
Subject: Development Charges Complaint – 1520 McCleary Drive, Thorold (Gorge Holdings Inc.)

Report to: Regional Council

Report date: Thursday, January 16, 2025

Recommendations

1. That the Complaint filed with respect to Regional Development Charges payable pursuant to Section 20 of the *Development Charges Act, 1997*, for the property located at 1520 McCleary Drive, Thorold (the “Subject Lands”), **BE DISMISSED** by Regional Council.

Key Facts

- The purpose of this report is to provide background information for a Regional Development Charge (RDC) complaint received on October 3, 2024, that was filed with the Region by legal counsel on behalf of Gorge Holdings Inc. (the “Complainant”) for a proposed development on the Subject Lands.
- Should a property owner feel that RDCs have been incorrectly applied there is a procedure for issuing a complaint under Section 20 of the *Development Charges Act, 1997* (the “DCA”). Regional Council is required to hold a hearing for the consideration of such a complaint and will be acting as a tribunal and exercising quasi-judicial powers as per the process outlined in report CSD 12-2018.
- In accordance with the DCA, in order to be successful in this process the Complainant must be able to demonstrate:
 - the amount of the development charge was incorrectly determined;
 - 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
 - there was an error in the application of the development charge By-law
- The Complainant was assessed RDCs on the basis that the Subject Lands are “Commercial” as opposed to “Industrial” under the RDC By-law 2022-71. Consequently, the Complainant has asserted that the Region erred in its interpretation and application of the definition of “Industrial Use” in RDC By-law 2022-71.

- Region staff have reviewed the Complaint and have confirmed that the Subject Lands leased by United Postal Service Canada Inc.'s (UPS) are used for a Commercial Purpose.
- The development is to be leased by UPS however it is the owner/developer that is seeking relief of RDCs. The owner/developer, Gorge Holdings Inc. is operating a business of leasing space, which is fundamentally a commercial use. Additionally, the tenant is engaged in a business that does not meet the definition of industrial use. The tenant will not be directly benefitting from the RDC relief or RDC Grant.
- UPS' operations are based in sorting and redistributing goods that were manufactured, produced and processed in other facilities before being send to their facility. The activities proposed to take place on the Subject Lands primarily involve handling these pre-manufactured and post-manufactured goods rather than engaging in the manufacturing, producing and processing of new goods on site. Therefore, the development on the Subject Lands does not meet the definition of "Industrial Use".
- Region staff believe there has been no error in the RDC payable or application of the RDC By-law 2022-71, and therefore the Complainant is not eligible for the requested relief under the DCA and the complaint should be dismissed. Should Council accept this complaint, the financial impact of determining that this property does in fact meet the definition of "Industrial Use" is \$383,024.
- External legal counsel of Kagan Shastri DeMelo Winer Park LLP with expertise in the DCA have been retained to attend the RDC Complaint hearing and provide legal support with this matter.

Financial Considerations

The Region's DC By-law includes both Residential and Non-Residential rate classes which form the basis for the calculation of applicable RDCs. The Region's DC By-law includes three (3) Non-Residential rate classes, Industrial, Commercial and Institutional. Development Charges under the RDC By-law are calculated and payable as of the date of issuance of the first building permit with respect to the development based on the applicable rate as defined in the By-law based on proposed use of the development.

The Region has several incentive programs specific to RDCs, including the Industrial Use Development Charges Grant. This program provides financial reductions for industrial developments in Niagara that have obtained (or plan to obtain) a building permit to build or expand existing facilities to support industrial investment in the region. Developers can apply for funding before receiving a building permit or within 90 days of

receiving a building permit and receive a grant for up to 100 per cent of the RDCs payable.

To qualify for Niagara Region's Industrial Development Charge Grant, the applicant's development must meet the following criteria:

- The proposed development must meet Niagara Region's definition of Industrial Use as per By-Law 2022-71.
- Apply for funding before receiving a building permit or within 90 days of receiving a building permit.
- Demonstrate the positive economic impact that the development will have in Niagara.

The Complainant has asserted that the Region erred in its interpretation and application of the definition of "Industrial Use" in the RDC By-law 2022-71. Additionally, the Complainant has asserted that the Region incorrectly denied a grant application for the Industrial Use Development Charge Grant Program.

This complaint is in regard to 61,978 square feet of the total 86,218 square foot building constructed on the Subject Lands. Proposed use of the remaining square footage has not yet been confirmed to Regional staff. Commercial DCs owing for the 61,978 square feet leased by UPS as a result of the denial under the Industrial Use Development Charge Grant Program total \$1,025,116.12. If this portion of the building was determined to meet the Industrial Use definition this would result in RDCs payable of \$383,024.

It is important for Council to note that the definition of Industrial Use for determination of the Industrial Rate per By-law 2022-71 is identical to the definition of Industrial Use per the Niagara Region's Industrial Development Charge Grant Program. If Council determines that the Industrial Rate applies to this development, it is important to note that it would also be eligible for a RDC incentive program that could result in a grant of up to 100% of their RDCs payable. RDC incentives are funded from the existing tax base in order to keep the RDC reserves whole, therefore this would result in this property being eligible for a grant equal to \$383,024. It is staff's position that this treatment is inconsistent with the RDC By-law.

Analysis

The Complainant's position is that RDCs should be calculated at the Industrial Use Rate. Additionally, they dispute that their application for the Niagara Region Industrial

Development Charge Grant Program should have been approved, therefore resulting in \$0 in RDCs payable for the Subject Lands.

On November 21, 2023, the Complainant submitted an application under the RDC Industrial Use Grant program for which the Region provided conditional approval. This conditional approval is subject to the end use of the building being constructed meeting the definition of Industrial Use as defined in the grant program and the RDC By-law. This conditional approval also allows for the property to obtain a deferral of RDCs payable under the Region's Incentive Policy (C-A-028) and related Procedure C-A-028-002. To obtain a deferral of RDCs under this program, prior to building permit issuance, applicants with conditional grant approval must enter a RDC deferral agreement with the Region for the tenanted square footage with no confirmed tenants. This deferral agreement terminates at the date that the Region confirms use of all applicable square footage of the building or on the first anniversary of execution of the deferral agreement, whichever is earlier. At the time of the deferral agreement ending any square footage with unconfirmed tenants or tenants not meeting the definition of Industrial Use per the DC By-law becomes payable immediately at the Commercial RDC rate.

On December 19, 2023, the Complainant entered into a RDC Deferral Agreement for the Subject Lands. Per the executed agreement, Niagara Region agreed to defer the collection of the RDCs totaling \$1,426,045.72 for 86,218 square feet until the earlier of one year from the date of execution of the agreement or the date that tenants for the space have been confirmed.

On July 11, 2024, Regional staff received a submission indicating that 61,978 square feet of the Subject Lands was to be leased by United Parcel Service Canada Ltd. ("UPS"). It is staff's position that RDCs have been calculated appropriately and that the denial under the Niagara Region Industrial Development Charge Grant Program is warranted. This would result in Regional DCs for this portion of the development to be due at the Commercial Rate totalling \$1,025,116.12. The Region will assess the remaining square footage of the building once tenants are confirmed. Regional staff do not believe that the proposed use of the development meets the definition of Industrial Use By-law 2022-71 which is as follows:

"industrial use" means land, buildings or structures used for or in connection with manufacturing by:

- a) manufacturing, producing, and processing goods for a commercial purpose, as well as storing and/or distribution of goods manufactured, produced or processed on site;

- b) research or development in connection with manufacturing, producing or processing good for a commercial purpose;
- c) retail sales by a manufacturer, producer or processor of goods they manufactured, produced or processed, if the retail sales are at the site where the manufacturing, production or processing takes place;
- d) office or administrative purposes, if it is:
 - i. carried out with respect to manufacturing, producing, processing, storage or distributing of something; and
 - ii. in or attached to the building or structure used for that manufacturing, producing, processing, storage or distribution.

On September 10, 2024, Regional staff drafted a formal letter in response to the submission made indicating that 61,978 square feet of the Subject Lands was to be leased by UPS. In this submission it was the Complainant's opinion the proposed use meets the definition contained in paragraphs (a) and (d) above because UPS will be "processing" goods for commercial purpose and storing goods "processed" on the site. Furthermore, it was stated that the associated office area meets the definition because it is carried out with respect to "processing" and is attached to the building used for "processing". This interpretation of the term "processing" is inconsistent with the intent of the DC By-law and the RDC Industrial Grant Program. The developer/owner of the Subject Lands, Gorge Holdings Inc. is operating a business of leasing space, which is fundamentally a commercial use. Additionally, the tenant is engaged in a business that does not meet the definition of industrial use. The tenant will not be directly benefitting from the RDC relief or RDC Grant.

It is staff's position that the term "processing", as it relates to the broader definition of "industrial use", is to be understood in its ordinary sense and harmoniously with the intent of the DC By-law and the RDC Industrial Grant Program. It is staff's position that the term "processing", as it relates to the broader definition of "industrial use", is to be understood in its ordinary sense and harmoniously with the intent of the DC By-law and the RDC Industrial Grant Program. It should also be noted that paragraphs (a) and (d) which are relied upon by the Complainant cannot be read independently of the first part of the definition which states that "industrial use" means land, building or structure used for or in connection with manufacturing by." Industrial use requires that products be manufactured on site and that the uses listed in the subsequent sub-paragraphs have a direct relation to the manufacturing that is occurring on site. Without any manufacturing as a starting point the other types of uses listed, including "processing" as relied upon by the Complainant do not trigger an industrial use. As such, the term cannot be construed in isolation to refer merely to handling, sorting, warehousing, packaging and/or

redistributing goods originally made or produced elsewhere. Rather, the term, read within its proper context, refers to preparation, handling, or other activity designed to effect form appearance, or other characteristics of the goods brought onto the site, so that the final product becomes more marketable or acquires added value. Based on the correspondence from the Complainant, no such activity is contemplated by UPS within the portion of the building that it intends to occupy. As a result, the activities described at the Subject Lands do not meet the Region's definition of industrial use. It is staff's position that the Complainant is required to pay RDCs at the commercial rate for the portion of the building to be occupied by UPS in accordance with section 4.b. of the RDC Deferral Agreement.

Alternatives Reviewed

In accordance with the DCA, Regional Council is required to hold a hearing upon receipt of an RDC complaint and provide the complainant with an opportunity to make representations, following which Council is required to render a decision. It is staff's position based on the language in the Region's DC By-law 2022-71 relative to the information submitted on behalf of the complainant by their representative, and applicable legislation, that the complaint should be dismissed as no error or miscalculation regarding RDCs imposed has been established and the proper classification of the proposed use is Commercial.

Relationship to Council Strategic Priorities

This report provides details related to the collection of RDCs. This relates to Council's Strategic Priorities of Effective and Prosperous Region as RDCs are a major source of funding for growth projects in the capital budget.

Other Pertinent Reports

CSD 12-2018 - Regional Development Charges Terms of Reference and Complaint Process – REVISED

(If you require a copy of this report, please contact the Regional Clerks Office)

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Appendices

Appendix 1	Complaint Form as Submitted
Appendix 2	Letter Re: Tenant Confirmation and Industrial Use Development Charge Grant Program Denial