Ontario Land Tribunal

Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: June 07, 2024 **CASE NO(S).:** OLT-23-000373

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

Appellant:	Greycan 12 Properties Inc. and 12501252 Canada Inc.
Description:	Determination of the development charges
Reference Number:	DC By-Law 2022-31
Property Address:	23675 and 23965 Woodbine Avenue and 2596 Glenwoods Avenue
Municipality/UT:	Georgina/York
OLT Case No.:	OLT-23-000373
OLT Lead Case No.:	OLT-23-000373
OLT Case Name:	Greycan 12 Properties Inc. and 12501252 Canada Inc. v. York (Region)

PROCEEDING COMMENCED UNDER subsection 19(1) of the *Ontario Land Tribunal Act, 2021*, S.O. 2021, c. 4, Sched. 6

Request by:	Regional Municipality of York
Request for:	Request for Dismissal Without a Hearing

Heard:	March 7 and 8, 2024 by video hearing ("VH" or "Hearing"); final written submissions and oral argument delivered on March 11, 2024

APPEARANCES:

Parties	**Counsel**
Greycan 12 Properties Inc. and 12501252 Canada Inc. ("Appellants" or "Greycan")	Alex Lusty Narmada Gunawardana
Regional Municipality of York ("York" or "Region")	Samantha Whalen Bola Ogunmefun (*in absentia*)

DECISION OF WILLIAM R. MIDDLETON AND ORDER OF THE TRIBUNAL

Link to Order

PART 1: INTRODUCTION

[1] The VH was the hearing of an appeal brought by the Appellants pursuant to Section 22(2) of the *Development Charges Act, 1997*, S.O. 1997, c. D.27, ("DC Act") from the non-decision of the York Regional Council on a complaint by the Appellants seeking a refund of alleged overpaid development charges ("DC") with respect to the properties municipally known as 23675 and 23965 Woodbine Avenue and 2596 Glenwoods Avenue ("Subject Properties"). The applicable development charges By-law is York By-Law 2022-31 ("DC Bylaw").

[2] The materials filed by the Parties pertaining to this appeal were:

(a) Joint Document Book, comprising 979 pages;
(b) Witness Statement Compendium of Witnesses Daryl Keleher and Craig Binning, comprising 149 pages;
(c) Appellants' Outline of Closing Submissions, comprising 22 pages;
(d) Appellants' Supplemental Submissions, comprising 5 pages;
(e) Appellant Book of Authorities, comprising 117 pages;
(f) Further Appellant Book of Authorities, comprising 203 pages;
(g) Appellants' Supplemental Book of Authorities 89 pages;

(h) York Region Written Submissions, comprising 13 pages;

(i) York Region Supplementary Submissions, comprising 3 pages;

(j) York Region Brief of Authorities, comprising 119 pages;

(k) York Region, submission of three additional decided cases/jurisprudence; and

(l) York Region Statutory Excerpts, comprising 1 page

[3] The items identified in paragraph [2] (d), (g), and (i) above were submitted subsequent to the Hearing at the request of the Tribunal.

PART 2: ISSUES TO BE DETERMINED BY THE TRIBUNAL

[4] The Parties defined the three main issues on this appeal in the governing Procedural Order.

Issue 1:

Did the determination of York's Development Charge, which included the application of the York's Interest Rate Policy, lead to an error in the determination and application of the DC Bylaw due to:

a) A contravention of s. 5(1)(4) of the DC Act?

b) A contravention of s. 2(1) of the DC Act?

c) A contravention of s. 5(1)(9), 5(6)(1), and 5(6)(2) of the DC Act?

[5] Section 5(1)(4) of the DC Act states (below emphasis added):

> "**Determination of development charges**
>
> 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:
>
> ...

> 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.
> …
>
> 4. The estimate under paragraph 2 must not include an increase that would result in the level of service exceeding the average level of that service provided in the municipality over the 15-year period immediately preceding the preparation of the background study required under section 10. How the level of service and average level of service is determined may be governed by the regulations.
>
> …
>
> 9. Rules must be developed to determine if a development charge is payable in any particular case and to determine the amount of the charge, subject to the limitations set out in subsection (6)."

[6] The Appellants argue that s. 5(1)(4) of the DC Act has been contravened because York made a calculation error by imposing a total charge that exceeds the historic level of service. Mr. Daryl Keleher, who was qualified on behalf of the Appellants to provide opinion evidence on matters of municipal finance, noted that for police services, the DC imposed by York exceeded the 2022 calculated historic level of service by about $61,000.00 ($60,753.48 = $1.77 m2 x 34,234 m2).

[7] In his evidence, Mr. Keleher further opined that subsection 5(1)(4) essentially further develops subsection 2(1) of the DC Act which sets out the basic rationale for imposing development charges (below emphasis added):

> "2 (1) 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."

[8] On the other hand, York rejects this position of the Appellants and through its expert witness, Mr. Craig Binning (qualified to provide the same category of opinion evidence as was Mr. Keleher) testified that it is the development charge program taken as a whole that should instead be considered. Mr. Binning therefore did not agree with the issue identified by Mr. Keleher as described above in paragraphs [6] and [7].

[9] In this regard, the Tribunal concurs with the arguments of the Appellants' counsel who contended:

> "The historic level of service limit is not a cap that needs to be read into the *Act* - it is plain as day…this particular complaint, in this particular case, is not about the entire development charge program… [as contended by Mr. Binning]… [subsection 2(1) of the DC Act] is about the requirement for there to be a relationship between need for service and the development charge imposed… [and] authorizes the imposition of development charges to pay increased need for services arising from development… As Mr. Keleher said, it is this provision that creates a connection between need for servicing and the imposition of development charges…Having been published a few months prior, the 2022 DC Study was the most up-to-date and accurate picture of the Region's anticipated need as of October 2022 when the Greycan development charge payment was imposed… Mr. Keleher took you through how the imposition… [by the Region]… of an additional $480k in interest is not rooted in Regional need, and so runs contrary to the scheme and purpose of the Act."

[10] Subsection 5(1)(9) is set out in paragraph [5] above and subsection 5(6)(1), and 5(6)(2) of the DC Act state (below emphasis added):

> "**Restriction on rules**
>
> (6) The rules developed under paragraph 9 of subsection (1) to determine if a development charge is payable in any particular case and to determine the amount of the charge are subject to the following restrictions:
>
> 1. The rules must be such that the total of the development charges that would be imposed upon the anticipated development is less than or equal to the capital costs determined under paragraphs 2 to 8 of subsection (1) for all the services to which the development charge by-law relates.
>
> 2. If the rules expressly identify a type of development they must not provide for the type of development to pay development charges that exceed the capital costs, determined under paragraphs 2 to 8 of subsection (1), that arise from the increase in the need for services attributable to the type of development. However, it is not necessary that the amount of the development charge for a particular development be limited to the increase in capital costs, if any, that are attributable to that particular development."

[11] The Appellants argue that the provisions reproduced in paragraph [10] are directing a comparative examination between the expectation set in the 2022 DC Study and what is actually being imposed as the development charge. If the development charge is higher, then this demonstrates that the payment of that charge exceeds the need. In terms of the relevant numbers, the Appellants note that the 'need component' prevailing as of May, 2022 is $9,018,974.24 while the development charge levied by York in October, 2022, inclusive of interest, is $9,497,132.41. Thus, the difference between those amounts is the overcharge that is the basis of the dispute in this case.

[12] The parallel argument by the Appellants is that Section 5(6)(2) also creates a comparative limit but in relation to development type. Thus, the Appellants contend that if the development type cost expectations as established in the DC Study is exceeded by the development type cost being imposed then this demonstrates that an overcharging error by York has occurred. Again, the relevant numbers "by type" are $262.75/m2 (as of May 2022) versus $276.71/m2 (development charge, inclusive of interest, imposed by York in October 2022).

[13] York argues that the effect of subsection 5(6)(2) of the DC Act is to preclude the argument made above by the Appellants. York also contends that so long as it has properly charged interest in accordance with the DC Act, there can be no argument that the addition of interest charges to the DC could ever constitute overcharging.

[14] The Tribunal disagrees that the arguments of the Appellants are precluded by operation of subsection 5(6)(2) of the DC Act. Instead, the Tribunal agrees that this provision merely eliminates the notion that a party otherwise liable to pay a development charge could seek a reduction on the basis that: "*My project does not need this or that type of service, so I shouldn't have to pay for it. Or, I should not have to pay the same as my neighbour to get less infrastructure*".

[15] The Tribunal also disagrees with the position of York that, in effect, the addition of interest to development charges should be ignored for the purposes of determining whether the overall total charges are in compliance with the DC Act. In this respect,

York essentially contends that so long as it lawfully imposed interest charges then that is the end of the matter: the total DCs, inclusive of interest, cannot give rise to a valid challenge by the Appellants. Thus, York argues that the sole issue is whether it assessed interest in accordance with the provisions of the DC Act – if the answer to that question is 'yes' then there are no valid grounds for this appeal.

Issue 2:

Does s. 26.2(3) of the DC Act authorize imposing the Region's Development Charge as determined and applied under the circumstance?

[16] The Appellant argues that Section 26.2(3) of the DC Act authorizes interest generally, but not in the manner calculated by York in these circumstances.

[17] Section 26.2 of the DC Act reads, in part:

> (1) Subject to subsection (1.1), the total amount of a development charge is the amount of the development charge that would be determined under the by-law on, the day an application for an approval of development in a site plan control area under subsection 41 (4) of the Planning Act or subsection 114 (5) of the City of Toronto Act, 2006 was made in respect of the development that is the subject of the development charge.

[18] Section 26.2(2) of the DC Act states that section 26.2(1) applies regardless of whether the By-law under which the charge would be determined is no longer in effect on the date the charges are payable:

> (2) Subsection (1) applies regardless of whether the by-law under which the amount of the development charge would be determined is no longer in effect on the date the development charge is payable.

[19] The DC Act specifies when the DC amount is determined under section 26.2, and in this case, it was August 20, 2021 which was the day the site plan application was made. Section 26.2(3) allows a municipality to charge interest on the DC payable, at a rate not exceeding the prescribed maximum interest rate, from the date of application referred to in the applicable clause in section 26.2(1) and the date the DC is payable:

Interest

(3) Where clause (1) (a) or (b) applies, the municipality may charge interest on the development charge, at a rate not exceeding the prescribed maximum interest rate, from the date of the application referred to in the applicable clause to the date the development charge is payable.

[20] Section 26.3, regarding the maximum interest rate that could be charged, was added to the DC Act on November 28, 2022, through Bill 23, *More Homes Built Faster Act, 2022*. However, as the development charge in this particular case was payable on October 14, 2022, prior to the enactment of Bill 23, the transition provision in section 26.3(3) confirms that the maximum interest rates set in section 26.3(2) of the Act do not apply in this instance. The Act also provides that regulations may be made prescribing the maximum rate of interest for purposes of section 26.2(3). This provision was enacted through Bill 108 in June 2019. However, at the time of payment, there was no prescribed maximum interest rate.

[21] Relying on extrinsic evidence as to the intentions expressed by the Ontario Government, the Appellant maintains that the purposes of the freeze and interest rate provisions are: (i) to improve predictability for developers as noted in a presentation by the Ministry of Municipal Affairs & Housing and its announced ‘Housing Action Plan’; and (ii) to allow municipalities to cover costs associated with the deferral and freeze provisions.

[22] A threshold sub-issue here is the admissibility or relevance of such extrinsic evidence. York argues that the DC Act is clear and unambiguous and there is no need to refer to extraneous material in this case but also that if the Tribunal does take into consideration extraneous material with respect to the purpose of the freezing provisions, little weight should be given to Mr. Keleher’s evidence as to the Minister’s letters. If the Tribunal does take into consideration extraneous material, York submitted that the materials referred to by the Region provide better evidence as to the Province’s intent as the term “certainty of costs” does not require any further interpretation or opinion.

[23] The Appellants contend that ignoring the letters would go against a basic

principle of statutory interpretation established in R. v. *Morgentaler* [1993] 3 S.C.R. 463 that decision makers are entitled to refer to extrinsic evidence of various kinds in determining the background, context and purpose of legislation. The Appellant also relies on *Re Orangeville District Homebuilders Association* [2010] O.M.B.D. No. 762 where similar Ministry letters were considered. Another Supreme Court decision in *Re Rizzo and Rizzo Shoes Ltd* [1998] 1 S.C.R. 27 is also supportive of this principle and reiterates the applicable rules of statutory interpretation:

> "Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament…
>
> … the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469 (S.C.C.), at p. 487; *R. v. Paul*, [1982] 1 S.C.R. 621 (S.C.C.), at pp. 635, 653 and 660)"

[24] The extrinsic evidence referred to above in paragraphs [21] and [22]] was discussed by Mr. Keleher in his written and oral evidence. A December 19, 2019, letter from MMAH to OHBA dealt with the changes to the Act allowing rates to be "frozen". The letter notes that municipalities will be permitted to charge interest to cover costs associated with a freeze (below emphasis added):

> Development charge rates, as of January 1, 2020, will be set for a development when a site plan or zoning amendment application is submitted to a municipality. Changes to Ontario Regulation 82/98 mean that the rate would continue to be frozen for two years after planning approvals have been received. <u>The legislation provides authority for municipalities to charge interest to cover costs associated with the deferral and the freeze</u>. A maximum interest rate will not be prescribed.

[25] The expected kinds of municipal costs were described by Mr. Keleher as:

- The loss arising from the expected spread between a prevailing development charge rate and a frozen rate.

- Costs arising from the interest charges incurred when building infrastructure ahead of receiving development charge funds.

As Mr. Keleher maintained, because the Region is receiving the prevailing amount, neither of these costs are present.

[26] York's expert Mr. Binning completely disagreed with the approach advocated by Mr. Keleher and the conclusions that he reached. In Mr. Binning's opinion, according to his interpretation of the DC Act sections alleged by the Appellants to have been violated no contraventions have actually occurred because York is not over collecting as whole or for the industrial "type of development" that the Appellants are undertaking.

[27] Mr. Binning opines that the introduction of section 26.2(1)(a) requires a municipality to determine the development charges applicable based on the "day an application for an approval of development…was made"; it is not a discretionary provision but rather a mandatory requirement. This is commonly referred to as the date at which the DC is "frozen".

[28] In his written and oral evidence, Mr. Binning went on to state that Bill 108 introduced additional changes to allow municipalities to charge interest on frozen DC rates from the time a complete site plan or rezoning application is made to the payment of development charges all as provided for in section 26.2(3) of the DC Act.

[29] Mr. Binning pointed out that in 2022, the Province made additional changes to the DC Act, including providing a maximum interest rate for DC rates frozen under section 26.2(3), the maximum interest rate is set out under the new section 26.3 (this is not a point of contention between the Parties). He further noted that while the Province through Bill 23 set a maximum interest rate that could be applied to frozen DC rates, it

did not cap the *amount* of interest that could be paid or cap the total amount of development charges payable by any particular development under section 26.2(3) of the DC Act.

[30] Mr. Binning in his witness statement highlighted the key area of dispute between his views and those of Mr. Keleher:

> "Based on the commentary and analysis in his August 15, 2022 memorandum, Mr. Keleher makes the following conclusion (final page of the document):
>
> *The general application of interest rates to DC rates applicable at the time of application is reasonable, however when that calculation results in applicable DC rates that exceed in-force DC rates, beyond being unreasonable and contrary to the intent of the DC freeze at date of application (plus interest), violates the DC Act, and in so doing generates a revenue windfall for the municipality.*
>
> Mr. Keleher's conclusion is flawed and erroneous as he has taken the findings from one specific application and extended it to a general overall conclusion that the Region's DC Interest Policy will result in a revenue "windfall", or over collection, therefore violating the DCA. Rather, the freezing of DC rates at site plan application or rezoning and charging interest can result in a municipality collecting less DC revenues than if the rates were indexed over the same period."

[31] Thus, the view that underpins Mr. Binning's opinion is that (below emphasis added):

> "The Region's Development Charge Interest Policy does not result in the Region collecting more development charge revenues than are necessary, as per the limitation and rules of the DCA, <u>in totality or within the Non-Residential: Industrial/Office/Institutional subcategory type of development.</u>"

[32] The Tribunal agrees that it may properly consider the Ministry letters described above and further agrees that they are relevant to the Tribunal's determinations. The Tribunal also finds that the purposes of the freeze and interest rate provisions in section 26.2(3) of the DC Act are: (i) as outlined in above in this Part; and (ii) the kinds of municipal costs are as described by Mr. Keleher above. Finally, the Tribunal is of the view that it cannot be the purpose of the interest provisions of the DC Act to permit a

municipality to charge more than what is needed to cover the cost of services. In the Tribunal's opinion, this finding is also consistent with the views on the correct principles of statutory interpretation as expressed in *Rizzo & Rizzo Shoes* cited above in paragraph [23]. Ultimately then, the Tribunal does not agree with the position taken by Mr. Binning.

[33] The Appellant argues:

> "While s. 26.2(3) authorizes the imposition of interest it does not authorize the imposition of a penalty. The $480k in interest over and above what the Region needs amounts to a penalty for filing an application at the wrong time. While an applicant could avoid that penalty be refiling, we arrive at an absurd remedy in place of one built into the statute, and behaviour that as Mr. Keleher spoke to as the only qualified land use planner, harms the public interest in timely development."

[34] The Tribunal agrees with the Appellant's submissions. It would be strange to in effect create an incentive for an applicant to withdraw a permit application in favour of a later re-filing, simply to avoid a DC interest charge. This is especially so during circumstances such as those presently existing in Ontario where the delay of housing projects and home construction would not appear to be in the public interest during an era when it seems to be apparently universally accepted that there is a housing supply shortage.

[35] Counsel for both Parties commented on the proper role of expert evidence in an appeal regarding the calculation of development charges under the DC Act. They conceded that the Tribunal's ultimate determination of the issues on appeal cannot be simply supplanted by the opinion evidence of one expert or the other. Much of the dispute here involves the interpretation of the provisions of the DC Act in the context of the circumstances. That ultimate legal determination cannot be provided by either expert. This was the subject of comment by this Tribunal in another development charge case in a Decision dated July 22, 2022 in OLT Case No.: OLT-22-002019:

> "Counsel for the Association conceded that although experts for both the Association and the Town testified in respect of this issue, the application of the Gas Tax funding in the context of the DC Act and its regulations, is a matter of statutory interpretation. The Town's counsel also agreed,

> stating in final argument that the treatment of the Federal Gas Tax Grant pursuant to the DC Act raises a pure question of law. This accords with the applicable longstanding jurisprudence, one cited example of which is Orangeville District Home Builders Assn. v. Orangeville (Town), [2010] O.M.B.D. No. 762, where the Ontario Municipal Board stated at paragraph 12:
>
> This panel is also aware of the *dicta* enunciated by the Court of Appeal in *Niagara Coalition v. the Town of Niagara-on-the-Lake*, 2010 ONCA 173, Docket C50553 which has restated some of the findings above. We are aware that in a tribunal setting, experts' views on the law should not be treated as determinative even if deemed to be admissible."

[36] The Tribunal has certainly had regard for the opinions of both Mr. Keleher and Mr. Binning. However, the Tribunal reached its own independent conclusion, as noted above, that it concurs with the approach advocated by the Appellants – after careful review of the relevant, applicable provisions of the DC Act and a thorough consideration of its underlying purposes and principles in light of the facts at issue here.

[37] As a further final point, to address an issue raised by counsel for the Appellant and responded to by York's counsel, while the Tribunal did note that Mr. Binning, at times during his cross-examination, demonstrated a passionate commitment to his client's position, the Tribunal did not find him to be overtly partisan nor was it of the view that any aspect of his past work or public advocacy was a cause for concern in terms of his capacity and duty to provide opinion evidence to assist the Tribunal.

Issue 3:

Should the Appellants be granted a refund pursuant to s. 25 of the DC Act? If so, what is the correct value of the refund?

[38] Section 20 of the DC Act sets out the relevant provisions concerning the availability of refunds for alleged overpayment of development charges:

> "20 (1) A person required to pay a development charge, or the person's agent, may complain to the council of the municipality imposing the development charge that,
>
> (a) the amount of the development charge was incorrectly determined;

> … (c) there was an error in the application of the development charge by-law."

[39] The Appellants argue that both section 20 (1) (a) and (c) are applicable on the facts of this case.

[40] The Appellants contend that the incorrect determination pursuant to section 20 (1) (a) arises from the failure to properly apply the limits required in the DC Act as discussed under **Issues 1 and 2** above thus leading to a charge paid by the Appellants that exceeds the amount needed to fund growth in contravention of various provisions of the DC Act.

> 26.10 The Appellants further argue that the errors under section 20 (1) (c) in the application of the development charge by-laws are: the failure to apply the limits imposed by the DC Act; the violation of the 'historic level of service requirement'; and the failure to fulfill the purpose of the Act because there was no nexus between need and the quantum of charge imposed – again all as discussed above.

[41] York on the other hand submits that no development charge refund should be provided to the Appellants as no error has been made because York followed the DC Act in developing its DC Bylaw and in developing its interest rate policy.

[42] As noted above in its analysis concerning **Issue 1 and Issue 2**, the Tribunal finds that York has made errors in the calculation of the DC imposed on the Appellant that has resulted in an overpayment by the Appellant which ought to be refunded pursuant to section 20 of the DC Act.

Part 3: CONCLUSIONS

[43] In light of the determinations reached by the Tribunal in Part 2 in relation to **Issues 1, 2 and 3** above, it follows that the Appellants were entitled to make the complaint under section 20 of the DC Act under which this appeal arose – and that the Appellants are owed a refund of the overpaid amount.

[44] Counsel for the Appellants maintain that York owes $483,221.17, representing

the overcharged amount of $478,158.17 plus interest in the amount of $5,063.00 accrued to the date of final written submissions, being March 11, 2024. York's counsel made no submission that disputed the arithmetic underlying the claim for overpayment as described above.

ORDER

[45] **THE TRIBUNAL ORDERS THAT:**

(a) The appeal of Greycan 12 Properties Inc. and 12501252 Canada Inc. ("Appellants") pursuant to Section 22(2) of the *Development Charges Act, 1997*, S.O. 1997, c. D.27 ("Act") is allowed in respect of the non-decision of the York Regional Council on a complaint seeking a refund of overpaid development charges with respect to the properties municipally known as 23675 and 23965 Woodbine Avenue and 2596 Glenwoods Avenue;

(b) York Region is ordered to issue a payment to the Appellants forthwith in the amount of $478,158.17, representing a refund of the overcharged and overpaid amount, plus interest in that amount calculated in accordance with the Act; and

(c) In the event that the Parties are unable to reach agreement on the amount of interest properly payable under sub-paragraph (b) above, they may seek the Tribunal's determination of such a dispute by filing written submissions to the Tribunal.

[46] This Vice Chair shall remain seized for the purpose of adjudicating any dispute which may arise under paragraph [45] (c) above.

"William R. Middleton"

WILLIAM R. MIDDLETON
VICE CHAIR