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TAB 7

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Introducing the Community Benefits Charge

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INTRODUCING THE COMMUNITY BENEFITS CHARGE

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INTRODUCTION

On June 6, 2019, Bill 108 – the *More Homes, More Choice Act, 2019*[1] – received Royal Assent. Schedule 12 of the statute introduced a new authority under the *Planning Act*[2] that would allow municipalities to impose a new charge – the "community benefits charge". The purpose of the community benefits charge is to allow municipalities to fund the capital costs of community services and facilities that are required due to development or redevelopment.[3] In doing so, it fundamentally alters the current legislative scheme.

However, before the foregoing amendments under the *More Homes, More Choice Act, 2019* could be proclaimed in force, the Province introduced Bill 197 – the *COVID-19 Economic Recovery Act, 2020*[4] in the Ontario Legislature on July 8, 2020. Schedule 17 of Bill 197 proposed to overhaul and replace the statutory amendments related to community benefits charges. The *COVID-19 Economic Recovery Act, 2020* was enacted and received Royal Assent on July 21, 2020.[5]

The community benefits charge wholly replaces the height and density bonusing provisions under section 37 of the *Planning Act*, alters the applicability of the parkland dedication provisions in that statute and partially supplants development charges.

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[1] S.O. 2019, c. 9.

[2] Amendments to the community benefits charge provisions under the *Planning Act* were made by Schedule 31 of the *Plan to Build Ontario Together Act, 2019,* S.O. 2019, c. 15, to include new transition provisions for alternative parkland dedication and a mechanism to appeal a municipality's community benefits charge by-law to the Local Planning Appeal Tribunal.

[3] On February 28, 2020, the Province posted a notice to the Environmental Registry of Ontario ("ERO") to help guide the development and application of the community benefits charge: ERO No. 019-1406 - *Proposed regulatory matters pertaining to community benefits authority under the Planning Act, the Development Charges Act, and the Building Code Act*.

[4] Bill 197, 1st Sess, 42nd Leg. Ontario, 2020.

[5] S.O. 2020, c. 18.

The legislative amendments include the addition of new regulations under the *Planning Act* and amendments to existing regulations under the *Development Charges Act, 1997*[6] and the *Building Code Act, 1992*.[7]

This paper will answer the following questions:

- What is a community benefits charge?
- How is a community benefits charge calculated?
- How is a community benefits charge imposed?
- When is a community benefits charge payable?
- How can a community benefits charge be challenged?
- What are the rules for transition to a community benefits charge?

WHAT IS A COMMUNITY BENEFITS CHARGE?

1. A Charge Against Land to Fund Community Services

A community benefits charge is a single charge against land that the council of a local municipality[8] can impose, by way of a duly-enacted by-law, to fund the capital costs of infrastructure for community services, facilities or matters that are required as a result of development or redevelopment.[9]

Community benefits charges can be imposed to recover the capital costs of services that are needed due to development (such as affordable housing units and childcare facilities).

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[6] S.O. 1997, c. 27

[7] S.O. 1992, c. 23.

[8] A "local municipality" is defined in s. 1 of the *Municipal Act, 2001*, S.O. 2001, c. 25, to mean "a single-tier municipality or a lower-tier municipality." It does not include an upper-tier municipality such as a regional, county or district municipality.

[9] While the terms "development" and "redevelopment" are not defined for the purpose of s. 37, they may be discerned by reference to development approvals that are listed in s. 37(3) of the *Planning Act*.

The community benefits charge entirely replaces height and density bonusing in section 37 of the *Planning Act*, which had, since 1983, allowed local municipalities to authorize increases in height and density set out a zoning by-law in exchange for the provision of facilities, services or matters. Unlike section 37 agreements, which are negotiated on a project-by-project basis, the community benefits charge is determined by the use of a standard formula to be applied in a uniform manner.

Community benefits charges also allow a local municipality to accept in-kind contributions from landowners. Where a municipality agrees to accept an in-kind contribution, it will first have to provide the landowner with a valuation of the facilities, services or matters being provided. The value attributed to the in-kind contributions will then be deducted from the total community benefits charge payable.[10]

The community benefits charge applies to development or redevelopment that requires:

- a zoning by-law or zoning by-law amendment;
- a plan of subdivision;
- a minor variance;
- a conveyance of land subject to a part-lot control by-law;
- a consent;
- a plan of condominium; or
- a building permit.[11]

[10] This is similar to the scheme set out for credits under s. 38 of the *Development Charges Act, 1997,* which allows a municipality to accept services in-lieu of payment of development charge. Where a municipality agrees to accept services in-lieu of payment, it will grant credits to the developer to be applied to off-set the development charge that is payable. The value of the credit is the reasonable cost of the doing the work as agreed to by the municipality and the landowner unless the parties agree otherwise.

The *COVID-19 Economic Recovery Act, 2020* introduced s. 37(52) to the *Planning Act,* which allows the holder of a credit under s. 38 of the *Development Charges Act, 1997* to apply the credit towards payment of a community benefits charge as long as the credit was held before the community benefits charge by-law was passed and relates to services other than those listed in paragraphs 1 to 20 of subsection 2(4) of the *Development Charges Act, 1997.*

[11] The list now set out in s. 37(3) of the *Planning Act* is identical to the development approval list under s. 2(1) of the *Development Charge Act, 1997*.

A community benefits charge cannot be imposed on developments that have fewer than five storeys or less than 10 residential units. A community benefits charge also does not apply to redevelopment that will have fewer than five storeys, or to a redevelopment that proposes to add fewer than 10 residential units to an existing building or structure.[12]

2. A Parkland Acquisition Tool

The community benefits charge can also be used to fund the acquisition of parkland (not the *improvement* of parkland – that will remain a capital cost that may be funded by development charges).

If a municipality chooses to use the community benefits charge to acquire parkland, it will not be able to apply the basic parkland dedication provisions under the *Planning Act.* The existing parkland provisions of the *Planning Act* allow a municipality to require that a percentage of a development be dedicated as parkland or that cash-in-lieu be provided.[13]

A local municipality which decides to use the community benefits charge as a parkland acquisition tool may acquire land for parks by:

1. using a portion of the funds collected through the community benefits charge to pay for parkland; or

2. agreeing to accept land for parks from a developer rather than payment.

If a municipality agrees to accept land for parks, the value of the land will be deducted from the total community benefits charge payable.[14]

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[12] These exclusions are listed under s. 37(4) of the *Planning Act*. Clause 37(4)(e) indicates that additional exclusions may be prescribed by regulation.

Section 1 of O. Reg. 509/20 – *Community Benefits Charges and Parkland* lists six additional types of excluded development, including long-term care homes, retirement homes, post-secondary educational institutions, hospice and end of life care facilities, and various forms of non-profit housing.

[13] Parkland dedication as a condition of development or re-development and subdivision or consent is currently set out in ss. 42, 51 and 51.1 of under the *Planning Act*.

[14] See ss. 37(7) and (8) of the *Planning Act*.

Where a municipality decides not use the community benefits charge to acquire parkland, the parkland dedication provisions in the *Planning Act* will continue to apply.

A municipality may apply the existing parkland dedication provisions provided that the capital costs intended to be funded by a community benefits charge are not capital costs that are intended to be funded from the special account under subsection 42(15) of the *Planning Act.*[15]

3. A Complement to Development Charges

The imposition of a community benefits charge does not impact a municipality's ability to collect development charges. The two frameworks are proposed to co-exist alongside each other and are meant to be complementary to one another.

While the community benefits charge is used to fund infrastructure for an indefinite and non-specified array of community services, facilities or matters, development charges can only be used to fund the services that are expressly set out in the *Development Charges Act, 1997*.[16]

The *COVID-19 Economic Recovery Act, 2020* establishes that a community benefits charge can be imposed with respect to the services set out in the *Development Charges Act, 1997* as long as the capital costs that are intended to be funded by the community benefits charge are not capital costs that are funded by a development charges by-law.[17]

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[15] Subsection 42(15) of the *Planning Act* establishes a special account whose funds are to be spent on the acquisition of land for parks or other public recreational purposes, including the erection, improvement or repair of buildings and the acquisition of machinery for park or other public recreational purposes.

The *COVID-19 Economic Recovery Act, 2020* amends s. 37(5) of the *Planning Act* to provide clarity on the applicability of community benefits charges to land for parks and other public recreational services listed in the *Development Charges Act, 1997.*

[16] The list of eligible services for which development charges may be imposed are set out in s. 2(4) of the *Development Charges Act, 1997* and includes both hard services (water, waste water, storm water, highways and electrical power services) and soft services (police, ambulance and fire services) as well as other services that may be prescribed by regulation.

[17] The *COVID-19 Economic Recovery Act, 2020* adds a provision under s. 2 of the *Development Charges Act, 1997* to clarify the relationship between development charges and community benefits charges.

Schedule 3 of the *Covid-19 Economic Recovery Act, 2020* amended subsection 2(4) of the *Development Charges Act, 1997,* which sets out the list of services for which development charges may be imposed.

The new list of services under subsection 2(4) of the *Development Charges Act, 1997* is as follows:

- water supply services, including distribution and treatment services;
- waste water services, including sewers and treatment services;
- storm water drainage and control services;
- electrical power services;
- waste diversion services;
- services related to a highway as defined in subsection 1(1) of the *Municipal Act, 2001* or subsection 3(1) of the *City of Toronto Act, 2006,* as the case may be;
- Toronto-York subway extension, as defined in subsection 5.1(1) of the *Development Charges Act, 1997;*
- transit services other than the Toronto-York subway extension;
- policing services;
- fire protection services;
- ambulance services;
- services provided by a board within the meaning of the *Public Libraries Act*;
- services related to long-term care;
- parks and recreation services, but not the acquisition of land for parks;
- services related to public health;
- child care and early years programs and services within the meaning of Part VI of the *Child Care and Early Years Act, 2014* and any related services;

- housing services;
- services related to proceedings under the *Provincial Offences Act,* including by-law enforcement services and municipally administered court services;
- services related to emergency preparedness;
- services related to airports, but only in the Regional Municipality of Waterloo; and
- additional services as prescribed.

HOW IS A COMMUNITY BENEFITS CHARGE CALCULATED?

The community benefits charge is calculated based on the value of the land subject to development or redevelopment. The *COVID-19 Economic Recovery Act, 2020* gives the Province the power to prescribe a maximum percentage of land value that municipalities can collect as a community benefits charge by regulation**.**

On September 18, 2020, Minister of Municipal Affairs and Housing Steve Clark announced that the maximum amount for a community benefits charge would be 4% of the land's value, calculated as of the "valuation date". The 4% amount is prescribed by section 3 of O. Reg. 509/20. [18] The valuation date is the day before the date on which the first (or only) building permit is issued for the development or redevelopment.[19]

HOW IS A COMMUNITY BENEFITS CHARGE IMPOSED?

A municipality is required to enact a by-law to impose a community benefits charge in a manner similar to the imposition of development charges. Like a by-law under the

[18] This represents a significant change from the previous maximum percentages set out in the ERO notice that had proposed the following numbers:

- 15% for single-tier municipalities;
- 10% for lower-tier municipalities; and
- 5% for upper-tier municipalities.

[19] This is similar to the valuation date for parkland conveyance under s. 42(6.4) of the *Planning Act*.

Development Charges Act, 1997 that requires a background study and includes the specific consideration of a number of matters,[20] a municipality must prepare what is termed a "strategy" before it can enact a community benefits charges.

Section 2 of O. Reg. 509/20 contains specific requirements that a municipality must include when preparing a community benefits charge strategy:

- estimates of the anticipated amount, type and location of development and redevelopment that would be subject to a community benefits charge;
- anticipated increase in the need for facilities, services and matters attributable to the anticipated development and redevelopment;
- the excess capacity existing in relation to the specific facilities, services and matters giving rise to the increase in need for same;
- estimates of the extent to which an increase in a facility, service or matter would benefit existing development;
- the capital costs necessary to provide the facilities, services and matters; and
- any capital grants, subsidies and other contributions made to the municipality from other levels of government

Both section 37 of the *Planning Act* and O. Reg. 509/20 do not provide an enumerated list of precisely what "facilities, services and matters" may be charged for. This leaves local municipalities with a broad discretion over what amenities may be available for community benefits charges.

There is a mandatory consultation requirement that leaves it to a municipality's discretion as to how it will consult with persons and public bodies as to the development of the strategy.[21]

[20] See s. 10 of the *Development Charges Act, 1997*.

[21] See s. 37(10) of the *Planning Act*.

WHEN IS A COMMUNITY BENEFITS CHARGE PAYABLE?

The community benefits charge is payable before any construction can take place on a proposed development or redevelopment under subsection 37(44) of the *Planning Act*.[22]

The Province has also amended the *Building Code*[23] to add the community benefits charge to the list of "applicable law" that must be satisfied before a building permit can be issued.[24]

Where a municipality has agreed to accept in-kind contributions from a developer instead of payment, any facilities, services or matters that were agreed upon must also be provided before construction can begin.

HOW CAN A COMMUNITY BENEFITS CHARGE BE CHALLENGED?

There are two avenues to challenge a community benefits charge. The first is an appeal, which is a challenge of the community benefits charge by-law itself; the second is a dispute, which is a contests the quantum of the community benefits charge imposed.

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[22] This is similar to the date that a development charge must be paid under s. 26(1) of the *Development Charges Act, 1997*.

[23] O. Reg. 332/12.

[24] Pursuant to s. 8(2) of the *Building Code Act, 1992*, S.O. 1992, c. 23, a chief building official cannot issue a building permit unless it complies with, *inter alia*, "any other applicable law." The term "applicable law" for the purposes of s. 8(2) of the statute is defined by an enumerating listing of laws set out in article 1.4.1.3(1) of the *Building Code*. Sub-clause 1.4.1.3.(a)(xix.1) provides as follows:

> **(1)** For the purposes of clause 8 (2) (a) of the Act, *applicable law* means,
>
> (a) the statutory requirements in the following provisions with respect to the following matters:
>
> …
>
> (xix.1) section 37 of the *Planning Act*,
>
> (A) with respect to the payment of money or making arrangements satisfactory to the council of a municipality for the payment of money, where the payment is required by a community benefits charge by-law passed under subsection 37 (2) of the *Planning Act*, and
>
> (B) with respect to the provision of facilities, services or matters in accordance with subsection 37 (6) of the *Planning Act* or making arrangements satisfactory to the council of a municipality for their provision,

1. Appeal of Community Benefits Charge By-law

(a) Appeal Procedure

Once a community benefits charge by-law has been passed, there will be a 40-day appeal period. Any person or public body may appeal a community benefits charge by-law to the Local Planning Appeal Tribunal ("LPAT") by filing a notice of appeal with the clerk of the municipality. The notice of appeal must set out the objection to the by-law and must identify supporting reasons for the objection.[25]

Upon hearing the appeal, the LPAT has the jurisdiction to dismiss the appeal in whole or in part, order the municipality's council to repeal or amend the by-law, or repeal or amend the by-law in accordance with the limitations set out in subsection 37(11.12) of the *Planning Act.* The LPAT also has the authority to dismiss appeals without a hearing where it determines that the objection to the by-law is insufficient in law.

The LPAT's power to amend a community benefits charge by-law is restricted under subsection 37(11.12). The LPAT cannot amend a community benefits charge by-law: (i) to increase a community benefits charge, (ii) to add, remove, or reduce the scope of an exemption, (iii) to change phasing to require earlier payment of a community benefits charge, or (iv) to change the expiry date of the community benefits charge by-law.[26]

(b) Refunds on Repeal or Amendment

Where the LPAT repeals or amends, or orders that a municipality repeal or amend a community benefits charge by-law, the municipality will be required to issue a refund. If the by-law is repealed, the municipality will have to refund the entire community benefits charge paid under the by-law.

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[25] This is similar to the appeal process for a development charges by-law under s.14 of the *Development Charges Act, 1997.* A development charges by-law must be appealed within 40 days of its passing, the appeal must be in writing, and it must include supporting reasons for the objection. It is also similar to appeals of various land use planning approvals under the *Planning Act*.

[26] These exact restrictions also apply to the LPAT's amendment of a development charges by-law. See s. 16(4) of the *Development Charges Act, 1997.*

If the by-law is amended, the municipality will have to refund the difference between any community benefits charge paid under the by-law and the community benefits charge that would have been payable under the amended by-law. A municipality will be required to pay interest on any amounts refunded. [27]

2. Disputing the Quantum of Community Benefits Charge

A landowner can challenge the quantum of a community benefits charge where the charge imposed is believed to exceed the maximum permitted amount.

To challenge the quantum of a community benefits charge, the landowner will first have to pay the charge under protest and then provide the municipality with an appraisal of the value of the land as of the valuation date. If the municipality disputes this value, it will have to provide its own appraisal.[28]

Where each side has provided an appraisal, two outcomes are possible:

1. if the values of the two appraisals are within 5% of each other, the municipality will refund the difference between the amount of the community benefits charge imposed and the maximum community benefits charge amount based on the landowner's or the municipality's appraisal, whichever is higher; or

2. if the values of the two appraisals are not within 5% of each other, the municipality will have to request a second appraisal. The municipality will then refund the landowner the difference between the amount of the community benefits charge imposed and the maximum community benefits charge amount based on the second appraisal.

[27] The rate is established under s. 5 of O. Reg. 509/20 as the Bank of Canada rate on the date that the by-law comes into force. Alternatively, a municipality can indicate in its by-law that the interest rate payable on a community benefits charge refund is the Bank of Canada rate updated on the first business day of every January, April, July and October.

[28] This is different from the process that is used to challenge a development charge under s. 20 of the *Development Charges Act, 1997.* The complaint of a development charge requires a hearing by the local council of the municipality and carries a right of appeal to the Local Planning Appeal Tribunal. The time periods for appraisals are set out in s. 6 of O. Reg. 509/20.

WHAT ARE THE RULES FOR TRANSITION TO A COMMUNITY BENEFITS CHARGE?

The transition rules for the community benefits charge are set out in a new stand-alone provision in section 37.1 of the *Planning Act*.

1. Timeline for Transitioning

A municipality that chooses to implement the community benefits charge will have two years, until September 18, 2022, to pass the required by-law and implement the legislative and administrative changes necessary to transition to the community benefits charge framework.

2. Application of Existing Section 37 Provisions

Section 37.1 confirms that the height and density bonusing provisions of the *Planning Act* will continue to apply until a municipality passes a community benefits charge by-law, or until the cut-off date to transition into the community benefits charge framework.

Under section 37.1, the community benefits charge will not apply to developments that have a zoning by-law which includes any requirement to provide facilities, services or matters under the height and density bonusing provisions of now-repealed section 37 of the *Planning Act*, provided that the zoning by-law was passed before either:

1. the date on which the municipality passes a community benefits charge by-law; or

2. the outside date prescribed in the regulations, whichever is earlier.

Existing agreements made under the now-repealed height and density bonusing provisions in section 37 of the *Planning Act* will not be impacted by the community benefits charge.

CONCLUSIONS

Where a local municipality has passed a community benefits charge by-law, persons who develop or redevelop land will have to pay the community benefits charge as a condition of development or redevelopment. The purpose of a community benefits charge is to fund the provision of community services, facilities and matters. The community benefits charge may be imposed with respect to land for parks or services listed in subsection 2(4) of the *Development Charges Act, 1997* as long as the capital costs covered by the community benefits charge by-law are not also included in a development charges by-law or otherwise covered by the parkland provisions in the *Planning Act*.

A community benefits charge will be calculated based at a maximum rate of 4% of the value of the land under development and will be payable prior to the issuance of the first building permit. The community benefits charge by-law can be appealed to the LPAT within 40 days of its enactment. A landowner will also be able to challenge the quantum of the community benefits charge by filing a dispute.

The existing height and density bonusing provisions under section 37 of the *Planning Act* will be entirely replaced by the community benefits charge and existing section 37 agreements will be transitioned.

Municipalities will have a two-year period to develop a community benefits charge strategy and pass the requisite by-law.

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