

CITATION: [Party] v. [Party] , [YYYY] ONSC
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DIVISIONAL COURT FILE NO.: 367/19
DATE: 2019/11/28

**SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT**

RE: THE REGIONAL MUNICIPALITY OF PEEL, the Moving Party

AND:

AMACON DEVELOPMENT (CITY CENTRE) CORP., the Responding Party

BEFORE: H. Sachs J.

COUNSEL: *Paul M. DeMelo*, for the Moving Party

Mark R. Flowers and Susan Rosenthal, for the Responding Party

HEARD at Toronto: November 28, 2019

ENDORSEMENT

[1] This is a motion for leave to appeal to the Divisional Court from the decision of the Local Planning Appeal Tribunal (the “Tribunal”) issued on June 11, 2019. In that decision the Tribunal amended certain aspects of the Region’s Development Charge By-law enacted on September 10, 2015. These amendments were at the request of and in accordance with the evidence adduced by Amacon.

[2] Decisions of the Tribunal may be appealed to the Divisional Court with leave, but only on questions of law. Thus, in order to succeed on its motion the Region must satisfy me:

- (a) That the alleged error constitutes a question of law:
- (b) That there is good reason to doubt the reasonableness of the Tribunal’s decision on the question of law; and
- (c) That the matter is of sufficient importance to warrant the attention of the Divisional Court.

[3] According to the Region, the Tribunal erred in its interpretation of the *Development Charges Act* (the “Act”). It also committed an error in law because it failed to provide sufficient reasons for its decision.

[4] With respect to the sufficiency of the Tribunal's reasons, the Region's submission is that while the Tribunal does give reasons as to why it finds that certain of the rates proposed in the By-Law do not comply with the Act, it does not give any reasons why the revised rates that it adopted (the rates proposed by Amacon) comply with the Act. The adequacy of reasons is to be considered as part of the substantive review of the reasonableness of the decision. In conducting this review, the court may look to the record, including the submissions of counsel, to find a basis for the Tribunal's decision (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*), [2011] 3 S.C.R. 708; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67).

[5] At the beginning of its decision the Tribunal summarizes the applicable legal principles. The Region takes no issue with this summary. However, in spite of this, the Region alleges that the Tribunal made the following specific errors:

Alleged Errors in the Allocation Between Categories

[6] In its By-Law, the Region recognizes two types of development, residential and non-residential. The Act provides that the Region must then ensure that the development charges applied to either category result solely from the increased need generated by the growth in that category. In the case at bar, Amacon's development was a residential development. Amacon alleged that the By-Law provided for residential development charges that had the effect of subsidizing the increased needs generated by the non-residential category. The Tribunal accepted its submission and made amendments to the By-Law in accordance with the suggestions provided by Amacon's expert witnesses. The Region alleges that in making these amendments the Tribunal erred in law. Specifically:

- (i) Transhelp: Transhelp is a service to help the physically disabled to get to various locations in the Region. According to the Region, the service is only available to residents and thus the development charges related to the growth in the service should be properly attributable to the residential category. To do otherwise would be to violate one of the fundamental objectives of the Act, which is to look at the needs that arise with respect to each category. The Tribunal did not accept that Transhelp was only used by residents. It found that "it did not distinguish between eligible riders by whether they are residents or non-residents. The service is available to the full population..." It also found that the service was the same as public transit. This is a factual finding for which there is an evidentiary basis in the record. On the basis of this finding the Tribunal made the decision it did as to how the development charges in relation to this service should be allocated. In doing so it applied the law to the facts as it found them. This is not a pure question of law.
- (ii) Paramedics: The Region argued that its evidence showed that residents use paramedics more than people who are employed in the Region. As a consequence, it attributed 100% of the increased need for these services to the residential category. The Tribunal found that "paramedics do not withhold services based on residential or employment status nor do they withhold emergency services until

those in need identify themselves as either residents or employees.” Thus, she^{it} amended the By-Law to provide that a portion of the increases in the need for paramedics should be attributed to the non-residential category. The portion chosen was based on the ratio of the projected population to the employment growth. Again, any error in the Tribunal’s analysis does not raise a pure question of law. The Tribunal made its own determinations as to what was driving the needs (a factual determination) and then applied the governing law to the facts as it found them.

- (iii) Police: The Region’s witness testified that the police services deal overwhelmingly with residents. Therefore, the Region made its attribution for police based on a weighted taxable assessment of real property. The Tribunal rejected this approach both because it did not accept the Region’s witness’s evidence about use (because it was not supported by data) and because it did not accept that there was any identifiable connection between tax assessments for real property and the increased need for these services that would result from the two categories in question. Thus, the Tribunal amended the By-Law to provide that attribution should be made based on the ratio of the projected residential growth to the projected employment growth. Any alleged error in the Tribunal’s conclusions on this point is at best a question of mixed fact and law, not a pure question of law.
- (iv) Water and Wastewater: The Region used historic billings as the basis to calculate and allocate need in the future. The Tribunal found that the evidence showed that historic billings do not take account of the fact that not all treated water is metered. Treated water may be lost through things such as leaks and fires. Therefore, the Tribunal chose to amend the By-Law to provide for development charges allocation to the categories based on historic flow data to which is applied the projected population and employment growth. In doing so the Tribunal noted that the Region used historic flow data to support the capital plan and applied an analysis of population and employment growth. The Tribunal’s analysis again involves applying the law to the facts as the Tribunal found them. Any error in that analysis does not raise a pure question of law.
- (v) Cash Flow and Reserve Fund: The Region acknowledged that the way that it dealt with this item was a matter of judgment. In my opinion, the Tribunal’s reasons on this issue do not raise an issue of law alone and certainly do not raise an issue of sufficient importance that it should be addressed by the Divisional Court.

Exclusions

[7] The Act requires that only the costs for increased need required by growth within a specific period are charged. Thus, any benefits to existing development (“BTE”) and post-period benefits (“PPB”) must be deducted. The Tribunal found that appropriate deductions had not been made with respect to two elements of transportation services. The Region submitted that in doing

so the Tribunal committed an error of law because ^{it} ~~she~~ equated "BTE" with capacity or use, which would totally undermine the objective of the Act.

(vi) Road construction projects: The main matter in dispute between the parties was whether some elements of the road construction benefit existing development or whether all elements of road construction provide some level of BTE. To make this determination requires a consideration of the facts. Based on the evidence before it, the Tribunal found that it was not appropriate to apply a flat percentage and attribute it to BTE for only some elements of road construction and not to others. Therefore, ~~it~~ she amended the By-Law to provide a flat percentage to all levels of road construction. This is a decision based on a consideration of the evidence before her. It is not a question of law alone.

(i) Road and Rail Grade Separations: In the By-Law the Tribunal attributed the costs of certain grade separations to the residential sector. The Tribunal found that this violated the Act and attributed a portion of these costs to the non-residential sector. The Region argued that in doing so the Tribunal undermined a fundamental objective of the Act because it equated BTE with capacity. A review of the record makes it clear that this is not what the Tribunal did. It accepted ~~the~~ expert evidence of Paul Martin Sarjeant that "Railway grade separations do not increase the capacity of the road network, but rather reduce train related delays and increase safety to all users of the road." In other words, the Tribunal found that all users of the road would benefit from grade railway separations and that these benefits had nothing to do with capacity. Therefore, it accepted Amacon's calculations as to BTE, which took this into account, and allocated the benefits based on an analysis of traffic volume. This analysis does not raise a pure question of law.

[8] For these reasons the motion for leave to appeal is dismissed. *As agreed by the parties the Region will pay Amacon its costs of this motion, fixed in the amount of \$25,000, all inclusive.*

Such J