claimed as DC Credits are available to the Appellants, and offset against the DCs payable, are, at first glance, squarely within the jurisdiction of the Tribunal. As excerpted above, the DC Credit Claim is advanced by the Appellants under s. 20(1)(b) of the *DC Act*, which provides that a Complaint may be advanced "as to whether a

credit is available to be used against the development charge".

[49] A complaint/appeal may also be advanced in relation to an issue as to whether the amount of the DC credit, or the amount of the service with respect to which the credit was given, was incorrectly determined. In this case, the City outright refused all of the Appellants' requested Credits and the issue is narrowed as to whether a credit is available to be used against the development charge.

[50] Sections 38 and 39 of the *DC Act*, which otherwise relate to the matter of credits, read as follows:

> **CREDITS**
>
> **Credits for work**
>
> **38** (1) If a municipality agrees to allow a person to perform work that relates to a service to which a development charge by-law relates, the municipality shall give the person a credit towards the development charge in accordance with the agreement.
>
> **Amount of credits**
>
> (2) The amount of the credit is the reasonable cost of doing the work as agreed by the municipality and the person who is to be given the credit.
>
> **Limitation: above average level of service**
>
> (3) No credit may be given for any part of the cost of work that relates to an increase in the level of service that exceeds the average level of service described in paragraph 4 of subsection 5 (1).
>
> **Credit can be given before work completed**
>
> (4) A credit, or any part of it, may be given before the work for which the credit is given is completed.
>
> **Credit relates to service for which work done**
>
> **39** (1) A credit given in exchange for work done is a credit only in relation to the service to which the work relates.
>
> **Credits can be divided among services**
>
> (2) If the work relates to more than one service, the credit for the work must be allocated, in the manner agreed by the municipality, among the services to which the work relates.

> **Exception by agreement**
>
> (3) The municipality may agree that a credit given be in relation to another service to which the development charge by-law relates.
>
> **Changes after credit given**
>
> (4) The municipality may agree to change a credit so that it relates to another service to which the development charge by-law relates.

[51] Section 24(4) of the *DC Act* succinctly sets out the powers of the Tribunal on these Appeals relating to the Appellants' complaints, and provides: "After the hearing, the [Tribunal] may do anything that could have been done by the council of the municipality under subsection 20(6)". Section 20(6) provides that, with respect to any complaint under s. 20(1), after the hearing of evidence and submissions a council (and the Tribunal) may dismiss the complaint or "rectify any incorrect determination or error that was the subject of the complaint."

Findings on Pertinent Factual Background

[52] First, the evidence before the Tribunal is that the DC Credits claimed by the Appellants relate to the value of specific work to be performed for specified improvements, some by the Appellants, and some by the City. Items 1 through 8 on Schedule B to the CIA relate to works to be performed by the Appellants. Of the amounts claimed for DC Credits in Exhibit 3, and listed in paragraph 12 above, $502,333 relates to works to be undertaken by the Appellants.

[53] The balance of the DC Credits claimed under the CIA relates to specific cash payments payable by the Appellants to the City (Items 9 through 15) as opposed for the provision of the specific work. Of the total DC Credits claimed, the amount of $1,530,000 relates to cash contributions. Those cash payments are, under the terms of the CIA, nevertheless directly related to specifically identified improvements for which separate cost estimates had been determined and identified in Schedule B of the CIA (and/or other supplied cost estimates). The fact that the payments were specifically directed to fund categorized improvements, and not outright cash payments, is made clear in the CIA as it further provides in s. 2.0 that if the improvements are not

constructed then the cash payments are to be returned to the Appellants. They were not returned.

[54] The evidence is clear that the parties were unable to agree to the specifics relating to the DC Credits, which were requested on December 11, 2012. As the chronology indicates, the Appellants made their requests for the DC Credits on December 11, 2012 through their representative consultants Altus Group. The City did not respond, and the Complaints were then filed with the City. Some two years thereafter, the City eventually responded on December 23, 2014, denying all requests for Credits.

[55] However, prior to that response from the City denying the DC Credits, section 28.4 of the CIA (Exhibit 1, Tab 47) executed by the parties on February 18, 2014, reserved the ability of the Appellants to claim the DC Credits and provided as follows:

> 28.4 The City acknowledges that nothing in this Agreement prohibits an Owner or Owners from applying to the City for applicable development charge credits. Any such application must be made and determined prior to an Owner or the Precinct Company undertaking any of the Works with respect to which the development charges credit is sought. The Owners acknowledge that this section does not fetter City Council's discretion in considering any such application.

The City's Position

[56] There are a number of facets to the City's position on the issue of the DC Credits. As the analysis is undertaken by the Tribunal, it is useful to summarize the primary arguments advanced by the City on this issue. The City submits that:

<u>The Jurisdiction of the Tribunal Over DC Credits</u>

1. Primarily the Tribunal does not have the jurisdiction to order that a municipality must give a credit against development charges otherwise payable and it is entirely within the discretion of a municipality to grant a DC credit. Deciding whether the City should give a DC credit to the Appellants for certain works is not a question within the powers of the Tribunal under s. 20 of the *DC Act*.

2. The granting of a DC credit is never mandatory, and it is only given if a municipality agrees with an owner that a DC credit is payable, just as, conversely, the City cannot force an owner to undertake work for which a DC credit must be paid. The City argues that only if it has expressly agreed that a credit is to be given to the owner can a credit be considered as "available to be used" as it is indicated in s. 20(1)(b) of the *DC Act*. There is, in this case, no mutual consent reduced to writing in the form of an agreement and therefore the City owes no DC Credit to the Appellants.

3. The City advances an argument of statutory interpretation, asserting that if the intent and purpose of s. 20 of the *DC Act* was to allow an owner the right to challenge a municipality's decision not to provide DC credits, clear and specific wording that that effect would have been provided. The City asserts that the wording in s. 20(1)(b) of the Act that allows a Complaint by an owner in relation to "...whether a credit is available to be used against the development charge" does not clearly confer such a right of challenge and that the Tribunal need only: (a) look to transitional rules contained in the *DC Act*, and Regulations under the *DC Act* and (b) compare s. 8(1) of the older *DC Act* (where the owner asserted that "..**the amount** of a previous development charged being credited …**is incorrect**") with the current wording of s. 20(1)(b) of the *DC Act* (where the owner asks the Tribunal to consider "**whether a credit is available** to be used against the development charge" (emphasis added).

4. The correct remedy available to the Appellants, according to the City, is an appeal under the *Planning Act* where the owner may argue for approval of a zoning by-law amendment that requires no obligation to provide services at its expense as a condition to approval.

<u>Classification of DC Credit Eligibility - Cash Payments versus Work Completed</u>

5. Under the *DC Act*, a credit is only available for work performed and not for

contributions of cash paid by the owner in relation to a DC service. In this case, as a portion of the Appellants' claim for DC Credits relates to the provision of cash "payments" for some improvements (which is *not* referred to in sections 38 and 39 of the *DC Act*), as opposed to the provision of "work" (which *is* referred to in sections 38 and 39), the *DC Act* does not entitle the Appellants to DC Credits. The City contends; "*It would make no sense to have a developer make a cash payment in relation to a DC service, and then give some of this money back in the form of a credit; obviously, the parties would simply agree on a lower cash payment in the first instance.*" That component of the Appellants' claim for DC Credits for cash payments, i.e. $1,530,000, is therefore not eligible under the *DC Act*. The Tribunal simply cannot direct the City to provide the DC Credits for the cash payments because they are not eligible for DC Credits under s. 38.

6. On the City's interpretation, neither do the terms of the CIA entitle the Appellants to a credit. Section 28.4 provides for credits upon "Works" being undertaken by the Appellants, and accordingly none of the identified cash payments are therefore eligible for reimbursement by way of a DC Credit.

Appellants' DC Credit Claims Are Also Ineligible on the Evidence

7. Even if the Tribunal does have jurisdiction to direct the City to grant the DC Credits, the factual evidence does not support the claims of the Appellants as set out in Exhibit 3 and paragraph 12 above.

8. The evidence to be considered by the Tribunal can not include the LSGs because LSGs are not required by the *DC Act* or Regulations, and further, are guidelines only and not binding as a statute might be.

9. With respect to the improvements relating to the storm sewers, the City's position is that because the City did not request an oversizing of the storm

sewer and because the City did not want or need a larger pipe, any upgrading of the storm sewer pipe was done for the Development and is not eligible for a credit under the LSGs.

10. With respect to the supply of work for road improvements, the City first takes the position that because the Development is adjacent to the roadways, the roadway improvements on those roads are therefore not external to the Development. These are improvements to existing infrastructure to accommodate the Development and thus are not brand-new roads, and therefore not eligible for DC Credits. The City's position is that these type of site-specific infrastructure improvements are not the types of DC projects that are included in the City's DC charges Background Study. The conceptual argument advanced by the City relating to DC charges is based upon the recognition that developers should not be required to "pay twice" for infrastructure. In final argument the City asserts: "If a work, or type of work, is identified in the Background Study, then the City should not be requiring a developer to pay for that work as part of a planning approval. Conversely, if the work or type of work is not included in the Study, then it is fair and reasonable to require the developer to be responsible for installing or funding that work once it has been identified as an infrastructure improvement that is necessary to support the proposed development." On the consideration of the factual evidence, the City asserts that all of the works (and payments) categorized by the Appellant as being eligible for DC Credits are actually site-specific and necessary to support the Development.

11. The City therefore argues: "if the City were forced to fund, by way of DC credits, these types of site-specific improvements, then it would lose its ability to control the spending and allocation of its DC reserve funds to pay for the types of capital projects set out in the Background Study." For the City, this circles back to its arguments that the *DC Act* must be interpreted to read that a DC charge can only be created with the acquiescence of the

City, as it is the City that has the authority to controls the DC processes that directs DC funds towards capital projects identified in the City's Background Study and provided for in an approved DCBL.

The Appellants' Position

[57] It is the Appellant's position that the Tribunal clearly has jurisdiction over the issue of DC Credits and under s. 20(1)(b) has been granted the clear authority to determine whether or not "…a credit is available to be used against a development charge", which is separate from the additional ability to consider and determine "…the correct amount of the credit if the credit or the service with respect to which the credit was given, was incorrectly determined".

[58] The Appellant directs the Tribunal to the wording of s. 38(1) that provides that a municipality "shall" give a credit where the owner is allowed to perform work which relates to a service to which a DCBL relates and s. 38(2) which provides that the amount of the credit is the reasonable cost of the works.

[59] The Appellants agree with the fundamental premise of the City's submissions/argument outlined in item 10, which is that DCs that are paid to fund capital works external to a development that arise from growth and benefit the City as a whole, whereas works that are local in nature and of benefit to, or internal to the Development, are not. Where the Appellants differ is with respect to the City's position that it cannot be directed by the Tribunal to provide the credit for works that provide a benefit directly to the Development and are triggered by the Development. The Appellant submits that the evidence supports the fact that all of the work, or payments for work, are DC eligible and not local, and therefore eligible as credits to be applied to the Appellants' benefit and that the quantum has been plainly established.

[60] The Appellants submit that the LSGs are absolutely relevant and applicable, support the eligibility of the works, or payment for the reasonable cost of the works, as credits to the Appellants. The Appellants submit that the LSGs have been ignored by the City.

[61] Of significance to the Appellants, on the facts, are the circumstances in which the CIA was signed, as the City unreasonably delayed responding to the request for the credits, admitted at various points to the eligibility of the works for DC Credits, took advantage of the Appellants' need to move forward with the Development, and required the payment of the DCs, reserving to the Appellants the right to pursue the DC Credits afterwards. Afterwards, the City had unfairly treated the Appellants inconsistently by denying the DC Credits, and by the City's asserting that it alone had the power to agree to the credits. This approach by the City is, in the Appellants' view, self-serving and ignores the legislation and the evidence.

[62] The Tribunal essentially agrees with the arguments advanced by the Appellants on the DC Credit Claim for the reasons that follow.

Analysis – The Jurisdiction of the Tribunal Over DC Credits

[63] The Tribunal notes, as a general finding made in the consideration of the evidence presented on the DC Credits issue that although it is ultimately the Tribunal that must make findings of law as to the application of the DC Act, the DCBL and the Background Study and LSGs, Mr. Keleher was the only witness qualified with expertise in development charges, and no witness was similarly qualified by the City on this subject matter. In that respect many aspects of Mr. Keleher's expert evidence as it relates to DCs and DC credits, is uncontested and consistent with the analysis of the Tribunal as set out in this Decision.

[64] In the course of the hearing, the Tribunal also heard from Mr. Hatton, who, like Mr. Keleher, has had hands-on experience in municipal finance and development charges for the City but had never been previously qualified as an expert in the area of development charges. Mr. Hatton, of significance, was the senior representative of the City consulted in relation to this Development and the City's representative that ultimately decided the fate of the Appellants' complaint, without any hearing, and determined the very issues that are now before the Tribunal as to whether there are DC Credits available to the Appellants. The initial questioning of Mr. Hatton, with respect to the request to qualify him as an expert, confirmed that Mr. Hatton was himself the first

"trier of fact" on the issue of the DC Credits and made the decision on behalf of the City. The Tribunal thus found that Mr. Hatton did not possess the impartiality and unbiased approach with respect to the issues in the hearing and could not be qualified as an independent and impartial expert witness in the subject matter of development charges.

[65] The Tribunal has considered, with some earnest, the evidence and the arguments of the City as to the Tribunal's jurisdiction in relation to the Appellants' claim for DC Credits. It is the City's view that the Tribunal's jurisdiction is more strictly limited on any complaint that relates to the application of the DCBL, as compared with an appeal of the form of the DCBL itself. The City submits that the purpose of s. 20(1) is to ensure only that the City "properly" applies the DCBL when charging DCs to an owner. The City's pointed argument has been advanced: "A municipality must agree to give a credit and a municipality cannot be forced to give a credit." In the Tribunal's view, these are two ways of saying the same thing – that the granting of a DC credit is an unfettered right of the City which is wholly insulated from review.

[66] For the reasons that follow, the Tribunal finds that such a constricted assertion of the City's absolute authority on the subject of DC credits is plainly at odds with the legislation which recognizes that DC credits are "available" to an entitled owner, upon satisfying stated pre-requisites, and that such availability of DC Credits is based upon rules and guidelines, and the facts of each case. Whether the DCBL, or LSGs, are "properly applied" in determining the quantum of DCs or DC credits is indeed a ground for a complaint provided for in the *DC Act*, but so too is the separate ground relating to the availability of, and entitlement to, DC credits.

[67] The Tribunal also finds that the City's further assertion that: "There is no avenue of appeal in a situation where a municipality declines to give a credit", is also at odds with the *DC Act* which provides that the issue of availability of, and entitlement to, a DC credit are subject to adjudicative determination by the Tribunal as the designated authority to decide such disputes.

[68] The Tribunal is accordingly unable to agree with the City's submissions on the matter of jurisdiction and to the extent that the witnesses' opinion evidence addresses

weighs in on the analysis of DC credits, the Tribunal prefers the evidence of the Appellants.

[69] While the Tribunal accepts that s. 20(1) provides limited bases upon which a complaint may be brought, in the Tribunal's view, the City's constricted approach ignores the plain meaning of the *DC Act*, and the identified powers granted to the Tribunal to consider circumstances where the issue is whether a credit is available to the owner to be used against the DC.

[70] Section 20(1)(b) cannot be read in isolation. The Tribunal must consider the same modern principle of statutory interpretation addressed with respect to the Appellants' Delay Claim, again that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

[71] The *DC Act* is to be viewed as a whole, and the two-part, "either/or" structure of s. 20(1)(b) must be read together with the two separate subsections of s. 38 that follow later. The two components of s. 20(1)(b) are consistent with, and complementary to, the two parts of s. 38(1) and (2) of the *Act*.

[72] In the Tribunal's view, sections 38(1) and (2) are each plainly structured to follow the two-part jurisdiction of the Tribunal set out in s. 20(1)(b), and vice versa:

- The first part of s. 20(1)(b) grants the Tribunal jurisdiction over the issue of the *availability* of the DC credit to the owner. Relatedly, s. 38(1) then sets out the guiding framework for determining the *availability* of, and eligibility of the owner to, the credit. That is – where a municipality has agreed to allow a person to perform work that relates to a service to which a development charge by-law relates. In that instance, the Owner "shall" receive a credit towards the development charge in accordance with that agreement.

- The latter part of s. 20(1)(b) then grants the Tribunal jurisdiction over the second basis for a complaint as to the proper *quantum* of the DC credit to the owner. Relatedly, s. 38(2) then sets out the guiding framework for

> determining the quantum of the DC credit. That is – by determining "the reasonable cost" of doing the work agreed to by the municipality and the owner. The Act imparts a reasonable test to the cost of the work and equates the amount of the DC credit to the determined reasonable cost of the work.

[73] The objections of the City do not relate to the quantum of the DC Credits, but instead to the availability of the DC Credits, and so the City's arguments as to jurisdiction, by application, relate to the first part of s. 20(1)(b) and s. 38(1) of the DC Act.

[74] The Tribunal cannot agree with the City's perception of the Act, or the effect of the authorities which it has cited in support of its jurisdictional argument, that suggests there is an absence of statutory jurisdiction over disputes relating to DC credits. The decision of *Mattamy (Rouge) Ltd. V. Toronto (City)* 68 O.R. (3d) 677, is cited by the City as authority for the fact that the Tribunal has no inherent jurisdiction. That is accepted and acknowledged by the Tribunal. The decision of *Bardhan v. Durham (Region)*, [2014] O.M.B.D. No. 527, is cited by the City as authority for the fact that Tribunal has limited jurisdiction in changing development charges limited to only the grounds set out in s. 20(1) and exercising only those powers set out in s. 20(6) to rectify the error. Those limitations are also accepted and acknowledged by the Tribunal.

[75] It does not however follow, in the view of the Tribunal, that sections 20(1)(b) and 38(1) of the DC Act, can be interpreted as withholding the power to the Tribunal to consider the matter of *availability* or *entitlement* to DC Credits, and to the contrary, that express authority is clearly provided for. In the Tribunal's view, the City's suggested interpretation of the *DC Act*, and in particular s. 38(1), would mean that the Tribunal is essentially barred from considering any complaint relating to DC Credits in the absence of an unequivocal agreement on the part of the City to give the credit to the Appellants. To the Tribunal's viewpoint, this is not a reasonable application of the *DC Act* as it has been drafted to provide a remedy to an owner that has been denied the benefit of DC Credits.

[76] The City has placed undue, and in the Tribunal's view, incorrect, emphasis on

the initial wording in s. 38(1) which begins “If a municipality agrees….”, in support of its submission that the City must first agree to grant a DC credit, in its absolute discretion. The Tribunal must agree with the submission of the Appellants, and Mr. Keleher’s opinion, that the section does not identify an agreement on the part of the municipality to “give” the credit that relates to a service to which a DCBL applies, but rather an agreement of the municipality “*…to allow a person to perform work…*” that relates to a service to which a DCBL applies.

[77] The section thus requires that the following three pre-requisites be satisfied before the owner can be given a credit “…in accordance with the agreement”:

1. The owner has performed certain work;

2. The municipality has agreed to allow the owner to perform the work; and

3. The work must relate to a service to which a DCBL relates.

[78] The section does not require a “written agreement” to provide the DC credit on the part of the municipality but rather, that it has “allowed” the work to be performed by the owner, demonstrated by some manner of conduct, be it formalized agreement, oral agreement, the circumstances of the arrangements relating to the work, acquiescence or a combination thereof. That is very different, in the Tribunal’s mind, from an agreement to grant the DC credit, which the City argues is absent in this case.

[79] Applying the rules of interpretation, if the Tribunal is to consider the third requirement – that the work relate to a service to which a DCBL relates – it follows that the ordinary sense and meaning of this requirement in this section, read and applied harmoniously with the scheme and object of the Act, is that an owner should not be unfairly burdened with the responsibility of paying for services which are external to the development and the type of works for which DC charges are to be collected under the DCBL, as benefiting the City as a whole, as “growth pays for growth”. If the City allows an owner to perform such DCBL related services work, then the work must be recognized as a DC credit available to the owner to fairly implement the scheme of the *DC Act* and the intent of the DCBL enacted under that Act.

[80] To accept the City's argument that there must be a clear agreement to pay the DC Credits, before the Tribunal has jurisdiction to hear a complaint about a DC credit would, in the Tribunal's view, render meaningless the remedial relief available to the Appellants under s. 20(1)(b) and s. 38(1), to pursue entitlement to DC Credits. Further, the City's interpretation that it has the ultimate authority to decide to agree to grant DC Credits, would mean that the DCBL, with it's Background Study and Local Service Guidelines, are also meaningless as they would serve to identify when DC credits are, or are not, available to an owner. It is unfathomable to the Tribunal, that the legislation, and the enacted processes under that legislation that allow a municipality to create a framework of policy, rules and guidelines to impose and collect development charges would not also incorporate a concurrent framework of policy rules and guidelines that entitle owners to DC credits from those imposed DCs. The fact that the DC Act, the DCBL, and the LSGs provide for DC credits would seem apposite to the right of an owner to claim such credits and the jurisdiction of the Tribunal to adjudicate the availability and entitlement of the owner to such DC credits.

[81] Further, as the *DC Act* is drafted, it is clear that if it is determined that the City has permitted work to be performed by the Appellants, which relates to a service to which a DCBL applies, it "*shall*" provide the DC credit "in accordance with the agreement". Upon the wording of the section, if the three pre-requisites are satisfied the obligation to provide the credit to the owner is absolute under the legislation, and not discretionary, as the City would argue. The process of determining whether the pre-requisites have been satisfied involves the application of the rules and guidelines established in the LSGs.

[82] A further aspect of the facts and law that provide for the Tribunal's jurisdiction over matters relating to DC Credits, is s. 24(4). The Tribunal agrees, as the Appellants' submit, that the plain reading of this section, which provides that after the hearing of a complaint the Tribunal "…may do anything that could have been done by the council of the municipality under subsection 20(6)", indicates that the powers of the Tribunal include the ability to remedy the refusal or failure of Council to make DC credits available to an owner.

[83] The Tribunal has considered the other authorities provided by the City in support of its argument, but it is not persuaded that they assist in providing guiding principles to support the somewhat stringent, and constricted jurisdiction of the Tribunal over, or the absolute discretion of the City in granting, DC Credits. The decision of the Tribunal in *Chateaux of Caledon Corporation v. Caledon (Region)*, 2017 CanLII 65179 (ON LPAT) relates to the limited facts of that case which discouraged the Tribunal from considering "alternative" development charge credits that were not in the original Complaint.

[84] It is necessary to comment upon, and distinguish, the decision of *First Baystone Shopping Centres Ltd. v. Barrie (City)*, 23 M.P.L.R. (3d) 125 (OMB), ("*First Baystone"*), provided by the City in support of its assertion that a municipality's agreement to a credit being given to an owner is the pre-requisite. While the comments of the Tribunal in that decision are noted, for the reasons indicated, the pre-requisite of s. 38(1) relating to the "agreement" is not as stated by the Panel member in the second point in paragraph 7, nor are the facts of that case similar to this one. What is relevant, and subject to examination by the Tribunal in this Appeal, is whether there was an agreement of the municipality to allow the appellant to perform the qualifying work, and not the unequivocal agreement to a credit being given to the appellant. The factual background in *First Baystone* involved the Appellant seeking a DC credit for an amount it had already agreed to pay under a prior Site Plan Agreement, for a service which the Tribunal found not to be in relation to a service to which a development charge by-law relates and which was, by inference, local in nature.

[85] Turning next to the City's submission that the Appellants' remedy should more properly be an appeal of the zoning by-law under the *Planning Act*, this argument, in the Tribunal's view, is untenable.

[86] It is the conclusion of the Tribunal that the matter of DC credits under the *DC Act*, and issues relating to services provided by a developer for which DC credits are to be given, and the classification of provided work as local services or services that are properly to be governed by a DCBL is entirely separate from matters of planning and zoning approvals in relation to a development. The City's suggestion that a developer's

remedy in an argument as to whether a municipality can require a developer to construct services in relation to a development, is an appeal to the Tribunal under the *Planning Act*, and a matter of zoning, unfortunately ignores the framework of the legislation applying the development charges which specifically integrates the availability of DC credits in relation to certain work.

[87] The *DC Act* also supports the all-inclusive construct of the regime for development charges as it creates an entire scheme to further the objects of the Act, and the intention of the Legislature, in creating a complete process for establishing a municipal framework for the charging and collecting of DCs and the provision of DC credits to fairly share the capital costs of growth on a broader spectrum. It would be contrary to the overall reading of the *DC Act* to deflect arguments relating to the character of work provided by owners for services that may, or may not, be local or internal to a development, and monetary allowances for such work to a planning hearing extraneous to the appeal processes provided for in the *DC Act*.

[88] The Tribunal has also considered, and accepts, the uncontroverted opinion evidence of Mr. Keleher on the subject. Mr. Keleher relies upon s. 59 of the *DC Act* which expressly prohibits a municipality from imposing charges on a developer for capital works as a condition of a plan of subdivision or site plan or the imposition of charges for local services through a development agreement or a condition unless provided through a front-ending agreement under sections 51 or 53 of the *Planning Act*. In Mr. Keleher's opinion, owners should not be required to fund DC eligible works outside of the provisions of the *DC Act* because the DCBLs, and LSGs are meant to ensure that all owners in a municipality are treated equally and are subject to the same rules regarding what is funded by DCs and what is not. The determination of whether DC credits are available to an owner is, in the Tribunal's view, squarely provided for within s. 20(1)(b), based upon the pre-requisites in s. 38 (2), and utilizing the LSGs as guidance. It is not something that is barred by the *DC Act*, to be dealt with in the context of planning processes, as the City suggests.

[89] In summary, the Tribunal has the jurisdiction and authority to consider the

Appellants' Complaints and determine whether the Appellants do, or do not, have available to them, the DC Credits summarized in this Decision. In the event the Tribunal finds that the DC Credits claimed under the Complaints are, and should be, made available to the Appellants, and credited against the DCs, the Tribunal may remedy the Complaints by determining the correct net amounts payable after the DC Credits and the amount paid can then be refunded to the Appellants under s. 25 of the *DC Act*.

The Local Service Guidelines

[90] The 2008 LSGs were presented in the record at Tab 44 of Exhibit 1, and as indicated, are acknowledged to be the in-force guidelines in place to govern the Appellants' applications. In light of the arguments advanced by the City with respect to the relevance of the LSG's, and for the analysis that follows, it is helpful to cite the initial two paragraphs of the LSG document identified as "Guidelines Re Landowner Emplacement of Local Services Under Development Agreement" which is included as an addendum to the prior Background Study. They provide as follows (emphasis added):

> The following guidelines set out, in general terms, the size and nature of engineered infrastructure that is included in the study as a development charge project, versus infrastructure that is considered as a local service, to be emplaced separately by landowners, pursuant to a development agreement.
>
> The following **policy guidelines are general principles** by which staff will be guided in considering development applications. However, **each application will be considered**, in the context of these policy guidelines and subsection 59(2) of the Development Charges Act, 1997, **on its own merits having regard to**, among other factors, **the nature, type and location of the development** and any existing and proposed **development in the surrounding area**, as well as the **location and type of services required** and their **relationship to the proposed development and to existing and proposed development in the area**.

[91] The City has submitted, in support of its position in the DC Credit issue, that these paragraphs are merely a preamble or introductory section that confirm that the LSGs are "only guidelines", are not "required" by the *DC Act* or its regulations, and thus are "not binding" and "cannot be strictly applied as if they were a statute".

[92] The Tribunal accepts that the LSGs are not mandatory in Background Studies and are not to be applied as the provisions of a statute would be utilized. The Tribunal however does not agree that that the LSGs are not "binding", in the sense that they are not to be accorded some measure of weight and effect on the issue of whether improvement works are DC credit eligible. To dismiss the LSGs as "only" guidelines is also misplaced since the introduction to the Guidelines clearly provides that they are to be used as "policy guidelines" to guide staff (and in turn developers who "play by the same rules") in considering development applications on their individual merits, having regard to the listed matters for consideration.

[93] The Tribunal would also note that while the terminology in the LSGs may perhaps have changed in subsequent versions, the second paragraph of the 2008 LSGs is not to be considered so lightly because it does, as a matter of common sense follow, and assist in implementing, the fundamental concepts of development charges and highlight the things that the City and the Tribunal must, in the process of categorizing infrastructure improvement works, have regard to. Those things are:

(a) the character ("nature and type") of the subject development;

(b) the character ("type") of the services;

(c) the relative location of both the development and the services;

(d) the "relationship" between the development and the services;

and then contextually, and comparatively,

(e) the character of other surrounding development;

(f) the location of other developments; and

(g) the relationship of the services to this other surrounding development.

[94] Although the wording of this guidance to matters to be considered does not refer to the subject of the "benefit" received by the improvements to services, the Tribunal considers that the ultimate determinations that result from considering such factors effectively relate to the determination of the respective practical benefits received by each of the subject development, and/or by nearby developments and/or generally by the City's population, as the consumers/users of the services. The nature of the listed elements to be considered in the LSGs calls for a comparison of the relative benefit of the improvement work to the different potential beneficiaries of the improvements. As an example, on the evidence here, although the right-turn lanes on Lake Shore did provide a direct benefit to the Appellants lands, the works also represented a widening of a Major Arterial Road which expanded, improved and better controlled traffic flow on this Major Arterial Road which also benefited nearby developments as well as all users of Lakeshore travelling along this traffic artery extending well beyond the Development. As such, the Tribunal would find that under the LSGs guidance, the works on Lake Shore are a DC eligible project

[95] Given the relevance that these enumerated seven factors set out in the introduction of the LSGs have in guiding the City, the owners and developers, and now the Tribunal, in the process of categorizing the works done on the services, and deciding if they are local to the subject development or instead related to broader development benefiting the City at large, the Tribunal concludes that the LSGs provide guidance in two different respects. There is first overall guidance as to the analytical approach to be applied in the necessary determinative categorization of the services improved by the contributions of the owner/developer, and then secondly, the specific guidance provided for each specific enumerated service in the LSGs (relating to such things as roadways, storm sewers, street lights, erosion control etc.). The Tribunal does not consider the placement of these general principles and the seven listed criteria/factors to which it should have regard to, at the beginning of the LSGs to have the diminished relevance, as the City would suggest, in labeling them merely as "preambles". To the contrary, the Tribunal interprets them, as just that – significant general principles and policy guidelines to be considered and applied to issues arising as to the eligibility of works on services as eligible for DC credits.

[96] The paragraph also contains the significant reminder that the examination and categorization of the services must take place in the context of the important prohibition contained in s. 59(1) (and 59(2) of the *DC Act* which prohibits a municipality from imposing conditions or agreements relating to subdivisions or consents unless they are in relation to "local services" that are related to a plan of subdivision or installed by the owner of the lands being severed. The Tribunal accepts Mr. Keleher's testimony, and the submissions of the Appellants, that the LSGs represent the types of "rules" or guidelines necessitated by s. 59, and the *DC Act* as a whole to implement a DC regime and delineate local services from DC eligible works so that the municipal DC structure does not overlap with development agreements that may be agreed upon by the City and landowners. The Tribunal concurs with Mr. Keleher's view as to the intent of the Act, under s. 59 and the Act as a whole that: development charges are not to be used to fund local services; only local services can be included in development agreements; and DC eligible works cannot be set out as a condition within a development agreement, at least not without commensurate DC credits.

[97] Mr. Keleher, in his witness statement and oral evidence expressed his view that landowners should not be asked to fund DC eligible works outside of the provisions of the *DC Act* and that the LSGs are meant to ensure that all landowners across the municipality are treated equally and are subject to the same rules regarding what is funded by DCs and what is not. The Tribunal accepts this viewpoint as being consistent with the structure of the development charges regime.

[98] The Tribunal would also respond to the City's dismissive approach to the LSGs by drawing a comparison of those LSGs to the status of other planning and design guidelines and the manner in which the Tribunal considers those types of "guidelines" utilized in planning under the *Planning Act*. There, in the hierarchy of planning policy, Provincial Planning policies and plans are at the apex of the planning policy pyramid, followed by Official Plans which set out general land use planning policies on a regional or municipal level, and then zoning by-laws which implement the Official Plans through regulatory performance standards. Within this hierarchy various types of guidelines, external to the policies, may be in place which are not themselves policy, but intended

only, by their plain meaning, to provide “guidance” in the implementation and application of policy or performance standards.

[99] Local service guidelines exist in a somewhat different “compartment” within the framework of legislation, regulations and enacted municipal Background Studies and by-laws which implement development charges. The *DC Act* imposes a mandatory requirement for a Background Study prepared in accordance with the Act and its regulations before it can pass a DCBL. Though the process should not be overly simplified, essentially the Background Study, to support the proposed DCBL, must forecast growth and development, identify development related capital projects and costs related to such forecasted city-wide development, apportion those costs to different development types and services and calculate development charges to be levied to fund such capital projects related to future growth. The identification process requires that the Study distinguish between those works related to development growth in the municipality and considered to be a DC project from other more site-specific local works that are “direct developer responsibility”.

[100] As part of that Background Study, although not a regulated requirement (as the City points out), the consultants hired by the City have drafted Local Service Guidelines specifically intended to assist in the sometimes challenging task of determining whether works and improvements may qualify for inclusion in the Background Study’s identified development projects or alternatively are considered local works and addressed in a front-end development agreement. Local Service Guidelines should, in the Tribunal’s view, be accorded status as a more elemental component that has been intentionally integrated by the City into the mandatory Background Study process that guides the imposition of development charges and their related DC credits. The inclusion of the LSGs within the City’s Background Study as an identified guideline causes them to be a relevant reference guide to the issues arising in relation to assessing development charges.

[101] As these policy guidelines and stated principles relating to development charges and DC credits in the LSGs are an integral and inseparable component of the

mandatory Background Study, the Tribunal finds that they therefore form a fundamental guide connected to the DCBL and the DC processes – including DC credits – to which all owners and developers, and the City, are subject.

[102] In this respect, the Tribunal cannot accept the City's submission that the LSGs are "only" guidelines and are not "binding" in the issue of the DC Credits. As the Tribunal recognizes the role the LSGs play, as they have been integrated into the Background Study, the Tribunal is, upon the analysis indicated, inclined to accept Mr. Keleher's opinion, in his testimony, that the LSGs are the closest thing to a set of "rules" that should be consistently applied. Mr. Keleher has expressed his view that the LSGs thus ensure that developers are treated equally, and not subject to discretionary, selective or arbitrary treatment when determining how a developer's contributions to infrastructure are to be treated.

[103] In summary, in exercising its jurisdiction, where the City or the Tribunal is called upon to determine whether contributions to work performed to improve services and infrastructure are related to DC eligible projects or are categorized as local services, the LSGs therefore cannot be ignored and must, of necessity, be considered as an important and relevant guide. The application of the LSGs, as a component of the Background Study, should be recognized as providing reliable guidance to all parties in the DC regime established by the *DC Act* and the DCBL, on the categorization of contributions for the reasonable cost of work performed in the course of development, and relatedly the the availability of DC credits to an owner/developer. Such recognition and application of the LSGs avoids discretionary, selective or arbitrary treatment when determining how a developer's contributions to infrastructure are to be treated.

[104] Turning to the specific applicable and relevant portions of the LSG's, the section which relate to roads, signals and intersections includes the following:

> **1 Expressways, Arterial and Collector Roads (including Structures):**
>
> i. New Collector Roads internal to a development are direct developer responsibility.
>
> ii. New, widened, extended or upgraded, Expressway, Arterial and Collector Roads (except in the case of (iii) external to a development are considered to be development charge projects.

iii. New Collector Roads external to a development but primarily acting as a connection serving a development, are a direct developer responsibility.

iv. All other roads are considered to be the developer's responsibility.

2 Traffic Signals and Intersection Improvements:

i. When on Arterial or Collector Roads external to a development are considered to be development charge projects.

ii. When on Collector Roads, Local Roads, private site entrances or entrances to specific developments are a direct developer responsibility.

iii. Intersection improvements and/or Traffic Signals on other roads due to general development growth resulting in increasing traffic are considered to be development charge projects.

[105] The relevant portion of the LSG's which relates to Stormwater Management and Storm Sewers is as follows:

1 Storm Sewers:

Storm sewers that are required for a development, either internal or external, are considered to be the developer's responsibility, unless the City requests oversizing, in which case the project will be considered a development charge project.

Analysis – Classification of DC Credit Eligibility - Cash Payments vs Work Completed

[106] The City objects to the ability of the Appellants to receive the benefit of DC Credits for contributions of cash allocated for the completion of work under the *DC Act* (as opposed to the performance of the work) and submits that DC Credits are exclusively for work performed by the Appellants.

[107] One of the City's arguments is that it makes no sense for an owner/developer to pay the City cash for costs to cover certain services and then turn around and get a refund in the form of a credit for that same amount, and the City submits that only the required prior agreement of the parties would avoid the necessity of the payment and repayment. Unfortunately, this argument by the City strikes the Tribunal as somewhat disingenuous since the City's perceived conundrum with the scenario would fail to exist if it responded to the Appellant's request for DC Credits when first asked. It is clear from

the evidence that the Appellants requested the DC Credits early on, and when the City delayed responding for two years, the only recourse was to proceed with the work and pay the requested contributions and await the response, and appeal as necessary. It is the Tribunal's view that the conundrum for the City with respect to the necessity of paying a refund also is out of step with the Tribunal's analysis of the *DC Act* and it's finding that it has the jurisdiction to determine the availability and entitlement to DC Credits under s. 38, which then would then give rise to the City's obligation to provide the refund as set out in s. 25(1) of the *DC Act*.

[108] It is the City's further submission that the terms of the CIA do not entitle the Appellants to a credit since it provides for credits to the Appellants upon "Works" being undertaken by them and none of the identified cash payments as contributions to the estimated costs of the Works are therefore eligible for reimbursement by way of a DC Credit.

[109] For the reasons that follow, the Tribunal does not accept the City's submissions in this regard as reasonable or consistent with the *DC Act* or the CIA.

[110] Mr. Keleher provided opinion evidence to support the Appellants' submission that because "works" are not specifically defined in the *DC Act*, and nothing in the LSGs distinguishes between cash payments or work performed, in his view, DC credits can be granted both for owner/contractor-performed work or cash payments paid to the municipality to complete the work.

[111] On the subject of the lack of stipulated distinction between the two types of contributions in the LSGs Mr. Nicolucci, on behalf of the City, acknowledged that nothing in the LSGs distinguish between cash payments and work provided by an Owner.

[112] Mr. Keleher also points to paragraph 7 of s. 5(1) of the *DC Act* which provides that the capital costs necessary to provide increased services must be estimated, and then paragraph 2 of s. 5(3) which provides that the costs to improve land are capital costs for the purposes of paragraph 7 of s. 5(1). In the absence of any definition of

"works" in the legislation, and with the recognition that costs to improve lands may be estimated for the purposes of administering the DC regime, DC credits can, in Mr. Keleher's view, be granted for both cash paid by an owner to the City to cover the cost of performing DC eligible work and payment to the owner to undertake the completion of the work. The Tribunal accepts this approach as correct.

[113] The Tribunal notes that s. 38(2) expressly provides that the amount of a DC credit is "…the reasonable cost of doing the work, as agreed by the municipality and the person who is to be given the credit". The section does not direct that the DC Credit is the reasonable cost of the work performed by the owner. The plain meaning of the section could thus be interpreted to include the reasonable cost of the work reimbursed to the City by the Owner or the reasonable cost of the work performed by the owner. As often occurs, and as is the case here, the City may elect to complete services that relate to existing infrastructure utilizing its own resources and construction and procurement processes, and then recover the costs from the owner/developer. Ultimately it is the actual determination and payment of the reasonable cost of the work however completed (or by whomever) that effectively results in the work being performed and the services improved. There is no stated or implied reference in the subsection defining the amount of the DC credits that requires that the owner must have performed the work to support the calculated credit. Accordingly, if payment is made by the owner to the City for that "reasonable cost of doing the work" then arguably the intent and purpose of the *DC Act* is satisfied, and a DC credit is available.

[114] The Tribunal acknowledges, in its analysis, that the wording of s. 38(1) provides that if a municipality "allows a person to perform work" that involves DC related services, the credit must be given, which ensures that no work is performed to the detriment of the owner, to the advantage of the City and its capital works without compensation being given. The section indeed does not specifically provide for the circumstances where the municipality "allows a person to contribute to the performance of work" that involved DC related services to prevent the similar disadvantage to the owner. However, in the Tribunal's view, in light of the form of s. 38(2), and the overall intent and purpose of the *DC Act*, it must go beyond the wording to understand the

ordinary meaning of the section, in the context of the intention of the DC regime addressed by the whole of the legislation. The Tribunal must also examine the circumstances such as this where the City has not only acquiesced, but expressly agreed, that it would receive a cash contribution from the Appellant to cover the reasonable cost of the work, rather than permit/require the Appellants to perform the work.

[115] The fact is that such a functioning cost-payment arrangement is regularly considered and utilized by municipalities in development work, including the City, whereby work is completed to improve infrastructure within the context of the Act, and DC credits are routinely given to owners on the basis of such contributions to those costs. This process, occurring under s. 38 of the *DC Act*, lends legitimacy to the existence of the two alternatives permitted under the Act. The two options are interchangeable depending on the circumstances of each case whereby the owner can either perform the work or pay for the work to be performed.

[116] As examples for this duality, the Appellants have directed the Tribunal to circumstances where this has occurred nearby when DC credits were given to Empire (Beyond the Seas) Ltd. who provided a cash contribution for costs incurred by another entity, Gemini Urban Design (Lakeshore) Ltd. to perform the work and who also received DC credits for other portions of the total cost (Tab 41, Exhibit 1). In the case of another development at Sheppard Avenue East (Tab 38, Exhibit 1) a developer received the benefit of DC credits for its contributions to a proposed community centre, a library and road improvements and not for work performed.

[117] Mr. Hatton on behalf of the City testified that in considering the matter of DC Credits, and the steps required to enact a DCBL, he is generally unconcerned as to how DC Credits apply or how they may be considered since, in his view, the credits do not affect the DCBL as it determines the rates and payment of DCs. The credits, he states, are “just a means of procurement” and the City can either hire someone to do it and receive a cash contribution to cover that cost or alternatively get the developer to complete the work.

[118] The Tribunal also finds, in the evidence presented, that the agreed-upon provisions of the CIA clearly provided for cash contributions from the Appellants that were directly tied to the reasonable cost of potentially DC Credit eligible work. That the contribution was directly tied to the improvement of the DC Credit eligible services is emphasized under the agreement which provided that if the specified roadway improvements were not to be constructed in relation to item 2.1(f) (Improvements to the intersection at $250,000) the cash contribution was to be returned to the Appellants. The contributions are clearly recognized in the CIA to be tied directly to the reasonable cost of the work. The Tribunal accordingly finds it difficult to understand how the City can object to cash contributions being ineligible as part of the Appellants' claims for DC Credits.

[119] In turn, within the CIA, the Tribunal accepts the submission of the Appellants, as expressed by Mr. Keleher in his evidence, and finds that s. 28.4 of the CIA expressly reserved the right of the Appellants to claim the DC Credits. The CIA set out the provisions for both the contributions for work performed and contributions of cash for performance of the work and did not thereafter limit the Appellant's right to claim DC Credit only to work actually performed and did not exclude those cash contributions as eligible for the DC Credit Claim. The only pre-requisite was that the Appellants make the application for the DC Credits and that the City make the determination.

[120] The application for the DC Credits was, on the evidence, done well in advance of the undertaking of all of the works at issue. It was the City that clearly delayed providing its response some two years after the justification report and request for the DC Credits was provided, as the Appellants continued to move forward with the Development. It was the City who thereafter denied the DC credit claims leading to these proceedings. In the Tribunal's view the CIA cannot be interpreted as closing the door to the Appellant's claims for DC Credits, but rather to preserving them for consideration under s. 20(1)(b) and sections 38 and 39 of the *DC Act*.

[121] It is accordingly the finding of the Tribunal that all of the Appellants' claims for DC Credits, inclusive of those relating to the determined amounts of the contribution to the

reasonable cost of the work to improve the services and infrastructure which amounts, on the evidence, have not been challenged by the City in this hearing.

Analysis of the Evidence – The Eligibility of the Appellants' DC Credit Claims

The Lakeshore Boulevard and Park Lawn Road Improvements

[122] The designated status of both Lake Shore Boulevard West and Park Lawn Road is not in dispute. Lake Shore is classified as a Major Arterial Road in the City and it functions as a major southwest to northeast route for traffic in the vicinity of the Lake Ontario shoreline area, south and east of the Gardiner Expressway extending to the downtown area of the City and further east.

[123] Park Lawn is also classified as a Major Arterial Road as it extends from the Queensway in the northwest down to Lake Shore in the southeast.

[124] The genesis of the requirement for improvements to Lake Shore and Park Lawn was the initial traffic impact study leading to the City staff report on the Humber Bay Shores Precinct Plan. It was determined that adjacent streets, inclusive of the two Major Arterial Roads, could "…accommodate the forecast volume of traffic that the Development would generate, including future area background traffic, provided that improvements are made to the Park Lawn Road corridor and the Lake Shore Boulevard West/Marine Parade Drive/Park Lawn Road intersection". Signals and auxiliary right turn lanes would be required on Lake Shore to Street B (which was internal to the Development) as well as eastbound right-turn lanes from Lake Shore onto Streets B and D (which were also internal to the development) and Street A (which was only partially internal to the Development.

[125] Improvements to Park Lawn of $700,000.00 were required "…to accommodate vehicle traffic generated by developments within the Precinct Plan boundaries." In addition to some traffic controls, this included a right hand turn on Lake Shore to go west on Park Lawn, (at a cost of $250,000 due to the requirement for the relocation of utilities) and widening of southbound lanes for both left turns onto Lake Shore and southbound through traffic. The cost to add an east bound left turn lane up at the

Gardiner Expressway Exit Ramp onto Park Lawn was an additional $350,000.00.

[126] The evidence before the Tribunal is that at the outset the City indicated that these costs would be the responsibility of the Appellants, and the Appellants consistently took the opposite position. The evidentiary record also includes Minutes of a Meeting prepared by the Appellant's consultants, for their meeting with City Technical Staff on July 13, 2010, which indicate that there were discussions regarding the required contribution of $700,000 for the Park Lawn Road improvements. The Minutes (Tab 5) reflect that, in response to an inquiry as to whether an application for DC credits would be allowed for these costs and the City's representative for Transportation Services, Mr. Smithies, responded that "he believed that [Humber Bay Shores Landowners Group] would have a valid case to apply for DC credits". These Minutes are by no means, themselves, determinative of the issue of entitlement to DC Credits for this work but they do, in the Tribunal's findings, indicate that the ability of the Appellants to claim the DC Credits for the costs associated with these improvements always remained a "live issue".

[127] That this was the case was also, for the Tribunal, clearly reduced to writing in paragraph 28.4 of the CIA which reserved the Appellants' right to apply for the DC Credits, and the reserved discretion of Council to consider such an application.

[128] The evidence is that the City's denial of the DC Credits for work on Lake Shore was based on its identification of these works as improvements that were not external to the development which was, in turn, heavily based on the fact that Lake Shore is a street that borders the Development and therefore cannot be considered external to the Development and is thus local in nature.

[129] The Tribunal has some difficulty accepting that the mere proximity of an already-existing major arterial transportation route in the City, adjacent to a Development, is sufficient to categorize any improvements to it as "local" and internal to the Development. That argument has previously been tried before the former Board, and failed, and the Tribunal would adopt the similar approach to this logic as it was considered in *Marjerrison v. Ottawa (City) and Building Owners and Management*

Association of Ottawa v. Ottawa (City) (November 29, 2016) ("*Marjerrison*") DC140015 and DC140030.

[130] Although the nature of the considerations in the *Marjerrison* decision was somewhat different, as it related to the interpretation of a DCBL, and policies relating to a subdivision, the underlying premise remains the same. The fact that a major arterial road may be *adjacent* to a development does not render the work provided or contributed by the Appellants with respect to the road, "local in nature", since the road provides city-wide services and are more accurately considered as "off-site". It is, in the Tribunal's approach, more importantly the nature of the arterial road, its function in the immediate and broader urban context, its interrelationship and connection to the development and to other immediate and outlying areas of the City, that better informs the character of the services as local or non-local. This approach is essentially that which is encapsulated in the listed seven criteria in the opening of the LSGs which are to be considered.

[131] Rather than this limited "adjacency" approach, advocated by the City based on mere proximity a more practical and purpose-based approach to categorizing the work is to determine the form, function and context of the subject infrastructure and whether the benefits of the improvements/changes to the infrastructure accrue primarily to "the Development" in an internal manner, or alternatively, accrue primarily, equally, or additionally, to other near, or more distanced, developments or other extended areas of the City, in an external manner such that the benefit is not exclusive to the Development.

[132] In the Tribunal's view, in addition to the general approach of the LSGs discussed above, this approach is fully bolstered in these Appeals, by the individual sections of the City's LSGs that are applicable to Road-Related services, and which provide, in section 1(ii), that "*New, widened, extended or upgraded, Expressway Arterial and Collector Roads*" (except in the case of New Collector Roads) that are "*external to a development are considered to be development charge projects*" and therefore not local services. Section 1(i) includes traffic signals and intersection improvements on such Arterial

Roads as improvements to be considered as part of the development charge projects.

[133] Upon reviewing all of the evidence, and in particular the LSGs, Mr. Keleher's testimony relating to the DC Credit Eligibility Analysis report prepared by Altus, on behalf of the Appellants, and the material relating to the nature of Lake Shore and Park Lawn improvements, the Tribunal must conclude that all of these roadway improvements plainly meet the requirements of the LSGs that serve to delineate when improvement to Arterial Roads are to be considered to be DC projects, and not local service improvements.

[134] The Tribunal accepts Mr. Keleher's approach to the roadway improvements to be correct as it is consistent with the LSGs and considers the functions of Lake Shore and Park Lawn, in both the immediate and broader urban context, and its interrelationship and connection to the Development and to other immediate and outlying areas of the City. On the facts before the Tribunal, if finds that the improvements on these two Arterial Roads, and in particular the intersections of Park Lawn, meet the three elements in the LSGs: 1. they are categorized as Arterial Roads; 2. they "widen, extend or upgrade" the roads; and 3. they are external to the Development.

[135] The Tribunal also finds that both Lake Shore and Park Lawn function as major vehicular arteries that service, to a significant extent, both immediate developed areas and a number of other developments as well as a broad area of the City. Although the improvements to these two Arterial Roads will obviously serve the Development, and in that respect there is an interrelationship between the Development and the improved, widened or extended roads, that additional, and significant connection also exists with a number of other developments set out in Exhibit 30 as well as the broader urban areas of the City, as these two major roads function to service a broad spectrum of the City.

[136] And pointedly, the Tribunal finds, again adopting the approach in the *Majerrison* decision, that Lake Shore and Park Lawn *are* external to the Development and do not become internal due simply to their proximity to the Development. The significance of the intersection of Park Lawn and Lake Shore as two major Arterial Roads, as it functions to control and service traffic beyond the Development, strengthens the view of

the Tribunal that the City's categorization of the work on these two roads, and the identified intersections, is untenable.

[137] Finally, to deal with the City's other submitted rationale for categorizing these road improvements as local services and not DC Credit eligible:

(a) The fact that these works would not have been undertaken but for the Development does not in and of itself, cause such works to be local. The LSGs do not identify that distinguishing factor, but more importantly for the Tribunal, s. 2(1) expressly provides that DCs are specifically imposed to cover "increased needs for services arising from development". The Tribunal accepts Mr. Keleher's opinion that all development, by its nature, "triggers" the payment of DCs and the need for works of some nature. The Tribunal recognizes the fact that most new development requires, and benefits from, certain components of infrastructure for service, and thus, in some measure there is a "local" connection to the improvement works. However, such additional or increased need for services on the part of the development is also a component of an "increased need for service" which gives rise to the requirement for development charges. The determination of local service versus external service requires the consideration of the LSGs, and the factors addressed above – and does not end with a summary conclusion that the work would not be required but for the application for development;

(b) The fact that the Development benefits from the work is also, not a factor that perfunctorily causes the work to be local in nature. For the same reasons indicated above, most development will give rise to the need for some improvements, and they will benefit the development. The more important focus is on the factors indicated above: the more immediate and broader context; how the works will function in relation to the subject development and other development or resident; whether other development and other urban areas will also benefit from the work; and

> whether, proportionately, the benefit to the owners is equal to, greater than, or lesser than, the benefit accruing to other development and residents. These factors must be considered on a case-by-case basis.

[138] Of the improvements to Lake Shore and Park Lawn, the Tribunal finds that all of the improvements are categorized as external to the Development, do not exclusively benefit the Development, and "serve a wider purpose" as indicated by Mr. Keleher. Indeed, at first glance, the additional turn lanes to the interior roads of the Development, from Lake Shore, do service the Development, but overall, the Tribunal finds that the intended improvements to traffic flow and improvement of controls of traffic movements off of Lake Shore, at this location, in proximity to the Park Lawn and Lake Shore intersection, serve and benefit all users of Lake Shore. The evidence indicates that although the turn lanes direct traffic into the internal areas of the Development, as through streets, and particularly as Street A is located, the improvements on the Arterial Road also serve to improve traffic direction to other nearby developments and public areas that also have a direction relationship to Lake Shore and Park Lawn as they are Major Arterial Roads servicing this area.

[139] The Tribunal heard from Mr. Nicolucci, the City's traffic and transportation planning expert on the subject of these improvements. Mr. Nicolucci was firm that the signals and turning lanes were there to serve the function of traffic entering into the Development. Mr. Nicolucci however testified, in-chief that he, and transportation staff generally do not look at the LSGs and if, in his view the development "requires" the road improvement, then the developer pays for the improvements. Later, in cross-examination, Mr. Nicolucci conceded that his predecessor Mr. Smithies would have been expected to look at the LSGs and that the LSGs represented a "critical document" to examine, and that they should be applied fairly and consistently.

[140] The Tribunal has noted that its view of the value of the LSGs in more precisely examining the relative aspects of the services, the development and other nearby development and the seven different criteria that the City and the Tribunal are to have regard to. In that respect the Tribunal prefers Mr. Keleher's approach to categorizing

these roadway improvements over that of Mr. Nicolucci. Mr. Keleher's analysis is the more fulsome approach that examines the relative relationship, function and benefit of the improvements to all nearby development and the city at large and not just the Appellants' Development. In contrast, Mr. Nicolucci's subjective considerations that supported his summary conclusion that the road improvements were local services, were limited and abruptly stopped once he concluded that the roads were adjacent to the Development, the Development "required the road improvements" and that the Development would benefit from the improvements.

[141] Mr. Nicolucci later clearly agreed, in cross-examination, that these road improvements would also have an overall benefit to other areas as well as the subject development, and that work on major arterial roads provided a greater benefit to the overall road system than a road that might be internal to a subdivision. Mr. Nicolucci also conceded that on a reading of the LSGs guidelines for Road Improvements, the work on Lake Shore and Park Lawn represented upgrades to either collector or arterial roads that were identified by the LSGs as development charge projects.

[142] The Tribunal has also carefully compared Mr. Nicolucci's evidence on the question of when a road improvement is "external" to a development and that of Mr. Keleher's on the same subject. Overall the Tribunal again prefers the approach of Mr. Keleher as it more reasonably recognizes the need to consider all factors examining function, the relative relationship of the services to the development and other development, and the related question of benefits to other nearby developments and the other extended city urban areas, rather than limiting the determination to the confined question of whether there is a "direct benefit" to the subject development and that the segment of the improved roadway is in proximity to the Development. The failings of this narrowed approach have been identified by the Tribunal.

[143] For all of these reasons, and upon all of the evidence, the Tribunal finds that the contributions made by the Appellants to improvements to Lake Shore and to Park Lawn are eligible for DC Credits and that, upon the evidence, the specified amounts claimed by the Appellants as set out in this Decision represent the reasonable cost of doing the

work as agreed to by the parties.

The Marine Parade Drive Improvements

[144] The road improvements to Marine Parade Drive, which is categorized by the City as a Collector road, were related to intersection improvements to provide for both eastbound and westbound lane turns onto an arterial road, Lake Shore and modifications to existing medians, totalling $250,000 and $47,815.00. The Tribunal was guided through the Exhibits (Tab 35, page 231) and Schedule B to the CIA to support the amounts, which were not challenged.

[145] The City's rejection of the request for DC Credits for these items were based upon the same reasons relating to Lake Shore and Park Lawn: Marine Parade Drive is a street which borders on the Development and if a road or intersection borders on a development it is not eligible for DC Credits and is not external to the Development; the improvements would not be required if the Development was not built; the improvements and modifications are for turning lanes and medians to facilitate access to the Development

[146] For the same reasons, and upon the same analysis set out above, and in considering the totality of the evidentiary record and the respective evidence of Mr. Keleher and Mr. Nicolucci, preferring the evidence of Mr. Keleher for the same reasons, the Tribunal must conclude that the justification for the refusal is unreasonable and fails to appropriately consider the LSGs and the necessary approach to examining the nature of the services. In this case, similarly, the Marine Parade Drive improvements, although providing a benefit to the Development, and being triggered by the Development, are nevertheless not local services, and are more reasonably categorized as external to the Development, benefiting transportation and traffic services to other nearby developments and overall traffic patterns in the surrounding area.

[147] For all of these reasons, and upon all of the evidence, the Tribunal finds that the contributions made by the Appellants to improvements to Marine Parade Drive are eligible for DC Credits and that, upon the evidence, the specified amounts claimed by

the Appellants as set out in this Decision represent the reasonable cost of doing the work as agreed to by the parties.

The Storm Sewer on Marine Parade Drive

[148] The Tribunal heard considerable evidence and was directed to a number of documents in the evidentiary record in relation to the contributed cost estimated at $158,880. The investigation of the storm sewer on Marine Parade Drive, and the need for increased capacity, was, on the evidence, one of the reasons that there were extended back and forth discussions between the Appellants and Toronto Water. The Tribunal heard from Mr. Shahbikian for the Appellant and Mr. Cheung for the City who were both qualified in engineering and spoke on the subject. Much time was spent in discussing the minutiae of the timeline of the exchanges of information, and its relation to the issue of delay raised by the Appellants. Most of that evidence is not directly relevant to the issue of whether the storm sewer work was eligible for the claimed DC Credits.

[149] Upon all of the evidence the Tribunal finds that the upgrades to the storm sewer on Marine Parade Drive, which twinned the pipe, represented an improvement that increased the sewer's capacity and served to provide increased flow of stormwater along the entirety of the municipal storm sewer system in this area that was necessary regardless of whether the Development was completed, or not.

[150] As to the specific manner of the upgrade, the Tribunal has heard and accepts Mr. Shahbikian's testimony on the subject of the storm sewer. Mr. Shahbikian was closely involved with the engineering design of the storm sewer and concluded early on that the segment of the system extending under Marine Parade Drive coming out of the curve at the west end of the Development required upgrading to meet the City's requirements and also assist in servicing the Toronto and Region Conservation Authority lands. Ultimately, the twinning of the storm sewer served to provide the additional capacity and was more efficient than increasing the capacity through replacing the existing pipe with an oversized pipe.

[151] Pointedly, Mr. Cheung, on behalf of the City, acknowledged that this section of the storm sewer ultimately needed upgrading regardless of the Appellants' Development and whether the engineering consultants had suggested the improvements. Further, Mr. Cheung conceded that, despite suggestions to that effect, the eventual upgrade to the storm sewer was not caused by the design of the Development's underground parking. Finally, Mr. Cheung also agreed that aside from the practical difference relating to operational requirements and costs to clean two pipes, instead of one, the twinning of the pipes effectively provided the same increase in flow as an oversizing of the pipe.

[152] Having regard to the considerations set out in the LSGs and the specific wording of the section applying to Storm Sewers outlined above, and upon the evidence of both Mr. Shahbikian and Mr. Cheung, the Tribunal finds that the contributions made by the Appellants to the twinning of the storm sewer pipes to increase capacity are eligible for DC Credits and that, upon the evidence, the specified amounts claimed by the Appellants as set out in this Decision represent the reasonable cost of doing the work as agreed to by the parties.

TECHNICAL NON-COMPLIANCE WITH FILING REQUIREMENTS

[153] The Tribunal has considered the time line and form and manner of the filing of the Complaints, and upon the evidence the Tribunal finds that there is no merit to the alternative arguments advanced by the City with respect to such technical filings, including the suggestion that they were filed in advance of the DCs being payable. Given the City's delay in responding to the clear requests for the DC Credits, and the timing of the removal of the Holding symbol, the Tribunal is unable to conclude that there are any fatal flaws to the manner in which the complaints were filed, and now before the Tribunal.

SUMMARY

[154] Accordingly, upon all the evidence, and the analysis and various findings of the Tribunal as outlined above, the Tribunal finds that the Appellants are not in a position to

claim, and the Tribunal cannot provide, relief to alter the DC rates applied in the calculation of the DC charges by reason of delay.

[155] And upon all of the evidence, and the analysis and various findings of the Tribunal and provided in this Decision, the Appellants are entitled to each of the DC Credits claimed in relation to the Development and which were denied by the City.

ORDER

[156] The Tribunal Orders that the Appeals of the Appellants' Complaints relating to the Development Charge rates, requesting relief in the form of a directed alternate Development Charge rate than that which was applied by the City, whereby Ocean Club claims a refund of $1,232,119.12, and Phantom claims a refund of $909,153.00, are hereby dismissed.

[157] The Tribunal Orders that the Appeals of the Appellants' Complaints relating to the availability of Development Charge Credits are allowed and the total amount of $2,032.333, as claimed by the Appellants, is to be credited against the Development Charges paid by the Appellants to the City, refunded to the Appellants in accordance with s. 25(1) of the *Development Charges Act, 2017*, together with interest payable in accordance with s. 25(2), and apportioned as between the Appellants, by them, in accordance with their mutual agreement.

"David L. Lanthier"

DAVID L. LANTHIER
VICE-CHAIR

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please visit www.olt.gov.on.ca to view the attachment in PDF format.