Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: November 27, 2024 **CASE NO(S).:** OLT-23-000509

PROCEEDING COMMENCED UNDER subsection 22(2) of the *Development Charges Act,* 1997, S.O. 1997, c. 30

Applicant/Appellant:	140 Old Mill Road LP and 140 Old Mill Road Coinvest LP
Subject:	Industrial Building and Warehousing
Description:	Determination of the development charges
Reference Number:	DC By-law 19-037
Property Address:	140 Old Mill Road
Municipality/UT:	Cambridge/Waterloo
OLT Case No:	OLT-23-000509
OLT Lead Case No:	OLT-23-000509
OLT Case Name:	140 Old Mill Road LP v. Waterloo (Region)

PROCEEDING COMMENCED UNDER subsection 9(1) of the *Ontario Land Tribunal Act*, 2021, S.O. 2021, c. 4, Sched. 6

Request by:	140 Old Mill Road LP and 140 Old Mill Road Coinvest LP
Request for:	Request for Directions
Heard:	October 09, 2024, by video hearing

APPEARANCES:

Parties	**Counsel**
140 Old Mill Road LP and 140 Old Mill Road Coinvest LP ("Appellants")	Steven Ferri Austin Ray
Regional Municipality of Waterloo	Paul DeMelo

DECISION DELIVERED BY ERIC S. CROWE AND ORDER OF THE TRIBUNAL

Link to Order

INTRODUCTION

[1] This matter concerns a Motion for Directions brought by 140 Old Mill Road Limited Partnership and 140 Old Mill Road Coinvest Limited Partnership ("Appellants"), pursuant to s.10.3 of the Tribunal's *Rules of Practice and Procedure.* The Appellants have filed an appeal pursuant to s. 22(2) of the *Development Charges Act* ("DC Act") against the Regional Municipality of Waterloo's ("Region") failure to make a decision on the Appellants' complaint. The property is municipally known as 140 Old Mill Road in the City of Cambridge ("subject property"). The applicable development charges By-law is Waterloo By-law No.19-037 ("DC By-law").

[2] The Development is a building that has been constructed on the subject property that is located at the southeast corner of Fountain Street and Highway 401 in Cambridge. The appeal as described by the Parties, is whether the DC By-law acts as bar to an additional amount or corrected amount being assessed and therefore, did the Region make an error in the application of its DC By-law.

BACKGROUND

[3] The Region's discounted "industrial" development charge rate (the prevailing non-residential rate discounted by 60%) was applied to assess and certify the Regional development charge for the proposed development totaling $9,082,948.59 net of redevelopment allowances.

[4] The Region identified an error had been made in the application of the DC By-law when the amount payable calculated in July of 2022 should have been

$22,802,521.00 (the “Corrected Amount”). As the Region noted, the error consisted of the application of a Discounted Rate where such rate was not applicable given the use of the subject property as proposed by the Development.

[5] On November 8, 2022, the Region sent Old Mill the Notice in the amount of $13,719,572.00 additional development charge.

[6] The Appellants’ Motion for Directions sought the following from the Tribunal:

1. A determination that the Region’s DC By-law, including at sections 4(8), 5, 11, 12, and 14, and the DC Act, including sections 26, 26.2, 29, and 59.1, act as a bar to an additional or different development charge amount, including the additional development charge, being assessed for the Old Mill Industrial Building with industrial permit 21 008811 000 CP, given that the Region has already assessed and collected the actual development charge from Old Mill, and has already issued a building permit for the Old Mill Industrial Building with industrial permit 21 008811 000 CP.

2. A determination that the Region erred in its application of the DC By-law, including at sections 4(8), 5, 11, 12, and 14, and the DC Act, including sections 26, 26.2, 29, and 59.1, when it assessed the additional development charge having already assessed and collected the actual development charge from Old Mill, and having already issued a building permit for the Old Mill Industrial Building with industrial permit 21 008811 000 CP.

3. An Order of the Tribunal allowing the appeal of Old Mill pursuant to subsection 22(2) of the DC Act from the non-decision of the Region Council on a Complaint by Old Mill.

4. An Order of the Tribunal confirming that the Region's Notice of Reassessment ("Notice") in the amount of $13,719,572.00 was an error in the application of the DC By-law.

5. An Order that the Region is to assess development charges on the Old Mill Industrial Building with industrial permit 21 008811 000 CP in the amount of $9,082,948.59, which has been paid.

6. An Order that no development charge is payable to the Region on the Old Mill Industrial Building with industrial permit 21 008811 000 CP.

7. An Order of the Tribunal abridging the time for service of the Notice of Motion, if necessary.

8. Such further or other relief as Counsel may advise and the Tribunal may permit.

[7] The Region responded to the Motion for Directions made by the Moving Party and requested relief. The Town seeks an order in the following:

1. Dismissal of the Applicant's Motion for Directions due to the DC Act and DC By-law do not act as a bar to estop the Region from collecting the corrected amounts.

2. The Region further requests that the Tribunal schedule a hearing into whether or not the Development by the Appellants meets the definition of Industrial Building and Warehousing use as defined under the DC By-law.

MOTION FOR DIRECTIONS HEARING

[8] Upon commencement of the Motion, the following materials were identified as Exhibits in respect of this Motion:

1. Motion Record of Applicant, comprising 233 pages;
2. Responding Motion Record of Region, comprised of 63 pages;
3. Reply to Response to Motion for Directions, of Applicant, comprised of 73 pages;
4. Applicant's Book of Authorities; and
5. Case: *Cooperative d'habitation Aile-Nord Inc. v. Sudbury (City)*, 1996 CarswellOnt 2514.

[9] Steven Ferri, Counsel for the Appellants, and Paul DeMelo, Counsel for the Region (the "Parties") agreed that this Motion would be a phased hearing of the matters. A Phase 1 approach and Phase 2 approach to this proceeding was required.

[10] The Parties agreed that only Phase 1 would need to be determined for this Motion which required only Issue 1 from the governing Procedural Order whether the Region erred in its application of the DC By-law.

[11] The Region asserts the Motion is seeking determination of a summary disposition of this matter and the matter is not capable of being determined in this Motion. The Appellants do not dispute that a full hearing would be required to resolve the Use Issue, relating to which development charge rate should apply to the Old Mill Industrial Building based on the use and definitions contained within the DC By-law ("Use Issue") if required following the adjudication of this Motion.

[12] Mr. DeMelo highlighted subsection 24(4) of the DC Act, the power of the Tribunal on a section 20 complaint allows the Tribunal to do anything that the Council could have done under subsection 20(6).

[13] Mr. DeMelo contends that it is trite law to say that this requires Council, or in this instance the Tribunal, to review the complaint within the context of the DC By-law. Accordingly, the examination requires that the Tribunal consider the DC By-law and in this regard, the Region submits that a number of key definitions and sections must be examined.

[14] Mr. DeMelo asserts that this is precisely what the Tribunal must assess under a section 20 complaint and instead the Claimants do not want the Tribunal to examine the application of the definitions under the DC By-law and whether or not the proposed use as of the date of the building permit would qualify for the Discounted Rate.

[15] Mr. Ferri contends the Region expressly consented to Old Mill bringing this Motion in order to resolve the threshold issue described herein and is now challenging the relief sought by Old Mill on the basis that the matter is not capable of being determined on the Motion. The Appellants submit that the Region's conduct in this regard is vexatious and in bad faith.

[16] Mr. DeMelo asserts the identification of the different development charge rates and the limited application of the Discounted Rate is not a matter that can be adjudicated by the Tribunal in these proceedings.

[17] Furthermore, the Parties agreed that the "Use Issue" such as whether the Old Mill Industrial Building met the definition of "Industrial" or "Warehouse" under the DC By-law would not be considered in this Motion and would be dealt with at Phase 2 of the merit hearing if required.

[18] Mr. Ferri submits the Use Issue is only relevant if the Tribunal finds that the imposition of the additional development charge is permitted under the DC Act and the DC By-law, or that the Region is permitted to correct an “error” made by the Region on the imposition and collection of a development charge.

[19] The Parties agreed this Motion is intended to increase efficiency in the adjudication of the overall appeal by resolving a threshold issue set out in Issue 1 of the Procedural Order. If the Tribunal determines that Old Mill’s position in this Motion is correct, and that the Region erred in its application of the DC By-law and the DC Act, the Use Issue is moot.

[20] The Parties explained that a Motion for Directions would be required to settle these outstanding issues.

ISSUES TO BE DETERMINED BY THE TRIBUNAL

[21] The Parties defined three main issues on this appeal in the governing Procedural Order. For the Purposes of this Motion only Issue 1 was to be determined as agreed by the Parties.

Issue 1

1. Did the Region err in its application of the DC By-law?

    a. Does the DC By-law, including at (sub)sections 4(8), 11, and 12, and the DC Act, including section 26, act as a bar to an additional or different amount being assessed (“Second DC Charge Assessment”) for the development of a 123,592 m^2 building on the Broccolini Lands (“Development”); and

b. Did the Region error in its application of the DC By-law, including sections 5, 11, 12, and 14 and the DC Act, including section 26.2 and section 29, by determining the Second DC Charge Assessment on a date after the issuance of the first building permit for the Development.

EVIDENCE

Appellants' Position

[22] Mr. Ferri submits the Use Issue is not before the Tribunal in this Motion. As outlined in the Notice of Motion, this Motion seeks a determination of the Tribunal that:

1) Municipalities in Ontario are statute-barred from charging and collecting multiple development charges for the same development;

2) DC By-law does not permit more than one development charge to be charged and collected;

3) The DC By-law expressly states that issuance of the Treasurer's Certificate is sufficient evidence of the payment of the development charges owing; and

4) The Region committed an error in the application of the DC By-law and the DC Act by assessing multiple development charges, or, by changing the amount of the development charges already charged and collected.

[23] Mr. Ferri submits the Region mischaracterizes Old Mill's position by conflating the concept of collecting a development charge with the concept of imposing a development charge.

[24] James Beach, Executive Vice-President of Broccolini Real Estate Group Ontario Inc., the Developer Manager of the Old Mill Industrial Building project provided a sworn written affidavit dated September 24, 2024 and reply affidavit dated October 7, 2024. Mr. Beach outlined the subject property, the Site Plan Application, and Relevant facts on the development charges as described below.

Development Charges

[25] On July 19, 2022, Old Mill received an invoice from the City in the amount of $9,082,948.59. The actual development charge applied the industrial development charge (“Industrial DC Rate”) set out in subsection 4(11) of the DC By-law. The amount of the actual development charge reflects a sixty percent (60%) reduction due to the Old Mill Industrial Building meeting the definition of “Warehouse” in the DC By-law. The actual development charge was assessed at the rate in effect at the time of the issuance of the building permit in accordance with section 5 of the DC By-law.

[26] The amount of the actual development charge was certified by the Regional Treasurer on July 12, 2022 in accordance with section 11 of the DC By-law.

[27] On or before August 19, 2022, the Region received payment of the actual development charge in full, via electronic funds, prior to the issuance of a building permit for the Old Mill Industrial Building in accordance with section 5 of the DC By-law.

[28] On August 30, 2022, Old Mill received Site Plan Approval to construct the Old Mill Industrial Building and the first building permit for the building was issued.

[29] Between August 30, 2022 and October 18, 2022, two more building permits were issued for the Old Mill Industrial Building.

[30] On November 8, 2022, the Region sent Old Mill the Notice in the amount of $13,719,572.00 additional development charge. The Notice advised Old Mill that,

following the issuance of the foundation/site servicing permit, the Region learned that Amazon will be the tenant of the Old Mill Industrial Building and, as such, the Old Mill Industrial Building does not qualify for the Industrial DC Rate.

[31] On November 16, 2022, Counsel for Old Mill sent correspondence to the Chief Building Official at the City responding to and disputing the additional development charge.

[32] On or about December 1, 2022, the Region and Old Mill entered into a Development Charges Alternative Payment Agreement (“DCAPA”), permitted under section 27 of the DC Act, to defer the payment of the disputed additional development charge until after a determination has been made on the application of the DC By-law rather than require payment in full of the development charges before a section 20 complaint could be filed.

[33] On December 2, 2022, the City Building Official issued a full building permit for the Old Mill Industrial Building and development on the subject property, specifically titled “Industrial Building Permit.”

[34] On February 24, 2023, Old Mill made a formal complaint (“Complaint”) pursuant to section 20 of the DC Act related to the construction of, and site development for, the Old Mill Industrial Building.

[35] On May 15, 2023, Old Mill appealed to the Tribunal pursuant to subsection 22(2) of the DC Act for failure of the Region’s Council to make a decision on the Complaint.

Region's Position

[36] Shane Fedy, Manager, Infrastructure Financing, for the Region provided a sworn written affidavit dated October 02, 2024. Mr. Fedy outlined the response and opposition to the Motion which seeks a declaration that there has been an error in the application of the Region's DC By-law. The majority of his affidavit dealt with the "Use issue" which was to be determinative in Phase 2 of this proceeding if required.

[37] Mr. Fedy contends, the error which the Appellants state has occurred relates to the Region's confirmation in November of 2022 that the full development charges applicable to the subject property had not been paid at the time that the first building permit was issued and that this amount should not have included what is defined and referred to as the Discounted Rate.

[38] Mr. Fedy advised the original assessment which occurred in July of 2022 erroneously applied a 60% discount from the Non-Residential Rate under the DC By-law which was based on the Appellants' identification of the use of the lands as being an Industrial Building despite information according to Mr. Fedy, that the Appellants had which identified the use as not being an Industrial Building under the DC By-law.

[39] Mr. Fedy acknowledges, on July 19, 2022, based on the information provided by the Appellants, the Region assessed development charges for the Development based on the Appellants building permit application which identified the Development as being an Industrial Building. That assessment at that time was in the amount $9,082,949, which applied the Discounted Rate and was paid by the Appellants on or about August 18, 2022. This assessment applied the Discounted Rate based on the information provided by the Appellants that did not identify an end user but rather only as an Industrial Building.

[40] Mr. Fedy submits, as development charges are collected by the local municipalities, the amounts, along with a report are remitted to the Region identifying

the amounts collected and the development charges paid after development charges are paid. When the assessment was completed for the Development, he was away from the office and was not aware of the application of the Discounted Rate until that report came to him. This report would have come to him in September of 2022 and at that time he questioned what had been identified as the application of a Discounted Rate for a large development.

[41] According to Mr. Fedy, at or about the same time, on September 27, 2022, the media reported that the Development was to be developed and constructed for the specific purpose of being a fulfillment centre for Amazon, being an on-line retailer, as the tenant. Mr. Fedy contends, at the time that the Appellants submitted their building permit application it did not specifically identify the use as being a fulfillment centre as had been confirmed by their own tenant in April of that year.

[42] Mr. Fedy asserts, based on this information, specifically that the Development would not be used as an Industrial Building, the Region realized that an error had been made when the original assessment had been conducted in July and issued a Notice of Re-assessment to the Developer identifying that the additional sum of $13,719,572 should have been paid when the first building permit was issued and that there had been an error in the application of the Discounted Rate.

[43] Mr. Fedy submits, the error in the application and calculation of what should have been the proper rate arose from the failure of the Appellants to describe the use of the Development in a manner consistent with that which its own tenant had confirmed. When those uses are considered against the definitions in the DC By-law, the Development does not meet the definition of Industrial Building or qualify for the Discounted Rate and as such it never should have been applied.

[44] Mr. Ferri submits, that the Region cannot retroactively assert that it is entitled, at any time after the imposition of the development charge, the collection of the development charge, the issuance of the Treasurer’s Certificate, and the first building

permit, to claim that it lacked the required information to certify the development charges payable in accordance with the DC By-law and DC Act.

DOES THE DC ACT, ACT AS A BAR TO THE REGION CORRECTING AN ERROR IN THE ORIGINAL CALCULATIONS

DC Act

[45] Counsel for the Appellants submits the following regarding the DC Act;

[46] Subsection 59.1 of the DC Act states that municipalities are prohibited from imposing a charge related to development except as permitted by the DC Act or another Act:

> 59.1 (1) A municipality shall not impose, directly or indirectly, a charge related to a development or a requirement to construct a service related to development, except as permitted by this Act or another Act.

[47] Subsection 26(1) of the DC Act establishes that a development charge is payable upon a building permit for the development being issued:

> 26 (1) A development charge is payable for a development upon a permit being issued for the development unless the development charge by-law provides otherwise under subsection (2).

[48] Mr. Ferri advised, while collection of a payable development charge already imposed may occur after the issuance of a building permit pursuant to section 26 of the DC Act, this can only apply if the DC By-law allows same, which in his opinion does not in this case.

[49] Mr. Ferris submits, on July 19, 2022, Old Mill received an invoice from the Region, indicating that the development charges had been assessed for the Old Mill Industrial Building in the amount of the actual development charge. Old Mill paid the actual development charge in full. This is the only development charge payable by Old Mill under the DC By-law.

[50] Mr. DeMelo submits the amounts identified by the Region are not an additional development charge but rather the Corrected Amount that is based on the calculations as of the date that the building permit was issued. The calculation has not altered any factors other than to remove the error that existed with the application of the Discounted Rate.

[51] According to Mr. DeMelo the Corrected Amount was calculated by the Region in accordance with its DC By-law and the DC Act in that the amount is based on the proposed use at the time that the building permit was issued and not a recalculation based on a change in use or change in the building itself.

[52] Mr. DeMelo submits the provisions of the DC Act which the Appellants' references relate to preventing a municipality from imposing a further charge after building permits have been issued because rates may have increased, exemptions may no longer apply, etc. Mr. DeMelo contends it does not apply to where an error has occurred in the original calculations and the corrected calculations are based on the rates and the By-law applicable at the time that building permit was issued.

[53] Mr. Ferris submits that he does not dispute that pursuant to the DC Act a development charge can be collected after the issuance of a building permit. Section 26 states that a development charge is payable upon the issuance of a building permit unless a DC By-law states otherwise.

DC By-law

[54] Under section 5 of the DC By-law, the whole of a development charge shall be calculated at the rate that is in effect at the time of the issuance of the building permit and shall be paid in full prior to the issuance of a building permit:

> 5. Subject to any agreement made pursuant to section 27(1) of the Act, the whole of the Development Charge imposed under this By-law shall be calculated at the rate in effect at the time of the issuance of the building permit and paid in full to the Treasurer of the lower-tier municipality in which the land is located prior to the issuance of a building permit under the Building Code Act for any building or structure in connection with the Development in respect of which the Development Charge hereunder is payable.[Emphasis added]

[55] The Appellants argue that section 5 of the DC By-law language is clear that the Region already calculated the development charge at the rate in effect at the time of the issuance of the building permit. Mr. Ferri asserts that since the Region calculated the development charge and a building permit was issued, the Region has no legislative authority to now impose additional charge or reassessment from the original charge of $9,082,948.59. The actual development charge applied the Industrial DC Rate set out in subsection 4(11) of the DC By-law. The amount of the actual development charge reflects a sixty percent (60%) reduction due to the Old Mill Industrial Building meeting the definition of “Warehouse” in the DC By-law.

[56] Section 11 of the DC By-law states that the Regional Treasurer shall certify to the lower-tier Treasurer (1) the amount of the development charge applicable to the proposed development; (2) the date upon which the development charge is payable or whether it has been paid; and (3) where it has not yet been paid, the manner in which the development charge is to be paid.

[57] Section 11 of the DC By-law explicitly states that the Treasurer’s Certificate is sufficient evidence of the development charges payable under the DC By-law for the purpose of issuing the building permit. The Region issued the Certificate, being Certification Number CAM-0145-22, in the amount of the actual development charge on July 12, 2022.

[58] Therefore, in accordance with the DC By-law, the Certificate is sufficient evidence of the development charge payable under the DC By-law and the Region

therefore had no authority under the DC By-law or the DC Act to charge the additional development charge after the issuance of such Certificate.

[59] In this case, Mr. Ferris submits that it cannot be said that the DC By-law states “in unmistakably clear terms” that the Region may assess an additional development charge after a development charge amount is certified, paid, and a building permit issued. Mr. Ferris contends that to the contrary, the Region did not include any provisions in the DC By-law respecting the recalculation or reassessment of development charges after the issuance of a building permit, possibly in recognition of its clear lack of jurisdiction to do so under the DC Act.

ANALYSIS

“CORRECTED AMOUNTS” AND FINALITY ARGUMENT

[60] Mr. Ferri highlighted the need for finality in respect of the calculation of development charges which was emphasized by the Ontario Municipal Board (OMB) (as it was then) in *Sherway Gate Development Corp., Re, 2013 CarswellOnt 8685*. In that case, as in the case at bar, the developer made full payment of the development charges owing to the municipality prior to the issuance of the building permit. The municipality provided receipt of payment on the same date, but later advised the developer that additional development charges were required to be paid. The developer disputed the additional charge.

[61] The Board found that the municipality’s written confirmation of payment, which represented official communication by the municipality to the developer, would lead a reasonable person to conclude that there were no further development charges outstanding. In so finding, the Board noted that the municipality had a responsibility to clearly communicate the development charge process to the developer pursuant to the DC By-law, and that it failed to do so. The municipality sought leave to appeal to the Divisional Court, which was dismissed.

[62] In this proceeding, the Appellants contend they were notified of a second development charge on November 8, 2022 – 119 days after the certification of the actual development charge and 70 days after the building permit for the Old Mill Industrial Building was issued.

[63] The Appellants raise the concern that there would be no permanence to the development charge regime and would not be in the public interest to have a Region add an additional development charge or reassessment to a development where a development charge was already paid and where a building permit was already issued.

[64] Furthermore, Mr. Ferri submits, this would lead to an absurd result whereby the Region is entitled to reassess development charges at any time in perpetuity and the Region would be permitted to reassess development charges or correct “errors” years after the initial certification of the development charge and issuance of the building permit, resulting in a profound lack of fairness and certainty for unsuspecting property owners.

FINDINGS ON “CORRECTED AMOUNTS” AND FINALITY ARGUMENTS

[65] The Tribunal finds that the term used to describe whether an “Additional development charge” as described by the Appellants or “Corrected Amount” as described by the Region is nonconsequential. Whether the development charge is described as a “Corrected Amount”, “Additional development charge”, “Second development charge”, or “Assessment” the Tribunal finds the description of the development charge has no bearing on the final analysis and does not change the determination of this issue.

[66] The Tribunal finds the *Sherway Gate Development Corp., Re* case is relevant where the OMB allowed the appeal under section 22(2) of the DC Act.

[67] The Board stated in Para 20:

> The City's argument that Sherway is an experienced developer and should have known that development charges are calculated on the date the building permit is issued is not supported by its written communications to Sherway The City has a responsibility to clearly communicate the development charge process to the developer pursuant to its DCBL. With respect to these applications, it is the Board's view it failed to do so.

[68] The Tribunal agrees with the Appellants that good public policy demands that there be some element of finality to the imposition of development charges and that property owners should not be forever exposed to the possibility of additional development charges because a municipality did not take appropriate care to ensure that its calculation of development charges was accurate.

[69] The Tribunal has considered the Books of Authorities from the Appellants and finds the cases noted above and below as having similar facts and relevance for the Tribunal to consider and reference.

SECTION 12 (1) DC BY-LAW ARGUMENT

[70] Section 12 of the DC By-law states (emphasis added):

> 12. For greater certainty, unless otherwise stated herein,
>
> (1) A Development Charge, including any rate or exemption pursuant to this By-law, shall be determined and payable for a Development at the time of and upon a building permit being issued for the Development:
> (2) If a Development consists of one building that requires more than one building permit, the Development Charge for the Development is payable upon the first building permit being issued: and

[71] Mr. DeMelo advised that pursuant to section 12(1) of the DC By-law, the development charge is to be calculated and paid upon a building permit being issued for the Development. Contrary to the submissions of the Appellants the Region has not calculated the development charges as of a date other than the date that the building permit was issued and was based on the proposed use as of that date.

[72] Mr. DeMelo submits that section 12(1) speaks to when the charge is to be calculated but does not estop corrections from being made so long as the calculations are still made as of the date that the building permit was issued. The fact that full payment was not made when it should have been may have been an error in calculation or remittance but is not a barrier to the Corrected Amounts from now being payable to the Region.

[73] Mr. DeMelo advised that pursuant to section 12(3) of the DC By-law, the onus of establishing that a development charge rate is applicable rests with the Applicant (Claimant): “An Applicant for a building permit shall bear the onus and provide the Regional Treasurer with such information and documentation as necessary to satisfy the Regional Treasurer in regard to any development charge rate or exemption as alleged by the Applicant at the time of the building permit.”

[74] Mr. DeMelo contends there is no bar to the Region requesting information to satisfy the onus of the Claimant after issuance of the building permit, rather what this section speaks to is placing the onus clearly on the Claimant to establish that what they assert to be the applicable rate as of the date of the building permit is in fact correct. This the Appellants have not done.

[75] Mr. DeMelo asserts that the Appellants seek to avoid satisfying this onus by circumventing same by relying on an error in the original calculation. An error which the Region submits was known to or should have been known to the Appellants as they were aware or reasonably could have been aware by reference to the DC By-law before the building permit was applied for and sought that the proposed use would not meet the definition of Industrial Building under the Region’s DC By-law.

[76] Mr. Ferri advised that the DC By-law requires that the amount of a development charge be assessed and paid prior to the issuance of a building permit and cited and confirmed by the Divisional Court in *The Regional Municipality of Waterloo v. Grerei*

Investment Limited (“Grerei”) at paragraph 36: “The building permit for the Development was issued on August 12, 2016. Pursuant to the DC By-law the applicable development charge was payable at the time of issuance of the building permit. The determination of the applicable rate of the development charge was required to be carried out at that time.”

[77] Mr. Ferri argues, the Region seems to take the position that the actual development charge was calculated at the time of building permit issuance “based on the proposed use as of that date” and that the Region is thereafter entitled to reassess the development charge once the actual use is determined. Mr. Ferri cites Grerei at paragraphs 42 and 43 respectively, which states (emphasis added):

> Because the determination of entitlement to the discounted industrial rate Is made by the decision-maker (the Region or the LPAT) at the time of issuance of the building permit and before the building is occupied, it cannot be based on an existing fact; it can only be based on a prediction of a future occurrence.
>
> The DC By-law does not set forth any factors to be considered in making the determination of whether the Development or Developments "are to be used for" industrial uses. Specifically, in the case of a development undertaken by a proposed lessor rather than by an industrial enterprise, the DC By-law does not require the existence of an executed lease for a proposed industrial use to satisfy the test.

FINDINGS ON SECTION 12-1 DC BY-LAW ARGUMENT

[78] The Tribunal finds that the case in Grerei is relevant. In the Grerei case, the Region (Waterloo) applied the DC By-law to disentitle Grerei to the benefit of the discounted “non-residential (industrial)” rate for the development charge to be levied on a new development being undertaken by Grerei on a property in the City of Cambridge.

[79] As a result of the decision of the LPAT, upheld following a review, the Region was ordered to apply the industrial rate (and not the non-industrial rate) for the development charge under the DC By-law in respect of the Development and to repay to Grerei the amount of the development charge it paid in excess of the industrial rate.

Subsequently, the Region's Motion for leave to appeal to the Divisional Court was dismissed.

[80] As noted in paragraph 36 in Grerei, “Pursuant to the DC By-law the applicable development charge was payable at the time of issuance of the building permit. The determination of the applicable rate of the development charge was required to be carried out at that time.” Similarly in the present case, the Tribunal finds the DC By-law states that where multiple permits are issued, as is the current situation, the first permit is the triggering date for assessment and payment of development charges and the first permit was issued on August 30, 2022.

[81] The Tribunal finds that the Divisional Court case *Cooperative d’habitation Aile-Nord v. Sudbury,* 1996 CarswellOnt2514 is also relevant. In this case the City added the overpayment to the tax roll pursuant to section 12(1) of the DC Act. The applicant applied for a declaration that the city could not utilize section 12(1) because the development charges in question did not remain unpaid after the due date.

[82] The Court allowed the Appeals and in paragraph15 which states (emphasis added):

> The respondent argues subsection 12(1) speaks continuously and where payment is made by or becomes owing again in like circumstances, the municipality may rely on the subsection to collect the monies by adding any unpaid amount to the tax roll. In my view, that is an overbroad reading of the section having regard to the context in which it is found. The applicant through its contractor had in fact paid all of the monies and certainly complied with the payment requirements set out in subsection 9(1). Thus, the amount was paid and it could not be said that there was any money owing to the respondent on the due date, which was the date on which the building permit was issued. The monies that became owing to the respondent were not monies that were due for non-payment because payment had in fact been made including an overpayment. It was due to the miscalculation of the refund that caused the applicant to be overpaid and it was because of this overpayment there is said to be monies owing. It seems clear this overpayment has nothing to do with the original building permit when it was issued as the payments were in fact made.

[83] Therefore, the Tribunal does not agree with the Region that an error in a calculation is not a barrier to the corrected amounts from now being payable to the Region. The fact is that a full payment was made when it should have been and certified by the Treasurer as per section 11 of the DC By-law.

[84] The Tribunal finds similar fact patterns in both cases. The Tribunal finds the Region's argument unsustainable in that the actual development charge was calculated at the time of building permit issuance "based on the proposed use as of that date" and it is thereafter entitled to reassess the development charge once the actual use is determined.

[85] The Tribunal will not delve into whether the application on the Use was sufficient since as agreed by the Parties this would be dealt with at Phase 2 of the proceeding if necessary.

SECTION 14 DC BY-LAW ARGUMENT

[86] The appellants contend, section 14 of the DC By-law does not apply where there is an "issue" as to the calculation of development charges; it only applies where there are no rules.

[87] Mr. DeMelo highlighted section 14 of the DC By-law which provides that:

> Where a Development Charge is payable hereunder, but any matter as to calculation, manner or timing for payment thereof is not expressly provided for herein, such matters shall be determined in accordance with the Act and Regulations, where applicable by analogy to similar provisions hereof and in accordance with the general principles underlying the Act and this By-law.

[88] Mr. DeMelo explained this section of the DC By-law requires that an issue arising as to the calculation, manner and limiting of payment shall be determined in accordance

with the DC Act and in accordance with the general principles underlying the DC Act and the DC By-law.

[89] Mr. DeMelo submits that given the wording in section 14 of the DC By-law there is no need for an express provision that would allow the Region to correct an error in the calculation of the development charges and in fact that such a correction is in line with underlying principles of both the DC Act and the DC By-law.

[90] In summary, Mr. Demelo contends the underlying provision of the DC Act is that growth shall pay for its share of growth-related needs, and the intention of the DC By-law is that the Discounted Rate shall only apply to those uses that meet the definitions under the DC By-law. According to Mr. DeMelo it is not an intention of the DC Act nor the DC By-law that a development may benefit from an error in the calculation of development charges.

FINDINGS ON SECTION 14 DC BY-LAW ARGUMENT

[91] The Tribunal finds the wording of section14 to be explicit when it reads: “Where a Development Charge is payable hereunder, but any matter as to calculation, manner or timing for payment thereof is not expressly provided for herein…”

[92] The Tribunal agrees with the Appellants that this language clearly states that section14 only applies where there is no provision made for the calculation, manner, or timing for payment within the DC By-law. These specific considerations are explicitly addressed within the DC By-law, and furthermore, all requirements under the DC Act have therefore been complied with in this case.

DEVELOPMENT CHARGES ARE A FORM OF TAX

[93] The Parties acknowledge that it is well-established law that development charges are a form of tax. The Appellants provided case *Ontario Cancer Treatment & Research*

Foundation v. Ottawa (City), whereby, the Ontario Court of Appeal held that while not every charge or levy imposed by the Province is a tax, DCs imposed under the DC Act are a tax.

[94] The Appellants contend, the principle that where there are two reasonable interpretations of a taxing provision, the interpretation that favours the taxpayer should be adopted (*Johns-Manville Can. Inc. v. R*., 1985 CarswellNat 313) wherein the Court held that it is a basic concept in tax law that where a taxing authority is not explicit, reasonable uncertainty or factual ambiguity resulting from lack of explicitness in the statute should be resolved in favour of the taxpayer.

[95] Mr. Ferri submits, a municipality has ultimate control of the specific terminology employed in a DC By-law, and as such, it is incumbent upon a municipality to express itself in “unmistakably clear terms” and avoid ambiguity when dealing with development charge obligations. If ambiguity does exist, the construction to be applied to the ambiguous language is the construction “which is most favourable to the subject”.

[96] In this case, the Appellants contend that it cannot be said that the DC By-law states “in unmistakably clear terms” that the Region may assess an additional development charge after a development charge amount is certified, paid, and a building permit issued. The Appellants argue, that to the contrary, the Region did not include any provisions in the DC By-law respecting the recalculation or reassessment of development charges after the issuance of a building permit, possibly in recognition of its clear lack of jurisdiction to do so under the DC Act.

[97] Mr. Ferri argues, to the extent that the DC By-law suffers from factual ambiguity resulting from lack of explicitness, the ambiguity must, at law, be resolved in favour of the Appellants and the Region must be estopped from imposing the additional development charge, as it is not provided for in the DC By-law or the DC Act.

FINDINGS ON DEVELOPMENT CHARGES ARE A FORM OF TAX

[98] The Tribunal agrees with the Appellants' argument that there is a lack of explicitness and there is ambiguity in regard to development charges obligations. The language in the DC By-law does not state the Region may assess an additional development charge or make a correction after a development charge amount is certified, paid, and a building permit issued. Since there is ambiguous language, the ambiguity must be resolved in favour of the Appellants and the Region cannot impose an additional development charge or correction as it is not provided for in the DC By-law or the DC Act.

SECTION 32 OF THE DC ACT – ARE DEVELOPMENT CHARGES A FORM OF TAX

Unpaid Charges Added to Taxes

[99] Subsection 32 (1) of the DC Act states: "If a development charge or any part of it remains unpaid after it is payable, the amount unpaid shall be added to the tax roll and shall be collected in the same manner as taxes."

[100] In regard to the section 32 DC Act argument from the Region, the Tribunal heard submissions from the Region that section 32 of the DC Act provides the authority for the Region to collect development charges through taxes that remain unpaid after they were payable. The Region asserts that there is only one development charge being charged for the Old Mill Industrial Building, as the Region had made an "error" in the calculation of the DC By-law when the amount payable was calculated.

[101] Mr. Ferri argues, the collection of a development charge already imposed, and the imposition of a development charge, are not the same thing. The DC By-law and the DC Act do not permit a municipality to impose a second development charge or a

corrected amount after a development charge has already been assessed, collected, and certified, and a building permit issued for the development.

[102] Mr. Ferri explained section 32 of the DC Act is clearly intended to capture a situation where, an applicant, either by choice or otherwise, fails to pay development charges when they are due. Section 32 ensures that the Region, as a taxing authority, has the legal right to collect such unpaid amounts and add them to the tax roll. It is a measure intended to protect the Region against the risk of nonpayment of development charges by an applicant.

[103] Mr. DeMelo advised the Appellants submit that the DC Act is exhaustive but in so doing they do no identify that the DC Act specifically allows a municipality to collect for development charges that remain unpaid after when they are payable.

[104] Mr. Ferri concludes that section 32 does not, implicitly or explicitly, authorize the Region to issue the additional development charge or corrected amount above and beyond the actual development charge, which was certified by the Region on July 19, 2022. According to Mr. Ferri, to read section 32 in this manner would grossly overextend the meaning of the section and fly in the face of the purpose and intent of the DC Act as a whole, as well as the relevant caselaw.

FINDINGS SECTION 32 OF THE DC ACT

[105] The Tribunal agrees with the Appellants that that the wording in section 32 of the DC Act is clear: “If a development charge or any part of it remains unpaid after it is payable...” which is not the case here. In this case, the collection of a development charge was already imposed. The development charge has already been assessed, collected, and certified, and a building permit issued for the development.

[106] The Tribunal agrees with the Appellants that the legislation does not intend to confer such a right upon the municipality, as there would have then been the need to

have wording in the DC Act which imposes a timeframe with respect to the imposition of any additional development charges or corrected amounts and other provisions providing clear legislative parameters with respect to such additional development charges or corrected amounts.

[107] The Tribunal agrees with Mr. Ferris that section 32 of the DC Act is clearly intended to capture a situation where, an applicant, either by choice or otherwise, fails to pay development charges when they are due. Section 32 ensures that the Region, as a taxing authority, has the legal right to collect such unpaid amounts and add them to the tax roll. It is a measure intended to protect the Region against the risk of nonpayment of development charges by an applicant.

[108] The Tribunal finds the DC Act specifically allows a municipality to collect for development charges that remain unpaid after when they are payable. However, in this case the Tribunal finds there was no unpaid development charge since the development charge has already been assessed, paid/collected, and certified, and a building permit issued for the development.

HYPOTHETICAL EXAMPLE

[109] The Tribunal will briefly discuss the hypothetical example argued by the Region in regards to an error where the actual charges to be paid on a clear reading of the DC By-law would be $1,000,000.00 but because of a clerical error in the preparation of the invoice, an invoice was sent for $10,000.00, i.e. the decimal place was incorrectly identified and a permit was issued based on the amount in error. The Region argues, by analogy the argument of the Claimants would be that they should benefit from the error and not be required to pay the additional $990,000.00 in development charges that should on a correct application of the By-law have been paid. Leaving this amount to now be funded by the taxpayers.

[110] Mr. Ferri submits, the fictitious example offered by the Region appears to equate a patent typographical error in the calculation of a development charge, as in the hypothetical scenario, to a substantive decision by a municipality to assess a second development charge following the assessment, payment, and certification of a development charge. Mr. Ferri contends this is a false equivalency. On the facts before the Tribunal, the Region is alleging that it has committed a substantive error; that is, the Region is alleging that it undertook the analysis, decision, and certification required of it by the DC By-law and DC Act and came to a conclusion, which it now, months later, seeks to alter through the issuance of the additional development charge. According to Mr. Ferri this is an entirely different scenario from the Region's hypothetical typographical error. That a substantive decision was made on the assessment of development charges applicable to the Old Mill is clear and obvious on the facts. The Region has not provided any evidence whatsoever that it was a clerical or typographical error in the application of the DC By-law.

[111] The Tribunal agrees with the Appellants that there was a substantive decision made in this case. The Tribunal will not delve into whether an error such as proposed in the hypothetical argument by the Region can be corrected, now or in the future, since the Tribunal is only relying on the facts before it in this case, which is clear that a substantive decision was made by a municipality to assess a second development charge or corrected amount following the assessment, payment, and certification of a development charge.

[112] Mr. DeMelo emphasized that if the Region was barred from correcting this error then the tax payers of the Region would be accountable to cover the shortfall of the corrected amount or additional development charge.

[113] The Tribunal understands the concern from the Region in this respect, however, a similar need for a good public policy demands that there be some element of finality to the imposition of development charges for an applicant and to ensure that legislation and By-laws are written without any ambiguities.

DEVELOPMENT CHARGES ALTERNATIVE PAYMENT AGREEMENT (“DCAPA”)

[114] The Tribunal will briefly discuss the DCAPA dated November 2022 between the Parties. The Appellants highlight section 4 of the DCAPA which states that the DCAPA is without prejudice to either party and shall not be produced “as evidence against either party in relation to the validity of the Disputed Development Charge”.

[115] During the hearing the Tribunal allowed to hear limited arguments on the DCAPA since it was disclosed in the Motion materials of both Parties.

[116] Mr. Ferri submits the references to the DCAPA in the background section of the Notice of Motion, is to confirm that payment of the additional development charge had been addressed.

[117] Mr. Ferri asserts the Region’s use of the DCAPA is a sword to argue that the Region can collect the amount in dispute is lamentable, contrary to the express terms of the DCAPA, and reflective of bad faith conduct.

[118] Mr. Ferri submits, the DCAPA is specific to the additional development charge, which the Appellants expressly maintain is an unlawful charge. It does not apply to the actual development charge. Also, pursuant to section 27 of the DC Act, the Region can only enter into a deferral agreement with “a person who is required to pay a development charge”.

[119] According to Mr. DeMelo, the Appellants themselves in their materials have provided a copy of the DCAPA. That agreement specifically identifies the ability of the Region to collect these amounts that are now in dispute as in accordance with section 32 of the DC Act.

[120] While the Agreement is not an acknowledgment by the Appellants that what they have described as additional development charges is payable to the Region, according to Mr. DeMelo, the agreement clearly recognizes that the Region may collect this amount as unpaid taxes if it is determined to be payable to the Region.

FINDINGS ON THE DCAPA

[121] The Tribunal views the DCAPA as an agreement of the Parties on the outcome of this proceeding acknowledging the decision body with competent jurisdiction and subsequent order.

[122] The Tribunal confirms the DCAPA is explicit in its wording that it is without prejudice to either Party and shall not be produced as evidence against either Party in relation to the validity of the Disputed Development Charge.

[123] Therefore, the Tribunal does not rely on the submissions or the context of the Motion materials in reference to the DCAPA and does not make a determination on the DCAPA itself within these proceedings.

SUMMARY OF FINDINGS

[124] The Tribunal finds the DC Act or the DC By-law does not permit a municipality to impose an additional development charge or a corrected amount after a development charge has already been assessed, collected, and certified, and a building permit issued for the development.

[125] The Tribunal finds that whether the description of a corrected amount or additional development charge is nonconsequential and has no bearing on the Tribunal’s analysis or determination of this issue.

[126] In regard to the jurisprudence provided by the Appellants, although determinations in other cases are neither binding nor do they fetter the discretion exercised by the Tribunal, they were considered instructive given their similar fact patterns and relevance. The Tribunal has exercised its discretion in referencing the above noted cases for the purposes of this Motion.

[127] In regard to the application itself and Use, the Parties made it clear to the Tribunal that the Use issue would be part of Phase 2 of these proceedings if necessary. The Motion was set out on consent of the Parties and during the start of the Motion hearing both Parties acknowledged that a Phase 1 and Phase 2 of the proceeding was to be administered.

CONCLUSION

[128] The Tribunal has considered the evidence before it as well as the submissions of the Parties. The Tribunal finds this matter is capable of being determined by the Tribunal and the phased approach agreed upon by the Parties at the outset of the Motion allowed for the Tribunal to determine the specific facts of Phase 1 which was cited on whether the Region errored in its application of the DC-By-law and did not prevent the determination of the issues raised in this Motion. Therefore, Phase 2 of the merit hearing is not required.

[129] An Order of the Tribunal abridging the time for service of the Notice of Motion, was not required since the Parties resolved this prior to the Motion and never raised this during the Motion hearing.

[130] Costs were not considered as part of this Motion as the Parties resolved this issue prior to the commencement of the Motion hearing.

ORDER

[131] **UPON MOTION** to the Tribunal by 140 Old Mill Road LP and 140 Old Mill Coinvest Limited Partnership ("140 Old Mill") for an Order of the Tribunal allowing the appeal of 140 Old Mill from the non-decision of the Region Council on a Complaint by 140 Old Mill pursuant to subsection 22(2) of the DC Act and after the hearing of the Motion,

[132] **THE TRIBUNAL ORDERS THAT** the Motion for Directions brought by 140 Old Mill is granted, and the Tribunal provides the following Directions for the purposes of this appeal before the Tribunal:

1. An Order of the Tribunal allowing the appeal of Old Mill pursuant to subsection 22(2) of the DC Act from the non-decision of the Region Council on a Complaint by Old Mill.

2. An Order of the Tribunal confirming that the Region's Notice of Reassessment in the amount of $13,719,572.00 was an error in the application of the DC By-law.

3. An Order that the Region is to assess development charges on the Old Mill Industrial Building with industrial permit 21 008811 000 CP in the amount of $9,082,948.59, which amount has been paid.

4. An Order that no development charge is payable to the Region on the Old Mill Industrial Building with industrial permit 21 008811 000 CP.

"*Eric S. Crowe"*

ERIC S. CROWE
MEMBER