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August 21, 2019

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RE: Proposed changes to O. Reg. 82/98 under the Development Charges Act (ERO number 019-0184)

On behalf of the City of Toronto, I am pleased to submit comments from City staff regarding the proposed regulation concerning amendments to the *Development Charges Act.* These comments should be considered in conjunction with comments submitted by the Municipal Finance Officers Association on behalf of all Ontario municipalities.

Toronto has become one of the fastest growing cities in Canada. The Development Charges Act is an important part of how Toronto funds and plans for Toronto's long-term livability and manages the impacts of growth. We agree that getting it right can have a significant impact on the issues of housing supply and affordability.

More residents generate increased demand for infrastructure across the city. Toronto's ability to fund critical growth-related capital works through development charges (DCs) has supported the local and city-wide investments that provide the community oriented facilities people need to enjoy a high quality of life and ensure the development of complete communities. Similarly, the provision of hard municipal services, such as roads, transit, water and wastewater, and protection services, is valued by municipalities and the development industry alike. Timely collection of DCs and accurate alignment between costs/payment is critical to supporting investment that allows new development to proceed, and to mitigate service impacts on existing residents.

The existing growth-based tools support a significant component of the City's growth-related capital plan (approximately $3 billion budgeted funding in the 2019-2028 capital budget and plan before in-kind contributions). In 2018, the City adopted a new development charges bylaw that included a two-year phase-in of the rate changes (November 1, 2018 to November 1, 2020). The bylaw also contains financial incentive policies to support City long term city planning and economic development priorities, such as exemptions for affordable rental housing, industrial uses, and high-rise office developments.

An orderly migration from the current tools to the new system established through Bill 108 will only occur if municipalities can continue to rely on planned development charge revenue streams. For example, of particular concern is how the proposed early crystallization of DC rates will affect residential dwelling units in the development pipeline, i.e. those that have planning applications submitted, but for which a building permit has not been issued. There are about 300,000 such units in Toronto, representing over 15 years' worth of residential unit supply and DC revenue.

General Principles

The following principles inform the City staff's comments on the proposed Bill 108 regulations:

1. Growth should pay for growth
2. Complete & vibrant communities are good for everyone
3. Municipal tools should allow for flexibility to meet the needs of local municipalities, including the opportunity to provide for both in-kind and financial contributions
4. Changes should be revenue neutral to municipalities and should consider revenue potential under the previous regime, not just historic revenues
5. Administrative burden should be minimized
6. Province should allow adequate time for consultation and analysis to mitigate potential unintended consequences and facilitate an orderly transition to the new regime

1. Transition

Proposed Regulatory Content
Minister proposes that the specified date for municipalities to transition to community benefits is January 1, 2021. From this date forward:

- *Municipalities would generally no longer be able to collect DCs for discounted services*

Staff Comments
The timeline to move to a Community Benefits Charge (CBC) appears unnecessarily compressed considering i) the challenges already identified to establish an appropriate and defensible CBC regime; ii) the number of municipalities affected; and iii) the limited public and private sector resources available to deal with the transition. If municipalities are unable to meet this deadline, or are forced to move ahead with sub-optimal bylaw changes, revenues would be jeopardized.

Another very serious transition concern in Toronto relates to the huge number of development applications already underway, and the proclamation of the parts of Bill 108 that would establish the timing of DC payments obligations at site plan or zoning application. There are currently about 300,000 residential dwelling units that have planning applications submitted and/or approved, but not yet issued building permit, representing over 15 year's housing supply. Proclamation of this feature in September of 2019 as requested by the Ontario Home Builders Association in their letter dated August 9, 2019, could result in numerous re-applications to avoid the City's scheduled DC increases and any future DC increases, and planned cost recovery would be seriously eroded. We believe that a prudent proclamation date would coincide with the CBC deadline.

A related concern is the effect of the rate freeze on discretionary exemptions. Currently the City provides DC exemptions for such uses as affordable housing units (which could be affected by the implementation of inclusionary zoning) and high-rise office developments (which are under review for a report in 2020). It is vital that the City retains its capacity to review and amend policies, and that the current pipeline of applications is not protected from pending changes, at least until these issues are resolved as expected over the next 18 months.

If in-process applications are able to avail themselves of charges at current rates and policies, rather than the future scheduled DC rates that had been expected to apply at the time of building permit issuance, City revenue would be seriously reduced for years, if not decades, to come, contrary to the Minister's assurances that revenues would be maintained.

Recommendations:

1.1 Prescribed transition to CBC should be the later of 4 years from enactment of the regulations or expiry of the local development charges bylaw (e.g. November 1, 2023).

1.2 Provisions related to the setting of DC payment obligations at the time of site plan and zoning applications must not apply to applications already received by the City, and should be proclaimed no earlier than the deadline for implementing the CBC (currently January 1, 2021).

2. Scope of types of development subject to development charges deferral

The Act provides for payment of DCs in six (6) annual installments commencing on the date of building permit occupancy and on the five anniversaries of that date for rental housing, institutional, industrial and commercial development and on the twenty (20) anniversaries of that date for non-profit housing.

Proposed Regulatory Content
The Minister proposes that the types of developments proposed for development charge deferrals be defined as follows:

- *"Rental housing development" means construction, erection or placing of one or more buildings or structures for or the making of an addition or alteration to a building or structure for residential purposes with four or more self-contained units that are intended for use as rented residential premises*
- *"Non-profit housing development" means the construction, erection or placing of one or more buildings or structures for or the making of an addition or alteration to a building or structure for residential purposes by a non-profit corporation.*
- *"Institutional development" means the construction, erection or placing of one or more buildings or structures for or the making of an addition or alteration to a building or structure for:*
    - *long-term care homes;*
    - *retirement homes;*
    - *universities and colleges;*
    - *memorial homes; clubhouses; or athletic grounds of the Royal Canadian Legion; and*
    - *hospices*
- *"Industrial development" means the construction, erection or placing of one or more buildings or structures for or the making of an addition or alteration to a building or structure for:*
    - *manufacturing, producing or processing anything,*
    - *research or development in connection with manufacturing, producing or processing anything,*
    - *storage, by a manufacturer, producer or processor, of anything used or produced in such manufacturing, production or processing if the storage is at the site where the manufacturing, production or processing takes place, or*
    - *retail sales by a manufacturer, producer or processor of anything produced in manufacturing, production or processing, if the retail sales are at the site where the manufacturing, production or processing takes place.*
- *"Commercial development" means the construction, erection or placing of one or more buildings or structures for or the making of an addition or alteration to a building or structure for:*

- *office buildings as defined under subsection 11(3) in Ontario Regulation 282/98 under the Assessment Act; and*
- *shopping centres as defined under subsection 12(3) in Ontario Regulation 282/98 under the Assessment Act.*

Staff Comments

Staff are concerned about the impact of the proposed DC deferrals, and how best to secure installment payments for DCs over time.

We fail to understand the government's rationale for why these particular forms of development have been targeted for this benefit, nor is the City aware of any study identifying their effectiveness vs. the cost to municipalities in terms of administration or delayed and at-risk revenue. Certainly luxury rental and high-end seniors' residences are currently being constructed without government incentives, and their occupants are among the least needy in society. Furthermore, even when incentives for a particular built form are deemed appropriate, measures are required to ensure that the building's use is maintained for the intended purpose for a significant length of time, typically 20 years, or at least the period of the deferral. Staff believe that municipalities should be provided with flexibility to determine whether DC deferrals for these types of built form or some defined sub-type align with social and economic development priorities and local planning circumstances.

Currently, the City may apply any unpaid DCs to the tax roll of an individual property, although those unpaid charges do not have priority lien status. However, collection through the tax bill is virtually never required under the current DCA. New collection risk under the proposed regime due to the proposed deferral entitlements may undermine a municipality's capacity to rely on and borrow against these revenues, and undermine municipal ability to make timely infrastructure investments as would have occurred otherwise. Furthermore, collection through the tax bill shifts the burden of payment from the developer to the buyer/occupant. It facilitates Purchase and Sale Agreements designed to transfer the DC burden, and undermines the legitimacy of the DC as a charge against the developer, quite possibly reducing the legal defensibility of the regime. Full security from the developer for deferred payments, the requirement to register deferral agreements on title and the capacity to apply priority liens would help avoid these problems.

The Minister has indicated that municipalities will not be constrained in terms of interest rates on deferred balances. Municipalities may use this authority to set interest rates that reflect collection risk. If so, the benefit of deferral would be reduced by the costs associated with collection, unless collection is fully and appropriately secured.

Recommendations:

2.1 Municipalities be delegated the responsibility to determine and define eligibility for deferral among the designated built forms.

2.2 Institutional development, commercial development and industrial development be removed from the prescribed development subject to DC deferrals.

2.3 Municipalities should be permitted to register deferral agreements on title and register a priority lien on the tax roll of properties with DC deferrals to protect municipalities against loss in event of bankruptcy or land ownership changes.

2.4 Municipalities be allowed to use additional tools, such as letters of credit, to ensure DC deferrals are secured by the developer in a manner that protects municipal interests.

2.5 The Province establish a mechanism to ensure that any built form subject to DC deferrals persists in its original purpose for a recommend period of time.

3. Period of time for which the development charge freeze would be in place

The amendment to the Act will, upon proclamation, provide that the amount of the DC would be set at the date that the municipality receives the site plan application for a development; or if a site plan is not submitted, at the time the municipality receives the application for zoning amendment. The freeze would remain in place until a specified period (2 years is proposed) after the application is approved by the municipality or the LPAT.

Proposed Regulatory Content
In order to encourage development to move to the building permit stage so that housing can get to market faster and provide greater certainty of costs, the Minister is proposing that the development charge would be frozen until two years from the date the site plan application is approved, or in the absence of the site plan application, two years from the date the zoning application was approved.

Staff comments

Inclusion of a sunset date for frozen DC obligation is welcome. However, linking the sunset date to the approval of site plan or zoning by-law amendment could encourage non-viable speculative or place-holder applications to be filed in an effort to circumvent future DC increases, and do little to motivate developers to progress to building permit in an expeditious manner.

In order for developers to obtain site plan and zoning approval, they must satisfy certain conditions and supply required documentation. Delays in providing this information will not be penalized under this proposed regulation, so there is no incentive for developers to expeditiously seek approvals. Furthermore, many approvals involve LPAT decisions and municipalities may not be able to control that timeframe. Consequently, there is theoretically an unlimited amount of time that could elapse between application date and the date that it may be approved.

The proposed changes create significant financial uncertainty for municipalities respecting revenues. Freezing the DC rates at too distant a point in time from construction creates a structural disconnect between the costs that are incurred and when revenues are determined. The DCs paid by development may be based on outdated requirements from many years prior, potentially resulting in a funding shortfall to municipalities, and undermining the defensibility of the charge. There should be a sunset provision from the date that an application is received to the date the DC is payable (building permit issuance).

Often applications are amended through the development review process and prior to ultimate approval to reflect changes in unit sizes, numbers of units and the overall blend of gross floor area. Flexibility is required to capture development charge revenues that reflect the development that ultimately is approved.

Municipalities should be permitted to recover the costs related to the DC rate freeze, including financing costs, through the DC.

Recommendations

3.1 The Province should provide municipalities with authority to set their own criteria for freezing the DC rates from the date an application is received to the date the DC is payable.

OR

The Province should provide for a sunset to the DC rate freeze from the date a planning application is received, such as [two years] from the date a site plan application is received and [three] years from the date a zoning by-law application is received.

3.2 The date that an application is received should be based on the date that an application is deemed complete by the municipality and provision be made for municipalities to determine what constitutes acceptance of a complete application or rezoning by-law application, for the purposes of determining the DC.

3.3 Any major revisions to an application should require a recalculation using the applicable DC rate as of the date the major revision is accepted by the municipality.

3.4 Municipalities should be able to fully recover growth-related costs, including any costs related to the DC rate freeze and associated financing costs.

4. Interest rate during deferral and freeze of development charges

Municipalities will be able to charge interest on DCs payable during a deferral, as well as DC "freeze" from the date the applicable application is received, to the date the DC is payable. The amended Act states that interest cannot be charged at a rate above a prescribed maximum rate.

Proposed Regulatory Content
The Minister is not proposing to prescribe a maximum interest rate that may be charged on development charge amounts that are deferred or on development charges that are frozen.

Staff comments

Staff supports the minister's proposal to not prescribe a maximum interest rate that may be charged on DC amounts that are deferred or on DCs that are frozen. The absence of a prescribed rate will allow municipalities to apply a rate applicable to their own financial circumstances.

Recommendations:

4.1 Staff support the Minister's proposal not to establish a maximum interest rate.

5. Additional dwelling units

The amendment to the Act provides that:

- the creation of additional dwelling in prescribed classes of residential buildings and ancillary structures does not trigger DC's
- the creation of a second dwelling unit in prescribed classes of new residential buildings, including ancillary structures, is exempt from DCs

Proposed Regulatory Content
The existing O. Reg. 82/98 prescribes existing single detached dwellings, semi-detached/row dwellings and other residential buildings as buildings in which additional residential units can be created without triggering a development charge and rules related to the maximum number of additional units and other restrictions. It is proposed that this regulation be amended so that units could also be created within

ancillary structures to these existing dwellings without triggering a development charge (subject to the same rules/restrictions).

It is also proposed that one additional unit in a new single detached dwelling; semi-detached dwelling; and row dwelling, including in a structure ancillary to one of these dwellings, would be exempt from development charges.

It is also proposed that within other existing residential buildings, the creation of additional units comprising 1% of existing units would be exempt from development charges.

Staff comments

Staff are concerned that this provision could be used to evade the payment of DCs for single detached, semi-detached dwellings, stacked townhouses and row dwellings. For instance, creatively designing "stacked" dwellings could leave the City open to challenges on whether a unit is a duplex or a single dwelling with a second unit. There should be a clearly established process for identifying stacked townhouses and other forms of primary dwelling units from dwelling units with additional or second units.

Recommendations:

5.1 The proposed regulations related to secondary dwelling units in new residential buildings should be clarified to indicate that a secondary dwelling unit is subordinate, or accessory to, a primary residential dwelling unit in order to be identifiably differentiated from other residential development, such as multi-unit buildings such as multiplexes and stacked townhouses.

5.2 That the definition of secondary dwelling unit should be clarified to exclude stacked townhouses, back-to-back town house dwellings and duplexes.

5.3 The cost of new statutory exemptions should be made recoverable through development charges rather than impact existing residents and businesses.

Conclusion

I trust the Ministry finds these comments to be constructive and informative. The City appreciates the opportunity to continue to participate in the consultations related to Bill 108 to ensure that an orderly and effective result is obtained, and that the Province's stated goals, including the maintenance municipal cost recovery mechanisms, is achieved.

Sincerely,

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City of Toronto