



April 20, 2020

Caspar Hall  
Director - Municipal Finance Policy Branch  
Ministry of Municipal Affairs and Housing  
13th Floor, 777 Bay Street

*Submitted electronically*

Dear Mr. Hall,

**RE: Proposed regulatory matters pertaining to community benefits authority under the Planning Act, the Development Charges Act, and the Building Code Act, ERO 019-1406**

We would like to thank the Ministry of Municipal Affairs and Housing (MMAH) for inviting the Residential Construction Council of Ontario (RESCON) to comment on the consultation document “Proposed Regulatory Matters Pertaining to Community Benefits Authority Under the Planning Act, the Development Charges Act and the Building Code Act”.

We appreciate the engagement by the Ministry on this issue, including the technical briefings for stakeholder groups. RESCON commends the Ministry’s decision to extend the deadline for comments to April 20.

RESCON supports the Ministry’s decision to replace the existing Section 37 provisions with a new Community Benefits Charge (CBC).

### **COVID-19 context**

We recognize that this consultation comes at a challenging time when economic activity in general, including construction work, and in some cases municipal permitting activity, has slowed down considerably.

The result is that municipal revenues are lower and that market demand for new housing and other new construction may also be temporarily restricted. The impact is that municipalities may require more income while developers and builders are facing challenges in the areas of market demand, prices, obtaining planning and building approvals, and necessary inspections. This is why electronic permitting and remote inspections to maintain municipal permitting functions are essential.



The result of the current COVID-19 episode could well be that municipalities may need more funding, while developers and builders are in an even more uncertain position.

Under these circumstances, it is more important than ever that there is transparency and predictability regarding CBC amounts and that mechanisms are in place to allow for payment to align with revenue streams (please see the recommendation below related to occupancy permits).

Nonetheless, RESCON believes that it is important to take a longer view and ensure that the CBC-related reforms provide a solid platform going forward. This submission provides some additional elements that should be taken into consideration by the Ministry as it continues improvements on this issue.

Thank you again for the opportunity to comment on the Ministry consultation on regulatory matters related to the new community benefits provisions and related issues.

Regards,

A handwritten signature in blue ink, appearing to be "R. Lyall", is written over a light blue circular watermark that contains the RESCON logo.

Richard Lyall,  
President  
RESCON



## **MMAH planning reforms to date are an important step forward**

RESCON, in its January 2019 [submission](#) on the Housing Supply Action Plan, recommended that the Ministry remove the then-Section 37 provisions which discouraged zoning updates to align the Provincial Growth Plan and updated Official Plans.

We commend the Ministry's bold initiative to amend Section 37 and replace it with provisions enabling the new Community Benefits Charge (CBC) which removes the linkage between rezoning and collecting Section 37 fees.

In its submission, RESCON also recommended combining zoning with site plan control through the introduction of a community planning permit system that would further streamline planning approvals. In addition, RESCON had recommended that the Minister use powers under Section 47 of the *Planning Act* to issue Minister's Zoning Orders and that the Province provide assistance to municipalities to align their land use plans with the Provincial Growth Plan and planning policies. We are encouraged by the fact that MMAH is inclined to take action to ensure that municipal land use plans align with provincial planning policy.

## **Revisions to Section 37 under Bill 108 to enable the new CBC**

Amendments to Section 37 of the Planning Act under Bill 108 modified this provision to enable the new Community Benefits Charge (CBC) regime.

As you know, under the previous Section 37, which so many found problematic, Section 37(1) "the council of a local municipality may in a bylaw passed under section 34 (zoning) authorize **increases in height and density otherwise permitted by the bylaw are permitted only in return for the provision of such services or matters set out in the bylaw**".

The old Section 37 that was problematic linked increases in height and density (requiring a rezoning) to the provision of such services or matters set out in the bylaw.

The new Section 37 enables a new CBC which notes that "the council may by by-law impose community benefits charges against land to pay for the capital costs of facilities, services and matters required because of development or redevelopment in the area to which the bylaw applies".



The CBC can only be applied to development that requires passing of a zoning bylaw or issuance of a building permit. This is the provision that de-links the charge from zoning. The new language for Section 37 is based on, but still different from, the language related to development charges.

Under the Development Charges Act, “...the council of a municipality may by bylaw impose development charges against land to **pay for the increased capital costs required because of increased needs for services** arising from the development of the area to which the bylaw applies”.

The new Section 37, as noted above says “... pay for land to pay for the capital costs of facilities, services and matters required because of development or redevelopment in the area to which the bylaw applies”. The language in the new Section 37 does not include the term “**increased**” **capital costs or “increased” needs for services.**

We understand that the government’s intent with the new Section 37 provision is to provide more predictability, certainty and transparency with respect to the previous Section 37 charges while allowing municipalities to maintain current revenues.

It does not appear that this language in the new Section 37, unless the underlying regulations provide compensating robustness, would support a Eurig-based case law challenge that the charge of fee is not in fact a tax disguised as a non-tax measure (i.e., fee or charge).

Section 37 under the *Planning Act* should be amended to align with the growth-pays -for-growth language in the development charges act or it should be eliminated so that all growth pays for growth charges are consolidated under the development charges act provision noted above.

## **CBC–related regulatory matters outlined in Ministry consultation paper**

### ***Required content of a Community Benefits Charge strategy***

The Ministry’s proposal refers to a list of content items that should be included in a community benefits strategy put out for consultation.

One of the eight items on the list, number seven, states: “... whether the increased provision of those specific services would also serve existing residents (for example, existing residents may also benefit from new child-care facilities that are needed because of new development or redevelopment) ...”



Some additional wording is needed for this item to make it more granular and provide the basis for a more appropriate charge based on the impact of the development.

We would recommend that the term “whether” be replaced by “the extent to which”. This more precise language is dictated by the idea that “growth pays for growth” and would then lead to an analysis of the portion of the increased provision of those specific services that should legitimately be covered by the CBC.

This may not align perfectly with the language of the enabling provision under the new Section 37 which deviates slightly but significantly from the development charges language, and if that is the case, this matter should be addressed in subsequent legislative and/or regulatory reforms.

### ***Services eligible to be funded through development charges***

The Ministry has proposed that the following additional services be funded under the *Development Charges Act* through regulation. These are: a) public libraries including library materials for circulation, reference or information purposes; b) long-term care; c) parks development such as playgrounds, splash pads, equipment and other park amenities (other than the land for park purposes which is addressed under the new Section 37 -CBC); d) public health; and e) recreation, such as community recreation centres and arenas.

RESCON generally supports moving these services under the provisions of the comparatively more robust “growth-pays-for-growth” language of the *Development Charges Act*.

Regarding the specific item “public health”, this requires more specificity, including: does it relate to capital cost only and what types of public health services does it cover?

The current list of services eligible for the CBC includes a) land for parks; b) affordable housing; c) day care.

As to affordable housing, we assume this refers to one specific subset of affordable housing which is subsidized housing (social, non-profit, rent geared to income) but not less expensive market housing, including laneway housing or accessory units.

There needs to be more clarity regarding the inclusion of affordable housing on this list:

- How is affordable housing defined for the purpose of the CBC?
- How will affordable housing be supported by the CBC?



- Will the community benefits strategy consider additions to market supply as a way to address affordable housing needs?
- What if affordable (subsidized or non-subsidized) housing is provided in areas outside of a CBC bylaw area where land values and hence delivery costs, may be much lower?
- How does the matter of affordable housing fit within the concept of a growth-pays-for-growth paradigm? This item – affordable housing -- would appear to fit more within a land value capture paradigm than a growth-pays-for-growth paradigm
- Is intrinsically affordable market housing (e.g., very small units where the market supports this) a way to address affordable?

### ***Percentage of land value for determining maximum CBC***

The proposal is that the maximum CBC charge in a CBC bylaw would be:

- single tier, 15%
- lower tier, 10%, and
- upper tier, 5%.

### ***Reduce maximum percentage***

Modelling and analysis undertaken by the OHBA indicates that municipalities will tend to use the maximum CBC charge rate, and if so, OHBA modelling indicates that more funds would be collected under the new CBC system at 15% (for single-tier municipalities) than under the previous Section 37 system. Therefore, we would support the OHBA proposal to reduce the maximum percentage for single-tier municipalities to 10% with corresponding changes to two-tier systems.

### ***Exclude low rise from the CBC***

The old Section 37 provisions have not generally been used for low-rise projects. We would support OHBA's recommendation to remove low-rise development from the new CBC provisions.

### ***There should be specific allowance for different CBC rates in sub-areas within a CBC bylaw zone***

These charges are based on the value of land on the day before the first building permit related to the development project, is issued.



We have a few questions and comments regarding this new provision which has the positive result of encouraging up-to-date zoning, a necessary precondition to applying for and receiving a building permit.

Given that land values may differ greatly within a municipality and may vary much more than the demand for growth-related services, can a municipal CBC bylaw include different CBC rates in different parts of the municipal CBC bylaw area? For example, within a transit-oriented development area (TOD) land values will usually be much higher directly adjacent to a transit station than beyond 0.8 km from that transit station.

The CBC consultation strategy paper therefore should specifically address the matter of differential rates, if any, within the CBC bylaw area to ensure that a municipality has taken into consideration the possibility of differential rates by subregion within the CBC bylaw area.

***CBC land value determination should be date of zoning update, not building permit issuance***

It is proposed that land values, which are the basis for the amount of money collected under the new CBC system, will be determined on the day before the building permit is issued.

Accordingly, a builder/developer will assess project viability via a proforma analysis, based on the anticipated CBC on the day before permit issuance. Updated zoning will increase land values as will an application for a building permit. A key intent of the Section 37 reforms urged by RESCON and others was that zoning would be updated by municipalities. This would reduce planning delays, uncertainty and associated supply reductions.

It was not expected that land value determination would be made as late as the permit issuance stage when services are in place which further increase land prices.

Under the Building Code, a permit must be issued for a complete and compliant building permit application within 20 or 30 days depending on whether the building is large or large and complex. If the issuance of the building permit is substantially delayed, this can lead to increased land values and potentially higher CBC costs.

Therefore, we would suggest that the land value determination for the purpose of the CBC be based on the time when zoning is updated (to align zoning with the provincial growth plan and associated municipal plans (official and secondary plans as the case may be).



### ***CBC funds should be paid at time of occupancy permit***

We would recommend the following that CBC fees be paid at the time of occupancy permit issuance.

This would tie municipal success (in collecting CBC fees) to the industry success in constructing a new project to the point of obtaining an occupancy permit which typically indicates the real-estate transaction will soon close.

The benefit is first of all that builders would have assurance that they have the funds available and on hand to pay the CBC (without borrowing which may be difficult for medium and smaller developer/builders), and secondly municipalities would be encouraged to issue a building permit and occupancy permit for a compliant project as quickly as possible, to ensure that the project is viable for the builder-developer and that construction can proceed as soon as possible

### ***Notice or appeals of a CBC (consultation heading “community bylaw notice”)***

There has been some discussion about potential appeals of a CBC bylaw.

The bylaw notice discussion includes no information on the basis for a potential appeal.

As noted earlier, the enabling language under Section 37, which deviates from the legislative provisions related to development charges, does not suggest that an appeal based on CBC costs exceeding the incremental costs imposed by the growth (the development charges concept) would be even possible, much less successful.

Therefore, the real intent of the CBC should be clarified, which appears to maintain for municipalities, at least some of the traditional revenues under the old Section 37. If that were not the case, all development-related costs could be handled under the development charges provision or the wording for the new Section 37 would be identical to that of the development charges provision.

### ***Building Code applicable law.***

As noted, the CBC fee is determined based on land values on the day before the issuance of the Building Permit (or first permit such as Foundation, footing permit or conditional permit).





While this provides more certainty, we are also recommending, as discussed previously, that the CBC amount be paid at the time of the occupancy permit.

This should be clarified under applicable law provisions in the Building Code.

### **Additional recommendation going forward**

The new CBC provision under the new Section 37 provision is an improvement and aligns with RESCON's comments regarding problems with the previous Section 37 which created an incentive to delay zoning updates.

In addition to the recommendations already outlined in this submission, we also recommend that the Ministry reviews the current development charges and even more importantly charges under the weaker language (compared to the development charges language) of the new Section 37.

While it appears that the intent of the Ministry may have been to maintain some of the revenues beyond incremental development related cost, to which municipalities are currently dependent, we would strongly recommend that the language under Section 37 be aligned with the more robust development charges language, or that the new Section 37 be eliminated altogether, so that all development-related charges are addressed through the *Development Charges Act*.

### ***Future DC and CBC review***

As soon as possible after new CBC regulatory provisions (with amendments noted above) are introduced, there needs to be a full review of the costs that are passed on under the *Development Charges Act* insofar as these costs are viewed by many as exceeding incremental growth costs. There should be a similar review of charges under the new CBC regime.

RESCON would be pleased to work with industry partners to provide input on the nature and magnitude of development charges currently collected relative to development-related costs.