Financing of Municipal Infrastructure to Support Development: An Historical Perspective

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1. OVERVIEW

This paper is intended to provide an historical overview of many of the methods used to finance the provision of the municipal infrastructure needed to support land development in Ontario.[1] The types of municipal infrastructure discussed relate to major capital works such as sewers, roads and sidewalks. The fascinating history of parks and public school financing is not discussed, much to the disappointment, I'm sure, of the attendees at this conference.

In the early twentieth century and in the post-war years, Ontario experienced significant population growth which in turn led to a boom in construction and development, and rapidly expanding urban municipalities. This boom was not necessarily accompanied by a corresponding provision of adequate servicing and transportation facilities. As a result, the Legislature and municipalities had to explore different ways of financing municipal infrastructure required to meet the increased need for services resulting from the growth and development. A partner in this process for many of the early years of rapid growth was the Ontario Municipal Board which played an important role in approving and administering the financing of municipal infrastructure, and contributed to the body of learning and jurisprudence in the area.

Over the years, the financing of the cost of constructing capital works such as sewers, roads and sidewalks has occurred in a number of ways, including (i) the issuance of debentures; (ii) special capital levies; (iii) subdivision agreements; (iv) lot levies; (v) developer cost sharing agreements; (vi) provincial grants and subsidies; and (vii) real property and business taxes. As time has passed it is fair to say that the approaches to financing municipal infrastructure have also become more sophisticated.

The following recounts, from an historical perspective, the major methods of raising the funds needed to supply the municipal infrastructure required to support a rapidly growing residential population in Ontario. One of the recurring themes in this review will be the question as to the extent that existing ratepayers, through property taxes, should bear the burden of financing

[1] In addition to a general review of articles and research relating to the financing of municipal infrastructure, the authors have relied on research and information provided in the Ontario Committee on Taxation Reports of 1967.

growth in their municipality and the extent to which such growth should be borne by the developers (or indirectly the new residents of the municipality who use the new infrastructure).

2. DEBENTURING

Over the years, the raising of money through the issue of debentures has been a common method of municipal financing. The authority of a municipality to incur debt and issue debentures to finance the cost of capital works has been provided in the *Municipal Act*. For instance, the 1892 *Consolidated Municipal Act,* S.O. 1892, c. 42 provided that the council of every city, town and incorporated village was permitted to pass by-laws for borrowing money and issuing debentures for drainage purposes.[2]

The obligation of repaying the principal and the annual cost of the interest charges was often passed on to ratepayers through a levy on taxable real property within the municipality. Alternatively, as a more equitable method of sharing the cost of municipal infrastructure, a municipality might levy the cost of the debenture debt, in whole or in part, against those properties that were thought to receive some special benefit from the capital works constructed.

The Ontario Municipal Board was charged with the responsibility of approving a wide range of financial matters, including the financing of capital works through the issue of debentures. There are a great number of Board decisions on these issues in older issues of the Ontario Municipal Board Reports.[3]

3. CAPITAL WORKS FINANCED BY SPECIAL CAPITAL LEVIES

Several statutes in Ontario have authorized special capital levies on properties directly served by or deemed to benefit from capital improvements. The oldest statutory basis for such charges is the *Local Improvement Act*. Other statutes authorizing special capital levies in Ontario included the *Ontario Water Resources Commission Act*, the *Drainage Act*, the *Tile Drainage Act*, the *Public Utilities Act* and, of course, the *Municipal Act*.

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[2] In the *Municipal Act*, R.S.O. 1990, c. M.45, the general power is found in section 147(1). In the *Municipal Act, 2001*, it is found in section 401.
[3] See *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, section 65, as amended.

Each of these statues prescribed its own procedures for initiating works to be financed by the special capital levies. Again, the Ontario Municipal Board played an important role in approving and administering the construction and financing of capital works by these special levies.

Generally, the cost of providing works under the provisions of the *Local Improvement Act* and the *Municipal Act* was shared by the municipality and benefiting property owners, although there was little guidance in the statutes as to the method by which the division would be made. This approach to capital levies reflected an emphasis upon a benefits-received approach to capital financing. At the same time, the extent to which the assessments conform to the benefits-received basis depended on the particular method used to apportion all or part of the cost of capital works among the individual property owners directly served by or deemed to benefit from the works.

Depending on the particular legislative framework, the owner's share of special capital levies could be levied against defined areas of a municipality, against abutting properties, against properties which while not abutting received some benefit from the work, or a combination of abutting and non-abutting properties. Generally, properties that were exempt from taxation under the *Assessment Act* were also exempt from local improvement levies. However, there were some exceptions, such as the narrowing of the exemption under the *Local Improvement Act* with respect to local improvement charges on churches, universities and seminaries of learning.

(a) The *Local Improvement Act*

Over the years, a variety of different works were undertaken as local improvements under the *Local Improvement Act*.[4] These works have included: the construction and improvement of streets, sewers, sewage treatment works, watermains and waterworks; the construction and maintenance of boulevards and the provision of street lighting; the planting and maintenance of trees, shrubs and plants on a street; and the capital cost of providing public parks and squares of a limited size.

[4] The *Local Improvement Act* was repealed on 1 January 2003. The *Municipal Act, 2001* (see sections 326 and 400(j)) and O. Reg. 119/03 have maintained and streamlined the local improvements previously authorized under the *Local Improvement Act*.

Local works could be initiated by petition signed by a certain minimum number of property owners representing a certain minimum value of the lots to be specially assessed for the work.[5] A municipality, while not forced to act on the request of the petitioners, could then pass a by-law to undertake the work as a local improvement.

Alternatively, if the work was not initiated by petition from property owners, it could be commenced in one of the following ways: (i) on the initiative of the municipal council; (ii) on sanitary grounds; or (iii) other work as approved by the Ontario Municipal Board.[6]

If commenced on the initiative of the municipal council (referred to as the initiative plan), council had to publish a notice of its intention to undertake the work and serve the notice on the owners of the lots to be specially assessed for the work.[7] Property owners then had a right to petition council against the work. Where the petition was from a majority of owners representing a certain minimum value of the lots to be specially assessed, the work could not be undertaken as a local improvement for at least two years. However, council could proceed with the work, despite the petition against it, if the new work was less expensive or of a different kind or description from that originally proposed.[8] The petition against the work also did not prevent council from proceeding under section 8 of the *Local Improvement Act*.[9]

Section 8 of the *Local Improvement Act* provided council the option of proceeding with the work, with no right of petition against the work, where there was a two-thirds favourable vote of council and the approval of the Ontario Municipal Board. However, council had to publish notice of its intention to undertake the work and any affected owner could then file an objection with the municipality for referral to the Ontario Municipal Board[10].

Section 9 of the *Local Improvement Act* provided that where a local board of health or the Minister of Health determined that certain sewer or watermain works were in the public interest

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[5] See, for example, *Local Improvement Act*, R.S.O. 1960, c. 223, section 11. A consolidation of the local improvement provisions of the early *Municipal Acts* was first introduced in S.O. 1911, 1 Geo. V., c.58, cited as *The Local Improvement Sections of the Municipal Act*. This legislation was continued in the *Local Improvement Act*, R.S.O. 1914, c. 193.
[6] *Local Improvement Act*, R.S.O. 1960, c. 223, section 7(1).
[7] *Local Improvement Act*, R.S.O. 1960, c. 223, section 12(1).
[8] *Local Improvement Act*, R.S.O. 1960, c. 223, section 13(1).
[9] *Local Improvement Act*, R.S.O. 1960, c. 223, section 13(2).
[10] *Local Improvement Act*, R.S.O. 1960, c. 223, section 8(3).

on sanitary grounds, council could undertake the work with a two-thirds vote of its members.[11] Again council had to publish notice of its intention to undertake the works.[12] While owners of the lots to be specially assessed under this provision of the *Local Improvement Act* did not have the right to petition council against the by-law, a majority of the affected property owners representing a minimum value of the lots to be specially assessed could petition the Ontario Municipal Board for relief, and "the Board may thereupon investigate the complaint and make such order with respect to the local improvement as may seem proper". Pending the determination of the Board, council could not proceed with the work.[13]

Council could install connections to the street line from a main sewer, watermain or gas main without receiving a petition, provided that there was a two-thirds favourable vote of its members. Ontario Municipal Board approval was also required for sewer and water connections to the street line. The property owners to be specially assessed for the cost of such work did not have a right of petition to council objecting to the construction of the project.[14]

Obviously, the Local Improvement method of providing infrastructure was most suitable for upgrading existing areas where those areas were operating in unsatisfactory conditions. It is a particularly cumbersome method of financing proposed new development.

(b) The *Municipal Act*

Under the *Municipal Act* councils were authorized to make capital expenditures for all types of municipal services, including: the construction of drains, sewers and sewage disposal works; the acquisition of land for parks; the provision of municipal parking lots, and capital expenditures on public utility undertakings.[15] Many of these works were also works that could be undertaken as local improvements under the *Local Improvement Act*. The *Municipal Act* followed the principles of the *Local Improvement Act* with respect to some services by permitting the cost to be levied against properties that specially benefited from the project.

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[11] *Local Improvement Act*, R.S.O. 1960, c. 223, section 9.
[12] *Local Improvement Act*, R.S.O. 1960, c. 223, section 10(1).
[13] *Local Improvement Act*, R.S.O. 1960, c. 223, section 10(2).
[14] *Local Improvement Act*, R.S.O. 1960, c. 223, section 4(1).
[15] See, for example, *Municipal Act*, R.S.O. 1960, c. 302, sections 377 and 379.

Before capital expenditures could be expended on public utility undertakings under the *Municipal Act*, the by-law had to be passed by a specified majority of council and approved by the Ontario Municipal Board.[16] The *Municipal Act* did not provide for works to be initiated on petition by local property owners. There was also no provision for notifying interested owners of council's intention to initiate work, other than in the case of parking lot projects.[17]

The *Municipal Act* also served a wider range of objectives through special capital levies than those covered under the *Local Improvement Act*. The *Municipal Act* could be used to construct a short sewer line along a residential block and to recover the cost of debenturing through a frontage charge. At the same time, the authority of the statute could form the basis for installing a complete sewage collection system that would serve an entire municipality.

In 1949, the *Municipal Act* introduced the concept of a deferred benefit where the financing of water and sewage works would be paid for by a benefiting property owner on a rising scale; a lower rate, called a deferred benefit rate, being payable until the "immediate benefit" of the works was fully realized, at which time the property owner would be expected to pay at a higher "immediate benefit rate" until the financial obligation related to the work had been fulfilled. This section has been amended over the intervening years[18] and is continued in the current *Municipal Act, 2001*, which provides as follows in sections 391 and 392:

> *391. (1) Despite any Act, a municipality and a local board may pass by-laws imposing fees or charges on any class of persons,*
>
> *(a) for services or activities provided or done by or on behalf of it;*
>
> *(b) for costs payable by it for services or activities provided or done by or on behalf of any other municipality or local board; and*
>
> *(c) for the use of its property including property under its control.*
>
> *391. (2) A fee or charge imposed under subsection (1) for capital costs related to sewage or water services or activities may be imposed on persons not receiving an immediate benefit from the services or activities but who will receive a benefit at some later point in time.*
>
> *392. A municipality and a local board shall establish and maintain a list for public inspection indicating which of its services and activities and the use of*

[16] See, for example, *Municipal Act*, R.S.O. 1960, c. 302, section 379(1)(52).
[17] See, for example, *Municipal Act*, R.S.O. 1960, c. 302, section 377(67).
[18] See, for example, *Municipal Act*, R.S.O. 1990, c. M.45, section 148.

which properties will be subject to fees or charges under this Part and the amount of each fee or charge.

(c) The *Ontario Water Resources Commission Act*

The *Ontario Water Resources Commission Act* reinforced reliance by municipalities upon the *Municipal Act* for the financing of water and sewer installations, through a provision that authorized the special levies for capital purposes contemplated in the *Municipal Act* to be used for repayment (by annual instalments) of obligations financed by the Ontario Water Resources Commission.[19]

(d) The *Drainage Act* and the *Tile Drainage Act*

The *Drainage Act* authorized a municipality to construct drainage works and to charge the cost of the works to benefiting landowners. The *Tile Drainage Act* authorized council to loan a landowner, on petition, up to a certain percent of the total cost of the work involved in draining the land.[20] The works under the *Drainage Act* and the *Tile Drainage Act* were not initiated by council, but rather were initiated on petition by landowners.[21] Again, these provisions were not generally appropriate for the financing of major infrastructure for growth.

(f) The *Public Utilities Act*

The *Public Utilities Act* authorized a municipality to levy a special tax on land abutting a public roadway along which a watermain was laid, to assist with the payment of interest and repayment of principal on debentures issued for waterworks purposes.[22] A tax could also be levied on land up to 300 feet from the roadway which enjoyed the use of water from the main for fire protection purposes.[23] This authority involved internal administrative decisions which could be made at the discretion of council.

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[19] See *Ontario Water Resources Commission Act*, R.S.O. 1960, c. 281, section 41. The *Ontario Water Resources Commission Act* was introduced in 1956, c. 62.
[20] See *Tile Drainage Act*, R.S.O. 1960, c. 399, section 7.
[21] See, for example, the *Municipal Drainage Act*, R.S.O. 1960, c. 252, section 2(1).
[22] See *Public Utilities Act*, R.S.O. 1960, c. 335, section 16.
[23] See *Public Utilities Act*, R.S.O. 1960, c. 335, section 14.

4. CAPITAL WORKS FINANCED BY DEVELOPERS

As a method of encouraging development of varied kinds, such as industrial development and residential development, municipalities have purchased and serviced land.

On a macro-scale, municipal land development activity has been dwarfed by large-scale subdivision projects undertaken by private developers for both residential and industrial/office purposes. This led to arrangements between municipalities and developers under which the developers, as specially benefiting property owners, took on all or part of the cost of the municipal infrastructure required for the development of the lands, both within and outside the subdivision that they were proposing. Developers who accepted these obligation did so with the expectation that they would recover the costs assumed by/imposed upon them through the sale price of the lots that were being serviced.

(a) Subdivision Agreements

The responsibility for providing or paying for certain municipal capital works was placed on land developers through subdivision agreements. These agreements usually required the subdivider to install or pay for certain services which would otherwise fall upon the municipality to provide.

While subdivision agreements were first used in the large, urban and suburban municipalities, their use soon became common in smaller municipalities in the course of the 1950s and 1960s. Furthermore, during this period, the responsibilities placed upon the developer for municipal services broadened, and an increasing number of developers were also expected to make cash payments in addition to providing or paying for the installation of specific municipal services. Most cash imposts were on a lot basis and were frequently the means of requiring the developer to share the cost of supporting services outside the subdivision.

The first acknowledgement of the financial fruits of subdivision agreements was made in the *Municipal Act* in 1958. The relevant *Municipal Act* provision[24] dealt with cash imposts received by municipalities for unspecified purposes, and required that such imposts be placed in reserve funds. The monies in the reserve funds were earmarked to meet expenses incurred by the

[24] S.O. 1958, c. 64, section 312a.

municipality for work of benefit to present or future occupants of the subdivision. If the municipality wanted to divert the money to other purposes, departmental approval was required.

In 1959, the *Planning Act* was amended to specifically empower the Minister and municipalities to enter into subdivision agreements and incorporated certain measures to control the content of subdivision agreements. Subdivision agreements requiring the provision of municipal services, among other things, also became a prerequisite to ministerial approval of the subdivision plan.

Attachment A to this paper identifies the subdivision provisions respecting the making of conditions to the approval of a draft plan of subdivision and respecting subdivision agreements as these provisions have ripened and changed since 1946. The sequential changes are noted in italics.

We return to the interpretation of these provisions later in the paper in the context of lot levies.

(b) Developer Agreements

As noted previously, in the post-war years, the rapid growth in urban municipalities led to municipalities substantially increasing their long-term debt burden. The municipal tax base was also being stretched to meet increased demands for services over and above the hard services of water, sewage, drainage, roads and sidewalks and for the ongoing maintenance of the hard services.

In this period, land developers were prepared to enter into developer agreements and contribute more capital in return for timely approval of subdivision and other development applications. These agreements were not necessarily authorized by statutes.

These types of agreements were essentially a contract between the municipality and the landowner and ensured that the landowner fulfilled certain conditions imposed by the municipality in granting the development approval. Needless to say, developer agreements also served to lighten the debt burden of municipalities. At the same time, however, developer agreements resulted in a reduction in the amount of subsidy for which local communities would otherwise have been eligible.

In some cases, the ready availability of developer financing led to municipalities demanding more extensive or elaborate services than what were actually warranted or more than what the municipality would have paid for itself. A consequence of this was an increase in the cost of new homes as the developer charges would in turn be transferred to the purchasers of the new homes.

Another criticism of developer agreements was that they sometimes set time limits for performance that were not related to the rate at which the properties were completed and occupied. This might result in developers rushing to install roads and utilities in a manner that was not up to par. Also, in the circumstances of a slow-down in the housing market, developers may have been placed in a position of financial hardship.

(c) Lot Levies

The lot levy system in Ontario, that grew out of the subdivision condition-making powers under the *Planning Act*, was the precursor to the current development charge regime and was used to finance major municipal services. The rationale for the imposition of lot levies was that new development leads to new demand for additional municipal infrastructure by those occupying and using the newly developed property. If municipalities did not have the assistance of developers in financing capital works relating to new development, this could cause a strain on the municipality's debt capacity and lead to increased taxes. It might also be a basis for the Minister (or other approval authority) not approving the draft plan of subdivision.

In basic terms, a lot levy constituted a monetary contribution from a landowner to a municipality towards the additional capital expenditures the municipality had made or was going to make in order for the proposed development to proceed. As such, a lot levy represented the cost of obtaining approval for new development, whether via subdivision, severance, condominium conversion or infill on a lot of record.

As noted above, before the 1950s, generally all municipal services required for new development were installed and paid for by municipalities accompanied by varying degrees of cost sharing between the general mill rate and site-specific rates. At this time, the major services provided

were sewers, area-specific roads (and related improvements) and water systems. The costs associated with the provision of these works were generally financed by debentures.

Again as noted above, during the 1950s as a consequence of urban growth, the responsibility for servicing new development began to shift onto the private sector, and developers were compelled to provide municipal services required within their subdivisions and to cede them to the municipalities prior to registration. Municipalities also introduced the practice of requiring cash contributions towards the growth-related costs of installing or enlarging off-site services such as sewers and water trunk lines.

While there was no explicit statutory authority for the imposition of lot levies, the 1959 amendment to the *Planning Act* provided that:

> *The Minister may impose such conditions to the approval of a plan of subdivision as in his opinion are advisable and … he may impose as a condition …*
>
> *(d) that the owner of the land enter into one or more agreements with the municipality dealing with such matters as the Minister may consider necessary, including the provision of municipal services.* (ed. underlining added)

This 1959 amendment to the *Planning Act, 1955* also provided as follows:

> *Every municipality shall be deemed to have always had authority to enter into agreements imposed as a condition to the approval of a plan of subdivision and all such agreements entered into before this section comes into force are hereby validated and confirmed and declared to be legal, valid and binding.*

These 1959 amendments to the *Planning Act, 1955* were given a liberal interpretation by the Supreme Court in 1961 in *Beaver Valley Developments Ltd. v. North York (Township)*[25], where the court upheld the power of the Township of North York to enter into a subdivision agreement executed in February 1956.

With the passage of time and spurred by the construction boom and the relatively free hand that municipalities appeared to have in requiring contributions from developers, municipalities began to look more seriously at their lot levy policies as a revenue raising tool.

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[25] *Beaver Valley Developments Ltd. v. North York (Township)* (1961), 28 D.L.R. (2d) 76 (S.C.C.), affirming (1960), 23 D.L.R. (2d) 341 (Ont. C.A.).

While in the 1950s and 1960s municipalities required financial contributions towards the construction of major municipal "hard" services such as roads, sewers and water systems, in the 1970s municipalities began to require contributions for "soft" services such as administrative facilities, recreational facilities and social service facilities. Ironically, developers themselves contributed to this situation by agreeing to such payments in order to speed up the approvals process and to enhance the saleability of their projects in the boom market.

At the same time, regional municipalities were being established in certain high-growth areas. These municipalities had the responsibility for services such as sewer, water and regional roads. Although these regional municipalities established lot levy policies for these works, many lower-tier municipalities continued to levy the same level of charges, but changed the purpose for which the levy was collected.

While the *Municipal Act*[26] provided municipalities with the power to impose charges on redevelopments, the charges could only be for any additional sewer or water capacity required as a result of the redevelopment. There was also a specific exclusion in the *Municipal Act* provision for charges on residential buildings having not more than two dwelling units.

Municipalities also began to search for ways to charge developers for other types of development, in addition to subdivisions. This led to numerous challenges before the Ontario Municipal Board and the courts with municipalities seeking authority to charge developers for rezonings, increases in density, condominium conversions, redevelopments and infills. While the findings of the courts and the Ontario Municipal Board varied from case to case, municipalities and developers became more knowledgeable as to the ground rules in regard to acceptable practices.

For instance, in the leading case of *Mills v. York (Regional Municipality) Land Division Committee*,[27] the Divisional Court held that a land division committee had the same powers under the *Planning Act* with respect to consents as the Minister had with respect to subdivision plan approval. Accordingly, the court found that, although the *Planning Act* did not provide in

[26] See *Municipal Act*, S.O. 1965, c. 77, s. 29; R.S.O. 1970, c. 284, s. 359; R.S.O. 1980, c. 302, section 215; and R.S.O. 1990, c. M.45, s. 218. There is no equivalent section in the new *Municipal Act, 2001*.
[27] *Mills v. York (Regional Municipality) Land Division Committee* (1975), 9 O.R. (2d) 349 (Div. Ct.).

express words for the imposition of a "lot severance fee", the payment was permissible as a condition to development under the subdivision provisions of the *Planning Act*. The court construed these provisions as requiring that the payment be relevant to the matters set out in the *Planning Act* or to the consequences of the severance.

With respect to rezonings, both the courts and the Ontario Municipal Board ruled that the *Planning Act* did not permit municipalities to impose lot levies on rezoning of lands. In *Sorokolit v. Peel (Regional Municipality)*[28] the Divisional Court considered an appeal from the decision of the Ontario Municipal Board with respect to the Board's imposition of a monetary condition on rezoning. The condition was a requirement that the owners of lands being rezoned pay to the Regional Municipality of Peel and to the City of Mississauga certain levies attributable to the potential development of the land at a price calculated upon the potential dwelling units of development. The court held that the Ontario Municipal Board did not have the power to impose lot levies as a condition of rezoning lands. The reasoning of the court also implies that municipalities did not have the power to impose lot levies on rezoning of lands. At the same time, the court noted that prima facie there was no obligation upon a municipality to enact a by-law to change the zoning of any lands. In effect, this meant that a municipality could withhold a rezoning unless a requested lot levy was paid, and some municipalities continued to impose lot levies on rezoning of lands. The remedy for the developer, a private appeal to the Ontario Municipal Board, was time consuming and costly. This served to discourage challenges to improper conduct when time was of the essence in getting lands to market.

As the *Planning Act* also provided that some developments may be subject to site plan control, a number of municipalities chose to incorporate unit levies in their site plan agreements.

By the 1980s, virtually all municipalities experiencing rapid urban growth had lot levy policies. While developers were still challenging municipalities with regard to lot levies, the focus of attention had shifted from whether municipalities had the right to impose lot levies to (i) the quantum of the levy (ii) the method used to calculate the levy and (iii) the nature of the services included in the levy.

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[28] *Sorokolit v. Peel (Regional Municipality)* (1977), 16 O.R. (2d) 607 (Div. Ct.).

With respect to the method used to calculate lot levies, the Ontario Municipal Board was faced with two alternative arguments of how such levies should be calculated. The first related to the need to demonstrate that the specific increase in capital costs was caused by the particular development (a site-specific approach). The second related to the use of an average cost approach that encompassed the growth-related capital costs of all development within the municipality over time (a growth-related average costing approach). The jurisprudence reveals that the Ontario Municipal Board upheld both methods of calculating lot levies on various occasions.

In the course of the challenges regarding lot levies before the courts and the Ontario Municipal Board developers also argued that need, equity and reasonableness should guide the use of lot levies.

In 1983, the new *Planning Act* came into effect and with it a meaningful change to the imposition of lot levies. In the 1983 *Act*, the reference to the Minister's power was changed from imposing such conditions as were in his opinion "advisable" to imposing conditions that were "reasonable, having regard to the nature of the development proposed for the subdivision". The intent of this change was to provide a more direct link between the conditions and the specific development.

In 1984, in *Mod-Aire Homes Ltd. v. Township of Georgina*[29] the Ontario Municipal Board affirmed the standard four-pronged test that had been developed over the previous years by the Board in considering whether lot levies were appropriate. In this case the Ontario Municipal Board noted that:

> *Over the years, when considering whether or not lot levies are appropriate, the tests most frequently used by the board have included, but have not been limited to the following:*
>
> *1. Is the lot levy relevant or, in other words, is it a consequence of the development of the subdivision?*
>
> *2. Is it necessary?*
>
> *3. Is it reasonable?*
>
> *4. Is it equitably applied?*

[29] *Mod-Aire Homes Ltd. v. Township of Georgina* (1984), 17 O.M.B.R. 213, affirmed (1985), 17 O.M.B.R. 213n.

> *More recently, as a result of certain court decisions, the board has tended to emphasize the test of reasonableness, and has placed less emphasis on the need for the levy to be a direct consequence of the subdivision of land.*

The line of Ontario Municipal Board decisions with regard to lot levies culminated in the1989 decision in *Mod-Aire Homes Ltd. v. Bradford (Town)*[30] where the Ontario Municipal Board confirmed that the so-called "soft services" (i.e. libraries, general administrative costs, community centres, fire protection, police protection, waste disposal, etc.) were as proper items for inclusion in a municipal "lot levy" as were the so-called "hard services" (i.e. sanitary and storm sewers, watermains, roads, sidewalks, etc.).

It had become readily apparent to developers, municipalities and the provincial government that a better system for determining the rates that should be charged for the provision by municipalities and Boards of Education of public services should be found. This resulted in a study process begun in 1985 and continued for several years where municipalities and developers battled for the edge in any legislative solution that might be forthcoming from the province.

When the lot levy system was finally overtaken by statutorily authorized "development charges" under the provisions of the *Development Charges Act*, *1989*, some viewed this new legislation as a codification of the lot levy system with procedural safeguards.

I will leave that matter and the further enlightenment on Development Charges and other developer methods of financing municipal infrastructure to subsequent speakers.

It has been our pleasure to have addressed you on this interesting topic and we thank the organizers of this conference for having given us the opportunity to visit some history, refresh memory and share with you thoughts on the tortuous path that has been followed on this most important subject.

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[30] *Mod-Aire Homes Ltd. v. Bradford (Town)* (1989), 23 O.M.B.R. 263 (O.M.B.), leave to appeal to Divisional Court refused (1990), 72 O.R. (2d) 683 (Div. Ct.).

ATTACHMENT A

Planning Act

Plan of Subdivision "condition" excerpts

1947, c. 75

25 (4a) The Minister may impose as a condition to the approval of a plan of subdivision that not more than five per centum of the land therein shall be dedicated for public purposes, other than highways, and that highways shall be dedicated adequate for the needs of the subdivision, and when the subdivision abuts on an existing highway, that sufficient land, other than land occupied by buildings or structures, shall be dedicated to provide for the widening of the highway to a width of not more than forty-three feet from the centre line of the highway as originally established.

1949, c. 71

25 (4a) The Minister may impose as a condition to the approval of a plan of subdivision that *land to an amount determined by the Minister but not exceeding five per centum of the land included in the plan* shall be dedicated for public purposes, other than highways, and that highways shall be dedicated adequate for the needs of the subdivision, and when the subdivision abuts on an existing highway, that sufficient land, other than land occupied by buildings or structures, shall be dedicated to provide for the widening of the highway to a width of not more than forty-three feet from the centre line of the highway as originally established.

1950, c. 53

25 (4a) The Minister may impose as a condition to the approval of a plan of subdivision that land to an amount determined by the Minister but not exceeding five per centum of the land included in the plan shall be dedicated for public purposes, other than highways, and that highways shall be dedicated adequate for the needs of the subdivision, and when the subdivision abuts on an existing highway, that sufficient land, other than land occupied by buildings or structures, shall be dedicated to provide for the widening of the highway to a width of not more than forty-three feet, *or in the case of the King's Highway fifty feet*, from the centre line of the highway as originally established.

R.S.O. 1950, c. 277

26 (5) The Minister may impose as a condition to the approval of a plan of subdivision that land to an amount determined by the Minister but not exceeding five per cent of the land included in the plan shall be dedicated for public purposes, other than highways, and that highways shall be dedicated adequate for the needs of the subdivision, and when the subdivision abuts on an existing highway, that sufficient land, other than land occupied by buildings or structures, shall be dedicated to provide for the widening of the highway to a width of not more than 43 feet, or in the case of the King's Highway 50 feet, from the centre line of the highway as originally established. 1947, c.75, s.11 (5); 1949, c.71, s. 10(1); 1950, c.53, s.3(2).

1952, c. 75

26 (5) The Minister may impose as a condition to the approval of a plan of subdivision that land to an amount determined by the Minister but not exceeding five per cent of the land included in the plan shall

be *conveyed to the municipality or if the land is not in a municipality shall be* dedicated for public purposes, other than highways, and that highways shall be dedicated adequate for the needs of the subdivision, and when the subdivision abuts on an existing highway, that sufficient land, other than land occupied by buildings or structures, shall be dedicated to provide for the widening of the highway to a width of not more than 43 feet, or in the case of the King's Highway 50 feet, from the centre line of the highway as originally established.

26 (5a) *Where the land is in a municipality and an official plan, indicating the amount and location of the land to be ultimately provided for public purposes, is in effect in the municipality, the Minister may authorize, in lieu of the conveyance required under subsection 5, the payment to the municipality of a sum of money not exceeding the value of five per cent of the land included in the subdivision.*

26 (5b) *Land conveyed to a municipality under subsection 5 shall be held and used by the municipality for public purposes, but may be sold with the approval of the Minister.*

26 (5c) *All moneys received by the municipality under subsection 5a, and all moneys received on the sale of land under subsection 5b, shall be paid into a special account and shall be expended only for the purchase, with the approval of the Minister, of land to be held and used by the municipality for public purposes.*

26 (5d) *The Minister may refer any application for his approval of the sale or purchase of land under subsection 5b or 5c respectively to the Ontario Municipal Board, in which case the approval of the Board shall have the same effect as if it were the approval of the Minister, and the decision of the Board shall be final.*

S.O. 1955, c. 61

26 (5) The Minister may impose as a condition to the approval of a plan of subdivision,

(a) that land to an amount determined by the Minister but not exceeding 5 per cent of the land included in the plan shall be conveyed to the municipality *for public purposes other than highways or, if the land is not in a municipality, shall be dedicated for public purposes other than highways*;

(b) that such highways shall be dedicated as the Minister deems necessary; and

(c) *when the subdivision abuts on an existing highway, that sufficient land, other than land occupied by buildings or structures, shall be dedicated to provide for the widening of the highway to such width as the Minister deems necessary.* R.S.O. 1950, c.277, s. 26(5); 1952, c. 75, s.11(1), *amended.*

26 (6) Where the land is in a municipality and an official plan, indicating the amount and location of the land to be ultimately provided for public purposes, is in effect in the municipality, the Minister may authorize, in lieu of the conveyance *for public purposes other than highways* required under subsection 5, the payment to the municipality of a sum of money not exceeding the value of 5 per cent of the land included in the subdivision. 1952, c. 75, s. 11(2), *part, amended*.

26 (7) Land conveyed to a municipality under subsection 5 shall be held and used by the municipality for public purposes, but may be sold with the approval of the Minister. 1952, c. 75, s. 11(2), *part*.

26 (8) All moneys received by the municipality under subsection 6, and all moneys received on the sale of land under subsection 7, shall be paid into a special account and *the moneys in such special account* shall be expended only for the purchase, with the approval of the Minister, of land to be held and used by the municipality for public purposes, *and may be invested in such securities as a trustee may invest in under The Trustee Act, and the earnings derived from the investment of such moneys shall be paid into such special account, and the auditor in his annual report shall report on the activities and position of the account.* 1952, c. 75, s. 11(2), *part, amended*.

1959, c. 71

26 (5) The Minister may impose *such conditions to the approval of a plan of subdivision as in his opinion are advisable and, in particular but without restricting in any way whatsoever the generality of the foregoing, he may impose as a condition ….*

> (d) *that the owner of the land enter into one or more agreements with the municipality dealing with such matters as the Minister may consider necessary, including the provision of municipal services.*

26 (5a) *Every municipality may enter into agreements imposed as a condition to the approval of a plan of subdivision.*

26 (5b) *Where the owner of the land or the municipality in which the land is situate is not satisfied as to the conditions imposed or to be imposed by the Minister or by the municipality, as the case may be, he or it may, at any time before the plan of subdivision is approved, require the matter to be referred to the Municipal Board by written notice to the secretary of the Board and to the Minister in which case the matter shall be deemed to be referred to the Board under section 29.*

Section 3 of 1959, c. 71 provided as follows:

> Every municipality shall be deemed to have always had authority to enter into agreements imposed as a condition to the approval of a plan of subdivision and all such agreements entered into before this section comes into force are hereby validated and confirmed and declared to be legal, valid and binding.

R.S.O. 1960, c. 296

28 (5) The Minister may impose such conditions to the approval of a plan of subdivision as in his opinion are advisable and, in particular but without restricting in any way whatsoever the generality of the foregoing, he may impose as a condition,

> (a) that land to an amount determined by the Minister but not exceeding 5 per cent of the land included in the plan shall be conveyed to the municipality for public purposes other than highways or, if the land is not in a municipality, shall be dedicated for public purposes other than highways;
>
> (b) that such highways shall be dedicated as the Minister deems necessary;
>
> (c) when the subdivision abuts on an existing highway, that sufficient land, other than land occupied by buildings or structures, shall be dedicated to provide for the widening of the highway to such width as the Minister deems necessary; and

(d) that the owner of the land enter into one or more agreements with the municipality dealing with such matters as the Minister may consider necessary, including the provision of municipal services. 1955, c.61, s.26 (5); 1959, c.71, s. 4(1)

28 (6) Every municipality may enter into agreements imposed as a condition to the approval of a plan of subdivision.

28 (7) Where the owner of the land or the municipality in which the land is situate is not satisfied as to the conditions imposed or to be imposed by the Minister or by the municipality, as the case may be, he or it may, at any time before the plan of subdivision is approved, require the matter to be referred to the Municipal Board by written notice to the secretary of the Board and to the Minister in which case the matter shall be deemed to be referred to the Board under section 34. 1959, c.71, s.4(2).

28 (8) Where the land is in a municipality and an official plan, indicating the amount and location of the land to be ultimately provided for public purposes, is in effect in the municipality, the Minister may authorize, in lieu of the conveyance for public purposes other than highways required under subsection 5, the payment to the municipality of a sum of money not exceeding the value of 5 per cent of the land included in the subdivision.

28 (9) Land conveyed to a municipality under subsection 5 shall be held and used by the municipality for public purposes, but may be sold with the approval of the Minister.

28 (10) All moneys received by the municipality under subsection 8, and all moneys received on the sale of land under subsection 9, shall be paid into a special account and the moneys in such special account shall be expended only for the purchase, with the approval of the Minister, of land to be held and used by the municipality for public purposes, and may be invested in such securities as a trustee may invest in under *The Trustee Act*, and the earnings derived from the investment of such moneys shall be paid into such special account, and the auditor in his annual report shall report on the activities and position of the account.

1974, c. 53

33 (6) *Every municipality and the Minister may enter into agreements imposed as a condition to the approval of a plan of subdivision and any such agreement may be registered against the land to which it applies and the municipality or the Minister, as the case may be, shall be entitled to enforce the provisions thereof against the owner and, subject to the provisions of The Registry Act and the Land Titles Act, any and all subsequent owners of the land*

S.O. 1983, c. 1

50 (5) The Minister may impose such conditions to the approval of a plan of subdivision as in his opinion are *reasonable, having regard to the nature of the development proposed for the subdivision* and, in particular, but without restricting in any way whatsoever the generality of the foregoing, he may impose as a condition,

(a) that land to an amount to be determined by the Minister but not exceeding *in the case of a subdivision proposed for commercial or industrial purposes, 2 per cent and in all other cases 5 per cent of the land included in the plan shall be conveyed to the local municipality for park or other public recreational purposes or, if the land is not in a municipality, shall be dedicated for park or other public recreational purposes;*

(b) that such highways shall be dedicated as the Minister *considers* necessary;

(c) when the subdivision abuts on an existing highway that sufficient land, other than land occupied by buildings or structures, shall be dedicated to provide for the widening of the highway to such width as the Minister considers necessary; and

(d) that the owner of the land enter into one or more agreements with a municipality, *or where the land is not in a municipality, with the Minister*, dealing with such matters as the Minister may consider necessary, including the provision of municipal services.

50 (6) Every municipality and the Minister may enter into agreements imposed as a condition to the approval of a plan of subdivision and any such agreement may be registered against the land to which it applies and the municipality or the Minister, as the case may be, shall be entitled to enforce the provisions thereof against the owner and, subject to the provisions of the *Registry Act* and the *Land Titles Act*, any and all subsequent owners of the land.

1994, c.23

51 (25) The *approval authority* may impose such conditions to the approval of a plan of subdivision as in *the opinion of the approval authority* are reasonable, having regard to the nature of the development proposed for the subdivision, *including a requirement,*

(a) *that land be dedicated or other requirements met for park or other public recreational purposes under section 51.1*;

(b) that such highways be dedicated as the *approval authority* considers necessary;

(c) when the *proposed* subdivision abuts on an existing highway, that sufficient land, other than land occupied by buildings or structures, be dedicated to provide for the widening of the highway to such width as the *approval authority* considers necessary; and

(d) that the owner of the land *proposed to be subdivided* enter into one or more agreements with a municipality, or where the land is *in territory without municipal organization, with any minister of the Crown in right of Ontario or planning board* dealing with such matters as the *approval authority* may consider necessary, including the provision of municipal *or other* services.

51 (26) *A municipality or approval authority, or both*, may enter into agreements imposed as a condition to the approval of a plan of subdivision and *the* agreements may be registered against the land to which it applies and the municipality *or the approval authority*, as the case may be, *is* entitled to enforce the provisions *of it* against the owner and, subject to the *Registry Act* and the *Land Titles Act*, any and all subsequent owners of the land.

51.1 (1) *The approval authority may impose as a condition to the approval of a plan of subdivision* that land in an amount not exceeding, in the case of a subdivision proposed for commercial or industrial purposes, 2 per cent and in all other cases 5 per cent of the land included in the plan shall be conveyed to the local municipality for park or other public recreational purposes or, if the land is not in a municipality, shall be dedicated for park or other public recreational purposes.

51.1 (2) *If the approval authority has imposed a condition under subsection (1) requiring land to be conveyed to the municipality and if the municipality has an official plan that contains specific policies*

relating to the provision of lands for park or other public recreational purposes, the municipality, in the case of a subdivision proposed for residential purposes, may, in lieu of such conveyance, require that land included in the plan be conveyed to the municipality for park or other public recreational purposes at a rate of one hectare for each 300 dwelling units proposed or at such lesser rate as may be determined by the municipality.

51.1 (3) *If the approval authority has imposed a condition under subsection (1) requiring land to be conveyed to the municipality, the municipality may, in lieu of accepting the conveyance, require the payment of money by the owner of the land,*

(a) *to the value of the land otherwise required to be conveyed; or*

(b) *where the municipality would be entitled to require a conveyance under subsection (2), to the value of the land that would otherwise be required to be conveyed.*

51.1 (4) *For the purpose of determining the amount of any payment required under subsection (3), the value of the land shall be determined as of the day before the day of the approval of the draft plan of subdivision.*

51.1 (5) *Subsections 42 (2), (5) and (12) to (16) apply with necessary modifications to a conveyance of land or a payment of money under this section.*