



Town of Whitby Policy

Policy Title:	Development Agreement Securities Policy
Policy Number:	F 500
Category:	Finance
Reference:	Planning Act, R.S.O. 1990, c. P.13 Part VII 70.3.1 O. Reg. 461/24
Date Approved:	February 3, 2025
Date Revised:	N/A
Approval:	Council
Point of Contact:	Financial Services Department

Policy Statement

Securities are essential for protecting the financial interests of the Town and the interests of the Town's current and future residents by insuring the financial or performance obligations of development agreements. This policy provides guidelines for accepting security deposits, letters of credit, and surety bonds as forms of financial security for development agreements.

Purpose

The purpose of the Development Agreement Securities Policy is to ensure equitable, transparent and effective administration in the use of security deposits, letters of credit, and surety bonds as a financial security for development agreements.

Scope

This policy applies to all instances where a security deposit, letter of credit, or surety bond is provided as financial security for a development agreement.

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1. Definitions

- 1.1. **Council** means the Mayor and members of Council for the Town of Whitby.
- 1.2. **Counterparty** means the other party or parties to an agreement with the Town of Whitby.
- 1.3. **Development Agreement** means any agreement between the Town of Whitby and a counterparty, to regulate the provision of on-site and municipal works required to service land under development applications. Development applications include, but are not limited to, Plans of Subdivision, Site Plans, Works Funding and Reimbursement Agreements, Joint Service Agreements, Development Charge Agreements, Minor Variance and Consent Agreements.
- 1.4. **Financial Institution** means a bank operating under the *Bank Act*, S.C. 1991, c.46, as amended, a trust company, or a credit union that meets the minimum credit rating or is otherwise approved in accordance with this policy.
- 1.5. **Letter of Credit** means a form of financial security issued by a financial institution that guarantees payment or performance by one or more counterparties to a beneficiary (the Town).
- 1.6. **Security or Financial Security** means an amount required to be provided under a Development Agreement which may be drawn upon by the Town in accordance with a Development Agreement, and the balance of which will be returned to the counterparty after the terms of the Development Agreement have been executed to the Town's satisfaction.
- 1.7. **Security Deposit** means a financial security provided in the form of cash through certified cheque, bank draft, or money order.
- 1.8. **Surety Bond** means a bond which guarantees the assumption of responsibility for payment of security in the event of default in the performance of an obligation as set out in a Development Agreement, as stipulated in Ontario Regulation 461/24.
- 1.9. **Surety Provider** means an insurer that is licensed under the *Insurance Act*, R.S.O 1990, c. I.8, as amended, to write surety insurance and meets the minimum credit rating prescribed in Ontario Regulation 461/24, as amended.
- 1.10. **Treasurer** means the employee designated as such by Council for the as Treasurer for The Corporation of the Town of Whitby. The Treasurer shall exercise all powers and duties of the Treasurer as set out in the *Municipal Act, 2001*, S.O. 2001, c.25, as amended. Treasurer shall also include another employee who has been delegated authority to act on the Treasurer's behalf.

2. Responsibilities

2.1. The Treasurer shall:

- 2.1.1. Maintain authority and responsibility for this policy;
- 2.1.2. Approves departmental operating procedures and processes governed by this policy; and
- 2.1.3. Reviews, and if applicable, approves exceptions to this policy, including acceptance of Financial Securities from Financial Institutions that do not meet the minimum requirements described in this policy.

2.2. All Staff involved in the acquisition, evaluation and administration of securities for development agreements are responsible for implementing and adhering to the requirements set out in this policy.

3. Acceptable Securities

Where Financial Security is required by the Town as a condition of a Development Agreement, the three types of securities below are considered satisfactory, provided they are issued to and received by the Town in accordance with the prescribed conditions.

3.1. Letters of Credit

- 3.1.1. Letters of Credit in the prescribed format may be provided as Financial Security for any Development Agreement.
- 3.1.2. Letters of Credit issued by any of the five largest banks set out in Schedule I of the Bank Act are acceptable:
 - i. Bank of Montreal
 - ii. Bank of Nova Scotia
 - iii. Canadian Imperial Bank of Commerce
 - iv. Royal Bank of Canada
 - v. Toronto-Dominion Bank
- 3.1.3. Letters of Credit may be accepted from other Schedule I banks or Schedule II banks meeting the minimum Dominion Bond Rating Service rating criteria, subject to the approval of the Treasurer.
 - i. Schedule I bank with a Dominion Bond Rating Service rating as “R-1 low” or “A” (low), or higher
 - ii. Schedule II bank with a minimum Dominion Bond Rating Service rating of “R-1 middle” or “AA” (low)
- 3.1.4. Letters of Credit from trust companies, credit unions and Schedule III banks will not be accepted, except in specific circumstances, subject to the sole and unfettered approval of the Treasurer. Factors to be considered in the review include, but are not limited to, the overall

potential risks to the Town, the credit rating of the issuing financial institution, and the amount to be secured.

3.2. Security Deposits

- 3.2.1. In instances where a Letter of Credit or Surety Bond is deemed unsuitable or cannot be provided by a counterparty in the required value or format, Security Deposits equivalent to the Letter of Credit amount may be accepted in the form of cash (certified cheque, bank draft, or money order).
- 3.2.2. If a Security Deposit is provided, the Town will receive and deposit the funds, with no interest accruing or payable to the counterparty.

3.3. Surety Bonds

- 3.3.1. Surety Bonds may be provided for any Development Agreement that explicitly allows their use as a financial security.
- 3.3.2. Surety Bonds may only be provided for any Development Agreement executed on or after the coming into force of Ontario Regulation 461/24, November 20, 2024.
- 3.3.3. Surety Bonds issued by a Surety Provider shall meet or exceed the requirements set out in Ontario Regulation 461/24, as amended or replaced from time to time.
- 3.3.4. A Surety Bond can be provided as part of a required Financial Security in addition to a Security Deposit or Letter of Credit, or as the full amount of required Financial Security.

4. Drawdowns and Demands for Payment

- 4.1. If the Town determines that the counterparty has defaulted in performing an obligation guaranteed by the Financial Security, the Treasurer is authorized to drawdown upon the Financial Security/demand payment against the Letter of Credit or Surety Bond in his or her sole discretion and in accordance with the Development Agreement.
- 4.2. The Treasurer is also authorized to drawdown/demand payment on Financial Securities in accordance with Development Agreements, which may include but not limited to drawdown schedules and/or drawdowns based on defined milestones being achieved.
- 4.3. If a Financial Security was previously accepted by the Town in accordance with this policy, but the Financial Institution or Surety Provider fails to maintain a credit rating that meets the minimum credit requirement outlined in this Policy, the counterparty must notify the Treasurer immediately. The counterparty must also provide a substituting security that meets the minimum requirements as set out in this Policy. If an acceptable substituting

security is not provided within 30 days of the credit rating downgrade, the Treasurer reserves the right to immediately drawdown upon the original Letter of Credit or make demand for payment from the original Surety Bond.

- 4.4. If the Town is notified by a Financial Institution or Surety Provider that the Financial Security will not be renewed or will be cancelled, the Treasurer reserves the right to immediately drawdown upon the original Letter of Credit. In the case of a Surety Bond, the counterparty shall deliver replacement Financial Security in the amount of the Surety Bond that is acceptable to the Town at least 30 days before the day on which a Surety Bond will be terminated. Failure to provide such replacement Financial Security will be considered a default in the performance of the counterparty's obligation guaranteed by the Surety Bond and the Treasurer is authorized to demand payment on the Surety Bond. When possible, the Town will allow the original Financial Security to be exchanged or replaced by another Financial Security acceptable to the Town.
- 4.5. If a Financial Security being held by the Town is determined to no longer provide adequate protection and/or transfer of risk for the Town, the Treasurer may request a new Financial Security to his or her satisfaction. This new Financial Security must be provided within ten (10) days of the demand subject to provisions in the Development Agreement, if any. Upon receipt, the original Financial Security will be exchanged for the replacement Financial Security. If the new Financial Security is not received as required, the Treasurer may draw upon/demand payment on the original Financial Security.
- 4.6. The Treasurer is authorized to immediately and without notice to any party withdraw upon or make demand of any/all securities provided to the Town upon the bankruptcy or insolvency of the counterparty.

5. Releases and Reductions

- 5.1. Upon fulfillment of financial and/or performance obligations and the expiration of any warranty periods, the Town will return the remaining balance of a Financial Security to the:
 - 5.1.1. Financial Institution for Letters of Credit;
 - 5.1.2. Provider on record for Security Deposits; and the
 - 5.1.3. Surety Provider for Surety Bonds.
- 5.2. The Treasurer may also return a portion of the security deposit or reduce the letter of credit or surety bond in accordance with this Policy or the terms/schedule outlined in a Development Agreement.

6. Form and Terms

- 6.1. A Letter of Credit provided to the Town, issued by financial institution shall be in the form and on the terms of the “Letter of Credit” template attached hereto as Appendix 1.
- 6.2. The surety bond to be provided to the Town issued by a surety provider shall be in the form and on the terms of the “Surety Bond” template attached hereto as Appendix 2.

Appendices

Appendix 1 Letter of Credit Template

Appendix 2 Surety Bond Template

This Policy is hereby approved by Council Resolution # 17-25 on this 3 day of February, 2025.

Date of Issue: *(date of issue)*

Beneficiary:

The Corporation of the Town of Whitby
575 Rossland Road East
Whitby, ON L1N 2M8

Irrevocable Standby Letter of Credit

Pursuant to the request of our customer *(customer name and address)*, we the undersigned, *(name and address of financial institution)*, hereby establish an Irrevocable Letter of Credit in your favour in the total amount of \$*(amount)* which may be drawn on by you to the extent required in connection with an agreement between *(customer name)* and the Corporation of the Town of Whitby relating to *(purpose)*

Drawings under this Letter of Credit shall be in the form of a written demand for payment made by the Corporation of the Town of Whitby.

The amount of this Letter of Credit shall be reduced from time to time as advised by notice in writing given to the undersigned by the Corporation of the Town of Whitby.

It is understood that this obligation is between *(name of financial institution)* and the Corporation of the Town of Whitby and any notice referred to in the preceding paragraphs shall not be used for any other purpose than herein set forth.

This Letter of Credit will continue to *(expiry date)* and will expire on that date and you may call for payment of the full amount outstanding under this Letter of Credit at any time up to the close of business on that date. It is a condition of this Letter of Credit that it shall be deemed to be automatically extended for one (1) year from the present or any future expiration date hereof, unless thirty (30) days prior to any such date, we shall notify you in writing by registered mail or courier that we elect not to consider this Letter of Credit renewed for any such additional period.

Upon receipt by you of such notice, you may draw hereunder by means of your demand accompanied by your written certification that the amounts drawn will be retained and used by you to meet obligations incurred or to be incurred in connection with the above, further that you will release any amount not required by you to our customer.

Authorized Financial Institution Signatures

BOND NO.:
AMOUNT: \$

KNOW ALL PERSONS BY THESE PRESENTS, that

,

as Principal, hereinafter called the "**Principal**", and

,

as Surety, hereinafter called the "**Surety**", are held and firmly bound unto the Corporation of the Town of Whitby, as Obligee, hereinafter called the "**Obligee**", in the amount of _____ Dollars (\$) lawful money of Canada, hereinafter called the "**Bond Amount**" for the payment of which sum, well and truly to be made, the Principal and the Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally in accordance with the provisions of this Bond.

WHEREAS the Principal and Obligee have entered into, or will enter into, an agreement with reference number _____ with respect to lands known as _____ in the Town of Whitby (said agreement is by reference made a part hereof and is hereinafter referred to as the "**Development Agreement**").

NOW THEREFORE, the condition of this obligation is such that if the Principal shall, in the opinion of the Obligee do and perform all of the stipulations, conditions, covenants and terms of the Development Agreement, then this obligation shall be void and of no effect; otherwise, it shall remain in full force and effect.

PROVIDED, however, the foregoing obligation is subject to the following terms and conditions:

1. Whenever the Principal shall be declared in writing by the Obligee to be in default under the Development Agreement, and the Obligee intends to make a claim under this bond, the Obligee shall promptly notify the Principal and the Surety in writing of such default in the form of a Demand, the form of which is attached to this Bond as Schedule "A".
2. On determination by the Obligee, in its sole and absolute discretion, that the Principal is in default of its obligations under the Development Agreement, the Surety and Principal agree that the Surety will make payments to the Obligee for amounts demanded by the Obligee, up to an aggregate of the Bond Amount, within fifteen (15) business days after the Surety's receipt of a Demand from the Obligee at the address noted herein by hand or courier.

3. This Bond is irrevocable and payment will be made notwithstanding any objection by the Principal. Where a Demand in the prescribed form has been delivered to the Surety, it shall be accepted by the Surety as conclusive evidence of its obligation to make payment to the Obligee, and the Surety shall not assert any defence or grounds of any nature or description for not making payment to the Obligee, in whole or in part, pursuant to such Demand, including but not limited to any of the following reasons: that a Default has not occurred, that the Principal committed any fraud or misrepresentation in its application for the Bond, or that the amount set out in the Demand is not appropriate, warranted or otherwise not in accordance with the Development Agreement. The Surety's liability under this Bond is unconditional and shall not be discharged or released or affected by any arrangements made between the Obligee and the Principal or by any dispute between the Surety and Principal, or the taking or receiving of security by the Obligee from the Principal, or by any alteration, change, addition, modification, or variation in the Principal's obligation under the Development Agreement, or by the exercise of the Obligee or any of the rights or remedies reserved to it under the Development Agreement or by any forbearance to exercise any such rights or remedies whether as to payment, time, performance or otherwise (whether or not by any arrangement, alteration or forbearance is made without the Surety's knowledge or consent). All payments by the Surety shall be made free and clear without deduction, set-off or withholding.
4. The Obligee may make multiple Demands under this bond.
5. The amount of the Bond may be reduced from time to time as advised by notice in writing by the Obligee to the Surety.
6. Each payment made by the Surety under this Bond shall reduce the amount of this Bond.
7. In no event shall the Surety be liable for a greater sum than the amount of this Bond.
8. No right of action shall accrue upon or by reason hereof to or for the use or benefit of any person other than the Obligee.
9. When the Principal has completed all works required by the Development Agreement to the Obligee's satisfaction, all maintenance and rectification periods contained within the Development Agreement have expired, and the Obligee has finally assumed all works in writing, the Obligee shall return this Bond to the Surety for termination or advise the Surety in writing that this Bond is terminated, in accordance with the terms of the Development Agreement.

10. If the Surety intends to terminate its obligation under this Bond, it shall deliver at least ninety (90) days prior to the date on which the Surety intends to terminate its obligations, written notice to the Obligees and to the Principal of its intention to terminate this obligation. The Principal shall deliver to the Obligees, not less than thirty (30) days prior to the termination of this Bond, financial security in the amount of this Bond in a form acceptable to the Obligees. If the replacement financial security is not provided by the Principal or is not accepted by the Obligees, the Principal shall be deemed to be in default of its obligations pursuant to the Development Agreement.
11. Nothing in this bond shall limit the Principal's liability to the Obligees under the Development Agreement.
12. This Bond shall be governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable thereto and shall be treated, in all respects, as a contract entered into in the Province of Ontario without regard to conflict of laws principles. The Principal and Surety hereby irrevocably and unconditionally attorn to the jurisdiction of the courts of the Province of Ontario.
13. All Demands and notices under this Bond shall be delivered by hand, registered mail or courier to the Surety, with a copy to the Principal at the addresses set out below, subject to any change of address in accordance with this Section. All other correspondence may be delivered by regular mail, registered mail, courier, or email. A change of address for the Surety is publicly available on the Financial Services Regulatory Authority of Ontario website. The address for the Principal may be changed by giving notice to the other parties setting out the new address in accordance with this Section.

The Surety:

Name
Address
Email
Phone

The Principal:

Name
Address
Email
Phone

The Obligees:

Name
Address
Email
Phone

IN TESTIMONY WHEREOF, the Principal has hereto set its hand and affixed its seal and the Surety has caused these presents to be sealed with its corporate seal duly attested by the signature of its authorized signing authority.

SIGNED AND SEALED this day of , 20 , in the presence of:

Per:
Name:
Title:

Per:
Name:
Title:

I / We have the authority to bind the Corporation.

, Attorney in Fact