

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: May 5, 2015

CASE NO(S): DC120006

PROCEEDING COMMENCED UNDER section 14 of the *Development Charges Act*, 1997, S.O. 1997, c. 27

Appellant:	Calloway REIT
Appellant:	Embee-Jovic Development Group
Appellant:	Hamilton Halton Home Builders' Association
Appellant:	Orlando Corporation; and others
Subject:	Development Charges By-law No. 48-12
Municipality:	Regional Municipality of Halton
OMB Case No.:	DC120006
OMB File No.:	DC120006

PROCEEDING COMMENCED UNDER subsection 22(1) of the *Development Charges Act*, 1997, S.O. 1997, c. 27, as amended

Appellant:	Embee Properties Limited
Subject:	Complaint against a Development Charge imposed under the authority of Development Charges By-law No. 48-12
Subject Property:	3041-3061 Walker's Line
Municipality:	Regional Municipality of Halton
OMB Case No.:	DC120006
OMB File No.:	DC140004

Heard: Monday, July 7, 2014 in Toronto, Ontario

APPEARANCES:

Parties

Regional Municipality of Halton

Embee-Jovic Development Group,
Embee Properties Limited, Calloway

Counsel*/Representation

R. Doumani* and J. Johnson*

D. Wood* and Y. Choi*

REIT, SmartCentres Limited

Orlando Corporation

C. Barnett*, L. Bisset*

DECISION DELIVERED BY J. E. SNIEZEK AND PARTIAL ORDER OF THE BOARD ON PHASE I

INTRODUCTION

[1] The Region of Halton passed development charges By-laws Nos 48-12 and 49-12 following the completion of the background study, reviewed by the Development Charges Advisory Committee that held four meetings Sept 8, 2011, Sept 29, 2011, October 5, 2011 and October 13, 2011. There was also a meeting of the Halton Developers Liaison Committee January 27, 2012. There were also consultation sessions with various Chambers of Commerce and BUILD. There a presentation to a public meeting on February 22, 2012 where council received 14 submissions. During the process, various notices and documents were posted on the Regions web site. The By-laws were read and passed at the Council Meeting of April 18, 2012. Following, the passage appeals were filed by a number of parties. There were seven prehearing conferences and the hearing was reduced from its original five phases to three and then two.

[2] Phase 1 consists of the appeals related to the non-residential charges for retail and industrial uses. Phase 2 relates development charges for property commonly known as 4011 Dundas Street West in the City of Burlington (now withdrawn); and Phase 3 consists of concerns related to the residential charge being levied on multiple and apartment residential units with no regard to the size of the units expressed in terms of the number of bedrooms and the collection of a new service for Conservation Halton.

[3] The Board heard evidence from experts in the fields of economics, transportation, land development, municipal finance, planning and development charges by-laws.

[4] The following is a list of the witnesses who testified during the hearing that lasted 17 days:

Orlando Corporation Witnesses:

- Phil King, President of Orlando Corporation,
- Tom McCormack, consulting economist,
- Audrey Jacob, planning consultant.

Embee et. al. Witnesses:

- Paul Sarjeant, transportation consultant,
- Rowan Faludi, consulting planner,

Region of Halton Witnesses:

- Russell Mathew, consulting planner,
- Cameron Watson, consulting economist,
- Jamie Cook, consulting planner,
- Matthew Buist, senior advisor development financing at the Region,
- Alvaro Almuina, transportation consultant.

[5] The Board will issue first its decision on Phase 1 and following it will issue its disposition on Phase 3.

Concerns raised by Orlando Corporation

[6] The issues raised by the Orlando Corporation regard the nature of large scale logistics buildings with increasing building heights and floorplates and decreasing numbers of employees that should be reflected in a lower density in terms of the building area expressed in thousands of square feet per employee. The Region proposes a density of 1100 sq. ft./ employee while Orlando's witness support a density of 2058 sq. ft. per employee.

[7] Mr. King testified about his company's experience in developing and building business parks in the Greater Toronto Area. Mr. King was a member of the DCAC and he indicated that Orlando Corp. was in the business of developing business and industrial parks in the Greater Toronto Area ("GTA"). The Corporation presently operates nine business parks and it has three planned parks. Eight of their developments are located in the Region of Peel.

[8] Mr. King then reviewed the portfolio of business park development that is summarized as follows:

1. Airport Business Park Pearson Airport in Mississauga- 600 acres - mixed use development with office, industrial and warehousing.
2. Heartland Business Park 401 and Hurontario in Mississauga – 250 acres- developed in the 1980s -developed in three phases – Phase I, 85,000 square feet ("sq. ft.") – Phase II 75,000 sq. ft. – Phase III 160,000 sq. ft. Future phases were adjusted to accommodate larger floorplates.
3. Derry/Kennedy Road – Mississauga-150 acres average building sizes of 300,000 sq. ft.

4. Churchill-Brampton Highway 407 and Steeles Avenue – 550 acres- average building floor plate 350,000 sq. ft. in the first phase.
5. Millcreek Business Park - Mississauga Road and Britannia Road
Mississauga- 220 acres
6. Brick Quarry – Britannia Road and Erin Mills Parkway – Mississauga- 170 acres -- averages 300,000 sq. ft.
7. Highway 50 –in Milton – 3 future parks – 230 acres, 150 acres and 300 acres –planned for 45% coverage.

[9] A study of the Churchill Business Park indicates a density of 3800 sq ft. per worker.

[10] Mr. McCormack, an economist prepared economic forecasts of employment by type of industry and noted the continuing productivity improvements in the logistics industry.

[11] It was the conclusion of both Mr. King and Mr. McCormack that the Region of Halton's average of 1100 sq. ft. per employee of non- retail commercial space was too low and significantly under counted the space requirements and resulted in a overcharging of industrial space (Orlando proposes 2058 sq. ft. per employee).

[12] Ms. Jacob testified that the average figure for floor space per employee should be 2058 sq. ft. not the 1100 sq. ft. per employee in the DC By-law No. 48-12. She provided survey information for Oakville, Burlington, Milton and North Milton. This survey information covered the period 2006 – 2013. Ms. Jacob accurately summarized the basic difference between her method for calculating floor space per worker when she concluded the following in her witness statement (Exhibit 30, Tab 4, pg.38):

A key distinguishing factor between the Watson approach and the IBI approach is that the Watson approach uses the historic employment average across all industrial buildings in the Region whereas the IBI Group's approach reflects incremental growth post 2005.

Concerns raised by Embee, Calloway and SmartCentres

[13] The issues raised by Embee, Calloway and SmartCentres focus on the amount being charged "retail" uses for road improvements. Mr. Sarjeant, a professional engineer with expertise in traffic and transportation management testified that he had no difficulty with the residential – non-residential split that was based upon the Halton Transportation Model (HTM). He had difficulties with the retail non retail split that used trip generators from the ITE manual that results in trip generation factors that produced 166000 trips compared to the Transportation model results of 83,000 trips.

[14] The other main concern raised by Embee, Calloway and SmartCentres was the definition and use of the term retail to describe the allocation of traffic demand. The appellants were also concerned about the increase in the charge from \$8.17 in the D. C. By-law No. 62-08 to \$17.35 in the 2012 DC By-law 48-12 an increase of 112 %.

[15] This was the primary focus of the evidence proffered by Mr. Faludi who concluded that retail trip generation is focussed in non- peak periods and may not require road improvements.

[16] Mr. Faludi also enumerated his concern with what had been included in the definition of retail when he stated that "the retail type of development has been created by combining a wide range of very different retail, office, entertainment, cultural, industrial and institutional uses and does not constitute a retail category as typically understood for land use planning purposes" (Exhibit 29, pg. 7-8).

Region's Approach and Responses to Orlando, Embee, Calloway and SmartCentres Concerns

[17] The Region did directly address the changes in the industrial employment and the increase in large warehousing and distribution centres in a report to the DCAC.

[18] The 2012 DC Background Study (2012) explains in some detail the employment density assumptions for industrial and others uses that have been questioned by Orlando:

Forecast assumptions regarding the average sq. ft. per employee are based on a detailed review of the 2010 Halton Region Employment Survey as well as a review of existing employment density trends across the Greater Toronto Area (GTA) based on surveys conducted by Watson and Associates.

The employee density assumptions reflect a "bottom up" approach to the forecast. For example, the average sq. ft. per employee for industrial development in the Built Boundary (800 -1,050) is lower than the Greenfield, Milton and Remaining Rural Areas (900 – 2000 respectively). In part, this accounts for the steady forecast of Greenfield construction along the Hwy. 401 corridor in the warehousing and distribution sector. Typically, the average number of sq. ft. per employee within the warehousing and distribution sector is much higher than the industrial average. The result of using this "bottom up" approach is that the average number of sq. ft. per employee varies from year to year depending on the weighting of employment growth by local municipality.

(Exhibit 31A, Tab 3, pg. 177)

[19] The DCAC Presentation dated October 13, 2011 dealt with the matter of employment density and concluded that 1100 sq. ft. per employee ration was reasonable and would result in 5.2 million sq. ft. annually for the next twenty years and that forecast exceeded the average of the last five years by 2.2 million square feet.

(Exhibit 31D, Tab 16b, pg.1506)

[20] The average industrial density used in the 2012 Background Study is consistent with the approach that was used in the 2008 DC Background Study. The 2012 Background Study is part of an evolutionary process that builds upon the work

completed in 2008 and 2004. The Region approach of building on previous studies ensures a strong data and methodological framework that is traceable and similar.

[21] The coverage ratios have an impact upon the density and that was the subject of the report on same dated April 7, 2008 and contained the following discussion:

As a result of a review of actual coverage ratios and based on more recent trends of higher coverage ratios, for the 2008 DC Update the coverage assumption has been adjusted in this addendum from 30% to 35%, which results in an increase in the conversion factor from 850 sq. ft. per employee to 992 sq. ft. per employee for industrial development. While many submissions received during the consultation process, identified a coverage ratio of over 40% for industrial development, this was not supported by the Region's review, which considered the entire non-residential sector based upon the Region's records. The adjustment to increase the coverage ratio and the conversion factor will increase the estimated square feet of industrial development by 5.3 million square feet in the DC calculation and thereby reduce the non- residential DC.

(Exhibit 89, 5th pg.)

[22] The Board notes that there was a historical comparison of the industrial employment densities reflected in assumptions used in all the DC Studies (2004, 2008, and 2012) and the industrial square footage rate per industrial employee has gone from 900 in 2004, to 992 in 2008 and to 1100 in 2012.

- It is interesting to note that the current ratios are as follows
Halton Hills (2007) 805 sq. ft./employee
- Burlington (2009) 992 sq. ft./employee
- Oakville (2009) 900 sq. ft./employee
- Milton (2012) 1300 sq. ft. / employee.
- (Exhibit 31D, Tab 16D, pg.1532)

[23] The Region points to its ongoing program of monitoring and inventorying industrial developments throughout the various municipalities as a clear indication of its intent to maintain a fair and reasonable ratio for industrial space that reflects the demand for services and the need to remain competitive as a place to do business.

[24] The addendum to the 2008 Development Charges Background Study explains the process that Halton followed in calculating the non-residential charge. It is clear that in its on-going effort to properly reflect the relationship between the demand for and supply of services, more effort would be placed on the correct formulae for cost recovery for non-residential uses.

Differentiated non-residential development charges – a review was undertaken to determine whether there was sufficient data contained in the infrastructure master plans and technical studies to support differentiated charges for four different non-residential uses. Although there was some technical information available to discriminate between industrial and non-industrial, there was insufficient detail available to calculate different non-residential development charges. Staff will be pursuing master plan models in the next DC update that will provide the level of analysis that can appropriate(ly) calculate DC's among these different land uses. The 2008 DC update will therefore continue to reflect an average full recovery non-residential charge consistent with previous Halton by-laws.

(Exhibit 89, 13th and 14th pg.)

[25] Mr. Watson neatly summarized the key issue with respect to the retail share of trips when he stated the following:

The non-residential cost share of the Roads program has been established and is constant. The issue at hand is to properly share that cost between Retail and Non Retail development. (Exhibit 27 pg. 7)

[26] The Region's Background Study clearly set out the rationale for the Non Residential DC Categories.

For the 2012 Study, it was investigated whether there was a means to differentiate the non-residential rates on technical grounds for services. The review indicated that transportation services can be differentiated for non-residential use, such as retail, office & other employment, based upon technical information that provides different trip generation rates relating to each category. The water and

wastewater services however, continue to be a uniform charge due to the inability to differentiate flow usage by employment types. Over the last several years, an increasing number of municipalities have differentiated their non-residential DC rates (most commonly transportation DCs) based on land use type (e.g. retail vs. non retail etc.).

Accordingly, draft non-residential DC rates were calculated for transportation service based on differentiated rates for retail, office and other employment uses. The calculation resulted in a significantly higher DC rate for the retail category compared to DC rates for office and other non-residential. This is consistent with the impacts of differentiated non-residential DC rates that have been imposed in other jurisdictions.

Given that the DC rates for office and other non-residential were not materially different, it is recommended that the office and other non-residential categories be combined and the non-residential DC be differentiated between a retail and non-retail rate.

Exhibit 31A, Tab 3, pgs. 136 and 137

The Law

[27] Section 5(6)2 of the *Development Charges Act* (“Act”) provides:

(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:

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), which 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.

[28] In that connection, it is noteworthy that the Act does, in fact, require a linkage between the determination of the increase in need of service for the purpose of estimate of development charges and the demonstration of council’s intent to meet such a demand. S. 5(1) 3 of the Act states:

3. The estimate under paragraph 2 may include an increase in need only if the council of the municipality has indicated that it intends to ensure that such an increase in need will be met. The determination as to whether a council has indicated such an intention may be governed by the regulations

[29] Section 3 of O.Reg.82/98 states:

3. For the purposes of paragraph 3 of subsection 5 (1) of the Act, the council of a municipality has indicated that it intends to ensure that an increase in the need for service will be met if the increase in service forms part of an official plan, capital forecast or similar expression of the intention of the council and the plan, forecast or similar expression of the intention of the council has been approved by the council. O. Reg.82/98, s. 3.

[30] The Act clearly requires a connection between the demand and supply functions as they relate to a specific service – it is simply not adequate to determine the demand for the service and not provide for its supply. The supply function is determined by some official document – official plan and/or capital works forecast. This linkage is a key component of the Act and its regulation.

[31] The Act also sets out what should be the basis for any charge – in that it is demand for a service. The demand must be adjusted for the use of any existing capacity and any discount. The cost attributed to the development type is then recovered over the term of the by-law, i.e., five years.

Findings of the Board

[32] The Board cannot accept the position of Orlando with respect to the square footage per employee due to a number of factors.

[33] The data provided by Ms. Jacob was in excess of the data provided for the background study i.e. 2012 – 2013. (See paragraph 11) (The Region's data in the

Background Study covered the period up to 2011 and the forecast period was 2012 to 2031. (Background Study A2-2).

[34] The result of accepting the position of Orlando would result in the amount of industrial square footage of 5.7 million sq. ft. per year compared to the Region's projection of 3.4 million sq. ft. per year, a difference of 68%. Ms. Jacob failed to calculate the amount of land required to accommodate her higher floor space per worker assumption.

[35] The impact on the changes in industrial employment density is in Mr. Mathew's witness statement. (Exhibit 26, pg.7)

21. The employment forecast, land use forecast and FSW in employment areas is also governed by policy. The *Growth Plan* mandates that the overall greenfield development densities in the Region must average a minimum of 50 persons plus employees per hectare. The current planning in the Region does achieve this minimum standard. Any measurably higher alternative FSW assumption would drive up land need and drive down employment density requiring reduced residential land and increased residential to meet the *Growth Plan* minimum requirements. Planned residential density is already considered by most to be near the high end of an achievable range. As a result, *Growth Plan* requirements limit the ability to adopt planning assumptions that result in additional land designation and reduced development density.

22. In Ms. Jacob's May 20th 2014 witness statement an industrial FSW of 191m² per employees for the Region of Halton as a whole is recommended. The FSW is further broken down to 213m² for North Halton and 104m² for south Halton. For example, Ms. Jacob's 213m² at a relatively high average building coverage of 0.45 would equate to 21 employees per net hectare or 17 employees per gross hectare.

23 To illustrate the implications of the recommended FSW for land planning, the effect of applying Ms. Jacob's FSW on new urban lands in north Halton has been calculated. Based on the density and need calculations in *Sustainable Halton Report 3.07: Accommodating Growth to 2013* on pages 30 to 38 the density for industrial-type for new urban areas in north Halton is 26 employees per net hectare. Applying Ms. Jacob's density to Halton's employment forecast for just the new urban areas would mean a need for 1,650 gross hectares of additional land, rather than the 1100 actually designated through ROPA 38. Applying the lower density to either 1100 hectares or larger 1650 hectares would remove any reasonable possibility that Halton could meet the minimum greenfield density requirements of the *Growth Plan*.

[36] The purpose of the Growth Plan is to shift residential and employment densities beyond the forces that the market would produce. If logistics industries continue at the pace described by Ms. Jacob the deficit in employment densities must be made up by other uses in order for the employment/population densities contained in the Growth Plan to be met. To accept the proposition proposed by Orlando would be to ignore the provisions of the Growth Plan and the Halton Official Plan. It would result in 550 hectares of additional industrial land that would reduce the density of industrial employment below the required density of 50 persons and/or employees per hectare. This density decrease would have to be made up by increasing other non-residential, i.e., retail or office densities and/or residential densities. This result in Halton failing to meet the density targets in the Growth Plan given the evidence of Mr. Mathew.

[37] The DCAC was clearly aware of the IBI study and the position of Orlando and it considered it and rejected it. (Exhibit 31(D), Tab 13B, pg. 1312) (Employment Density)

[38] The Orlando projects are primarily near the 401 Corridor mostly in Mississauga and Peel. There are projects planned for Milton but the Milton D.C. By-law provides for an industrial employment density of 1300 sq. ft./employee in a similar range to the used by Halton to calculate its charge.

[39] Orlando provided the Board with no calculation of what the charge would be if the average employment density for industrial employment was reduced by a factor of almost two.

[40] The Board when making a decision on a DC By-law, must be presented with an alternative charge if you are challenging the charge the Board should have to choose charge A or B. The rationale for this is that the Board must determine whether the charge is being increased or decreased. The Board can only decrease the charge and if the change in the rate would increase the charge and that would be *ultra vires* powers of the Board. (see Orangeville District Home Builders Assn, Re (2010) CarswellOnt 7065 and Saugeen Shores (Town) Development Charges By-law No. 24-2013, Re 2014

CarswellOnt 10917, 81 O.M.B.R. 148) It must see before it the alternative charge it cannot make the assumption that the charge would be decreased because the test must be proven before it can make its determination. Orlando's position is not Amount A but we are not sure what Amount B is but the municipality can calculate it based upon an employment density of 2058 sq. ft. per worker versus the Halton figure of 1100 sq. ft. per worker.

[41] Halton has traditionally used the average of industrial employment to calculate its Development Charge and has decreased industrial employment densities over time. The Board expects that the next charge will involve lower average employment densities if the trend continues. The Orlando forecasted numbers only uses recent data and only calculates the incremental increase in employment. This will result in a fundamental change in the DC calculation and the potential under charging of industrial users because of the recent economic downturn has highlighted the growth of logistics and warehousing industries versus higher density manufacturing industries. The approach used by Halton is more conservative and will change over time to reflect current trends if they continue. It should be noted that employment in newer developments may be lower in the beginning as a new business grows into its new space or a relocating business adapts to what may be larger space. The approach used by Orlando is a "narrow cast" using only the most recent data some of which is beyond the time frame used to calculate the charge and may under state employment over the longer term.

[42] The approach used by Halton is reasonable, within the bounds of the DCA and consistent with past practice.

[43] The concerns from Embee et al can be summarized into two basic issues the use of the term "retail" and the use of the ITE manual to allocated the traffic between retail and non- retail uses.

[44] It is interesting to note that Embee et al did not question the split between residential and non-residential trip making i.e. the 68:32 split for residential and non-residential traffic demand.

[45] The definition of the term “retail” is much broader than the traditional or technical definition of the term. Mr. Watson admitted in cross examination that it could have been called commercial, minus office and industrial.

[46] The Board has looked at the definition of “retail development in both By-law No. 62-08 and By-law No. 48-12.

- (i) (nn) “retail development” means land, buildings or portions thereof used, designed or intended for use for the purpose of offering food, wares, merchandise, substances, articles or things for sale directly to the public or providing services or entertainment to the public.
Retail development:
 - (1) land, buildings or portions thereof used, designed or intended for use for rental of wares, merchandise, substances, articles or things;
 - (2) offices and storage in connection with or related to or ancillary to retail use; and
 - (3) conventional restaurants; fast food restaurants; concert halls/theatres/cinemas/movie houses/drive-in theatres; automotive fuel stations with and without service facilities; specialty automotive shops/auto repairs/collision services/ car or truck washes; auto dealerships; shopping centres and plazas, including more than two attached stores under one ownership; department/discount stores; banks and similar financial institutions, including credit unions; warehouse clubs and retail warehouses; and
- (ii) excludes freestanding bank kiosks.

(Exhibit 64, pg. 6)

(qq) “retail development” means land, buildings or portions thereof used, designed or intended for use for the purpose of offering food, wares, merchandise, substances, articles or things for sale directly to the public or providing services or entertainment to the public. Retail development excludes freestanding bank kiosks and includes but is not limited to:

- (1) land, buildings or portions thereof used, designed or intended for use for rental of wares, merchandise, substances, articles or things;
- (2) offices and storage in connection with or related to or ancillary to retail use; and
- (3) conventional restaurants; fast food restaurants; catering establishments; bars and taverns; beer and wine-making stores; concert halls/theatres/cinemas/movie houses/drive-in theatres; dinner theatres; casinos; amusement and theme parks ; amusement arcades; bowling alleys ; fitness /recreation sport centres; hotels/motels/bed and breakfast facilities/ rooming and boarding houses; gas stations and service stations; specialty automotive shops/auto repairs/collision services/ car or truck washes; auto dealerships; shopping centres and plazas, including more than two attached stores under one ownership; department/discount stores; banks and similar financial institutions, including credit unions; insurance brokerages; investment advisory services; warehouse clubs and retail warehouses;

(Highlighted sections are changes for previous by-law Exhibit 31A Tab 2, pg. 0023)

[47] The definition of retail in both the by-laws is much broader the highlighted sections do not expand the definition by much other than to add clarity. The major difference is the addition of rooming and boarding houses which would normally be classified as “residential” uses.

[48] The definition of retail is clear for Embee et al to assert that because the term “retail” was used in the Background Study and that misled the Council of the Region in its decision is a little bit of a stretch given the fact that the previous by-law included a definition of retail that was not substantially different and also given the fact that the Region had telegraphed its intent to have a separate “retail” category following completion of the 2008 DC process.

[49] The question is how to allocate the retail trip component. The TMP model is based upon a five percent sample making any traffic zone with less than 1000 observations less reliable – given the accuracy of the model for any specific use it is impossible to use the model to allocate trips to specific uses.

[50] Mr. Almuina clearly stated this in his witness statement in paragraph 4.1. 10.

This component of the Transportation Technical Report required that the methodology be developed to allocate costs among the non-Residential land uses. The Region's TMP Model cannot differentiate among the three specific uses identified by the DCAC during the 2008 DC process, hence a methodology specific to just the allocation of costs among Retail, Office and Other Employment need to be defined.

(Exhibit 23, pg. 6)

[51] Mr. Almuina used the ITE Trip manual and the shopping centre use as a means of allocating retail trips.

[52] The discussion of pass by and diverted trips is an interesting discussion but in no way clarifies the allocation process used by Mr. Almuina, who was responsible for the transportation section of the Development Charge Background Studies in 2004, 2008 and 2012.

[53] In cross examination, Mr. Sarjeant admitted that it was an apples to oranges comparison in that the ITE Manual used in and out trips and if one accounts for the in and out trips the figures are comparable (83290 trips vs. 83441 trips).

[54] Embee et al did not call into question the 62/38 split of trips between residential/non-residential uses. As outlined above the trip allocation was similar that is, number of trips and the amount of floor space allocated to "retail" was not questioned. Therefore, the only question was the allocation process that included an offset for transit (5% of trips) and the use of the ITE Manual for shopping centre trips.

[55] The witnesses for the appellants provided no alternative for allocating the "retail" trips they just proposed the combined ratio that was based upon the 2008 allocation process.

[56] The Board notes that the DCAC was given a chart of Non Residential Development Charges as of July 1, 2011 that ranged from a high of \$37.33 in Richmond Hill to a low of approximately \$10 in Toronto. (Exhibit 31D, Tab13B, pg.1327)

[57]

[58] The Board notes that the criticism was entire based upon the definition of “retail” use and the allocation process that attempted to link transportation planning methodology with the allocation of retail trips. This was a false premise that was described as “picking fly specs out of pepper”.

[59] The arguments put forward were not grounded in fact or theory and were straw men that were easily immolated by the carefully crafted municipal approaches to determining the charge for retail.

[60] The theoretical position put forward that “retail” should only pay for incremental demand i.e. demand created by increased employment because most of the retail traffic occurs in off peak times is a very narrow interpretation of the DC Act.

[61] There is increased demand in the non- residential sector. That demand is in part retail demand and retail uses will use the increased supply that is, better road system to serve their businesses that is, for deliveries, and to serve their employees and their customers.

[62] The argument put forward that we do not contribute to peak hour demand and as a result should not contribute is akin to the argument that I do not flush by toilet in the peak flow period and as a result I do not use the peak capacity and should not pay for it. Or I do not have children in school and should not pay education costs. There is a clear demand on the transportation system and that demand should pay some of the increased costs.

[63] Mr. Watson admitted that a title other than retail might have been more apt. The Board notes that the retail definition in the 2008 By-law was broad and all encompassing. Board also concludes that it was telegraphed in the report following completion of the 2008 process. The allocation of the retail charge does not have to be perfect. (N.L.N.U. v. Newfoundland & Labrador (Treasury Board), 2011 SCC 62 pg. 5

Paragraph 18) I doubt that there is a data base that could calculated a “perfect” incremental charge that is suggested by the appellants. Notwithstanding this lack of perfection, the charge for retail is reasonable and within the range of other similar charges. The naming of the charge is not the main issue it is how the name is defined and there is little difference in how the term “retail” is defined in the 2008 and 2012 By-laws. One is remind of Shakespeare’s oft quoted line “A rose by any other name would smell as sweet”. Retail is as defined is not necessarily pure retail but it is what it is as set out in the by-law. Embee et. al. are sophisticated parties with consultants who can clearly read and understand by-laws and should not be easily confused or misled by the word retail that was clearly defined as something much broader.

[64] The DC charge for both “retail” and industrial is reasonable and appropriate and reflects an evolutionary and iterative process that places the current DC By-law upon the strong municipally developed foundation of the work previous By-laws and their Background studies The assumptions that underly the Development Charges Background Study and By-law No. 48-12 are in conformity with the Halton Official Plan as amended by Regional Official Plan Amendment (ROPA) #37. #38 and #39. These assumptions were contained in the Best Planning Estimates (PBE) that responded to the allocations of growth contained in the Provincial Growth Plan. The proposed development assumptions underlying the Orlando objection would clearly conflict with the Halton Official Plan and the Growth Plan. As far as the Embee-Jovic Development Group appeal that is based upon the definition of “retail” that was in the previous by-law and would require the Region to abandon their allocation of “retail” traffic that is not perfect but is certainly reasonable and understandable. There was no question of the traffic split between residential and non-residential traffic demand or the amount of expected retail development the key assumptions that were the basis for road improvements. The Board dismisses the appeals and approves the portions of the By-law under appeal.

[65] The Board orders that the appeals of Orlando Corporation and Embee et al are

dismissed and the portions of By-law No. 48-12 under appeal are now approved.

“J. E. Sniezek”

J. E. SNIEZEK
MEMBER

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Ontario Municipal Board

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