

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)**

IN THE MATTER OF the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1

BETWEEN:

THE TORONTO DISTRICT SCHOOL BOARD

Applicant

-and-

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

Respondent

APPLICATION UNDER section 2 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1

**REPLY AFFIDAVIT OF
CYNTHIA CLARKE
(SWORN SEPTEMBER 21, 2018)**

I, Cynthia Clarke, of the City of Burlington, in the Regional Municipality of Halton, in the Province of Ontario, MAKE OATH AND SAY as follows:

Growth-Related Land Needs of the TDSB

1. At paragraphs 58 and 59 of his Affidavit, Mr. Bloye provides evidence of excess capacity within the TDSB at a Board-wide level.

2. All excess capacity within the TDSB was fully considered and accounted for in reaching my conclusion that the TDSB has growth-related land needs - it is already “built-in” to the calculations. So, nothing stated in paragraphs 58 or 59, or elsewhere in the Bloye Affidavit, alters my conclusion that the TDSB would qualify for growth-related land needs in the order of 60 acres to address future enrolment growth within the City of Toronto at the elementary school level. Growth-related school site needs in the City of Toronto are not based on Greenfields development, but rather intensification and redevelopment and, in any EDC by-law, the TDSB would still have to go through the process of aligning the EDC entitlement with its long-term accommodation strategies – which could ultimately decrease the number of acres where, for example, growth related needs are addressed through an expansion rather than a new school. The secondary entitlement has yet to be assessed.
3. Much of Mr. Bloye’s evidence is retrospective – the history of education development charges in the context of the provincial capital funding model (i.e. as it has evolved over time) and how school boards have, or have not, dealt with excess classroom capacity over time, which he correlates to the EDC process.
4. However, EDCs are prospective, not retrospective.
5. Over the next 15 years, more than 214,000 new dwelling units and more than 71 million square feet of non-residential gross floor area are expected to be constructed in the City

of Toronto. The majority of the new dwelling unit construction, or more than 63%, will occur along the Yonge Street corridor from Lake Ontario to Steeles Ave, as well as the Waterfront Secondary Plan. The co-terminous Toronto school boards do not have a local school presence in these development areas offering sufficient surplus classroom capacity to accommodate students generated by the construction of 136,000 additional high-rise dwellings.

6. The City of Toronto has issued reports such as Growing Up Vertical highlighting the lack of schools and community amenities for children living in high-rise developments in key areas of the City. The density value of land along the Yonge St. corridor and Waterfront precinct plans suggests school site values ranging from \$21 to \$88 million per acre (i.e. based on 2018 appraisal reports), as documented in the TCDSB EDC Background Study Report dated April 17, 2018, a copy of which is attached hereto and marked as Exhibit "A".

7. As such, long term student accommodation in the City of Toronto requires significant, stable funding together with innovative solutions and complex development partnerships involving, for example, strata schools, shared parkland, underground parking, community spaces, etc. in order to provide equitable educational opportunities to all students across the City.

Closing Schools

8. Paragraph 27 of the Bloye Affidavit states that “in the Ministry’s view, the EDC eligibility criteria of enrolment greater than capacity encourages boards to ensure their assets are managed as efficiently as possible. School boards in Ontario need to have the ability to acquire new sites to allow for the construction of new schools to address accommodation pressures which exist within certain neighbourhoods. However, boards also need to address other neighbourhoods which are facing declining enrolment and thus have schools which are underutilized. The current eligibility criteria balance these two goals.”

9. When the EDC eligibility criteria was added to the regulation in 1998, there was no evidence of declining enrolment in EDC jurisdictions. Each of the EDC boards continues to experience enrolment growth on a sub-area basis - generating the need to acquire additional growth-related land for school sites. Enrolment trends have, and will continue to shift over time, reflecting the strength of the school-age cohorts moving through and changes in apportionment shares between co-terminous boards. Absent section 10 (2)(iii), using Board-wide capacity and enrolment as a “growth-related test” would have the effect of disqualifying many boards from by-law adoption; leaving them unable to fully recover the net education land costs.

10. In any event, in my view, for the reasons stated below, the existing Board-wide EDC eligibility criteria found in the Regulations does not balance the two stated goals of meeting growth-related needs while eliminating surplus capacity within the Board’s

jurisdiction and, as already stated in my original affidavit, has no rational connection to the EDC scheme of ensuring that growth pays for growth.

11. The process for dealing with excess capacity is entirely distinct from the process to assess and determine growth-related school site needs at a sub-area level within a board's jurisdiction. These two factors: growth and available space, only intersect at the sub-area, not the board-wide level, and only as one of numerous student accommodation considerations in evaluating growth-related needs. While it is incumbent upon a school board in identifying future growth-related student accommodation needs, to take into consideration any surplus space that is in good condition and in reasonable proximity to new housing development that is expected to generate enrolment growth (per: section 7(3) of O. Reg. 20/98), is only one factor.
12. It is also incumbent upon a school board to consider a whole host of additional factors including transportation distances and costs, facility operating costs, program delivery and specialized program needs, boundary changes, grade configurations, board presence, school staffing and administration costs, the renewal needs of nearby schools, community partnerships, child care, etc. as part of supporting the decision to include additional land acquisition and servicing costs in an EDC by-law.
13. The surplus secondary spaces noted in paragraph 59 of the Bloye Affidavit, namely George Harvey CI and Burnhamthorpe CI, are not geographically situated to serve the location of the significant future development along the Yonge St./Waterfront corridor. School board attendance boundaries and board transportation policies necessarily have

regard for distance, student safety, impediments to walking to school (e.g. railway lines, rivers, highways, major arterial roads, etc.), available public transportation, etc. School boards avoid cutting up neighbourhoods as much as possible. This is wholly consistent with those provisions in the EDC Regulation that enables school boards to ignore surplus and available capacity in considering reasonable school attendance boundaries as part of determining growth-related site needs.

14. Enrolment in excess of capacity outcomes are more reflective of provincial changes to program delivery and enrolment cycles than to historical school closure decisions. Only one school board qualified to adopt an EDC by-law due to short window of opportunity resulting from a combination of school closures and pending construction that, during the short window, had not yet translated into increased capacity: the Hamilton-Wentworth DSB in 2013.

15. But for the operation of section 10(2)(iii), only 1 EDC-eligible school board would qualify for EDCs as at 2014 on the basis of elementary enrolment in excess of capacity - as the elementary enrolment in excess of capacity of 25 of the 27 EDC-eligible boards declined from 81,511 spaces in 1999 to '774' spaces in 2014/15; and only 5 school boards would have qualified on the basis of secondary enrolment in excess of capacity - all but 1 being a Catholic school board, as I have set out in the table attached hereto and marked as Exhibit "B", which I have prepared from publicly available background studies.

16. The Province has supported the retention of local schools with excess capacity. Over the course of the last thirty years of the education development charges regime, the Province has emplaced: capital moratoriums; school consolidation moratoriums; a whole host of financial grants that were disincentives to closing surplus classroom spaces (e.g. top-up, declining enrolment grants, rural and supported schools funds, etc.) as well as numerous policy decisions made by the Province that had the effect of increasing the utilization of all schools (e.g. Full-day Kindergarten, Primary Class Caps, the provision of child care in schools, Community Hubs and Community partnerships in schools, etc.).
17. There is a historical practice of providing local schools and a lack of public support for closing schools which, when coupled with the fact that longer-term neighbourhood student accommodation needs may change dramatically over time, all militate against shedding surplus capacity as part of any funding approval process. Boards need to be able to consider and plan for how neighbourhoods will grow and change over the ensuing decades given an aging population and the level of immigration experienced in the City of Toronto, all of which will drive neighbourhood re-gentrification, intensification and redevelopment.
18. The Ministry has recognized the value of preserving surplus classroom spaces in the City of Toronto to deal with demographic shifts; housing intensification, neighbourhood re-gentrification and increasing immigration requirements. For example, Ministry staff supported TDSB's "core holdings" practice as a means of addressing future enrolment

growth within the Board's jurisdiction (e.g. retaining the Bannockburn PS property declared surplus in 2002, rather than disposing of the property at fair market value).

History of Education Development Charges (EDCs)

19. In 1992, I was retained to undertake a joint Education Development Charges study on behalf of the Metropolitan Separate School Board (MSSB) and the Metropolitan Toronto School Board (MTSB).
20. Part III of the *Development Charges Act, 1989* specifically granted authority for the MSSB and the MTSB to adopt EDC by-laws to recover the non-grant portion of capital projects. Section 30 of the *Act* specified that the only eligibility criteria precedent to adopting an EDC by-law was that there was "residential development in the area of jurisdiction of a board that would increase education capital costs ..." The same eligibility criteria is currently found in section 257.54 of the *Education Act*, although it restricts 'capital costs' to 'education land costs'.
21. In November 1991, the York Boards adopted the first jurisdiction-wide EDC by-laws (based on 1 Review Area for the entire jurisdiction) and in 1992 several builder/developer companies appealed the York EDC by-laws. Several school boards who had initiated EDC studies post 1991, including MTSB and MSSB placed the adoption and implementation processes on hold pending the outcome of the court challenge.

22. In August 1996, the Supreme Court of Canada heard the case and held that EDCs were constitutional. In the interim, I completed the preliminary EDC analysis, met with Ministry staff and presented a summary to a joint meeting of the MTSB/MSSB Board of Trustees, showing eligibility of the MTSB to collect EDCs. The original EDC legislation afforded the TDSB the opportunity to adopt an EDC by-law(s).

23. Following the decision of the Supreme Court of Canada, the development community, having a long history of opposing municipal and school board development charges as a hidden tax that would have a significant “impact on Ontario’s competitiveness” (in their view), and having been unsuccessful in having EDCs declared unconstitutional, supported the introduction of the Bill 130 in 1997 and its intention to make several changes to the EDC provisions (see Exhibit 5 of the Bloye Application), many of which were incorporated into the 1998 changes. Sections 10(2)(i) and (ii) of O. Reg 20/ 98 were introduced as a result.

24. The Bloye Affidavit seems to suggest that there was no push back on section 10(2) of O. Reg. 20/98 but, that was not the case. Many stakeholders expressed concern over the years. For example, in 2008, Peter D. Lauwers (now a Justice of the Court of Appeal for Ontario), acting as EDC legal advisor to several school boards (where I was also involved as an advisor) proposed to the Ministry that a section 10(2)(iv) be added stating:

“The board demonstrate that there are growth-related net education land costs in the area to which the proposed education development charge by-law

would apply, that the need for a new school or addition has been identified in the board's long term capital plan, and that the planned school or addition is projected to experience an average utilization over the 10-year period beginning in the second full year of operation of the new school or addition that is satisfactory to the Minister."

25. The Ministry did not make the requested change. The proposed change to the Regulation is attached as Exhibit "C".

General Tax Revenue to fund Growth-related Land Needs

26. Paragraphs 50 through 52 of the Bloye Affidavit states that the Ministry had provided funding through the Land Priorities Program for the last 7 years and that all boards have a source of funding available for site acquisitions and preparation. For most of the 30-year history of EDCs however, school boards have been expected to use EDCs to fund growth-related land needs if they qualified to adopt a by-law. The annual Technical Paper was clear in this regard.
27. Paragraph 51 goes on to state that \$259 million, or \$37 million per annum has been made available under this more recent land funding source and that an additional \$100 million was made available in 2018/19 to support site acquisition and preparation costs for projects that are not eligible for EDCs for all 72 school boards.
28. The minimum TCDSB site acquisition/preparation cost for a single elementary school site is \$21 million. The Province would need to increase the annual Land Priorities budget by more than \$383 million per annum (i.e. this figure is understated in that it is

based on 2014 appraised values), along with land escalation factors which are substantive in the City of Toronto, in order to fund growth-related site acquisition and preparation needs province- wide.

29. The dollar value of capital priority funding requests forwarded to the Ministry for approval each year (i.e. typically the top eight capital priority projects) far outweighs the level of funding made available annually.
30. The capital funding priorities established at the school board staff level are based on a detailed review of short and long-term student accommodation and program needs. While little is known about the analytical process applied by the Capital Programs Branch in assessing/approving capital projects, a capital priority submitted last on a board's priority list may be funded as the most immediate capital priority.
31. In Paragraph 45, Mr. Bloye states that "funding is allocated after an in-depth review of all capital priorities submitted by all school boards based on the degree of urgency, alignment with Ministry priorities, and the overall availability of Capital Priorities funding", confirming that the Ministry controls the allocation of funds to individual school boards based on the Ministry's funding and policy priorities. Similarly, paragraph 44 states that the "priority rankings assist the Ministry in determining which projects to fund but are not themselves determinative."
32. Exhibit 10 Page 93 (first bullet) of the Bloye Affidavit confirms that the policy intention was to link the requirement for land for new schools to growth schools funding. Bullet 3 also confirms the Ministry's intention that school boards prepare and submit a long-term

plan to the Ministry every three (3) years, outlining the need for growth-related schools, where warranted.

33. The Bloye Affidavit confirms that the Ministry takes a sub-area approach to approval of capital priorities – including projects to address growth related, or enrolment pressures, needs. There is no rational basis why for some boards these funds come from general taxpayer revenue while for other boards “growth pays for growth” as contemplated under the EDC framework.
34. As stated in paragraph 8 of the Bloye Affidavit, the underlying policy thrust of municipal and education development charges formalized in legislation in 1989, is that ‘growth must pay for growth’. That is, the cost of infrastructure required to service new residential and non-residential development should be at least partially paid for by new development rather than from the general tax base (e.g. libraries, parkland, recreational and community facilities, police, fire, roads, water, sewer, land for schools, etc.).
35. The Toronto District School Board needs to address accommodation pressures which exist in certain neighbourhoods - as already confirmed by the Ministry in granting the capital allocation approvals for the Davisville area (site preparation costs); the Canadian Tire site redevelopment on Sheppard Avenue; and consideration of the need for a new public school at 1 Yonge Street, etc.

Catholic Funding

36. Paragraph 73 of the Bloye Affidavit notes that TCDSB has been eligible since 1998 to pass EDC by-laws. Actually, TCDSB has been eligible to adopt an EDC by-law since 1989.

37. It should be noted that 14 of the 25 EDC-eligible school boards outlined in Exhibit “B”- are Catholic school boards, 10 of whom continually qualified only on the basis of enrolment in excess of secondary capacity until 2009/10, primarily due to the fact that the facility capacity in school buildings transferred to Catholic boards as part of the extension of secondary funding to Catholic boards was less than enrolment growth precipitated by the extension of full funding in 1984. This, again, demonstrates that there is no relationship between Board-wide enrolment in excess of capacity and growth-related accommodation needs on a sub-area basis and further demonstrates how the board-wide enrolment in excess of capacity threshold operates unfairly as between catholic boards and the public boards.

38. To date, this legislation has funded more than \$1.5 billion in site acquisition and site preparation expenditures. The Toronto Catholic DSB has funded just over \$203 million from the imposition of education development charges since 2001 and expects to fund more than \$2.0 billion in additional growth-related education land costs over the mid-2018 to mid-2033 period. Proposed construction of new secondary schools however, could place the TCDSB in a position of having to maintain a deficit in their EDC

account in order to continue to qualify for successor EDC by-laws and not create a funding shortfall. Several EDC boards in high-growth areas are in danger of losing enrolment in excess of capacity as an EDC by-law eligibility trigger.

39. The TDSB has similar sub-area growth-related land needs as the TCDSB over the next 15-years and beyond and yet the TDSB is excluded from meeting those needs through EDCs by operation of section 10(2)(i) and (ii) of O. Reg 20/98.

Conclusions

40. Section 10(2)(i) and (ii) of O. Reg. 20/98 prohibit school boards like the Toronto District School Board from accessing EDCs as a growth-related funding source and forces many existing EDC-eligible school boards to accelerate land acquisition where possible to create a deficit for renewal purposes; carefully time changes to capacity in SFIS (e.g. pass a by-law before completion of newly constructed space); or create 5-year, rather than 15-year, EDC rates designed to generate an account shortfall in Years 6 and 11 of the 15-year forecast period, so that the board can qualify for successor by-laws based on 10(2)(iii) account deficit.

41. It is my opinion that board-wide enrolment in excess of capacity has no relevance to the determination of growth-related needs underlying an education development charges by-law given that long-term accommodation strategies and Ministry Capital priority approvals demonstrate growth-related accommodation needs on a sub-area basis.

SWORN BEFORE ME at the City)
of Toronto, in the Province of Ontario, this)
21st day of September, 2018)
_____)
A Commissioner for taking Affidavits, etc.)
Patrick J. Cotter)

Cynthia Clarke
Cynthia Clarke

THE TORONTO DISTRICT SCHOOL BOARD

-and-

**HER MAJESTY THE QUEEN IN RIGHT
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Respondent

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Proceeding commenced in Toronto

AFFIDAVIT

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