

Streamlining Brownfields Redevelopment and Limiting Records of Site Condition

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Developers, lenders, municipalities, and other persons regularly transacting in real estate need to be aware that changes to the record of site condition (RSC) process are coming. Ontario's Ministry of the Environment, Conservation and Parks (the Ministry) is seeking feedback on proposed amendments to Ontario Regulation 153/04: Records of Site Condition (the Regulation) under the *Environmental Protection Act* (the EPA) to remove barriers to redeveloping brownfields to accelerate development.

If enacted, the amendments would prevent third parties, including approval authorities, from requiring an RSC where one is not strictly required by the EPA by prohibiting the submission of an RSC where not required to manage environmental risk. The province is also expanding an existing RSC exemption in support of mixed-used buildings.

The amendments are aimed at reducing regulatory burden and time associated with developments where an RSC would not otherwise be required to ensure protection of human health and the environment. If the amendments are passed, they would remove what can be a lengthy and expensive condition from development, but we anticipate municipalities and other third parties will need to look to other mechanisms to ensure lands to be conveyed do not pose a risk of liability. We also expect more time spent on the early stages of environmental risk review and greater attention to ensuring Phase One Environmental Site Assessments (ESAs) are thorough, accurate, and supported in their conclusions. With the expansion of the mixed-use development regulatory exemption, the province is aiming to make conversion projects simpler.

Background

The filing of an RSC is a process established under the EPA to facilitate the redevelopment of brownfield sites by confirming compliance with applicable environmental standards at a given point in time, which can be relied upon by applicable persons to limit liability and the issuance of certain orders under the EPA.

To obtain an RSC, a person must comply with the requirements established in the Regulation. At a minimum, a "qualified person" must prepare a Phase One ESA, consisting of a review of records and other non-intrusive searches to determine whether there is likely any contamination at the property. If the Phase One ESA concludes that contamination is likely, the qualified person must undertake a Phase Two ESA, which consists of soil and groundwater sampling to delineate contamination and which may propose a

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strategy for remediation. To obtain an RSC, the risk of such contamination to the natural environment and human health must generally be mitigated through remediation or other measures. An RSC is filed on a registry established by the Ministry. Undertaking the assessments necessary to obtain an RSC and having it filed can take several months to years.

Subject to certain exceptions, an RSC is required by the EPA to change the use of a site from a less sensitive use (generally, industrial, commercial, and specified community uses) to a more sensitive use (which generally includes institutional, agricultural, residential, and parkland uses). However, the requirement to obtain an RSC may also be required contractually (by lenders or other third parties) or by approval authorities where land is being conveyed to a municipality or other public body to limit future risk and liability.

Regulatory Proposal to Prohibit Filing of RSCs

The proposed amendments to the Regulation intend to prohibit filing an RSC when it is not required under the EPA but instead is being required by another party. The amendment is intended to eliminate RSCs for low-risk sites. The Ministry has cited land use planning approvals and financing as two contexts where a requirement for an RSC may not be necessary.

It is expected that, if enacted, this change would mean that when a Phase One ESA does not identify potentially contaminating activities or areas of potential environmental concern, no person, including a municipality or an entity providing financing to a project, could require an RSC to be filed.

This first proposal is tied to legislative amendments proposed through Bill 227, the proposed *Cutting Red Tape, Building Ontario Act 2024*. If it proceeds, we expect greater scrutiny on the results of Phase One ESAs, including greater reliance on peer reviews and perhaps increased direction on Phase Two ESAs. We will continue to monitor the impact these changes may have on commercial transactions, financings and development approvals, and whether parties revert to pre-Regulation practices or develop new ways to manage potential liability.

Regulatory Proposal to Expand Mixed Use RSC Exemption

Currently, the Regulation exempts certain changes in property uses involving existing commercial or community uses from a requirement to file an RSC if the following criteria are met:

- The property will be a mixed-use consisting of commercial/community use and residential and/or institutional uses;
- The building has and will have after the change no more than six storeys;

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- The change in use is restricted to the floors above the ground floor, the building envelope will not change, and there will be no additions to the exterior portions of the building; and
- The property cannot have been ever used for an industrial use, a garage, a bulk liquid dispensing facility, or for the operation of dry-cleaning equipment.

The Ministry is proposing an amendment to the Regulation to allow more projects to benefit from the RSC exemption. The proposal would remove the six-storey height limit, which would allow taller buildings like office towers to be converted into mixed-use buildings and modify the restrictions on changes to the building envelope and the building exterior to permit additions above the ground floor. Ground floor additions beyond current safety and accessibility requirements and below grade additions would continue to take projects outside the scope of the exemption, leaving RSC requirements in place.

Next Steps

The province is seeking comments on the Environmental Registry of Ontario ([ERO Posting 019-9310](#)). We encourage all interested persons to submit comments.

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