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**Subject:** Development Charges Act – Exemption for affordable and attainable residential units

**Report To:** Corporate Services Committee

**Report date:** Wednesday, July 10, 2024

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## Recommendations

1. That staff **BE DIRECTED** to draft a formal policy and procedures related to the authority and administration of the new affordable residential development charge (DC) exemption established by section 4.1 of the *Development Charges Act, 1997* (DC Act) to be brought forward to Council at a later date;
2. That Regional Council **DELEGATE** temporary authority to the CAO and Commissioner of Corporate Services/Treasurer to execute affordable residential DC exemption agreements and other associated documents, including without limitation, registration of charges and postponements of interest, to secure affordable housing units in accordance with section 4.1 of the DC Act and this report, as an interim measure until such time as a policy is approved;
3. That, in the absence of a standard form of agreement established by the Minister of Municipal Affairs and Housing, staff, in consultation with Director of Legal Services, **BE DIRECTED** to prepare a form of agreement securing the requirements of *Section 4.1* of the DC Act and this report; and
4. That a copy of this report **BE FORWARDED** to all Niagara Local Area Municipalities.

## Key Facts

- The purpose of this report is to seek Council's approval to provide temporary authority to the CAO and Commissioner of Corporate Services/Treasurer to execute affordable residential DC exemption agreements and other associated documents, including without limitation, registration of charges and postponements of interest, as an interim measure pending completion and Council approval of a formal policy to implement the new affordable residential exemption established under the DC Act.
- Supporting delegated authority for these agreements and other associated documents on a temporary basis allows Regional staff to provide agreements on a more timely basis to developers. Alternatively, without a policy in place Council would be required to provide approval to execute these agreements which would delay the building permit process for developers.

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- In April 2024, the Province announced that June 1, 2024 would be named as the date of proclamation for Section 4.1 of the DC Act which puts into effect a full exemption of DCs for affordable and attainable residential units, as both terms are defined in the DC Act. As this exemption exists within the DC Act, implementation is mandatory across all municipalities and regions across the Province.
  - DC exemptions for Attainable Units are also included within Section 4.1 of the DC Act, however these exemptions are not currently in effect pending further regulations by the Minister of Municipal Affairs and Housing.
  - Staff are consulting with our upper-, lower- and single-tier municipal partners with regard to policy and process of implementing the new statutory DC exemption and the legal mechanisms to ensure the exemption is provided only to qualifying developments. A formal policy will be brought forward to Council at a future date once staff have been able to consider all policy, procedural and legal implications of the new statutory exemption.

## **Financial Considerations**

The full financial considerations associated with this report are unknown at this time. Staff are not able to estimate the number of residential units that will qualify and utilize this DC exemption. This exemption will result in lost DC revenue for the Region that could otherwise be used to pay for increased capital costs associated with increased needs for services arising from development. To support the Region's growth related infrastructure needs this DC exemption will be funded from the general levy in the same manner as other DC grants/incentives. Staff do not expect a significant financial impact as a result of the low affordability thresholds across the Region as established by the bulletin (appendix 1) and the current high costs of construction.

A developer who, but for the exemption, would be required to pay DCs must enter into an agreement with the relevant local area municipality and the Region that requires the residential unit to which the exemption applies to be an affordable residential unit for a period of 25 years. Any such agreement may be registered against the land to which it applies and the local area municipalities and/or the Region are entitled to enforce the provisions of the agreement against the owner and against any and all subsequent owners of the land.

The process of drafting, executing and monitoring legal agreements associated with this affordable DC exemption for the period of 25-years places an administrative burden on regional staff. Due to the administrative costs associated with this process an update to the Region's Fees and Charges By-law may be required to appropriately recover the

administrative costs to the Region. Currently, the Niagara Region's Fees and Charges By-law 2023-90 includes a Development Charge Agreement fee of \$570 per agreement. Staff will need to review this fee to determine if it appropriately captures the staff time required to complete, execute, and monitor these 25-year agreements.

The Region will retain the ability to collect any DCs owing on a project if a residential unit ceases to remain affordable at any time during the statutory 25-year term secured by way of an agreement entered into and registered on title pursuant to subsections 4.1(9) and 4.1(13) of the DC Act. Failure to comply with the terms of the agreement will constitute an event of default rendering any exempt DCs immediately due and payable. Per Section 32(1) of the DC Act the Region is permitted to add any unpaid DCs to the tax roll of the property in the event a developer/owner defaults on their agreement and does not pay any applicable Regional Development Charges. In the case of default there would be additional administrative costs associated with collecting unpaid DC's through the tax roll or exercising the Region's rights under a charge/mortgage.

## **Analysis**

Exemptions for affordable residential units were included in the More Homes Built Faster Act (Bill 23), enacted by the Province on November 28, 2022. While the legislation was enacted in November 2022, municipalities were not able to implement the exemptions pending publication by the Minister of Municipal Affairs and Housing of an "Affordable Residential Units for the Purposes of the *Development Charges Act*, 1997 Bulletin." The purpose of the bulletin is to establish the market-based (i.e., average purchase prices and market rents) and income-based thresholds that are to be used to determine the eligibility of a residential unit for an exemption from DCs. Additionally, at the time of Bill 23 being enacted a date of proclamation was not yet set by the Minister for Section 4.1 of the DC Act which includes details of the exemption for affordable and attainable residential units.

In April 2024, the Province announced June 1, 2024 as the date of proclamation for Section 4.1 of the DC Act and released the Affordable Housing Bulletin which provides the Affordable Unit Prices (ownership and rental) that will be used to determine eligibility for the affordable housing DC exemption. This means that as of June 1, 2024, all lower-, upper- and single-tier municipalities across the Province are required to fully exempt residential units meeting the DC Act's definition of affordable and attainable from the payment of DCs.

It is important for Council to note that while Section 4.1 of the DC Act includes details of a full exemption of DCs for both affordable and attainable residential units that the Minister of Municipal Affairs and Housing has not yet provided details of the prescribed development or class of developments which will be eligible for the attainable residential unit exemption. As a result, this portion of the legislation is currently inoperative until further notice as no units can currently meet the definition of attainable under the DC Act. This report will only be providing commentary and details regarding the affordable residential unit exemption at this time.

For a residential unit to receive a full DC exemption as an affordable residential unit Section 4.1 of the DC Act states that the unit must be intended to be an affordable residential unit for a period of 25-years or more from the time that the unit is first rented or sold. A developer looking to obtain this exemption must enter into an agreement with the Region and local area municipality (LAM) that requires the unit to remain affordable for this 25-year period.

Subsection 4.1(12) of the DC Act states that the Minister of Municipal Affairs and Housing may establish standard forms of agreement that shall be used for the purposes of securing affordable residential unit DC exemptions. At this time the Minister has not established any standard forms of agreement, meaning that the Region and the local area municipalities will have to establish their own forms of agreements including appropriate legal mechanisms to secure the affordability period and recover unpaid DCs in the event of default. If at any time during the affordability period the unit ceases to be affordable as per the Minister's definition, DCs will then become immediately due and payable.

Pursuant to subsection 4.1(13) of the DC Act the agreement may be registered against the land to which it applies and the municipality is entitled to enforce the provisions of the agreement against the owner and, subject to the Registry Act and the Land Titles Act, against any and all subsequent owners of the land.

Pursuant to subsection 4.1(7) affordable residential units must also be sold or rented on an arm's length basis which is to be determined based on section 251 of the Income Tax Act (Canada) with necessary modifications.

For ownership housing, a unit would be considered affordable when the purchase price is at or below the lesser of:

- Income-based purchase price: A purchase price that would result in annual accommodation costs equal to 30% of a household's gross annual income for a

household at the 60<sup>th</sup> percentile of the income distribution for all households in the local municipality; and

- Market-based purchase price: 90% of the average purchase price of a unit of the same unit type in the local municipality.

For rental housing, a unit would be considered affordable when the rent is at or below the lesser of:

- Income-based rent: Rent that is equal to 30% of gross annual household income for a household at the 60<sup>th</sup> percentile of the income distribution for renter households in the local municipality; and
- Market-based rent: Average market rent of a unit of the same unit type in the local municipality.

Appendix 1 outlines the affordable ownership and affordable rental housing thresholds for all twelve Area Municipalities in the Niagara Region as provided in the [Bulletin](https://www.ontario.ca/page/municipal-development-and-community-benefits-charges-and-parklands#section-4) (<https://www.ontario.ca/page/municipal-development-and-community-benefits-charges-and-parklands#section-4>).

Throughout the month of May, 2024 the Region hosted three virtual information and discussion sessions to discuss the affordable residential DC exemption. Invitations were sent to representatives from Finance, Planning and Building Departments at all twelve LAMs. These sessions had over 50 attendees with representation from all twelve LAMs. These sessions included brainstorming and idea sharing regarding the policy items that should be considered when drafting standard forms of agreements to mitigate risk to the Region and LAMs. There was consensus during these sessions that to minimize confusion for developers that it would be beneficial for the LAMs and Region to endeavour to share one standard form of agreement. The Region has considered the comments and feedback obtained during these sessions as a part of this report and will continue to work towards the development of a standardized agreement with the LAMs to the extent possible.

It is important to note that there is no requirement under the DC Act for the Region and LAM to have the same form of agreement, therefore each individual LAM must determine the details of what they would like included in their agreements. Since DCs are payable to both the LAM and Region as part of the DC collection process, each level of government must enter into an agreement with a developer for them to obtain this exemption per the DC Act.

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Currently, staff are consulting with our internal legal as well as our peer upper tier municipalities across the province to determine how best to protect our financial interests and ensure that units qualifying for this exemption remain affordable for the period of 25-years consistent with the requirement of the legislation. Staff are seeking to create an appropriate balance between risk mitigation, administrative simplicity and market realities so as not deter the development community from accessing the exemption. Staff are recommending that the following policy considerations be included within our agreements with developers. These items are not mandatory under the DC Act but are in staff's opinion necessary to strike an appropriate balance. These policy considerations are as follows:

- That the Region put in place separate standard forms of agreement for affordable ownership and affordable rentals due to the differences in documentation required for the Region to validate continued affordability over the agreement's 25-year duration.
- That as an enforcement mechanism pursuant to the right of the municipality to register these agreements on title; the Region include criteria for postponement within our agreements and charge documents which allows for postponement of the Region's interest only to a bank mortgage in the amount of the loan equal to the value of the unit based on the bank appraisal minus the amount of DCs payable but for the exemption. Postponement means subordination of one's secured interest to a subsequent secured interest. Including criteria for postponement in our agreements is a practical item which will ensure an individual purchasing a property with an agreement registered on title will be able to obtain a mortgage on the property. Without postponement criteria, some banks may deny a mortgage on a property to protect their rights to repayment, this will make this agreement less of a barrier to this exemption being utilized while also protecting the Region's interest. For example, Mortgagee A ranking in priority to Mortgagee B is entitled to have its loan repaid first and Mortgage B is entitled to a repayment of its loan only to the extent of any excess of proceeds of sale after Mortgage A's loan has been fully repaid.
- That if a unit ceases to meet the affordability thresholds as updated by the Province on an annual basis that prorated DCs based on the amount of time the unit remained affordable will become immediately due payable subject to interest at the Bank of Canada rate (currently 4.75%).
- That at building permit issuance, a developer must show proof of executed and registered section 4.1 Agreement.
- That at occupancy permit, a developer must confirm that the completed units are in fact affordable by providing to the Region sales documents or lease agreements. If

these are not available at the time of occupancy permit the developer has 90 days to provide these documents or DCs will become payable.

- That the Region has the right at any time during the 25-year agreement to conduct an audit of affordability and request documents to evidence the units continued affordability.
- For rentals: that on an annual basis landlords must provide rent rolls/lease information to support continued affordability.
- In instances where a developer is unable to have an agreement executed and registered prior to building permit issuance, due to timing constraints, that DCs may be paid upfront and later be refunded as long as an agreement is entered into within 90 days of building permit issuance.
- That agreements be subject to a development charge agreement fee consistent with the Niagara Region's Fees and Charges By-law (\$570 per 2023-90) related to staff time for implementation and administration of this program.

At this time staff are recommending that a formal policy related to this DC exemption be brought forward to Council at a later date. At the time of this report conversations are ongoing with our peers at other municipalities and Regions regarding their approach to the administration of this new exemption.

Council's approval of the temporary authority as outlined in this report will allow staff to continue working towards a policy and standard form of agreement, while at the same time promptly addressing any incoming requests for this new exemption. Developers looking to access the exemption will be required to have an executed and registered agreement prior to the issuance of a building permit. Without temporary authority as per this report, staff would have to bring forward each application for Council's approval, potentially causing delays to construction timeframes, increasing red tape and in the final analysis delaying the supply of much needed affordable housing to the market.

### **Alternatives Reviewed**

The exemption for affordable residential units is a legislated exemption that the Region must administer. All policy items included within this report have been considered to mitigate risk to the Region.

Staff have considered the alternative of putting a policy forward to Council for approval at this time, however, feel this is premature given the ongoing discussions with comparator municipalities and LAMs regarding approaches to implementation.

An additional alternative is that Council does not grant staff temporary authority to enter into affordable housing DC exemption agreements. This would require each agreement to be brought forward to Council for approval. This alternative is not recommended as it would result in long delays for developers. For a developer to obtain their building permit they must either pay the amount of DCs owing or have an agreement in place for an exemption of DCs. This will result in construction delays of these affordable units being constructed as developers must wait for the next Council meeting to obtain an executed agreement and obtain their building permit.

### **Relationship to Council Strategic Priorities**

This report provides details of legislative changes involving the *Development Charges Act, 1997* which will have an impact on the amount of Regional Development Charges collected to fund growth related infrastructure. This relates to Council's Strategic Properties of Effective and Prosperous Region as Regional Development Charges are a major source of funding for growth projects in the capital budget.

### **Other Pertinent Reports**

CSD 14-2023	Bill 23 Financial Impacts on Regional Development Charges
PDS 17-2024	Overview of Bill 185 (Cutting Red Tape to Build More Housing Act, 2024)
CWCD 2024-102	Thresholds for Affordable Housing for Exemptions and Discounts of Municipal Development-Related Charges

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This report was prepared in consultation with Roman Ivanov, Legal Counsel, Legal and Court Services, and reviewed by Beth Brens, Associate Director, Budget Planning & Strategy & Donna Gibbs, Director, Legal and Court Services.

## **Appendices**

Appendix 1            Thresholds for Affordable Housing Exemption by Municipality