

Growth Funding Tools: Analyzing Toronto's Draft Materials

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On September 25, 2020, the Municipal & Land Use Planning Group provided an update with respect to the proclamation of Bill 108, which received Royal Assent on June 6, 2019, as the *More Homes, More Choice Act* ("Bill 108"), and Bill 197, which received Royal Assent on July 21, 2020, as the *COVID-19 Economic Recovery Act* ("Bill 197").

Bill 108 and Bill 197 made amendments to the *Planning Act* and the *Development Charges Act, 1997* in Ontario, with respect to how municipalities generate funding from development in respect of three primary growth funding tools: Development Charges ("DC"), Community Benefits Charges ("CBC") and Alternative Parkland Dedication Rate. The new framework is intended to provide more certainty and predictability regarding the costs of development.

In response to the legislative changes, and as part of its review and update of its growth-related funding tools, the City of Toronto has released draft materials for public input on development charges, community benefits charges and parkland contribution.

Development Charges

As required by section 10 of the *Development Charges Act, S.O. 1997, c. 27* (the "DCA"), the City must complete a DC background study in order to pass a DC by-law. The City's DC background study for its forthcoming by-law was prepared by Hemson Consulting Ltd. The draft study is currently dated for April 2022. Pursuant to section 11 of the DCA, the City must pass its by-law within one year from the completion of the DC background study. The background study currently available is marked draft and is not yet in final form. A DC Fact Sheet has also been made available.

The City is required to hold at least one public meeting prior to passing its DC by-law and is required to give at least 20 days' notice and ensure that the proposed by-law and background study are made available to the public at least two weeks prior to the meeting. The City has scheduled public consultation meetings for April 26, from 11 a.m. to 12:30 p.m., and April 28, from 7 p.m. to 8:30 p.m. While the agenda is not yet available for future Executive Committee meetings at the time of this publication, it is expected that the June 8, 2022, meeting of the Executive Committee will consider the proposed DC by-law.

Interested persons are permitted to make representations at this public meeting.

Updates From the Current Form of the City's Draft Development Charges By-Law

The most notable update for the development community is the quantum of increases for DC contained in Schedules A and B. The rates in the 2022 DC by-law represent significant increases from the current rates. It is likely advantageous, where possible, to meet the criteria for proceeding under the current DC by-law before new rates come into effect.

At this time, based on the information publicly available, there is no specific indication in the by-law on when the new rates will come into effect. The draft by-law has two dates, a date that the by-law is passed and a date that it will come into effect. In the current draft, neither date has been included. Schedule A to the by-law, which includes the rates, also includes reference to an effective date but is similarly not indicated. The new rates could come into effect as early as when City Council passes the new DC by-law or on a specified later date.

There is indication in the draft by-law of a form of transition or phase-in from current rates and references to a schedule that is to be created. The schedule that sets out the quantum and timing of a phase-in or transition of rates is not currently available in the draft by-law.

The rates contained in the draft by-law will be further adjusted in accordance with indexing on November 1, 2023, and November 1 of each subsequent year until the end of the five-year term of the by-law, unless repealed on an earlier date.

Other changes include an express recognition of the statutory exemptions to DC contained in recent amendments to the DCA. Certain exemptions are maintained, including for industrial uses.

Once passed by City Council and the City Clerk gives written notice of passing, a person or organization may appeal the DC by-law to the Ontario Land Tribunal within 40 days. Where a person or organization appeals the subject by-law, the applicable DC rates in the by-law continue in effect despite the presence of an appeal.

Community Benefits Charges

The CBC concept was first introduced through Bill 108, and then substantially amended before coming into force through Bill 197.

When Bill 197 came into force, the previous height and density bonusing provisions of the “old” section 37 of the *Planning Act* were repealed and replaced with the “new” section 37, which provides the statutory authority for the CBC regime.

Municipal authority to use the old section 37 powers did not immediately disappear. Despite the old section 37 being repealed by Bill 197, the transition provisions allow a municipality to pass a zoning by-law amendment that imposes section 37 benefits until the earlier of the two following dates:

- (a) the municipality enacting a new CBC by-law; or
- (b) September 18, 2022.

Once the earlier of these two events has occurred, the municipality loses the authority to permit increased height and/or density in exchange for community benefits. Gone will be the days of negotiating “section 37 agreements.” Community benefits will be secured by a CBC by-law of universal application, and not negotiated on a case-by-case basis with the exception of any negotiations for in-kind contributions (detailed below).

Draft Community Benefits Charges By-law Is Released

The City of Toronto has released a draft CBC by-law, a draft CBC strategy, and an accompanying Fact Sheet. While it is unclear when City Council will pass its CBC by-law, the City has stated its intention to do so before the expiration of the current height/density bonusing authority on September 18, 2022.

The City’s draft CBC by-law includes the following key provisions:

- Unlike the previous section 37 regime, a CBC may be payable for any “development or redevelopment” activity which requires: (a) the passing of a zoning by-law or of an amendment to a zoning by-law; (b) the approval of a minor variance; (c) a conveyance of land to which a part lot control exemption by-law applies; (d) the approval of a plan of subdivision; (e) a consent to sever; (f) the approval of a description of a plan of condominium pursuant to the *Condominium Act, 1998*; or (g) the issuing of a permit under the *Building Code Act, 1992* in relation to a building or structure.
- A CBC shall be imposed on all development or redevelopment of a building or structure with five or more storeys and that adds 10 or more residential units.
- The CBC regime shall apply to development and redevelopment of all lands in the geographic area of the City of Toronto.

- The amount of the CBC payable is 4% of the value of the land that is the subject of the development or redevelopment on the day before the day the first building permit is issued in respect of the development or redevelopment.
- The CBC is payable prior to the issuance of the first building permit issued for the development or redevelopment.
- If a development or redevelopment is to be constructed in phases, each phase of the development is deemed to be a separate development or redevelopment for the purposes of this by-law and the amount of the CBC for each phase will be 4% of the value of the land of that phase on the day before the first building permit for development or redevelopment of that phase is issued.

“In-kind” contributions - facilities, services or matters identified in a CBC strategy in lieu of payment of the CBC otherwise applicable - are permitted, but there are obvious challenges to providing in-kind contributions to satisfy the CBC charge. For instance, as described in the City’s Fact Sheet:

Under the Planning Act, the City must advise the owner of the value that will be attributed to the in-kind contribution. This will have to happen at a planning approval stage; whereas, the appraisal for the site’s land value comes much later at building permit issuance. This leaves a potential for a wide discrepancy between the value of the in-kind benefit and the ultimate CBC owing.

How, and in what instances, the City will value and accept in-kind contributions to satisfy CBC requirements is unclear. It is also unclear how in-kind contributions will be secured.

Notably absent from the City’s draft CBC by-law are transition provisions, which would provide much-needed clarity as to what will befall in-progress applications which do not yet have in-force zoning (either being before the Tribunal, or approved by Council without enacting bills) despite having existing section 37 deals settled (in principle) with the City. The accompanying Fact Sheet is equally silent.

Appeals of the CBC By-law

The City’s CBC by-law can be appealed to the Tribunal, although it will remain in effect despite any appeals.

Within 20 days after the CBC by-law is passed, the Clerk will issue notice of passing of the by-law. An appeal can then be filed within 20 days of the notice, setting out the objection to the by-law and the reasons supporting the objection.

The Tribunal will hold a hearing on the appeal. On an appeal, the Tribunal may:

- (a) dismiss the appeal in whole or in part;
- (b) order the council of the municipality to repeal or amend the by-law in accordance with the Tribunal’s order; or
- (c) repeal or amend the by-law in such manner as the Tribunal may determine.

However, the *Planning Act* also sets out certain limitations on the Tribunal’s power to dispose of an appeal of a CBC by-law. The Tribunal may not amend or order the amendment of a by-law so as to:

- (a) increase the amount of a CBC that will be payable in any particular case;
- (b) add or remove, or reduce the scope of, an exemption provided in the by-law;
- (c) change a provision for the phasing in of CBC in such a way as to make a charge, or part of a charge, payable earlier; or
- (d) change the date, if any, the by-law will expire.

In the event that the Tribunal repeals or amends the CBC by-law, the City may be required to issue a refund. In the case that the Tribunal orders the CBC by-law to be repealed, the City will refund any CBC paid under the by-law. In the case that the Tribunal orders an amendment, the refund will be the difference between any CBC paid under the by-law and the CBC that would have been payable under the by-law as amended.

Parkland

Section 42 of the *Planning Act* allows municipalities to require development projects to contribute a portion of their site as a public park or collect cash-in-lieu of parkland and identifies “base” parkland dedication rates. However, municipalities are also entitled to pass a by-law to establish an alternative parkland dedication rate, which can only apply to residential developments. Prior to passing such a by-law, the municipality must pass Official Plan policies to guide the provision of land for parks (or other recreation purposes) and the use of an alternative rate for parkland dedication and cash-in-lieu payments.

Bill 197 amends section 42 of the *Planning Act*, requiring municipalities to reassess existing alternative parkland dedication policies before September 18, 2022.

Following the passage of Bill 108, Council had approved a Parkland Strategy for the City of Toronto. In response to the subsequently enacted provisions in Bill 197, the City has now released the 2022 Parkland Strategy Refresh, which provides updates to its 2019 Parkland Strategy.

In addition to its updated Parkland Strategy, the City has released a draft Alternative Parkland Dedication By-law and an Official Plan Amendment, which provide for a new approach to calculating the alternative parkland rate, as well as changes to how and where the alternative rate will be applied. An Alternative Parkland Dedication Rate Fact Sheet is also available.

One key change to the City’s application of its alternative parkland dedication rate is that the same rate applies across the entirety of the City (with the exception of designated Transit-Oriented Communities, as detailed below).

1. Alternative Parkland Rate to be Based on Project Density

Under the City’s previous regime, the alternative parkland rate was calculated based on the size of the development site. The City is proposing to change its approach so that the alternative rate is applied based on project density, as follows:

- For residential development or the residential component of a mixed-use project, the owner of land must convey the greater of 5% of the land to be developed or:
 - for sites with a residential density of 2.0 or less floor space index (“FSI”), no more than 15% of the development site
 - for sites with a residential density greater than 2.0 FSI, no more than 15% of the development site plus 1% per additional 1.0 FSI.
- The proposed alternative rate imposes a minimum cap on the land to be dedicated of 5%, and a maximum cap of 25%.
- For sites greater than five hectares in size, the land dedication will be no less than 20% of the development site.

The payment of cash-in-lieu of land will be equal to the financial value of the land that would otherwise be conveyed in accordance with the above calculation, with this amount to be paid and therefore calculated prior to the first building permit for the project.

2. Calculation of FSI

The formula for calculating FSI in the proposed Alternative Parkland Dedication By-law is different from the formula contained in the City’s Zoning By-law. Notably, hallways, stairwells and elevator shafts are not

excluded from the calculation when determining parkland dedication requirements. The result is that a project's FSI will be higher for the purposes of determining parkland dedication requirements.

3. Exemptions

Several types of residential development are exempt from the alternative parkland rates, including:

- creation of one additional dwelling unit in an existing building where that existing building already has more than four dwelling units;
- the residential component of a building with no more than four dwelling units; and
- garden suites and laneway housing.

An additional exemption is for temporary sales pavilions located on development sites.

Existing exemptions for small-scale additions, industrial uses, Long-Term Care homes, daycares, hospitals and other types of similar uses will continue.

It should be noted that affordable units required pursuant to the City's inclusionary zoning regime are not exempt from the alternative parkland calculation.

4. Timing of Conveyance or Payment

Conveyance of land will be required to be made prior to the issuance of the first above-grade building permit for the development. This is a clarification from the previous by-law, which did not specify the type of permit that triggered the conveyance.

In contrast, payment of cash-in-lieu will be required prior to the first building permit for the project. This timing aligns with the date that payment of the CBC will be required.

5. Transition

The transition provisions contemplated in the proposed Alternative Parkland Dedication By-law have two parts: the first is a trigger date before the new by-law comes into force, which is followed by a requirement that a building permit for the project be issued within two years.

The alternate rate provisions of the existing Alternative Parkland Dedication By-law will continue to apply to development or redevelopment projects where:

- the project is authorized by an applicable zoning by-law amendment, or an application for a zoning by-law amendment in respect of the project has been received and deemed complete by the City **prior** to the effective date of the new Alternative Parkland Dedication By-law **AND** a building permit is issued no more than two years from either the date that zoning by-law amendment is passed, or the effective date of the new parkland by-law, whichever is later, or
- the project is authorized by an approved plan of subdivision, or an application for an approval of a plan of subdivision has been received and deemed complete by the City **prior** to the effective date of the new Alternative Parkland Dedication By-law **AND** a building permit is issued no more than two years from either the date that plan of subdivision is approved, or the effective date of the new parkland by-law, whichever is later.

6. Exception for Designated Transit-Oriented Communities

Bill 109, which was introduced on March 30, 2022, and received Royal Assent on April 14, 2022, amends section 42 of the *Planning Act* by imposing a maximum cap on the alternative parkland dedication rate for lands that are designated as Transit-Oriented Communities under the *Transit-Oriented Communities Act, 2020* as follows:

- a maximum of 10% of the land for properties that are less than five hectares in size; and

- a maximum of 15% of the land for properties that are more than five hectares in size.

Designated Transit-Oriented Communities are areas that have been specifically designated by Order in Council and are required to support priority transit projects; for example, lands that may be on or adjacent to the Ontario Line, the subway expansions or the Eglinton LRT.

7. Appeal Rights

Once adopted, the City's Alternative Parkland Dedication By-law and related Official Plan Amendment are appealable to the Ontario Land Tribunal within 40 days. Where a person or organization appeals the by-law, the applicable parkland dedication rates in the by-law continue in effect despite the presence of an appeal. If an appeal is successful, the appellant is entitled to a refund.

Conclusions

The draft instruments noted in this article are still in draft and are subject to City Council approval and the outcome of appeals, if any. We will continue to monitor and report on the decision-making process respecting these matters.

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