



City of Hamilton

AUDIT, FINANCE AND ADMINISTRATION COMMITTEE ADDENDUM

Meeting #: 21-009

Date: June 3, 2021

Time: 9:30 a.m.

Location: Due to the COVID-19 and the Closure of City Hall (CC)

All electronic meetings can be viewed at:

City's Website:

<https://www.hamilton.ca/council-committee/council-committee-meetings/meetings-and-agendas>

City's YouTube Channel:

<https://www.youtube.com/user/InsideCityofHamilton> or Cable 14

Angela McRae, Legislative Coordinator (905) 546-2424 ext. 5987

5. COMMUNICATIONS

- *5.1. Correspondence from the West End Home Builders' Association, respecting the Adoption of Modern Pay on Demand Surety Bonds in Hamilton

Recommendation: Be received and referred to consideration of Item 10.1.

- *5.2. Correspondence from Brandon Campbell, President, Starward Homes, respecting the Adoption of Modern Pay on Demand Surety Bonds in Hamilton

Recommendation: Be received and referred to consideration of Item 10.1.

- *5.3. Correspondence from Mike Naples, Director, Masters Insurance Limited, respecting the Adoption of Modern Pay on Demand Surety Bonds in Hamilton

Recommendation: Be received and referred to consideration of Item 10.1.

10. DISCUSSION ITEMS

- *10.6. Citizen Committee Report - Committee Against Racism - Recommendations for the City's [Hamilton.ca/coronavirus](https://www.hamilton.ca/coronavirus) webpage with Respect to Anti-Asian Racism

June 3, 2021

Hamilton City Hall
 71 Main Street West
 Hamilton, ON L8P 4Y5

Chair and Members of the Audit, Finance and Administration Committee:

RE: The Adoption of Modern Pay on Demand Surety Bonds in Hamilton

The West End Home Builders' Association (WE HBA) is the voice of the land development, new housing and professional renovation industries in Hamilton and Halton Region. The WE HBA represents approximately 300 member companies made up of all disciplines involved in land development and residential construction, including: builders, developers, professional renovators, trade contractors, consultants, and suppliers. The residential construction industry employed over 27,300 people, paying \$1.7 billion in wages, and contributed over \$3.0 billion in investment value within the Hamilton Census Metropolitan Area in 2019.

Our industry is constantly facing challenges that affect our ability to build the necessary supply of new housing to meet growing demand for a variety of housing options in Hamilton. In February, WE HBA wrote to the Mayor supporting the recommendations in the report of the *Mayor's Task Force on Economic Recovery*. WE HBA had a direct role on the *Mayor's Task Force on Economic Recovery*, where WE HBA 1st Vice President Terri Johns worked collaboratively to provide our recommendations within a multi-sector approach to guide Hamilton's recovery. The task force recommended the City accept modern pay-on-demand surety bonds as financial security for projects to secure municipal agreements. To that effect, WE HBA is now writing in support of the City's adoption of modern pay-on-demand surety bonds, which emerged as a recommendation from the Mayor's Task Force.

Should the City of Hamilton enable the use of modern pay-on demand surety bonds, this represents a significant process improvement, and will allow greater capital liquidity to invest in the City of Hamilton. When approving a development proposal modern pay-on-demand surety bonds can be used as assurance that the necessary site improvements will be made by the developer.

Historically, it was common practice that Ontario municipalities accepted surety bonds as financial security for subdivision agreements and site plans. Since the 1980's, municipalities have moved away from accepting surety bonds as a form of financial security and today almost exclusively require letters of credit from a chartered bank. The problem with letters of credit is that developers are often required to collateralize the letter of credit dollar for dollar against the value of the municipal works. Often this means developers can only afford to finance one housing project at a time because of the letter of credit financial security requirements through the financial institution. Modern pay on demand surety bonds provide the required municipal financial security, while not tying up private capital that could be used for investment in additional development projects that support well



paying jobs in the skilled trades. Encouraging private investment and supporting job creation in Hamilton was a key objective of the Mayor's Task Force and Economic Recovery and this tool will have a direct impact to support the attractiveness of investing private capital in the City of Hamilton.

Modern pay-on-demand surety bonds are proven to provide the same benefits and security as a letter of credit. The City of Hamilton will have access to all the features of a letter of credit while enjoying the added benefit of professional underwriting, carried out by licensed bonding companies, ensuring that the developer is qualified to fulfill its obligations under the municipal agreement. Most importantly, from a municipal perspective, is the financial obligation is secured and if a problem were to arise, the secure bond is fully payable by the bond company on demand. This proposed change could unlock millions of dollars of private sector financial liquidity for investment in new infrastructure and housing projects, provide for more units per development and accelerate the delivery of housing of all types.

As Hamilton emerges from the COVID-19 Pandemic and continues to grow, WE HBA is very supportive of the City of Hamilton allowing the use of modern pay-on-demand surety bonds to secure development agreements. Recovering from the impacts of COVID -19 and understanding the significant growth pressures our region is experiencing, allowing the use of modern pay-on-demand surety bonds will help our members positively contribute to the recovery of our city through the reinvestment of funds into other much needed housing projects. Today, Hamilton has an important opportunity to be leaders in this space and achieve a competitive advantage, while setting a precedent for the adoption of surety bonds in other municipalities throughout Ontario.

Sincerely,

Michael Collins-Williams, MCIP, RPP
Chief Executive Officer
West End Home Builders' Association

Terri Johns, MCIP, RPP
First Vice President
West End Home Builders' Association





May 26, 2021

Hamilton City Hall
71 Main Street West
Hamilton, ON L8P 4Y5

Chair and Members of the Audit, Finance and Administration Committee:

RE: The Adoption of Modern Pay on Demand Surety Bonds in Hamilton

Starward Homes is a fourth-generation residential construction company that has been building homes in Hamilton for 115 years.

Under the current process, we are required to submit Letters of Credit through our banks to satisfy the development requirements. We are encouraged by the recommendations proposed by the West End Home Builders' Association and the *Mayor's Task Force on Economic Recovery* that the City would be able to accept surety bonds as financial security for projects to secure municipal agreements.

The change from a Letter of Credit to a Surety Bond will allow us to reinvest our equity more quickly into additional future developments rather than leaving equity in completed projects due to the requirement of cash collateralizing outstanding Letters of Credit at the completion of a development. Since the finalization of letters of credit can sometimes take 5 or more years after the closing of the final residential units in a development, we often have a significant amount of equity tied up in cash security for completed projects.

Given that the Pay on Demand surety bonds have the same benefits and security as a letter of credit, the City of Hamilton will continue to have the required security from developers such as Starward but they will also have the benefit of professional underwriting that is carried out by licensed bonding companies which will ensure that the developer is qualified to fulfill its obligations under the municipal agreement.

We fully support the City's adoption of this recommendation and look forward to the implementation of this as an alternative to the traditional Letter of Credit.

Sincerely,

A handwritten signature in blue ink, appearing to be "BC", written over a faint circular stamp.

Brandon Campbell
President
Starward Homes Group of Companies



Masters Insurance Limited
TORONTO | HAMILTON | OTTAWA | WINDSOR | ROCHESTER, NY

T 905 738 4164 F 905 738 5143
7501 Keele Street, Suite 400, Vaughan, ON L4K 1Y2
mastersinsurance.com

Re: Audit, Finance and Administration Committee Meeting

June 2nd 2021

City of Hamilton Audit, Finance and Administration Committee

Meeting #: 21-009

Date: June 3, 2021

Time: 9:30 a.m.

Discussion Item 10.1. Development Agreement Surety Bonds (FCS21056 / LS21021) (City Wide)
(Outstanding Business List Item)

Masters would like to thank the Audit, Finance and Administration Committee for the opportunity to participate in this meeting as a stakeholder.

When approving a proposal to develop real estate, municipalities look for assurance that the necessary site improvements will be delivered in a timely fashion and warranted by the developer. To ensure that the developer has the necessary financial resources to deliver and pay for the required site improvements, municipalities typically require financial security from the developer.

In Ontario, the most common form of security has historically been limited to a very narrow range of instruments. Most typically, municipalities will require the posting of cash, a certified cheque or an irrevocable standby letter of credit.

Subdivision Bonds have been an acceptable form of security for municipal subdivision agreements. Several Canadian municipalities have now adopted policies to allow Subdivision Bonds to be accepted.

Subdivision Bonds guarantee the developer's obligations to the municipality under the Subdivision Agreement and have been designed to incorporate the core demand elements of a letter of credit. The feasibility of Subdivision Bonds as security are further discussed in the attached *Subdivision Bonds V Letters of Credit* Report, dated November 16, 2020.

The report was submitted to the Development Industry Liaison Group (DILG). In the months that followed, Masters consulted with the City of Hamilton and the Surety Industry to determine what, if any, Subdivision bond template language would be acceptable. Masters submitted bond template language for the City's and the Industry's consideration and review.

On Tuesday, May 11, 2021, the City of Hamilton's Financial Planning, Administration and Policy Department returned the bond template language with proposed changes. Ultimately, the changes were reviewed and accepted without any further comment from Masters.

Mike Naples
Director
Masters Insurance Limited





SUBDIVISION BONDS V. LETTERS OF CREDIT

File: DILG 1523-01

Date: Nov 16, 2020

PREPARED BY:

Mike Naples, Director
Masters Insurance Limited

PREPARED FOR:

Development Industry
Liaison Group (DILG) c/o

Terri Johns

T. John Consulting

Lindsay Gillies,

City of Hamilton

Tony Sergi

City of Hamilton

November 16, 2020

TABLE OF CONTENTS

| | |
|---|----|
| | 1 |
| COVER MEMO | 3 |
| INTRODUCTION..... | 4 |
| PERFORMANCE BONDS AND SUBDIVISION BONDS EXPLAINED | 5 |
| Performance Bonds | 5 |
| Subdivision Bonds | 5 |
| COMPARISON - SUBDIVISION BONDS and LETTERS OF CREDIT | 6 |
| DEVELOPER SURETY BONDS TRIED AND TESTED in Ontario | 8 |
| Developer Surety and the Law in Ontario | 8 |
| Tarion Bonds | 8 |
| Excess Condominium Deposit Insurance (ECDI)..... | 8 |
| Analysis of Security – Tarion Warranty Corporation | 9 |
| OTHERS IN COMPARABLE POSITIONS | 9 |
| Emerging Municipal Practice: Case Studies | 9 |
| City of Calgary, 2019 | 9 |
| Sault Ste. Marie, 2019 | 10 |
| Town of Bracebridge, 2018..... | 10 |
| Town of Innisfil, 2015 | 11 |
| City of Pickering, 2015..... | 13 |
| Jurisdictions Allowing Subdivision Bonds as Security via By-law or policy document..... | 13 |
| Other municipalities where Subdivision Bonds have been issued. | 13 |
| IMPLEMENTATIONS PROCESS | 14 |
| Implementation Diagram..... | 14 |
| MASTER PLAN COMMUNITIES (HUGE PROJECTS / HUGE EFFORTS)..... | 15 |
| CONCLUSION | 16 |
| REFERENCES..... | 17 |



COVER MEMO

November 16, 2020

Terri Johns, Lindsay Gillies, Toni Sergi c/o
 Development Industry Liaison Group
 71 Main Street West,
 Hamilton, ON
 L8P 4Y5

RE: Subdivision Bonds as an alternative to Letters of Credit.

Established in 1966, Masters Insurance is closely attuned to the unique intricacies of the construction and realty industries. Developer Surety is a complex area that demands highly specialized knowledge in accounting/finance and regulatory practices. Our staff, including a chartered accountant, a former senior underwriter at Tarion, and a former banking executive, help projects move forward with relevant funding resources, while also upholding our responsibilities and the responsibilities of all parties. With continued trust in our systems and governing entity, our goal is to build a partnership and understanding with the City of Hamilton, in which together, we can achieve a common desired result – creating progressive communities where people want to live.

We are entrusted with decision making authority by Canada's highest rated bonding companies allowing us to deliver on solutions. We have facilitated bonds for a number of complex projects, including master-planned communities like Friday Harbour where a Subdivision Bond was used to secure the obligations in the Subdivision Agreement and was an integral part of the Construction Lenders capital stack. We trust that the enclosed review will serve as a comparable example that demonstrates the potential for Roxboro and Pier 8 Waterfront Redevelopments.

With thorough review of our report, we hope that The City of Hamilton would give consideration to pilot the use of Subdivision Bonds for the above mentioned, high-profile projects.

We look forward to your response.

Yours truly

A blue ink signature of Mike Naples, consisting of several overlapping loops and lines.

Mike Naples
 Director

A blue ink signature of Doug Corby, featuring a large, stylized 'D' and 'C' intertwined.

Doug Corby
 Partner

C.c Sam Ciccolini, Founding Partner
 C.c Wade Corby, Partner

INTRODUCTION

When approving a proposal to develop real estate, municipalities look for assurance that the necessary site improvements will be delivered in a timely fashion and warranted by the developer. To ensure that the developer has the necessary financial resources to deliver and pay for the required site improvements, municipalities typically require financial security from the developer.¹

The obligation to build is most typically found in either a Subdivision Agreement, a site plan agreement or some other form of development agreement (in Ontario). The agreement will describe the services to be constructed by reference to plans and specifications prepared by the developer's consulting engineer and reviewed and approved by the municipality's engineers. The services are typically designed according to engineering design criteria prepared by the municipality and adopted by council. This ensures that services will be constructed to an acceptable and common standard.

The development agreement governing the construction will contain clauses respecting the satisfactory completion of the services because ultimately, the services will be owned by the municipality and therefore the municipality will be responsible for the continued maintenance, repair and replacement of the services and will be responsible for any liability resulting from the operation and use of the services by members of the public. During the maintenance period described above (usually 2 years or more), the developer is responsible to make all repairs to any part of the system that does not perform to a satisfactory standard. The agreement will also contain certain financial provisions which are intended to guaranty to the municipality that the services will be completed to the approved specifications and that they will function appropriately.

In Ontario, the most common form of security has historically been limited to a very narrow range of instruments. Most typically, municipalities will require the posting of cash, a certified cheque or an irrevocable standby letter of credit. Bonds have been an acceptable form of municipal subdivision services security in the US for many years. Several Canadian municipalities have now adopted policies to allow bonds to be accepted. Notably, the City of Pickering has adopted such a policy. The City of Calgary², the City of Grand Prairie, The Regional Municipality of Durham and the City of Greater Sudbury have all accepted some form of Surety Bond for the construction of municipal services³.

Where the parties involved are open to more flexible and creative arrangements we believe that we will continue to see more and more municipalities accept Surety Bonds as security for subdivision services in future.

¹ Dick Longland, National Vice President, Intact Insurance (Securing Subdivision Agreements with Surety Bonds, (Oct 2017)

² City of Calgary's Planning Service Centre.(Mar 2019)

³ Quinto Annibale, Partner Loopstra Nixon LLP, International Municipal Lawyers Association (IMLA) Securing Construction of Public Highways and Other Municipal Services (Oct 2015)

PERFORMANCE BONDS AND SUBDIVISION BONDS EXPLAINED ⁴

Performance Bonds

Are a promise from an Issuer to the Beneficiary that if the Principal defaults on an underlying agreement, the Issuer will remedy the default.

Municipalities in Ontario have historically avoided Performance Bonds, a type of Surety Bond, to secure subdivision works. This is because Performance Bonds can present complications to recovery, including:

- i. **Risk**: That the terms of the Performance Bond, will be strictly interpreted by the courts to prevent recovery.
- ii. **The amount of administrative work**: A time-consuming process to file a claim for default before recovery is available
- iii. **Delays**: Resulting from recovery not being “on demand”, and sometimes requiring the commencement of a legal process.
- iv. **The risk of delays**: While the Surety investigates whether an alleged default is covered by the Performance Bond.
- v. **The scope of recovery**: Being potentially limited to only damages incurred resulting from the default instead of remedying the default.

Subdivision Bonds

Guarantee the developers obligations to the municipality under the Subdivision Agreement and have been designed to incorporate the core elements of a letter of credit. Subdivision Bonds are a three party agreement between the Municipality/Obligee, the Developer and the Surety Company. The Bond amount is determined by the Obligee in the Subdivision Agreement.

- i. **Default**: The surety’s obligation under the Subdivision Bond arises if the Developer fails to perform its obligations to the Municipality under the Subdivision Agreement. The Municipality is to declare the Developer in default under the Subdivision Agreement in accordance with the terms of the Subdivision Agreement. The Subdivision Bond contains the important clauses that conform to the same Uniform Customs and Practice (UPC 600) terms that are widely incorporated into letters of credit.⁵
- ii. **Payment on Demand**: As is with letters of credit the principle is that the Issuer should be in no way concerned with performance on the underlying contract and that the obligation to pay is not subject to any defence. Where the “on demand” principle is incorporated

⁴ Kim Beckman and Alex Lusty , Davies Howe LLP (Subdivision Bonds and Letters of Credit (May 2020)

⁵ Quinto Annibale, Partner Loopstra Nixon LLP, International Municipal Lawyers Association (IMLA) Securing Construction of Public Highways and Other Municipal Services (Oct 2015)



principle is incorporated into the Subdivision Agreement the Subdivision Bond will function identically to Letters of Credit

- iii. **Cancellation:** Cancellation is effective only if the Developer provides the replacement security – in a form and amount acceptable to the Municipality – 30 days before the cancellation of the Bond. If acceptable replacement security is not provided to the Municipality by the Developer, the bond remains in effect.
- iv. **Bond Return:** When all the obligations of the Developer under the Subdivision Agreement are performed to the satisfaction of the Municipality, the Municipality will return the Subdivision Bond to the Surety for cancellation. This is the same process used for Letters of Credit.

Subdivision Bonds, when constructed properly, function identically to Letters of Credit.⁶

COMPARISON - SUBDIVISION BONDS and LETTERS OF CREDIT

| Element | Subdivision Bond | Letter of Credit |
|-------------------------|---|---|
| Prequalification | <p>(+) To obtain a subdivision bond, a developer must demonstrate not only the financial means to complete the development project, but also the expertise, resources and operational controls to bring it to a successful conclusion.</p> | <p>(-) No prequalification provided and the provision of a letter of credit provides no insight as to the capabilities of the developer.</p> |
| Cash Position | <p>(+) <u>Working Capital:</u> Sureties assess the working capital and cash flow of the Developer (principal)</p> <p>(+) <u>Greater Credit Availability.</u> By using a subdivision bond instead of a letter of credit, the developer makes available bank financing that can be used to grow the company's business and improve its liquidity</p> <p>(+) <u>Off-Balance Sheet Security:</u> Subdivision bonds are considered "off-balance sheet" security, meaning they do not encumber a developer's balance sheet as a letter of credit would. Using</p> | <p>(-) <u>Credit Availability:</u> A Letter of Credit diminishes the amount of credit available to the Developer which can cause cash flow issues during a project.</p> <p>(-) <u>Potential of default:</u> Is increased if the Developer does not have the cash flow and banking credit to pay the bills.</p> <p>(-) <u>Cash Reserves:</u> A Developer must have access to significant cash reserves and/or borrowing lines to secure a LOC.</p> |

⁶ Kim Beckman and Alex Lusty , Davies Howe LLP (Midhurst Subdivision Bonds and Letters of Credit (May 2020)

| | | |
|---------------------------|---|---|
| | <p>this form of security maximizes the financial resources available to the developer to complete the proposed development</p> <p>(+) Access to Unproductive Cash: Since a subdivision bond allows the developer to access the substantial amounts of idle cash that usually secures the letter of credit, the developer is much better positioned to satisfy the cash-flow requirements of the development project</p> | |
| Project Monitoring | <p>(+) Risk Mitigation</p> <ul style="list-style-type: none"> ▪ Examine track record and current work in progress (WIP) ▪ Evaluating Site Plan obligations ▪ Examine the principals financial capacity to perform the obligation ▪ Asses expertise ▪ Review credit history ▪ Management ▪ Access to qualified sub-contractors | (-) Simply indicates that the developer can post the required security at a specific point in time. |
| Payment on Demand | <p>(+) Upon receiving the Demand from the Municipality, the Issuer shall make payment to the Municipality in the amount of the Demand to enable the Municipality to remedy the Developer's default under the Subdivision Agreement</p> | <p>(+) The manner of payment on Letters of Credit given to municipalities tends to be "on sight" or "on presentation". The practical effect is that there is very little delay between demand and payment</p> |
| Issuer | <p>(+) Licensed insurance company</p> | <p>(+) Chartered Bank or Financial Institution</p> |



DEVELOPER SURETY BONDS TRIED AND TESTED in Ontario

In 1976, the Government of Ontario delegated Tarion Warranty Corporation (Tarion), formerly known as the Ontario New Home Warranty Program, as a non-profit corporation to administer the *Ontario New Home Warranties Plan Act* (Act). (The word “Tarion” is a partial anagram of “Ontario.”)

Developer Surety and the Law in Ontario

Developer Surety Bonds satisfy provincial legislation by providing warranty and deposit protection to home buyers. Ontario condominium developers encounter two pieces of legislation when developing a new condominium project: *The Ontario New Home Warranties Plan Act*, and *the Condominium Act*.

Tarion Bonds

Tarion Warranty Corporation (“Tarion”), is a non-profit corporation that was established in 1976 by the *Ontario New Home Warranties Plan Act*. Tarion ensures that builders abide by the Act, protecting consumers when developers fail to perform their obligations under the Act. All developers must be registered with Tarion to build and sell condominiums in Ontario. New condominium projects must be enrolled with Tarion prior to construction, and security must be provided to Tarion before the sale of any condominium units.

The Tarion Bond enables condominium developers to satisfy their security requirements under Tarion’s Builder Bulletin 28. The bond covers both deposit claims (up to \$20,000) and construction deficiency claims.

Excess Condominium Deposit Insurance (ECDI)

Provincial legislation outlines the rights and obligations of condominium purchasers and sellers. In Ontario, the *Condominium Act* requires that deposits paid to the developer by a condominium purchaser must be held by a prescribed trustee in a separate trust account. These deposits may be released from the trust account to the developer, so long as an Excess Condominium Deposit Insurance (ECDI) policy is issued to the prescribed trustee. An ECDI policy guarantees that the deposits released to the developer will be repaid if the developer fails to deliver the condominium to the purchaser in accordance with the purchase agreement. From the developer’s perspective, an ECDI policy enables the developer to use the purchasers’ deposits as a source of financing for the construction of the condominium project.

The ECDI policy is issued on new residential condominium projects in Ontario. The ECDI policy guarantees purchasers’ deposits in excess of the \$20,000 that is guaranteed by the Tarion bond

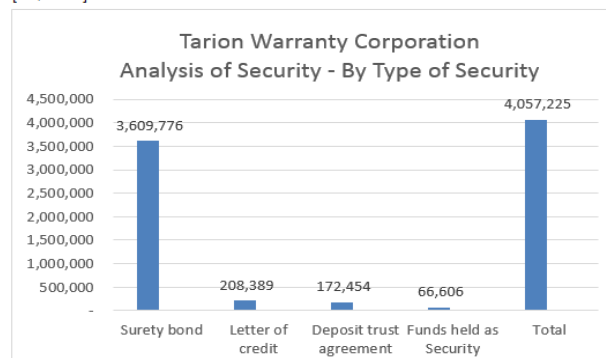


Analysis of Security – Tarion Warranty Corporation

Tarion Warranty Corporation
Analysis of Security - By Type of Security
Period Ending September 30, 2020

| Security Type | Amount | |
|-------------------------|------------------|-----|
| Surety bond | 3,609,776 | 89% |
| Letter of credit | 208,389 | 5% |
| Deposit trust agreement | 172,454 | 4% |
| Funds held as Security | 66,606 | 2% |
| Total | 4,057,225 | |

[In \$000's]



OTHERS IN COMPARABLE POSITIONS

Emerging Municipal Practice: Case Studies⁷

As mentioned at the outset, Subdivision Bonds are being implemented by municipalities who have found they are a direct replacement for Letters of Credit. What follows is a review of the reasons provided by municipalities that have decided to accept Subdivision Bonds in place of Letters of Credit.

City of Calgary, 2019

The City of Calgary (“**Calgary**”) made the decision to accept bonds as security for a range of development agreements in March, 2019. Prior to this decision being made, Calgary, like most municipalities, relied on Letters of Credit issued by banks.

Calgary decided to accept bonds, including Subdivision Bonds, in place of Letters of Credit for the following reasons:

1. The bonds can be structured to have the same flexibility as a Letter of Credit;
2. Like Letters of Credit, bonds auto-renew (do not expire);
3. Bonds bind developers to the obligations of the development agreement just as easily as Letters of Credit;
4. Bonds can be liquidated just as easily as Letters of Credit; and,
5. Security reductions for bonds are handled in the same way as reductions for Letters of Credit.

⁷ Kim Beckman and Alex Lusty, Davies Howe LLP (Midhurst Subdivision Bonds and Letters of Credit (May 2020))



Calgary allowed Subdivision Bonds to replace Letters of Credit in development agreements retroactive to 2016. Retroactive acceptance suggests that Calgary was highly confident in the reliability of Subdivision Bonds.⁸

Sault Ste. Marie, 2019

On September 9, 2019 Council for the City of Sault Ste. Marie passed a resolution authorizing Staff to pilot the use of subdivision bonds following a recommendation from the City Solicitor.⁹ The City Solicitor's report:

1. Drew the distinction between Performance Bonds which are provided by contractors undertaking work on behalf of the City and Subdivision Bonds which are provided by developers to secure works in a subdivision agreement.
2. Summarized the features of Subdivisions Bonds as:
 - 2.1. Providing a municipality with the funds required to correct a default by a developer;
 - 2.2. Being customizable; and,
 - 2.3. Being capable of being drawn against partially and repeatedly (more closely resembling a letter of credit).
3. Noted that:
 - 3.1. The developer must be prequalified by the Issuer which requires demonstrating they have the financial means, expertise and operational controls to complete the project; and,

The prequalification of developers is an advantage to the municipality.¹⁰

Town of Bracebridge, 2018

In February, 2018 the Town of Bracebridge passed a resolution of Council approving, what they refer to as "Surety Bonds" for use as security in their development agreements, which includes subdivision agreements.¹¹ An amendment to Bracebridge's *Installation and Maintenance of Municipal Services By-law 2000-95*, which prescribes acceptable forms of security for development agreements, was to follow the resolution, but appears to have not yet been enacted.

The Staff Recommendation Report, explained that:

1. Issuers of bonds recognized that their terms had to evolve if they wanted to remain competitive with other financial security products.

⁸ City of Calgary, Calgary Approvals Coordination Bulletin, (Amended May 6, 2019), "Developer Surety Bonds – Transition Letters of Credit", online:

⁹ City of Sault Ste. Marie, "Council Resolution 6.12" (2019)

¹⁰ City of Sault Ste. Marie, "Staff Report re: Performance Bonds and Letters of Credit" (2019)

¹¹ Town of Bracebridge, "Council Resolution 6.2" (2018)



2. Issuers perform additional due diligence that is not completed when producing Letters of Credit. The extra due diligence provides further assurance to the municipality that the Developer is fully capable of completing the proposed development.
3. In the event of a default, the municipality completes a notice of claim (or demand) and declaration of default under the terms of the development agreement. Funds are then released to the municipality and remedial action is taken. Subsequent to remediation, an accounting of expenses is produced, and any unspent funds are returned to the Issuer.
4. The Town's Solicitor confirmed that there is no difference in security for a municipality if development agreements are secured by surety bonds, provided certain key terms are included and the Issuer has acceptable financial status and capacity.¹²

It is important to note that the Town's Solicitor viewed Subdivision Bonds and Letters of Credit as capable of being interchangeable.

Town of Innisfil, 2015

The Council of the Town of Innisfil authorized the use of a bond as security for an external works agreement associated with a major development called Friday Harbour Resort in June, 2015. Prior to authorizing the use of the bond, Innisfil only accepted cash and Letters of Credit as security. The example set by the Innisfil is generally recognized as the first documented use of a Subdivision Bond in the Province.

The Town's external legal Counsel advised the Town that the bond would be as liquid as a Letter of Credit if it had the following characteristics, ensuring the bond aligned with the principles in UCP 600:

1. The bond must reference the specific agreement for which it provides security to.
2. The bond should act as standby security. It is only anticipated to be cashed in the event of default, as determined by the Municipality.
3. The bond should be cashable by the Municipality on demand, without cause or regard for the equities. This means that although the Municipality would be required to provide notice to the Issuer that it considers the Developer to have defaulted on the agreement, the Municipality is not required to justify or provide evidence of the default condition in order to cash the bond and the Issuer is given no right in the bond language to dispute the determination of default by the Municipality. The terms of the bond should be adjusted to allow as much control as possible for the Municipality.
4. The bond should be irrevocable, meaning that it cannot be cancelled or modified in any way without the consent of the parties.

¹² Town of Bracebridge, "Staff Report FN004-18: Development Agreement Securities – Surety Bonds" (2018).



5. The bond should either not expire or should provide for automatic renewal. It should be capable of being terminated by the Issuer only on a predetermined length of notice so that the Municipality has the opportunity to determine next steps, which could include a requirement for new security or the ability to cash the bond.
6. Partial draws should be permitted by the Municipality where the cost of remedying a default is less than the value of the bond.
7. Partial reductions in the bond amount should be permitted as works are completed (although not crucial as generally this benefits the Developer more than it does the Municipality).
8. In its bond policy, the Municipality should be permitted to require a replacement security if the credit rating of the Issuer falls below what is considered acceptable. This is intended to ensure that the security provided by the Developer remains suitable throughout the life of the obligations under the agreement.¹³

The bond provided for in this project was for \$25 million and represented 100% of the costs of the external works.

Staff were satisfied that a bond, with the characteristics above, could be as liquid as a Letter of Credit and ultimately recommended that the bond be used.

The Innisfil example is notable for the opinion of external legal counsel who concluded that, provided certain terms were included the bond it would be equivalent to a Letter of Credit. Based on the experience in Innisfil, which has largely been used as the starting point for other municipalities investigating the use of Subdivision Bonds, we expect that the Township would only accept a bond from one of the major Canadian banks or an insurance company that:

1. Is required to publicly report on its financial position;
2. Is strongly capitalized with predominantly liquid assets;
3. Has a favourable rating from A.M. Best (A or better) or Standard and Poor's (A- or better); and,
4. Is regulated by the Office of the Superintendent of Financial Institutions ("OSFI" and is required to comply with OSFI minimum capital requirements.

¹³ Town of Innisfil, "Staff Report DSR-116-15 re: Friday Harbour External Works Agreement - Security of Agreement with Bonds" (2015)



City of Pickering, 2015

On March 23, 2015, through Council resolution 35/19, the City of Pickering approved the use of bonds as security in subdivision agreements, site plan agreements and other municipal agreements of a similar nature.¹⁴ The passing of the resolution was based on a report from the City's Director of Corporate Services and City Solicitor dealing with the City's 2015 capital budget.¹⁵

In the Report, the reasons given for recommending the use of bonds, in addition to economic benefits realized by the Developer, were:

- Pickering would benefit from the use of Subdivision Bonds since the Developer's ability to finance its business would be improved, which in turn reduces the risk of default by a Developer on a development agreement; and,
- Pickering would continue to have secure and appropriate financial protection for subdivision and other agreements.

This is the third example, in addition to Innisfil and Bracebridge, of a lawyer advising a municipality that properly structured bonds function the same as Letters of Credit.

Jurisdictions Allowing Subdivision Bonds as Security via By-law or policy document.

Other municipalities that permit the use of Subdivision Bonds as security, whether through a by-law or a policy document include:

1. Region of Durham (By-law)¹⁶,
2. City of Windsor (Policy)¹⁷; and,
3. Town of Lakeshore (Policy)¹⁸.

It should be noted that the Region of Durham By-law requires 10-25% of internal and 100% of external works to be secured.

Other municipalities where Subdivision Bonds have been issued. ¹⁹

1. Township of Guelph-Eramosa (ON)
2. Town of Gananoque (ON)
3. Municipality of Strathroy-Caradoc (ON)
4. Municipality of Chatham-Kent (ON)
5. Peterborough Utilities Commission (ON)

¹⁴ City of Pickering, "Council Resolution 35/19" (2015)

¹⁵ City of Pickering, "Staff Report FIN 08-15 re: 2015 Current and Capital Budget" (2015)

¹⁶ Region of Durham, By-law 35-2018, s. 30-33

¹⁷ City of Windsor, "Development Manual" (2015)

¹⁸ Town of Lakeshore, "Development Manual" (2017)

¹⁹ Dick Longland, National Vice President, Intact Insurance (May 11, 2020)

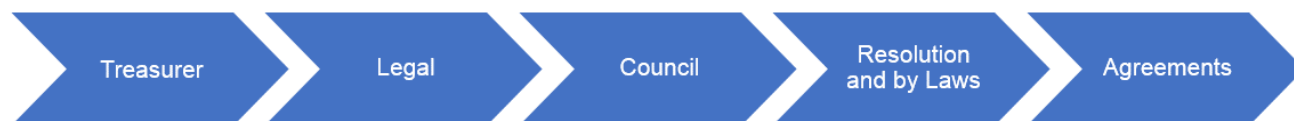
IMPLEMENTATIONS PROCESS

There is no express provision of the *Planning Act* or *Municipal Act* that requires Council approval prior to the acceptance of a Subdivision Bond as security on a Subdivision Agreement in place of a Letter of Credit.²⁰

We anticipate that where request to use a Subdivision Bond in place of a Letter of Credit is made, The Municipality will seek Council direction. While staff are not, strictly speaking, required to do so, this has been the practice in virtually all instances where Subdivision Bonds are used.

²¹

Implementation Diagram



Step 1.

Treasurer / CFO in agreement to conduct due diligence on the use of a Bond

Step 2.

Review Bond Wording for remarks and approval.

Once approved, then submit recommendation to council

Step 3.

Vote on recommendation.

Step 4.

Incorporate into By-Laws.

Step 5.

Update agreement

²⁰ Kim Beckman and Alex Lusty , Davies Howe LLP (Midhurst Subdivision Bonds and Letters of Credit (May 2020)

²¹ Kim Beckman and Alex Lusty , Davies Howe LLP (Midhurst Subdivision Bonds and Letters of Credit (May 2020)

MASTER PLAN COMMUNITIES (HUGE PROJECTS / HUGE EFFORTS)

Friday Harbour is a prominent project, backed by 4 of the most reputable home builders in Ontario. With a mix of resort-style and residential living, there are unique characteristics that bring increased complexity throughout the course of construction. We can comparatively see similar, anticipated complexities to those of Roxboro and Waterfront Pier 8 – projects that are also supported by top tier builders. The projects outlined below are similar in scope and magnitude, making Roxboro Park and Waterfront Pier 8 ideal candidates to pilot the use of Subdivision Bonds in the City of Hamilton.

FRIDAY HARBOUR RESORT

www.fridayharbour.com

1. Marina
2. Golf course
3. Resort residential units (1600 units)
4. Hotel (minimum 400 units)
5. Conference space
6. Pumping Station

Note* The Subdivision Agreement requires the project to be developed in 4 phases.

Subdivision Bond Amount: \$33,667,000



ROXBOROUGH PARK

<https://urbansolutions.info/roxborough-park>

Roxboro is an ambitious 13-acre development that will revitalize an east end Hamilton neighbourhood, while addressing the critical need for more affordable housing in the city. The project is a strategic alliance between Carriage Gate Homes, UrbanCore Developments, Effort Group and City Housing Hamilton (CHH) that could see up to 800 units constructed, including new CHH-owned rental apartments.

Subdivision Bond Amount: TBD



WEST HARBOUR KEY PROJECT - PIER 8 DEVELOPMENT

<https://www.hamilton.ca/city-initiatives/priority-projects/vision-waterfront>

1. Residential (Market + Affordable) 1,292
2. Commercial (Office/Retail) 6,440m²
3. Institutional
4. Parking
5. Flagship Bier Hall
6. Fitness and Health

Subdivision Bond Amount: TBD



CONCLUSION

As was done with Friday Harbour, where a surety company and the municipality is open to such arrangements, incorporating terms and language that is typical of irrevocable standby letter of credit (“ISLOC”) into the surety contract can offer significant advantages to all parties involved.

On the one hand, the municipality gets the flexibility and peace of mind offered by an ISLOC. For example, if the developer defaults on its obligations it is unnecessary for the municipality to go through a drawn out negotiation with the surety company and the risk of non-performance is thereby drastically mitigated. As well, with amended language, the modified bond provides just as much protection to a municipality as an ISLOC. Meanwhile, the developer benefits, because although the modified bond now operates in many ways the same as an ISLOC would, the developer’s liability with respect to the surety remains in the nature of an indemnity. Under an ISLOC the developer would be required to provide dollar for dollar direct security and potentially tie up resources in the form of its line of credit with the issuing bank thereby decreasing the cash available to complete construction. This potentially reduces the risk of default which is an advantage for both the developer and the municipality. As well, the overall cost of borrowing for the developer is lower.

Where the parties involved are open to more flexible and creative arrangements I believe that we will see more and more municipalities accept Surety Bonds as security for subdivision services in future projects.²²

²² Quinto Annibale, Partner Loopstra Nixon LLP, International Municipal Lawyers Association (IMLA) Securing Construction of Public Highways and Other Municipal Services (Oct 2015)

REFERENCES

SECONDARY MATERIALS: ARTICLES

City of Hamilton 2016-2020, Ec-Dev-Action Plan

City of Hamilton, Comprehensive Development Guidelines and Financial Policies Manual (2019)

Urban Toronto (<https://urbantoronto.ca/news/2018/06/team-selected-lead-hamiltons-pier-8-redevelopment>) (June 14, 2018)

Toronto Star Diverse, \$400M housing plan is a focused vision for Hamilton <https://www.thestar.com/life/homes/2020/09/09/diverse-400m-housing-plan-kickstarts-a-vision-for-hamilton.html> (Sept 9, 2020)

Quinto Annibale, Partner Loopstra Nixon LLP, International Municipal Lawyers Association (IMLA) Securing Construction of Public Highways and Other Municipal Services (Oct 2015)

Kim Beckman/Alex Lusty Davies Howe LLP, Subdivision Bonds and Letters of Credit (May 7, 2020)

Surety Association of Canada, Information Paper Surety Bonds versus Letters of Credit <https://suretycanada.com/SAC/Resources/Information-Paper---Surety-Bonds-versus-Letters-of-Credit.aspx>

Ontario Homes Builders Association, Modern Surety Bonds as Financial Security for Municipalities Briefing Note (Nov 11, 2020)

Dick Longland, The Guarantee Company of North America, Subdivision Bonds for Residential Developments PPT (April 15, 2014)

Tarion Warranty Corporation, analysis of security by security type (Sept 30, 2020)



Hamilton

CITIZEN COMMITTEE REPORT

| | |
|--------------|--|
| To: | Audit, Finance and Administration Committee |
| From: | Committee Against Racism <div style="text-align: right;"> <hr style="width: 20%; margin-left: auto; margin-right: 0;"/> Marlene Dei-Amoah, Chair </div> |
| Date: | May 27, 2021 |
| Re: | Recommendations for the City's hamilton.ca/coronavirus webpage with Respect to Anti-Asian Racism |

Recommendation

It is recommended that the City of Hamilton Coronavirus Website Choose Solidarity message at <https://www.hamilton.ca/coronavirus> be amended to acknowledge the increase in anti-Asian racism against Asian communities, provide information about resources to support individuals who have faced racism, and provide information about anti-racism education.

Background

At its meeting of May 25th, 2021, the Committee Against Racism passed the following motion:

That the Committee Against Racism will submit a Citizen Committee Report with recommendations respecting Anti-Asian Racism message on the City of Hamilton's [Hamilton.ca/coronavirus](https://www.hamilton.ca/coronavirus) webpage.

Since the COVID-19 pandemic began, there has been a highly disturbing surge of anti-Asian hate including violent assaults, verbal harassment, and being coughed at or spat on.

A recent report funded by the Government of Canada, “A Year of Racist Attacks: Anti-Asian Racism Across Canada One Year into The COVID-19 Pandemic”, released by the Chinese Canadian National Council Toronto Chapter and other advocacy groups, documented and analyzed 1150 cases of racist attacks across Canada during the period of March 10, 2020, to February 28, 2021 which were reported through the online platforms covidracism.ca and eliminatehate.org. Data which was collected up to December 31, 2020, was analyzed. The traumatic attacks were reported to cause mental distress, emotional harm, and physical harm.

Forty percent of the attacks that were reported occurred in Ontario. The attacks happened in locations including public spaces, business (such as grocery stores and restaurants), public transport, and schools.

Acts of anti-Asian racism also happen within Hamilton and have been written about in both the Hamilton Spectator and the Statement of Solidarity Condemning Anti-Asian Racism from No Hate in the Hammer.

Analysis/Rationale

The Choose Solidarity message on the City of Hamilton Coronavirus website needs to be amended to acknowledge anti-Asian racism and provide information on resources to provide support for victims of racism in Hamilton. The City of Hamilton coronavirus webpage provides links, information, and contact information for topics related to COVID-19 such as COVID-19 vaccines, COVID-19 testing, and Protecting Yourself and Others. Although the Choose Solidarity message on the same webpage provides a positive message about inclusiveness and solidarity, it does not acknowledge anti-Asian racism and does not provide links, information, or contact information about supports for victims of anti-Asian racism that are available from the City of Hamilton or external resources. Furthermore, the Choose Solidarity message does not provide the much needed information on anti-racism education. Links to or information about anti-racism education can help stop the spread of misinformation which helps to fuel racism and to learn about what can be done to help.

Currently, the Choose Solidarity message on the <https://www.hamilton.ca/coronavirus> website states the following:

“The City of Hamilton values equity and inclusion and works to ensure Hamilton is a place where people of all ages, backgrounds and abilities are accepted and celebrated. Although the COVID-19 outbreak originated in China, this virus is not racially oriented - it is geographically oriented. This means that it does not discriminate among people who can be affected. Unfortunately, during the COVID-19 outbreak, persons of Chinese heritage (and other Asian countries)

have voiced concerns about the potential for discrimination. During times like this, people need to support each other and speak out against any instances of discrimination.”

In order to help support the victims and survivors of anti-Asian racism within Hamilton and to help our communities as a whole in the City of Hamilton to recover and thrive, it is recommended that the changes discussed above, acknowledging anti-Asian racism and relating to anti-racism education and support, be implemented on the City of Hamilton COVID-19 website.

Links referenced

<https://www.hamilton.ca/coronavirus>

<https://www.covidr racism.ca/> (findings section)

<http://www.elimin8hate.org/>

<https://nohateinthehammer.ca/stop-anti-asian-racism/>

<https://www.canada.ca/en/canadian-heritage/campaigns/asian-heritage-month/anti-asian-racism.html>

<https://www.thespec.com/news/hamilton-region/2021/04/01/anti-asian-racism-on-the-rise-learning-the-long-history-of-racialized-violence-is-part-of-the-solution-says-mac-researcher.html>

Related Websites and other Resources

<https://www.canada.ca/en/canadian-heritage/campaigns/asian-heritage-month/anti-asian-racism.html>

<https://toronto.ctvnews.ca/ontario-reveals-plan-to-combat-anti-asian-racism-in-schools-1.5425015>

Request for response

We thank the Audit, Finance and Administration Committee of the City of Hamilton for reviewing our recommendations on such an important matter. We would please ask that the City of Hamilton provide our committee with their response to our recommendations and updated wording and links for the Choose Solidarity section on the City of Hamilton COVID-19 web page in time for our committee to review for our next Committee Against Racism meeting on June 22, 2021.