SULLIVAN | MAHONEY LLP

LAWYERS

Please reply to the Niagara Falls Office
Rocco "Rocky" Vacca

By Electronic Mail to: Ann-Marie.Norio@niagararegion.ca
By Electronic Mail to: Robert.Foster@niagararegion.ca
By Regular Mail

July 5, 2022

Niagara Region
1815 Sir Isaac Brock Way
P.O. Box 1042
Thorold, Ontario L2V 4T7

Attention: Ann-Marie Norio, Regional Clerk

- and to –

Niagara Region
1815 Sir Isaac Brock Way
P.O. Box 1042
Thorold, Ontario L2V 4T7

Attention: Robert Foster, Chair – Corporate Services Committee

Dear Ms. Norio and Mr. Foster:

Re: Our Client: 1568223 Ontario Ltd. o/a West End Self-Storage
66 Commerce Place & 278 St. Paul Street, St. Catharines
Notice of Complaint Under Section 20 of the Development Charges Act
(the "DC Act")

We act as the solicitors for 1568223 Ontario Ltd. operating as West End Self-Storage.

We have been instructed by our client to lodge a formal complaint to council under section 20 of the DC Act.

As required by section 20(3) of the DC Act we provide the following information:

Name of Complainant:	1568223 Ontario Ltd. o/a West End Self Storage
Address for Service:	c/o 4781 Portage Road, Niagara Falls, Ontario, L2B 6B1

The grounds for the complaint are twofold:

1. Pursuant to section 20(1)(a) of the DC Act, that the amount of the development charge was incorrectly determined; and
2. Pursuant to section 20(1)(c) of the DC Act that there was an error in the application of the development charge by-law.

In short, Regional staff has determined that the proposed expansion of the self-storage facility results in the application of the Region's D.C. By-law No. 2017-98 and the payment of development charges at the applicable commercial rate of $14.20 per square foot. The Complainant takes the position that it ought to pay no development charges for the reasons set out below. It is noted that in the case of the prior five phases of development at this site, development charges were paid at the industrial rate because "self-storage facilities" fell under the definition of "industrial use". As such, the Complainant takes the position that Regional staff has made an error in the application of the DC By-law by applying the commercial rate and, therefore, has incorrectly determined the amount of the development charge payable.

BACKGROUND

Our client owns and operates a self-storage facility known as West End Self-Storage.

The facility, as it currently stands, consists of 624 storage units over six (6) acres on a site that is fully paved and fully landscaped. The units are metal clad with metal roll up doors with an interior that is metal clad with insulation on the roof which serves as a moisture barrier. The units have no lights and have no electricity. The units have no heating. The only lighting is site lighting on the exterior of the units and in the office. The only municipal services utilized for the entire 6 acre parcel are for one (1) toilet and two (2) sinks in the office.

In terms of the operation of the business, there is only one employee at the premises. Units are leased on a month to month basis with the majority of lease agreements and payments made electronically. Customers are required to provide their own locks for the units and have self-access to their unit between 6:00AM to midnight daily with a security access card.

In summary, the operation is not consistent with that of an industrial or commercial enterprise as it is self-serve. No services are being provided to customers nor are commodities being rented or leased to customers which form the cornerstone of the definition of "commercial purposes" in the Region's DC By-law. Furthermore, the operation makes the most minimal use of municipal services (2 sinks and 1 bathroom) which development charges are intended to pay for.

PRIOR DEVELOPMENT PHASES

As previously stated, the operation has been developed in four (4) phases to date with a fifth phase proposed. A description of each phase and the development charges paid at the industrial rate in each instance is as follows:

Phase	Date	Square Footage	DC's per ft^2	DC's Paid
1	December/2003	17,000	$2.20	$37,400.00
2	October/2004	16,300	$2.20	$35,940.00
3	May-Nov/2008	26,850	$2.44	$64,766.02
4	June/2016	17,700	$5.16	$0.00 (Grant applied)
5 (Proposed)	July/2022	38,600	$14.20	$561,865.00

Note: Phase 5 rates and amounts are based on Commercial rate as applied by Regional staff.

The application of the commercial rate to the expansion of the self-serve facility would result in an average 700% increase in development charges paid per square foot in comparison to the prior phases.

PROPERTY TAXES

It is important to note that, although the facility, for all intents and purposes is self-serve with minimal use of municipal services, since 2004 the facility has paid a total of $1,786,919,93 in property taxes with annual taxes now being $183,614.57. These amounts will increase substantially with the proposed Phase 5 development.

LEGAL ANALYSIS

It is a well-established legal principle that any laws or by-laws which impose a tax and/or charge must be clear and unequivocal as to when and where the tax and/or charge is payable failing which the taxpayer ought not to be imposed said tax and/or charge.

Regional staff has taken the position that the industrial rate applies because in DC By-law No. 2017-68 "self-storage facilities" was deleted from the definition of industrial use and therefore, according to the opinion of Regional staff, by default it became a "commercial use". We enclose the electronic mail exchange between Regional staff, this writer and the Complainant as Schedule "A" to this letter as evidence of same.

Regional staff then proceeds to conclude that in their opinion "self-storage" is clearly "the provision of services for a fee", and therefore a "Commercial Purpose" as defined in the current DC By-law. We enclose an excerpt from the DC By-law containing the definition of "Commercial Purpose" as Schedule "B" to this letter.

Respectfully, Regional staff's opinion and decision in this matter is seriously flawed.

What provision of services are being provided for a fee by West End Self-Storage?

"Services" is a noun. According to BusinessDictionary.com, services are intangible products such as accounting, banking, cleaning, consultancy, education, insurance, expertise, medical treatment or transportation. Most services require supporting goods in order to be useful.

In the case of this operation there are no "services" being provided and no supporting goods exist in order for the service to be useful.

The operation is "self-serve". A customer serves himself or herself. To suggest that a "service" is being provided for a fee is non-sensical in the case of a "self-serve" facility.

More correctly, the operation rents or leases out self-serve storage units. The definition of "Commercial Purpose" in the DC By-law references "used, designed or intended for use for or in connection with the… rental of commodities.

"Commodity" or "Commodities" is a noun. The Oxford Dictionary defines "Commodities" as "a raw material or primary agricultural product that can be bought and sold, such as copper or coffee".

Our client does not rent or lease out commodities. It rents or leases out self-storage metal units without any heat, electricity or water.

In conclusion, it is our considered opinion based on the analysis above that West End Self-Storage is not a "Commercial Purpose". Accordingly, Regional staff has errored in calculating the development charges payable for Phase 5 at the commercial rate of $14.20 per square foot.

Furthermore, it is important to note that the definition of "Commercial Purpose" has remained unchanged in prior DC By-laws applicable to prior phases of development. As such, if we accept the Regional staff's current opinion then in the past the development fell both within the definition of "Commercial Purpose" and "Industrial Use". This would have created an inherent or direct conflict. This position has never been stated for prior phases of the development and has only been raised at this point in time.

If the commercial rate does not apply then which rate applies?

The non-residential rates in the current DC By-law reference "Commercial", "Residential, "Institutional" and "Wind Turbines". Clearly the development is not a wind turbine nor institutional. The analysis above clearly establishes that it is not a "Commercial" use which is consistent with the fact that the City of St. Catharines Official Plan and Zoning by-law does not permit "Commercial" uses on the subject lands. Regional staff has taken the position that given that "self-storage facilities" was removed from the definition of "industrial use" then this facility is not an industrial use.

In light of all of the above, the only conclusion that can be reached is that the development does not fall within any of the residential or non-residential categories, including commercial and industrial, and therefore the DC By-law does not apply to self-storage facilities. If the intent was that it would revert to a "Commercial Purpose" as is now being argued by Regional staff then one would have assumed that the definition of "Commercial Purpose" would have been revised to include self-storage facilities at the same time that it was removed from the definition of "Industrial Use". It was not.

We reiterate that the current DC By-law is silent as to what rate applies to a development that does not fall within any of the categories within any of the categories unlike prior DC By-laws which arguably caught all developments by using categories such as:

DC By-law No. 62-2009

Non-Residential	(excluding industrial)	vs.	Non-Residential Industrial

CASELAW IN SUPPORT OF COMPLAINT

We draw your attention to the Ontario Municipal Board's decision in *Airport Self Storage Ltd. vs. Durham (Regional Municipality) (2004) 48 O.M.B.R.* 414. We have enclosed a copy of the decision as Schedule "C". In this case, the appellant argued that self-storage units were not commercial uses but instead an industrial use under the applicable Durham Region D.C. by-law. The Region argued that self-storage operations provide a rental service in the form of storage space and therefore fall within the ordinary meaning of "retail use" in the by-law. The Board disagreed. The Board found that the definitions in the by-law created ambiguity.

The Board concluded that:

"A traditional view of storage or warehousing holds that such a use is an industrial use"

"Furthermore, the Board looks to how similar uses are treated under the by-law. In this case other warehousing and storage uses are treated as industrial and are not charged under the by-law".

In summary, it is our considered opinion that this decision is right on point and, without exception, supports our position that the self-storage facility in question is not a commercial use or an operation for a "Commercial Purpose" as that term is defined in the Region's D.C. By-law. Likewise it does not fall within the definition of "Industrial Use".

CONCLUSION

For all the grounds and reasons noted above, we respectfully submit that the proposed Phase 5 development does not fall within the definition of "Commercial Purpose" nor within any of the residential or other non-residential categories in the Region's DC By-law No. 2017-68. Therefore, no development charges ought to be payable.

This conclusion is consistent with the fact that for purposes of zoning and construction (Building Code), the subject property, the use and the proposed development all fall within the category of "industrial". No other party other than Regional staff, to date, has treated it otherwise or, more importantly, treated it as "commercial".

We trust that the above and the enclosed adequately set out the Complainant's position in this matter. We would ask that this matter be considered at the Corporate Services Committee meeting scheduled for August 10, 2022 at 9:30AM. We formally request that the Complainant and this writer be given the opportunity to appear as a delegation at the meeting.

Yours truly,

SULLIVAN MAHONEY LLP
Per:

Rocco Vacca
RV:cc
c.c. client

SCHEDULE "A"

Rocky Vacca

From: Renzo Giancaterino <rgiancaterino@cottoninc.ca>
Sent: June 17, 2022 4:59 PM
To: Scholtens, Ken
Cc: Hutchings, Blair; Rotundo, Alex; Michael Colaneri; Rocky Vacca; Murphy, Margaret; Wood, Sterling; Michael Colaneri Sr
Subject: Re: Self Storage Regional Development Charges

Thanks Ken
That's not what the current by law states and again the definition of commercial has not changed. Saying that self storage is in commercial by default does not hold water with us, especially when it was specifically designated previously in the Industrial definition and now, nowhere. We plan to appeal at council and perhaps Provincial court if things at Regional council fails. Any taxation law has to be 100% clear in its intent or as Rocky stated, the benefit goes to the citizen. I will let Rocky add any comments if he has any.

I also would like to add that if this goes to council, which it sounds like that's the way it's going, I will contact the other self storage facilities that paid the Commercial DC for their particular expansions after the 2017 DC bylaws and let them know our position. Thanks again

Have a great day and weekend.

Renzo Giancaterino
Westend Self Storage

On Jun 17, 2022, at 4:43 PM, Scholtens, Ken <Ken.Scholtens@niagararegion.ca> wrote:

Good Afternoon Mr. Giancaterino

Staff have had the opportunity to review the information provided by yourself and Mr. Vacca. It is staff's opinion that in 2017 when the development charge by-law was adopted it intentionally removed self-storage as an industrial use. In the Council Package – CL 11-2017 report CSD 11-2017 included a By Law Comparisons Chart (CSD 11-2017: Appendix 2) that shows self-storage was intentionally deleted as an industrial use:

<image001.png>

(page 582 of 1052)

Due to the removal of self-storage from the definition of industrial-use it by default became a "commercial" use. Under the existing by-law commercial purpose is defined as:

<image012.png>

It is staff's opinion that self-storage is clearly the provision of services for a fee. If you wish to appeal the decision made by staff you are welcome to delegate to Corporate Services Committee and make an appeal.

Should you have any further questions please do not hesitate ask.

Ken

Ken Scholtens
Manager, Business Development & Expedited Services
Economic Development | Niagara Region

<image004.png>905-980-6000 ext. 3710 | 905-401-8209
<image005.png>Ken.Scholtens@niagararegion.ca
<image006.png>NiagaraCanada.com
<image007.png>1815 Sir Isaac Brock Way, P.O. Box 1042, Thc L2V 4T7

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From: Renzo Giancaterino <rgiancaterino@cottoninc.ca>
Sent: Monday, June 13, 2022 9:33 AM
To: Scholtens, Ken <Ken.Scholtens@niagararegion.ca>
Cc: Hutchings, Blair <Blair.Hutchings@niagararegion.ca>; Rotundo, Alex <Alex.Rotundo@niagararegion.ca>; Michael Colaneri <michaelcolaneri@pinewoodniagarabuilders.ca>; Rocky Vacca <rvacca@sullivan-mahoney.com>
Subject: Re: Self Storage Regional Development Charges

Hi Ken
Appreciate your response.
Look forward to resolving this soon. Take care.

Have a great day

Renzo Giancaterino
Westend Self Storage

On Jun 13, 2022, at 9:15 AM, Scholtens, Ken <Ken.Scholtens@niagararegion.ca> wrote:

Good Morning Renzo,

Thank you for following up and I would like to let you know that we engaged our legal counsel to get their opinion on this matter. My intent is have a more fulsome response to you before end of week.

We appreciate your patience in this matter,
Ken

Ken Scholtens
Manager, Business Development & Expedited Services
Economic Development | Niagara Region

[redacted] 905-980-6000 ext. 3710 | 905-401-8209
[redacted] Ken.Scholtens@niagararegion.ca
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NiagaraCanada.com
[redacted] 1815 Sir Isaac Brock Way, P.O. Box 1042, Thorolc

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From: Renzo Giancaterino <rgiancaterino@cottoninc.ca>
Sent: Monday, June 13, 2022 8:42 AM
To: Scholtens, Ken <Ken.Scholtens@niagararegion.ca>; Hutchings, Blair <Blair.Hutchings@niagararegion.ca>; Rotundo, Alex <Alex.Rotundo@niagararegion.ca>
Cc: Michael Colaneri <michaelcolaneri@pinewoodniagarabuilders.ca>; Rocky Vacca <rvacca@sullivan-mahoney.com>
Subject: Re: Self Storage Regional Development Charges

Good Morning All
It has been well over a week since our lawyer sent you our position via email. The one question we have is, do you intend on giving us a response? if so when? It's is our opinion that this development, as per the current development charge by law, pays zero for development charges.
This is our interpretation based on current and past development charge by law definitions.
Looking forward to your response.

Have a great day.

Renzo Giancaterino
Westend Self Storage

On Jun 2, 2022, at 11:40 AM, Rocky Vacca <rvacca@sullivan-mahoney.com> wrote:

Good morning all,

As you are aware, I represent the owner of Westend Self Storage.

The issue at hand is the application of the DC by-law in this matter to the subject project.

We are not disputing that "self-storage facilities" has been removed from the definition of "industrial use" in the current by-law. The issue however is the proposed application of commercial DC charges for this use. The definition of "commercial purpose" in the DC by-law in the current by-law is the same as it was in 2012 and in prior by-laws. At no point in the past has the proposed use fallen within the definition of "commercial purpose" for any prior expansions of the use until your recent position. Furthermore, this is supported by the fact that the zoning of the property does not permit "commercial uses".
In short, although this may have been an unintended consequence by the Region by changing the definition of "industrial use" to remove "self-storage facilities" and intending that it fall within "commercial purpose", the DC by-law's unchanged definition of "commercial purpose" and the Region's prior interpretation of "commercial purpose" as not including this use runs contrary to this intention. The law is quite clear that any taxation or charge statutes/by-laws are to be clear and unequivocal and, if not, are interpreted in favour of the taxpayer.

I hope the above sheds a light on our position. Respectfully, it may be in the best interest of the Region to resolve this without the matter proceeding through a formal complaint process and creating a precedent with a decision by Regional Council.

I would be pleased to meet in person with you and your solicitor.

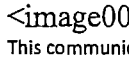
Regards,

Rocco "Rocky" Vacca, Partner

R. Vacca Professional Corporation

SULLIVAN MAHONEY LLP
4781 Portage Road
Niagara Falls, Ontario L2E 6B1

Direct Dial: (905) 357-5863
Facsimile: (905) 357-3336



From: Renzo Giancaterino <rgiancaterino@cottoninc.ca>
Sent: June 1, 2022 4:06 PM
To: Scholtens, Ken <Ken.Scholtens@niagararegion.ca>
Cc: Hutchings, Blair <Blair.Hutchings@niagararegion.ca>; Rotundo, Alex <Alex.Rotundo@niagararegion.ca>; Michael Colaneri <michaelcolaneri@pinewoodniagarabuilders.ca>; Rocky Vacca <rvacca@sullivan-mahoney.com>
Subject: Re: Self Storage Regional Development Charges

Hi Ken
Thanks for the email.
I will ask our lawyer to respond to what we wish to discuss with staff first. Thanks again and we'll wait for Rocky's response.
Have a great day!

Renzo Giancaterino
Westend Self Storage.

On Jun 1, 2022, at 3:56 PM, Scholtens, Ken <Ken.Scholtens@niagararegion.ca> wrote:

Good Afternoon Mr. Giancaterino,

Staff at the Niagara Region are prohibited from acting outside of the Development Charges By-Law. For certainty, the Industrial Development Charge Grant Program is clear:

Self-storage is not a defined industrial use and therefore does not qualify for an exemption or grant under the Niagara Region's Development Charge By-law. I want to clarify, that all self-storage developments that have been built since the by-law went into effect in September 2017 have been subject to Regional development charges.

I'm happy to reach out to our legal counsel to determine their availability and when we may be able to schedule a meeting. However, to make the most effective use of staff's time I would ask that you please share your findings with staff prior to scheduling a meeting.

You are welcome to request to speak at Committee and/or Council in writing. You can find all the information you need below:

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https://www.niagararegion.ca/government/council/speakingatCommittee.aspx

Thank you,
Ken

Ken Scholtens
Manager, Business Development & Expedited Services
Economic Development | Niagara Region

[redacted] 905-980-6000 ext. 3710 | 905-
[redacted] Ken.Scholtens@niagararegion.ca
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[redacted] 1815 Sir Isaac Brock Way, P.O. Bo

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[redacted]

From: Renzo Giancaterino <rgiancaterino@cottoninc.ca>
Sent: Wednesday, June 1, 2022 6:04 AM
To: Hutchings, Blair

<Blair.Hutchings@niagararegion.ca>; Rotundo, Alex <Alex.Rotundo@niagararegion.ca>; Scholtens, Ken <Ken.Scholtens@niagararegion.ca>
Cc: Michael Colaneri <michaelcolaneri@pinewoodniagarabuilders.ca>
Subject: Self Storage Regional Development Charges

Good Morning Gentlemen

We would like to set up a meeting between ourselves and our lawyer and your team and the Regions lawyer to discuss our findings and concerns with the current DC bylaw.
Before we take this to council, our lawyer suggests we discuss our findings with staff. We do not want to share our findings with any councilors until after we have this meeting.
Our team would be represented by myself, Michael Colaneri Jr and our lawyer Rocky Vacca. Please let us know your availability either in person, zoom or Microsoft Teams.
We appreciate your attention to this matter and hopefully we hear from you soon.

Have a great day!

Thank you,

Renzo Giancaterino
West End Self Storage
66 Commerce Place
St. Catharines, ON L0S 1B3
p. 905-646-2634
e. frontoffice@westendselfstorage.ca

<image011.jpg>

"commercial purpose" means used, designed or intended for use for or in connection with the purchase and/or sale and/or rental of commodities; the provision of services for a fee; or the operation of a business office, and includes hotels and motels;

"development" means the construction, erection or placing of one or more buildings or structures on land or the making of an addition or alteration to a building or structure that has the effect of increasing the size or usability thereof, and includes redevelopment; notwithstanding the foregoing, development does not include temporary structures, including but not limited to, seasonal hoop structures, seasonal fabric structures, tents, or produce sales stands;

"dwelling room" means either:

a) each bedroom used, designed or intended for use by one or more persons living together in a lodging home, dormitories, or

b) in the case of a special care/special dwelling unit/room, each individual room or suite of rooms used, designed or intended for use by one or two persons with or without exclusive sanitary and/or culinary facilities.

"dwelling unit" means one or more rooms used, designed or intended to be used by one or more persons as a residence and which has access to culinary and/or sanitary facilities. A "dwelling unit" does not include a Park Model Trailer conforming to National Standard of Canada #CAN/CSA - Z241.0-92 or equivalent standard;

"eligible costs of remediation" means work related to the following categories:

(a) Phase 1 Environmental Site Assessments;

(b) Phase 2 Environmental Site Assessments;

(c) Environmental Remediation Work; and

(d) Indirect Remediation Costs, all as detailed in the listing of eligible remediation costs by category in Schedule "D".

"existing industrial building" means a building or buildings existing on a site in the Regional Municipality of Niagara as of July 6, 2012 or the buildings or structures constructed and occupied on a vacant site pursuant to site plan approval under section 41 of the Planning Act, R.S.O. 1990, c. P.13 (the "Planning Act") subsequent to the July

SCHEDULE "C"

2004 CarswellOnt 5552
Ontario Municipal Board

Airport Self Storage Ltd. v. Durham (Regional Municipality)

2004 CarswellOnt 5552, [2004] O.M.B.D. No. 1204, 48 O.M.B.R. 414, 4 M.P.L.R. (4th) 305

Airport Self Storage Limited has appealed to the Ontario Municipal Board under subsection 22 (1) of the Development Charges Act, S.O. 1997 c. 27 against a development charge imposed on a property at 425 Taunton Road West by the Regional Municipality of Durham under the authority of By-law 50-99

Rogers Member

Judgment: November 22, 2004
Docket: DC030012

Counsel: L. Townsend-Renaud for Airport Self Storage Limited
A, Allison for Regional Municipality of Durham

Related Abridgment Classifications
Municipal law
XVII Development charges and levies
XVII.1 Development charges
XVII.1.b Imposition by by-law
XVII.1.b.ii Calculation

Headnote
Municipal law --- Development charges and levies — Development charges — Imposition by by-law — Calculation
Complainant owned property in city on which it was constructing self-storage operation — Operation included office, residence for security person and series of self-storage units rented out to public and available to commercial, industrial and residential users — Development charge by-law for region provided for charges against commercial and residential development only and did not charge industrial users — Complainant paid commercial charges on office component and residential charges on residential component, but also paid commerical charges on square footage of self-storage unit area — Complainant's claim that self-storage area should be considered industrial use and therefore not subject to development charges was dismissed at first instance and complainant appealed to Ontario Municipal Board — Appeal allowed — Definition of retail uses in by-law was so broad as to invite ambiguity in application in certain circumstances, including this case — Self-storage uses were not included in by-law as one of uses which were specified as commercial for purposes of clarifying any ambiguity — Self-storage uses were considered industrial use in study which underlay development charges — Other storage uses were treated as industrial uses in application of by-law — Accordingly, self-storage units were industrial use and city should refund to complainant amount paid as commercial development charge plus interest.

Table of Authorities
Statutes considered:
Assessment Act, R.S.O. 1990, c. A.31
Generally — referred to
Development Charges Act, 1997, S.O. 1997, c. 27
Generally — considered

s. 2(1) — considered

s. 5 — considered

s. 20(1)(a) — considered

s. 20(1)(c) — considered

Regulations considered:

Building Code Act, 1992, S.O. 1992, c. 23

Building Code, O. Reg. 403/97

Generally

***Rogers Member*:**

The Hearing

1 This is the first of two hearings relating to appeals and complaints filed by Airport Self Storage Limited with respect to the imposition of development charges by the Regional Municipality of Durham.

2 In this hearing, the Board heard the appeal of a complaint under the *Development Charges Act* with respect to the imposition of a development charge by the Region on a property at 425 Taunton Road West. The development charge was levied under the authority of By-law 50-99. The Board heard two witnesses who attested to an agreed statement of facts, and assisted the Board in understanding the background study to By-law 50-99. The thrust of the case was argument, in which counsel for each side argued the correct interpretation of the by-law. The appellant has asked the Board to order a refund of the development charges that it alleges have been improperly paid.

The Facts

3 Airport Self Storage limited (Airport) owns a property on Taunton Road in the City of Oshawa, on which it is constructing a self-storage operation. The development includes an office, a residence for a 24-hour security person, as well as a series of self storage units, which are rented out for storage purposes to members of the public. According to the agreed facts, there is no limitation on the purposes for which the storage space can be used, although there is a prohibition against goods that are illegal, dangerous, explosive or a fire hazard. Storage is available to commercial, industrial and residential users. However, the predominant users are private persons who are storing personal possessions.

4 It was agreed between the parties that on passing By-law 50-99, the development charge by-law for the Region, it was intended that industrial users ought not be charged a development charge. The by-law was therefore, crafted so as to exclude any reference to industrial uses, and to provide for charges against residential and commercial development only. It was further agreed between the parties that in the data which underlies the background study for the development charge by-law, a self storage unit was considered, and the data relating thereto was calculated, as an industrial use.

5 The complainant paid commercial development charges with respect to the office component of the development and residential development charges with respect to the residential portion of the development. It also paid commercial development charges with respect to the square footage of the development used for self storage purposes. It is this latter charge that the complainant is disputing.

The Issue

6 Section 20 of the *Development Charges Act* states:

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

7 The appellant filed its complaint claiming either or both of these errors.

8 It is claimed by the appellant that the self storage portion of its development ought not to be subject to development charges under By-law 50-99, because self storage should be considered an industrial use pursuant to the relevant background study and therefore, under the by-law. As an industrial use, self-storage is exempt from payment of development charges.

9 The Region argues that notwithstanding the kind of data used in the background study, self storage units are commercial uses, and fall within the broad definition of commercial "retail uses" contained in By-law 50-99. The Region makes this argument notwithstanding the fact that other types of storage and warehousing facilities are classified by the Region as industrial and are exempt from the imposition of development charges.

The Board's Finding and Order

10 The issue was carefully and thoroughly argued by both parties. The Board finds based on the agreed statement of facts, and based on the wording of the *Development Charges Act*, the by-law, and after a review of the background study on which By-law 50-99 was based, that self storage units should be considered an industrial use under By-law 50-99. The self storage portion of this development is, therefore, exempt from the payment of development charges.

11 The Board therefore orders that the Region refund to Airport the amount paid by Airport on account of a commercial development charge, which the Board was advised amounted to $119,241.01, plus interest in accordance with the *Development Charges Act.*

12 The Board notes that this decision is not determinative of the appeal filed by Airport of the Region's new Development Charge By-law 45-2003.

Reasons

13 Self storage units are a relatively recent phenomenon, in terms of planning and development. As well, the standard classifications of land uses has been evolving over the years, so that there is a substantial blurring, in planning terms, of what once were considered hard and fast classifications of uses.

14 This is clearly demonstrated by a review of the various indices, which classify self storage operations. The evidence before the Board indicated that self storage units are classified as industrial by the Statistics Canada Standard Industrial Classification System (1980), and by the *Ontario Building Code*. Such operations are taxed under the Ontario *Assessment Act* as commercial uses, and have recently been classified under the new Statistics Canada North American industry Classification System (1997) as commercial. There is, apparently, no common understanding as to the correct classification of this type of use. It may be that this type of use should be classified differently for different purposes.

15 Section 2(1) of the *Development Charges Act* states:

> 2(1) The council of a municipality may by by-law impose development charges against land to pay for increased capital costs required because of increased needs for services arising from development of the area to which the by-law applies.

16 Section 5 sets out the method to be used to determine the amounts paid under the development charge by-law. That section requires the municipality to estimate the anticipated amount, type and location of development, and to project the increased need for services attributed to the anticipated development. The capital costs to provide the increased services are estimated, and then the total cost is apportioned among the anticipated development. In the case of non-residential development the costs are apportioned on a per square foot, or per square metre basis.

17 Many municipalities use this method to determine a residential development charge, and a non-residential development charge. In the case of Durham Region, the non-residential development charge was further refined to determine separately, the anticipated square footage of anticipated development for commercial, institutional, and industrial uses, as well as the anticipated

services attributable to each type of use. A per square foot charge was calculated for commercial uses, industrial uses and institutional uses, but only a charge applicable to commercial uses was included in the actual development charge By-law 50-99.

18 In the background study, self storage uses were included in the data used to calculate anticipated industrial development. Thus, this type of development and the services generated by it were included in the calculation of an industrial development charge. Council for the Region then decided not to charge that industrial development charge.

19 The Region did not specifically exempt industrial uses from a development charge. There was simply no provision for a charge on industrial uses in the by-law. The Region did however impose a charge on commercial uses. By-law 55-90 defines "commercial" as office and retail uses. The parties agreed that self storage operations are not an office use. However, there is a debate as to whether this use falls into the definition of a "retail use".

20 By-law 50-99 defines a "retail use" as follows:

> "retail use" means lands, buildings or structures used, or designed or intended for use for the sale or rental or offer for sale or rental of goods or services for consumption or use and for greater certainty, but without in any way limiting the generality of the foregoing, shall include but not be limited to food stores, pharmacies, clothing stores, furniture stores, department stores, sporting goods stores, appliance stores, garden centers, automotive dealers, automotive repair shops, gasoline service stations, government owned retail facilities, private daycare, private recreational facilities sports clubs, golf courses, skiing facilities, race tracks, gambling operations medical clinics, funeral homes, motels, hotels, restaurants, theatres, facilities for motion pictures, audio and video producing and distribution, sound recording services.

21 A self storage operation is not included in the list clarifying some of the types of uses that are to be considered commercial and subject to the by-law.

22 The Region argues that self storage operations are providing a rental service in the form of storage space, and therefore such operations fall within the ordinary meaning of the words used in the definition of "retail use" in the by-law.

23 The Board finds that, contrary to the argument of the Region, the Board cannot rely on the "ordinary meaning" of the opening words of this definition. The Board finds that the definition of retail uses in this by-law can create ambiguity in application. The difficulty the Board has, is that just about any use, industrial or commercial, could fall within the definition included in this by-law. For example, if an owner was developing property for a small industrial plaza, and intended the space to be rented to small industrial or manufacturing uses, then the Board understands that the development would be considered industrial, and the charge would not apply. The owner in that case is renting manufacturing space for use. In this case, the owner is renting storage space for use, as opposed to manufacturing space. However, it is space that is being provided.

24 Thus it seems that it should be the activity in the space which should define how the operation is classified. A traditional view of storage or warehousing holds that such a use is an industrial use.

25 The Region argues that a security service is supplied for the self storage operation, which provides a service to the public. However, it may very well be that a security service is supplied by the owner of the industrial plaza to ensure the security of the industrial operations in the plaza used in the example above. In any event, that portion of the complainant's self storage operation which houses the security service, the office, has been charged a commercial development charge which is not disputed by the complainant.

26 The Region also suggested that the reason a self-storage operation is considered commercial is that residential-based users are the primary users of the operation. However, the Board was advised that there is no restriction on who uses this self storage operation.

27 Furthermore, the Board was advised by the Region that if a large warehouse were constructed to house goods that were to be stored for an industry before distribution and transportation, for example, such a storage facility would be considered industrial and not be charged as a commercial facility. This exemption from the application of development charges would

apply even if the owner of that warehouse decided to rent part of his building out to residential tenants for storage purposes. It therefore appears that reliance on who uses the facility is not particularly helpful here. Unless clearly restricted by some means, the ultimate users, in this operation, may vary or change over time. It may be that the character of the building and the activity in the space that is rented out is the best indicator of the nature of the activity, in the absence of any defining classification in the by-law.

28 This Board finds that the initial statement in the definition of retail uses in By-law 50-99, is so broad as to require judgment. Applying judgement can result, in some circumstances, in ambiguity of meaning. Thus, the ordinary meaning of these words is not helpful. This is why, the Board presumes, there was a need to include a list of uses as clarification. The list included in the definition is a recognition that there may be some uses for which there would be a debate on whether they are properly considered "retail uses" or not. For example, an automotive repair shop might well be considered an industrial type of use; a daycare or medical clinic might be considered an institutional type use; a skiing facility might be considered a recreational or park type use; a garden center might be considered an agricultural type of use.

29 The broad definition of "retail" in this by-law could encompass these types of uses, but other indicia might point to another classification. The Region has, therefore, included them specifically in the definition of retail uses. If no clarification was required for some types of uses, there would be no need for a list. In the case before the Board, some indicia would point to a self storage operation as an industrial use, and yet this use is not included on the list clarifying what constitutes a retail use.

30 The Board must therefore look to the purpose and intent of the enactment. The Board refers to the statement cited by Dredger and Sullivan on the 'Construction of Statutes', from Lord Tindal in the Sussex Peerage Case:

> If the words of the statue are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statue, and to have recourse to the preamble... and "the mischiefs which [the makes of the Act] intended to redress" (1844 8 E. R. 1034 at 1057).

31 The Board rejects the argument of counsel for the Region that one can look to the decision of the Regional council in this complaint to determine the intent of the Region in this regard. The ruling of Regional council on the complaint is an interpretation only, and not determinative of the meaning of the by-law. Otherwise, there would be no need for an appeal to this Board.

32 Legislation should operate pro-actively. Enactments including by-laws should be interpreted by decision makers in a manner that reasonably accords with how the reader and user of the legislation could best determine the meaning. To interpret the legislation, the reader should refer to what is written in the by-law, and about the by-law, before a dispute has arisen. Should that interpretation not accord with what the legislators want, amendments are possible.

33 The Board will not rely on the policy reasons provided by Mr. Watson as a basis on which to classify this use as a commercial use for the purposes of the 1999 Development Charge By-law. The policy reasons, which relate to why industrial uses were excluded from the development charge by-law, were never articulated in any background study or staff report for the 1999 By-law that was brought to the attention of the Board.

34 The Board accepts the argument of counsel for the appellant that the *Development Charges Act* requires, by its language, that there be a nexus between the study which supports it and the ultimate by-law. The charges intended to be imposed by the Development Charge By-law must be supported by the development charge study underlying the by-law.

35 However the Board does not accept that there must be a precise match between the categories of uses used as data to calculate a particular charge, and the charge accorded that particular use, in the Development Charge By-law. The process of calculating a development charge requires the use of whatever data is available and useful, and requires a projection into the future. Precision cannot be fully required or expected.

36 However, where there is ambiguity in the ultimate Development Charge By-law the Board must look to the background study to clarify that ambiguity. To clarify the ambiguity, the Board finds that there should be a general correspondence between the calculations and the ultimate charge accorded any particular use. This is particularly so when the charges have been calculated to a refined category of uses, as is the case here. In this case, the charges are accorded to industrial, commercial and institutional uses, as opposed to a broader category of uses called "non-residential". Thus, to clarify the ambiguity, a general correspondence between the types of uses used in calculating the charge and the types of uses that are charged, can be assumed, unless otherwise clarified in the by-law.

37 Furthermore, the Board looks to how other similar uses are treated under the By-law. In this case, other warehousing and storage uses are treated as industrial and are not charged under the By-law.

38 Thus, in determining that self-storage operations are an industrial use for the purposes of By-law 50-99, the Board relies on the following:

1. The definition of "retail uses" in By-law 50-99 is so broad as to invite ambiguity in application in certain circumstances, including this one.

2. Self-storage uses are not included in By-law 50-99 as one of the uses, which are specified as commercial for the purposes of clarifying any ambiguity.

3. Self-storage uses were considered an industrial use in the study, which underlies the development charges.

4. Other storage uses are treated as industrial uses in the application of By-law 50-99.

Appeal allowed.