EX44.55.2
Submitted by Adam Brown

1993 CarswellOnt 4878
Ontario Municipal Board

A. Pigeau Construction, Re

1993 CarswellOnt 4878, 30 O.M.B.R. 210

In the Matter of Section 8(7) of the Development Charges Act, (S.O. 1990, c. D.9)

In the Matter of appeals by A. Pigeau Construction, William J. Boivin, Jim Thompson, Jean Paul Belanger, Eliseau Goncalves, Claire St. Jean, Ken and Monique Johnson, Onorato Cirelli, William Ranelli Sr., Markus C. Bertels and Adriana J. Filippone, Christine Mustaler, Gilles Plourde, and John Dragic against By-law 91-150 of the Regional Municipality of Sudbury

Middleton Member, Yao Member

Judgment: October 12, 1993
Docket: S 920101, S 920140, S 920141, S 920148, S 920149, S 920150, S 920151, S 920152, S 920153, S 920154, S 920155, S 920156, S 920157

Counsel: Heather Salter, for Regional Municipality of Sudbury
Joe Zito, for A. Pigeau Construction
Joel Gray, for Jean Paul Belanger

Subject: Public

Table of Authorities

Statutes considered:

Development Charges Act, R.S.O. 1990, c. D.9
Generally — referred to

s. 4(4) — referred to

s. 8 — considered

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s. 8(1) — considered

s. 8(13) — considered

s. 9(1) — considered

s. 13 — referred to

s. 14 — referred to

Income Tax Act, S.C. 1970-71-72, c. 63
s. 165 — referred to

s. 169 — referred to

Planning Act, R.S.O. 1990, c. P.13
s. 34(25) — referred to

s. 34(30) — referred to

Retail Sales Tax Act, R.S.O. 1990, c. R.31
s. 25 — referred to

s. 26 — referred to

s. 27 — referred to

Decision of the Board:

1 These are a series of 13 appeals under Section 8, concerning the *application* of the Sudbury Region's development charges by-law. They are not appeals of the *by-law itself* under section 4(4).

2 The various fact situations are resumed as follows.

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Ken and Monique Johnson

3 The Johnsons seek a refund of $910 from Regional development charges. In their appeal letter they also sought refund of $1090 from City of Sudbury development charges but by the time the hearing took place they now acknowledge that they were obligated to pay City development charges.

4 They knew about the impending Regional charges.

> Our contractor told us.... In September, I had heard on the local channel, I listened and got in the paper.

5 On October 17, 1991, they applied for a permit for a single family dwelling.

> At this time I questioned whether or not there would be sufficient time to have the permit issued prior to the November 4th deadline. No promises were made, however it was indicated to me that as long as all conditions were met, they could not see any reason why the permit could not be issued in time.

To make a long story short, the Johnsons rushed back and forth to various government offices over the next few weeks, getting all the approvals necessary. They kept asking the Buildings Department, "Is this all I have to do to get the permit by November 4th?" Finally, on October 31, 1991, they were told everything was complete except the plan examination. They went with a supervisor to the examiner's desk and found the plans ready to be examined. They were fourth in line at that particular examiner. They left, satisfied that this would be done before November 4.

6 After two telephone calls on Nov. 4 and 27, the Johnsons were informed that the plans were still not examined; they were still fourth in line. Finally Buildings Control examined their plans. They informed the Johnsons that the City development charge had not been paid. The Johnsons paid both the City and Region's development charges under protest on December 31, 1991 and the permit was issued that day.

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Claire St. Jean and William Ranelli

7 Ms St Jean seeks a refund of $3,000 and Mr. Ranelli a refund of $910. Both of these cases are similar fact situations. Ms St Jean applied for a building permit *and* septic system permit on September 24, 1991. The health inspector attended at her lot on October 15, 1991. The certificate of approval is dated November 28, 1991 and septic system use permit March 31, 1992. The permit was issued June 14, 1992. In Mr. Ranelli's case, application was made August 12, 1991 and the health inspector also attended in October. In both cases, Health Unit approval was made prior to November 4, 1991 but the document verifying this was not produced until after that date because of difficulties with the Health Unit computer.

Jean Paul Belanger

8 Mr. Belanger applied for a permit on October 10, 1991. He obtained all approvals except for the local area municipality roads and drainage approval. On the same day he delivered the form to the Region's local office in Chelmsford. They advised him that it was not the right office but the Region's staff said, "Don't worry about it, we'll look after it." On the same day he went to the local municipality, Raeside Balfour, and they apparently gave him the same message, that everything was OK, the Town would get the document from the Region and forward it to the Building Controls Department.

9 This was not done. When Mr. Belanger returned to the Chelmsford office on November 8, 1991, the uncompleted form was still in the official's box. "The guy who was looking after that was gone on vacation."

10 The Region's position is that the general practice for this form is delivery to Raeside Balfour Roads and Drainage Dept., i.e. the local municipality. Nonetheless a close working relationship exists between the two departments. Mr. Fransen said, "If the form is brought to the Region, they would know what to do with it. Generally it would take an extra day to get from the Raeside Balfour office to us." However, inexplicably it did not get to Raeside Balfour. The approval date for the permit was November 28, 1991.

Christine Mustaler

11 Christine Mustaler seeks an exemption of $910. The basis of her appeal is that buildings staff did not tell her to return forms "for any specific time." She stated she is unfamiliar with the process:

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I planned to start in the spring of 92. And my supplier for building materials informed me that the fees were going up. He said as long as you get your application started, then everything will be OK. Then on Oct 17, I applied.... I'm not aware of the system, and they gave me the forms and they said get them back to us whenever, then when I came in May 92, I could get the permit. I am a nurse by trade, I didn't have a contractor, so I said what do I have to do to save myself the extra money? As long as you have the application and I paid $700, don't worry and they said it doesn't matter when, they know I was going to build in early spring, I want to beat that extra fee that is coming in.

Then when I found out I had to pay it was like a slap across the face. I had more days than some of the other guys; if I had known I would have boogied my butt.

Markus C. Bertels and Adriana J. Filippone

12 Mr. Bertels stated:

In spite of timely application and regular follow up, the process is rather complex and I suffered some poor communication. I was past the Nov 4 deadline despite my best efforts. I would like to base my appeal on the fact that there was a heavy work load in the buildings control department.

Mr. Bertels applied on September 30. He had all the approvals except for City development charges on October 28.

To make a long story short, I made a special effort to find out what was required, but I was never aware that there were development charges payable to the city.

13 The City was aware that the charges were not paid; apparently they called a number of times at the number Mr. Bertels left on the permit application. This was a home phone and no-one was there to receive the call (both working outside the home.)

I was down on the 28th, and dropped off the hydro. I said, here's my hydro, and they said everything looks fine, there's some time for processing.'

The Board asked Mr. Bertels if he asked specifically, "Is this everything I have to do to get a permit?" His answer was,

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I can't specifically remember if I asked if there would be anything else.

His basic complaint was that the Buildings Control Department had not organized procedures so that mistakes in communication did not occur.

...in my personal opinion, special plans have to be made so that there is some streamlining. There must be some method so problems are taken care of before the deadline. Buildings had a duty to make sure that all plans were trouble shot. There was a lack of a formal plan or some special procedures weren't made.

Onorato Cirelli

14 Mr. Cirelli seeks a refund of $6,000 on account of two semi-detached houses he built in the spring of 1993. He applied on October 28, 1992. He said he did not ask about development charges nor was he informed about them. When he applied he said, "I asked the guy if I can have the permit as soon as possible." His permit was processed and he was later informed in writing of the requirement for the development charge.

Eliseau Goncalves

15 Mr. Goncalves seeks the largest refund of all the appellants; he seeks a return of $57,000. By an agreement dated July 25, 1990, he obtained site plan approval for 3 buildings along Cambrian Heights Drive on a 1.181 ha parcel of land. The density was controlled by a site specific by-law increasing the lot area per dwelling unit from the normal standard to 384 m2 per unit. He had site plan and zoning approval permission to build 54 units, in three 18-unit buildings.

16 Buildings 1 and 2 were built by permits issued August 14, 1990 and June 21, 1991. Mr. Goncalves has spent $75,000 on blasting for sewer and water connections. The site plan agreement required deposit of $14,500 cash to ensure that all conditions would be met.

17 The development agreement shows only on-site improvements, such as parking lots, landscaping and local connections, which are different from development charges. The permit for the third building has never been applied for. Mr. Goncalves states that he was not aware of the charges; he never heard from associates in the industry nor from the local media.

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Gilles Plourde

18 Gilles Plourde is a small contractor who builds about one or two houses per year. He seeks an exemption from a $3000 charge. On October 28, 1991, he applied for a permit and was given the approval forms and by acting with some energy he was able to obtain all the forms by October 30. Two of the approvals, the Valley East roads approval and Hydro, were in his hands but were not delivered to Building Control until 8:30 am, Monday, November 4, 1991. He was then informed that he was too late and shortly thereafter he received notice by mail that the development charge was payable.

19 The reason for his failure to deliver the approvals is not completely clear. Mr. Plourde states he was aware of the deadline but thought that it applied only to the application. Once it had been filed, he thought he was safe. When he got the approvals, he decided to wait until the next trip to Sudbury to deliver them. However, on the weekend, he talked to a friend who set him straight. This is why he was at the Region on Monday morning.

20 Mr. Plourde says,

> I should have asked more questions. I know the charges was in effect, I didn't know it had to be issued. A permit always takes 14 to 28 days. ...Those people said there is no problem to getting the permit. I applied on the 28th, feeling I had done what I had to, to avoid paying the fee. Some people were called three or four times to bring their papers up to date. ...I should have asked more questions, I assumed too much.

21 He has subsequently researched the matter and found that some applicants got permits in as few as two days.

Jim Thompson

22 Mr. Thompson applied on for a permit in August 1990. His contractor was his brother in law, Kevin Rivers. Buildings told Mr. Thompson that the only outstanding items were Hydro and Sudbury District Health Unit approval and the purchase of a driveway culvert from the City of Sudbury. Unfortunately Mr. Rivers broke his foot and the construction was put on hold.

23 Mr. Thompson's primary intention was to maintain the "live" status of permit without incurring additional processing fees. If he did obtain a permit and was unable to commence

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construction within 6 months, the permit could lapse and he would have to start all over again. The processing fee was about a thousand dollars. Mr. Henry in building control said he could put the file on hold.

24 He reactivated his permit application in September, 1991. He was aware of the fees through the media. Mr. Henry told him the same thing as was told to the Johnsons, that the fees should not be a problem. Mr. Thompson claims that another examiner, Julie Forget, was "confused about the situation", but there appears to be no evidence that she or anyone else told him that the mere fact of having an application on file was sufficient to avoid the development charges.

25 On November 4, 1991, his application lacked roads and drainage, and SDHU approval and could not be issued. The permit was issued on July 9, 1992. The roads approval could not be issued before June 30, 1992, when Mr. Thompson came into the City Roads offices to purchase a culvert.

A. Pigeau Construction

26 Pigeau owns land in Capreol on which it proposes to construct an 8 unit apartment building. It seeks exemption from about $15,000 worth of development charges.

27 All the approvals for the land were in place except the zoning. On October 9, 1991, Regional council passed zoning by-law 91-333 to permit Pigeau's apartment units. The last day for filing notices of appeal was November 1, 1991. Since this coincided with the last day before Pigeau could have sought a building permit, the only way Pigeau could have got a permit was for the plans examiner to have ensured everything was in place except for the expiry of the 20 day appeal period and then approving the permit after business hours on Friday, Nov. 1.

28 However, this scenario does not have to be considered. On October 31, 1991, Pauline Brien-Courtemanche appealed 91-333. Pigeau brought a motion to dismiss the appeal pursuant to section 34(25) of the *Planning Act*. On April 8, 1992, after the motion commenced, Ms. Brien-Courtemanche verbally withdrew her appeal on the strength of discussions outside the Board room with the Region and Pigeau. Pigeau invited us to draw the inference that the appeal was not meritorious and for the purposes of this hearing we accept that proposition. By the operation of section 34(30), the by-law is deemed to come into force on October 9, 1991. Pigeau states that this would have given it ample opportunity to get a permit as the plans had already been reviewed for Building Code purposes and the other approvals were already in place.

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John Dragic

29 This was Mr. Dragic's first venture into the development business. Right away, one senses that this is a story that is going to end badly. Mr. Dragic was attempting to develop three lots, one on Burton Street and two on Kingsway St. The Kingsway properties were purchased from the City of Sudbury and were thought to be once used for waste disposal. There was fear of methane emissions. Mr. Dragic and his engineering consultants, Trow, had protracted negotiations lasting well into the late summer of 1991 as to how he would be able to meet Ministry of Environment and Energy requirements demonstrating there was no danger of emissions. Besides the purchase money, Mr. Dragic had already paid $25,000 towards various hard services improvements which are not included in the capital costs to be covered under By-law 91-150. He was at M.O.E.E.'s mercy.

30 He delayed applying for a permit for the Burton property because he thought that he would get a better price on construction materials if he bought all the materials at once. When tests for non-emissions satisfied M.O.E.E., he applied for the three permits. The application date was November 1, 1991. He did not get any permit before November 4. For the Kingsway property, even the zoning was not yet in place.

The Region's position

31 Prior to 91-150, Sudbury Region had no system of lot levies. By-law 91-150 was passed September 25, 1991 and took effect November 4, 1991. Before its passage there was a public meeting August 12, 1991 for which there was print and electronic media coverage. Subsequent to September 15, there were notices in the three local newspapers.

32 Council considered 10 of the appeals on January 29, 1992. It had advice from its solicitor that its jurisdiction was solely to deal with "errors in the application of the By-law", and that in the opinion of staff none of these cases involved an error. The appeals were to be forwarded to the Board and staff were to assist applicants in the filing of appeals. The A. Pigeau matter was added to the list on May 21, 1992 and after calling for and considering an additional report, and forming an ad hoc committee regarding development charges appeals, Council denied all freshly added appeals and confirmed its earlier denials.

33 The appeals really involve the process of issuing building permits as the policy of the act is to use this as the mechanism for ensuring payment of the charge. Sudbury Region is a two tiered system of government. The region is responsible for certain regional functions such as

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sewage treatment, regional roads etc. In addition it performs all land use planning and is responsible for issuing building permits.

34 In Sudbury Region, the Chief Building Official has a staff of about 20. The Director of Engineering Controls is Bernie Fransen, who gave all the Region's version of the events described above. His department does not directly issue permits but shares activities with the Building Control. He noted that By-law 91-150 had a dramatic effect on the operation of the plans examination department. It issued 152 residential permits in October 1991, compared to 64 the previous and following years. He said that any one time the Region has about 3,500 to 5,000 open permit files.

35 The basic system for obtaining a permit is for the applicant to submit plans and at the same time obtain a series of approval forms - sewer and water, roads (local and regional), drainage, hydro, local development charges and possibly health unit approval. Depending on what was required, the applicant was responsible for obtaining these approvals from the various governments and departments and returning them physically to Buildings Control. Alternatively Buildings Control would do this itself but this was a slower process than for the applicant to walk his or her application through the system. About 85% of applicants chose to get the approvals themselves.

36 With the development charge deadline, the Buildings Control Department was faced with a novel situation. In Mr. Fransen's words:

> We tried desperately to process all of those permits that were complete, prior to the implementation date of development charges. We did that by working overtime; we spent some time purging our files, making sure that all of the information was in for the permits, and going through the files and for all the complete ones making sure that the permits could be issued. Where all the files were complete, the permits were issued on time. In some of the other cases, the persons were contacted and told that we were fast nearing the development charges stage and advising on the approvals that were required. People were instructed to get the approvals before the deadline if they wanted to avoid development charges.

Legislation

37 For ease of reference the following legislation is applicable:

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> 8(1) An owner may complain in writing to the council of a municipality in respect of the development charge imposed by the municipality on the owner's development that,
>
> (a) the amount of the development charge imposed was incorrect or was based on incorrect data;
>
> (b) the amount credited to the owner under section 13 is incorrect;
>
> (c) the amount of a previous development charge being credited under section 14 is incorrect; or
>
> (d) there was an error in the application of the development charge by-law.

After the hearing by council the complainant may appeal the decision of council to the Board, and in section 8(13):

> 8(13) The Municipal Board may make any decision that could have been made by the council of the municipality.

The operative date is when the building permit is issued:

> 9(1) A development charge is payable on the date a building permit is issued in relation to a building or structure on land to which a development charge applies.

Result

38 Sudbury Region takes the position that to be successful, an appellant must bring himself or herself under 8(1). We agree. None of the appellants is seeking a *credit* under sections 13 or 14 nor is alleging the charge is the incorrect amount or based on *incorrect data*. Therefore the appellant must prove an "error in the application of the development charge by-law."

39 The By-law 91-150 states that a charge is payable for various categories of uses of land, calculated on the date a permit is issued. The by-law came into force on November 4, 1991. The collection of the charge is piggy-backed onto the process of the issuing of a building permit. Strictly speaking, the majority of appellants allege an error in the latter process, not the application of the development charges by-law. In any case, Sudbury says "There was no *error*; there may have been a misunderstanding, but in all cases the process functioned as it should

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have and the result was that perhaps the permit was issued *after* the date hoped for by the applicant."

40 If Sudbury's position was taken literally, there would be very few successful appeals. An appealable error might be the case of a typist mistyping the date a permit was issued (an error all too possible with Sudbury's system of numeric dating). The typed date would be after Nov 4, whereas the permit was actually issued before Nov 4. Perhaps we have too much confidence in the bona fides of Ontario municipal councils and officials, but we cannot conceive of a municipal official insisting on a charge in such a case. Nor would anyone need such an elaborate system of appeals to Council and the Board to correct such obvious errors.

41 When we compare other taxing statutes, such as the *Income Tax Act*[1] , and the *Retail Sales Act*[2] , we do not see the words "complaint" and "error", but rather the words "appeal" and "notice of objection". The wording of section 8 suggests that the range of issues which could be addressed by complainants is intended to be comprehensive, and Council and the Board are to deal with them in a common-sense, practical and expeditious manner. Although Sudbury's position has the attractiveness of being certain in its application, we think that the intent of the legislature was broader, to cover the whole range of problems that could crop up.

42 Yet there must be some limit; not all failures to get a permit by a certain date could be said to result from "error in the application of the development charges by-law." The first principle is that the ultimate responsibility must be with the applicants themselves since they are the only ones with knowledge of their intentions.

1 Aplicants must have acted in such a way that they have taken all possible steps that were within their power in a timely fashion.

43 Thus we do not see that the Act has created any responsibility on municipal officials to actively inform applicants of the impending deadline. This may be wise, helpful, charitable, and the hallmark of service to the public, but failure to do is not a ground for a refund under section 8. Thus we deny the appeals of Christine Mustaler, Onorato Cirelli, Eliseau Goncalves, Gilles Plourde and Jim Thompson. Their basic complaint is that they did not know that the charge comes into effect if the permit is not issued on Nov 1 and the Region ought to have informed them. We must deny the appeal of John Dragic because his Kingsway properties were not properly zoned at the time of application and for the Burton property, he could not reasonably expect to get a permit issued in one day. We must also deny the appeal of Markus C. Bertels, because he did not ask the basic question of "what must I do to get the permit issued before November 4?"

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44 The second principle, if the words of section 8 are to have any meaning, is

2. There must be an error on the part of the municipal official.

45 By "municipal official", we include Health Unit officials and similar organizations. Application of principles 1 and 2 means that the error cannot be corrected by the appellant alone. In the case of Jean Paul Belanger, he placed a approval document to be signed by a local municipal official in the hands of Regional staff and was assured it would have been forwarded correctly. Inexplicably, and apparently knowing the significance of the Nov 4 date, he did not follow up in a timely way at either end. The ultimate responsibility for getting a permit *before Nov 4* was his, and the "error" of the Region could have been corrected by Mr. Belanger with reasonable diligence. Therefore we deny his appeal as well.

46 In the case of A. Pigeau, there is no error on the part of anybody, unless we interpret the withdrawal of the appeal by Ms. Brien-Courtemanche as an error. She is obviously not a municipal official.

47 Counsel for Pigeau referred to *Hirmann v. Nixon, C.B.O for Toronto*[3] , a case where the applicant sought a building permit for a use permitted under a by-law passed by Council but appealed to the Board. Despite the passage of 5 years since the appeal were launched, the Board had not heard the appeals[4] . The Court there said that it was unreasonable for the Chief Building Official to apply the most restrictive zoning provision when an appeal had been pending for that length of time and no resolution was imminent. We do not see that case as having any application here, where the Pigeau plan examiner was called upon to give zoning approval between Oct 9 and Nov 1, precisely when the relevant By-law 91-333 was under appeal. Thus while, A. Pigeau Construction can meet principle 1, it cannot meet principle 2 and although we have every sympathy for it, we must deny its appeal.

48 This leaves the Johnsons, St. Jean and Ranelli appeals. These meet both principles. There is error by the municipal official, the plan examiner in the Johnsons' case, and the health unit officials in the other two cases. The error was not correctable by the applicants for a permit. They did everything they could. Their appeals will be allowed.

William J. Boivin

49 Mr. Boivin applied for a permit August 13, 1991. This matter is not a question of meeting the Nov. 4, 1991 deadline but rather an interpretation of 1.30 of By-law 91-150. This states:

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> Sewer and water service area means ...
>
> properties that are connected to the municipal sanitary sewer and water services,
>
> properties that abut on streets, easements, or rights of way upon which municipal sanitary sewer and water have been placed or are placed from time to time,
>
> properties that are located within 500 feet (152.5m) of municipal sanitary sewer and water services as they may exist from time to time, ...

50 Mr. Boivin has 26.4 acres of land, which are located in the Township of Hanmer. There is a frontage of 1800 feet on Notre Dame Avenue and 630 feet on Gravel Drive. The parcel is within 500 feet of water services, the nearest point being at the intersection of Linden Drive and Notre Dame. It is also within 500 feet of sewer services, the nearest outlets being in a subdivision abutting the Boivin parcel, on Jules Street. However Mr. Boivin did not wish to locate his residence near the subdivision. It is at the other end of his parcel; about 640 feet (as the crow flies) from water and about 1800 feet from sewer services.

51 On a simple reading of the by-law it would appear that the Boivin lands, some 26 acres, are located within 500 feet of the municipal sewer service and water services as they exist. However, if the house as developed by the Boivins was on a severed lot, the development charges would not apply because the property is located in excess of the 500 feet as set out in the by-law. Obviously, these distances are provided in the by-law in order to allow some development on lands on severed lots and not on full municipal services and, therefore, when a lot is developed beyond the prescribed distances, the development charges do not apply.

52 If the Board looks at the purposes of development charges, it is to provide a pool of funds which allows the capital expenditures required by development to be borne by those people who will benefit from the services and not to impose the capital costs for developments on the whole of the municipality. The method by which the municipality has determined to collect these fees is that they are payable when a building permit is obtained. It is the building permit which triggers the collection of the taxes or charge. In most circumstances, this provides for an equitable collection of the development charge on the property.

53 With respect, however, to the Boivins, it seems to fly in the face of equity and natural justice, that the charges that are being imposed because of the obtaining of the building permit will not now or in the foreseeable future be available to the house for which the permit is obtained. It is because this is a single development away from the existing development that this circumstance arises. The reasons for the choice of this location are not the concern of the Board

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but one would assume was the location chosen by the Boivins to offer privacy and a more rural setting.

54 In the opinion of the Board, when the natural extension of development on to the Boivin lands occurs, it is at that point in time that it would be appropriate to commence the imposition of the development charges on the subject lands. If a process could be administered it would, in the opinion of the Board, be appropriate to defer the payment of the development charges by the Boivins until the services for which they are collected are directly available to the Boivin house.

55 In the opinion of the Board, it would be appropriate for the Boivins to pay the basic development charge now and enter into an agreement with the municipality to pay for the excess development charges at the time at which either water or sewer services are installed within 500 feet of the subject house. Thus the Boivins must pay $910 and agree to pay those charges as set out in Schedule "C" of By-law 91-150. The agreement should be registered on title. If there are difficulties with the registration of such agreement, the Board may be spoken to.

Footnotes

1 Sections 165, and 169, *Income Tax Act*, S.C. 1970-71-72, c. 63, as amended

2 the *Retail Sales Act*, R.S.O. 1990, c. R.31, s. 25, 26, and 27

3 13 O.R. (3rd) 54

4 In defence of the Board, it should be said that By-laws 527-88 and 528-88 are awaiting referral of umbrella Official Plan Amendments. They are not being delayed at the caprice of the Board.

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