Enabling the Use of Pay-on-Demand Surety Bonds to Secure Land-Use Planning Obligations under Section 70.3.1 of the Planning Act.

Please accept the following City of Kitchener staff review for the ERO Posting 019-9198:

- Enabling the Use of Pay-on-Demand Surety Bonds to Secure Land-Use Planning Obligations under Section 70.3.1 of the Planning Act

Developing innovative solutions to build more homes for Ontarians is a shared goal amongst the Province of Ontario, municipalities, developers, and homebuilders. Kitchener remains a leader in streamlining the development process and welcomes new and additional tools to get housing built faster in support of our shared housing goals. To ensure Kitchener is best prepared for the proposed introduction of pay-on-demand surety bonds for conditions of land use planning approvals, staff seek further clarity on the following questions:

How will municipalities monitor credit rating and eligibility criteria for pay-on-demand surety bonds?

The City appreciates that the proposed regulation will require that insurers be licensed under the Insurance Act and meet minimum credit ratings. 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 are to be taken if the insurer fails to maintain eligibility, which is an important factor as many security deposits are held over a period of many years.

Kitchener recommends that the regulation stipulate 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 developer within a reasonable timeframe as determined by the municipality and that the municipality may, at its sole discretion, draw upon the original bond until a replacement security can be obtained.

To help ease the administrative process of approving insurance companies that meet provincial requirements, Kitchener recommends that the Province maintain a public list of eligible companies, updated on a regular basis and posted in a bulletin online.

Would the Province consider revising the cancellation process to minimize financial risk to municipalities?

The proposed language in the regulation limits the ability for the municipality to access the funds only in the event the developer defaults in performing the obligation guaranteed by the bond. Kitchener is concerned that there is no option for municipalities to choose to draw on the bond if the insurer terminates the bond.

The cancellation process laid out in the proposed regulation is administratively burdensome and poses significant risk that the municipality may find itself in an unsecured position. The municipality would be required to track the notice of intention to terminate the bond and monitor for a replacement security to be received within 60 days of receipt. Failing receipt of a replacement security, the municipality must notify the original insurer that the bond must remain in full force with only 30 days remaining before the stated cancellation date.

The proposed regulation does not identify a means of delivery for the written notice and is unclear whether municipalities may define the required means, such as through registered mail which is the common practice for letters of credit. Without this, there is risk that written notices fail to reach the required endpoint, potentially preventing the parties from acting in a timely manner and risking that the municipality wind up in an unsecured position without being aware.

Additionally, there are questions on whether insurers will honour, without any dispute, the notice from the municipality that the bond must remain in full force, particularly in a case where they are attempting to terminate the bond due to non-payment by the developer. Municipalities will be placed with the burden of proof on delivery of notices and will need to act in a timely manner without any delay in order to maintain a secured position to manage their risk.

Kitchener recommends that if an insurer intends to terminate or cancel the pay-on-demand surety bond, the municipality should retain the right to draw on the bond and that payment would be required to be made within 15 business days of written notice to the principal. This follows existing practices with letters of credit, and is a critical feature to manage a municipality's risk associated with noncompliance from a developer. The Province should consider regulations to this effect to provide greater consistency across Ontario and limit risk to a municipality.

Will the structure of pay-on-demand surety bonds be standardized to ensure consistency and reduce administrative burden?

In an effort to streamline the implementation of any new tool, City of Kitchener staff encourage the Province to standardize through regulation the structure and language of pay-on-demand surety bonds among Ontario municipalities. Doing so will provide developers with a new tool – surety bonds – which follow a consistent processes from municipality to municipality, while also reducing municipal administrative burden.

Kitchener looks forward to continuing our collaboration with the Province to delivering the necessary homes to Ontarians over the next decade.