

Authority: Item 6, General Issues Committee
Report 22-005 (LS22012)
CM: February 23, 2022
Ward: City Wide
Bill No. 035

CITY OF HAMILTON

BY-LAW NO. 22-035

**To Amend By-law No. 21-021, A By-law to Govern the Proceedings of Council
and Committees of Council**

WHEREAS Council is, pursuant to the *Development Charges Act, 1997*, S.O. 1997, c. 27 and the *Education Act*, responsible for holding hearings of complaints made in respect of the payment of Development Charge and Education Development Charge payable pursuant to the respective Acts;

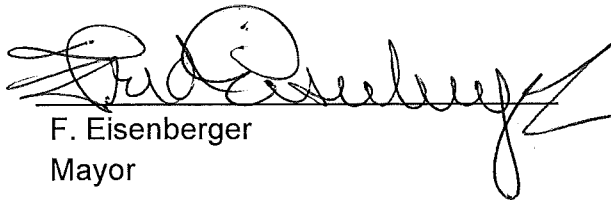
WHEREAS Council delegated its authority to hold Development Charge complaint hearings to the Audit, Finance & Administration Committee on October 23, 2019; and

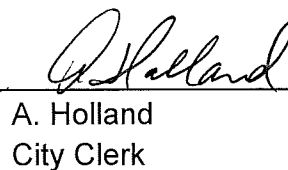
WHEREAS Council is now required to delegate its authority to hold Education Development Charge ("EDC") complaint hearings to Audit, Finance & Administration Committee.

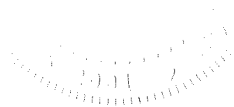
NOW THEREFORE the Council of the City of Hamilton enacts as follows:

1. The amendments in this By-law include any necessary indexing, grammatical, numbering and lettering changes.
2. That Appendix J of By-law No. 21-021, be deleted in its entirety and replaced with Schedule 1, attached to this by-law.
3. This By-law come into force on the day it is passed.

PASSED this 23rd day of February, 2022.


F. Eisenberger
Mayor


A. Holland
City Clerk



**HEARING PROCEDURES FOR
SECTION 20 DEVELOPMENT CHARGES ACT, 1997 COMPLAINTS
AND
SECTION 257.85 EDUCATION ACT COMPLAINTS**

COMMITTEE COMPOSITION

The Audit, Finance & Administration Committee ("Committee") has delegated authority to hold hearings for Section 20 Development Charge Act complaints and Section 257.85 Education Act complaints. The Committee shall be comprised of a minimum of 7 members of Council, plus the Mayor as ex-officio.

**DEVELOPMENT CHARGES ACT, 1997 SECTION 20 COMPLAINT AND
EDUCATION ACT SECTION 257.85 COMPLAINT**

Pursuant to the *Development Charges Act, 1997*, a person is required to pay a development charge, or the person's agent may submit a formal complaint to Council respecting one of three issues:

- (a) the amount of the development charge was incorrectly determined;
- (b) whether a credit is available to be used against the development charge, or the amount of the credit or the service with respect to which the credit was given, was incorrectly determined; or
- (c) there was an error in the application of the development charge by-law.

Pursuant to the *Education Act*, an owner, the owner's agent or a school board may submit a formal complaint to Council respecting one of three issues:

- (a) the amount of the education development charge was incorrectly determined;
- (b) a credit is or is not available to be used against the education development charge, or that the amount of a credit was incorrectly determined; or
- (c) there was an error in the application of the education development charge by-law.

Pursuant to the *Development Charges Act, 1997* and the *Education Act*, the respective complaints must be submitted within 90 days of the charge being payable and must be in accordance with the grounds permitted under the applicable Act.

The formal complaint must be in writing, stating the complainant's name, address where notice can be given, and the reason for the complaint.

**DEVELOPMENT CHARGE OR EDUCATION DEVELOPMENT CHARGE
COMPLAINT HEARING**

Both the *Development Charges Act, 1997* and the *Education Act* require that a hearing of the complaint must be held within 60 days of receiving the complaint. A Hearing Notice will be mailed to the complainant at least 14 days before the hearing.

The Complaint Hearing is governed by the procedures set out in the Council Procedure By-law and the *Statutory Powers Procedure Act* ("SPPA").

The Committee, in conducting the hearing of a Development Charge Complaint or Education Development Charge Complaint, is required to only consider the grounds permitted under subsection 20(1) of the *Development Charges Act* and subsection 257.85(1) of the *Education Act*.

The grounds set out in the *Development Charges Act, 1997* and *Education Act* are very specific and quite focused. They do not include a request to be exempt from a Development Charge or Education Development Charge respectively, otherwise applicable pursuant to a Development Charge By-law or Education Development Charge By-law, nor do they include a request to create a new category of development not found in a Development Charge By-law or Education Development Charge By-law. Neither a Development Charge Complaint or Education Development Charge Complaint can be used to: amend the Development Charge By-law or Education Development Charge By-law respectively, to alter the Development Charge rate or Education Development Charge rate otherwise validly applicable or to add a credit or exemption not already within the Development Charge By-law or Education Development Charge By-law.

1. Party Representatives

There are two parties to the hearing of a Development Charge Complaint, the City and the Complainant. The City's Finance Division is responsible for administering the Development Charge By-law and a solicitor from the Legal Division will represent the City at the hearing. The Complainant may represent themselves or have legal representation as well. There are two parties to the hearing of an Education Development Charge Complaint; the Owner and the applicable school board. The City is not a party to the hearing and will not be represented at the hearing as a party.

In addition, the Committee will have an external solicitor to provide legal advice to the Committee during either a Development Charge Complaint Hearing or Education Development Charge Complaint Hearing and deliberations. This practice is permissible provided that the solicitor does not take part in making findings of fact or in making the ultimate decision on the matter.

2. Live Stream & Electronic Voting

Neither Development Charge Complaint Hearings or Education Development Charge Complaint Hearing are live-streamed when meeting IN-PERSON, unless specifically requested by someone in attendance and then agreed upon by both parties.

Electronic votes are not taken during a Development Charge Complaint Hearing or Education Development Charge Complaint Hearing.

Subject to Section 4 of this Appendix J, the Development Charge Complaint Hearing or Education Development Charge Complaint Hearing is live-streamed when meeting VIRTUALLY, in order to have all proceedings open to the public and the parties.

3. Interests

(1) In this Section:

(a) An "Interest" means a 'disqualifying interest' or a 'non-disqualifying interest' as such terms are defined within the Council approved Code of Conduct to which the member is bound.

(2) Where a member has disclosed an Interest at a meeting in accordance with a Council approved Code of Conduct to which the member is bound, the member, shall file a written statement with the Clerk.

(3) Where a member, has disclosed an Interest and filed a written statement with the Clerk, as required by subsection 3.15(2), the Clerk, shall:

(a) file the written statement by the member in the Declarations of Interest Registry;

(b) record the Interest in the minutes of the meeting;

(c) file a record of the Interest recorded in the minutes of the meeting in the Declarations of Interest Registry; and

(d) make the Declarations of Interest Registry available for public inspection.

4. Open and Closed Proceedings / Deliberations

All proceedings are to be open to the public and the parties unless one of the exceptions under the SPPA or the *Municipal Act, 2001* applies. Section 9(1) of the SPPA provides that a hearing may be closed to the public if:

(a) a matter involving public security may be disclosed; or

(b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.

If the Committee believes that such matters could be disclosed, it should ask each of the parties if this is the case. If the Committee is convinced that the harm outweighs the desirability of the hearing being open to the public, the hearing may be closed to the public.

When a hearing is closed to the public under the SPPA, only the parties and their representatives remain in attendance.

The Committee may also rely on the authority under section 239 of the *Municipal Act, 2001* in closing proceedings to the public or the public and the parties - for example, if it wishes to receive advice subject to solicitor client privilege.

The Committee may, but is not required to, retire to deliberate in the absence of the public and the parties. Deliberations occur when the Committee considers the evidence and submissions in arriving at a decision. The decision itself is announced in the presence of the public and the parties. The authority for retiring to deliberate is found at common law and is referred to as the “confidentiality principle” or the “rule on deliberative secrecy”.

5. Adjournments

Adjournments may be requested by either party at the start of or during a hearing. The Committee may grant or refuse an adjournment request in light of a number of considerations including: the legitimate inability of the complainant or a witness to attend or, within reason, the counsel of their choice; or, the necessity for time to prepare before a hearing or to respond to new and unexpected issues or allegations arising in the course of a hearing.

6. Agreed Upon Statements of Fact and Joint Submissions

The parties may submit an agreed upon statement of facts which means that they will inform the Committee that some or all of the facts relevant to the hearing are not in dispute. Agreed upon facts need not be proven and should be accepted by the Committee.

The parties may go beyond an agreed upon statement of facts to make a joint submission, asking for a final decision that is acceptable to both. The Committee must give serious consideration to a joint submission and must not reject it without good cause. While the Committee may reject all or part of a joint submission, if this is being considered, both parties must be given the opportunity to make representations before the final decision is made.

7. Witnesses

The parties may call witnesses during the Hearing. (Section 10.1, SPPA)

At the request of a party or on its own initiative, the Committee may require the attendance of a witness to give evidence by issuing a summons.

A witness who is summoned to testify before the Committee cannot refuse to answer a proper and relevant question and Section 13 of the *Canadian Charter of Rights and Freedoms* and Section 14 of the SPPA protect witnesses when providing answers.

The Committee should be hearing only the relevant evidence of the parties' witnesses.

Witnesses should be sworn or affirmed by the Chair of the Committee prior to commencing their testimony.

Lawyers or representatives acting as an advocate for a complainant cannot be a witness.

8. Evidence

Administrative tribunals are given much more latitude than courts with respect to the evidence which they may receive and consider in arriving at a decision. Accordingly, the Committee may receive hearsay evidence and unsworn evidence. (Section 15, SPPA)

The fundamental test with respect to the admissibility of evidence is that it must be relevant to the issues which are involved in the hearing. Relevance for a Development Charge Complaint Hearing is determined by reference to the permitted grounds set out in subsection 20(1) of the *Development Charges Act, 1997* and by the grounds set out in the complaint, but only if those grounds are permitted grounds. Relevance for an Education Development Charge Complaint Hearing is determined by reference to the permitted grounds set out in subsection 257.85(1) of the *Education Act* and by the grounds set out in the complaint, but only if those grounds are permitted grounds.

When the Committee is confronted with an objection to the admissibility of a relevant piece of evidence, the evidence should generally be admitted unless it is clearly irrelevant. The Committee should consider the objection with respect to the weight it gives to that particular evidence when arriving at its decision. The general principle is that indirect evidence (hearsay) should be given less weight than direct evidence such as a witness' own observations, unless there is a valid reason to conclude that the direct evidence is not credible.

The Committee may make a finding of credibility in considering the testimony of a witness – giving little or no weight to testimony it does not find credible. An administrative tribunal may find it very difficult to indicate in a decision that a witness was not credible. It is advisable for the administrative tribunal to fully and clearly explain itself, for example, by stating X's testimony was not relied upon because they admitted to a direct financial interest in the outcome of the hearing and because their answers were influenced by this.

Although unaffirmed or unsworn evidence is admissible, testimony to the Committee should be given under affirmation or oath. Each witness should be affirmed or sworn immediately before giving their testimony. A witness should be asked whether they prefer to be sworn or affirmed.

An unrepresented complainant is acting in two capacities, both as their own representative and as a witness. When they are acting as a witness – for example, telling the Committee what did or did not happen – they should be under affirmation.

The parties may examine their own witnesses and cross-examine other witnesses. (Section 10.1, SPPA) The Committee may also question witnesses. Generally, this should be done after the parties have finished questioning the witness.

The Chair or Vice Chair presiding should allow each party to ask any further questions of the witness they may have arising from questions posed by a member of the Committee.

The onus is on the complainant to satisfy the Committee that the Development Charge amount or Education Development Charge amount was incorrectly determined, that a credit should have been issued against the Development Charge, that a credit was incorrectly applied, or there was an error in the application of the Development Charge by-law or Education Development Charge by-law .

9. Note-taking

Notes taken by Committee members during the Hearing should be kept for a reasonable period of time, enough time for whatever appeal right there may be to be exercised. A problem arises when protection of privacy and freedom of information legislation applies. In the case of the *Municipal Freedom of Information and Protection of Privacy Act*, there is no exception made for the notes of members sitting on a municipal tribunal such as a Development Charge Complaint Hearing or Education Development Charge Complaint Hearing. As a consequence, if the City, in this case Clerks, has custody or control of the notes, these notes may be subject to disclosure under MFIPPA. In addition, the notes arguably would be subject to the Records Retention By-law and could only be destroyed in accordance with that By-law.

Consequently, to ensure that adjudicative independence can be maintained, it is recommended that if a Committee member chooses to take notes, they:

- (1) Do so for the purposes of helping:
 - (a) to remember and understand what occurred during a hearing; and
 - (b) to make a decision in respect of a hearing;
- (2) Keep their notes confidential, not allowing any other person to see, read or use the notes for any purpose;
- (3) maintain responsibility for the care and safe-keeping of their notes;
- (4) store their notes at their office or home; and
- (5) destroy their notes after some reasonable period of time such as one year.

10. Decisions

In the context of a Development Charge Complaint Hearing or Education Development Charge Complaint Hearing, the Committee makes two types of decisions:

- (1) procedural decisions such as adjourning the hearing to another date; and,
- (2) final decisions concerning whether:
 - (a) the amount of the development charge was incorrectly determined;
 - (b) whether a credit is available to be used against the development charge, or the amount of the credit or the service with respect to which the credit was given, was incorrectly determined; or
 - (c) there was an error in the application of the development charge by-law.

The procedural decision or final decision of the majority of the members of the Committee is the procedural decision or final decision of the Hearing, allowing for a vote with dissent. However, it is recommended that the Committee operate on a consensual basis in respect of Development Charge Complaint or Education Development Charge Complaint decisions.

The Committee may retire to deliberate in the absence of the public and the parties. At the conclusion of its deliberations, the Committee gives its procedural decision or final decision on the matter in the presence of the parties and the public.

The Committee is not required to give reasons for a procedural decision that is made with the consent of the parties. The Committee must give oral and/or written reasons for a procedural decision that does not have the consent of both parties.

For a final decision, the Committee must announce it orally in the presence of the parties and the public. Additionally, it must make its decision in writing to the complainant and/or their legal counsel or agent within a reasonable time subsequent to the completion of the hearing.

Subsection 17(1) of the SPPA requires a written decision to include reasons for the decision only if a party to the complaint requests reasons. If reasons are requested the decision should summarize the facts and arguments presented by the parties, the findings of fact made by the Committee. The decision must explain the relationship between the evidence and its conclusions, including why evidence was rejected or given little credibility.

Committee members should refrain from expressing opinions on the merits or strength of a case until after all of the evidence and submissions have been heard and they are giving their decision.

It is important that the Committee provides clear instructions to the Legislative Coordinator about the decisions it makes, however, it is acceptable for the Legislative Coordinator to prepare a draft decision for approval by the Committee.

11. Appeal

Both the *Development Charges Act, 1997* and the *Education Act* require notice of the decision of the Hearing to be mailed within 20 days after the day the decision is made.

The decision of the Hearing is subject to appeal by the complainant to the OLT. An appeal must be made no later than 40 days after the day the decision is made. The appeal is an appeal *de novo* which means OLT is not required to consider the Committee's reasons in its decision regarding an appeal.