Town of Whitby

Staff Report

whitby.ca/CouncilCalendar

Report Title: Development Agreement Securities Policy

Report to: **Committee of the Whole**

Date of meeting: January 20, 2025

Report Number: **FS 02-25**

Department(s) Responsible:

Financial Services Department

Submitted by:
Fuwing Wong – Commissioner, Financial Services & Treasurer

Acknowledged by M. Gaskell, Chief Administrative Officer

For additional information, contact:

Raymond Law – Manager, Development Finance ext. 2909

1. Recommendation:

1. **That Council approve the Development Agreement Securities Policy included as Attachment 1 of Staff Report FS 02-25;**
2. **That Council authorize the Treasurer to periodically update the appendices of the Development Agreement Securities Policy, specifically the letter of credit and surety bond templates, as necessary; and,**
3. **That Council approve updates to F 100 the "Investment Policy" and F 130 the "Required Securities Within Site Plan Agreements Policy" as outlined in Staff Report FS 02-25.**

2. Highlights:

- Letters of credit are the primary instrument used for financial security of development agreements because they are irrevocable and can be drawn upon unconditionally.
- Ontario Regulation 461/24, filed on November 20, 2024, requires municipalities to accept Surety Bonds to meet financial security obligations of development agreements, provided they include specific mandatory features.

- A policy will ensure equitable, transparent and effective administration in the use of Security Deposits, Letters of Credit, and Surety Bonds as a financial security for development agreements.

3. Background:

Securities play a crucial role in protecting the financial interests of the Town in relation to financial or performance obligations of development agreements. Traditionally, this has been achieved primarily through letters of credit issued by financial institutions, which guarantees payment to the Town. Additionally, security deposits in the form of cash, provided via certified cheque, bank draft, etc., have been used to a lesser extent.

Letters of credit are the predominant instrument of financial security utilized by municipalities across Ontario for development agreements. They are favoured due to their irrevocable status, meaning they cannot be revoked or amended without mutual consent between the beneficiary and the issuer. Furthermore, they can be drawn upon unconditionally by the municipality.

Another instrument for securing financial or performance obligations is through Surety Bonds, which have been commonly used as performance securities in construction contracts.

Historically, the Town of Whitby, like most municipalities in Ontario, has not accepted Surety Bonds for development agreements. The primary reason for their limited use is that they could not be drawn upon unconditionally and in a timely manner by the municipality. Instead, the municipality was required to demonstrate default by the counterparty before accessing the funds. This not only resulted in delayed access to the funds due to the added administrative workload of collecting and providing satisfactory evidence to the insurer, but also increased the risk of failing to meet the burden of proof required to access the funds.

The acceptance of Surety Bonds is advantageous for the development community because Surety Bonds do not impact a developer's financial position in the same manner as Letters of Credit. Unlike Surety Bonds, Letters of Credit appear on the balance sheet for developers. Using Surety Bonds maximizes the financial resources available to developers by preserving their credit and cash flow.

As part of the Bill 109: Homes for Everyone Act, 2022, the authority was granted for the Province to enact regulations defining and prescribing the use of Surety Bonds. This includes the potential requirement for municipalities to accept these bonds at the developer's request.

Leading up to the passing of Bill 109, there had been a gradual increase in their use, with municipalities such as the Region of Durham, the City of Pickering, and the City of Hamilton, accepting Surety Bonds for these agreements prior to the change in legislation.

This shift in sentiment was likely due to the introduction of a newer version of the Surety Bond by insurers. The revised Surety Bond, commonly known as a Pay-on-Demand Bond, addresses the concerns municipalities previously had and provides the enhanced level of protection required of financial securities by municipalities.

On November 20, 2024, the Province exercised the authority granted to them from Bill 109 by filing Ontario Regulation 461/24. This regulation allows counterparties seeking approvals for land use planning matters to use Surety Bonds to meet financial security obligations imposed by municipalities. While the regulation does not mandate the use of Surety Bonds, it requires municipalities to accept them if a counterparty chooses to provide one. The regulation incorporates various mandatory elements, enabling eligible Surety Bonds to operate more like Letters of Credit. Additionally, the regulation imposes further restrictions related to licensing and credit rating requirements to enhance the reliability of the Surety Bond.

4. Discussion:

The following outlines the mandatory elements required for Surety Bonds as per the associated regulation for acceptance by the Town, compares these requirements to the Town's current requirements for letters of credit, and explains the importance of each element.

Requirements of the Issuer

The Surety Bond must be issued by an insurer that is licensed under the Insurance Act to write surety insurance and must meet one of the following third-party credit ratings:

- Dominion Bond Rating Service as "A" or higher;
- Fitch Ratings as "A-" or higher;
- Moody's Investors Service Inc. as "A3" or higher;
- Standard and Poor's as "A-" or higher;
- A.M. Best Company, Inc. as "A-" or higher.

These requirements are similar to the Town's current requirement of financial institutions issuing Letters of Credit, as the Town only accepts Letters of Credit from financial institutions operating under the Bank Act with the following third party credit ratings:

- Schedule I bank with a Dominion Bond Rating Service rating as "R-1 low" or "A" (low), or higher
- Schedule II bank with a minimum Dominion Bond Rating Service rating of "R-1 middle" or "AA" (low)

This is important because it assures the Town of the insurers' and financial institutions' ability to pay the amount demanded and on time.

Requirements of Payments

Upon declaring a default and issuing a written demand, the insurer must pay the demanded amount within 15 business days, without contesting or asserting any defenses, regardless of the counterparty's objections.

These elements of guaranteed payment and payment timing make the Surety Bonds more like Letters of Credits, which can be drawn upon unconditionally by the Town at its sole discretion.

Payments can also be requested as partial drawdowns. In other words, a Surety Bond can be drawn down or released in portions, rather than waiting for the completion or default of the entire secured work. This is a standard feature of Letters of Credit.

These are important elements of ensuring the Town has timely access to funds to remedy or complete any necessary work.

A policy is proposed to provide guidelines for accepting various forms of financial security for development agreements.

This proposed policy ensures equitable, transparent and effective administration in the use of Security Deposits, Letters of Credit, and Surety Bonds as a financial security for development agreements.

The proposed policy specifically applies to the use of Surety Bonds for development agreements and does not extend to securities required for other purposes, such as construction contracts.

Currently, the required elements for accepting a Letter of Credit are outlined in the policy F 100 Investment Policy with references to Letter of Credits also included in policy F 130 Required Securities Within Site Plan Agreements. Upon approval of this report/the proposed policy, these policies will also be updated (i.e. removal/reworded to refer to the expanded financial security options in the new Development Agreement Securities Policy) for consistency.

5. Financial Considerations:

No additional financial costs are identified with the implementation of the attached policy and acceptance of qualified Surety Bonds for Development Agreements.

6. Communication and Public Engagement:

For transparency, the approved policy will be made publicly available on the Town's website, to be included under the Finance Policies section of the Town Policies webpage.

7. Input from Departments/Sources:

A draft policy was reviewed by the Policy Co-ordination Committee and their feedback has been incorporated into the Development Agreement Securities Policy included as Attachment 1.

8. Strategic Priorities:

The recommendations in this report support the Strategic Pillar: Whitby's Neighbourhoods – Safe, Healthy, & Inclusive. The Province has identified the broader acceptance of Surety Bonds as a key step to increase housing supply in Ontario. By accepting Surety Bonds for Development Agreements, homebuilders may be able to free up funds for housing projects.

9. Attachments:

Attachment 1 - Development Agreement Securities Policy