

April 21, 2021

Legislative Coordinator
Audit, Finance & Administration Committee
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File no. H216207

Dear Legislative Coordinator:

Re: Comments on the City of Hamilton's Proposed 2021 Amending Development Charges By-law and 2021 Development Charges Update Study – Public Meeting, April 22, 2021

In light of recent provincial legislative changes, Gowling WLG has been asked by McMaster University (“**McMaster**”) to provide insight and analysis of the City of Hamilton’s (“**City**”) proposed 2021 Amending Development Charges By-law (“**Amending By-law**”) and 2021 Development Charges Update Study (“**Update Study**”).

McMaster is committed to working with the City constructively on changes to the Amending By-Law and future developments moving forward. It is in this spirit that Gowling WLG submits the following analysis on behalf of McMaster.

Background

The stated purpose of the Update Study is to update development charge By-law No. 19-142 (“**Current By-law**”) in order to meet the requirements of the *Development Charges Act, 1997*, S.O. 1997, c. 27 (“**DCA**”), as amended by various bills:

- i. Bill 108 – *More Homes, More Choice Act, 2019*;
- ii. Bill 138 – *Plan to Build Ontario Act, 2019*;
- iii. Bill 197 – *COVID-19 Economic Recovery Act*, and
- iv. Bill 213 – *Better for People, Smarter for Business Act, 2020*.¹

The Current By-law was passed in June of 2019 and remains under appeal by various parties, including McMaster. The Amending By-law does not propose to amend several aspects of the Current By-law that were raised as issues for appeal. To the extent that these provisions are maintained through the City’s Amending By-law, McMaster continues to raise its prior objections.

With respect to the legislative amendments, as a university and major institutional developer in the City, McMaster is primarily concerned with ensuring that the Update Study and Amending By-law accurately reflect the legislative amendments introduced through Bill 138 which requires a differential treatment for

¹ Update Study, p. 1-2.

institutional developments, and Bill 213 which creates an exemption from development charges for university developments through section 6.1 of the *Ministry of Training, Colleges and Universities Act*, R.S.O. 1990, c. M.19.

While the Update Study accurately describes these legislative amendments, the City’s proposed Amending By-law does not sufficiently revise the Current By-law. Sections 27 and 41 of the Current By-law are *ultra vires*, yet remain unchanged by the Amending By-law. Further, the Amending By-law does not propose to include the language of section 6.1 of the *Ministry of Training, Colleges and Universities Act*, which fails to clearly demarcate this new development charge exemption and complicates the process for City staff and stakeholders to navigate the by-law.

1. The Amending By-law does not sufficiently reflect Bill 108

The proposed Amending By-law does not sufficiently reflect the legislative changes brought in through Bill 108. As acknowledged in the Update Study, the *DCA* now distinguishes rental housing, institutional and non-profit housing development from other types of development, providing that these are payable at different times, payable in installments, and that the amount of the charge is determined under the by-law on the date of an application for site plan approval (or other dates, as the case may be), rather than at the time of a building permit application.²

However, the Amending By-law fails to address provisions of the Current By-law that are presently *ultra vires*. It is necessary to amend sections 27 and 41 of the Current By-law to come into compliance with Bill 108.

Section 27

27. Notwithstanding any other provision of this By-law, the Development Charges payable under this By-law respecting all Development, other than Class A Office Development, within the boundaries of the Downtown CIPA shall:

(a) be reduced by the following percentages, after all other credits are applied, under this By-law for only the portion of the Building that is within the height restrictions as shown in Schedule “F” based on the later of the date on which Development Charges are payable or the date all applicable Development Charges were actually paid:

Table 2: Downtown Hamilton CIPA Partial Exemption

Date	Percentage of reduction (%)	Percentage of development charge payable (%)
June 13, 2019 to July 5, 2019	70	30
July 6, 2019 to July 5, 2020	60	40
July 6, 2020 to July 5, 2021	50	50
July 6, 2021 to July 5, 2022	40	60
July 6, 2022 to July 5, 2023	40	60

² Update Study at p. 1-3.

July 6, 2023 to June 12, 2024	40	60
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Section 27 of the Current By-law calculates the value of the Downtown CIPA partial exemption based on the later of the date on which development charges are payable, or the date on which all development charges are actually paid. For rental housing, institutional and non-profit housing, development charges are payable at the time of occupancy, but the amount is to be calculated at the time of a site plan application (or zoning by-law amendment, etc. as the case may be). This creates a contradiction in section 27 of the Current By-law, as it is contrary to the *DCA* to provide that the value of an exemption for institutional development will be different on the date the development charge is payable, than it was on the date of an application for site plan approval.

Sections 40-41

40. The Development Charge rates payable are the rates in effect at the time of building permit issuance subject to any exceptions in Section 41 of this By-law.

41. The Development Charge rates payable are the rates in effect on the date a complete building permit application is received and accepted by the City's Chief Building Official, provided that the permit is issued within 6 months of the effective date of the first Development Charge rate increase following said building permit application. Where the said building permit is lawfully revoked by the Chief Building Official on or after the date of the said Development Charge rate increase, any subsequent application for a building permit on the lands or site will be subject to the Development Charge rate in effect on the date of building permit issuance. For the purposes of this Section, a "complete application" shall mean an application with all information and plans required as per the Ontario Building Code.

Sections 40-41 of the Current By-law state that the development charge rates payable are those in effect on the date of a complete building permit application or at building permit issuance. This contradicts section 26.2(1) of the *DCA* which specifies, that for rental housing, institutional and non-profit housing development, development charges are determined according to the rates in effect at the time of site plan application (or zoning by-law amendment, etc. as the case may be). The *DCA* further provides that this applies regardless of whether the by-law under which the amount of the development charge would be determined is no longer in effect on the date the development charge is payable.³

2. The Amending By-law does not sufficiently address Bill 213

Section 6.1 of the *Ministry of Training, Colleges and Universities Act* creates an exemption from development charges for land vested in or leased to a university if the development is intended to be occupied and used by the university:

Exemption, development charges

6.1 (1) Land vested in or leased to a university that receives regular and ongoing operating funds from the government for the purposes of post-secondary education is exempt from development charges imposed under the *Development Charges Act, 1997* if the development in respect of which development charges

³ Section 26.2(2) of the *DCA*.

would otherwise be payable is intended to be occupied and used by the university. 2020, c. 34, Sched. 10, s. 1.

Same

(2) For greater certainty, the exemption from development charges referred to in subsection (1) applies with respect to land described in that subsection regardless of whether an application referred to in clause 26.2 (1) (a) or (b) of the *Development Charges Act, 1997* has been made with respect to that land on or before the day section 1 of Schedule 10 to the *Better for People, Smarter for Business Act, 2020* comes into force. 2020, c. 34, Sched. 10, s. 1.

Same

(3) Nothing in this section limits the application of an exemption from development charges provided in any other Act with respect to a university described in subsection (1). 2020, c. 34, Sched. 10, s. 1.

The Amending By-law does not propose to include this language into the body of the Current By-law, or to otherwise explicitly acknowledge the exemption for universities from development charges that is now in force pursuant to section 6.1 of the *Ministry of Training, Colleges and Universities Act*. This omission fails to clearly demarcate this new development charge exemption and will complicate the process for City staff and stakeholders to navigate the by-law.

In the interest of clarity at the stage of enforcement of the City's by-law, sections 6.1(1) and (2) of the *Ministry of Training, Colleges and Universities Act* should be added among the listed exemptions in the Current By-law.

Further, various sections of the Current By-law improperly impose development charges on land vested in or leased to a university as specified in section 6.1 of the *Ministry of Training, Colleges and Universities Act*, and should be reframed to explicitly exclude any development that meets this statutory exemption.

Sections 12-16

Approvals for Development

12. The Development of land is subject to a Development Charge where the Development requires the following:

- (a) the passing of a zoning by-law or an amendment thereto under section 34 of the Planning Act;
- (b) the approval of a minor variance under section 45 of the Planning Act;
- (c) a conveyance of land to which a by-law passed under sub-section 50(7) of the Planning Act applies;
- (d) the approval of a plan of subdivision under section 51 of the Planning Act;
- (e) a consent under section 53 of the Planning Act;
- (f) the approval of a description under section 9 of the Condominium Act 1998, S.O. 1998, c.19; or

(g) the issuance of a permit under the Building Code Act, 1992, S.O. 1992, c.23, as amended, or successor legislation, in relation to a building or structure.

13. Where two or more of the actions described in Section 12 of this By-law occur at different times, or a second or subsequent building permit is issued resulting in increased, additional or different Development, then additional Development Charges shall be imposed in respect of such increased, additional, or different Development permitted by that action.

14. Where a Development requires an approval described in Subsections 12(a) to 12(f) of this By-law after the issuance of a building permit and no Development Charges have been paid, then the Development Charges shall be paid prior to the granting of any approval required under Subsections 12(a) to 12(f) of this By-law.

15. Where a Development does not require a building permit but does require one or more of the approvals described in Subsection 12(a) to 12(f) of this By-law, then, notwithstanding Section 33 of this By-law, Development Charges shall be payable and paid prior to the granting of any approval required under Subsections 12(a) to 12(f) of this By-law.

16. Nothing in this By-law prevents Council from requiring, in a condition of an approval or an agreement respecting same under Section 51 of the Planning Act or as a condition of consent or an agreement respecting same under Section 53 of the Planning Act that the owner, at his or her own expense, shall install such local services related to or within a plan of subdivision, as Council may require, in accordance with the City's applicable local services policies in effect at this time.

Sections 12-16 of the Current By-law purport to impose development charges any time that certain planning approvals are required for the development of land. This language is overly broad and would inadvertently and inaccurately impose development charges on the development of land that is statutorily exempt pursuant to section 6.1 of the *Ministry of Training, Colleges and Universities Act*, contrary to that Act. The Amending By-law should explicitly provide that sections 12-16 of the Current By-law do not apply to development that falls within the statutory exemption provided by section 6.1 of the *Ministry of Training, Colleges and Universities Act*.

3. Prior Objections to the Current By-law

McMaster continues to maintain its objections to various aspects of the Current By-law, which the Amending By-law does not propose to address. In particular, McMaster has concerns with the substantial modification of the Student Residence Exemption, the lack of adequate transition provisions in the Current By-law, and the discriminatory treatment of McMaster as an institution, as well as its developments at 1190 Main Street and 191 King Street West in the Current By-law.

Student Residence Exemption

Section 1(ttt) defines a "Student Residence", and section 29(c) provides an exemption, as follows:

1. (ttt) Residential Development that is solely owned by a university, college of applied arts and technology or other accredited post-secondary institution, designed or intended to be used for sleeping and living accommodations by students of the university, college of applied arts and technology or other accredited post-secondary institution that owns the Residential Development.

29. (c) Until June 30, 2020 Development of a Student Residence is exempt from 50% of the Development Charge otherwise payable pursuant to this Bylaw according to the type of Residential Development. After June 30, 2020 no exemption shall be provided for Development of a Student Residence and the Development of a Student Residence will be subject to the payment of Development Charges payable pursuant to this By-law.

We reiterate that this definition of “Student Residence” in the Current By-law is not reasonable or appropriate. It does not correspond with commonly accepted definitions of the term. For example, the *Residential Tenancies Act* allows for full or partial exemptions to educational institutions providing housing to students or staff, with no ownership requirement, in addition to privileges extended to residential complexes owned, operated or administered by or on behalf of post-secondary educational institutions.

Further, Bill 213 has since provided a statutory exemption at section 6.1 of the *Ministry of Training, Colleges and Universities Act* which does not require sole ownership of a student residence development by a university, but rather that the land be vested in the university and the development be intended to be used by the university.

The language of the definition of “Student Residence” in the Current By-law should be revised to exclude the requirement for sole ownership.

Transition Provisions

Section 6, paragraph 2 of the *Development Charges Act* states that a development charges by-law must set out an express statement indicating how, if at all, the rules provide for exemptions, for the phasing in of Development Charges and for the indexing of Development Charges. Section 29(c) of the Current By-law includes an arbitrary date of June 30, 2020 to end the Student Residences Exemption (which cut-off date is maintained by the Amending By-law). The new student residence definition and the arbitrary exemption cut-off date greatly threaten the viability of two of McMaster’s existing, planned student residences in the City at 1190 Main Street and 191 King Street West, as well as any future student residence developments.

In the alternative to the legislative changes in Bill 108, the absence of sufficient transitional provisions in the Current By-Law (and maintained through the Amending By-law), raise serious issues of fairness. It is common and appropriate for development charge by-laws to include appropriate transition provisions for the benefit of those whose planning was well advanced and whose financial pro formas were based on by-laws in existence at the time that the municipal approval process was commenced. In particular, McMaster held various public consultations, design meetings, and undertook various planning applications associated with its developments at 1190 Main Street and 191 King Street West, beginning as early as 2016. McMaster requested the City implement transition dates that would accommodate these projects but the City ultimately refused without reasons. The Amending By-law should be revised to address the insufficiency of transitional provisions in the Current By-law to ensure

that planning applications that were subject to the City's planning approval process prior to the passage of the Current By-law are not inappropriately and abruptly barred from prior exemptions.

Conclusion

The Amending By-law does not meet the fair and reasonable test. In particular, sections 27 and 40-41 of the Current By-law should be amended to comply with the requirements of the *DCA*, relating to rental housing, institutional and non-profit housing development, and sections 6.1(1) and (2) of the *Ministry of Training, Colleges and Universities Act* should be added to the existing list of exemptions in the Current By-law. Further, sections 12-16 of the Current By-law must explicitly exclude development that falls within the statutory exemption provided by section 6.1 of the *Ministry of Training, Colleges and Universities Act*.

The definition of "Student Residence" should be modified to reflect common understanding of the term by removing the requirement for sole ownership, and that the Current By-law be modified to include appropriate transition provisions.

We trust that these proposed revisions will assist the City in bringing the Current By-law into compliance with recent legislative amendments. McMaster is committed to working constructively with the City on these revisions and looks forward to partnering with the City on future developments. Should you have any questions or concerns, please contact the undersigned.

Sincerely,



Roberto D. Aburto

RDA