

Ontario Land Tribunal
Tribunal ontarien de l'aménagement
du territoire



ISSUE DATE: January 24, 2024

CASE NO(S): OLT-22-003397
(Formerly DC150001)

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

Appellant: Dunster Investments Inc.
Appellant: J. Stollar Construction Limited
Appellant: Mason Homes Limited
Appellant: The Orsi Land Group
Subject: Development Charges By-law No. 2014-238
Municipality: City of Kawartha Lakes
OLT Case No.: OLT-22-003397
Legacy Case No.: DC150001
OLT Lead Case No.: OLT-22-003397
Legacy Lead Case No.: DC150001
OLT Case Name: Dunster Investments Inc. v. Kawartha Lakes
(City)

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

Appellant: Dunster Investments Inc.
Appellant: J. Stollar Construction Limited
Appellant: Mason Homes Limited
Appellant: The Orsi Land Group
Subject: Development Charges By-law No. 2014-264
Municipality: City of Kawartha Lakes
OLT Case No.: OLT-22-003398
Legacy Case No.: DC150002
OLT Lead Case No.: OLT-22-003397
Legacy Lead Case No.: DC150001

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

Appellant:	J. Stollar Construction Limited
Appellant:	Mason Homes Limited
Appellant:	The Orsi Land Group
Subject:	Development Charges By-law No. 2015-224
Municipality:	City of Kawartha Lakes
OLT Case No.:	OLT-22-003390
Legacy Case No.:	DC150001
OLT Lead Case No.:	OLT-22-003397
Legacy Lead Case No.:	DC150001

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

Appellant:	J. Stollar Construction Limited
Subject:	Development Charges By-law No. 2019-184
Municipality:	City of Kawartha Lakes
OLT Case No.:	OLT-23-000097
OLT Lead Case No.:	OLT-22-003397
Legacy Lead Case No.:	DC150001
OLT Case Name:	J. Stollar Construction Limited v. Kawartha Lakes (City)

Heard: September 7 – 15, 2023 by video hearing

APPEARANCES:

Parties

City of Kawartha Lakes
J. Stollar Construction Limited

Counsel

Stephen D'Agostino
Denise Baker

DECISION DELIVERED BY W. DANIEL BEST AND SHARYN VINCENT AND ORDER OF THE TRIBUNAL

[Link to Order](#)

INTRODUCTION

[1] This was a hearing to determine the first phase of a series of sequential appeals originating with the City of Kawartha Lakes (“City”) Development Charges By-law 2014-238 and By-Law 2014-264 (“2014 DC By-laws”) by J. Stollar Construction Limited (“JSCL”). The 2014 DC By-laws were enacted by City Council (“Council”) on August 12, 2014 and October 14, 2014, respectively. The appeal was filed under Section 14 of the *Development Charges Act*, S.O. 1997, c. 27, as amended (“DCA”).

[2] Prior to the hearing, Dunster Investments Inc., The Orsi Land Group and Mason Homes Ltd., in this instance, vacated their respective Party status.

[3] The appeal to the Ontario Land Tribunal (“OLT” or “Tribunal”) proceeded by video hearing for a period of six days. Final arguments, along with Books of Authorities and a Compendium of Documents were submitted post-hearing.

THE FRAMEWORK ACHIEVED THROUGH THE COLLABORATION OF THE PARTIES

[4] The development charges (“DCs”) in the 2014 Development Charge Background Study (“2014 DCBS”) were based on the following time horizons:

1. 2014 – 2023 for discounted services; and
2. 2014 – 2031 for non-discounted services.

[5] The materials before the Tribunal were condensed to a Joint Document Book in the form of 13 volumes of pertinent documents, reference materials, a compendium of

witness statements, new exhibits introduced through cross-examination, together with an updated Recast Schedule of Development Charges and full list provided in an appendix.

[6] Previously, at the Parties' request, the Tribunal authorized a phased hearing approach. This hearing ("Phase 1") will address those 41 issues (attached as Schedule 1) grouped in the Procedural Order ("PO") as follows:

1. Ineligible Projects;
2. Benefits to Existing;
3. Residual Capacity beyond the Planning Period;
4. Project and Study Costs;
5. Levels of Service;
6. Roads;
7. Phasing in of Development Charge Rates;
8. Non-Residential Development;
9. Reserve Funds; and
10. General.

[7] On September 1, 2023, the Parties, on consent, requested a delay in the start of the hearing until September 7, 2023. The Parties advised that the Benefit to Existing ("BTE") issue under dispute was progressing towards a path of resolution, but the City

would need to seek direction from Council. The following was presented to the Tribunal for consideration:

1. Should the BTE issue be resolved, the Parties would ask the OLT to reconvene for the proposed settlement to be presented, with a reconciliation of the non-BTE issues and numbers from the agreed BTE methodology.
2. Should a settlement on the BTE issues not be reached, the Parties would request a motion/hearing early in the new year. Following a decision on this issue, the Tribunal would be able to issue its Final Order on Phase 1.
3. The hearing would commence on September 7, 2023. The Parties proposed that the uncontested evidence of Andrew Grunda, a witness for the City, would begin, to review the background information on:
 - i. How the 2014 By-laws were prepared;
 - ii. The peer review process of Mr. Grunda;
 - iii. The “recast” 2014 Development Charge Background Study (“Recast DCBS”); and
 - iv. An overview of the Agreed Statement of Facts (“ASOF”).
4. Following Mr. Grunda’s overview, the Hearing would proceed with the evidence of the remaining issues under dispute.
5. The Parties would request the Tribunal withhold its Final Order pending the outcome of the BTE issue outlined above.

[8] The Tribunal agreed with the recommended approach presented by the Parties on consent.

AREAS OF EXPERTISE FOR THE HEARING

[9] All expert witnesses were qualified by the Tribunal, having noted their education, experience, technical and speciality expertise, qualifications and/or professional accreditation, to provide opinion evidence in their respective area of expertise to assist the Tribunal in its deliberations. The expert witnesses were as follows:

Appellant:

1. Mr. Ian Drever, P. Eng - Water, Wastewater and Roads Planning and Engineering
2. Mr. Daryl Keleher, MCIP, RPP – Land Economics, Municipal Finance and Land Use Planning

The City:

1. Mr. Andrew Grunda, MBA, CPA, CMA – Municipal Finance, Land Economics with Expertise in Development Charge matters
2. Mr. Juan Rojas, P. Eng, the Director of Engineering and Corporate Assets for the City.

[10] Except for Mr. Rojas, all expert witnesses had been previously qualified by or appeared before the Tribunal or its predecessors.

AGREED STATEMENT OF FACTS (“ASOF”)

[11] The expert witnesses engaged in several meetings to review the 41 issues. Schedule 1 provides an overview of each issue and its status prior to this hearing. Schedule 1 identifies those issues 5, 7, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 23, 24, 27, 29, 30, 31, 32, 33, 34, 37, 38, 39 and 40 are resolved. The ASOF is attached as Schedule 2.

[12] The ASOF also identifies the following matters:

1. The Recast DCBS incorporating the changes agreed-to via the settled issues will be attached as Appendix B to the ASOF;
2. The DC reserve fund reconciliation done to establish the appropriate starting point for the 2014 DC calculations is attached as Appendix C to the ASOF; and
3. For the purposes of the calculations contained in Appendix C and how those calculations inform Appendix B, it was agreed that the Omemee Wastewater and North Street/Helen Street reserve fund draws should remain in the calculated DC reserve fund as made by the City.

[13] Based on the preceding and identified issues being deferred to the next phase of the hearing, the following will be decided at this phase of the Hearing:

1. Issue 2 regarding Administration Facilities and Storm Sewer Capacity Studies (“SSCS”);
2. Issue 3 regarding the Library Expansions and Fenelon Falls Water Pollution Control Plant (“WPCP”) related to Post Period Benefit (“PPB”);

3. Issue 9 regarding the overstatement of capital costs related to the OPS #1 Drain Bridge;
4. Issue 15 regarding the costs attributed to Urban/Rural Road (“URR”) reconstruction being growth related;
5. Issues 25 and 28 regarding the implementation of the City’s 2014 DC By-law;
6. Issue 36 regarding the pre-payment for hard services and comprehensibility of provisions within a subdivision agreement; and
7. Issue 41 regarding the inclusion of South-east (“SE”) Lindsay water and wastewater projects within the 2014 DC By-law.

[14] The Tribunal would like to commend the Parties for all their efforts to focus and scope the issues to assist the Tribunal in its determination on the matters before it in this hearing.

THE CITY DEVELOPMENT CHARGE BY-LAWS AND ITS DEVELOPMENT CHARGE BACKGROUND STUDY

[15] As set out in the introduction, the now scoped matter before the Tribunal is an appeal of two 2014 DC By-laws. By-law 2014-238 is the original by-law passed by the City. A subsequent by-law, known as By-law 2014-264 was passed due to the City’s acknowledgement that Schedules 1 and 2 of By-law 2014-238 were in non-compliance with the DCA.

[16] Both 2014 DC By-laws are informed by the City’s DCBS, authored by the Manager of Corporate Assets dated August 11, 2014, as amended September 24, 2014 and adopted by Council.

[17] The City engaged Watson and Associates (“Watson”) to conduct a Peer Review Study (“Peer Review”) of the City DCBS. The final Peer Review is dated July 3, 2015.

[18] The Peer Review acknowledged that the City 2014 DC By-laws were under appeal and a DC Task Force was created by the City to address the implementation of DCs for 2016, and the remaining term of the by-law. Watson had been requested to prepare a Peer Review Study, with a presentation of the findings to the City for their consideration in addressing questions of the DC Task Force and developing recommendations for Council.

[19] The objectives of the Peer Review were to:

1. Identify within the DCBS areas of non-compliance with the legislative requirements of the DCA;
2. Identify specific assumptions within the methodology of the DCBS that are susceptible to challenge and provide alternatives to mitigate such risks;
and
3. Identify areas of improvement within the DCBS that would further serve to provide for a defensible DC By-law.

[20] It was acknowledged by the Parties that the Peer Review was not available to Council at the time the 2014 DC By-laws were passed, and therefore could not be relied upon as having informed or been part of the DCBS, the basis of the DCBL.

[21] Ms. Baker, Counsel for JSCL reinforced the qualification of the Peer Review and argued that the Peer Review is similarly not the background study required by the DCA. The Peer Review simply reflects Mr. Grunda’s position as it relates to the appeals of the 2014 DC By-laws.

THE ROLE OF THE TRIBUNAL IN DETERMINING DCA CHALLENGES

[22] Although not relied upon by either Party in this matter, the Panel adopts, and therefore will appropriately quote, the very general tenets set out to establish the foundation for determining these types of disputes by Former Vice-Chair Lanthier articulated in OLT-21-001867 that:

Planning is about function and growth. How a community functions and how a community evolves, and transforms its functionality as it grows, is planning and development in its most fundamental form.

Paying for a community's evolution of functionality as it grows in the planning process is facilitated by such vehicles as the *Development Charges Act*. Under that Act, a municipality will undertake the required consultation and study process and enact a DC By-law to identify those services that are to be paid for through development charges against land and borne by development itself in the identified area and distinguish those services that are local services to be borne by a developer relative to a specific development. Each municipality is granted the authority, under the *DC Act*, to organize their framework for the collection of funds necessary to pay for new development as a community grows and its functionality evolves and differentiate this from costs to be borne by a developer through conditions imposed under the *Planning Act*. "Growth pays for growth" is the prevailing concept.

It therefore follows that a municipality's exercise of determining what is DC eligible and applying that concept of "growth pays for growth" practically involves an examination of function. If a particular service primarily functions to service the broader growth of the community at large, more than it serves the immediate and more localized needs of a developer's specific development, then it most likely falls within the rubric of "growth pays for growth".

[23] There is a practical reason a municipality is required to secure a new background study each time it enacts a DC by-law. As a community evolves, planning policies should be updated and it stands to reason that the DC framework would change as well. It is hoped that some continuity exists with prior reports and studies. The Tribunal was presented with prior versions of the Background Studies conducted in prior years and documents post-2014 to support certain points raised in the Hearing. Though it is possible that information regarding prior treatment of Projects in previous DC by-laws could have some bearing in an appeal relating to a DC by-law, that is not the case in this Hearing.

[24] The Tribunal stands in the place of Council when deciding the substantive issues that are before it. The Tribunal must focus on the information before it that Council had when it made its decision to pass the 2014 DC By-laws.

[25] The Tribunal is acutely aware that on an appeal, its role is to determine whether the municipality has acted fairly and reasonably, within its powers, in accordance with the process set out in the legislation, and where the Tribunal has found that the municipality has acted fairly and reasonably, in accordance with the process set out in the legislation, then it should not substitute its policy choices for that of Council.

[26] Subsection 10(2)(b) of the DCA places an onus that the background study on which the development charge rates are based must include the calculations under paragraphs 2 to 8 of subsection 5(1) for each service to which the DC by-law would relate. The Tribunal's view is that this provision requires that the study set out a clear and complete methodology and assumptions that justify the rates in the by-law.

[27] The Tribunal, together with the Parties, acknowledge that paragraph 20 of Peel (Region) Development Charges By-law No. 79-2012 provides guidance and reinforces the concept of "whether the estimates of anticipated growth and service need are reasonable at the time they were made."

[28] Additionally, the Tribunal must look to the determination of weight applied to the evidence of the expert witnesses. The role of the expert witness is to assist the Tribunal as argued by Ms. Baker as "the finder of fact, and the weigher of evidence and the decision maker."

[29] The Tribunal has carefully considered all the witness statements and oral testimony of the witnesses inclusive of cross-examination and all the documents and materials submitted as exhibits in the evidentiary record. The Tribunal has considered the application of the DCA, the extensive written and closing submissions on behalf of the Parties, and the authorities submitted.

ANALYSIS

[30] For the reasons that follow, the Tribunal finds the following:

- a. That the City attribute a BTE of 100% for the Library expansions for Bobcaygeon, Omemee, Coboconk and Fenelon Falls, and attribute a BTE of 50% for the expansion to the Lindsay Library and therefore remove an additional \$879,070 over and above the amount that the reconciliation removed to reflect the partial settlement of the library issues, from the 2014 DCBS calculations.
- b. That the costs associated with the 11,000 square foot administrative space for Fire and Paramedic Services be removed for the purpose of calculating the 2014 Development Charges contained within the DC By-laws.
- c. That the costs associated with the Storm Sewer Capacity Studies be removed for the purpose of calculating the 2014 Development Charges contained within the DC By-laws.
- d. That the appropriate PPB for the Fenelon Falls WPCP is 64.8% and that the 2014 Development Charges be recalculated to reflect this PPB for this infrastructure.
- e. That the cost associated with the William Street N. bridge be removed for the purpose of calculating the 2014 Development Charges contained within the DC By-laws.
- f. That the costs associated with the undefined URR program be removed from the 2014 DC By-laws other than the costs associated with the Hamilton Street, Victoria Street South and Ridout Street projects, and that

those projects be provided with an appropriate project identifier to ensure that the funds collected go to those specific projects.

- g. That Schedule 1A and Schedule 2A in By-law 2014-264 replace the respective schedules in By-law 2014-238.
- h. That the City remove the capital costs associated with the water and sewer projects which extend services into the SE Lindsay Area from the 2014 DC By-laws.

Library Expansions

[31] The issue before the Tribunal is to determine if capital costs have been allocated appropriately between growth and BTE respecting the library expansions. Overall, the Tribunal prefers the evidence, submissions and position of the Appellant.

[32] The Tribunal is persuaded by the evidence of Mr. Keleher that, except for the Lindsay Library expansion, all the proposed expansions will still be below the Administrators of Rural and Urban Public Libraries of Ontario ("ARUPLO") standard. It is Mr. Keleher's opinion that the proposed expansions which bring the libraries to or below the standard are entirely a benefit to the existing communities, and this assertion is supported by the 2008 Library Strategic Plan.

[33] Mr. Grunda stated that the City's 2014 DCBS included seven library expansion projects, with expansions to branches in Bethany, Bobcaygeon, Coboconk, Fenelon Falls, Lindsay, Omemee and Woodville. He continued that these projects were included based on the City's 2008 Library Strategic Plan for an incremental 12,333 square feet ("sq. ft.") of facility space requirement. The City's 2014 DCBS included 0% BTE for the incremental facility space associated with the seven library expansions.

[34] Mr. Grunda stated that the 2014 DCBS Peer Review, and 2014 Recast DCBS maintained the four priority library branch expansions from the City's 2008 Service

Delivery Model addendum to the Strategic Plan (i.e., Bobcaygeon, Fenelon Falls, Lindsay and Omemee) and the Coboconk branch expansion, based on the forecast needs in the City's 2014 5-Year Capital Budget. He advised that the facility size needs were revised to reflect the 2008 Service Delivery Model and reduced the anticipated incremental facility space requirement to 10,290 sq. ft.

[35] Mr. Grunda detailed that three of the five library expansions identified in the 2014 DCBS Peer Review and Recast DCBS. were previously identified in the City's 2009 DCBS. These included the branch expansions in Bobcaygeon, Fenelon Falls and Omemee. The City's 2009 DCBS identified a 50% BTE deduction for the Bobcaygeon and Omemee branch expansions, reflecting the level of service of the current facilities relative to service standards and the significant improvement to be provided in addressing the increase in need for expansion related to new development. Further, he stated that the Lindsay branch expansion had no BTE deduction applied, reflecting the increase in need for service of development.

[36] Mr. Grunda stated that based on the level of service deficiencies identified in the 2008 Service Delivery Model and the BTE deductions provided in the City's 2009 DCBS, the Recast DCBS maintained the BTE deductions provided in City's 2009 DCBS for the Bobcaygeon, Omemee and Lindsay branches. Moreover, a 50% BTE deduction was provided for the Coboconk and Fenelon Falls branch expansions.

[37] Mr. Grunda stated that the City's 2009 DCBS included branch library expansions for Lindsay, Bobcaygeon and Fenelon Falls with the same percentage of BTE deductions as provided in the Recast DCBS. H2008e opined that this indicates Council's intent to increase the Library standard gradually over time while maintaining existing service levels of service for future development.

[38] Mr. Grunda concluded that the BTE deductions as required by the DCA are appropriate for the five library expansion projects within the Recast DCBS. These deductions are reasonable as they recognize the tangible level of service improvement

to the benefit of the existing community while addressing the increase in need for service of development over the 10-year forecast period.

[39] Mr. Grunda confirmed that the 2014 DCBS is reflective of the same 2008 Library Strategic Plan. Under cross-examination, Mr. Grunda stated that the 2008 Library Strategic Plan recommends expansion to the library facilities based on the ARUPLO standards.

[40] Mr. Grunda stated that the City had never achieved the ARUPLO standards but rather, had sought to maintain its current level of services over time. His evidence identified that the ARUPLO standards informed level of service improvements but were not used to recommend an immediate standard for compliance.

[41] Mr. Keleher referenced Table 3 of the 2008 Library Strategic Plan that identified several of the City's existing library branches being below standard in terms of size, based on the ARUPLO standard. He relied on the ARUPLO standard as it was identified in the 2015 Peer Review Study that stated that:

In the DCBS, the Bobcaygeon Library Renovation and Expansion BTE is based on the increase in gross floor area. All other facility expansions are listed as 100% attributable to growth in that they are providing additional floor area. The Library Strategic Plan identifies that the facilities are currently undersized for the current service requirement. Therefore, it is recommended that deductions be made for BTE to reflect these improvements to the existing population. The 2009 DCBS recognized a broad BTE of 50% for all expansion except the Lindsay expansion which was determined to be 100% growth-related. For the purposes of the peer review it is recommended that this more conservative approach be used to recognize the BTE of the expansions that are identified in the Strategy Plan.

[42] Mr. Keleher identified that, with respect to the Lindsay branch expansion, the 2008 Strategic Plan identified an existing need to improve accessibility at the City's main library:

Lindsay as the Main library requires enlargement, improved Handicap Accessibility, and elimination of the ridge-like connection between the Children's and Adult areas. While the 1970's building was designed to

accommodate a third floor addition structurally, an expansion on the main adult level to the south would be more efficient from a staffing perspective.

An increase in area of about 1,300 square feet is required to meet the ARUPLO Standards. This is half the floor plate of the 1970's addition. Given the cost of such a small addition plus the larger role Lindsay has as the Main Library for the system, it would make sense to consider building a larger extension.

[43] Mr. Keleher stated that based on the size of the expansion relative to the existing space needs alone, the BTE for the Lindsay expansion project should be at least 40%. This percentage of the 3,000 square foot expansion would bring the library up to minimum standards. The BTE should be moderately higher to account for the shared benefit (between existing and new growth) of the improved accessibility that the Lindsay expansion will allow for that all City residents will benefit from.

[44] Mr. Keleher indicated that the library expansions are all or in part servicing existing needs. In his revised DCBS calculations, he removed the PPB allocations. He stated this is different from where the 2015 Peer Review Study removed \$1,146,610 in costs from the Net DC Eligible Costs, the additional changes to BTE/PPB to reflect the extent to which the library projects truly benefit existing development and bring those existing facilities up to base minimum standards, and that another \$879,070 in Net DC Eligible Costs should be removed from the 2014 DCBS calculations.

[45] The ARUPLO standard was an area of contention in the Hearing. However, the Tribunal is persuaded by Ms. Baker's argument:

if the City is correct and the ARUPLO standards have not been approved, and cannot be relied upon, then the Tribunal has no evidence before it to justify any Library Expansions being included within the 2014 DCBS and the 2014 DC By-laws. In other words, if the City is correct that the ARUPLO standards are not to be used, then it flows that the Library Expansions must be removed from the by-laws all together because the need for any library expansion has not been justified in the 2014 DCBS under any other objective standard.

[46] The 2008 Library Strategic Plan identified the problems with the existing facilities and the size of the expansions that are required to bring the facilities up to standard. The path forward was identified in the 2008 Library Strategic Plan to:

...adopt one of the District Library Models proposed and the City fund the Library sufficient to reach ARUPLO Standards and provincial accreditation designation within the next 10 years." The next 10 years would be to 2018, which is in the planning period of the 2014 DC By-laws.

Fire Administration

[47] The issue under dispute before the Tribunal is related to the inclusion of the administration component of the Lindsay Firehall expansion and its compliance with subsection 2(4) of the DCA which sets out ineligible services for which a municipality may impose a DC. Overall, the Tribunal prefers the evidence, submissions and position of the Appellant.

[48] Mr. Keleher stated that in accordance with the DCA, recovery of administration facilities was not DC eligible, and the Fire Administration facility should not be included in the DC. It is his opinion that if the Tribunal is to find that identified administration facilities are DC eligible, by looking at the BTE in isolation and based on the allocation of BTE for the Central Training Facility (roughly proportional to the ratio of existing population to total future population), the BTE for the Fire Administration facility should be at least equivalent of 87%. Mr. Keleher stated that the construction of general administration space for municipal and area boards includes the individual administrative spaces associated with each department or division of the municipality, or board, and these costs should be removed from the calculation of DCs.

[49] It was the opinion of Mr. Grunda that the service exclusion was incorporated into the DCA to remove a municipality's ability to fund growth-related capital costs for City Hall and similar general administrative headquarters. He stated that the Financial Information Return ("FIR") informs the definition of general administration of municipalities. He asserted that the FIR for fire services, as an example, provides for

administration; however, this administration relates to the front-line delivery of fire services within the municipality and not the general administration of the municipality.

[50] It was Mr. Grunda's opinion that the Administration Facilities for Fire and Paramedic Services within the City's 2014 DCBS is an eligible category of expenditure for inclusion in the City's DC and does not represent "headquarters for the general administration of municipalities", which is ineligible under the DCA. Mr. Grunda disagreed with the BTE calculation methodology of Mr. Keleher and states the replacement approach to calculate the BTE is appropriate.

[51] Under cross-examination, Mr. Grunda acknowledged that the FIR has never been provided by the Province to assist in the interpretation of the DCA. Moreover, Mr. Grunda confirmed that the document he was referencing from the FIR does not apply to the Schedules specifically related to DC Reserve Funds and DC rates.

[52] Ms. Baker argued that the location of the service of headquarters for general administration is irrelevant and articulates the following:

While the parliamentarians used provision of headquarters for the general administration of municipalities and local boards and "city halls" interchangeably, the DC Act itself does not. Moreover, what is important is the intention behind the language, to not include as part of the development charge regime services that are to the benefit of every single citizen of a community, regardless of the size of that community. It cannot be suggested by the City that the Fire and Paramedic administration services are not to the benefit of the entire community. Moreover, it cannot be considered appropriate that to move these services outside of city hall, a municipality can now get around the ineligible provision of the DC Act.

[53] The "draft" 2010-17 Fire Master Plan was presented during the cross-examination of Mr. Keleher. He stated that the services identified as administration under the plan are administrative functions like the general administration of the municipality. They are some of the same administrative functions provided by any number of other departments within the municipality, within corporate headquarters, which benefit all the residents and therefore are ineligible for DC funding.

[54] Mr. D'Agostino argued the "golden rule of literal construction" on how to interpret statutes. Although the Tribunal agrees with the assertion, it is not persuaded by Mr. D'Agostino's interpretation with respect to this matter.

Storm Sewer Capacity Studies

[55] The matter before the Tribunal regarding SSCS is to determine if the inclusion of this project is DC eligible. Overall, the Tribunal prefers the evidence, submissions and position of the Appellant.

[56] Mr. Drever identified that within the 2014 DCBS, the City included an SSCS in the Roads Engineering Capital Plan and an assigned a share attributable to growth of 22% for SSCS. In two sample studies Mr. Drever found that existing drainage conditions and the condition of existing infrastructure were reviewed. The Fenelon Falls study concluded that:

existing sewer sizes remain valid, and recommendations for repair of deteriorated infrastructure. No recommendations are made with respect to upgrading infrastructure to accommodate future development.

[57] Mr. Drever referred to the Bobcaygeon Study that identified several existing sewers that are undersized relative to current engineering standards identified and an upgrade program to meet existing drainage conditions is developed. The Bobcaygeon Study states:

The analysis of the existing storm sewer system has been based on the existing level of development within the community. It has been assumed for the purpose of this study that future development will implement stormwater management measures (e.g., SWM ponds, infiltration techniques etc.) to control runoff rates to existing levels.

[58] Mr. Drever cited the Local Service Policy in the 2014 DCBS and the 2014 Peer Review, which stated "stormwater quantity and quality works are the direct developer responsibility through local service provisions." Mr. Drever opined that such a policy is appropriate as stormwater management is very site-specific and should be the direct

developer's responsibility unless there is a broader master plan that is cost shared on an area-specific basis.

[59] It was Mr. Drever's opinion that the types of SSCS conducted by the City are no different than Roads Needs Studies or Structural Appraisals. These types of studies are asset management related and should be entirely tax-supported as they identify repairs required to maintain existing service levels or upgrades necessary to meet current engineering standards.

[60] Mr. Drever's evidence indicated in his overall evidence that the SSCS envisioned in the 2014 DCBS are indicative of state of good repair studies to inventory and address existing conditions and are therefore asset management related. In support of his position, Mr. Drever referenced the Terms of Reference for the Fenelon Falls Study as an example, focused on "inventorying and assessing" the existing drainage system. He referenced the recommendations and opined that the conclusions of the study confirmed that the existing storm sewer trunk sizes remain valid, and recommendations were made for the repair of the Francis Street Culvert.

[61] Mr. Drever reviewed the recommendations of the report which included the creation of an overall Storm Water Management Plan ("SWMP") for the community that would address future requirements. It was Mr. Drever's evidence that the overall SWMP was akin to a Master Plan, which was a report that was separate and distinct from the SSCS referred to in the 2014 DCBS.

[62] In his examination in chief, Mr. D'Agostino reasoned that the studies identified in the 2014 DCBS are in the same category as other studies noted therein, such as the Roads Needs Study and various masterplans. They are the type of study supported by Mr. Drever. Mr. Rojas testified that it was the City's intention to undertake studies in accordance which included the criteria supported by Mr. Drever.

[63] Mr. Drever stated that the studies should either be removed from the Development Charge Capital Plan or alternately assigned a Share Attributable Growth of 0%.

[64] Mr. Rojas stated that the purpose of the SSCS is to examine the systems to assess how they function under existing and theoretical future conditions and to identify related capital needs arising from infrastructure deficiencies, anticipated growth and development and other factors. He continued that these studies inform local service conditions of development, inform the URR and highlight parameter changes due to time, growth, and urbanization.

[65] In his reply witness statement, Mr. Rojas acknowledged that the studies referenced by Mr. Drever are from 2004. He advised that the SSCS now contemplated by the City will follow a master plan approach under the Municipal Class Environmental Assessment (“MCEA”). He continued that the planned SSCS are expected to identify growth-related capital needs and design criteria to be implemented by the URR capital program or local service conditions of development. Mr. Rojas stated that the inclusion of the SSCS in the 2014 DCBS is appropriate.

[66] Mr. Rojas did not provide any evidence in his witness statement or in his reply witness statement on the content of the studies that the City provided to Mr. Drever.

[67] Mr. Rojas indicated that the SSCS referred to in the 2014 DCBS informed the URR program. However, the Tribunal is challenged to determine how such a link can be made when the details of the URR program are unknown and URR projects are identified only on a program level and not a project level.

[68] Mr. Grunda disagreed with Mr. Drever’s opinion that SSCS should be 0% attributable to growth. He opined that these studies inform the City’s increase in the need for services related to roads. He noted that the City’s 2014 DCBS, 2014 Peer Review and Recast DCBS all include periodic Roads Needs Studies and Structural

Appraisals over the forecast period to 2031. He stated these studies have been assigned an 80% BTE, which is consistent with SSCS.

[69] In evidence, Mr. Grunda identified how the SSCS were dealt with in the 2014 DCBS together with other studies that inform the increase in need for roads engineering services attributable to anticipated development.

[70] Under cross-examination, Mr. Grunda advised that he had read the studies “some time ago.” Ms. Baker contended that “this admission alone, along with not being familiar with the content of the studies, and providing an opinion on an engineering issue, limits the weight on his evidence.”

Fenelon Falls Water Pollution Control Plant

[71] The matter before the Tribunal is to determine if capital costs have been allocated appropriately between growth and BTE respecting the Fenelon Falls WPCP. Overall, the Tribunal prefers the evidence, submissions and position of the Appellant.

[72] Mr. Grunda advised that the WPCP capacity improvements are required to expand the capacity of the plant to allow servicing to accommodate development. He confirms the City's 2014 DCBS BTE deduction of 0% was adjusted to reflect the results of the Fenelon Falls Capacity Study within the Capacity Model. Based on the City's capacity and age BTE formula for water and wastewater services, the BTE deduction in the Recast DCBS is 27% of the total project cost. This deduction is based on the product of the BTE Capacity Ratio of 51% ($3,430 \text{ m}^3/\text{d} / 6,668 \text{ m}^3/\text{d}$) and a BTE Age Ratio of 53% (24 years / 45 years).

[73] Mr. Grunda noted that his opinion is based on his review of Mr. Rojas' witness statement which explains the following Capacity Studies and the Environmental

Assessment for the Lindsay Water Pollution Control Plant, and how these studies informed the City's Capacity Model and Capital Plan:

- Water and Wastewater Infrastructure Review – Lindsay Capacity Assessment & Capital Improvements Plan – Final Report, October 2014 (“Lindsay Capacity Study”);
- Water and Wastewater Infrastructure Review – Bobcaygeon Capacity Assessment & Capital Improvements Plan – Final Report, July 2014 (“Bobcaygeon Capacity Study”); and
- Water and Wastewater Infrastructure Review – Fenelon Falls Capacity Assessment & Capital Improvements Plan – Final Report, July 2014 (“Fenelon Falls Capacity Study”)

[74] Mr. Drever observed that within the 2014 DCBS, the City had included a project within the Sewerage Capital Plan listed as Fenelon Falls WPCP Upgrade (WW-FF-05) at a total capital cost of \$9,130,000. The project had been assigned a share attributable to growth of 100%, and a share attributable to post period growth of 28.48%. In the 2015 DCBS, the City updated the BTE share from 0% to 31% but reduced the share attributable to post period growth to 11.5%. Further, he stated that it is not clear how the BTE share was derived as it is not consistent with that shown on the Table 1 Water and Sewer DC Capital Inputs, provided by the City.

[75] Mr. Drever stated that in the 2012 Municipal Servicing Assessment, UEM Engineering (“UEM”) identified the need for short term modifications to the plant to address operational issues and some growth, to be split between residents and growth. UEM recommended a further expansion by 2030, at a cost of \$8 million. Mr. Drever stated there were no details provided on the extent of the expansion; however, he referenced a table that provides some guidance identifying Water Pollution Control Plant expansion or upgrade costs at \$1,500 m³/d or \$1.5M per ml/d. He advised that in

the 2014 Fenelon Falls Water and Wastewater Infrastructure Capacity Review, expansion of the plant was identified as being required by 2026. The cost of the project was increased to \$9.13 million, and again the scale of the expansion was not identified.

[76] Mr. Drever explained that:

The current rated capacity available within the WPCP is 1,800 m³/d. The rated treatment capacity is measured by “the Annual Average Daily Influent Flow for which the Sewage Treatment Plant is designed to handle.” As such, the rated treatment capacity is measured by the hydraulic loading to the Wastewater Treatment Plant (“WWTP”).

[77] Further, Mr. Drever advised that:

The rated treatment capacity required to accommodate the growth forecast through 2031, as per the 2014 Study, is 2,042 m³/d. This is the forecasted demand, or projection of hydraulic loading, expressed as an Average Day Flow based on the forecasted residential and employment growth through 2031.

[78] Mr. Drever continued to explain that the Ministry of Environment and Climate Protection (“MECP”) Guideline D-5-1 “outlines the approach municipalities are required to take in calculating the reserve capacity available in the WPCP to accommodate new development.” He advised that:

The uncommitted reserve capacity available for development is calculated using a formula that takes into consideration the rated capacity of the plant, the actual average day flows to the plant at the time of the calculation, and the anticipated flows generated by new development.

[79] Based on the foregoing, he opined that “the allocation of capacity for new development or “growth” is connected to hydraulic loading.” Further, he stated that “MECP defines the Rated Capacity of a WPCP “as the Average Daily Flow which the sewage treatment works have been approved to handle.” Rated capacity of plants is not based on Maximum Day Flow, or Peak Flow.”

[80] Mr. Drever stated that where sufficient data exists, PPB can be calculated by comparing “capacity for 2031 needs vs. capacity for post period growth”. The approach,

was identified in the 2020 Development Charge Policies, prepared for the Region of Peel by Watson and Associates, which was proffered as an example of the most current best practice. Represented by a simple formula that is based on a ratio of the capacity provided within period and out of period as follows:

(Capacity Provided-Capacity Required to 2031)/Capacity Provided)

[81] Mr. Drever opined that design capacity of the WPCP, using a ratio of capacity required to meet 2031 needs to capacity, provided:

The City underestimates post period benefit by a significant margin and is therefore not in compliance with the Development Charges Act nor Section 8(1) of O. Reg 82/98. If the calculated expansion of 4,000 m³/d is a reasonable approximation of the scope of the work, it is my opinion that an assigned share of 94% would be appropriate, fair, and in compliance with the Development Charges Act and Regulation.

[82] Mr. Drever stated that from the findings of the 2014 Study, operational issues exist at the plant, which upon completion of an expansion or a re-rating of the plant, would have a clear BTE. He advised it is difficult to quantify on an exact basis based on the information available. In the absence of such details, he opined that the BTE of 31% assigned to the Fenelon Falls WPCP Upgrade by the City in the 2015 DCBS is a fair and reasonable approximation of BTE.

[83] Mr. Drever summarized that the 2014 DCBS inappropriately estimates BTE, and unfairly assesses the share of cost to growth beyond the increase in need for service, and therefore is not in compliance with section 2 and subsection 5(1)(6) of the DCA for the WPCP. Further, he stated that for the WPCP project, the share attributable to post period growth is inappropriately estimated and is not in compliance with subsection 5(1)(2) of the DCA and subsection 8(1)(3) of O Reg 82/98.

[84] Mr. Drever stated that he was prepared to accept the inputs provided by Mr. Rojas to resolve the issue. By using Mr. Rojas' inputs, he was able to revise the PPB from 94% to 64.8%. Mr. Drever stated that the existing plant is operating satisfactorily,

that existing capacity does not need to be replaced and that the upgrade project is entirely for the expansion of the facility to serve the “build out” population.

[85] Mr. Keleher opined that the City used a formula that reduces estimated BTE due to the age of existing assets being replaced is not a capital cost necessary to provide increased services for development; therefore, it is not consistent with the approach set out in the DCA - to recover costs associated with increased needs for service from anticipated development. Further, he stated that “the City’s approach to BTE ignores the benefits that early replacement of assets provides existing residents and presumes through the BTE formula that early replacement of assets represents a ‘lost benefit’ that growth should fund.”

[86] Mr. Keleher opined that the City’s approach to BTE be revised to ensure that the City is only recovering anticipated incremental capital costs for works necessary to service growth and eliminate the reliance on growth to partially fund costs that the ratepayers would have had to pay in the absence of growth.

[87] Mr. Rojas assessed Mr. Drever’s analysis as being invalid. He advised that Mr. Drever’s insistence that the assumed unit cost of \$1500 m³/d should not capture Environmental Assessment (“EA”) design, contract administration and other project components which are clearly part of the capital need; is an assumption that the entire cost of the WPCP Upgrade is directed toward plant expansion. Further, he stated that by disregarding the considerable portion of the upgrade directed toward renewal of existing capacity, the amount of the expansion entailed by the upgrade is grossly overestimated.

[88] Mr. Rojas stated that even if the estimated plant expansion of 4,000 m³/d rested on justifiable assumptions and were considered reasonably accurate, Mr. Drever’s PPB calculation, is invalid because it uses an erroneous input of 242 m³/d of plant capacity required by 2031. He opined that had Mr. Drever used the correct figure of 2,042 m³/d a figure which is clearly stated in the 2014 Fenelon Falls capacity review. he would have

computed a PPB of 49% instead of the unrealistic 94%. He also opined that if Mr. Drever used the more defensible plant expansion figure of 1,200 m³/d, he would have computed an even lower PPB of 32%.

[89] Mr. Rojas stated that if Mr. Drever's calculations were valid, his approach to imputing plant capacity would still be inferior to simply extracting the appropriate plant capacity figures from the 2014 Fenelon Falls capacity study, which are the following:

- Existing Capacity: 1800 m³/d, assuming rated capacity is existing capacity.
- Proposed capacity: 2487 m³/d which corresponds to build-out in 2038.
- In-period Required Capacity: 2042 m³/day which corresponds to 2031.

Combining these figures with the facts that the capacity of the Fenelon Falls WPCP was last renewed or expanded in 2000 and that in 2014 the Fenelon Falls WPCP Upgrade was anticipated to occur in 2024, he finds for the project that:

- $BTE = (1800 / 2487) (24 / 45) = 38\%$; and
- $PPB = (2487 - 2042) / 2,487 = 18\%$.

[90] Based on the foregoing, he rejected Mr. Drever's figures of BTE= 31% and PPB= 94% for the same project.

[91] Under cross examination Mr. Rojas conducted a calculation by using inputs found in paragraph 24 of his reply witness statement and input them into the formula found in the 2014 DCBS, which he relied upon in his witness statement as the correct formula to use for the calculation of PPB for the Fenelon Falls WPCP. The Tribunal notes that the calculation would have resulted in the exact same PPB as Mr. Drever arrived at, being 64.8%. This was not acknowledged by Mr. Rojas, and he remained

strident in defending his position of 18% PPB, which was arrived at by using a different formula from the one used in the 2014 DCBS.

[92] Mr. Grunda, in support of Mr. Rojas, confirmed that his calculations of a BTE deduction of 38%, based on a capacity ratio of 72% and age ratio of 53%, and PPB deduction of 18%, are accurate and appropriate.

Challenges With Engineering Projects

[93] The matter before the Tribunal is to determine if there are estimated project costs that have been overstated, taking into consideration the City's approved capital budgets, master plans and capital forecasts and previous development charge background studies.

[94] The Tribunal was presented with considerable evidence by both Parties; however, the fundamental issue before the Tribunal amounts to transparency first, and then determinations of fairness and reasonableness.

William Street North Bridge over Jennings Creek ("Ops 1 Drain Bridge")

[95] The Tribunal prefers the evidence, submissions and position of the Appellant.

[96] Mr. Rojas stated that in 2014, the Kawartha Region Conservation Authority ("KRCA") undertook a Flood Plan Mapping Study for the Ops 1/Jennings Creek Watershed area ("KRCA Study"). Informed by that study, the 2014 DC Study identified the Jennings Creek Culvert Structures project as a growth-related capital need. The project involves a series of three large culverts by which Jennings Creek crosses William Street North, a Vacant Lot east of William Street North and the City's Victoria Rail Trail. The KRCA Study recommended enlargement of the first and third culverts, removal of the second culvert and potential minor rerouting of Jennings Creek to improve the flood plain and foster development in the vicinity. Mr. Rojas opined that while the project benefits existing development through the replacement of two culverts,

the BTE figure of 70% designated for it in the 2014 DCBS seemed overly high. He proffered that the BTE figure of 50% cited in the 2015 DC Study for the same project to be more reasonable.

[97] Mr. Drever stated that the City advised that the Jennings Creek Culvert Structure Replacement project “lies within the vicinity of Pinch Point “A” as described in Section 14 (Infrastructure Improvements) of Ops 1 Drain/Jennings Creek Flood Mapping Study (2014) by KRCA, and advised:

The project is currently planned to include enlargement of the William Street N. culvert, removal of the defunct GTR culvert and berm and enlargement of the VRTC culvert and may include minor rerouting of Jennings Creek.

[98] Mr. Drever opined the project would connect William Street North in the existing Springdale Gardens (Springdale Gardens is a built out subdivision. The existing subdivision currently has a single road connection for over one hundred lots through the subdivision to the west to Angeline Street) subdivision with the existing Lindsay urban area to the south.

[99] Mr. Drever highlighted that within the Springdale Gardens subdivision, the existing roads all provide a local road function, with indirect access to Angeline Street North. He opined the Jennings Creek Culvert Replacement project will be of primary benefit to the existing residents of Springdale Gardens, in providing a secondary access to the existing Lindsay urban area. He continued that the road fabric within Springdale Gardens, and in the subdivision to the east, will discourage infiltration of traffic from development to the south of Jennings Creek, as other more direct options to Angeline Street North, such as Alcorn Drive exist.

[100] Mr. Drever stated that assigning a 70% BTE to the Jennings Creek Culvert Replacement project does not recognize the full BTE realized and unfairly assesses the cost of the replacement beyond the increase in need for service and is therefore not in compliance with section 2 and subsection 5(1)(6) of the DCA. He stated that a

reasonable and fair allocation of BTE, in compliance with the DCA and O Reg 82/98, would be 90%, acknowledging potential for some limited growth within the existing Springdale Gardens subdivision.

[101] Mr. Rojas rejected the totality of Mr. Drever's assessment and cites the following to identify the project is concerned with growth and development:

The Ops #1 Drain and Jennings Creek are a vital component of the local infrastructure and are facing pressure from continued growth and future urban expansion. Both watercourses are subject to flooding due to urbanization and its associated land use changes. Existing flooding concerns may be amplified by future growth and need to be addressed to manage flood water flow within the drainage area. In particular flooding has been experienced at Commerce Road close to the south Entrance of the Lindsay Square Shopping Mall, Highway 7/35, McLaughlin Road, and west of Highway 35 adjacent to the airport and at Jennings Creek in the vicinity of the Victoria Recreation Transportation Corridor. Flooding issues appear to result from increased runoff due to change of land use from agricultural to mixed residential and commercial uses. Because of increased development pressures in the upstream area, numerous studies have been carried out in the past to attempt to understand and reduce future flooding.

[102] Mr. Rojas stated that the KRCA identified watercourse flow and flooding concerns regarding three culverts comprising an area identified as "Pinch Point A". He continued that those culverts are the subject of the Jennings Creek Culvert Structures project and that the KRCA outlined the need for culvert upsizing or removal and the negative impacts of upsizing upstream culverts without also upsizing downstream culverts.

[103] Mr. Rojas stated that the:

Jennings Creek Culvert Structures project is growth-related and while the project benefits existing development, the BTE figure of 70% designated for it in the 2014 DCBS seems overly high, given there is no immediate need to replace the subject culverts from a lifecycle perspective.

He stated that finding the BTE figure of 50%, cited in the 2015 DCBS for the same project, was more reasonable.

[104] Mr. Drever responded to Mr. Rojas' opinion by further reviewing the KRCA Flood Plan Mapping Study. Mr. Drever stated that:

the report looks at the impact of a minor modification to the floodplain via a cut and fill balance of the floodplain. The proposed subdivision for the area is aligned with the proposed modifications to the floodplain with only minor encroachments.

He stated that there is no modification or removal of culverts required to permit the subdivision.

[105] Mr. Drever opined that the approach of making minor modifications to a floodplain to accommodate development is common, and is of local benefit, the cost of which is entirely borne by the benefitting landowner. The additional lands owned by the applicant for the subdivision in the area are entirely out of the floodplain, and do not require modification of the culverts to permit development.

[106] Mr. Drever identified that the report assessed some potential improvements that could be made at key points within the system to alleviate flooding. Within the KRCA Flood Plan Mapping Study it is specifically noted:

Although it is beyond the scope of the flood plain study to outline specific infrastructure improvements to reduce flooding, several simple analyses were run to determine impacts on the flood elevations. The existing culvert under the Rail Trail is a 2.5m x 2.0m metal box culvert. The HEC-RAS model was modified by increasing the culvert theoretically to a 7.5m x 6m concrete box culvert. The flood elevation upstream of the culvert decreased by almost 1.5m, from 254.45m to 252.86m. and,

Future comprehensive engineering analyses are recommended to evaluate infrastructure improvements and determine the most cost-effective way to lower flood elevations. The analyses should include culvert upsizing, culvert removal, potential bridge installation, road centreline modifications.

[107] Mr. Drever advised that, within the report, he could find no reference to specific upgrades to the William Street North culvert, nor to the removal of the culvert between William Street North and the Victoria Rail Trail. He could find no reference to reducing the floodplain to support growth.

[108] Mr. Drever proffered that upon reviewing the materials in the context of Mr. Rojas' statements, that the constraining culverts in the vicinity of the William Street Bridge are the Victoria Rail Trail and a vacant lot immediately downstream of the William Street Bridge. He stated that "if there were any benefits to growth associated with infrastructure improvements, these benefits would be entirely local, the cost of which should be entirely borne by the benefitting landowner." He stated that the inclusion of the Jennings Creek Culvert Structures project is not in compliance with subsection 5(1)(2) of the DCA, and that this project in its entirety should be removed from the 2014 DCBS.

[109] Ms. Baker argued that as was determined in the *Amacon* decision, a DCBS must be transparent in its analysis. She continued that for the City to include a project within its 2014 DCBS, it should be transparent and clear as to where the infrastructure is to be located and what its purpose is.

[110] Ms. Baker asserted that what was before the Tribunal on this issue, is not what was presented in the 2014 DC By-laws passed by Council.

[111] Mr. D'Agostino argued that the issue for the Tribunal's consideration is whether the estimate in the DCBS is reasonable and referenced *Peel Region Development Charge By-law 79-2012*.

[112] Ms. Baker argued that the City contended that if only the cost of the culvert was included and it turned out that they needed a bridge, then the City would not be able to collect for the costs of the bridge. She impugned this contention because those bridge costs, when the details of the project were known, would go into a future DC by-law. She continued that if the City puts the cost of a bridge into the DC By-law and later learns that it only needs a culvert as shown in Mr. Drever's analysis, the difference in cost would not be refunded to those who have paid development charges based on the inclusion of the capital costs for the bridge.

[113] Ms. Baker argued that the City would keep the money even if they do not install the bridge. It is for this reason that DCBS are required to be transparent and detailed in terms of project details and project costs to be fair to those paying development charges.

Urban/Rural Road Reconstruction Program

[114] The matter before the Tribunal is to determine if the costs attributed to the URR Reconstruction Program ("URR") are growth related.

[115] The position of the Appellant is that the inclusion of a broad category titled URR without any details as to what is included in the program is contrary to the DCA. Mr. Drever supports this position and stated the inclusion of a category of an undefined URR program is not in compliance with subsections 5(1)(2), 5(1)(3) and 5(1)(6) of the DCA and should be removed from the 2014 DCBS. The Tribunal concurs.

[116] Mr. Rojas stated that his understanding was that this issue relates to the question of whether it is reasonable for the 2014 DC Study to assign a positive but nominal Benefit to Growth ("BTG") to the URR. He supported the rationale for this action via a memorandum to Robyn Carlson (City Solicitor) from Andrew Grunda (Watson & Associates Economists Ltd.) dated June 7, 2016 Re: City of Kawartha Lakes - 2015 Development Charge (DC) Background Study, from which he opined:

Overall, the program is included in the 2014 DC Study on the basis that it meets the needs of both existing development and growth, given the complex and multidimensional nature of the projects it facilitates.

[117] Mr. Rojas stated that growth and urbanization precipitate the need to improve the road network to address increased traffic demand and mitigate traffic congestion to maintain or enhance road service levels. He continued that such needs routinely relate to the challenge of integrating growth into the road network through the enhancement of various dimensions of road network capacity. He continued that part of that integration relates to the road network's ability to accommodate new or increased needs relating to

multimodal transportation, on-street parking, traffic safety and storm water management. He sets out his opinion that since road network capacity is multidimensional, and thus not entirely measurable by lane-kilometres, and as growth entails network-wide impacts, it follows that road network capacity may be enhanced by the following general types of capital works:

1. Network Expansion: Capital works intended to preserve, extend, or improve road service levels, or otherwise increase road network capacity, through physical network expansion, such as new roadways, new traffic lanes and new traffic signals. Such capital works tend to be specifically identified in Transportation Master Plans; and
2. Network Upgrade: Capital works intended to preserve, extend, or improve road service levels, or otherwise increase road network capacity, through network upgrading, such as traffic congestion mitigation, traffic safety measures and network integration. Such capital works tend not to be specifically identified in Transportation Master Plans.

[118] Mr. Rojas supported his general observation with the premise that as a general rule, network expansions primarily benefit growth while network upgrades primarily benefit existing development, a distinction reflected by the City's various DC studies. He advised that the URR often involves several of the following road network upgrades:

1. Widening and or addition of lanes, intersections, on street parking, bicycle lanes etc. not otherwise specifically identified in Transportation Master Plans or DC studies;
2. Expansion and/or upgrade of the right-of-way, base and/or surface of roads; Installation, extension and/or upgrade of sidewalks, curbs, gutters, boulevards, and storm sewer systems; and

3. Other road improvements intended to facilitate urbanization or otherwise to preserve, extend or enhance operational aspects of the road network such as network integration, traffic flow, traffic safety, drainage, resiliency, and durability. Such upgrades are means by which to enhance road network capacity across multiple dimensions without necessarily having to widen roads through the addition of traffic lanes.

[119] Mr. Drever identified that the 2014 DCBS included a URR line item of \$4.2M from 2014-2031. He continued that the share attributable to growth starts at 22% in 2014 and increases 1% annually to reach a share attributable to growth of 36% in 2031.

[120] Mr. Drever stated it was his understanding that the Road Surface Upgrade Under the URR Program – 2012–2016 (the “Table”) provided by the City formed the basis of the inclusion of the URR program within the 2014 DCBS.

[121] Mr. Drever advised that in his review of the 37 projects listed, none are specifically identified in the DCBS Roads Program, and none were identified as a specific project necessitated by growth in the 2012 Transportation Master Plan (“TMP”) prepared by UEM.

[122] Further, Mr. Drever advised that the City’s Roads Infrastructure Guidelines set out the minimum requirements for road infrastructure within the City. The Roads Infrastructure Guidelines defer to the 2012 TMP for road classification. Of the 37 projects listed within the Capital Program, all were classified as local roads within the TMP.

[123] Mr. Drever opined that improvements were established by estimating trips from proposed residential and employment growth shown on the plans, and modelling capacity to identify areas which failed to provide adequate capacity and needed improvement.

[124] It is the opinion of Mr. Drever that the planned upgrades identified in the Table, except for four projects, are intended to meet minimum municipal requirements for road infrastructure in the City. Of the four projects which identify upgrades exceeding the minimum municipal standard (“MMS”), only three are within a growth centre. He advised that the Municipal Engineers Association (“MEA”) defines same purpose, use, capacity, or location as:

the replacement or upgrading of a structure or facility or its performance, where the objective and application remain unchanged, and the volume, size and capability do not exceed the minimum municipal standard, or the existing rated capacity, and there is no substantial change in location.

[125] It is the opinion evidence of Mr. Drever that the costs attributable to URR projects required to meet the MMS are not growth related and should be entirely ratepayer funded. It is his position that the inclusion of a category of undefined URR projects is not in compliance with subsections 5(1)2, 5(1)3 and 5(1)6 of the DCA and that they should be removed from the 2014 DCBS.

[126] Mr. D’Agostino argued that under cross-examination, Mr. Drever agreed that in other municipalities, he had observed the use of program level costings in other DCBSs for matters with forecasting problems like the URR program.

[127] Mr. Rojas responded to Mr. Drever’s assessment by stating that:

As road capacity and improvements thereto exist regardless of design standards, Mr. Drever's contention that the three subject road reconstructions are growth-related only because they happened to exceed applicable design standards is unsupported by reality. And because Mr. Drever has admitted that these projects are indeed growth-related, it stands to reason, in my opinion, that all other urban road reconstruction projects are similarly growth-related, given their mutual qualitative comparability.

[128] Additionally, Mr. Rojas stated that the URR program provides for road capacity improvements which benefit existing and new development proportionately, regardless of how those improvements compare to design standards.

[129] Mr. Rojas' evidence centred around the projects identified in the 2016 Grunda memo to Ms. Carlson; however, none of that information was before Council in 2014.

[130] Ms. Baker impugned Mr. Rojas' opinion that the URR program would "create capacity such that there was a substantial component of more than 20% of the cost of the program (depending on the year) should be attributable to growth."

[131] Ms. Baker argued that by having an undefined URR program, there are no assurances that the funds collected are being used for the infrastructure improvements because there is no information as to what the infrastructure improvements are. Ms. Baker continued that "this effectively creates a "slush fund" over which the City can spend as it sees fit." Ms. Baker argued that this is entirely contrary to the intent and purpose of the DCA and the requirement to prepare a transparent DCBS.

DC By-laws and Pre-payment for Hard Services

[132] The matter before the Tribunal is to determine if the adoption of the 2014 DCBS rectify the entirety of 2014 DC By-laws contraventions of the DCA as claimed in Staff Report CORP2014-023 and determine if the adoption of the 2014 DCBS result in increases in the total development charge rates payable during remainder of 2014 and as well as in 2015. If so, was such an outcome consistent with the directions of, as well as the information supplied to, Council at the time of its adoption. On this matter, the Tribunal is persuaded by the arguments put forth by the City.

[133] Mr. Keleher opined that the City's approach to phasing-in the full DC rates as set out in DC By-law 2014-238 was flawed and over-charged for some DC services, including DC services that were in the 2009 DC By-law, but not included in the 2014 DC By-law. He observed that in other instances, the 2014 DC By-law phase-in overcharged for a given DC service relative to what the maximum allowable, fully phased-in rates would be. He stated that the DC reserve funds should be reconciled to ensure that even if the total amount of DCs imposed to an applicant would be unchanged, the mix of

revenues between DC services would need to be corrected to ensure that each DC reserve fund for each service is made whole.

[134] Mr. Keleher further advised that the Notice of the City passing a DC by-law, the Council's intended approach to phasing in DC rates is set out as follows:

The schedule of development charges imposed by the by-law came into effect on August 13, 2014, and are implemented on a phased basis as per Schedules 1 and 2 to the by-law. With respect to the total development charge aggregated across all services, the phase in results in no increase for the balance of 2014, an increase to the average of the 2014 and 2016 levels for 2015 and finally an increase to the full level (as calculated in the development charge background study) for 2016 onward.

[135] Mr. Keleher drew to the attention of the Tribunal the intended nature of the phase-in through the Staff Report CORP 2014-023:

As detailed in the addendum to report CORP-2014-015, the phase-in adopted by Council corresponds to Option 4 of that report, where the intended structure of the phase-in is as follows with respect to the sum of development charges over all services (i.e., the aggregate development charge) for each type of development:

1. Maintain the effective predecessor aggregate development charge, inclusive of related former exemptions, for the balance of 2014.
2. Impose the average of the predecessor and new aggregate development charges for 2015, subject to indexing.
3. Impose the new aggregate development charge for the post-2015 life of By-law 2014-238, subject to indexing.

[136] Mr. Keleher referenced the Minutes to a Special Council Meeting on October 14, 2014, which included an agenda item to review the proposed amendments to the 2014 DC By-law to correct the issues related to the phase-in. According to the meeting minutes, Staff advised that through the amended 2014DC By-law it will implement Councils intended approach to phasing-in the DC rates:

Director Taylor advised that the proposed amendment to the by-law is administrative in nature and that it will implement the phased-in approach to development charges as intended by Council.

[137] Mr. Keleher opined that to ensure regarding how pre-payments of DCs for hard services are treated and accounted for, the 2014 DC By-laws should have continued to the practice as expressed in the City's 2009 DC By-law.

[138] Mr. D'Agostino argued that under cross-examination, Mr. Keleher agreed that the relevant provisions in By-law 2014-238 were lawful. It was simply his opinion that the 2009 provisions were better. He stated that both By-laws required an agreement as part of the prepayment process and that even with the 2009 version of the DC By-law, there are going to be circumstances not addressed in the by-law that would have to be dealt with by an agreement.

[139] Ms. Baker argued that in By-law 2014-238, the detailed specifications from the 2009 DC By-law had been removed and that the way the replacement provisions (Sections 5.08 and 5.09) have been formulated provide no clarity and guidance. She argued that while these provisions appear to allow for the possibility of such pre-payment in any given case, it does not require it.

[140] Ms. Baker's expressed concern is related to the deferral of complete discretion to City staff to decide whether a pre-payment will be required in each case. Ms. Baker argued that these provisions open the door for different treatment for different landowners resulting in the potential of residential rates going forward being higher than they would otherwise be if there is not a predictable method of collecting DCs.

[141] Mr. D'Agostino argued that the interpretation of a by-law, including the determination of Council's intent is not a matter for evidence. It requires a review of the by-law. He impugned Mr. Keleher's opinion as it was beyond Mr. Keleher's expertise to opine with respect to Council's intention regarding phase-in provisions or its intention with respect to the subdivision agreement provisions.

[142] Mr. D'Agostino advised that the City agrees with the Appellant's submissions in part. By-law 2014-264 was meant to correct the schedules in By-Law 2014-238; however, he argued that the change was not retroactive. He continued that only this

Tribunal has the authority to make the change retroactive by replacing the schedules in By-law 2014-238 with the Schedule 1A and 2A in By-law 2014-264.

Lindsay Urban Servicing Boundary

[143] The matter before the Tribunal is to determine if the 2014 DCBS includes Water & Sewer Projects which extend services beyond the Lindsay Urban Servicing Boundary and whether the inclusion of these projects was appropriate and in accordance with the DCA. The Tribunal is persuaded by the evidence, submissions and arguments put forth by the Appellant.

[144] The key factor for the Tribunal is determining what information was before Council at the time of the passing of the 2014 DC By-laws.

[145] Mr. Rojas stated it was his understanding that this issue relates to the question of whether it is appropriate of the 2014 DC Study to include water-wastewater capital works relating to an area south of the Lindsay Golf Course. He stated that the servicing boundary underlying the 2014 Lindsay Water-Wastewater Capacity Study, and thus the 2014 DC Study, is consistent with the 2011 City of Kawartha Lakes Growth Management Strategy and the 2013 South East Lindsay DC Study. He opined that the latter documents identify development areas immediately south of the Lindsay Golf Course. Further, he stated that, like the 2013 South East Lindsay DC Study, the 2014 DC Study includes capital needs arising from growth anticipated to occur in these development areas.

[146] Mr. Grunda advised that the City adopted By-Law 2013-175 to impose an area-specific DC for the Lindsay SE Development Area. The 2013 Lindsay SE DCBS was the basis for By-law 2013-175.

[147] Mr. Grunda stated Chapter 3 of the 2013 Lindsay SE DCBS summarizes the anticipated development used in the calculation of the area-specific DC. The following is extracted from this chapter:

The lands considered within the review area are referred to as the Lindsay South-East Development Area. Within the South-East Development Area there have been three sub-areas identified, each with different servicing requirements. Sub-area E1 is currently within the City's urban service area boundary, consistent with the City's recently completed Growth Management Strategy and Official Plan. The remaining sub-areas, E2 and E3 are outside the existing urban service area boundary and have been excluded from the area-specific DC calculation at this time.

[148] Mr. Grunda highlighted that the 2014 DCBS established the following respecting the 2013 Lindsay SE DC:

It should be noted that the City held public meetings on July 19, 2013 for development/capital charge background studies and by-laws for the following capital works:

1. Lindsay Southeast Development
2. Omemee Wastewater Upgrades
3. Fenelon Falls North St./Helen St. Upgrades

Since implementing by-laws have not yet been enacted for the latter two capital works, their individual projects have been integrated into the capital forecast herein or as committed excess capacity in the case where the project was completed in 2013 or prior. Therefore, the City will no longer pursue area-specific capital and development charges in connection with these two capital works. Similarly, outstanding Lindsay South-East Development projects have too been integrated into the present study, so the City will no longer need an area-specific DC for this capital work.

[149] Mr. Grunda stated that the City's 2014 DCBS growth forecast is based on the City's 2011 Growth Management Study ("GMS"). The Settlement Area Boundary identified in the GMS Study includes the lands identified as Sub-Area E1 in the 2013 Lindsay SE DCBS. The City's 2014 DCBS growth forecast is based on the GMS. He stated that the Settlement Area Boundary identified in the GMS includes the lands identified as Sub-Area E1 in the 2013 Lindsay SE DCBS. Based on this premise, it was his opinion that the 2014 DCBS and Recast DCBS did not include water and

wastewater projects outside of the settlement area and service boundary used in the DC calculations.

[150] Mr. Drever advised that in 2007, TSH completed the Lindsay Wastewater Collection System Modelling Study (“TSH Study”). Figure 1 from TSH Study, titled “Drainage Areas and Land Use”, included a delineation of the Urban Service Area Boundary. The inclusion of catchment areas NA and E1 within the Urban Service Area in the 2006 Area Specific Development Charge Background Study was consistent with the Urban Service Area Boundary in the TSH Study.

[151] Mr. Drever stated that the City Official Plan (“City OP”) included the Lindsay SE Development Area within the Lindsay Settlement Boundary, but they were excluded from the Town of Lindsay Official Plan 2000 Boundary. The Town of Lindsay Official Plan 2000 Boundary is consistent with the Urban Service Area Boundary identified in the TSH Study.

[152] Mr. Drever highlighted the lands within the Settlement Boundary, but outside the Lindsay Official Plan 2000 Boundary, representing the Lindsay SE Development Area lands, were given a Tourist Commercial designation in the City O P. Section 26.4 of the City OP set out the servicing policy for the Tourist Commercial Designation as follows:

Tourist Commercial Development may be developed on privately owned and operated communal wastewater treatment system and/or privately owned and operated communal water systems.

[153] Mr. Drever opined that there was no intent expressed by Council through the City OP to extend urban services to these lands, and as previously noted by Mr. Keleher, the GMS confirmed that the City’s growth forecast to 2031 could be fully accommodated within the existing built boundary and designated greenfield areas, without consideration of inclusion of the Lindsay SE Development Area.

[154] Mr. Drever is of the view that the 2013 City of Kawartha Lakes Area-Specific DCBS, Lindsay SE Development Area identified Area E1 as being entirely within the

Urban Service Area Boundary of Lindsay, consistent with the Settlement Boundary of Lindsay, was an error and is inconsistent with the approved planning document in place at the time, being the City OP, and with the findings of the GMS.

[155] Mr. Drever stated that based on the foregoing, the 2014 DCBS includes water and sewer projects which extend services beyond the Lindsay Urban Service Area Boundary, and that the inclusion of these projects is not in compliance with subsection 5(1)2 of the DCA and subsection 8(1)3 of O Reg 82/98, and that they should be removed from the 2014 DCBS, or alternatively assigned a PPB of 100%.

[156] Mr. Rojas advised that the position that the statement Council had not previously expressed an intention to extend water and wastewater services to such lands prior inclusion of the capital needs in the 2014 DCBS is unsupported as Council made such an expression by adopting the 2013 SE Lindsay DCBS.

[157] Mr. Drever identified that the City OP permits tourist commercial development to be serviced with communal and/or private water-wastewater systems.

[158] Mr. Rojas agreed with that finding, but advised that:

...it does not follow, that tourist commercial development must necessarily be serviced by such systems. He stated that the OP does not prohibit tourist commercial development to be so serviced. He further stated that that the 2013 South-East Lindsay DCBS and 2014 DCBS are entirely consistent with the City OP as far as they relate to lands subject to the former DCBS.

[159] Mr. Grunda disagreed with Mr. Drever regarding his opinion that Council's intent was to extend urban services to the E1 lands in the City's 2013 DCBS as Council adopted By-Law 2013-175 to recover the capital costs associated with providing municipal wastewater services to these lands. Mr. Grunda stated that, in his experience, the adoption of a DC by-law represents a clear intention of a council in this regard. He also stated he was unaware if By-Law 2013-175 was appealed to the Ontario Municipal Board at the time.

[160] Mr. D'Agostino argued that Mr. Keleher, the only planner to give evidence, could not recall a policy in the City OP limiting servicing to the urban settlement boundary identified in the City OP. Further, he advised that Mr. Keleher confirmed that there is no policy making the urban settlement boundary the urban servicing boundary.

[161] In his closing submissions to the Tribunal, Mr. D'Agostino argued that there is no evidence of an urban servicing boundary in any of the City OP documents and that the Appellant's submissions with respect to an urban servicing boundary are irrelevant.

[162] Mr. D'Agostino impugned the Appellant's position, which fails to acknowledge Exhibit 22, which is the Lindsay Capacity Study Action Plan Summary provided to Council at the same meeting that By-law 2014-238 was passed. He argued that Figure 6-3 of the report clearly showed anticipated development in SE Lindsay proposed within the 2031 development horizon. Similarly, he argued that Figure 6-2 depicts proposed water system upgrades and shows anticipated development within the 2031 development horizon.

[163] Mr. D'Agostino argued the Appellant refers to the Capital Charge By-laws found at Exhibit 13, Tab 97 and 98. He maintained that the Appellant rightly observed that those by-laws are in force and effect. He stated that the City requests that the Tribunal withhold its decision with respect to SE Lindsay to permit Council to determine whether to repeal the Capital Charge By-laws and report back to the Tribunal.

[164] Mr. D'Agostino argued that no evidence was led with respect to whether charges were collected pursuant to these by-laws, and that if of assistance to the Tribunal and subject to the Appellant's right to cross-examination, the City would receive the Tribunal's direction to prepare a report.

[165] Mr. D'Agostino confirmed that the City requested that the Tribunal find that the 2014 DC By-laws did not include water and sewer projects which extended services beyond the Lindsay urban servicing boundary.

[166] Ms. Baker argued that the Peer Review prepared by Mr. Grunda was clear that the 2014 DCBS "... is based on the City's Growth Management Study (GMS) and Statistics Canada Census data."

[167] Ms. Baker reasoned that the above is critical in the context of the DCA as the follows following in subsection 2 (1) of the DCA states:

The council of a municipality may by by-law impose development charges against land to pay for increased capital costs required because of increased needs for services arising from development of the area to which the by-law applies.

[168] In addition, Ms. Baker relied on subsection 5(1), paragraphs 1 and 2 of the DCA in supporting the position of JSCL:

5 (1) The following is the method that must be used, in developing a development charge by-law, to determine the development charges that may be imposed:

1. The anticipated amount, type and location of development, for which development charges can be imposed, must be estimated.
2. The increase in the need for service attributable to the anticipated development must be estimated for each service to which the development charge by-law would relate.

[169] Ms. Baker argued that based on the foregoing, to determine if there are increased needs for services attributable to anticipated development, Council must be clear as to what the growth forecast is. She reasoned that is the "denominator" that was referred to in the evidence of Mr. Keleher. She referenced the *Smooth Run Developments Inc.* decision regarding subsection 2(1) of the DCA:

The wording of this provision is precise and laden with meaning. In more ways than one, this provision is akin to an operatic leitmotif, foreshadowing themes in the subsequent provisions with richer flourishes after the overture. There are two essential requirements. Firstly, there must be an "increase" in needs and; secondly, there must be an "increased" capital costs arising from the increased needs. Each of the requirements is a necessary condition. Together they form the necessary and sufficient conditions before charges can be imposed.

[170] Ms. Baker acknowledged that there would be an increased need for service if there was development planned for the SE Lindsay area. Ms. Baker argued that based on the evidence, there is no growth forecasted in the SE Lindsay area in the 2014 DCBS.

[171] Ms. Baker impugned the position of the City that the Tribunal should have regard for the report in Exhibit 22. She argued that Mr. Grunda's own evidence in his Peer Review was that the Lindsay Capacity Study referenced in Exhibit 22 was not available until after the 2014 DCBS that Council approved was completed. She continued that the City failed to mention that the endorsement of Council regarding the Lindsay Capacity Study, as set out in Exhibit 22, was to implement its findings through future capital initiatives.

[172] Ms. Baker reasoned that given that the Lindsay Capacity Study was adopted the same day as DC By-law 2014-238, clearly it was not intended to be captured by By-law 2014-238, as that would not be a future capital initiative, directly contrary to what the City presented.

[173] Ms. Baker reaffirmed the position of JSCL that the Tribunal cannot consider the Lindsay Capacity Study as it was not to be implemented at the time the 2014 DC By-law was passed.

[174] Ms. Baker referenced that the evidence shows that the Lindsay Urban Servicing Boundary is as shown in Volume 1, Tab 19. She argued that this is a 2009 document which was in effect when Council passed the DC By-laws.

[175] Ms. Baker argued that there is no evidence to demonstrate that this Urban Servicing Boundary was amended in any way, until Council passed the Lindsay Secondary Plan in 2017. In the Lindsay Secondary Plan, the Urban Servicing Boundary is moved to include the SE Lindsay lands. She argued that the Lindsay Secondary Plan is still not in force and effect and was also not in 2014 when the 2014 DC By-laws were passed.

[176] Ms. Baker maintained that the DCA requires the estimation of the amount, type, and location of development. She argued there has been no estimation as to the amount of development for the SE Lindsay Area because the 2GMS does not attribute any growth to this area.

[177] Ms. Baker contended that the inclusion of these works in the 2014 DC By-laws was done with the knowledge that the expansion of the Lindsay Settlement Area Boundary was under appeal.

[178] JSCL requested that the Tribunal order that the City remove the capital costs associated with the water and sewer projects which extend services into the SE Lindsay Area from the 2014 DC By-laws. Alternatively, the Tribunal Order that the capital costs associated with the water and sewer projects which extend services into the SE Lindsay Area remain in the 2014 DC By-law; however, they are assigned a PPB of 100%.

SUMMARY OF DISPOSITION

[179] Upon the whole of the evidence, and in considering those submissions, the Tribunal finds the following:

1. That the Tribunal order the City to attribute a BTE of 100% for the Library expansions for Bobcaygeon, Omemee, Coboconk and Fenelon Falls, and attribute a BTE of 50% for the expansion to the Lindsay Library and therefore remove an additional \$879,070 over and above the amount that the reconciliation removed to reflect the partial settlement of the library issues, from the 2014 DCBS calculations.
2. That the costs associated with the 11,000 square foot administrative space for Fire and Paramedic Services be removed for the purpose of calculating the 2014 Development Charges contained within the 2014 DC By-laws.

3. That the costs associated with the Storm Sewer Capacity Studies be removed for the purpose of calculating the 2014 Development Charges contained within the 2014 DC By-laws.
4. That the appropriate PPB for the Fenelon Falls WPCP is 64.8% and that the 2014 Development Charges be recalculated to reflect this PPB for this infrastructure.
5. That the cost associated with the William Street N. bridge be removed for the purpose of calculating the 2014 Development Charges contained within the 2014 DC By-laws.
6. That the costs associated with the undefined URR program be removed from the 2014 DC By-laws other than the costs associated with the Hamilton Street, Victoria Street South and Ridout Street projects, and that those projects be provided with an appropriate project identifier to ensure that the funds collected go to those specific projects.
7. That Schedule 1A and Schedule 2A in By-law 2014-264 replace the respective schedules in By-law 2014-238.
8. That the City remove the capital costs associated with the water and sewer projects which extend services into the SE Lindsay Area from the 2014 DC By-law.
9. The final order be withheld pending a further reconciliation of the 2014 development charges to be included in the By-law 2014-238 and By-law 2014-264, and further discussion between the Parties on the outstanding methodology questions.

THE INTERIM ORDER

[180] **TRIBUNAL ORDERS** that the appeal be allowed in part and the Directions contained in this Decision.

[181] The Panel Members will remain seized and may be spoken to through the Tribunal's Case Coordinator if there are any issues with respect to the implementation of this Order.

"W. Daniel Best"

W. DANIEL BEST
MEMBER

"Sharyn Vincent"

SHARYN VINCENT
VICE-CHAIR

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