Ontario
Home Builders'
Association

October 16, 2024

Ministry of Municipal Affairs and Housing
Municipal Finance Policy Branch
777 Bay Street, 13th Floor
Toronto, Ontario
M7A 2J3

Re: ERO 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

The Ontario Home Builders' Association

The Ontario Home Builders' Association (OHBA) is the voice of the residential construction industry in Ontario, representing 4,000 member companies organized into 28 local associations across the province. Members include builders, developers, professional renovators, trade contractors, suppliers, and manufacturers serving the residential construction industry.

Please accept the below as our submission to the government's request for feedback on a proposal to enable the use of pay-on-demand surety bonds (PODSB) which is being submitted on behalf of OHBA and its 28 local associations including but not limited to BILD, WE HBA, GO HBA, and London HBA.

Environmental Registry Background

The government is proposing a regulation under s.70.3.1 of the *Planning Act* that would authorize landowners to stipulate pay-on-demand surety bonds to be used to secure municipal obligations that are conditions of land-use planning approvals. The rationale for this proposal is that a wider acceptance of pay-on-demand surety bonds would improve liquidity which would help home builders to free up funds for more housing projects.

OHBA Response

The Ministry of Municipal Affairs and Housing has indicated that they have heard from stakeholders that instruments such as letters of credit (LOCs) which municipalities generally require to secure home builder obligations when building communities, tie up the home builder's capital that could otherwise be invested in additional home-building projects. If this capital could be released, it would make some projects that currently cannot obtain financing immediately more viable and contribute to getting shovels in the ground faster for more projects. The government has listened to its stakeholders and recognized that a wider acceptance of pay-on-demand surety bonds is regarded by many home builders as a means to help free up funds for housing projects while providing municipalities with the same level of assurance that they would have ready access to funds, similar to a LOC, to fulfil any conditions that may not be met by the home builder. OHBA commends the government on this significant step forward for the housing industry, and our members appreciate the effort and commitment of the government to move forward with modernizing how new housing approvals are administered.

Members were encouraged when in 2022 under Bill 109, the *More Homes for Everyone Act, 2022,* the province amended the *Planning Act* to provide regulation-making authority to the Minister of Municipal Affairs and Housing to authorize landowners to stipulate the instruments to be used to secure municipal obligations that are conditions of land-use planning approvals. As part of Bill 185, the *Cutting Red Tape to Build More Homes Act, 2024,* the government then announced that it would consult on a potential regulation to prescribe instruments, such as pay-on-demand surety bonds, to secure municipal obligations that are conditions of land-use planning approvals. These successive steps forward on this file were received positively by the industry and further demonstrated the governments commitment to work with our members to shed light on the effectiveness of surety bonds as a viable alternative instrument to secure financing.

OHBA has advocated for many years for this alternative financial security tool to be made available to help home builders unlock capital for new housing projects and streamline the construction of more homes in Ontario. Our submission will build off previous submissions and communications developed on this topic and provided to the government in the past, as well as highlight some key areas that must be taken into greater consideration as the regulation is developed, namely: ensuring that builders who currently have LOCs to collateralize municipal obligations can easily transition to surety bonds to free up essential capital for new projects, re-consideration of the minimum credit rating required for any surety issuing bonds under the new protocol, and ensuring that the government's municipal partners are fully educated and informed about the benefits of surety bonds and provided with proper guidance for enabling their use in a timely manner by all municipalities of the province.

Background

Throughout the 1950's, 60's and 70's it was common practice that Ontario municipalities accepted surety bonds as financial security for subdivision agreements and site plans. These bonds provided the required security for the municipality while not tying up capital that could be used for investment in additional home construction projects. Starting in the 1980's however, municipalities moved away from accepting surety bonds as a form of financial security and today almost exclusively require a Letter of Credit (LOC) from a chartered bank.

Municipal adoption of surety bonds was identified by Ontario's Housing Affordability Task Force's 2022 report as a core recommendation to accelerate the delivery of new housing, "More widespread use of this instrument could unlock billions of dollars of private sector financial liquidity that could be used to build new infrastructure and housing projects, provide for more units in each development and accelerate the delivery of housing of all types." – Housing Affordability Task Force, Page 32, Feb 8, 2022. OHBA was pleased to see this recommendation then translate into policy when regulation making authority for surety bonds was introduced in Bill 109.

Bonds have been an acceptable form of municipal subdivision services security in the United States for many years. Several Canadian municipalities have now adopted policies to allow bonds to be accepted, including City of Calgary and the City of Grand Prairie alongside several in Ontario:

- The Town of Innisfil
- The Township of Springwater
- The Town of Whitchurch-Stouffville
- The Town Bradford West Gwillimbury

- The City of Hamilton
- The Town of Erin
- The City of Pickering
- The Township of Centre Wellington
- The City of Burlington (pilot program scheduled to be rolled out later this fall)
- The City of Niagara Falls
- The City of London
- The Region of Durham

It has been brought to our attention that several municipalities are still hesitant and resistant to the acceptance of surety bonds. For example, as recently as mid-September, a member brought to OHBA's attention that they had received communication from the City of Barrie indicating that they are "not receptive to the use of Surety Bonds in lieu of cash or LOCs as security for Subdivision Development at this time".

Letters of Credit

Currently, many municipalities and government bodies (including both lower tier municipalities and regional levels of government) require that home builders provide letters of credit solely from banking institutions. OHBA members have highlighted for years that this can be very onerous, time consuming, and capital intensive, particularly at the early stages of a development project due to the conditions and requirements placed on the builder by the banks in question.

Developers are often required to collateralize a letter of credit dollar-for-dollar against the value of the municipal works they are performing. Often this means developers can only afford to finance one or two housing projects at a time, constraining housing supply. Every LOC directly reduces the financing capacity the builder has available to finance other potential housing projects; an LOC on one project that occupies all the financial capacity of a builder means that other housing projects in the builder's portfolio are delayed until the LOC is cleared, or new financing is secured.

Put simply, many builders can only afford to finance one housing project at a time because of the LOC requirements. As a result, OHBA estimates that across Ontario, billions of dollars are tied up in collateral or borrowing capacity that could be used to advance more projects.

Pay on Demand Surety Bonds

PODSB have proven to provide the same benefits and security as a letter of credit, while not tying up private capital the way letters of credit do. Municipalities across Ontario would maintain access to all the features of a LOC but with 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, while maintaining all along that the financial obligation is secured, which is most critical from a municipal point of view.

Should an issue arise, the secure bond is fully payable by the bond company on demand (typically just a couple of days). Surety companies, like banks, are regulated by Ontario's Office of the Superintendent of Financial Institutions to ensure they have sufficient funds in place to pay out bond claims. Utilizing PODSB as a financial security alternative would have no impact on provincial or municipal revenues or expenditures and provides a flexible policy option with no impact on the treasury.

PODSB can be designed to provide municipalities with the financial security tool they need to move infrastructure forward, including timely compensation if required, while permitting the financing capacity of the builder to fund additional projects.

PODSB In Practice

When a new project application is under review at a municipality, municipalities look for assurance that the necessary site improvements will be delivered in a timely fashion and warranted by the builder. To ensure that the builder has the necessary financial resources to deliver and pay for the required site improvements, municipalities will require financial security from the builder.

The obligation to build is most often found in either a subdivision agreement, a site plan agreement, or some other form of development agreement. The agreement will describe the services to be constructed by reference to plans and specifications prepared by the builder's consulting engineer, and in turn be 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 Councils. This ensures that services will be constructed to an acceptable and common standard.

Whichever form of 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 builder is responsible to make all repairs to any part of the system that does not perform to a satisfactory standard.

The agreement also contains certain financial obligations which are intended to guarantee to the municipality that the services will be completed to the approved specifications and that they will function appropriately. In Ontario, this 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 to be called upon in the event of default.

For municipalities, a PODSB would function as a liquid financial instrument that provides the funds immediately, on demand, without the requirement for the municipality to prove default and so in essence, functioning just like a LOC. Furthermore, the municipal acceptance of PODSB provides a clear signal to the home construction industry that they are open to modern and innovative financial opportunities that will help them meet provincial growth targets, create additional housing supply, as well as provide local employment opportunities.

Finally, surety bond wording can be designed so that municipalities receive the flexibility and peace of mind offered by a LOC. For example, if the builder 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. The surety has no basis to contest the payment and must pay out the value of the bond to the municipality.

Additional Benefits

The following benefits are notable for municipalities when utilizing a PODSB for financial security:

1. Liquidity: A subdivision bond is comparable to a letter of credit in that it represents a highly liquid instrument that provides the municipality with the funds required to correct a default by the builder.
2. Responsive: The trigger to making a claim under a subdivision bond mirrors that of a letter of credit, in that the municipality provides written notice to the surety that the builder has defaulted under its development agreement. The municipality is not bound to take any action or proceedings, or to exhaust its recourse against the builder or any other security, before turning to the subdivision bond for payment.
3. Customized Solution: The specific terms of the subdivision bond can be tailored to each municipality, providing financial protection in line with its specific form of development agreement.
4. Pre-qualification: To obtain a subdivision bond, a builder 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.
5. Performance: Should a claim be filed against the bond, the builder is required to repay the surety all amounts paid under the subdivision bond. The bond keeps the builder responsible, accountable and motivated to fully perform all its' obligations to the municipality.
6. Promotes Growth: Accepting an alternate form of financial security that is of benefit to builders sends a clear message to the development industry that a municipality is innovative, responsive to the needs of builders, and growth oriented. Attracting development opportunities - at no additional risk to the municipality - helps ensure the continued growth of the municipality and its economy.

Key Considerations

There are two key features of the government's proposal that OHBA and our industry partners believe must be noted and taken into greater consideration as the regulation is developed.

Firstly, a key focus for OHBA during this consultation is to ensure that builders that currently have LOCs tied up with municipal partners that are collateralized dollar-for-dollar, can easily transition out those LOCs to surety bonds, freeing up essential capital for new projects. As has been highlighted at several points throughout this submission, developers can often only afford to finance a small number of housing projects at one time, as they will have most of their financial capacity occupied by those one or two projects and as a result other projects must be put on hold or delayed until an LOC is cleared or alternative financing is secured.

Should the government move forward with authorizing home builders to use PODSB as a means of financial security, there must be consideration given to how builders can transition an already existing LOC into a surety bond and free up the capital that is being otherwise tied up by the outstanding LOC. Often times, it can take years for an LOC to be cleared and for that capital to be ultimately released, and so with the opportunity for surety bonds to be a viable alternative option, the government must also determine the proper way to execute a transition from one to the other for the sake of the capital that will be able to be released and as a result allow for more housing projects to be brought online.

Secondly, the OHBA would like to support a consideration that has been raised by the Surety Association of Canada (SAC) regarding the minimum credit rating required for any surety issuing bonds under the new protocol. Under the proposed mandatory elements of a PODSB, item number 2 speaks to ‘credit rating requirements’, stating that to minimize credit risk to municipalities, an insurer would be required to meet one of the listed minimum credit ratings. SAC has identified a particular potential issue with the minimum A credit rating by AM Best, as it is overly restrictive.

OHBA is in support of their argument that the credit rating requirement as proposed would mean that large, US based and multinational providers would have preferential opportunities at the expense of various equally qualified and reputable Canadian based sureties who may not meet that onerous minimum criteria and be precluded from participating, as well as it contributes to limiting the number of surety providers who take part in the developer surety bond space and minimizes competition and choice available to home builders. We look to SAC for their expertise in this space and support their recommendation that maintaining a minimum credit rating requirement has validity however should be lowered to an A- for AM Best’s minimum rating to ensure a range of qualified Canadian surety participants have access to the home builder market.

Finally, as with all submissions to the provincial government from the OHBA, we continue to advocate for proper education and guidance to be provided to our municipal partners. It is imperative that should the regulation move forward, all levels of elected and non-elected municipal officials and staff are informed about the opportunities and benefits of surety bonds, that any resistance or apprehension is efficiently and properly addressed and mitigated, that guidance as to how to utilize and accept surety bonds instead of LOCs be provided, and that the government ensure municipalities understand how to transition from an existing LOC to a surety bond to free up necessary capital and bring more housing projects to fruition simultaneously.

Conclusion

The Ontario Home Builders’ Association and our local associations respectfully submits the feedback and recommendations contained within this submission regarding the enabling of pay on demand surety bonds as a means for securing financial obligations for new developments, and we encourage the Minister of Municipal Affairs and Housing to take into consideration all content contained within as the government deliberates the intricacies and nuances of this policy and the development of the regulation.

OHBA is encouraged by these recent steps towards enabling surety bond usage province wide and is ready to work with all municipalities to support their adoption. PODSB will unlock millions of dollars of financing liquidity that can fund infrastructure and create thousands of new housing units across Ontario. These investments will produce additional employment opportunities for skilled trades and suppliers in the home building industry, which in turn, will provide positive economic stimulus for the Ontario economy.

PODSB provides municipalities with the protection they need, without undercutting the financing capacity of the builder to bring additional projects and housing supply forward at the same time. OHBA is confident that this flexible, on-demand and secure form of security is an important way to help accelerate the development process, while ensuring that municipalities continue to have strong financial protections that they need.

OHBA encourages the government to ensure that proper transition from an existing LOC to a PODSB is well thought out and accounted for in the regulation, so currently held capital can be released and allow for home builders to be able to fund more concurrent projects. OHBA also supports the feedback put forward by the SAC regarding the minimum credit rating being lowered to A- for AM Best to allow for more Canadian based surety providers to enter the arena; and OHBA requests proper guidance and education be provided to our municipal partners to ensure more municipalities move toward adoption of PODSB in a timely and efficient manner.

We appreciate the opportunity to comment on this proposal. We look forward to continuing our ongoing engagement with the Ministry staff to ensure that our collective efforts are fulfilling our shared goals of delivering on Ontario’s housing supply targets while improving housing attainability for current and future Ontarians.