CITY OF HAMILTON

CORPORATE SERVICES DEPARTMENT
Legal and Risk Management Services Division
and
Financial Planning, Administration and Policy Division

TO:	Chair and Members Audit, Finance and Administration Committee
COMMITTEE DATE:	December 5, 2019
SUBJECT/REPORT NO:	Harvey Armstrong Ltd. – Section 20 Complaint under the *Development Charges Act, 1997* (LS19045 / FCS19093) (City Wide)
WARD(S) AFFECTED:	City Wide
PREPARED BY:	Mike G. Kovacevic (905) 546-2424 Ext. 4641 Lindsay Gillies (905) 546-2424 Ext. 2790
SUBMITTED BY: **SIGNATURE:**	Nicole Auty City Solicitor Legal and Risk Management Services Corporate Services Department
SUBMITTED BY: **SIGNATURE:**	Brian McMullen Director, Financial Planning, Administration and Policy Corporate Services Department

RECOMMENDATION(S)

That the Development Charges complaint filed under Section 20 of the *Development Charges Act, 1997,* S.O. 1997, c.27 by letter dated October 11, 2019 from Sullivan, Mahony LLP on behalf of Harvey Armstrong Ltd. be dismissed.

EXECUTIVE SUMMARY

Report LS19045 / FCS19093 has been prepared as a result of a letter submitted by Sullivan, Mahony LLP on behalf of Harvey Armstrong Ltd. (HAL), dated October 11, 2019, attached as Appendix "A" to Report LS19045/ FCS19093, which was received by the City Clerk's Office on October 11, 2019 (the "Complaint"). The letter serves as a formal complaint under Section 20 of the *Development Charge Act, 1997*, S.O. 1997, c.27 ("DC Act").

The DC's paid by HAL are in respect of the development and construction of an addition of 11,380.68 square feet to the Home Hardware store located at 2400 Regional Road 56, Binbrook.

Section 20(1) of the DC Act permits a person to complain to Council of a municipality imposing a DC that: (a) the amount of the development charges ("DC") was incorrectly determined; (b) whether a credit is available to be used against the DC, or the amount of the credit or the service with respect to which the credit was given, was incorrectly determined; or (c) there was an error in the application of the DC By-law. The foregoing are the only grounds of complaint permitted by the DC Act. Council does not have the jurisdiction to consider any other grounds.

Subsection 20(4) of the DC Act requires Council to hold a hearing in respect of a complaint and provide the complainant the opportunity to make representations at the hearing. Council, at its meeting of October 23, 2019, approved a Motion as Item 7.5 to delegate the hearing of complaints pursuant to Section 20 of the DC Act to the Audit, Finance and Administration Committee ("AF&A"). After hearing the evidence and submissions, AF&A may dismiss the complaint or rectify any incorrect determination or error that was the subject of the complaint, the key being that there was an incorrect determination or error in the application of the DC By-law. A more detailed description of the hearing process can be found in Report LS19043, which was presented to AF&A on November 21, 2019.

The hearing before AF&A shall include the following:

(1) Presentation of City's case and evidence regarding the complaint which includes witness direct examination and cross examination by Complainant (or representative), anticipated witnesses include:
   (i) Lindsay Gillies (Senior Financial Analyst, Financial Planning, Administration and Policy Division, Capital Budgets and Development Finance Section of Corporate Services Department),
   (ii) Alaina Baldassera, (Planner, Development Planning Section of Planning and Economic Development Department),
   (iii) Ed Vanderwindt (Chief Building Official, Director, Building Division of Planning and Economic Development Department),

(iv) Binu Korah (Manager, Engineering Approvals, Growth Management Division, Engineering Design and Construction Section of Planning and Economic Development Department), and
(v) Anita Fabac (Manager of Development Planning, Heritage and Design, Development Planning Section of Planning and Economic Development Department);

(2) Presentation of Complainant of its case and evidence including witness direct examination and cross examination (the witnesses of Complainant were unknown at the time Report LS19045 / FCS19093 was written);
(3) Response, if any, by Staff to Complainant's Case;
(4) Closing Statements by Complainant;
(5) Closing Statements by Staff; and
(6) Possible Oral Decision by Committee followed by written decision.

The relief sought in the Complaint is a refund of $104,693.35, being the alleged difference between the DC paid ($238,311.49) versus DC's calculated in accordance with DCs applicable prior to DC By-law 19-142 coming into force, being June 13, 2019. However, the amount of DC's payable prior to June 13, 2019 would not have been the amount as alleged by HAL. The DC amount desired by HAL includes a refund of Education DCs ("EDCs"). A complaint filed pursuant to subsection 20(1) of the DC Act cannot deal with EDCs imposed by the public or separate school boards. AF&A does not have the jurisdiction to grant such relief. AF&A, in providing any relief, can only do so in respect of the City component of the DCs paid by HAL.

The grounds contained within HAL's complaint can be summarized as follows:

(a) the process to obtain the building permit was delayed as a result of inactions and actions of City staff resulting in the payment of DCs pursuant to DC By-law 19-142 and had it proceeded in a timely fashion, DCs would have been payable pursuant to DC By-law 14-153;

(b) s.224 of the *Municipal Act, 2001*, S.O. 2001, c.25 ("*Municipal Act*").

HAL **does not complain of** or raise any of the following grounds:

(a) the amount of the DCs was incorrectly determined;
(b) whether a credit is available to be used against the DC, or the amount of the credit or the service with respect to which the credit was given, was incorrectly determined; or
(c) there was an error in the application of the DC By-law.

In other words, HAL's complaint is not based on any grounds contained within the DC Act, specifically subsection 20(1).

The time taken to process HAL's site plan and building permit applications was not inordinate and was consistent with the issues raised by the applications including a lack of available servicing. No errors were committed by staff in the processing of the applications and HAL was made aware, at the time of their application, that the clearance of conditions for final site plan approval could take eight (8) months or longer. The site plan application was processed in accordance with the procedures approved by Council and in a manner consistent with how all other site plan applications are processed. HAL was treated no differently than any other applicant.

No guarantees were made to HAL as to the time it would take to process its applications and obtain final approval. HAL, 30 days after it submitted its site plan application, had the opportunity to appeal the site plan application to the Local Planning Appeal Tribunal ("LPAT") on the grounds the site plan was not approved within 30 days. HAL never appealed its site plan application to the LPAT. Such an appeal was the appropriate remedy for HAL to pursue if it felt staff's actions or inactions were delaying the site plan approval.

HAL required two building permit applications for the development, one for the addition and one for a temporary holding tank. Both permits were processed within the time periods required by the Building Code, Ontario Regulation 332/12 ("BC"). The *Building Code Act, 1992*, S.O. 1992, c. 23 ("BCA") provides appropriate remedies (applications to the Building Code Commission or appeals to the Superior Court of Justice) to deal with disagreements with technical requirements or delay. In respect of its building permit applications, HAL did not make any applications to the Building Code Commission or appealed to the Superior Court of Justice. The foregoing dispute resolution mechanisms under the BCA were the appropriate remedies for HAL to pursue if it felt staff's actions or inactions were delaying the site plan approval.

A chronology respecting HAL's site plan applications and building permit applications is attached as Appendix "B" to Report LS19045/ FCS19093.

HAL's Complaint is not based on any of the grounds contained in subsection 20(1) of the DC Act. AF&A does not have the jurisdiction to grant the relief requested. Further, granting such relief and refunding a portion of the DCs paid would result in HAL paying less than the required amount of DCs. HAL is a commercial enterprise and permitting HAL to pay less than the required amount of DCs would result in the City providing assistance (i.e. bonusing) to HAL, which is expressly prohibited by s.106 of the *Municipal Act*.

Unless otherwise stated herein, any reference to "DC By-law" is to DC By-law 19-142.

Staff recommends dismissing the complaint made by HAL under Section 20 of the DC Act as there has been no error or incorrect determination while applying the in-force DC By-law to the relevant building permit 19-111798.

Alternatives for Consideration – See Page 25

FINANCIAL – STAFFING – LEGAL IMPLICATIONS

Financial: None

Staffing: None

Legal: HAL's complaint is not based on any of the grounds contained in subsection 20(1) of the DC Act. AF&A does not have the jurisdiction to grant the relief requested. Further, granting such relief and refunding a portion of the DCs paid would result in HAL paying less than the required amount of DCs. HAL is a commercial enterprise and permitting HAL to pay less than the required amount of DCs would result in the City providing assistance (i.e. bonusing) to HAL, which is expressly prohibited by s.106 of the *Municipal Act*.

HISTORICAL BACKGROUND

Appendix "B" to Report LS19045 / FCS19093 contains a detailed description of the processing of the site plan applications; processing of the building permit applications; DC By-law enactment process; and DC payments. Key dates include the following:

- April 17, 2018: Site Plan Application received
- January 4, 2019: Conditional Site Plan Approval issued
- March 12, 2019: Building permit application submitted through concurrent review process for addition (separate application required for temporary holding not yet submitted)
- April 17, 2019: Building permit application for temporary holding tank submitted
- June 13, 2019: DC By-law 19-142 comes into effect (5,000 square foot non-industrial exemption for expansions contained within DC By-law 14-153 not contained with DC By-law 19-142)
- August 8, 2019: final site plan approval issued, March 12, 2019 Building permit application now considered a complete building permit application
- August 13, 2019: Both building permits issued, DC's payable in order for permit to be issued (DC's not fully paid on basis DC deferral agreement to be executed but not executed)
- October 3, 2019: HAL decides not to execute DC deferral agreement and pays balance of DCs owing and which were payable on August 13, 2019
- October 11, 2019: HAL submits complaint pursuant to Section 20 of the DC Act to City Clerk.

The City Clerk's Office received the Complaint on October 11, 2019. The letter identifies that it serves as a formal complaint under Section 20 of the DC Act but does not allege any error in the application of DC By-law 19-142. Rather the Complaint identifies alleged delays leading up to the permit issuance date and a request to not be held to the requirements of the applicable DC By-law 19-142.

POLICY IMPLICATIONS AND LEGISLATED REQUIREMENTS

Development Charges Act, 1997

The *Development Charges Act, 1997* ("DC Act") provides a remedy for developers who disagree with a Development Charge required to be paid. Section 20 of the DC Act states:

"Complaint to council of municipality
20 (1) A person required to pay a development charge, or the person's agent, may complain to the council of the municipality imposing the development charge that,

(a) the amount of the development charge was incorrectly determined;

(b) whether a credit is available to be used against the development charge, or the amount of the credit or the service with respect to which the credit was given, was incorrectly determined; or

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

Time limit
(2) A complaint may not be made under subsection (1) later than 90 days after the day the development charge, or any part of it, is payable.

Form of complaint
(3) The complaint must be in writing, must state the complainant's name, the address where notice can be given to the complainant and the reasons for the complaint.

Hearing
(4) The council shall hold a hearing into the complaint and shall give the complainant an opportunity to make representations at the hearing.

Notice of hearing
(5) The clerk of the municipality shall mail a notice of the hearing to the complainant at least 14 days before the hearing.

Council's powers
(6) After hearing the evidence and submissions of the complainant, the council may dismiss the complaint or rectify any incorrect determination or error that was the subject of the complaint."

Section 22(1) of the DC Act permits a complainant to appeal the decision of Council to the Local Planning Appeal Tribunal ("LPAT").

Planning Act

The *Planning Act, R.S.O. 1990*, c.P.13, ("Planning Act") provides a remedy for site plan applications to be appealed to the LPAT if an applicant feels the site plan application approval is delayed. Subsection 41(12) permits an applicant for site plan approval to appeal the site plan to the LPAT if the plans have not been approved by the municipality within thirty (30) days of the submission of the site plan to the municipality.

Subsection 41(12) specifically states:

"Appeal to L.P.A.T. re approval of plans or drawings

41(12) If the municipality fails to approve the plans or drawings referred to in subsection (4) within 30 days after they are submitted to the municipality, the owner may appeal the failure to approve the plans or drawings to the Tribunal by filing with the clerk of the local municipality a notice of appeal accompanied by the fee charged under the Local Planning Appeal Tribunal Act, 2017."

HAL's site plan was submitted on April 7, 2018 and could have been appealed to the LPAT on May 7, 2018 or any time thereafter and prior to final approval. Despite alleging delays by City staff in the site plan application approval process, HAL did not appeal the site plan to the LPAT. The remedy for dealing with site plan application processing delays is not a complaint pursuant to subsection 20(1) of the DC Act, it is an appeal to the LPAT pursuant to section 41(12) of the Planning Act. Delay in the processing of a Planning Act application is not grounds for complaint pursuant to subsection 20(1) of the DC Act.

Building Code Act and Building Code

The Building Code, Ontario Regulation 332/12 ("BC") provides a time period in which building permit applications are to be reviewed and in which the Chief Building Official must make a decision to grant or deny a building permit. In addition, the *Building Code Act*, 1992, S.O. 1992, c. 23 ("BCA") provides for dispute resolution mechanisms in relation to the timeliness of building permit application approvals, technical matters related to building permit applications and the issuance or refusal to issue a building permit.

Subsection 1.3.1.3(1) of the BC states:

"1.3.1.3. Period Within Which a Permit is Issued or Refused

(1) Subject to Sentences (2) and (3) and unless the circumstances set out in Sentence (6) exist, if an application for a permit under subsection 8 (1) of the Act that meets the requirements of Sentence (5) is submitted to a chief building official, the chief building official shall, within the time period set out in Column 2 of Table 1.3.1.3. corresponding to the class of building described in Column 1 of Table 1.3.1.3. for which the application is made,

(a) issue the permit, or

(b) refuse to issue the permit and provide in writing all of the reasons for the refusal."

The time period for the review of the two building permit applications submitted by HAL, one for the addition and one for the temporary holding tank, was 20 days. The reviews were completed within the 20 days and permits were not issued but comments were provided as to what was needed to be resolved in order to issue the permits. HAL could have appealed the Chief Building Official's refusal to issue the permits to the Building Code Commission pursuant to subsection 24(1) of the BCA but did not do so.

Subsections 24(1) to (3.1) of the BCA state:

"Dispute resolution
24 (1) This section applies if there is a dispute,

(a) between an applicant for a permit, a holder of a permit or a person to whom an order is given and the chief building official, a registered code agency or an inspector concerning the sufficiency of compliance with the technical requirements of the building code;

(b) between an applicant for a permit and the chief building official concerning whether the official complied with subsection 8 (2.2) or (2.3); or

(c) between a holder of a permit and the chief building official, a registered code agency or an inspector concerning whether the requirements of subsection 10.2 (2) have been met.

Application for dispute resolution
(1.1) A party to the dispute may apply to the Building Code Commission to resolve the issue.

Hearing
(2) The Building Code Commission shall hold a hearing to decide the dispute and shall give the parties to the dispute notice of the hearing.

Same
(2.1) A hearing to decide a dispute described in clause (1) (b) or (c) must be held within the prescribed period.

Powers
(3) The Building Code Commission shall, by order, determine a dispute described in clause (1) (a) and, for that purpose, may substitute its opinion for that of the chief building official, registered code agency or inspector.

Same
(3.1) The Building Code Commission shall, by order, determine a dispute described in clause (1) (b) or (c) and, for that purpose, may require the chief building official, registered code agency or inspector, as the case may be, to comply with the applicable subsection of the Act."

In addition, subsection 25 of the BCA states:

"Appeal to court
25 (1) A person who considers themself aggrieved by an order or decision made by the chief building official, a registered code agency or an inspector under this Act (except a decision under subsection 8 (3) not to issue a conditional permit) may appeal the order or decision to the Superior Court of Justice within 20 days after the order or decision is made."

The BC requirements to review HAL's building permit applications within 20 days were complied with. There was no appealable delay in respect of the processing of HAL's building permit applications. HAL's applications were deficient and building permits could not be issued at the end of the 20-day period. HAL could have filed an appeal to the Building Code Commission of any concerns it had regarding the sufficiency of compliance with the technical requirements of the BC in respect of its applications. HAL did not file such an appeal. HAL could have appealed the Chief Building Official's refusal to issue the building permits applied for. HAL did not.

Remedies existed for HAL in respect of any alleged building permit delay issuance. However, no such delay in the context of the BC or BCA occurred. If HAL had concerns with the reviews conducted in respect of compliance with the BC it could have filed appeals. The remedy for HAL's concerns regarding any delay in the processing of its building permit applications does not lie in a complaint filed pursuant to subsection 20(1) of the DC Act but, rather, are contained within the BCA itself.

Municipal Act

The Complaint raises the issue of the application of s.224 of the *Municipal Act* which states:

"224 It is the role of council,

(a) to represent the public and to consider the well-being and interests of the municipality;

(b) to develop and evaluate the policies and programs of the municipality;

(c) to determine which services the municipality provides;

(d) to ensure that administrative policies, practices and procedures and controllership policies, practices and procedures are in place to implement the decisions of council;

(d.1) to ensure the accountability and transparency of the operations of the municipality, including the activities of the senior management of the municipality;

(e) to maintain the financial integrity of the municipality; and

(f) to carry out the duties of council under this or any other Act."

AF&A, in hearing a complaint pursuant to subsection 20(1) of the DC Act, is limited in the grounds it can consider in respect of the complaint. Council's role is not one of those grounds. In addition, the *Municipal Act* does not provide for any complaint or appeal regarding DCs. Any remedies regarding the quantum of DCs or application of the DC By-law are only found in the DC Act. Council's (AF&A's) role in considering a DC complaint is not governed by the *Municipal Act*. Council's (AF&A's) role and what it is permitted to do and consider in respect of a DC complaint is prescribed by the DC Act. Section 224 of the *Municipal Act* is irrelevant to the consideration of a DC complaint.

The Complaint also refers to the City's Employee Code of Conduct. Such a reference, in the context of the Complaint, leads to the implication that an employee or employees violated the Employee Code of Conduct in some way. However, no violation is actually identified.

In addition, at no time during the processing of the site plan application process was a complaint made by HAL alleging a violation of the Employee Code of Conduct. If HAL felt during the approval process that an employee violated the Employee Code of Conduct, it could have complained but did not do so nor did HAL request, at any time, that any employee be removed from the processing of its applications. If HAL felt an employee had conducted themselves contrary to the Employee Code of Conduct, it should have made the complaint as soon as the misconduct occurred. In any event, employee conduct is not a permitted ground for a complaint pursuant to subsection 20(1) of the DC Act. The remedy for dealing with an employee's misconduct lies elsewhere and not within the DC Act.

The relief sought in the Complaint would require a refund of EDCs. The Complaint unequivocally indicates it is a complaint made pursuant to Section 20 of the DC Act. In order for AF&A to provide relief in respect of EDCs, complaints in respect of both the public and separate school board EDCs would have had to have been made by HAL to Council pursuant to subsection 257.85(1) of the *Education Act*, R.S.O. 1990, c.E.2 ("*Education Act*") within 90 days after the EDCs were payable (subsection 257.85(2)).

Subsections 257.85(1) and (2) state:

> "Complaint to council of municipality
> 257.85 (1) An owner, the owner's agent or a board, may complain to the council of the municipality to which an education development charge is payable that,
>
> (a) the amount of the education development charge was incorrectly determined;
>
> (b) a credit is or is not available to be used against the education development charge, or that the amount of a credit was incorrectly determined; or
>
> (c) there was an error in the application of the education development charge by-law. 1997, c. 31, s. 113 (5).
>
> Time limit
> (2) A complaint may not be made under subsection (1) later than 90 days after the day the education development charge, or any part of it, is payable. 1997, c. 31, s. 113 (5)."

Since no complaints pursuant to subsection 257.85(1) of the *Education Act* were submitted to Council within the 90-day period, AF&A has no jurisdiction to provide any relief in respect of EDCs that were paid.

RELEVANT CONSULTATION

The legal content of Report LS19045 / FCS19093 and any legal opinions expressed herein, were prepared by staff of the Legal Services and Risk Management Section, Corporate Services Department.

The factual content of Report LS19045 / FCS19093 was prepared in consultation with the departments listed below or directly by staff in Financial Planning, Administration and Policy Division:

- Planning Division, Planning and Economic Development Department
- Building Division, Planning and Economic Development Department
- Growth Management Division, Planning and Economic Development Department

ANALYSIS AND RATIONALE FOR RECOMMENDATION(S)

Grounds Within Complaint

The Complaint was filed pursuant the subsection 20(1) of the DC Act but does not raise any of the grounds on which a complaint must be based under subsection 20(1) of the DC Act. More specifically, the Complaint does not complain of or raise any of the following grounds:

(a) the amount of the DCs was incorrectly determined;
(b) whether a credit is available to be used against the DC, or the amount of the credit or the service with respect to which the credit was given, was incorrectly determined; or
(c) there was an error in the application of the DC By-law.

In making a decision in respect of a complaint pursuant to subsection 20(1) of the DC Act, AF&A cannot:

(1) provide an exemption where none exists in the applicable DC By-law;
(2) alter the date of building permit issuance and thereby alter which DC By- law applies;
(3) change or amend policy contained in a DC By-law;
(4) amend the DC By-law; and
(5) deal with/evaluate the appropriateness of any part of the DC By-law.

HAL does not allege that any error in the application of DC By-law 19-142 has occurred. Rather, the letter requests that Council apply the rules of the previous DC By-law 14-153 to the relevant building permit based on alleged delays that occurred through the development planning process. All of the grounds alleged in the Complaint are irrelevant to the consideration of a complaint made pursuant to subsection 20(1) of the DC Act.

The nature of the Complaint is not an improper DC calculation but rather a complaint about the timing of site plan and building permit application processing and the impact on the DCs payable. The tool or remedy HAL is attempting to use to deal with the impacts of the alleged delay is the Complaint (being Section 20 of the DC Act). The Complaint is not the appropriate tool or remedy. HAL's appropriate remedy to deal with any delay in the site plan application would have been to file an appeal to the LPAT pursuant to subsection 41(12) of the *Planning Act* for the failure of the site plan being approved within thirty (30) days of its submission to the City. HAL never exercised its right of appeal.

The Complaint states the following in respect of Planning Department concerns:

> "there appeared to be little or no room for discussion on the majority of these issues, HAL decided it would be prudent to appear before the Committee of Adjustment (COA)"

Planning and Zoning Examination staff do not agree with the foregoing characterization. The site plan application was circulated for comments to Building Engineering and Zoning staff for review in regard to zoning compliance. Approximately 20 pages of comments were received in respect of zoning compliance. Planning and Zoning Examination staff identified the need for minor variances and HAL was advised of the need. A site plan cannot be approved unless it complies with zoning. Pursuant to the BCA and BC, zoning is applicable law and must be complied with in order for a building permit to be issued.

HAL made the appropriate minor variance applications which were processed in an expeditious fashion. More specifically, the minor variance notice was received by Planning and Zoning Examination staff for write-up on August 13, 2018 and scheduled for the September 6, 2018 hearing. The notice write-up was completed August 14, 2018 and the application was heard and approved on September 6, 2018. City staff expedited the processing of the minor variance applications. Normally, it would take six to eight weeks for a minor variance application to be considered by the Committee of Adjustment. HAL's application took less than four weeks.

HAL was advised by Planning staff in November 2017 that it would take around six weeks for a site plan application to be considered by the Development Review Team but was not guaranteed that would be the case. HAL was also advised by Planning staff in November 2017 that the clearing of conditions in order to obtain final approval could take eight months or longer and was not promised final approval could occur within any given time period.

A number of factors affect the timing of the processing of site plan applications including but not limited to: complexity of the application; novel issues (such as consideration of the use of a temporary holding tank in respect of HAL's site plan application); the experience of staff processing the applications; the resources (including staffing) of departments responding to applications; the quality of the applicant's responses to issues or the clearing of conditions; the time in which applicants respond to issues or clearing of conditions; the need for other approvals such as variances; the need for ancillary agreements; and the volume of other applications in the queue which are also being processed. A number of these factors affected the timing of the processing of HAL's site plan application.

The Complaint alleges delay in the time it took for comments to be received in respect of its site plan application, namely eight weeks. HAL's site plan application was treated no differently than any other. It was processed in order. Processing time is dictated by the resources staff is provided with to deal with applications. For example, the zoning comments were not received until July 23, 2018. The reason for the timing of the comments was because zoning review staff were backlogged due to the number of files being received for review. As of May 2018, an additional staff member was hired because zoning comments were still several months behind in respect of Planning files due to the extremely heavy workload and number of files coming in. This staff member required several months of training and began reviewing files in July 2018. At this point, zoning review staff began to catch up on outstanding files.

As of July 2018, the average response time for zoning review for Planning files was 30 working days. As of July 2019, the average response time for Planning files was 25 working days. The zoning review of HAL's site plan was not an average or simple review. It was complex in that it required a review in respect of both Zoning By-law 05-200 and Glanbrook Zoning By-law 464 because the commercial and mixed use ("CMU") zoning provisions of Zoning By-law 05-200 were under appeal but could apply depending on the date of the resolution of the appeals and the date of building permit issuance.

The time period in which initial comments were received in respect of HAL's site plan application is consistent with timing of processing other site plan applications at the City. The City's website indicates a four to six-week period between complete application and conditional approval but at the time of HAL's application, this was not the case. The time period can vary based on volume of applications and resources available to process applications. The normal period of time in which comments were being received for site plan applications, in and around mid-2018, was three months from the date of site plan application. HAL's site plan application was treated no differently than any other site plan application. The issue of the use of a temporary holding tank was not a routine matter for staff to deal with and added complexity to the application.

HAL has alleged in the Complaint that on September 12, 2018 it was informed by the City that its project was being put on hold because of insufficient sewer and water capacity. However, in the Complaint HAL acknowledges that it was fully aware that the sewer and water lines would not be available throughout the building period and that it intended to use a temporary holding tank. Despite this awareness HAL, in its site plan application, included the following:

> Site Servicing & Grading Plan dated and stamped on April 13, 2018 by J. Schooley, Upper Canada Consultants does not illustrate holding tank. Proposed 100mm sanitary lateral connection to existing sanitary main on Reg. Rd 56 shown.

No indication was provided in the Site Servicing and Grading Plan or elsewhere in the site plan application that a temporary holding tank was to be used. The site plan application, despite HAL by its own admission in the Complaint that it knew a connection to sanitary services was not possible, proposed a connection to the sanitary lateral. The site plan also indicated an existing septic tank to be removed but, as described above, did not include a temporary holding tank on the site plan. Planning staff, in the absence of any information proposing the use of holding tank and given the site servicing plan and grading plan that was submitted, assumed the intention of HAL was that the proposed development would be serviced by municipal services.

On September 10, 2018, Planning staff advised HAL that final site plan approval could not be provided until servicing capacity was available. Staff's information was consistent with how other development applications in Binbrook, including site plan applications with the similar servicing capacity issues, were being processed. Examples include but are not limited to the following site plan applications:

> (1) DA-17-083 (3079 Binbrook Road): Received on August 4, 2017
> Condition: "The Applicant / Owner shall demonstrate that there is adequate Sanitary Sewer Capacity within the municipal sewer system to accommodate this development to the satisfaction of the Manager, Development Approvals";

(2) DA-18-132 (2506-2520 Regional Road 56): Received on July 11, 2018
Condition: "That prior to the issuance of any Servicing Permits for the proposed development, the required sanitary pumping and trunk sewer upgrades to the Binbrook Sanitary Sewer Pumping Station are to be completed to the satisfaction of both the Director of Public Works and the Senior Director of Growth Management";

(3) DA-18-202 (3435 Binbrook Road): Received on October 31, 2018
Comment Received, "No Special Condition Required: The Binbrook Sanitary Sewer Pumping Station has reached its capacity and it cannot accommodate any further developments with this catchment area. Upgrades to the Binbrook Pumping Station / trunk sewer are required and the completion of the works is in progress.
We therefore wish to advise that we are in support of this site plan application proceeding to conditional approval. However, the applicant / owner is to be advised that no servicing permits will be issued for this development until such time that the required sanitary pumping and trunk sewer upgrades are completed and it is determined that adequate capacity is available for this development to the satisfaction of both the director of public works and the senior director of Growth Management"; and

(4) DA-19-049 (3100-3140 Regional Road 56): Received on March 5, 2019
Condition: "That prior to the issuance of any Servicing Permits for the proposed development, the required sanitary pumping and trunk sewer upgrades to the Binbrook Sanitary Sewer Pumping Station are to be completed to the satisfaction of both the Director of Public Works and the Senior Director of Growth Management".

HAL also spoke with Development Engineering staff on September 12, 2018. Staff and HAL discussed the possible use of a temporary holding tank and possible condition of the site plan approval that permit for the holding tank obtained.

HAL was not informed on September 10 or 12, 2018 that the processing of its site plan application was put on hold. The processing of its application continued including staff's consideration of the use of a temporary holding tank until servicing capacity was available. HAL misunderstood the communication from Planning staff. After the temporary holding tank issue was considered by staff (discussions between departments), it was determined the conditions of site plan approval did not need to contain such a special condition and servicing would be dealt with through the standard site servicing condition.

Standard Condition 3(k) of HAL's conditional site plan approval addressed the servicing issue in requiring a site servicing plan. Eventually, this condition was satisfied by the use of a temporary holding tank which required a separate building permit application and holding tank agreement. Details regarding the communications between staff and HAL and the processing of the site plan application are set out in the chronology attached as Appendix "B" to Report LS19045 / FCS19093.

HAL asserts there was a nine-month period between the date HAL alleges its site plan application was put on hold and the date DC By-law 19-142 came into force. However, during this nine-month period, staff continued to process HAL's site plan as illustrated in the chronology attached as Appendix "B" to Report LS19045 / FCS19093, including the issuance of conditional approval on January 4, 2019. As of the date of the passage of DC By-law on June 12, 2019, the following matters were outstanding in respect of the site plan approval: Pest Control Plan; Enbridge Crossing Agreement; Tariff of Fee; Best Effort Watermain Fee; Grading and Drainage Control; Stormwater Management Design; and Site Servicing Design (this last matter relates to the temporary holding tank). These matters were not addressed by HAL until after DC By-law 19-142 came into effect. City staff assisted HAL throughout the processing of its site plan application in its attempts to clear conditions of approval, however, the responsibility of clearing the conditions rested with HAL not City staff.

HAL contributed to the delay in the processing of its applications. It did not respond promptly to clearing conditions of site plan approval. For example, in the initial comments regarding the site plan application provided to the Owner on July 23, 2018, the issue regarding emergency stormwater overflow was identified by development engineering staff. No response was received from HAL until a meeting held between the Owner's consultant and development engineering staff on February 6, 2019. The issue was not resolved by HAL until the submission of a signed agreement with the neighbouring land owner on July 29, 2019, six weeks after the DC By-law 19-142 was in force.

The *Planning Act* provides a remedy for site plan applications to be appealed to the LPAT if an applicant feels the site plan application approval is delayed. HAL's site plan was submitted on April 7, 2018 and could have been appealed to the LPAT on May 7, 2018 or any time thereafter and prior to final approval. Despite alleging delays by City staff in the site plan application approval process, HAL did not appeal the site plan to the LPAT. The remedy for dealing with site plan application processing delays is not a complaint pursuant to subsection 20(1) of the DC Act it is an appeal to the LPAT pursuant to section 41(12) of the *Planning Act*. Delay in the processing of a *Planning Act* application is not grounds for complaint pursuant to subsection 20(1) of the DC Act.

The BC requires that a municipality review a complete permit application within a certain timeframe where the application meets the criteria set out in the BC. One of the criteria for the issuance of a building permit is compliance with applicable law. The timeframe for the review and decision on a building permit for the type of construction applied for by HAL is twenty days. However, the issuance of a building permit for the addition was contingent on final site plan approval being obtained since such approval is considered applicable law under the BCA and a building permit cannot be issued until all applicable law is complied with. HAL was advised that it needed final site plan approval in order to obtain a building permit.

If a Chief Building Official refuses a building permit application, an applicant would be told why. If an applicant cannot resolve the problems with the municipality, they have a few options for appealing the Chief Building Official's decision. If the problem relates to a dispute:

(a) between an applicant for a permit, and the chief building official concerning the sufficiency of compliance with the technical requirements of the BC; or

(b) between an applicant for a permit and the chief building official concerning whether the official complied with subsection 8 (2.2) (issuance of a permit) or (2.3) (refusal to issue a permit);

an applicant can appeal to the Building Code Commission (ss. 24(1) of the BCA). The Building Code Commission is an independent adjudicative tribunal of the provincial government whose mandate is to hear disputes related to compliance with the technical requirements of the BC. If the problem relates to compliance with other applicable laws, such as interpretation of the zoning bylaw, an applicant can appeal to a judge of the Superior Court of Justice, who will review the matter or exercise. In addition, if the dispute relates to applicable law approvals such as obtaining site plan approval, an applicant has appeal options to other bodies in respect of such approvals. For lack of approval for site plan applications within the time provided in the *Planning Act*, an appeal can be made to the LPAT.

HAL's Building Permit application #19-111798, for the addition, was submitted through the concurrent review process on March 12, 2019. The BC (Div. C Subsection 1.3.1.3(1)) required the application to be reviewed and a decision to issue or not issue the permit within 20 working days. A review letter was issued on April 9, 2019 in compliance with the BC. A permit could not be issued. Once the first review letter was issued no further requirements to review additional submissions applied under the BC.

A further review letter was issued on May 7, 2019. HAL's Building Permit application #19-118792, for the temporary holding tank, was submitted on April 17, 2019. The BC (Div. C Subsections 1.3.1.3(3) & (4)) required the application to be reviewed and a decision to issue or not issue the permit within 20 working days. A review letter was issued on May 17, 2019 in compliance with the BC. A permit could not be issued. Once the first review letter was issued no further requirements to review additional submissions applied under the BC. Both permits were issued on August 13, 2019 once HAL satisfied all the requirements for permit issuance pursuant to the BCA and BC.

HAL's building permit applications were permitted to be submitted as part of the concurrent review process the City permits. The concurrent process is an optional service, not required by the BCA or BC, the City offers to allow developers to undergo building permit review for BC compliance while still going through site plan process in order to save time between site plan approval and building permit issuance. Alternately, without this service, HAL would not have been able to apply for a building permit until after August 8, 2019 (final site plan approval) and then would have been subject to the 20 working days for OBC compliance review (or a lot longer than 20 working days if additional review was required if the initial BC compliance review had identified issues as it had for HAL's applications). Instead, the City was able to issue the permit only three working days after the final site plan approval was issued. If the City had not permitted the concurrent review process, the earliest a building permit may have been able to be issued would have been September 5, 2019.

Remedies existed for HAL in respect of any alleged building permit delay issuance. However, no such delay, in the context of the BC or BCA occurred. If HAL had concerns with the reviews conducted in respect of compliance with the BC, it could have filed appeals. The remedy for HAL's concerns regarding any delay in the processing of its building permit applications does not lie in a complaint filed pursuant to subsection 20(1) of the DC Act, but rather are contained within the BCA itself.

HAL did not make any appeals to the Building Code Commission, commence any proceedings at the Superior Court of Justice in relation to its building permit applications, nor did it file any appeals to the LPAT in relation to its site plan applications.

The appropriate remedy for any improper or delayed processing of HAL's building permit applications and its site plan applications is provided at law in other forums and is not the permitted subject matter / ground of a DC complaint pursuant to subsection 20(1) of the DC Act. The ultimate responsibility for obtaining final site plan approval and the approval of the building permits was HAL's.

The Complaint appears to allege breaches of the Employee Code of Conduct but does provide any particulars. The authors of Report LS19045 / FCS19093 could find no evidence to indicate, during the processing of the site plan application process, that a complaint was made by HAL alleging a violation of the Employee Code of Conduct. If HAL felt during the process an employee violated the Employee Code of Conduct, it could have complained but did not do so, nor did HAL request, at any time, that any employee be removed from the processing of its applications. If HAL felt an employee had conducted themselves contrary to the Employee Code of Conduct, it should have made the complaint as soon as the misconduct occurred. Employee conduct is not a permitted ground for a complaint pursuant to subsection 20(1) of DC Act. The remedy for dealing with an employee's misconduct is found within the Employee Code of Conduct, not within the DC Act.

The Complaint raises the issue of the application of s.224 of the *Municipal Act* in respect of Council's role. A complaint pursuant to subsection 20(1) of the DC Act is limited in the grounds it can consider in respect of complaint. Council's role is not one of those grounds.

DC By-law Application

The factual content in the following portion of the report including when the DCs are payable quantum of the DCs, the quantum of EDCs and the correctness of the City's and HAL's calculations was prepared by staff of the Financial Planning, Administration and Policy Division.

Subsection 26(1) of the DC Act provides that a DC is payable for a development upon a building permit being issued for the development unless the development charge by-law provides otherwise under subsection (2). Subsection 26(2) does not apply to HAL's development. Similarly, section 33 of DC By-law 19-142 states:

> "Subject to the provisions of Section 34, Development Charges are payable at the time a building permit is issued with respect to a Development."

Section 34 of DC By-law 19-142 permits DCs to be deferred if a DC deferral agreement is entered into between the City and the payor.

DC By-law 19-142 was the DC By-law in effect at permit issuance. Accordingly, it determines the quantum of City DCs payable, not DC By-law 14-153. No error in the DC calculation or application of DC By-law 19-142 has occurred. Figure 1 details the calculation of the DC and the payments received.

Figure 1: DC Calculation and payments for building permit 19-111798

DC CALCULATION & PAYMENT SUMMARY - 2400 Regional Road 56, Glanbrook **Building Permit 19-111798**

Building Permit Issuance Date: 13-Aug-19
Date Building Permit was deemed a "complete application" by CBO: 08-Aug-19
For 1057.3 m3 expansion of existing hardware store
(Note that the building permit rounded this figure up)

		City DC's COH DC By-law 19-142		Public EDC's HWDSB EDC By-law No. 19-1		Catholic EDC's HWDCSB EDC By-law No. 2019		TOTAL
	sq ft	Rate per sq ft	Extended	Rate per sq ft	Extended	Rate per sq ft	Extended	
Expansion	11,380.68	$ 20.18	$ 229,662.17	$ 0.41	$4,666.08	$ 0.35	$3,983.24	**$238,311.49**
August 9, 2019 Payment			$ 95,550.68		$4,666.08		$3,983.24	$104,200.00
October 3, 2019 Payment			$ 134,111.49		$ -		$ -	$134,111.49
Outstanding			$ 0.00		-$ 0.00		-$ 0.00	$ 0.00

HAL does not indicate that any error in the calculation or application of DC By-law 19-142 has occurred. There is no dispute regarding the timing of building permit issuance or the figures used in the calculation under DC By-law 19-142. Staff recommends dismissing the Complaint as there has been no error or incorrect determination while applying DC By-law 19-142 to the relevant building permit 19-111798.

HAL claims that delays by staff throughout the site plan and building permit processes resulted in the building permit being delayed and the DCs increasing from $133,618.41 under DC By-law 14-153 to $238,311.49 under DC By-law 19-142. An increase of $104,693.35 (note a mathematical variance of $0.27). HAL's request is for financial relief equivalent to the change in City DCs between the DCs that would have been payable if the building permit had been issued on June 12, 2019 (under the previous DC By-law 14-153) and actual building permit issuance.

Staff has reviewed the DC amounts referenced in the Complaint. The Complaint indicates the quantum of DC's payable pursuant to DC By-law 19-142 total $238,311.49. HAL's calculation of DC's payable pursuant to DC By-law 19-142 is incorrect. As illustrated in Figure 1, $238,311.49 represents the total of the DCs payable pursuant to DC By-law 19-142 (City DCs), the public school board's EDC's of $4,666.08 and the Catholic school board EDCs of $3,983.24. The City DC portion of the total $238,311.49 is $229,662.17.

However, the amount of $133,618.41 calculated by HAL, in respect of DCs that would have been payable pursuant to DC By-laws in effect prior to June 13, 2019, is not in alignment with the calculation methodology. In order to arrive at the amount calculated by HAL (of $133,618.41) the 5,000 square foot expansion exemption for non-industrial developments found in DC By-law 14-153 would need to be added to each EDC. The school boards have never had such a policy and the City cannot impose its policy on the school boards.

As well, the per square foot rate would need to be lower than the DC rate in effect at June 12, 2019. For reference, staff has calculated the City DC using the rates and policy at June 12, 2019 under DC By-law 14-153. Figure 2 shows this calculation. Note that no edit to the EDCs has been calculated versus Figure 1 as the City has no authority over the EDCs. The difference between the total calculated in Figure 2 and Figure 1 is $98,602.95.

In order to provide the total relief sought by HAL in the complaint, HAL would have had to have filed a complaint to Council pursuant to subsection 257.85(1) of the *Education Act* in respect of each EDC. The Complaint clearly and unequivocally indicates it is a complaint pursuant to section 20 of the DC Act and does not include a complaint pursuant to subsection 257.85(1) of the *Education Act*. AF&A has no authority under the *Education Act* or DC Act to deem the Complaint being one made under the *Education Act*. The time period for filing a complaint under the *Education Act* is 90 days from the date the EDC is payable. The 90-day period has expired and therefore, a complaint pursuant to subsection 257.85(1) cannot be made. In considering the Complaint, AF&A has no jurisdiction to provide any relief in respect of EDCs.

Figure 2: DC Calculation under DC By-law 14-153 for building permit 19-111798

		City DC's COH DC By-law 14-153		Public EDC's HWDSB EDC By-law No. 19-1		Catholic EDC's HWDCSB EDC By-law No. 2019		TOTAL
	sq ft	Rate per sq ft	Extended	Rate per sq ft	Extended	Rate per sq ft	Extended	
Expansion	11,380.68	$ 20.54	$ 233,759.22	$ 0.41	$4,666.08	$ 0.35	$3,983.24	
Exemption by Policy	(5,000.00)	$ 20.54	($ 102,700.00)					
			$ 131,059.22		$4,666.08		$3,983.24	**$139,708.54**

The primary reason for the increase in DCs applicable under DC By-law 19-142 versus DC By-law 14-153 is the existence of the 5,000 square foot expansion exemption for non-industrial developments found in DC By-law 14-153 which is not contained in DC By-law 19-142. The DC rate paid by HAL pursuant to DC By-law 19-142 ($20.18 per sq. ft.) is lower than the DC rate in DC By-law 14-153 had it been applicable ($20.54 per sq. ft.).

The total DCs that would have been payable by HAL pursuant to By-law 14-153, had HAL obtained its building permit prior to June 13, 2019, would have been $131,059.22 as illustrated in Figure 2.

In respect of DC By-law 19-142, all statutory requirements in respect of public notice were met. The 2019 DC Background Study and proposed by-law were made available to the public as result of being posted to the City website. This posting to the website was communicated through the City's Twitter account on March 13, 2019 and a formal public notice was posted in the Hamilton Community News and Hamilton Spectator on March 21 & 22, 2019. The City's Twitter account further communicated where the public could access the 2019 DC Background Study as well as invited members of the public to get involved in the discussion on March 25, April 1, April 8, and April 15, 2019.

On April 18, 2019, the public meeting in respect of the 2019 DC Background Study and 2019 DC By-law was held at City Hall. A morning (9:30 am) and evening (7:00 pm) session were held in order to accommodate schedules of members of the public. On June 12, 2019, DC By-law 19-142 was approved and passed by Council. On June 27 and 28, 2019, notice of the passing of DC By-law 19-142 was posted in the Hamilton Community News and Hamilton Spectator. The deadline to appeal the DC by-law was July 22, 2019. No appeal was filed by HAL. Notice of the passing of the by-law was also posted on the City's website and on the City's Twitter account.

LPAT jurisprudence regarding the responsibility of the City or its staff regarding informing applicants of impending deadlines for changes in DCs provides that the DC Act has not created any responsibility on municipal officials to actively inform applicants of an impending deadline. The LPAT (then OMB) has said while this may be wise, helpful, charitable, and the hallmark of service to the public, the failure to do so is not a ground for a refund pursuant to a DC complaint made pursuant to Section 20 (then Section 8) of the DC Act.

AF&A, in conducting the hearing of a DC complaint, is required to only consider the grounds permitted under subsection 20(1) of the DC Act namely:

(a) whether the amount of the DC was incorrectly determined;

(b) whether a credit is available to be used against the DC, or the amount of the credit or the service with respect to which the credit was given, was incorrectly determined; or

(c) there was an error in the application of the DC by-law.

Examples of matters not relevant to the determination of a DC complaint include but are not limited to: financial or personal hardship as resulting from the DC; using a complaint as a way to provide assistance (i.e. bonusing) to a commercial enterprise contrary to section 106 of the *Municipal Act;* lack of knowledge of the applicability of the DC; failure of municipal officials to inform applicants of deadline in relation to a change in DC quantum and / or the appropriateness of a DC By-law. As stated by the LPAT, the grounds set out in the DC Act are very specific and quite focused. The complaint grounds do not include a request to be exempt from a DC otherwise applicable pursuant to a DC By-law, nor do they include a request to create a new category of development not found in a DC By-law. A DC complaint cannot be used to amend the DC By-law, to alter the DC rate otherwise validly applicable or to add a credit or exemption not already within the DC By-law.

Conclusion

The Complaint is not based on any of the limited grounds contained within subsection 20(1) of the DC Act. AF&A does not have the jurisdiction to allow the Complaint and grant any of the relief sought. Given the Complaint is not based on permitted grounds, any relief sought would provide assistance (i.e. bonusing) to HAL a commercial entity and such assistance would be prohibited by s.106 of the *Municipal Act*. Even if the Complaint was based on permitted grounds, it seeks relief in respect of EDCs for which no complaints have been submitted. AF&A does not have any jurisdiction to grant any refund or relief in respect of EDCs.

The intent of the DC Act in permitting complaints is not for Council (AF&A) to evaluate the performance of City staff or determine whether a site plan application or building permit application was processed appropriately. The intent of the DC Act in permitting complaints is to rectify errors in the application of the DC By-law including such errors as: calculation errors; interpretation errors (i.e. error in type of development residential versus commercial); or lack of application of credits. Providing any relief pursuant to the Complaint would set an undesirable precedent which could result in AF&A hearing a plethora of DC complaints related to City staff performance in the processing of applications. That is clearly not what is contemplated in Section 20 of the DC Act. The Complaint is not a complaint contemplated by section 20 of the DC Act because it is not based upon the limited grounds found in Section 20.

Accordingly, based upon all of the foregoing, AF&A should dismiss the Complaint.

ALTERNATIVES FOR CONSIDERATION

Staff of the Legal Services and Risk Management Division are of the opinion that AF&A has no alternative but to dismiss the Complaint as it not based upon any of the limited grounds set out in subsection 20(1) of the DC Act.

ALIGNMENT TO THE 2016 – 2025 STRATEGIC PLAN

Community Engagement and Participation
Hamilton has an open, transparent and accessible approach to City government that engages with and empowers all citizens to be involved in their community.

Economic Prosperity and Growth
Hamilton has a prosperous and diverse local economy where people have opportunities to grow and develop.

Built Environment and Infrastructure
Hamilton is supported by state of the art infrastructure, transportation options, buildings and public spaces that create a dynamic City.

Our People and Performance
Hamiltonians have a high level of trust and confidence in their City government.

APPENDICES AND SCHEDULES ATTACHED

Appendix “A” to Report LS19045 / FCS19093 – October 11, 2019 Harvey Armstrong Ltd. Compliant Letter pursuant to Section 20 of the *Development Charges Act, 1997*

Appendix “B” to Report LS19045 / FCS19093 – Chronology – 2400 Regional Road 56, Glanbrook

MK/LG/mc/dt