TORONTO

STAFF REPORT
ACTION REQUIRED

Development Charges Act Changes

Date:	January 14, 2016
To:	Executive Committee
From:	Deputy City Manager & Chief Financial Officer
Wards:	All
Reference Number:	P:\2016\Internal Services\Cf\Ec16003Cf (AFS # 22159)

SUMMARY

The Province enacted Bill 73, the *Smart Growth for Our Communities Act, 2015* on December 3, 2015, to amend the *Development Charges Act, 1997* (the "DCA") and the *Planning Act* and filed amendments to the related regulation (Ontario Regulation 428/15) on December 17, 2015. The amended legislation came into effect on January 1, 2016. This report provides Council with an assessment of the legislative and regulatory amendments to the DCA. The changes to the *Planning Act* will be the subject of a future report from the Chief Planner to Planning & Growth Management Committee.

The primary effect of the new legislation is to add transit to the list of services not subject to the mandatory 10% discount, permit the use of a forward-looking level of service for transit development charge calculations, and allow recoveries for waste diversion. These changes partially respond to Council's long-standing requests for amendments to the DCA and will allow development charges to fund a higher proportion of growth-related infrastructure costs.

However, amendments to the DCA also alter the timing of payment of development charges to the first building permit for multi-permit developments (which include excavation/shoring or foundation permits) and prescribe extensive reporting requirements under the calculation methodology for transit which could have a significant negative impact on the City.

Most of the amendments to the DCA are not effective until the City's development charges by-law is updated or renewed. However, the changes to the timing of calculation and payment of development charges are effective immediately and take precedence over the City's existing by-law. To bridge the interval until the next anticipated by-law renewal (2017/2018), staff recommends that the Chief Building Official be authorized to

require applicants seeking conditional below-grade building permits to enter into a Development Charges Deferral Agreement. Development charges would then become payable with the issuance of the first above-grade permit.

These were the first major changes to the DCA since 1997 when, under a different government and different economic circumstances, the Act was amended to restrict municipal cost recovery. Accordingly, municipal officials had hoped that the exhaustive consultation over the summer of 2015 would achieve broader improvements in support of the principle of growth paying for growth.

This report has been prepared in consultation with the City Solicitor and the Chief Building Official who concur with the recommendations.

RECOMMENDATIONS

The Deputy City Manager & Chief Financial Officer recommends that City Council:

1. Authorize the Chief Building Official to require applicants seeking conditional below-grade permits to enter into a Development Charges Deferral Agreement in accordance with the general terms and conditions in Appendix 1 and in a form acceptable to the Deputy City Manager & Chief Financial Officer and the City Solicitor.

2. Direct and authorize the appropriate City staff to take the necessary action to give effect thereto.

Financial Impact

The net effect of the various amendments to the DCA on City development charge revenues is difficult to predict until a new by-law is undertaken. For illustration purposes staff has estimated the potential impact had these changes been in effect for the City's 2013 Development Charges By-law.

For example, had the mandatory 10% discount to calculated rates not been applied to transit under the 2013 by-law and the subsequent 2015 Scarborough Subway Extension amendment, almost $220 million in additional capital costs could have been eligible for recovery over the 10-year planning period. Future benefits from the elimination of this discount come at the cost of extensive new reporting requirements, exclusive to transit, in future background studies.

At the time of the 2013 by-law, the 10-year capital plan for waste diversion projects amounted to almost $412 million. A portion of the planned expenditure would have been attributable and recoverable from growth-related development under the new legislation. Because it was ineligible no calculations were done at the time.

If the requirement to collect at the time of first permit had been in place for the 2013 Development Charges By-law, it would have advanced many collections by a year or more, potentially facilitating avoidance of the scheduled rate increases, and thereby reducing recoveries. While it is difficult to quantify the financial impact of this change, staff estimates potentially $60 - $90 million in foregone development charge revenue could have resulted in the first eighteen months of the by-law. The procedural changes recommended by staff through this report, and potential adaptations in the City's next by-law, should mitigate any such cost impacts in the future.

DECISION HISTORY

At its meeting on May 5, 6 and 7, 2015, City Council considered a staff report that addressed the amendments proposed to the DCA by the *Smart Growth of Our Communities Act, 2015* (identified as Bill 73 in the staff report). In adopting staff recommendations in the report Council endorsed the proposed amendments and requested the province to go further and make additional changes to the DCA to ensure that growth did indeed pay for growth.
(http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2015.EX5.7)

City Council has sought amendments to the DCA on a number of occasions, the most recent being at its meeting on October 8, 9, 10 and 11, 2013, as part of its deliberations to enact the current Development Charges By-law (No. 1347-2013; the "DC by-law") (http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2013.EX34.1) and during consideration of a report from the City Manager on Scarborough Rapid Transit Options (http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2013.CC39.5).

ISSUE BACKGROUND

The DCA provides the legislative authority and framework for municipalities to impose development charges upon development of land, based on the principle "growth pays for growth", and lays out the process, procedures, and reporting requirements. Prior to the amendments, the revenue-raising potential of municipalities was, however, restricted by a number of provisions under the DCA and accompanying regulation, such as the list of ineligible services, the mandatory 10% discount for some services, and the requirement to use historical service level caps in the determination of the charge.

In response to municipal and other stakeholder requests the province has, through the *Smart Growth for Our Communities Act, 2015*, amended the DCA and associated regulation by:

- Adding transit to the list of services not subject to the mandatory 10% discount, and allowing the use of a forward-looking service level for transit development charge calculations
- Moving the list of ineligible services to regulation and concurrently more narrowly defining waste management services so that waste diversion can now be included as a DC-eligible service (landfill sites and services, and facilities and

services for the incineration of waste remain ineligible for development charge recovery)
- Various reporting and administrative changes including specifying the timing of payment of development charges

COMMENTS

Process

The Province launched a review of the DCA in October 2013. Following the introduction of Bill 73, the *Smart Growth for Our Communities Act, 2015*, City staff, as part of the Development Charges Working Group established by the Province, provided input with respect to forward-looking service levels, expanding the list of services not subject to the mandatory 10% discount, mandatory area-specific development charge calculations, and recommendations relating to regulatory amendments.

In November 2015 the City (Councillor Di Ciano) made submissions to the Standing Committee on Social Policy in response to Bill 73. On December 3, 2015, the Act received Royal Assent. In mid-December, the Province provided confidential preview of the associated regulations to key stakeholders. Both the Act and the Regulation came into effect on January 1, 2016.

City Council has requested the Province to amend the DCA on a number of occasions. The table below summarizes Council's requests and those now enacted by the province:

	Council requests and/or recommendations	**DCA & Regulation (as amended)**	**Implications**
Service level	Remove or amend the use of historical service levels to establish DC-eligible costs (to enable more appropriate cost recovery)	Historical service level to be utilized for all services unless prescribed by regulation Regulation identifies transit as a prescribed service; the method and criteria for estimating the "planned level of service" (forward-looking instead of historical average) also prescribed	Removing the restriction for transit is consistent with Council's request for the SSE project and may be beneficial for future for by-laws. In the 2013 DC by-law rates for transit where not constrained by service levels (EMS and Parks & Rec rates were).
10% discount	Eliminate mandatory discount Services for which the discount applied are: Transit, Libraries, Child Care, Civic Improvements, Emergency Medical Services, Health, Parks & Rec.,	Only transit added to list of services exempted from the discount	Transit changes are the largest single component of the City's DC rates, and elimination of the 10% discount requirement will increase recoverable costs in future by-laws. This change was accompanied by extensive new reporting

	Council requests and/or recommendations	DCA & Regulation (as amended)	Implications
	Pedestrian Infrastructure, Dev't Related Studies, Subsidized Housing		requirements for transit projects within future background studies.
Ineligible service list	Eliminate list of ineligible services; allow recovery for all municipal services. Ineligible services include: cultural tourism or entertainment facilities, the acquisition of land for parks, hospitals, waste management services, general administration headquarters, and other services prescribed in the regulations	DC recovery allowed for waste diversion List moved to regulation	May increase recoveries under next DC by-law
Metrolinx DC	Empower Metrolinx to implement GTHA-wide uniform DC	Not addressed	This potential change is understood to be a Ministry of Transportation responsibility. It would allow the resolution of outstanding Metrolinx/City contributions, and provide a fair and reasonable basis for offsetting a portion of MX capital cost
Timing of DC payment	Retain municipal discretion; delete related provision under Bill 73	DCs payable at first permit issuance	Contrary to City by-law; increases admin costs and facilitates avoidance of future DC rate increases
Area-specific DCs	Retain municipal discretion; delete related provision under Bill 73	Province, through regulation, able to mandate the use of area-specific DCs by service	If imposed on the City by Provincial regulation, could disrupt development patterns, increase DC admin cost, and increase appeals to the OMB
OMB powers	Re-balance appellant-municipality risk on DC by-law appeals by allowing OMB the authority to increase the charge if a by-law is appealed	Not addressed	Development community can continue to appeal DCs with no risk to themselves
Asset Management Plan	No recommendation	Background study to include asset management plans that reflect full life-cycle cost; AMP to be prepared in "prescribed manner"	Increased cost of administration

	Council requests and/or recommendations	DCA & Regulation (as amended)	Implications
Additional levies	No recommendation	Ensure that municipalities do not impose additional levies, "voluntary payments"	No impact

The sections that follow discuss some of the key amendments.

Service level

Growth-related capital expenditures recoverable through development charges are limited to expenditures that support maintaining service levels at the average over the previous ten years. Under the amended DCA the province can now specify services that are permitted to utilize a planned level of service (forward-looking instead of a backward-looking historical average) to establish development charges, and also prescribe the method and criteria to estimate the planned level of service, all through regulation.

The amended regulation (O.Reg 428/15) makes only transit services eligible to use a planned level of service and prescribes the method and criteria to establish the service level. Allowing transit services to use forward-looking levels of service is a welcome change. Municipalities will no longer be restricted to historical service levels, which in the extreme case precluded development charge recoveries upon the introduction of a new municipal service (since the historical service level would be 0).

The change in methodology for transit development charges is similar to the one provided for the Toronto-York Spadina Subway Extension project, except it is coupled with extensive and complex reporting requirements. Also, municipalities were disappointed the changes were limited to transit. In the City, under the 2013 DC by-law, capital costs of over $254 million for Parks and Recreation and $12 million for Emergency Medical Services could not be levied for on account of the requirement to use historical service levels.

10% reduction

The DCA mandates a 10% reduction of eligible growth-related capital costs of all services except water services, including waste water and storm water; roads; electrical power; police; fire protection; and Toronto-York subway extension (as listed under subsection 5.(5)). The discount creates two classes of services – those that are 100% recoverable, and others that are only 90% recoverable – and effectively transfers some of the growth-related costs on to existing taxpayers in the latter case. Municipal representatives have sought a removal of the discount such that all services are 100% recoverable. The City also requested the 10% discount be removed for the SSE project.

The amendment to the DCA partially addresses this matter by adding transit to the list of services that are 100% recoverable. Under the 2013 DC by-law and the subsequent 2015 Scarborough Subway Extension amendment, almost $220 million was not recoverable due to the discount, representing an average reduction of $22 million in recoverable costs over a 10-year period. The discount is no longer required. However, extensive new

reporting requirements are required, and will increase the complexity of background studies. The full implications will be better understood when the by-law is next renewed, incorporating these changes.

Ineligible services

Municipalities provide a wide range of services, however, since 1997 when a list of ineligible services was introduced in the legislation, not all services are eligible for recovery through development charges. Municipalities have repeatedly requested the province to eliminate the list of ineligible services. Through the latest amendment to the DCA, the province has moved the list of ineligible services from the DCA to the accompanying regulation. Further, waste management services has been redefined such that while provision of landfill and waste incineration services remain ineligible, municipalities can now recover growth-related costs for waste diversion through development charges.

Allowing development charge recoveries for waste diversion is a positive step from a municipal standpoint. The ability to prescribe ineligible services through regulation, however, creates both an opportunity and risk to delete or add to the list without seeking legislative changes.

Timing of development charge payment – below-grade versus above-grade

The circumstances under which a municipality may impose development charges are identified in the DCA (subsection 2 (2)) and include "the issuing of a permit under the *Building Code Act, 1992* in relation to a building or structure" (emphasis added). Prior to the amendments section 26 of the DCA (timing of payment) allowed the municipality to specify which permit, would trigger the requirement to pay development charges. Under the City's DC by-law applicable development charges are calculated and payable upon the issuance of a building permit that allows above-grade construction.

Subsection 26 (1.1) of the amended DCA establishes the timing of payment for developments that require multiple building permits (the predominant case in the City for development projects that are large in scale and scope) – "upon the first building permit being issued" – superseding the payment timing under the City's DC by-law.

While City Council and staff had expressed opposition to legislatively establishing the timing of payment of development charges since it was first proposed during the consultation phase, the amended DCA does exactly that. From the City's perspective this is an undesirable change for the following reasons:

- Developments that seek out and obtain partial permits for things like excavation/shoring may avoid paying potential future rate increases and/or phase-ins. Staff estimates that had this provision been in place for the 2013 by-law potentially $60 - $90 million in foregone development charge revenue could have resulted in the first eighteen months.

- Administrative and implementation complexity will increase as development plans evolve (unit type/mix/count are generally crystallized later in the process), numerous and sometimes complex fee adjustments will be required, with a likely increase in the incidence of statutory complaints under section 20 of the DCA.
- Some developers may be challenged by the requirement to make development charge payments earlier in the sometimes lengthy development approval process, potentially months if not years, in advance of when they have been due until now.

To comply with the amended DCA and to safeguard the City's financial interests and ensure that development charge collections are not adversely affected as a result of the altered payment timing provision, staff recommends the following approach:

1. Applications compliant with applicable law (Non-conditional permits)

   Where an applicant for a first building permit can demonstrate that they have complied with all applicable law, as defined in the Ontario Building Code, the Chief Building Official will be obligated to issue the building permit and development charges will be collected at the time that first permit is issued.

2. Conditional Permits

   Developments that are of a significant scale and/or scope routinely seek building permits prior to the applicant being able to demonstrate that they comply with all applicable law. Often, the permits that are sought are for below grade construction only (excavation/shoring and foundation). In such cases, and even though all the requirements have not been met to obtain an as of right building permit, a conditional building permit may be granted for any stage of construction if the conditional permit requirements of the *Building Code Act, 1992* and the Ontario Building Code have been met. The issuance of such permits is at the discretion of the Chief Building Official. No one is ever entitled to a conditional building permit. The issuance of a conditional building permit, particularly for below grade construction, allows commencement of construction while the applicant continues to work toward obtaining compliance with all applicable law and may align with the City's strategic plan that promotes growth. Such construction is undertaken at the sole risk of the applicant.

Section 27 of the DCA allows, Council to enter into an agreement "providing for all or a part of a development charge to be paid before or after it would otherwise be payable." In instances where compliance with all applicable law has not been established, the City could, as a condition of the issuance of a conditional permit, require an applicant to enter into an agreement under section 27 of the DCA. The agreement would:

a. defer the development charge payment to the earlier of the first above-grade permit issuance or expiry of the agreement
b. require the amount payable to be calculated at the rates in effect at the time of payment

c. be for a period of up to 5 years, the term extendable at the sole discretion of the Chief Building Official in consultation with the Deputy City Manager & Chief Financial Officer

Items (a) and (b) above ensure that the amount collected as development charges paid within the term of the agreement will equal what the City would collect under the provisions of its current DC by-law. The 5 year limit is a means to prevent indefinite deferrals. In most cases, projects are able to draw above-grade permits within a year or two of the associated below-grade permits.

Under the DCA Council approval is required to enter into development charge deferral agreements. However, since there will likely be a significant number of building permits and projects that would require such agreement, and often at short notice, staff recommends that Council delegate authority to the Chief Building Official to enter into development charge deferral agreement for this particular purpose only, on terms established in consultation with the Deputy City Manager & Chief Financial Officer, and in a form satisfactory to the City Solicitor.

The recommended approach balances a variety of considerations including financial, planning and policy, and economic development objectives of the City. Developers who seek building permits prior to them being able to establish that they comply with applicable law will have the choice between waiting until they can demonstrate their compliance with applicable law and obtaining an as of right building permit or, where the Chief Building Official has determined that she is willing and able to issue a conditional permit, to accept the conditional building permit with the requirement that a section 27 development charge deferral agreement as described in this report be entered into in advance.

Staff considered other potential approaches as well, such as

- suspending the issuance of conditional permit permits altogether, noting that the issuance of conditional building permits is at the discretion of the Chief Building Official; or
- collecting development charges at first permit but requiring a true-up at above-grade permit issuance

In view of administrative and other considerations, however, these were deemed not to be the most appropriate or productive response and are not recommended.

Other Amendments

As summarized earlier in the table, the amended DCA and regulation include a number of other changes – administrative, reporting, and procedural. For example, under the amended DCA, a background study is required to be made available to the public 60 days prior to passing a by-law (increased from 20 days), and include an asset management

plan prepared in accordance with the prescribed manner. As mentioned previously, for transit, the use of a planned level of service and removal of the mandatory 10% discount is accompanied by highly prescriptive reporting requirements, which are likely to increase the cost, time and complexities associated with completing the required background studies. Further, the Minister is authorized to prescribe through regulation the use of area-specific development charges for a service or an area in a municipality. A better understanding of the overall impact of the amendments will be possible when the City next updates its by-law.

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SIGNATURE

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Roberto Rossini
Deputy City Manager & Chief Financial Officer

ATTACHMENTS

Appendix 1: General Terms of Development Charges Deferral Agreement

APPENDIX 1

General Terms of Development Charges Deferral Agreement

1. Pertains to a specific building permit application number.

2. Defers development charge (DC) payment to the earlier of
   a. date of issuance of first building permit that allows above-grade construction (no authority to defer beyond that); or
   b. expiry of the agreement.

3. DC Deferral Agreement be for a period of up to 5 years; extension possible at the sole discretion of the CBO, in consultation with the Deputy City Manager & Chief Financial Officer.

4. DCs due and payable shall be calculated based on the rates in effect at the time of payment

5. Such additional terms and conditions as are necessary and reasonable, at the discretion of the Chief Building Official in consultation with the City Solicitor and the Deputy City Manager & Chief Financial Officer.