

Email to: MFPB@ontario.ca

October 15, 2024

RE: Enabling the Use of Pay-on-Demand Surety Bonds to Secure Land-Use Planning Obligations under Section 70.3.1 of the Planning Act (ERO 019-9198)

I am writing on behalf of the Municipal Finance Officers' Association of Ontario (MFOA), and the municipalities it serves, to provide comment on the proposed changes to the Planning Act, 1990, on the use of pay-on-demand surety bonds to secure land-use planning obligations.

MFOA was established in 1989 to represent the interests of municipal finance professionals across the province. Our membership includes more than 4500 individual members who are responsible for handling the financial affairs of municipalities and are key advisors to councils. Throughout our history, MFOA has been a strong advocate for best practices that encourage long-term financial sustainability in the municipal sector.

MFOA is pleased to see that the principles and general standards set out in ERO 019-9198 reflect current practices of Ontario municipalities that accept pay-on-demand surety bonds for development approvals

Over the past few years, Ontario municipalities have begun to explore the use of pay-on-demand surety bonds as a new security option for homebuilders to use for development approvals. MFOA understands that as opposed to other securities like letters of credit or cash, homebuilders have argued that pay-on-demand surety bonds are more flexible and frees up capital that can be used to build homes faster. Developing innovative solutions to build more homes for Ontarians is a shared goal amongst the Province, municipalities, and homebuilders.

Municipalities that currently accept pay-on-demand surety bonds have worked closely with insurance groups, legal teams, and homebuilder associations to develop policies that reflect the added risk that municipalities incur while also maintaining flexibility for homebuilders. MFOA appreciates that the proposed regulation reflects many of the stipulations and elements that are included in existing municipal policies on the use of pay-on-demand surety bonds. This ensures that the regulation will include best practices that are being used today. However, there are some elements of the proposed regulation that MFOA would like to raise attention to in this letter.

The Province should publish a list of eligible insurers through a regularly updated bulletin to minimize the costs on the sector of monitoring insurer credit ratings, and the regulation should include provisions for replacing the pay-on-demand surety bond should the insurer become ineligible as per provincial requirements

MFOA appreciates that the proposed regulation will require that insurers maintain minimum credit ratings and are licensed under the *Insurance Act*, which ensures sufficient risk management oversight. An essential aspect of pay-on-demand surety bonds is the assurance that the insurer can pay the amount due in a timely manner if required by the municipality. However, there are no details provided on what actions must be taken if the insurer fails to

maintain eligibility. Ultimately, responsibility should be placed on the homebuilder to secure a new bond with an eligible insurer, and this requirement should be explicitly stated in the regulation.

MFOA recommends that the regulation outline that if an insurer does not maintain eligibility according to provincial requirements, a new pay-on-demand surety bond or other type of security must be secured by the homebuilder within 60 days of request by the municipality, aligned with the insurer cancellation provisions. If the homebuilder fails to obtain a new security, the municipality may draw upon the original bond as outlined in the agreement until a replacement security can be obtained.

To help ease the administrative process of approving and reviewing the status of insurance companies that meet provincial requirements, MFOA recommends that the Province maintain a public list of eligible companies. Keeping a public list that municipalities and homebuilders can access will ensure that pay-on-demand surety bonds are developed with qualified and pre-approved companies. This list should be updated on a regular basis and posted in a bulletin online.

In the event of an insurer providing notice to cancel a pay-on-demand surety bond, municipalities should maintain the same rights to draw on the surety bond to minimize financial risks

The proposed regulation states that if an insurer intends to terminate the pay-on-demand surety bond, the homebuilder will need to provide the municipality with a replacement security within 60 days. Failure to do so will result in the existing pay-on-demand surety bond to remain in full force. There are limited situations where an insurer will provide notice of intent to cancel a bond. Should this situation arise, whereby an insurer provides notice to terminate the security and the homebuilder fails to provide a replacement security, municipalities believe that any resolution process between the homebuilder and the insurer should not increase their administrative burden, nor should it increase their risk exposure.

MFOA recommends that if an insurer intends to terminate or cancel the pay-on-demand surety bond, then, as per Section 4 of ERO 019-9198 (Timely Payment), the municipality should retain the full right to draw on the bond within 15 business days of providing written notice to the principal.

The Province should provide guidelines on standard language that should be included in all pay-on-demand surety bonds issued under this regulation, but municipalities must maintain the flexibility to add additional requirements

One of the strongest benefits to pay-on-demand surety bonds is the ability for the securities to be structured in a flexible way that can meet provincial requirements and municipal finance standards. As such, there should be careful consideration in the language adopted in pay-on-demand surety bonds for development approvals.

For instance, MFOA appreciates that ERO 019-9198 includes language that municipalities have the “sole discretion” to determine when a principal has defaulted in performing its obligation guaranteed by the bond. Similar language will be essential in all pay-on-demand surety bond agreements to maintain a municipality’s ability to draw on bonds.

When the regulation is published, the Province should issue guidelines that provide best practices on what pay-on-demand surety bonds should include. Guidelines will allow municipal staff, insurers, and homebuilders to comply with the regulation. Guidelines will also provide municipalities with the flexibility to include any additional clauses or requirements that may not be outlined in the regulation. Municipalities should maintain the ability to include additional clauses that reflect the needs of their municipality and the risk levels outlined by council.

To ensure the effectiveness of the proposed regulation, the Province should commit to working with municipalities to monitor the ongoing use of pay-on-demand surety bonds to ensure municipalities, and the public, are not assuming undue risk

While some municipalities have begun accepting pay-on-demand surety bonds as a form of security for development approvals since 2021, to our knowledge no Ontario municipality has had to draw on a pay-on-demand surety bond. Traditional forms of surety bonds were too risky for municipalities to accept as securities, because the process to draw on the bond was cumbersome and warranted the municipality to meet a burden of proof to access the funds. Unlike letters of credits, which are obtained through neutral third parties (banks) and are fully secured, surety bonds are obtained through insurance companies that have a right to defend claims and enter arbitration if necessary. Ultimately, this transfers the risk of non-performance from the home-builder to an insurer and, to a lesser extent, the municipal ratepayer in favour of freeing up homebuilder capital, so they can build more homes. Drawing on traditional surety bonds was an arduous process, and many municipalities are hesitant to accept pay-on-demand surety bonds as a result.

Pay-on-demand surety bonds are meant to provide a heightened level of financial security to the traditional surety bond and can be worded to accommodate municipal finance and legal standards. However, until this is further tested, MFOA is concerned that the process to draw on a bond may cause more friction than previously anticipated. While the process should be simple, this will undoubtedly lead to administrative and legal costs – the full cost of which is unknown, and could result in the municipal ratepayer bearing more risk than intended.

MFOA recommends that the Province commit to evaluating the effectiveness of the regulation at least every five years from its implementation date. Additionally, as implementation of the regulation evolves, MFOA recommends that the Province work with stakeholders to closely monitor pay-on-demand surety bonds in action, particularly in the event that a municipality needs to draw down on one. Regular monitoring and a scheduled cycle of evaluation will ensure that adjustments can be made if administrative and legal costs become overly burdensome for municipalities. MFOA agrees with the sentiment that homebuilders should have flexibility in their choice of securities, but this should not pose undue risk to municipalities and, by extension, the public.

To accommodate the administrative work for implementing pay-on-demand surety bond policies, the regulation should include a transitional period or delayed in force period of at least 120 days

As municipalities begin to implement the processes to accept pay-on-demand surety bonds, municipal staff will need to educate themselves on the features and nuances of the securities, develop policies, application forms, evaluation methods, update systems, and delegate staff and

departments. Likewise, for municipalities that have existing pay-on-demand surety policies, they will need to update their existing policies and standards to ensure it aligns with provincial requirements.

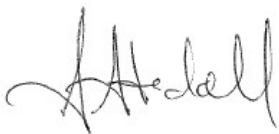
MFOA understands that the Province is eager to move forward with this regulation in order to help homebuilders free up funds for housing projects. However, implementing a new security will not be a simple process and will require extensive time and effort from municipal staff. Establishing processes to accept pay-on-demand surety bonds will span across municipal departments, and may require external resources. In particular, smaller municipalities will need time to educate staff on the intricacies of pay-on-demand surety bonds and source external legal resources to develop bond agreements and policies. MFOA's consultations with municipalities have suggested a wide spectrum of implementation estimates ranging from six months to a year.

Municipalities that do not currently accept pay-on-demand surety bonds may be unaware of the differences between the traditional surety bond and pay-on-demand surety bonds. Education on the matter will be essential for a successful rollout, and MFOA is currently developing education and training resources to support the transition and help the sector expedite the implementation of pay-on-demand surety bonds. However, time is necessary. MFOA recommends that the regulation include a transitional period or delayed in force period of at least 120 days, so municipalities can adequately prepare for the acceptance of this new type of security.

MFOA appreciates the opportunity to comment on the proposed regulation to enable the use of pay-on-demand surety bonds, however we are mindful that the 30-day consultation period poses a challenge for municipal staff to learn about the new security and provide adequate feedback to council and staff. MFOA has consulted with various municipalities on this matter and will continue to work with municipalities to educate on the topic.

MFOA would be pleased to elaborate on any of the recommendations included in this submission. Should your staff have the need to follow up, please contact MFOA's Executive Director, Donna Herridge, by phone (416-362-9001) or by email (donna@mfoa.on.ca).

Yours Truly,

A handwritten signature in black ink, appearing to read 'Shelley Stedall'.

Shelley Stedall, Dipl. B. Admin, AMCT
President, MFOA