

High Demand for Pay-on-Demand: Ontario Proposes a New Regulation to Support Housing Development

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On September 16, 2024, the Province of Ontario proposed a new regulation under the *Planning Act* that would authorize the use of pay-on-demand surety bonds (PSB) with prescribed features to secure development-related obligations.

Development approvals are often conditional on applicants/landowners (landowners) providing public infrastructure or other matters, typically secured through agreements and provision of funds to guarantee the completion of the works. PSBs serve as an alternative to letters of credit (LOCs or LCs), certified funds, and cash, the most common forms of development security, which may require that landowners have full amounts available upfront for municipalities to draw on directly. PSBs are expected to free up funds for homebuilders to build more homes.

The Province's Broad Proposed Regulation

The proposed regulation, not yet filed, is the Province's first under new regulation-making powers granted to the Minister of Municipal Affairs and Housing through Bill 109, the *More Homes for Everyone Act, 2022* (Bill 109).

The power allows the Minister to make regulations authorizing landowners "in respect of land use planning matters" to utilize prescribed types of surety bonds or other instruments to secure an obligation that a municipality imposed as a condition to an approval in connection with land use planning. The power also allows the Minister to specify any circumstances in which the landowner can exercise the authority.

Section 70.3.1 of the *Planning Act*, which authorizes the regulation, was proclaimed into force in October 2024.

Proposed Pay-on-demand Surety Bond Requirements

Under a PSB arrangement, an insurer guarantees the availability of funds necessary to secure the required works and payment to the municipality if the landowner fails to meet a development obligation.

Cassels

The proposed regulation would not require landowners to use PSBs. However, a municipality must accept the instrument if a landowner chooses to provide a PSB and the instrument has certain mandatory features proposed to be as follows:

1. The issuing insurer must:

- have a valid licence under the *Insurance Act* to write surety insurance;
- meet one of several prescribed credit ratings;
- guarantee payment to the municipality in the event of the landowner's default, as determined in the municipality's sole discretion; and
- pay the municipality within 15 business days of receiving a written notice of default.

2. The PSB must:

- provide for partial drawdowns; and
- contain specific cancellation terms.

Although entitled to enumerate circumstances under which landowners can use a PSB, the Minister has not proposed to do so.

While some municipalities historically permitted performance bonds, only a small number of municipalities permit PSBs today, subject to policies which impose similar requirements as the Province has proposed. Mandating that all municipalities accept PSBs will provide flexibility for landowners and may more generally assist in establishing consistent security expectations and requirements across municipalities.

Next Steps

Following stakeholder consultation earlier this year, the proposed regulation was subject to public consultation through the Environmental Registry of Ontario (ERO) until October 16, 2024. Neither a draft nor final form of the proposed regulation have been posted on the ERO. However, given the demand for this tool and broader acceptance of PSBs through this provincial direction, a number of municipalities have already begun developing policies or pilot programs to implement PSBs.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.