

Community Benefits Charges: The New Section 37

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The *COVID-19 Economic Recovery Act, 2020* replaced the density bonusing scheme under section 37 of the *Planning Act* with a new regime, but with a transition to September 18, 2022.

The new section 37 permits the council of a local municipality to impose a community benefits charge (a “CBC”) against land to pay for the capital costs of facilities, services and matters required because of the development. Community benefits charges may be imposed on developments or redevelopments that require:

- the passing of a zoning by-law or an amendment thereto under s.34;
- the approval of a minor variance under section 45;
- a conveyance of land to which a by-law passed under subsection 50 (7) applies;
- the approval of a plan of subdivision under section 51;
- a consent under section 53;
- the approval of a description under section 9 of the *Condominium Act, 1998*; or,
- the issuance of a permit under the *Building Code Act, 1992*.

Municipalities are only permitted to impose CBCs for higher density residential development. Section 37 prohibits CBCs for developments or redevelopment of fewer than 10 residential units or for buildings or structures with fewer than 5 storeys. The new CBC regulation – O Reg 509/20 – exempts additional developments from CBCs, including developments intended for use as long-term care homes and certain post-secondary education uses.

Subsection 37(5) clarifies that municipalities may impose CBCs for both parkland purposes and for the services enumerated in the newly amended subsection 2(4) of the *Development Charges Act*. However, a municipality may not recover capital costs for the same service more than once. Essentially, CBCs can fund capital costs of municipal services that are not being recovered under a parkland by-law or a DC by-law.

Before passing a CBC by-law, the municipality must have a CBC strategy which identifies what will be funded by the charges and meets requirements in the regulation including estimates of increased need for services or facilities attributable to the anticipated development which would be subject to the charge. These requirements appear similar to parts of what are addressed in the Development Charge study process.

Landowners can be allowed to provide in-kind contributions to be deducted from the CBCs owed under the by-law.

Notably, CBC by-laws can be appealed to the LPAT. On appeal, the LPAT may either dismiss the appeal, repeal or amend the by-law, or order that the council of the municipality repeal or amend the by-law. As with the limitations on the LPAT powers on Development Charge appeals, the LPAT cannot increase a CBC, make it payable earlier, or change exemptions.

Pursuant to the CBC regulation, the amount of a CBC payable shall not exceed 4% of the value of land on the date of the first building permit. Section 37 sets up a process involving an exchange of appraisal reports to resolve disputes over the value of the land, with a third appraiser from a municipal roster, if required.

What will happen to existing bonusing by-laws and agreements?

The new CBC regime under section 37 is permissive, not mandatory. As such, municipalities can choose whether or not to go through the process of putting a CBC by-law in place.

Existing bonusing by-laws and agreements under them will remain in effect until they are repealed, and they will not be extinguished solely by the municipality's enactment of a CBC by-law. However, after the earlier of the enactment of a new CBC by-law or September 18, 2022, municipalities can no longer enact new density bonusing by-laws.

Practical Implications for Municipalities

Municipalities now must consider the relationship between Development Charges, parkland by-laws and the potential for a new CBC scheme. Municipalities should consider not only whether the CBC rate of 4% will provide comparable revenue to the municipality as under parkland or DC by-laws, but also the possible impacts on certain types of development. It will be challenging to develop a new CBC regime, integrated with the other funding tools within the next two years. This challenge will be compounded because so many municipalities will be looking at the issue at the same time, placing demands on the professionals working on DC matters and other related financial issues. The development of a CBC system will necessarily be done knowing the likelihood of appeals and without the guidance of prior decisions to set out some parameters. Once the new systems have been put into place and defended on appeal, there will also be impacts on Official Plan designations and the scope for increases in height and density, with the designations likely to become less flexible than when bonus by-laws could be employed.

Practical Implications for Developers

In the short term, existing bonusing by-laws and agreements will remain in effect until, in the case of by-laws, they are repealed by the municipality. Moreover, developments that are captured by bonusing by-laws before the Municipality enacts a CBC by-law will not be subject to a new CBC by-law. There will be opportunities to provide input into the development of the new system and consider its relationship to other funding mechanisms. However, municipalities will all be addressing these issues within the same two year time period, which may make it challenging to be involved in multiple locations. It will take some time for appeals to work their way through the LPAT hearing process, although the early decisions will likely set the tone for many municipal by-laws. There will be less room to seek density and height increases because the bonussing regime will be gone, but there should be more certainty about what can be built and what will have to be paid.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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