Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: January 23, 2024 **CASE NO(S).:** OLT-23-000314

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

Applicant/Appellant:	Sher Markham Inc.
Description:	Development Charge Complaint
Reference Number:	9704 McCowan Road PLAN 21 139775
Property Address:	9704 McCowan Road
Municipality/UT:	Markham/York
OLT Case No:	OLT-23-000314
OLT Lead Case No.:	OLT-23-000314
OLT Case Name:	Sher Markham Inc. v. Markham (City)

Heard: November 22, 2023, by video hearing

APPEARANCES:

Parties	**Counsel**
Sher Markham Inc. ("Sher" / "Appellant")	A. Lusty H. Ruby
City of Markham ("City")	A. Baker M. Grant J. Kahansky (student-at-law)
Regional Municipality of York ("Region")	B. Ogunmefun S. Whalen

DECISION DELIVERED BY S. TOUSAW AND S. L. DIONNE AND ORDER OF THE TRIBUNAL

Link to the Order

Introduction

[1] Sher appealed to the Tribunal under s. 22(2) of the *Development Charges Act* ("DCA") to the absence of decisions from the City and Region to Sher's complaint to a portion of the Development Charge ("DC"), paid under protest, affecting its development at 9704 McCowan Road, Markham (the "site").

[2] The Tribunal's authority arises from the DCA s. 24(4) which places the Tribunal *in the municipality's shoes* of s. 20(6) related to addressing the complaint. The Tribunal "may dismiss the complaint or rectify any incorrect determination or error" [s. 20(6)] found in relation to a DC By-law.

[3] Sher's complaint is limited to the classification of 20 dwelling units of some 131 total dwelling units on this site.

[4] The applicable DC By-laws are: the Region By-law Nos. 2017-35 (original) and 2018-42 (subsequent updates); and the City By-law Nos. 2017-116 (for hard services) and 2017-117 (for soft services); collectively referred to as "BL(s)" or "DCBL(s)."

[5] The crux of the issue arising from this complaint is whether the 20 units constitute "multiple" dwellings or "apartment" dwellings under the BLs. Sher argues that the disputed units are apartments, not multiples, and requests refunds of $290,280 plus interest from the Region, and $142,440 plus interest from the City.

[6] As explained below, the Tribunal dismisses the complaint to the Region DC (no refund) but allows the complaint to the City DC (warranting a refund).

[7] The Tribunal received written and oral evidence from four professional witnesses, each of whom was qualified to provide opinion evidence on DCs and related land use planning:

For Sher:	Daryl Keleher, Registered Professional Planner (“RPP”)
For the City:	Craig Binning, Professional Land Economist (“PLE”) and Jaclyn Hall, RPP and PLE
For the Region:	Fabrizio Filippazzo, RPP.

Contextual Facts

[8] On the evidence of the witnesses and the submissions of counsel, the Tribunal accepts the following undisputed facts.

- The site is approved for a total of 131 dwelling units (“units”) of varying types within three main buildings: an eight-storey, mixed-use building facing McCowan; with two, five-storey residential buildings behind (“north” and “south” buildings); collectively creating an outdoor courtyard. Automobile parking is located below the courtyard and below these buildings.

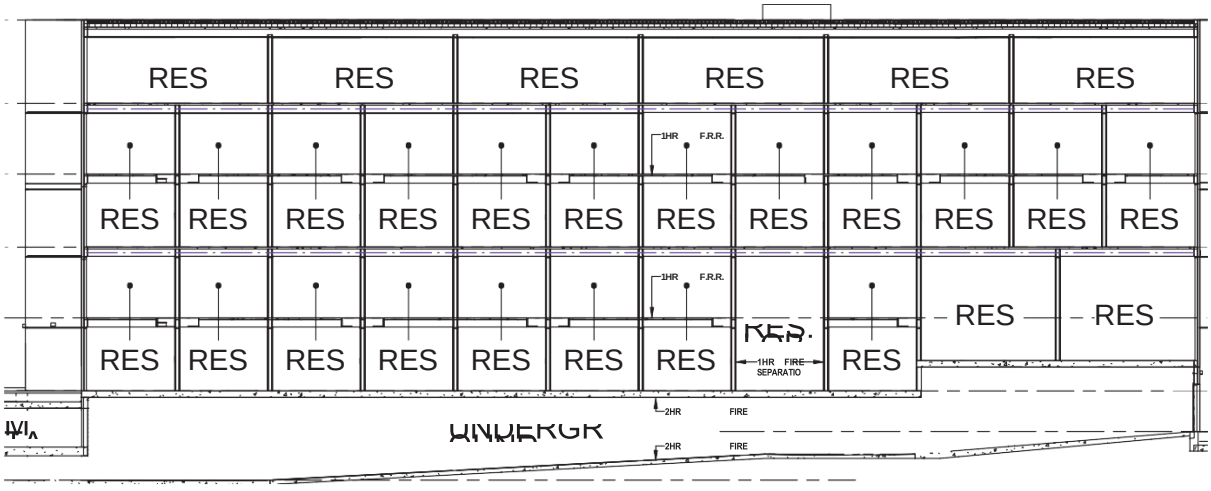
- The Site Concept is illustrated as follows (Ex. 1, p. 30):

- The two five-storey buildings contain a total of 54 units, of which only 20 units (10 units in each building) are disputed.

- The disputed units comprise the “lower” units of the two buildings, each unit having its own “front door” facing and accessing the courtyard. Eighteen of the units are two-storeys and two units are one-storey.

- Above the disputed units are two-storey units (the “upper” units), and above them are one-storey units on the top floor (“top-floor” units). The upper and top-floor units are accessed by common entrances and corridors, and agreed by the Parties to constitute “large apartments” in the BLs.

- These characteristics are illustrated by the following cross-section of the north building (Ex. 1, p. 60):



Party Positions

[9] Sher contends that the 20 units are large apartments, not multiple attached dwellings, such that refunds from both the City and Region are warranted. Sher refers to the StatsCan data used in the BLs’ Background Studies (“Study/Studies”) and the related persons per unit (“PPU”), arguing that it is occupancy that drives the need for services, not the buildings per se. Like the upper units, the disputed units should be considered as large apartments, as justified by both their actual service demands and a

reasonable application of the BLs' definitions.

[10] The City responds that a complaint is disallowed from challenging the basis of DCBL and must focus on the BL itself. The issue is not what the Appellant argues ought to apply in this case, but rather how the BL results in a calculated DC. The Study may provide context and rationale, but even if a BL, as passed, differs from the study, the BL must be complied with. Only a DC calculated in error may be altered by the Tribunal. The City argues that the BL definitions are mutually exclusive such that no ambiguity arises in their application to this site. The disputed units should be found as multiple dwellings.

[11] The Region aligns with the City, responding that this complaint asks the Tribunal to go back in time to examine the policy decisions related to unit types, for which the Tribunal has no jurisdiction. DCBLs are based on a municipality's estimate of service costs for different types of units, being estimates by PPU, not for the service demands of a particular development. Definitions cannot be ignored on a site-specific basis. The Region argues that the definitions are clear and the DCs as paid should be upheld by the Tribunal.

Findings

[12] As an over-riding issue, the Tribunal's jurisdiction is clarified first, based on the Parties' submissions and filed case law. The Panel accepts that its duty on a complaint is to interpret and apply the BLs, on their face and based on a plain reading, in line with their purpose and intent, to determine whether or not the DCs were incorrectly calculated for this site. An exception would be if a DCBL provision were found *ultra vires*, in which case such provision could be excluded from a DC calculation.

[13] Here, the Panel does not accept that potential, minor differences between the Studies and the resulting BLs make a provision in the BLs non-applicable. Mr. Keleher focuses on the Studies' dwelling unit types and PPU to opine that the City and Region have misapplied the BLs. The Panel accepts the City and Region's positions that a

Study anticipates servicing demands to help guide the BL wording, but the application of the BL to a particular case may not align perfectly with the Study. The Panel finds no overt error in the BL sections applicable here and is prepared to carefully apply the BLs' wording to the Appellant's intentions for this site.

[14] To this point, Mr. Keleher acknowledges that DCA s. 5(6)(2) is intended to prevent the need to revisit the facts and assumptions from a Study that helped formulate a BL. For a particular development, the DC levied may exceed the actual servicing needs generated by that development (Ex. 1, p. 8). On this basis, the Panel finds it unnecessary to delve into the PPU estimates used to establish the DCs for different unit types. The task at hand is to ascertain which unit type captures these disputed units.

[15] The Region BLs include the following definitions (emphasis added):

> "**apartment building**" means a residential building or the residential portion of a mixed use building, other than a townhouse or a stacked townhouse, consisting of more than 3 dwelling units, which dwelling units have a common entrance to grade;
>
> "**large apartment**" means a dwelling unit in an apartment building or plex that is 700 square feet or larger in size;
>
> "**multiple unit dwellings**" includes townhouses, stacked and back-to-back townhouses, mobile homes, group homes and all other residential uses that are not included in the definition of "apartment building", "small apartment", "large apartment", "single detached dwelling" or "semi-detached dwelling";
>
> "**plex**" means a duplex, a semi-detached duplex, a triplex or a semi-detached triplex;
>
> "**stacked townhouse**" means a building, other than a plex, townhouse or apartment building, containing at least 3 dwelling units, each dwelling unit being separated from the other vertically and/or horizontally and each dwelling unit having an entrance to grade shared with no more than 3 other units;
>
> "**triplex**" means a building comprising 3 dwelling units, each of which has a separate entrance to grade;
>
> "**townhouse**" means a building, other than a plex, stacked townhouse or apartment building, containing at least 3 dwelling units, each dwelling unit separated vertically from the other by a party wall and each dwelling unit having a separate entrance to grade;

[16] The City BLs include the following definitions (emphasis added):

> "**Apartment Building**" means a Residential Building, or the Residential portion of a Mixed-Use Building, other than a Townhouse, Back-to-Back Townhouse or Stacked Townhouse, containing more than three Dwelling Units where the Residential units are connected by an interior corridor or have a common entrance to Grade;
>
> "**Building**" means a building, or part thereof, occupying an area greater than ten square metres (10 m^2) consisting of a wall, roof and floor or a structural system serving the function thereof … ;
>
> "**Grade**" means the average level of finished ground adjoining a Building;
>
> "**Large Apartment**" means a Dwelling Unit in an Apartment Building or Plex which has a Floor Area of 700 square feet (65 square metres) or larger;
>
> "**Multiple Dwelling Unit**" includes Townhouses, Stacked and Back-to-Back Townhouse, and all other Residential uses that are not included in the definition of Apartment Building, Small Apartment, Large Apartment, Single Detached Dwelling or Semi-Detached Dwelling;
>
> "**Plex**" means a Duplex, a Semi-Detached Duplex, a Triplex or a Semi-Detached Triplex;
>
> "**Stacked Townhouse**" means a Residential Building, other than a Plex, Townhouse, Back-to-Back Townhouse or Apartment Building, containing at least 3 Dwelling Units, each Dwelling Unit being separated from the other vertically and/or horizontally and each Dwelling Unit having an entrance to Grade shared with no more than 3 other units;
>
> "**Triplex**" means a Building that is divided horizontally or a combination of horizontally and vertically into three Dwelling Units, each of which has an independent entrance to the outside or through a common vestibule.

[17] To explain the mechanics of arriving at its Decision, the Panel will first address what it considers is a "building," "entrance" and "grade" under the BLs.

[18] To determine what is meant by a "building," the Tribunal relies on the City BL definition, given that it is not defined in the Region BL. A "building" may include part of the structure, such that for the purpose of interpreting the other definitions, a portion of a structure containing a certain type of unit may be considered a building within the overall structure.

[19] To illustrate, it is not uncommon for two-storey townhouses to be attached to the side of a multi-storey apartment building, which itself has the ground floor devoted to retail use. Three attached "buildings" would result for the purpose of DCs: the townhouse building; the apartment building; and the retail building.

[20] In the case at hand, it is reasonable and practical to consider that the north and south structures in question comprise two or more buildings each, for example: the lower (disputed) units' building; and the upper apartment units' building. The Tribunal finds that using this approach to interpret the Region BL is fair and reasonable given its alignment with common DC practices. In addition, further analysis below results in the Tribunal's acceptance of other potential "building" types that, together, comprise the north and south buildings.

[21] Using this "building" logic, the Tribunal finds that this site will have three structures containing dwelling units within varying building types. While a common below-grade parking structure will underlie and structurally connect these buildings, the Tribunal does not accept that such is the type of "entrance" envisioned in the dwelling definitions. A "separate entrance" and a "shared entrance" are interpreted to facilitate a person moving from outside to inside a building, as separate and distinct from vehicles entering or exiting a parking garage (despite them being driven by a person). DCs apply to a dwelling unit and "entrance" pertains to such units, not to, from or through an accessory parking area.

[22] The Panel finds that references to "grade" in the various definitions refer to the average elevation of "finished ground" as noted in the City BL definition of grade. The various unit types refer to grade in reference to a unit's entrance. The Panel accepts that one of the primary purposes of the courtyard is to gain pedestrian access to the buildings. The courtyard may, therefore, be considered at "grade" given that it is an outdoor area and designed for pedestrian access either to a private entrance (lower units) or a shared entrance (upper units).

[23] The Panel does not accept Mr. Keleher's position that the courtyard is not at grade due to its modestly higher elevation above the parking structure. Whatever the "average" level of finished ground becomes around all of the site's buildings, the courtyard functions and serves as "grade" for entrance purposes into the north and south buildings, including to the disputed units.

[24] Applying the “building” concept addressed above, the Panel has reviewed the sequence of logic advanced by the planners, as well as contemplated whether these buildings could be considered a “plex.” A “triplex” could be the sum of: a lower two-storey unit, an upper two-storey unit, and a top-floor one-storey unit. Each individual triplex could constitute a building, such that several triplexes would comprise the entire structure. The Panel recognizes that each top-floor unit would straddle two triplexes, as those top-floor one-storey units are twice as wide as the units below. However, this requirement is reasonably addressed by the triplex permission for horizontal or vertical separations in the City BL, and no separation direction in the Region BL.

[25] Under the Region BL, the Panel finds that the triplex concept does not capture the “buildings” containing the disputed units given that each unit would require “a separate entrance to grade.” The buildings’ upper and top-floor units do not have their own separate entrance.

[26] However, under the City BL, a triplex may be accessed by “an independent entrance to the outside or through a common vestibule.” This definition results in a reasonable application of the triplex concept to these structures, being several connected triplex buildings. Following this concept through the other definitions, one finds that a “plex” includes a triplex, and a “large apartment” includes a dwelling unit within a “plex.” Thus, through this channel, each disputed unit may constitute a “large apartment” under the City BL. This interpretation of definitions results in alignment with the Parties’ acceptance that the upper and top units are large apartments.

[27] Applying the foregoing analysis to the BL definitions, the Panel summarizes that the 20 disputed units are within a building that is:

- in the Region BL:
    - not an “apartment building” due to the absence of a “common entrance to grade”; each disputed unit has its own private entrance from the exterior courtyard;

- not a “large apartment” given that none of the following apply: “apartment” (as above); “triplex” (the upper and top-floor units do not have a “separate entrance to grade”); or “plex” (because not a triplex);
- the lower units could be a “stacked townhouse” with units separated vertically and an entrance shared with not more than three other units (the private entrances are shared with zero other units);
- and the lower units could also be a “townhouse” with their vertical party wall and a separate entrance to grade;
- thus, a “multiple unit dwelling” applies because such includes a townhouse and stacked townhouse and “all other residential uses” not captured by the definitions;

- in the City BL:
  - not an “apartment building” due to the absence of a “common entrance to grade”; each disputed unit has its own private entrance from the exterior courtyard;
  - could be considered a series of “triplex(es)” inclusive of the upper and top-floor units, and the allowance for independent or common entrances; triplex makes them a “plex,” and in turn, leads to being a “large apartment” which includes a plex; or
  - if not considered a “plex,” could be a “stacked townhouse” for the disputed units, separated vertically, and an entrance shared with not more than three other units (the private entrances are shared with zero other units); stacked townhouse leads to inclusion as a “multiple dwelling unit” provided that it is not a “plex.”

[28] Applying the foregoing determination of the nature of the “buildings” at issue, the Panel finds that the disputed units are:

- multiple unit dwellings (“multiples”) in the Region BL; and

- large apartments or multiples in the City BL.

[29] To address the apparent “tie” related to the City BL – either a “large apartment” or “multiples” – the Panel finds for the Appellant. First, to achieve the doctrine of fairness, the proponent of a development should not be penalized when two equally valid analyses arrive at different conclusions. “Large apartment” results in a somewhat lower DC per unit than “multiples.”

[30] Second, the Panel finds an important difference in the definitions’ criteria. A “stacked townhouse” must be “other than a Plex” such that, if it is a plex, it cannot be a stacked townhouse. Such limitation does not apply to a “triplex.” Thus, one must first determine the possible existence of a plex in the course of evaluating for a stacked townhouse. Here, the Panel finds that these buildings, in their entirety and for the disputed units themselves, meet the definition of a “triplex” which pre-empts their consideration as a stacked townhouse. This finding is illustrated by the cross-section of the north building (para. 8 herein).

[31] Third, from a broader perspective, the Panel considers the concept sketch of these buildings to present as apartments. To residents, neighbours or visitors, these rear structures will generally appear as apartment buildings. Such appearance, coincidentally, aligns with the City BL classification of “large apartments” established by this Decision and is consistent with the naming of the upper and top-floor large apartments.

[32] Thus, the Panel’s findings align with the complaint to the City BL, but not to the complaint to the Region BL. While the Panel determines the units to be large apartments in the City BL, it does so via a different logic route (above) than provided by Mr. Keleher.

[33] The Panel accepts Mr. Keleher’s position that “residents drive the need for services” but, of assistance, is his acknowledgment that DCBLs do not always result in

a perfect fit for each development. While the Panel agrees that “it is occupancy that matters” when contemplating and drafting DCBLs, the Panel finds that these BLs endeavour to achieve that goal in general accordance with the Background Studies. Although the upper and lower two-storey units are highly similar, if not identical, in their potential PPU capacity, the private entrance to each disputed unit is a distinguishing factor that can attract a different DC. The Panel accepts that the BLs attempt to apply DCs on a PPU basis, but the case at hand demonstrates that divergence can occur on a unique site plan.

[34] Mr. Keleher points to s. 3.1.1 of the Region BL to support his opinion that one must interpret the BL in accordance with the Study. However, the Panel finds that reference to the Study in the BL helps one understand the foundation and intention of the BL, but does not necessarily enable more latitude in interpreting and applying the BL as written. Here, both the City and Region BLs contain specific, exclusionary definitions upon which the Tribunal must rely in ascertaining the applicable DCs.

[35] Mr. Keleher emphasizes that the only difference between the lower and upper units is how they are accessed. He opines that their similar size, design and occupancy potential should result in the same or similar DC. If the upper units are apartments, so should be the lower units, as supported by the Studies where unit size and function drive its PPU.

[36] The Panel finds that it must interpret the BLs as written, with the knowledge of the Studies, but not to pick and choose those concepts in the BLs that either directly align or fail to align with the Studies. Thus, the Panel accepts that the only essential difference is how the units are accessed, but finds that such fact is a mandatory consideration based on the BL definitions as written. The Panel does not accept Mr. Keleher’s opinion that the best interpretation of entrance is to the property, not to each unit.

[37] Mr. Binning and Ms. Hall opine for the City that the disputed units should be considered as stacked townhouses and are, therefore, captured as multiple dwelling

units, not apartments. However, based on the “buildings” concept found above, the Panel has difficulty accepting these units as stacked townhouses by asking the question: what are they stacked with? The Parties agree that the disputed units are topped by apartments, not stacked townhouses, and the Panel finds that the entrances accessing those upper units serve more than three other units. The Panel’s application of “triplex” leads to the disputed units being considered as “large apartments,” consistent with the upper and top-floor units’ classification.

[38] These Parties, all familiar with the housing industry, can visualize the apparent difference between an apartment building and a stacked townhouse building. The latter tends to have multiple front doors and internal private staircases connecting to upper units. Apartments tend to have fewer entrance doors owing to shared entrances and shared elevators to upper units, while a grade-level unit may have its own “front” door. In this general sense, the Panel finds that these rear buildings containing the disputed units appear as and will function as apartment buildings. This finding is noted only to demonstrate that the Panel’s findings of “large apartments” and “multiple unit dwellings” align with the appearance of these buildings.

[39] While not relied upon in arriving at these findings, the Tribunal notes that the City considered the disputed units as apartments on several occasions through correspondence with Sher. That position appears to not have changed until the final DC assessment where the lower units were considered as multiples. If nothing else, this case history simply exemplifies the careful analysis that is necessary to arrive at the appropriate DC.

ORDER

[40] **The Tribunal Orders** that:

- the appeal to the charge payable under the Regional Municipality of York Development Charges By-laws is dismissed; and
- the appeal to the charge payable under the City of Markham Development

Charges By-laws is allowed in part, and the City shall reimburse Sher Markham Inc. the amount of $142,440 plus interest at a rate agreeable to the Parties.

"S. Tousaw"

S. TOUSAW
VICE CHAIR

"S. L. Dionne"

S. L. DIONNE
MEMBER