**Report to**
**Rapport au:**

**Planning Committee**
**Comité de l'urbanisme**
**27 August 2020 / 27 août 2020**

**and Council**
**et au Conseil**
**9 September 2020 / 9 septembre 2020**

**Submitted on 14 August 2020**
**Soumis le 14 août 2020**

**Submitted by**
**Soumis par:**
**Frank Bidin**
**Chief Building Official / Chef du service du bâtiment, Planning, Infrastructure and Economic Development Department / Services de planification, d'infrastructure et de développement économique**

**Contact Person**
**Personne ressource:**
**Richard Ashe**
**Manager / gestionnaire, Permit Approvals / Approbation des permis**
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**Ward**: BAY (7) / BAIE (7) **File Number**: ACS2020-PIE-GEN-0007

**SUBJECT: Development Charge Complaint – 130 Britannia Road**

**OBJET: Plainte relative aux redevances d'aménagement – 130, chemin Britannia**

## REPORT RECOMMENDATIONS

**That Planning Committee recommend that Council dismiss the development charge complaint in respect of 130 Britannia Road**.

## RECOMMANDATIONS DU RAPPORT

**Que le Comité de l'urbanisme recommande au Conseil de rejeter la plainte relative aux redevances d'aménagement à l'égard du 130, chemin Britannia**.

## BACKGROUND

The *Development Charges Act*, Section 20 provides that a complaint may be filed by an owner in respect of the development charges imposed by a municipality in respect of a project on the basis that:

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

b) Whether a credit is available to be used against the development charges, 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.

### Basis of Complaint

The complaint is by the owner of 130 Britannia Road. The owner takes the position that it should have received a credit against the Municipal Development Charges payable based upon Section 9 of the City's Development Charge By-law. Section 9 is attached as Document 1 to this report. The Development Charge complaint by the owner is attached as Document 2.

## DISCUSSION

A chronology of the relevant events is as follows:

| | |
|---|---|
| April 09, 2015 | Committee of Adjustment issues decision to grant permission for severance of 130 Britannia into two parcels |
| April 29, 2015 | Decision of Committee of Adjustment becomes final and binding |
| March 21, 2016 | Demolition Permit issued – 130 Britannia Road |
| March 31, 2016 | Demolition work completed – 130 Britannia Road |
| April 8, 2016 | Certificate for Severance issued by the Committee of Adjustment |
| April 27, 2016 | Severance of 130 Britannia Road into 130 and 136 Britannia Road occurs with the registration of the Certificate |

| | |
|---|---|
| June 7, 2019 | Building Permit issued – 136 Britannia Road – Development Charges Credit applied |
| July 17, 2020 | Building Permit issued – 130 Britannia Road – Municipal Development Charges in the amount of $30,540 paid |

The key event to be noted in the chronology above is that at the time the demolition of the dwelling at 130 Britannia Road, there was only one parcel, the severance into 130 and 136 Britannia Road had not yet occurred.

Pursuant to the provisions of Section 9 of the Development Charges By-law, a credit is to be provided in respect of the demolition of a dwelling unit where such demolition has occurred in the past five years. There is no language in the provision that speaks to what occurs if the parcel upon which the dwelling unit was located is subsequently severed. Given the absence of such language, it was and is the position of staff that the credit must be provided in respect of the first building permit issued subsequent to the demolition. Put another way, there is no basis in the by-law to have denied to the owner of what is now 136 Britannia Road the Development Charge credit when such owner obtained a building permit on June 7, 2019.

**RURAL IMPLICATIONS**

There are no rural implications associated with this report.

**CONSULTATION**

The applicable legislation requires that two weeks notice of a hearing into a development charges complaint be given to the complainant. This notice was given on Thursday, August 13, 2020.

**COMMENTS BY THE WARD COUNCILLOR**

The Ward Councillor is aware of this report.

**LEGAL IMPLICATIONS**

Following Council's consideration of this complaint, notice of the decision will be sent to the complainant. The complainant has the ability to appeal Council's decision to the Local Planning Appeal Tribunal.

**RISK MANAGEMENT IMPLICATIONS**

There are no risk management implications associated with this report.

## ASSET MANAGEMENT IMPLICATIONS

There are no asset management implications associated with the recommendations of this report.

## FINANCIAL IMPLICATIONS

There are no direct financial implications associated with the report recommendation.

## ACCESSIBILITY IMPACTS

There are no accessibility impacts associated with this report.

## ENVIRONMENTAL IMPLICATIONS

There are no environmental implications associated with this report.

## TERM OF COUNCIL PRIORITIES

There are no Term of Council priorities impacted by this report.

## SUPPORTING DOCUMENTATION

Document 1 Development Charges By-law, Section 9

Document 2 Development Charge Complaint

## DISPOSITION

The Office of the City Clerk will advise the complainant of Council’s decision.

**Document 1 – Development Charges By-law, Section 9**

REDEVELOPMENT OF LAND CREDITS

9. (1) Where residential development occurs on a site which involved within the immediately previous five years the demolition of a previously existing building or structure, other than a derelict building, or will involve such demolition to permit the issuance of a building permit for the construction of the subject development, a credit will be provided against the development charge so that only the net increase in residential use dwelling units is charged.

(2) Where non-residential development occurs on a site which involved within the immediately previous five years the demolition of a previously existing building or structure, other than a derelict building, or will involve such demolition to permit the issuance of a building permit for the construction of the subject development, a credit will be provided against the development charge to the extent of the existing or demolished gross floor area at the rate in effect for the existing use or the use in place at the demolition of the gross floor area when the building permit is issued for the redevelopment.

(3) Where a non-residential use building, or portion, is to be converted to a residential use, or a non-residential use building, other than a derelict building, demolished within the immediately previous five years and a residential use building erected in its place, a credit, not to exceed the amount of the development charges payable, will be provided in the amount of the development charges that would have been payable for the non-residential gross floor area being converted had a building permit been issued to construct the non-residential use building utilized for the same use in existence immediately prior to the conversion taking place.

(4) The credit to be provided pursuant to Subsection (3) shall be determined in accordance with Schedules “C” according to the gross floor area of the building that had been used for non-residential uses.

15. (5) Where a credit for a non-residential use building, or portion thereof, is provided pursuant to Subsections (2) or (3), no credit for that non-residential use building or portion thereof shall be provided pursuant to Subsection (1).

(6) The credits provided under this section relate only to the land, including any parcel subject to the same site plan approval for the proposed development,

upon which the building was demolished or converted and are not transferable to another parcel of land.

(7) Subject to Subsections (8) and (10), after July 31, 2011, the credits provided under this Section and Clause 7(i) do not apply based upon an existing or previously existing development, which is exempt under the provisions of this by-law.

(8) Credits provided under this section based upon an existing or previously existing development, which is exempt under the provisions of this by-law will continue to be provided after July 31, 2011 where, on or prior to July 31, 2011, the owner of the subject lands and the City have signed a site plan agreement in respect of such redevelopment.

(9) In the instance of a demolition of a coach house, only a credit for the transit component of the development charge shall be provided.

(10) Despite, Subsection (7), a credit will be provided under Clause 7(i), in respect of a farm non-residential building in existence on May 22, 2019 where the building will continue to exist, and it is reasonably possible for the building to be reutilized for bona fide agriculture purposes in the future.

# Document 2 – Development Charge Complaint

August 7, 2020

Mr. Rick O'Connor
City Clerk
City of Ottawa
110 Laurier Ave. W.
Ottawa, ON K1P 1J1

**Re: Complaint under s. 20 of the Development Charges Act, 1997 in respect of the City's denial of a credit against the development charge for 130 Britannia Road**

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Further to my formal letter of complaint dated June 23, 2020 filed with the Clerk, please find below the full legal argument I wish to submit in support of my complaint.

What is at issue in this case is the amount of the development charge applicable on the construction of a single detached house at 130 Britannia Rd., and in particular whether the charge should be reduced by the amount of the credit available in respect of the demolition of a previously existing house on the property.

130 Britannia Rd. is legally described as Plan 40 1/2 Lot 14, Part 1. Lot 14 was originally one parcel of land with a house located on the north side. In 2016 the then owner demolished the house and then severed the south side of Lot 14 to create an additional lot – Lot 14, Part 2, to be known municipally as 136 Britannia Rd. The two building sites were then sold to separate purchasers. The complainant (Rhys Hill) and his wife purchased Lot 14, Part 1 (130 Britannia Rd.) and an unrelated party purchased Lot 14, Part 2 (136 Britannia Rd.). The house that was demolished was located wholly on the complainant's lot - Lot 14, Part 1, 130 Britannia Rd.

Under subsection 9(1) of the Development Charges By-Law 2019-156, a credit is provided against the development charge where the development site involved the demolition of a building within the five previous years.

However, when the complainant applied for a building permit, the City denied the credit against the development charge on 130 Britannia Rd. In doing so, it stated:

> According to City records, the house was demolished by the end of March, 2016, at which time there continued to be only one parcel of land. Land registry records show that the severance took place on April 27, 2016. As such, it continues to be the opinion of staff that the demolished house was associated with the parent parcel and the development charge credit for the demolished house would properly be assigned to the first dwelling unit erected on either of the two resulting parcels.

The City has refused to apply the credit to 130 Britannia Rd. on the grounds that it had already applied it to 136 Britannia Rd. The City interpreted subsection 9(1) of the By-Law so that both 130 and 136 Britannia Rd. qualified for the credit and since the owner of 136 Britannia Rd. applied for a building permit first, the credit was given to him. The result is that the owner of the lot on which the demolished house was, in fact, located is now being assessed the full development charge contrary to the clear wording in subsection 9(1) of the By-Law.

The City's decision is wrong for the following reasons:

1) It is based on an unlawful first-come, first-served test which is not mandated by the By-Law; and

2) It denies the credit to the complainant despite the fact that his site fully meets the criteria for entitlement to the credit in subs. 9(1) of the By-Law.

**Argument**:

**Issue one: The City cannot base its decision to deny a credit on a test of first come, first served since no such criterion is set out in the By-Law**

1. The *Development Charges Act, 1997* S.O. 1997, c. 27 grants municipalities the power to impose development charges by by-law. The Act also specifies in sections 5 and 6 that rules *must* be developed and set out in the by-law. Paragraph 9 of subs. 5(1) states:

9. Rules must be developed to determine if a development charge is payable in any particular case and to determine the amount of the charge, subject to the limitations set out in subsection (6).

Section 6 states:

**6.** A development charge by-law must set out the following:
1. The rules developed under paragraph 9 of subsection 5 (1) for determining if a development charge is payable in any particular case and for determining the amount of the charge.
2. ...
3. How the rules referred to in paragraph 1 apply to the redevelopment of land.
4. ... .

2. The City of Ottawa has set out its rules for development charges in By-Law 2019-156.

3. Paragraph 5(6)(g) of the By-Law imposes a development charge when the development requires the issuing of a building permit.

4. Where there is redevelopment, s. 9 of the By-Law provides for a credit against a development charge where there has been a previously existing building or structure that has been demolished in the previous five years. Subsections (1) to (10) set out the rules for determining whether a credit is available in various situations. For residential redevelopment, the rule is found in subsection 9(1). It reads:

> 9. (1*)* **Where residential development occurs on a site which involved** within the immediately previous five years **the demolition of a previously existing building** or structure, other than a derelict building, or will involve such demolition to permit the issuance of a building permit for the construction of the subject development**, a credit will be provided against the development charge so that only the net increase in residential use dwelling units is charged.** [bolding added]

5. The intention of subs. 9(1) is to provide one credit with respect to each demolished building (single dwelling unit), to be applied against the development charge otherwise payable. The credit reduces the development charge so that only

the net increase in residential use dwelling units is charged. Simply put, if one dwelling unit is demolished, one credit for a dwelling unit is available for application against the development charge.

6. The City's interpretation that subs. 9(1) included all land that was part of the original parent parcel resulted in both lots - 130 and 136 Britannia Rd. - being eligible for the credit. When the complainant applied for a building permit to construct a single detached house on his lot, the City refused to provide the credit to reduce the development charge otherwise payable on the basis that it had already allocated the credit to the new owner of 136 Britannia Rd. The City denied the complainant the credit - not on the grounds that his site failed to meet the criteria for entitlement to a credit in accordance with the rules in s. 9, which it clearly did - but on the basis that the credit was assigned to the first dwelling unit erected on either of the two parcels. That is to say, the City applied a first-come, first-served rule to determine entitlement.

7. The City has applied an unlawful test to determine entitlement to the credit. The City **must** be able to justify its refusal to grant the credit by pointing to a specific rule in By-Law 2019-156 mandating the use of the first-come, first-served principle. Not only is there no such rule in s. 9, which is, as indicated earlier, the provision applicable to credits relating to redevelopment of land, but there is no such rule anywhere else in the By-Law. Furthermore, the City does not even attempt to justify its use by reference to the By-Law.

8. The first-come, first-served method of determining entitlement to the credit is not based on the criteria set out in the By-Law, but rather relies on the actions of a third party. The By-Law recognizes that where a new house is simply replacing a previously existing house it is only the net increase in residential use dwelling units that is charged. For an owner of a property on which a house was demolished and who wishes to build a new house, the actions of a third party in filing a building

permit for a different lot should have no effect on the calculation of the development charge on his property.

9. The City's position is unworkable because it results in uncertainty. Whether a credit against development charges is available in respect of any particular property is an important consideration in determining the value of that property. The City's interpretation, however, means that in situations where a demolition occurs prior to a subdivision, there can be no certainty until the first building permit is approved. Whoever gets there first gets the credit.

10. Such a policy is contrary to the intent of the *Development Charges Act, 1997*. The province has mandated that the rules be clearly determined and set out in the by-law so that there is certainty in advance *in any particular case* as to the amount of the development charge. Had the City correctly interpreted subs. 9(1), there would have been such certainty because only one of the two building sites would qualify for entitlement to the credit and there would be no need to use an unauthorized and unlawful test to subsequently deny the credit to 130 Britannia Rd.

**Issue two: The complainant is entitled to the credit under subs. 9(1) of the By-Law**

11. Redevelopment often involves the demolition of a house and the division of the lot on which the house stood into two or more separate building sites. Subs. 9(1) provides for a credit against a development charge with respect to the demolition. However, there would be only one credit and multiple building lots.

12. In this case, the demolition of the house at 130 Britannia Rd. occurred in 2016, prior to Lot 14 being subdivided into two separate parcels of land. The two lots were then purchased by unrelated parties. The house that was demolished was wholly situated on the land comprising the complainant's lot.

13. The City erred in concluding that because there was only one parcel of land (Lot 14) at the time of demolition, therefore subs. 9(1) applied to that parent parcel, resulting in both lots being eligible for the credit. For the following three reasons, the City's interpretation cannot stand:

(1) as described above, it results in one of the two lots being denied the credit on the basis of an unlawful test;

(2) the wording of subs. 9(1) indicates that it is the development site - the subject of the building permit application - that must have involved a demolition of an existing building; and

(3) subs. 9(6) mandates that the credit relates to the land upon which the building was demolished

**(1) It requires the use of an unlawful test to deny entitlement to one of the two lots**

14. In concluding that subs. 9(1) applied to the parent parcel, the City created an untenable situation in which more than one site became eligible for the credit. Since there was only one dwelling unit demolished, there could be only one available credit. According to the explanation provided by City legal counsel, the owner of 136 Britannia Rd. applied for a building permit first, and since his lot was part of the original parent parcel, it qualified under subs. 9(1) and there was no other provision by which the City could deny him the credit.

15. The fallacy in the City's reasoning is that if the decision was to be made solely on the basis of subs. 9(1) and there was only one credit, how is it possible to interpret subs. 9(1) to be applicable to the parent parcel and therefore to two separate lots? If there was no other provision by which the City could deny the credit to 136 Britannia Rd. (as the City stated) then there could be no other provision by which the City could deny it to 130 Britannia Rd.

16. The only way the City could justify its interpretation that both lots were eligible was to allocate the credit on the basis of a first-come, first-served test. Rather than properly interpreting and applying the test in subs. 9(1) itself to determine entitlement to the credit, the City applied an unlawful test not set out in s. 9 nor anywhere else in the By-Law to deny the credit to 130 Britannia Rd.

**(2) The wording of subs. 9(1) indicates that the demolished building must have been on the development site itself**

17. Subs. 9(1) states that "where residential development occurs on a site which involved … the demolition of a previously existing building …". That is to say, did the "site" involve the demolition of an existing building? It is a simple matter to ascertain what the site is for purposes of this subsection. Application for a building permit requires the applicant to furnish a Site Plan which shows the property lines and lot area. (By-Law 2014-220, Schedule B). It should be noted that the subsection does not use the word "parcel" or "lot" but "site". Within the confines of the "site" was there a demolition?

18. The City erred in expanding the "site" to include the whole of the original parcel. In doing so, it created two "sites" involved in the demolition of a previously existing building, despite the fact that no part of the building was on the 136 Britannia Rd. development site.

**(3) Subsection 9(6) specifically mandates that the credit relates only to the land upon which the building was demolished**

19. Once severance occurred in 2016, there was no longer a Lot 14. There were now two new lots owned by two unrelated parties. Subs. 9(6) states that the credit relates only to the land upon which the building was demolished and it cannot be transferred to another parcel. The only exception permitted is to include in that land a parcel which is subject to the same site plan approval for the proposed development. Subs. 9(6) reads:

> (6) **The credits provided under this section relate only to the land,** including any parcel subject to the same site plan approval for the proposed development, **upon which the building was demolished** or converted and are not transferable to another parcel of land. [bolding added]

20. In determining whether a particular development site is entitled to a credit, therefore, it must be established that the land upon which the building was demolished was within the property boundaries of that site. If the site had a building on it that was demolished in the previous five years, the owner is entitled to a credit against the development charge.

21. The City's rationale for refusing the complainant's claim ignores subs. 9(6). Although a site may have been part of a parent parcel at the time of demolition, unless it includes the land upon which the building was demolished, it has no entitlement to the credit.

22. It should also be noted that subs. 9(6) of the By-Law prohibits transferring the credit to another parcel of land. Once severance occurred, and there was no longer a Lot 14, but now a Lot 14, Part 1 and Lot 14, Part 2, the credit could follow only one of these two lots. It would be a simple matter for the City to specify at the time of severance which of the new lots carried the credit.

**Conclusion**

23. Since entitlement to a credit is governed only by the provisions in s. 9 of the By-Law, it is within the four corners of this section that entitlement must be determined. Since the rules for residential redevelopment are contained in subsections 9(1) and (6), these provisions must be interpreted in such a way that there can be only one development site eligible for the credit.

24. The legal weakness in the City's interpretation of the By-Law is that it cannot achieve this result. By allowing for more than one parcel of land to qualify for the credit, the City must rely on an unlawful criterion to allocate the credit. There is no rule in s. 9 that permits the entitlement to be based on a first-come, first-served basis. The answer has to be found in s. 9 itself.

25. There is a simple straightforward interpretation of subs. 9(1) that is consistent with both its words and its purpose and results in certainty of application. It merely requires the City to determine whether there was demolition of a previously existing building on the development site within the previous five years.

26. The complainant's development site meets the requirement for a credit under s. 9(1) of the By-Law and there is no statutory authority to deny it to him.

All of the above is submitted in support of the complainant's request that the City's decision to deny a credit to 130 Britannia Rd. be vacated.

Yours truly,

Rhys Hill