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## Establishing Security in Developer Agreements

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**References:** *Municipal Government Act, RSA 2000, c. M-26 (the "MGA"); Sections 650 and 655.*

### Policy Statement

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This policy provides a framework for establishing Developer Security requirements associated with Developer Agreements within Strathcona County.

### Purpose

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The purpose of this policy is to provide an incentivized and consistent approach to establish Security requirements for private Developers, with consideration to Developers' past performance in managing the potential for default by the Developer, prior to completion of all obligations under the Developer Agreement.

### Definitions

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**Construction Completion Certificate (CCC)** - the certificate issued by Strathcona County indicating the completion of Municipal Improvements, or a portion thereof, once the Municipal Improvements have been constructed and installed by the Developer to the satisfaction of the County in accordance with the Developer Agreement, triggering the start of the warranty period.

**Developer Agreement** – A legal agreement between a Developer and Strathcona County which specifies the financial obligations and the terms and conditions for the construction and warranty of Municipal Improvements necessary to service Development Lands. Developer Agreements can include a variety of municipal agreements, including both Development Agreements and Infrastructure Agreements.

**Development Agreement** – A Developer Agreement associated with a subdivision or development permit application, which can be registered as a caveat on title.

**Development Lands** – Lands located within Strathcona County which are proposed for residential, commercial, institutional, industrial or mixed use development.

**Development Stage** – Development Lands that are being subdivided or otherwise developed. Could also refer to a stage of proposed offsite Municipal Improvements for the purpose of servicing future Development Lands.

**Developer** – A person that develops private or public lands in Strathcona County.

**Final Acceptance Certificate (FAC)** – the certificate issued by Strathcona County indicating the final acceptance of Municipal Improvements, or a portion thereof, upon the completion of any repairs for known defects or deficiencies to the satisfaction of Strathcona County and the expiration of the warranty period.

**Infrastructure Agreement** – A Developer Agreement not associated with a subdivision or development permit application, specifically for the construction of offsite Municipal Improvements within Strathcona County controlled land.

**Major Breach** – Any breach of a Developer Agreement by a Developer which is determined to be major in nature, at the discretion of the Director of Planning and Development Services. Examples of Major Breaches are included in Section 13 of this policy.

**Minor Breach** – Any breach of a Developer Agreement by a Developer which is determined to be minor in nature, at the discretion of the Director of Planning and Development Services. Examples of Minor Breaches are included in Section 12 of this policy.

**Municipal Improvement** – Any improvements which are intended to be transferred to the ownership or control of Strathcona County and as listed within 7.c of this policy.

**Security** – A financial deposit assigned to Strathcona County to ensure full compliance by the Developer for the performance of the Developer's obligations as contemplated within the Developer Agreement and as authorized under Sections 650(1) and 655(1) of the MGA.

## **Guidelines**

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### Summary

1. Developers are categorized based on their past performance in Strathcona County or Edmonton region. Based on their performance category, the Security amount required to be posted will be set out within the Developer Agreement.

### Forms of Security

2. The type and form of Security that will be accepted by Strathcona County for a Developer Agreement will be determined by the Chief Commissioner (or delegate). The types of Security that may be accepted include:
  - a. An irrevocable letter of credit issued by a Chartered Bank or the Treasury Branch;
  - b. A certified cheque issued by a Canadian financial institution;
  - c. A bank draft issued by a Canadian financial institution; or
  - d. A developer bond issued by a qualified surety company authorized to transact the business of suretyship in Alberta

### Developer Categories

3. Subject to any other requirements, conditions or limitations set out in this policy, a Developer will be classified at the discretion of the Director of Planning and Development Services in one of three categories as follows:

**Category A:** A Developer will be classified in Category A if the Developer:

- a. Has completed at least two Developer Agreements with Strathcona County in the past five years without committing a Major Breach in any of the Developer Agreements; or
- b. Provides a reference from another municipality in the Edmonton Region certifying completion of at least two Developer Agreements with that municipality in the past five years without committing a Major Breach in any of the Developer Agreements (provided they have also not committed a Major Breach in any Developer Agreement with Strathcona County in the past five years); and

- c. Has paid all applicable offsite development levies associated with the Development Stage.

**Category B:** A Developer will be classified in Category B if the Developer:

- a. Does not meet the requirements of Category A; and
- b. Has never committed a Major Breach of a Developer Agreement with Strathcona County or any other municipality in the Edmonton Region; or
- c. Has completed one Developer Agreement with Strathcona County in the past five years without committing a Major Breach in the Developer Agreement.

**Category C:** A Developer will be classified in Category C if the Developer:

- a. Does not meet the requirements of Category B; or
- b. Has been reclassified to Category C by Strathcona County pursuant to this policy.

4. Upon reclassification in Category C, a Developer is not eligible to be reclassified in a higher category for a minimum of five years.
5. Developers using multiple company names to sign their agreements may be considered as one Developer at the discretion of the Director of Planning and Development Services. Joint ventures that fall into more than one category under this policy will be considered on a case by case basis.

#### Security Amounts

6. Once a Developer has been categorized, the amount of Security to be posted will be based on a percentage of the construction cost estimates for the Development Stage. Construction cost estimates must be stamped and signed by a qualified Professional Engineer. The percentage of Security will vary depending on the type of Developer Agreement and the category in which the Developer has been placed as follows:

Category	Initial Security (applicable to Development Agreements associated with a subdivision application)	Further Security (applicable to all Developer Agreements)	Security During Warranty Period (after CCC)
A	10% of estimated cost to complete all Municipal Improvements	50% of remaining cost to complete all Municipal Improvements	10% of total or 50% of cost to complete, whichever is greater
B	10% of estimated cost to complete all Municipal Improvements	115% of remaining cost to complete all Municipal Improvements	10% of total plus 115% of cost to complete
C	115% of estimated cost to complete all Municipal Improvements	Not applicable	10% of total plus 50% of landscaping plus 115% of cost to complete

7. Initial Security:
  - a. Applicable to Development Agreements associated with an approved subdivision application which has not yet received endorsement.
  - b. In accordance with provisions of Strathcona County's standard Developer Agreements, the initial Security shall be delivered and deposited with Strathcona County prior to the acceptance of the construction drawings for all Municipal Improvements proposed to be constructed and installed in connection with the Development Stage.

- c. The amount of the initial Security is based on the estimated cost of constructing and installing any or all of the Municipal Improvements listed below:
- i. All sanitary sewer mains and appurtenances;
  - ii. All drainage systems, including storm sewers, storm sewer connections, provisions for weeping tile flow, storm retention ponds and associated works, all as and where required by Strathcona County;
  - iii. All water mains, including all fittings, valves, and hydrants and looping as required by Strathcona County to safeguard and ensure the continuous and safe supply of water in the Development Stage;
  - iv. All concrete curbs, gutters, sidewalks and sub grade, base and asphaltic pavement;
  - v. All traffic signs, street signs, development identification signs, zoning signs, and directional signs, berming and noise attenuation devices all as and where required by Strathcona County;
  - vi. all landscaping and land improvements which are to be constructed and installed to the satisfaction of Strathcona County;
  - vii. Such construction or development of streets and lanes as may be required by Strathcona County; including, but in no manner limited to, temporary turnarounds or a second or temporary access for vehicular traffic from the Development Stage;
  - viii. Any major entrance features located within road right-of-way or on private property within an easement;
  - ix. Such uniform fencing, (noise attenuation, or screen) either permanent or temporary, of a standard and of a design satisfactory to Strathcona County, all of which is to be constructed and located to the satisfaction of Strathcona County; and
  - x. Any additional amount of Security specified in the "Additional Provisions" Schedule of the Development Agreement.
- d. The percentage of initial Security will vary depending on the category in which the Developer has been placed as follows:

CATEGORY	INITIAL SECURITY
A	Shall be <b>TEN (10%) percent</b> of the estimated cost of constructing and installing the Municipal Improvements.
B	Shall be <b>TEN (10%) percent</b> of the estimated cost of constructing and installing the Municipal Improvements.
C	Shall be <b>ONE HUNDRED FIFTEEN (115%)</b> percent of the estimated cost of constructing and installing the Municipal Improvements.

8. Further Security:

- a. For a Development Agreement associated with a subdivision application; in accordance with provisions of Strathcona County's standard Development Agreement, further Security shall be delivered and deposited with Strathcona County at the time the Developer submits to Strathcona County for endorsement the plan of subdivision for the Development Stage.
- b. For an Infrastructure Agreement or a Development Agreement associated with a development permit application; in accordance with provisions of Strathcona County's standard Developer Agreements, the further Security will serve as

initial Security and shall be delivered and deposited with Strathcona County prior to the acceptance of the construction drawings for the Municipal Improvements proposed to be constructed and installed in connection with the Development Stage.

- c. The percentage of further Security will vary depending on the category in which the Developer has been placed as follows:

CATEGORY	FURTHER SECURITY
A	Shall be equal to <b>FIFTY (50%) percent</b> of the estimated cost of completing the Municipal Improvements.
B	Shall be equal to <b>ONE HUNDRED FIFTEEN (115%) percent</b> of the estimated cost of completing the Municipal Improvements.
C	Not applicable.

- d. For Development Agreements, in the event that the Municipal Improvements noted in 7.c have been completed and accepted (CCC issued) at the time the plan of subdivision is submitted to Strathcona County for endorsement, the Security shall be as set out in Section 9 following for the warranty period.
- e. Category C Developers will not be eligible to enter into an Infrastructure Agreement for the construction of offsite Municipal Improvements and an alternative approach will be required for the construction and installation of the Municipal Infrastructure in this case.
9. Security during warranty period (applicable to all Developer Agreements after CCC):
- a. In accordance with provisions of Strathcona County's standard Developer Agreements, Strathcona County will retain a Security holdback following the issuance of CCC for all Municipal Improvements constructed and installed in connection with the Development Stage.
- b. The percentage of Security holdback will vary depending on the category in which the Developer has been placed as follows:
- Category A:** The amount of Security may be reduced on application by the Developer upon the Developer having received a CCC. After the issuance of any CCCs and prior to the issuance of FACs for the Municipal Improvements, the Security shall be the greater of **TEN (10%) percent** of the estimated costs of all the Municipal Improvements **or FIFTY (50%) percent** of the total estimated cost of completing all Municipal Improvements for which a CCC has not been issued.
  - Category B:** The amount of Security may be reduced on application by the Developer upon the Developer having received a CCC. After the issuance of any CCCs and prior to the issuance of FACs for the Municipal Improvements, the Security shall be the greater of **TEN (10%) percent** of the estimated costs of all the Municipal Improvements **PLUS ONE HUNDRED FIFTEEN (115%) percent** of the total estimated cost of completing all Municipal Improvements for which a CCC has not been issued.
  - Category C:** The amount of Security may be reduced on application by the Developer upon the Developer having received a CCC. After the issuance of any CCCs and prior to the issuance of FACs for the Municipal Improvements, the Security shall be **TEN (10%) percent** of the estimated costs of all the Municipal Improvements, **PLUS FIFTY (50%) percent** of the estimated costs of the landscaping improvements, **PLUS**

**ONE HUNDRED FIFTEEN (115%)** percent of the total estimated cost of completing all Municipal Improvements for which a CCC has not been issued.

Releasing Security

10. Security will be released upon Strathcona County's issuance of a FAC for the Municipal Improvements, which includes the requirement for receipt of all record drawings.

Minor and Major Breaches

11. Breaches of a Developer Agreement by a Developer will be classified as either minor or major. Some examples of each are set out below. These lists are not intended to describe all possible breaches. The classification of any breach not specifically mentioned is entirely within the discretion of the Director of Planning and Development Services.

12. Minor Breaches:

- a. Failure to apply for a CCC or an FAC within the timelines set out in the Developer Agreement;
- b. Failure to submit any fees by the date required;
- c. Failure to present a Right-of-Way Construction Activity Permit when required by Strathcona County;
- d. Commencement of construction prior to submitting securities or proof of insurance;
- e. Failure to comply with the terms of any other agreement entered into with Strathcona County; and
- f. Failure to maintain erosion and sedimentation control measures, provide dust control, weed control or control of construction debris.

13. Major Breaches:

- a. Failure to remedy any Minor Breach within the time set out in a warning issued by Strathcona County;
- b. Failure to obtain any regulatory approvals, permits or licenses required;
- c. Commencement of construction prior to the approval of engineering drawings or without a signed Developer Agreement, unless done with the express written consent of Strathcona County;
- d. Failure to comply with the engineering requirements and reporting set forth in the approved plans and in Strathcona County's Design and Construction Standards;
- e. Failure to provide adequate inspection services, supervised by a professional engineer, throughout construction of the Municipal Improvements;
- f. Failure to provide initial, further or additional Security as required by Strathcona County;
- g. Failure to renew or replace any letter of credit or surety bond provided as Security in accordance with the terms of the Developer Agreement;
- h. Failure to obtain or renew insurance coverage in accordance with the terms of the Developer Agreement;
- i. For Development Agreements, failure to complete all essential services under the Developers control, as obligated under a 60 day clause, for the purpose of obtaining building permits prior to CCC; and

- j. Failure to remedy any latent defects for which the Developer is responsible (exempting defects under formal dispute).

#### Developer Reclassification

14. Positive performance: a Developer may be reclassified for positive performance as follows:

- a. A Developer may be reclassified from Category B to Category A if the Developer has completed at least two Developer Agreements with Strathcona County in the past five years without committing a Major Breach in any of the Developer Agreements, and the Developer has not been reclassified down from Category A within the past two years; or
- b. A Developer may be reclassified from Category C to Category B if the Developer has completed a Developer Agreement with Strathcona County in the past five years without committing a Major Breach in the Developer Agreement and at least five years have passed since the Developer was classified in Category C.

15. Negative performance: a Developer may be reclassified for negative performance as follows:

- a. Multiple or repeated Minor Breaches of a Developer Agreement by a Category A Developer, even if remedied within the time specified by Strathcona County, can result in the Developer being reclassified to Category B;
- b. Multiple or repeated Minor Breaches of a Developer Agreement by a Category B Developer, even if remedied within the time specified by Strathcona County, can result in the Developer being reclassified to Category C; or
- c. A single Major Breach of a Developer Agreement can result in the Developer being reclassified to Category C regardless of which category the Developer was in previously.

#### Enforcement of Breaches

16. Enforcement of Minor Breaches:

- a. A single Minor Breach of a Developer Agreement will generally result in a warning to the Developer from Strathcona County with a demand to remedy the Minor Breach within a specified time. A failure to remedy the Minor Breach within the specified time will be treated as a Major Breach by the Developer.
- b. Before a Developer is reclassified due to multiple or repeated Minor Breaches of a Developer Agreement, a Developer will generally receive a warning from Strathcona County that one further Minor Breach, even if remedied within the time specified by Strathcona County, will result in reclassification.

17. Enforcement of Major Breaches:

- a. A single Major Breach of a Developer Agreement will generally result in the immediate reclassification of the Developer to Category C regardless of which category the Developer was in previously.
- b. In rare cases, and only where there are significant extenuating circumstances in favour of the Developer, Strathcona County may instead issue a warning to the Developer with a demand to remedy the Major Breach within a specified time. A failure to remedy the Major Breach within the specified time will result in the immediate reclassification of the Developer to Category C regardless of which category the Developer was in previously.

Effective Date

18. This policy is effective as of the date of approval of the policy and these Security considerations will not be applied retroactively to existing Developer Agreements.

## **Policy Record**

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**Resolution No:**

**Next Review Date:**

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