

**STAFF REPORT:      Engineering & Public Works Department**

**REPORT TO:**            Council  
**MEETING DATE:**    May 14, 2012  
**REPORT NO.:**        EPW.12.001  
**SUBJECT:**            Modifications to Development Agreement Templates  
**PREPARED BY:**     Reg Russwurm, Director of Engineering and Public Works, on behalf of Development Template Review Committee

**A. Recommendation**

THAT Council receive Staff Report EPW.12.001 entitled “Modifications to Development Agreement Templates”; and,

THAT Council direct Staff to prepare Development Agreement Templates that include the following:

1. Revise the criteria for the Assumption of Municipal Works within a Subdivision Agreement to two (2) years after the issuance of a Certificate of Preliminary Acceptance of Basic Services consisting of a minimum of one (1) year maintenance period from the Preliminary Acceptance of Basic Services to the issuance of the Certificate of Completion plus a minimum maintenance period of one (1) year to the issuance of the Certificate of Final Acceptance subject to a Municipal Lands Work Permit process being enacted by Council that includes the provision to obtain a frontage deposit; and,
2. Maintain the current rough grading tolerance, being 300mm for lot grades and 50mm for drainage swales, within the Subdivision Agreement, and in lieu of satisfying the rough grading criteria, the Developer be provided the option to submit a Rough Grading Plan to demonstrate that building construction upon any one lot will not impede drainage on another; and,
3. Increase the Works security held for developments from 100% to 105% of outstanding work plus 10% of completed works with the understanding that the cost of outstanding works includes known deficiencies plus an allowance of 6% of the outstanding capital cost for engineering services; and,
4. Require prior to the issuance of Accepted for Constructed drawings by the Town, it be demonstrated that agreements have been entered into between the Developer and the utility providers for the installation of the utility services for the plan, and that the installation of utilities shall be fully secured with the utility or the Town in the instances where securities are necessary; and,
5. Maintain the current \$25,000 security deposit for Pre-Servicing Agreement and, if necessary, amend the Property Standards By-law so as to include wording to ensure that any costs incurred beyond the available securities can be added to the property tax bill as a priority lien; and,

6. Require a deposit be established with the Town in an amount equal to 3 years of street lighting costs from which the Town will pay related electrical costs; and,
7. Require the security allowance held for erosion and sediment control not be reduced to below 100% of the actual cost of original installation of the erosion and sediment controls until the area of concern is fully vegetated; and,
8. Endorse maintaining the status quo with respect to the provision of snow removal on roads and sidewalks, being that the Developer shall be responsible for snow removal in subdivisions until assumption; and,
9. Expand the definition of the Certificate of Preliminary Acceptance of Basic Services to include regulatory traffic signs and street name signage; and,
10. Require the security allowance held for sidewalks and curb & gutters not be reduced to below 25% of the actual cost of original installation until the issuance of the Certificate of Final Acceptance; and,

THAT Council delegate the authority to finalise and enact the Town's Development Agreements upon the recommendation of the Town's solicitor, Director of Planning and Building Services, Director of Finance and Information Technology, and the Director of Engineering and Public Works.

## **B. Background**

In response to Staff Report EPW.11.030 (attached) where eight modifications to the Development Agreement Templates had been proposed for consideration, Staff prepared and held two Public Information Centers (PIC's) and conducted a meeting with interested members of the development industry to discuss options and the implications of each modification.

Further to the public engagement, Deputy Mayor McKinley and Councillors Gamble and Martin were tasked by Council to undertake a review of the issues and recommend to Council what, if any, modifications should be made to the Development Agreement Templates. The Councillors, along with David Finbow, Director of Planning and Building Services, John Metras, the Town's solicitor, Robert Cummings, Director of Finance and Information Technology Services, and Reg Russwurm, Director of Engineering and Public Works, met to review the comments made at the PIC's and the written submissions received. For ease of reference, this group will be referred to as the Development Template Review Committee (Committee).

Since two of the key issues of concern were Developer initiated, it was decided to concentrate on these two issues in order to make a quick decision on these points, and then to later consider the remaining six issues. Staff Report EPW.11.071 (attached) was prepared to address the two issues. Council however did not approve the recommendations as made by the Committee, and referred the issue back to the Committee to reconsider the points. Subsequently, the Committee met on September 8, 2011 to reconsider the two issues presented and to prepare recommendations for the remaining 6 issues.

The discussion prepared below outlines the important points of each of the eight issues along with the Committee's recommendation. For additional information, reference can be made to the earlier reports as attached.

### Issue 1: Assumption of Municipal Works

Currently, the Town's Subdivision Agreement states that the Town will not assume ownership of municipal works, and thereby any maintenance costs, until "75% of the buildings permitted to be constructed on lots within the Plan by the Town's zoning by-law have been substantially completed". This means that dwellings must be built and ready to be occupied and not just started before the Town will assume the municipal works. The purpose for this clause is to make the Developer responsible for maintenance and repair of the new works as the infrastructure, particularly roads, curbs, boulevards and sidewalks are susceptible to damage during house construction activities. This method leaves the risk of damage to infrastructure during house construction with the Developer.

From the Developer's point of view, the 75% assumption clause is overly burdensome because it places a non-defined responsibility on the Developer who may have sold all the lots and has no further interest in the project other than the on-going maintenance and provision of related securities. The local development industry had asked for a return to the previous assumption criterion that was in place prior to 2006. That is, that Assumption would occur after a 2 year Maintenance Period regardless of the number of homes constructed. This method transfers the risk of infrastructure damage to the Town.

The Committee recommended to Council in Report EPW.11.071 that the Town provide some certainty to the development community by setting the Maintenance Period at 5 years. In addition to setting a specific time frame, the Committee recommended the percentage built criteria be reduced from 75% to 50% to aid faster moving developments. In response to concerns raised by local developers, Council referred this issue back to the Committee for further consideration.

Committee asked the Director of Finance and IT to inquire as to the strength of the Developer's argument that financing is not available for projects with undefined assumption. His research came to the conclusion that there is funding available if there is a satisfactory business case. Unfortunately, the local real estate market is currently slow with reduced lot sales and housing starts. This is expected to be a relatively short term effect because the underlying real estate market is attractive albeit oversaturated at the time being with vacant lots. Presently, the number of vacant serviced lots in the Town is around 862 which equates to 11% of all serviced lots. Considering that the average number of new home starts in the past three years within the Town has been 70 annually, there is around 12 years worth of vacant lots available. The key question then for Council becomes how much risk should the Town assume to enable land development to take place now, or is it prudent to wait until the surplus vacant lots are built upon before constructing more vacant lots?

Another way of looking at the issue is the benefit of economic development. There is no doubt that economic activity in the Town is strongly tied to the development and house construction industry.

There are indeed economic benefits to the construction of underground works and roads; however without the accompanying house construction the majority of the associated economic activity (trades, services, etc) is deferred sometimes for years after the municipal infrastructure is built.

To address the Town's concern over the transfer of risk, the development community has proposed that the Town collect frontage security (a security held by the Town to address damage caused to the municipal infrastructure fronting a lot to be constructed upon) from the property owner prior to issuance of building permits on lots located within an assumed subdivision. In addition, the development community asserted that the Town collects taxes on lots, built upon or not, that will offset the cost of any repairs.

To enable the Town to collect funds to cover the damage caused by house builders, the Town would require the frontage security be established on some criteria and collected as part of the Municipal Lands Work Permit process required prior to the issuance of a building permit. By-law No. 99-53 provides for this type of permit however this by-law, along with the By-Law No. 99-29, will require some amendments so as to address the proposed requirements for frontage security.

The primary concern with collecting frontage security from property owners for damage is the ability to assign costs and being able to hold the responsible person to account. All too often home builders are crossing adjacent vacant lots to access the home under construction, and as a result are damaging works that front another future home. Without direct observed evidence in hand it will be difficult to hold the perpetrator to account. In addition, it may be unfair or even possible to hold the future home owner responsible for damage to their frontage caused by others perhaps years earlier.

Regarding the point that the Town collects new taxation revenues from the development of vacant lots, the Committee considered the need to prepare a detailed cost analysis to determine the amount of incremental taxation the Town receives due to the creation of vacant lots. In the past, the Town has used the increase in assessment as a means to reduce the tax burden on current taxpayers instead of holding the additional funds for other purposes. In the end though the Committee felt the financial work was unwarranted since taxation is meant to be cost recovery only and that such an analysis separating the increased revenues into cost centers would be time extensive, divert resources needed for other priorities and would provide limited insight.

It is possible though to prepare some quick calculations for comparison purposes of the extremes. When considering the financial pictures, it should be kept in mind that there are Town costs associated with a vacant lot. These costs include snow removal, street lighting, fire protection, and general administration.

For an individual vacant lot worth \$200,000;

- \$690 is paid in taxation to the Town after County and Board of Education transfers
- \$175 of Town taxation is provided to Roads to maintain 260 centreline kilometres of road
- \$0.02 is available annually to maintain the frontage of 30m (100') wide lot
- Assuming an average of 5 years until house construction, \$0.10 is available to repair damage – a figure so small as to be negligible.

On the other extreme, if one were to consider that a vacant lot will not result in any other additional cost burden to the Town, \$3,450 is available to repair damaged infrastructure from the \$200,000 vacant lot example over 5 years. Considering that the cost of curb & gutter and sidewalk replacement is \$125/m and \$150/m respectively, the amount of combined replacement is 12.5m ( $\$3,450 / (\$125/m + \$150/m)$ ). This does not consider any other damage such as curb stops, boulevards and asphalt.

In conclusion, it is noted that any reduction in the current assumption criteria will result in added cost to the taxpayer to repair damage caused by house builders. A frontage deposit scheme for lots located within an assumed subdivision will certainly assist in limiting the costs but it is not expected to recover all costs. Of course the trade off of limiting the risk to the Town is the realisation that some or all developments will be delayed or deferred until the market conditions suit the risk.

In response to Council's request to reconsider the assumption criteria previously put forward, the Committee can recommend a return to the 2 year maintenance criteria based on an economic development argument provided suitable risk mitigation measures such as a frontage security methodology or equivalent is approved by Council. Staff is currently considering models for a Municipal Lands Work Permit and will be bringing forward a report for Council's consideration.

In considering the specifics of the 2 year maintenance period, Staff will include wording in the Development Template Agreements to ensure that at minimum two years is provided on critical infrastructure and that all infrastructure is warranted for a least a one year period. The recommendation is that there be a minimum of 1 year from the Preliminary Acceptance of Basic Services (to allow issuance of building permits) until the preparation of the Certificate of Completion (all works 100% completed), and then another minimum maintenance period of one year until the Certificate of Final Acceptance (triggers release of all securities and assumption). This methodology will permit the proponent to complete a development in approximately two years provided that works are completed expeditiously and other criteria are satisfied. Staff will furthermore include wording specifically to ensure a minimum maintenance period of two (2) years is provided for base asphalt with curb & gutter just in case there is an instance where building permits are issued prior to base asphalt, and to ensure that surface asphalt be placed no sooner than one year after the base asphalt is completed.

## Issue 2: Rough Grading Criteria

The rough grading criteria were presented in Report EPW.11.071 and referred back to Committee along with Issue 1 due to confusion in the resolution wording. Committee reconsidered their recommendation but felt that the spirit of the recommendation should not be modified however the resolution could be re-worded to add clarity. For completeness, the discussion is presented again for Council's information.

Within the Town's Subdivision Agreement there is a requirement that prior to the issuance of building permits within a Plan of Subdivision that rough grading within the Plan be such that positive drainage off all lots is provided. In the past, this performance standard applied at Basic Services (point where building permits could be issued). Experience has shown that although lots are graded for positive drainage by the Developer prior to building permits, houses are typically constructed independent of adjacent units in a random manner which has led to drainage blockages resulting in localised ponding and/or flooding. The subsequent measures taken by home owners to correct problems have exasperated issues and caused ongoing challenges in a number of developments. To correct that problem, the grading criteria have recently been strengthened within the Engineering Standards and Subdivision Agreement by establishing set tolerances for rough grading (300mm for lot grades and 50mm for drainage swales). The purpose of this tolerance is to ensure to every extent reasonable that grades along property lines and more importantly along swales are constructed to avoid a situation where the construction of a house and related landscaping doesn't impede drainage off another lot.

Since the enhanced grading criteria increases the land clearing, including tree removal, and earth moving costs for Developers at the initial rough grading stage, the Town has been asked to relax the requirement to permit more tree cover and natural topography to remain in place until the home is constructed.

The Committee reviewed this issue and was concerned with the drainage problems that occur on properties, inconvenience caused to home owners, and the ongoing Staff time needed to resolve the concerns. Although the Committee recognised and very much agreed with the wish to retain as much of the natural tree cover as possible, the Committee felt that any change in the final grading from the natural elevation in the range of 300mm would result in the tree ultimately being removed regardless. The Committee is of the opinion that if tree and natural topography preservation is a primary wish of the proponent or of a commenting Agency (GSCA, NVCA, NEC, etc), the grading designer must prepare a plan to that end. Ultimately, the grading along the property lines have to match the final grading plan approved by the Town and there is no reasonable opportunity to waiver from that design. The Committee felt that the 300mm tolerance provided sufficient opportunity for individual internal lot grading to maximise tree preservation while staying true to the overall final grading plans. Internal lot grading must be such that there is positive drainage to the property line. It is reasonable to expect that through good design that the entire lot can be rough graded in a manner to facilitate a range of housing units on the property and maintain the tree cover and natural topography desired.

Staff recently though has had discussions and success on a development where it was demonstrated that it is possible to achieve the Town's goal of positive drainage from any one building independent of whether the adjacent lot is built upon and be outside of the set tolerance. The Committee is therefore recommending that the development proponent be given the opportunity to have the rough grading tolerance waived if a Rough Grading Plan can be prepared to achieve the Town's overall goal. The Rough Grading Plan would be submitted with the design review submissions and any associated Work will need to be completed prior to the issuance of building permits.

### Issue 3: Security for Outstanding Work

The Town's current Development Agreements require that securities be provided for 100% of outstanding municipally assumed work, and that securities can be reduced to 10% for works completed to guarantee maintenance activities. The primary purpose of the 10% security for completed works is to deal with failures and repairs of completed works not anticipated and not to cover any inadequacies in the security for outstanding work.

It must be noted that the Town has an obligation to complete any works that the Developer has defaulted on at any point after the registration of a Plan of Subdivision for the benefit of the affected property owners and adjacent area. In the extreme, after plan registration the Developer can sell all the lots, not construct any works and the Town is obligated to construct the project in its entirety. The risk of this extremely scenario is very low but a possibility.

The risk that the Town incurs with the current securities calculation method is that the security held can be inadequate to complete the works in the event the Developer defaults due to: i) the cost inflation of construction; ii) low initial cost estimates; and, iii) public sector pricing.

Staff re-calculate the security requirements at every security reduction to minimise the Town's risk exposure. This practice is adequate for developments that progress normally through the development process. It's impossible however to identify which developments will ultimately default when the Development Agreement is executed, and therefore an adequate security calculation and retention practice is needed that applies equally to all developments at all stages of the development process.

It should be noted that although the Town in theory can immediately after default access the securities, in practice it takes a year or more to expend the funds which adds to the cost pressure. The reasons for the delay include correspondence with the developer and agents to allow sufficient opportunity to complete/ correct the Works, internal procedures, staff resources and construction timing.

Committee recommends that a premium be added to the security for outstanding work above the current 100%. In the event that Council passes the recommendation to move to a 2 yr maintenance period, Committee is proposing a 5% premium to 105% of outstanding works. Should Council proceed with a longer maintenance period, Committee recommends that the premium be re-visited and set at a value up to 25% depending on the expected maintenance period.

Furthermore, Committee also recommends that it be clarified in the security requirements that the cost of work includes an allowance for engineering services at 6% in the event that the Town must utilise the services of an engineering consultant to complete the Works.

#### Issue 4: Utility Security

Currently, the Town does not collect securities for the installation of third party utilities (electrical, gas, telecommunications). The concern is that if the Developer defaults prior to the installation of these services, the Town may be obligated to install uncompleted utilities, and thus, appropriate surety is needed to ensure that the property owners will have adequate servicing. The cost of providing servicing is increasing because the utilities are pushing more costs onto the Developer to make sure the utility has a positive business plan. When considering what liability the Town is exposed to for utilities, it should be noted that only the electrical utility must be installed for the issuance of occupancy by the Chief Building Official.

The Committee recommends that prior to final approval of a plan of subdivision for registration, agreements be entered into between the developer and the utility providers for the installation of the utility services for the plan. The agreement with the electrical utility (Hydro One, Collus) for the installation of the electrical distribution system shall be secured either with the utility or the Town, and that the electrical distribution system be included in the definition of Basic Services as appropriate measures to make sure that the property owners are provided with the basic services of heat and electricity required under the Ontario Building Code in the event of default.

#### Issue 5: Pre-Servicing Security

Under Pre-Servicing Agreements, the Town permits Developers to proceed with subdivision work prior to execution of a Development Agreement. The key benefit a Pre-Servicing Agreement is that the Developer doesn't have to upfront a significant amount of securities.

The Developer can only undertake specified work within their site boundaries without connecting to municipal infrastructure. Since the Town does not have an obligation to complete the development, the requirement for securities is greatly reduced and is limited to the cost to make the site safe and to provide environmental protection. The current security held is \$25,000 regardless of the size of the development. The concern is that this amount is inadequate to address larger developments and the ongoing costs to address drainage and erosion control. The major risks with respect to a default under a Pre-Servicing Agreement involve grading and drainage, stormwater management issues and open excavations which may have an impact on the natural environment, adjoining lands and health and safety of the general public. While the Town has not experienced any defaults of this nature, the risk certainly exists.

The Committee considered if the Pre-Servicing security should be set in part by the size of the development and/or if there is another means to accomplish the goals since the lands are not divided and under single ownership.



The Committee is recommending that the Town maintain the current \$25,000 security deposit which can be used to rectify a default. If additional funding is required, the default can be remedied through an order under the Property Standards By-law through the provisions of the Building Code Act which allows the Town to enter the lands, do the required remedial work and add the costs to the tax bill as a priority lien. The Town's solicitor feels the existing Property Standards By-law is enforceable to a degree but recommends that amendments should be made to it to deal specifically with default situations under the Pre-Servicing Agreement.

#### Issue 6 - Street Lighting

Within the current Development Agreement, the Developer is responsible for street lighting costs until assumption. Staff have discovered that on several occasions the cost for the street lights has been unknowingly added to the Town utility invoices by either Developer statements to the electrical provider or a billing error. The nature of the invoicing is such that it can be difficult to discern which street lights has been added and when. Staff have worked from time to time with the electrical providers to clarify the invoicing but billing coordination has proven complicated. Staff will continue to pursue detailed analysis of the invoicing as time and priorities permit. Regardless, Staff wish to ensure a methodology that appropriately allocates the street light costs to development.

The Committee continues to feel it's appropriate that the Developer pay the entire cost of street lighting until assumption, and the best means to achieve this goal is for the Developer to deposit an amount equal of 3 years of lighting costs with the Town with provision to obtain additional deposits or access securities should the deposit be depleted. The 3 year time frame is based on the expectation of a 2 year maintenance period. Council therefore should consider increasing this time frame if the 2 year maintenance period is not endorsed. Electrical power used by street lights is paid for at a monthly flat rate based on the light wattage and is not metered which facilitates the confident calculation of the deposit amount.

#### Issue 7 - Erosion Control Securities

One of the troublesome ongoing issues within developments is erosion and sediment control. This work involves the erection of siltation fencing, monitoring, corrective action and removal. Often, the erosion fencing is erected initially in accordance with applicable standards but routine maintenance is lacking. Along with ensuring that there is continued security to undertake corrective actions by the Town if necessary, consideration of increased security for erosion and sediment control is warranted to focus developer attention.

The key point when evaluating alternatives is that the Town have sufficient security to implement corrective measures without having to erode securities held to complete the project or otherwise deal with unseen repairs. For this reason Committee recommends that the security allowance held for erosion and sediment control not be reduced to below 100% of the cost of installation of the erosion and sediment controls until the area of concern is fully vegetated.

In the event that a premium is set for the security held for uncompleted works, the initial security for erosion and sediment control will have the same premium while the works are unfinished and then reduced to 100% when initially installed. The security for this work will not be reduced to below 10% of the initial cost until assumption similar to other works.

### Issue 8 -Snow Removal

The current Development Agreement template obligates the Developer to provide snow removal (roads and sidewalks) within a subdivision until assumption of the municipal works by the Town. (It should be noted that the requirement for sidewalk clearing is only applied in areas where the Town undertakes sidewalk clearing - i.e. Thornbury). Nonetheless, an option within the Subdivision Agreements permits the Town to undertake snow removal for compensation with a "hold harmless" clause. Furthermore, if the Developer defaults or neglects to remove snow in a timely manner, the Town has an obligation to take proactive corrective action to ensure the residents receive snow removal service comparable to Town maintained roads. The Town has undertaken snow removal within several subdivisions in the past for compensation but generally now avoids taking on this work to avoid significant Staff time on discussions over responsibility for curb, sidewalk, sod and other snow removal related damage accusations. Although the current Subdivision Agreement clearly states that the Developer is responsible for any such damage and must hold the Town harmless, Engineering and Public Works Staff expend effort defending that position and the project completion is delayed.

Snow removal is one activity that can get overlooked by the Developer. The residents can suffer from poor service and it may affect other municipal services like garbage collection. In the worse case, emergency vehicles will not be able to access the site. Given that residents living on roads not assumed by the Town may experience less than municipal standard snow removal, a review of the snow removal clause for roads and sidewalks is warranted.

Although the provision of snow removal services is an attractive option to lessen the Developer's burden and to moreover ensure a minimum level of service to taxpayers and visitors, the Committee recommends that the Town maintain the Status Quo and continue the current practice of requiring the Developer to be responsible to coordinating and paying for snow removal in subdivisions until assumption. The key factors in this recommendation are the disagreement on who is responsible for snow removal damage and the possibility that a "hold harmless" clause may not be enforceable if the Town insists on providing the service.

Staff will continue to monitor subdivisions to ensure residents receive adequate service and will take appropriate actions as needed. If the Town has to do emergency snow removal, the Town will generally use a contractor to separate Town forces from the activity and to clearly establish the cost for recovery purposes. In addition, it is easier for a contractor with smaller equipment to manoeuvre around construction equipment and materials usually left on active subdivision construction sites.

## **Additional Issues**

Staff are currently making minor revisions to the Development Templates to clarify wording and procedures. During that discussion, several issues came up that warrant the attention of Council. These issues are being amended to the original list of eight.

### Issue 9 – Expand the Definition of Basic Services

Prior to the release of building permits, the subdivision works must achieve the Basic Services necessary to permit occupancy of the building. Staff recommends that regulatory traffic signs and street name signage be included in the definition of Basic Services. The primary reason for the recommendation is to increase the safety of the road corridor and better enable emergency vehicles to find a specific property.

### Issue 10 – Sidewalk and Curb Security Retention

The Town has experienced ongoing concerns with the amount of damage caused to sidewalks and curbs during house construction. The Town currently holds at least 25% of the cost of landscaping until the Certificate of Final Acceptance (triggers assumption) because there can be significant die off if there isn't proper maintenance. Staff recommend that sidewalks and curb & gutter be considered similarly. That is, at least 25% of the cost of sidewalks and curb & gutter is held until Final Acceptance.

### Next Steps

Upon the approval of Council to undertake the modifications to the Development Agreement Template, the Town's solicitor will coordinate the approved changes and also include minor wording and process modifications that will clarify the template documents for the users. The revised template will be reviewed by the Director of Planning and Building Services, Director of Finance and Information Technology, and the Director of Engineering and Public Works. That reviewed document will be circulated to the development community for comment. Once comments are received, the above members of Staff will consider the comments and modify the template documents as warranted. It is recommended that the authority to finalise and enact the Development Template Agreements be delegated to the above senior Staff.

At the same time as the Development Templates are being finalised, Staff will draft a By-Law for Council's consideration to enact a new and revised Municipal Lands Work Permit process to address any works being done on Town owned lands. The emphasis will be on works within road allowances, however this permit process could extend to all Town lands.

### C. The Blue Mountains' Strategic Plan

This report furthers the Town's Strategic Goal #2 "Addressing the Town's municipal infrastructure needs" and Strategic Goal #6 "Providing a strong well managed municipal government".

### D. Environmental Impacts

none

### E. Financial Impact

The steps recommended within this report will both individually and in combination are a responsible compromise as to the sharing of financial risk between the Developer and the Town to enable development to advance.

### F. In Consultation With

This report has been prepared in consultation with the members of the Development Template Review Committee and the CAO.

### G. Attached

1. Report EPW.11.030 (Revised) - Consideration of Modifications to Development Agreement Templates
2. Report EPW.11.071 - Modifications to Development Agreement Templates - Assumption and Rough Grading

Respectfully submitted,

**Reg Russwurm**

Reg Russwurm  
Director of Engineering & Public Works

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**STAFF REPORT:           Engineering & Public Works Department**



**REPORT TO:**           Infrastructure and Recreation  
                                  Committee  
**MEETING DATE:**    May 10, 2011  
**REPORT NO.:**        EPW.11.030 (REVISED)  
**SUBJECT:**            Consideration of Modifications to  
                                  Development Agreement Templates  
**PREPARED BY:**     Reg Russwurm, Director of Engineering and  
                                  Public Works

**A. Recommendation**

THAT Council receive Staff Report EPW.11.030 entitled “Consideration of Modifications to Development Agreement Templates”; and,

THAT Council direct staff to discuss items 1 to 8 further with the area development community and stakeholders and provide council with comments.

1. THAT Council endorse maintaining the status quo with respect to the criteria for the assumption of municipal works, being 75% of the buildings permitted to be constructed on lots within the Plan by the Town’s zoning by-law have been substantially completed; and,
2. THAT Council endorse maintaining the current rough grading tolerance, being 300mm for lot grades and 50mm for drainage swales, within the Subdivision Agreement, or that the development proponent be given the option to submit a rough grading plan to demonstrate that building construction upon any one lot will not impede drainage on another; and,
3. THAT Council increase the works security held for developments from 100% to 125% of outstanding work plus 10% of completed works with the understanding that outstanding works includes known deficiencies and that the cost of work includes an allowance of 6% for engineering services; and,
4. THAT Council require, prior to final approval of a Plan of Subdivision for registration, agreements be entered into between the Developer and the utility providers for the installation of the utility services for the plan, and the agreement with the electrical utility (Hydro One, Collus) for the installation of the electrical distribution system shall be fully secured, and that the electrical distribution system be included in the definition of Basic Services; and,
5. THAT Council set the works security for Pre-Servicing Agreements at the greater of 25% of the works being constructed under the Pre-Servicing Agreement or \$25,000; and,
6. THAT Council require a deposit be established with the Town in an amount equal to 5 years of street lighting costs from which the Town will pay related electrical costs; and,
7. THAT Council require the security allowance held for erosion and sediment control not be reduced to below 100% of the actual cost of original installation of the erosion and sediment controls until the area of concern is fully vegetated; and,

8. THAT Council endorse maintaining the status quo with respect to the provision of snow removal on roads and sidewalks, being that the Developer shall be responsible for snow removal in subdivisions until assumption.

## **B. Background**

The current Development Agreement templates for subdivision, condominium and site plan projects have been in use for approximately five years. Over that time, Staff and the development industry have gained experience with the document, and it is appropriate that the Town consider how well the documents have been working. There is some wording and termination modifications that Staff will bring forward at a later date with the proposed revised Development Agreement templates, however the purpose of Staff Report EPW.11.030 is to seek Council direction on several key terms within the agreements. The impetus for consideration of the issues outlined below has been from both Town Staff and development proponents.

The following discussion on the proposed changes is structured to outline the issue, propose several options and make a Staff recommendation. The alternatives outlined below can be considered as primary alternatives. Opportunities exist for sub-alternatives or variations for each issue to fine tune the final solution. Throughout the discussion is the theme that: i) the Town is responsible to complete the development project in the event of a Developer defaulting at any point in the development process; ii) the need to protect those who have purchased lots or units and the environment; and, iii) that the Town (Taxpayer) should not incur undue cost risk.

The key complicating factor when considering the various issues in this Report is that unlike developments in more urban communities, housing construction within Plans of Subdivision in the Town occurs over a period of years. Many lots are purchased on the speculation of future construction (retirement or 2<sup>nd</sup> home) or as an investment. It is not uncommon for lots to be sold by a Developer and then sit vacant for five to ten years or longer. As a point of measure, at the end of 2010 there were 919 vacant units that front but are not connected to the water system out of a total of 8415 units that are or could connect to the water system. That's an 11% vacancy rate, or in other words, that's 11% of the Town's infrastructure that must be maintained (if all assumed) without the user rate revenue or taxation from built-form assessment.

Different municipalities may approach the solution to each of the issues discussed below differently. The solution for The Blue Mountains however needs to reflect the realities of development within the Town, the amount of risk that this municipality is willing to assume, and the financial resources available to address the problem and /or liability concerns.

The intent of this Report is that Council will consider the issues presented and provide direction to Staff who will then modify the appropriate Development Agreement templates and then bring the templates back for Council's consideration.

Issue 1 – Assumption of Municipal Works

Currently, the Town's Subdivision Agreement states that the Town will not assume ownership of municipal works, and thereby any maintenance costs, until "75% of the buildings permitted to be constructed on lots within the Plan by the Town's zoning by-law have been substantially completed". This means that dwellings must be built and ready to be occupied and not just started before the Town will assume the municipal works. The reason for this clause is to make the Developer responsible for maintenance and repair of the new works because the infrastructure, particularly roads, curbs and sidewalks, are susceptible to damage during house construction activities to the point where significant replacement work is needed. For example, experience has shown that about a third of curb and gutter has had to be replaced on several projects. Along the same lines, the Agreement requires that 60% of homes be constructed before the final lift of asphalt is placed to avoid damage to the final wearing surface.

From the Developer's point of view the 75% assumption clause is overly burdensome because it places a non-defined responsibility on the Developer who may have sold all the lots and has no further interest in the project other than the on-going maintenance and provision of related securities. Much like the Town does after assumption, the Developer becomes responsible for repairs to infrastructure that he has little control over and on which he has limited opportunity to recover costs. Beyond the cost of actual repairs, the cost burden for the Developer also includes the carrying cost of security provided to the Town to ensure that he follows through on his obligations. Even if the Developer were to gather a premium from the lot purchaser, the costs remain to be borne by someone.

The alternatives considered are:

- A. Status Quo: Remain with 75% built clause prior to assumption
  - does not increase risk of costs for Town
  - maintains onus on the Developer to either capture sufficient allowance for risk in sale price of lot or to gather a separate Developer-taken security, or otherwise monitor work of builder
  - may result in some developments not proceeding until market conditions allow cost premiums
- B. Return to 2 yr maintenance
  - practice stopped in 2006 with adoption of current subdivision agreement template
  - significantly increases Staff involvement to monitor house construction and related damage in subdivisions
  - places significant risk and potential cost burden on taxation to repair damaged infrastructure prematurely
  - no relationship with original lot purchaser to capture cost premium or security
- C. Return to 2 yr maintenance and require Lot Frontage Deposits from Lot Owners at the time of Building Permit Issuance
  - problematic in terms of tracking responsibility for damage (i.e. damage could occur at Lot X and be the responsibility of Lot Owner Z)
  - places onus on Town to determine responsibility for damage
  - significantly increases Staff involvement to monitor house construction and related damage in subdivisions

- D. Change to sooner of 5 yrs or 75%
  - reduces the uncertainty for the Developer such that the maintenance end date is known
  - increased risk and potential cost burden on taxation to repair damaged infrastructure prematurely
  - increase in Staff involvement to monitor house construction and related damage in subdivisions
- E. Assume underground works after 2 year maintenance time period
  - generally the underground systems (watermain, sewers) are entirely completed prior to house construction and within two years construction maintenance concerns become evident
  - builder related damage likely to underground works include broken or debris-filled valve boxes, debris or siltation disposition in sewers (storm water management facilities are not considered underground works)
  - the risk of additional cost is low for the Town as long as there is sufficient wording in the Agreement that any damage caused to or debris deposited within watermain and sewer works is appropriately dealt with
  - consideration needed if additional security is needed for surface works to address damage to underground
  - legal implications of Town-owned infrastructure on Developer-owned road works (i.e. costing sharing and inferred assumption of surface works or responsibility for road structure if underground repairs undertaken by Town)
- F. Change built criteria to 50%
  - option similar to Status Quo except that the criteria for assumption is changed to 50%
  - provides more certainty to the Developer that his obligations will end sooner than current situation
  - increased risk and potential cost burden on taxation to repair damaged infrastructure earlier than Status Quo
- G. Buy-out clause option
  - optional negotiated settlement of a one-time payment by the Developer to buy-out his obligations such that the Town assumes all risk and repair costs
  - significant increase in Staff time to assess damage, likelihood of future damage and assigning costs to work
  - increased risk and potential cost burden on taxation to repair damaged infrastructure prematurely if Staff assessment is incorrect or if resulting damage is more than anticipated
  - payment amount should be enough to cover reasonable costs however the Town should not “make a profit” if the actual costs are less than the buy-out payment



- H. Lot deposit paid back to property owner
  - Similar to the buy-out option except that any funds unspent are returned to the property owners (not necessarily Developer) on an individual lot basis dependent on actual cost incurred at that lot, or on a per lot basis whereby any unspent funds are divided among the lots for which the deposit is provided
  - significant increase in Staff time and resources to assess damage, likelihood of future damage and assigning costs to work, and then to calculate and return deposits to lot owners
  - increased risk and potential cost burden on taxation to repair damaged infrastructure prematurely if Staff assessment is incorrect or if damage is more than anticipated
- I. Defer works prone to damage
  - surface works such as asphalt, curb & gutter and sidewalk not completed until a set number or percentage of buildings constructed, or other criteria satisfied
  - will require modifications to road standards to ensure road structure can carry construction traffic (asphalt forms part of road structure and caps granular)
  - services (i.e. sidewalks) will not be available to local residents for some time
  - increased costs for Developer to construct “builder’s road” suitable for long term use during house construction and to prepare the road for asphalt placement
  - possibility to cap granular with asphalt without curb however experience has shown that much of the asphalt will not be on grade suitable for curb installation
- J. Town undertakes some services without assumption of municipal works
  - to reduce the cost burden on the Developer and ensure consistent Town-wide level of service, the Town could assume the provision of some municipal services (i.e. snow plowing, street lighting)
  - current municipal supplied field services include fire, police, garbage collection, water & wastewater operation, by-law enforcement
  - Town has obligation to ensure that new property owners have access to the same services provided to residents on assumed works, and as such the current agreement provides clauses for the Town to undertake the services on either an emergency basis in case of developer default, or as fee-for-service
  - an argument that is made is that with the lot creation the Town receives increased tax generated revenue and thereby has funding in hand to pay for the service provision, however the tax revenue generated in any one year is zero sum such that to provide additional services the overall tax revenue would have to be increased accordingly
  - streetlighting and snow removal will be considered separately in this Report

Staff have carefully reviewed the various options outlined above. Again, the key point to consider is that an undue cost risk burden not be placed on the Taxpayer in permitting development to proceed. All the options considered, save the status quo, increase the cost risk to some degree over the current Development Agreement templates. Options to reduce the cost risk have not been considered because Staff is confident that the current assumption clauses are adequate for the Town’s needs. That being said, several municipalities in southern Ontario with fast moving real estate markets have a 100% built assumption clause. That is not the situation in The Blue Mountains.

It should be expected that by insisting on 75% built before assumption, several developments may not proceed until the market conditions are sufficient to compensate for the risk premium. Staff feel that the housing market is the proper place to assign the cost risk, not the Taxpayer. In short, if the business case is not sound to address all the costs of development, the development should not proceed. The Developer has options to raise the cost of the lot accordingly or to collect a Developer-taken security from the lot owner to cover the Developer's risk related to builder damage to municipal works prior to assumption.

An argument exists that the Town will forgo economic benefits related to the construction of the underground services and roads, and the added assessment growth in taxation. Without in-depth analysis, a cost-benefit accounting is not available but Staff feel that the cost risk and additional Staff time that will be incurred to monitor construction activities is not offset by the economic benefits or assessment growth. Regardless, a change from the current 75% assumption criteria only increases the actual and potential cost burden on the Taxpayer. The development will likely proceed at some point in time and therefore any economic benefits are arguably postponed and not lost. Furthermore, the fact that 11% of units (lots) in the Town are not built upon, begs the question whether the Town should be assuming additional infrastructure without associated user rate and assessment growth revenue.

A number of the options considered include the Town accepting the cost of repair or recovering costs from someone other than the developer. Although the Town has available methods under the Municipal Act to recover the costs from property owners, it is extremely difficult to assign actual costs to a particular lot unless the damage is witnessed and properly documented. Staff do not recommend that costs be assigned to a lot owner for frontage damage regardless of how the damage may have been caused because that scenario is ripe for litigation.

Engineering and Public Works Staff are of the opinion that the status quo provides adequate protection to the municipality as it relates to risk protection. Due to the increased cost risk to the taxpayer and that the Developer has full control over timing of the development and their relationship with lot purchaser to protect their interests, Staff recommend that Council endorse maintaining the Status Quo and as such to only assume municipal works within a subdivision once 75% of units have been constructed.

If Council wishes to investigate the financial implications of a change in assumption criteria, Staff recommend that the Financial and Information Services Department prepare a detailed accounting of the various costs and risk assessment along with the economic and tax base benefits. This work can be done internally, however, Staff note that this Department faces pressing priorities whose relative importance will have to be assessed. Another option is to assign this or other work to a consultant.

### Issue 2 - Grading Criteria

Within the Town's Subdivision Agreement there is a requirement that prior to the issuance of building permits, rough grading be such to ensure positive drainage.

Experience has shown that although lots are graded for position drainage by the Developer prior to building permits, houses are typically constructed independent of adjacent units which has led to drainage blockages resulting in localised ponding and/or flooding. The subsequent measures taken by home owners to correct problems have exasperated issues and caused ongoing challenges in a number of developments. To correct that problem, the grading criteria has recently been strengthened within the Engineering Standards and Subdivision Agreement by establishing set tolerances for rough grading (300mm for lot grades and 50mm for drainage swales).

Since the enhanced grading criteria increases the land clearing, including tree removal, and earth moving costs for Developers at the initial rough grading stage, the Town has been asked to relax the requirement. It is important to note that the overall land clearing and earth moving work ultimately completed within the development will remain the same because tree cover cannot be salvaged if the adjacent grades are modified to ensure the final drainage pattern is implemented as designed.

The alternatives considered are:

A. Status Quo: Maintains the current set tolerances

- developer will incur costs as necessary to rough grade the entire site to within the set tolerances including importing or exporting fill.
- rough grading at earth works stage will avoid fill being hauled by house builders on newly constructed subdivision roads that are not explicitly designed for extensive heavy truck traffic
- limits the likelihood of construction related and ongoing drainage problems for the residents

B. Remove tolerance

- cost savings to developer
- increased risk of road damage due to heavy truck traffic to move fill during house construction
- increased risk of ongoing drainage problems
- increased Staff time resolve drainage issues

C. Prepare Optional Rough Drainage Plan

- maintain current rough grading tolerance criteria
- submit as part of the technical review of the development, a rough grading plan that demonstrates how rough grading will be accomplished such that any lot can be built upon without jeopardizing the drainage patterns of adjacent lots
- additional consultant engineering design costs to find a solution if possible
- increased Staff technical review but considered less than resolving drainage problems post construction

Even though the rough grading criteria is part of the Engineering Standards for which the Director of Engineering and Public Works has delegated authority to modify, this issue is being brought forward with other development agreement issues due to the significance to the local development industry. Staff recommend that Council endorse that the current criteria of a rough grading tolerance be maintained but that the development proponent be given the option to submit a rough grading plan to demonstrate that the development of any one lot will not impede drainage on another.

As an aside, Staff are considering the implications of more Staff involvement in final grade verification due to recent experience with grading problems.

### Issue 3 – Securities for Outstanding Work

The Town's current Development Agreements require that securities be provided for 100% of outstanding municipally assumed work, and that securities can be reduced to 10% for works completed to guarantee maintenance activities. It must be noted that the Town has an obligation to complete any works that the Developer has defaulted on at any point after the registration of a Plan of Subdivision for the benefit of the affected property owners and adjacent area. In the extreme, after plan registration the Developer can sell all the lots, not construct any works and the Town is obligated to construct the project in its entirety. The risk of this extremely scenario is very low but a possibility. The primary purpose of the 10% security for completed works is to deal with failures and repairs of completed works not anticipated and not to cover any inadequacies in the security for outstanding work.

The risk that the Town incurs with the current securities calculation method is that the security held can be inadequate to complete the works in the event the Developer defaults due to: i) the cost inflation of construction; ii) low initial cost estimates; and, iii) public sector pricing. These concepts are expanded upon below. Given the risks, a review of the securities held is warranted.

#### Cost Inflation of Construction:

Inflationary pressures for construction, which have been typically higher than cost of living increases, erode the available security. Moreover, these inflationary factors compound over many years. Given the slower pace of subdivision completion in the Town than typical and the time between when the Town identifies a Developer may be in default, formally declares the default and ultimately takes corrective action, a time period of 5 to 10yrs after the first issuance of building permits is not out of the question. As an illustration, an annual inflation of 3% for seven years is a 23% premium.

#### Low Initial Cost Estimates:

Currently, the Town generally relies on the design consultant to establish the cost of works subject to a reasonableness test by Town Staff. Since the Town's security is based on those estimates, the security held may be inadequate if the initial cost estimate is low.

#### Public Sector Pricing:

The securities may be inadequate because the public sector generally pays a premium for work due to the inability to negotiate between several vendors as can be done in the private sector.

It should be noted that Staff re-calculate the security requirements at every security reduction to minimise the Town's risk. This practice is adequate for developments that progress normally through the development process.

It's impossible however to identify which developments will ultimately default when the Development Agreement is executed, and therefore an adequate security calculation and retention practice is needed that applies equally to all developments at all stages of the development process.

The alternatives considered are:

- A. Status Quo: Security is 100% of outstanding work and 10% of completed work
  - does not address concern of possible inadequate securities
  - accepted by development community
  - three developments, all started within the past ten years, recently defaulted but fortunately there had been a means to adequately complete the projects (another party obligated to pay for the works or sufficient security to complete the minimum of work to correct immediate deficiencies but left some work undone); however it's very much within the realm of possibility that a default may occur for which the Town has inadequate securities.
- B. Increase Security: 125% of outstanding work plus 10% of completed work
  - 25% premium for outstanding work will increase the surety that the Town has adequate security and acts much like a contingency allowance which is currently not collected in the security calculations
  - 10% of completed work is considered adequate for maintenance activities as long as the definition of outstanding work includes identifiable deficiencies such as known curb or sidewalk damage
  - outstanding work security includes an allowance for engineering services at 6% of the cost of outstanding work
  - higher upfront cost for developers and obtaining security may be difficult for smaller developers
  - subdivision and certain condominium projects can take advantage of Pre-Servicing Agreement option to reduce the amount of upfront security required
  - projects constructed under site plan agreements will require higher upfront security for municipal works to be assumed by the Town because pre-servicing option not available
- C. Reduce initial security to 75% and increase post Basic Services security to 125% for outstanding work plus 10% of completed work
  - the risk of default generally increases after the completion of Basic Services (point at which building permits can be issued)
  - significantly increases Town cost risk if default occurs early in project before completion of Basic Services
  - Town's Pre-Servicing option provides similar security reduction measure for subdivision project
- D. Town generated security calculation
  - Staff prepare internal estimate of costs based on benchmark pricing including an allowance for engineering, contingency and cost escalation
  - increased Staff resources to prepare the cost estimate and defend costing to development proponent
  - current practice of reasonableness test of design engineer's estimate has been adequate and little significant concern has been evident with construction pricing.

When analysing the alternatives, the foremost philosophy used by Staff is ensuring that the Town is not at undo risk for future costs while not overly burdening the development industry. A significant influencer was the long time (5 – 10yrs or more) that local development can take to build out given the part-time and speculative nature of lot purchase. Staff's recommendation is to increase the security held to 125% of outstanding work plus 10% of completed works with the understanding that outstanding works includes known deficiencies and that the cost of work includes an allowance for engineering services of 6%.

#### Issue 4 – Utility Security

Currently, the Town does not collect securities for the installation of third party utilities (electrical, gas, telecommunications). The concern is that if the developer defaults prior to the installation of these services, the Town may be obligated to install uncompleted utilities, and as such, appropriate surety is needed to ensure that the property owners will have adequate servicing. The cost of providing servicing is increasing because the utilities are pushing more costs onto the Developer to make sure the utility has a positive business plan.

As an approximation for the cost of utility installation, the budget value for an electrical system installation is \$4,500 per lot. The Developer must provide trenching, vaults and ducted road crossings while the electrical utility provides the transformers. The utility agreement identifies whether the Developer or the utility supplies and installs the wire. When the Developer signs a utility agreement, the items in the agreement provided by the utility are secured, but the Developer provided works are unsecured.

For Bell and Rogers the Developer supplies the ducted road crossings. Both of these utilities hire the Developer's electrical utility installer to install their wires. Union Gas generally works independent of and at no cost to the Developer with respect to supply and installation of the natural gas system. Recently though, the gas utility has been backing off that assurance. If there were a development that was not economical to service, Union Gas may require top up funding.

When considering what liability the Town is exposed to for utilities, it should be noted that only the electrical utility must be installed for the issuance of occupancy by the Chief Building Official.

The alternatives considered are:

A. Status Quo: unsecure utilities

- does not address concern of inadequate securities and continued risk of cost burden on taxation in the event of default
- accepted by development community

B. Collect Securities

- similar to any other outstanding work
- increased surety that work will be completed without Town incurring costs
- increased security burden for Developer because may need to double secure for certain services

C. Require Secured Utility Agreement

- prior to final approval of the draft plan for registration, a secured agreement with the utility can be provided to the Town to satisfy the condition that the utility will be installed regardless of a default by the Developer
- since the only service required for occupancy is electrical, an option is to only require a secured agreement with the electrical utility
- added cost for the Developer
- increased construction coordination because the secured agreement must be in place prior to registration and not completed afterwards
- requires the electrical utility to provide a letter or equivalent to the Town indicated they have adequate securities in place to ensure works are installed

Staff recommend that the Subdivision Agreement require that, prior to final approval of a plan of subdivision for registration, agreements be entered into between the developer and the utility providers for the installation of the utility services for the plan. The agreement with the electrical utility (Hydro One, Collus) for the installation of the electrical distribution system shall be secured and that the electrical distribution system be included in the definition of Basic Services as appropriate measures to make sure that the property owners are provided with the basic services of heat and electricity required under the Ontario Building Code in the event of default.

Should the Town be held responsible for the installation of natural gas and telecommunications, the Town's other securities can be utilised for these purposes. On a related note, should the Developer not have a secured letter agreement with the utility in place, the Town can accept cash or equal security to hold until the letter agreement is finalised.

Issue 5 – Pre-Servicing Security

Under Pre-Servicing Agreements, the Town permits Developers to proceed with subdivision work prior to execution of a Development Agreement. The Developer can only undertake specified work within their site boundaries without connecting to municipal infrastructure. Since the Town does not have an obligation to complete the development, the requirement for securities is greatly reduced and is limited to the cost to make the site safe and to provide environmental protection. The current security held is \$25,000 regardless of the size of the development. Staff have concern that this amount is inadequate to address larger developments and the ongoing costs to address drainage and erosion control.

The alternatives considered are:

A. Status Quo: Maintain at \$25,000 set security

- does not address concern of inadequate securities and continued risk of cost burden on taxation in the event of default
- accepted by development community

- B. Set at 100% cost of erosion / sediment control / storm water management plus 25% of works to be constructed
  - increased surety that Town will have adequate funds to complete drainage and erosion control works as anticipated
  - completion of all works may not be necessary but to only make the site safe and provide adequate environmental protection needs
  - may significantly increase security for Developer depending on size of development.
- C. Set at greater of 25% of works under Pre-Servicing or \$25,000
  - increased surety that Town will have adequate funds available to take corrective actions to minimise or reduce off site detrimental effects
  - percentage of Pre-Servicing works provides measure of cost of possible corrective works
  - may significantly increase security for Developer depending on size of development

Staff feel that the Pre-Servicing security be set in part by the size of the development and that a base minimum be gathered. Although there are several means to accomplish this goal, Staff recommend that the Pre-Servicing security be set at the greater of 25% of the works being constructed or \$25,000. This methodology recognises that the Pre-Servicing security extends beyond the erosion and drainage control works while not making the security requested overly burdensome to the developer. The proposed security requested will increase costs for developments over \$100,000 in pre-servicing capital costs.

Any security collected at the Pre-Servicing Stage is either returned or rolled over when the Development Agreement is prepared.

#### Issue 6 - Street Lighting

Within the current Development Agreement, the Developer is responsible for street lighting costs until assumption. Staff have discovered that on several occasions the cost for the street lights has been unknowingly added to the Town utility invoices by either Developer statements to the electrical provider or a billing error. Electrical power used by street lights is paid for at a monthly flat rate based on the light wattage and is not metered. The nature of the invoicing is such that it can be difficult to discern which street lights has been added and when. Staff have worked from time to time with the electrical providers to clarify the invoicing but billing coordination has proven complicated. Staff will continue to pursue detailed analysis of the invoicing as time and priorities permit. Regardless, Staff wish to ensure a methodology that appropriately allocates the street light costs to development.

The alternatives considered are:

- A. Status Quo: Lighting paid directly by Developer until Assumption
  - accept that from time to time, street lights are erroneously added to the electrical cost for the Town, and continued diligence from Staff to closely monitor detailed invoices
  - no impact to developers



- B. Lighting Town Paid from Developer Deposit
  - Developer provides deposit of 5yrs worth of lighting from which Town pays invoicing
  - Staff time incurred to gather and monitor deposits but less than cost of erroneous payment and reconciliation
  - deposit top up as needed at security reductions
  - unused deposit is returned at assumption
- C. Town pays after 5 years regardless of development status
  - Developer provides initial deposit of 5yrs worth of lighting from which Town pays invoicing
  - increased burden on taxation if municipal assumption occurs after five years since Developer pays less of street lighting costs
  - avoids continued misallocation of costs and corrections
  - less Staff time to coordinate deposit top ups
  - remaining deposit returned if assumption before five years

Since one of the key tenements of development in the Town is that growth pays for growth, Staff feel it is appropriate that the Developer pay the entire cost of street lighting until assumption, and the best means to achieve this goal is for the Developer to deposit an amount equal of 5 years of lighting costs with the Town. Since the billing is already to the Town, there is no worry that erroneous invoicing will be sent to the Town. The cost of street lights is relatively straightforward to calculate knowing the number of lights and the wattage. Staff therefore recommend that at execution of the Subdivision Agreement, a deposit equal to 5 years of electrical cost be provided to the Town. Consideration was given to requiring the deposit at the completion of Basic Services (building permits available), however since the amount is relatively small (< \$5,000 for typical subdivision) and it is easier to set all deposits and securities at the same time, Staff feel execution of the agreement is an appropriate time period. At each security reduction, the street lighting deposit will be topped up.

#### Issue 7 - Erosion Control Securities

One of the troublesome ongoing issues within developments is erosion and sediment control. This work involves the erection of siltation fencing, monitoring, corrective action and removal. Often, the erosion fencing is erected initially in accordance with applicable standards but routine maintenance is lacking. Along with ensuring that there is continued security to undertake corrective actions by the Town if necessary, consideration of increased security for erosion and sediment control is warranted to focus developer attention.

The Town has the ability to utilise securities obtained for the purposes of completing unfinished work and repair of completed works. These securities however should not be used for ongoing maintenance activities because the available securities will be eroded and then not be available for their intended use.

The alternatives considered are:

A. Status Quo:

- utilize base securities collected to take corrective actions however risks eroding available securities for unintended purposes
- not an increase in securities for developers

B. Require 100% Erosion & Sediment Control Security Until Assumption

- do not release securities below 100% of original cost
- increased security burden for developers

C. Require 100% Erosion & Sediment Control Security Until Vegetated

- do not release securities below 100% of original cost until disturbed area has established
- all erosion and sediment control measures have been removed before security reduced to 10% of original to hold in case there is subsequent site disturbance
- increased security burden for developer

The key point when evaluating these alternatives is that the Town have sufficient security to implement corrective measures without having to erode securities held to complete the project or otherwise deal with unseen repairs. For this reason Staff recommend that the security allowance held for erosion and sediment control not be reduced to below 100% of the cost of installation of the erosion and sediment controls until the area of concern is fully vegetated. In the event that the security held for uncompleted works is raised to 125% of the cost of uncompleted works, the initial security for erosion and sediment control will be 125% while the works are unfinished and then reduced to 100% when initially installed. The security for this work will not be reduced to below 10% of the initial cost until assumption similar to other works.

### Issue 8 -Snow Removal

The current Development Agreement template obligates the Developer to provide snow removal (roads and sidewalks) within a subdivision until assumption of the municipal works by the Town. Nonetheless, an option within the Subdivision Agreements permits the Town to undertake snow removal for compensation with a “hold harmless” clause. Furthermore, if the Developer defaults or neglects to remove snow in a timely manner, the Town has an obligation to take proactive corrective action to ensure the residents receive snow removal service comparable to Town maintained roads. The Town has undertaken snow removal within several subdivisions in the past for compensation but generally now avoids taking on this work to avoid significant Staff time on discussions over responsibility for curb, sidewalk, sod and other snow removal related damage accusations. Although the current Subdivision Agreement clearly states that the Developer is responsible for any such damage and must hold the Town harmless, Engineering and Public Works Staff expend significant effort defending that position and the project completion is delayed.

Snow removal is one activity that can get overlooked by the Developer. The residents can suffer from poor service and it may affect other municipal services like garbage collection. In the worse case, emergency vehicles will not be able to access the site. Given that residents living on roads not assumed by the Town may experience less than municipal standard snow removal, a review of the snow removal clause for roads and sidewalks is warranted.

The alternatives considered are:

A. Status Quo:

- snow removal continues to be responsibility of Developer
- Town will undertake emergency snow removal as needed and recover costs by means available
- Town Staff continue to monitor subdivisions to ensure that adequate snow removal is undertaken

B. Town undertakes snow removal at Developer cost

- Town undertakes snow removal at Developer cost once building permits can be issued (Basic Services)
- new residents experience municipal level of service
- difficult to ascertain whether curb damage is caused by Town snow plow or house builder
- difficult for Town to not assume responsibility for curb or other damage if Town insists on providing service
- difficult to establish fair flat rate of compensation and administratively onerous to track on a time basis however rate can include cost premium
- establish 5 year deposit to compensate for several years of snow removal to avoid unfunded liabilities due to non-payment
- deposit renewal at all security reductions

C. Town undertakes snow removal at Developer's discretion

- the Town can provide the Developer the option to contract the Town to undertake snow removal
- will lessen coordination required by Developer and increase attractiveness of lots
- Developer will execute separate agreement expressly holding the Town, and any contractors that the Town may use, harmless and acknowledges that any damage that may result from snow removal activities is the responsibility of the Developer
- new residents experience municipal level of service
- difficult to ascertain whether curb damage is caused by Town snow plow or house builder
- difficult to establish fair flat rate of compensation and administratively onerous to track on a time basis however rate can include administrative cost premium
- establish 5 year deposit to compensate for several years of snow removal to avoid unfunded liabilities due to non-payment
- deposit renewal at all security reductions

D. Town undertakes snow removal at Town cost

- Town undertakes snow removal (roads and sidewalks) at Town cost on roadways that have been conveyed to the municipality, but not yet assumed, upon the issuance of the first building permit for a dwelling within the Plan provided appropriate "hold harmless" provisions are in place in the Development Agreement and appropriate measures are in place to allow for the safe and efficient removal of snow such as appropriate turn around facilities
- new residents experience municipal level of service
- difficult to ascertain whether curb damage is by Town snow plow or house builder

- difficult for Town to not assume responsibility for curb or other damage if Town insists on providing snow removal service
- reduced security and maintenance cost burden by Developer
- increased cost for taxpayer

Although the provision of snow removal services is an attractive option to lessen the Developer's burden and to moreover ensure a minimum level of service to new residents, Engineering and Public Works Staff recommend that the Town maintain the Status Quo and continue the current practice of requiring the Developer to be responsible to coordinating and paying for snow removal in subdivisions until assumption. The key factors in this recommendation are the disagreement on who is responsible for snow removal damage and the possibility that a "hold harmless" clause may not be enforceable if the Town insists on providing the service.

Staff will continue to monitor subdivisions to ensure residents receive adequate service and will take appropriate actions as needed. If the Town has to do emergency snow removal, the Town will generally use a contractor to separate Town forces from the activity and to clearly establish the cost for recovery purposes. In addition, it is easier for a contractor with smaller equipment to maneuver around construction equipment and materials usually left on active subdivision construction sites.

### Wrap Up and Next Steps

Staff have presented the above suggested modifications to the Development Agreements templates in response to Developer requests and Staff experience with the Development Agreements. Although the economic benefit and revenue growth associated with development is undeniable, these gains must be balanced against the cost risk the Town wants to undertake and the implication on the Taxpayer.

A framework by which many initiatives of the Town are measured is "growth pays for growth". As such, any development project should not have a lasting detrimental effect on the general taxpayer however it is appropriate that some investment is needed by the Town to enable growth. It is with these key factors in mind with which Staff analyzed the options to the various issues. There is no doubt that the recommendations proposed by the Engineering and Public Works Staff may affect profitability of the Developers and may indeed slow development within the Town until a more favorable business case exists.

Should Council approve modifications to the current Development Agreement as it relates to this report, the Georgian Triangle Development Institute and the Developers who are in the process of seeking land development approvals will be provided a copy of this Report as approved. Given the nature of the changes, Staff will circulate the draft Development Agreement templates to the area development industry stakeholders for their comment. Once those comments are received, Staff will repost to Council on those comments and bring the revised draft Development Agreement templates to Council for consideration.

In order for current development applications to move through the agreement process and for Developers to adapt to the changes, Staff will recommend that any modifications to the templates not apply to Development Agreements executed within 60 days of the passing of the resolution that gives final endorsement of the templates. It should be noted however that the Town always has the option to impose any conditions or make special allowances for any particular development upon Council resolution.

### **C. The Blue Mountains' Strategic Plan**

This report furthers the Town's Strategic Goal #2 "Addressing the Town's municipal infrastructure needs" and Strategic Goal #6 "Providing a strong well managed municipal government".

### **D. Environmental Impacts**

none

### **E. Financial Impact**

The steps recommended within this report will both individually and in combination reduce, but moreover not increase the cost risk that may potentially be borne by taxation in the event that a Developer defaults on their obligations within a development agreement.

### **F. Attached**

None.

Respectfully submitted,

**Reg Russwurm**  
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**STAFF REPORT:        Engineering & Public Works Department**



**REPORT TO:**            Council  
**MEETING DATE:**    August 8, 2011  
**REPORT NO.:**        EPW.11.071  
**SUBJECT:**            Modifications to Development  
                             Agreement Templates - Assumption and  
                             Rough Grading  
**PREPARED BY:**     Reg Russwurm, Director of Engineering and  
                             Public Works, on behalf of Development  
                             Template Review Committee

**A. Recommendation**

THAT Council receive Staff Report EPW.11.071 entitled "Modifications to Development Agreement Templates - Assumption and Rough Grading"; and,

THAT Council approve revising the criteria for the Assumption of Municipal Works within a Subdivision Agreement to the lesser of 50% of the buildings to be constructed on lots within the Plan have been substantially completed or five (5) years after the issuance of a Certificate of Preliminary Acceptance, but at no time can Assumption occur less than two (2) years after the issuance of a Certificate of Preliminary Acceptance; and,

THAT Council endorse maintaining the current rough grading tolerance, being 300mm for lot grades and 50mm for drainage swales, within the Subdivision Agreement or, as an alternative, the development proponent may submit a rough grading plan to demonstrate that building construction upon any one lot will not impede drainage on another; and,

THAT Council approve that the Assumption of Municipal Works Criteria in Development Agreements already executed may be modified upon application for same to the criteria as outlined in Staff Report EPW.11.071.

**B. Background**

In response to Staff Report EPW.11.030 (attached) where eight modifications to the Development Agreement Templates had been proposed for consideration, Staff prepared and held two Public Information Centers (PIC's) and conducted a meeting with interested members of the development industry to discuss options and the implications of each modification. Deputy Mayor McKinley and Councillors Gamble and Martin attended this meeting.

These three Councillors were tasked by Council to undertake a review of the issues and recommend to Council what, if any, modifications should be made to the Development Agreement Templates. The Councillors, along with David Finbow, Director of Planning and Building Services, John Metras, the Town's solicitor, Robert Cummings, Director of Finance and Information Technology Services, and Reg Russwurm, Director of Engineering and Public Works, met to review the comments made at the PIC's and the written submissions received. For ease of reference, this group will be referred to as the Development Template Review Committee (Committee).

Since two of the issues of concern were Developer initiated, it was decided to concentrate on these two issues in order to make a quick decision on these points, and then to later consider the remaining six issues. The two issues considered in this report are Issue 1: Assumption of Municipal Works and Issue 2: Rough Grading Criteria.

### Issue 1: Assumption of Municipal Works

Currently, the Town's Subdivision Agreement states that the Town will not assume ownership of municipal works, and thereby any maintenance costs, until "75% of the buildings permitted to be constructed on lots within the Plan by the Town's zoning by-law have been substantially completed". This means that dwellings must be built and ready to be occupied and not just started before the Town will assume the municipal works. The purpose for this clause is to make the Developer responsible for maintenance and repair of the new works as the infrastructure, particularly roads, curbs, boulevards and sidewalks are susceptible to damage during house construction activities. The Committee considered various written submissions, both in favour of and against maintaining the current Assumption criteria.

From the Developer's point of view, the 75% assumption clause is overly burdensome because it places a non-defined responsibility on the Developer who may have sold all the lots and has no further interest in the project other than the on-going maintenance and provision of related securities. The local development industry had asked for a return to the previous assumption criterion that was in place. That is, that Assumption would occur after a 2 year Maintenance Period regardless of the number of homes constructed. Their recommendation for the Town to protect the built infrastructure was to collect a damage deposit from the property owner prior to issuance of building permits. Another point that has been raised is that the Town collects taxes on lots, be they constructed upon or not, that will offset the cost of any repairs.

The primary concern with collecting a deposit from property owners for damage is assignability and being able to hold the responsible person to account. The Committee anticipates that the Town will implement such a deposit however it was not willing to accept the damages that may happen early in a development.

On the point that the Town has received increased taxation revenues and that there is a positive cash flow; the Committee felt that the preparation of a detailed financial plan was not warranted since taxation is cost recovery only and that separating the increased revenues into cost centers would be time extensive, divert resources needed for other priorities and will provide limited insight.

Given that generally the greatest amount of home building activity (and infrastructure damage) occurs in the first few years of a development and that the Town has the ability to implement a Frontage Deposit Policy in accordance with the provisions of the Municipal Act that would apply to lots within a Plan of Subdivision post assumption, the Committee is of the mind that the risk to the municipality is limited and therefore recommends a Maintenance Period of 5 years to provide more certainty to the end of the Developer's responsibility. In addition, to setting a time frame, the Committee recommends the percentage built criteria be reduced from 75% to 50% to aid faster moving developments.

However, the Committee was of the mind that at no time should the Maintenance Period be less than two years given that the majority of issues of significance are identified within that time frame. For reference, the Maintenance Period is the time between the issuance of Preliminary Acceptance by the Town and when the Developer can request Final Acceptance and Assumption.

### Issue 2: Rough Grading Criteria

Within the Town's Subdivision Agreement there is a requirement that prior to the issuance of building permits within a Plan of Subdivision that rough grading within the Plan be such that positive drainage off all lots is provided. In the past, this performance standard applied at Basic Services (point where building permits could be issued). Experience has shown that although lots are graded for positive drainage by the Developer prior to building permits, houses are typically constructed independent of adjacent units in a random manner which has led to drainage blockages resulting in localised ponding and/or flooding. The subsequent measures taken by home owners to correct problems have exasperated issues and caused ongoing challenges in a number of developments. To correct that problem, the grading criteria have recently been strengthened within the Engineering Standards and Subdivision Agreement by establishing set tolerances for rough grading (300mm for lot grades and 50mm for drainage swales). The purpose of this tolerance is to ensure to every extent reasonable that grades along property lines and more importantly along swales are constructed to avoid a situation where the construction of a house and related landscaping doesn't impede drainage off another lot.

Since the enhanced grading criteria increases the land clearing, including tree removal, and earth moving costs for Developers at the initial rough grading stage, the Town has been asked to relax the requirement to permit more tree cover and natural topography to remain in place until the home is constructed.

The Committee reviewed this issue and was concerned with the drainage problems that occur on properties, inconvenience caused to home owners, and the Staff time needed to resolve the concerns. Although the Committee recognised and very much agreed with the wish to retain as much of the natural tree cover as possible, the Committee felt that any change in the final grading from the natural elevation in the range of 300mm would result in the tree ultimately being removed regardless. The Committee is of the opinion that if tree and natural topography preservation is a primary wish of the proponent or of a commenting Agency (such as the NEC), the grading designer must prepare a plan to that end. Ultimately, the grading along the property lines have to match the final grading plan approved by the Town and there is no reasonable opportunity to waiver from that design. The Committee felt that the 300mm tolerance provided sufficient opportunity for individual internal lot grading to maximise tree preservation while staying true to the overall final grading plans. Internal lot grading must be such that there is positive drainage to the property line. It is reasonable to expect that through good design that the entire lot can be rough graded in a manner to facilitate a range of housing units on the property and maintain the tree cover and natural topography desired.



Staff recently though has had discussions and success on a development where it was demonstrated that achieving the Town's goal of achieving positive drainage from any one building independent of whether the adjacent lot is built upon outside of the set tolerance. The Committee is therefore recommending that the development proponent be given the opportunity to have the rough grading tolerance waived if a Rough Grading Plan can be prepared to achieve the Town's overall goal. The Rough Grading Plan would be submitted with the design review submissions and the work will need to be completed prior to the issuance of building permits.

#### Next Steps

Upon the approval of Council to undertake the modifications to the Development Agreement Template, the Town's Solicitor will coordinate the changes.

The remaining six (6) issues considered within Report EPW.11.030 will be addressed via a meeting of the Committee in September. Those recommendations of the Committee are expected to be brought forward to Council in the fall.

### **C. The Blue Mountains' Strategic Plan**

This report furthers the Town's Strategic Goal #2 "Addressing the Town's municipal infrastructure needs" and Strategic Goal #6 "Providing a strong well managed municipal government".

### **D. Environmental Impacts**

none

### **E. Financial Impact**

The steps recommended within this report will both individually and in combination are a responsible compromise as to the sharing of financial risk between the Developer and the Town to enable development to advance.

**F. Attached**

1. Report EPW.11.030 (Revised) - Consideration of Modifications to Development Agreement Templates

Respectfully submitted,

**Reg Russwurm**

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For more information, please contact:

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