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# HALDIMAND COUNTY

## Report FDS-02-2023 Local Service Policy

For Consideration by Council in Committee on October 10, 2023

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### OBJECTIVE:

To provide Council with a response related to their direction to seek legal advice on the cost sharing request from a developer related to infrastructure required for residential development in the Northwest Quadrant within the Dunnville urban boundary. The required infrastructure includes a local sanitary pumping station and related works.

Additionally, this request would review the application of the County's current Local Service By-law to these works and if the by-law meets the current legislative framework in Ontario for such a policy. This would also evaluate the County's intended use of a cost recovery methodology, referred to as a "Best Efforts" recovery, to recover the proportionate share of these works from benefitting land in the area as the are developed in the future.

### RECOMMENDATIONS:

1. THAT Report FDS-02-2023 Local Service Policy be received;
2. AND THAT the County commit to enacting a Capital Recovery by-law to facilitate the best efforts recovery of the developer's cost of local services from benefitting lands as they are developed;
3. AND THAT the County commit to prepare and market the lands currently owned by the County that benefit from these services, to expedite the recovery of the proportionate share of costs.

**Respectfully submitted:** Mark Merritt, CPA, CA, General Manager of Financial & Data Services

**Approved:** Cathy Case, Chief Administrative Officer

### EXECUTIVE SUMMARY:

To provide Council with legal advice on the cost sharing request, staff reached out to the consultant that prepared the County's most recent Development Charges Background Study and related Local Service Policy, Watson & Associates Economists Ltd, as they are experts in this field and have been involved in the development of and defending numerous by-laws and policies of this nature in the Province. We then engaged their solicitor to provide the legal opinion as requested.

In summary, it has been confirmed that the County's Local Service Policy and related Best Efforts Recovery policy and practices conform to all Provincial legislation, regulations and case law.

Specifically related to the County's Local Service Policy, the solicitor reviewed various legislative sections of the Development Charges Act (DCA) and related case law in relation to the assertions made by the developer's lawyer. This opinion confirms that the determination of what constitutes Local Services is at the authority of Council. As such, the services proposed by the developer, have been appropriately identified as local services under the County's Local Service Policy and are solely the responsibility of the developer. As outlined in the opinion, while it is recognized that all benefitting landowners should pay their proportionate share of the works constructed, it does not mean the County has any legal obligation to enact such a recovery, let alone bear the financial risks associated therein.

Despite this fact, the County is prepared to use its best-efforts to recover the proportionate share of the construction costs from benefitting landowners as these parcels are developed.

The County is doing what it can to ensure that the principle of cost sharing is advanced without imposing financial obligations on its taxpayers for services that have previously been deemed the responsibility of the developer. As such, there is no requirement under any applicable legislation that would require the County to entertain such an agreement and to be responsible for the payment of costs that it has under an approved policy defined as local services.

Given the above, staff are of the opinion there is very little the County can do to accommodate the developer's request. As it stands, this request would violate a number of Provincial statutes as well as County approved by-laws and policies. To amend these at this time, in addition to being very time consuming, would represent a paradigm shift in the County's past practices and would certainly have financial implications for the County as a whole.

At this time, the County can offer a commitment to enact a Capital Recovery by-law to facilitate the best efforts recovery of these costs from benefitting land owners as they are developed. Additionally, the County could expedite the preparation and marketing of the property that is County owned that benefits from the construction of these works.

## **BACKGROUND:**

At the August 29, 2023 Council-in-Committee meeting, representatives from the developers, Niagara Mountainview Homes (Niagara) Ltd and 918865 Ontario Limited, proposing a residential development in the North West Quadrant within the Dunnville urban boundary, requested the County enter into a "cost sharing agreement" to share the construction of a local sanitary pumping station and related works to service this area. It was proposed by the Developers that the County front-end the total costs of these works and the developer would pay their proportionate share at that time related to their relative area of the total area benefitting from this infrastructure. Although staff do not have any detailed costs estimates at this time, it was suggested these costs could exceed \$1 million.

Staff had met with the developers prior to their delegation to explain that this infrastructure was considered a "Local Service" under the County's Council approved Local Service Policy (LSP) and, as such, is entirely the financial responsibility of the developer. The LSP requires the developer of the first development requiring the infrastructure to pay the full cost of the external works. This practice/policy has consistently been applied to all developments in the County for over 15 years and the proponents of this development have been made aware of this requirement since the inception of this proposed development. Additionally, there are a number of similar instances across the County at this time requiring the first developer to build external works that benefit multiple properties/developers. Starting approximately 10 years ago, the County included a "Best Efforts Recovery" clause in the LSP that essentially means the County will do its best effort to recover the proportionate cost of the external works from future developers as their properties are developed. This would typically be achieved through a Capital Recovery by-law that would apportion the total cost of the works to each parcel and include that share as a lien on the property to be recovered when the property is developed.

During the developer's delegation to Council, their legal counsel challenged, among other things, the ability of the County, through the conditions of a Site Plan, to require the developer to construct the external works in question. Additionally, they challenged that the works in question should not be considered local services and, as such, should not be a requirement of the developer to construct and pay for. They contend that the County's LSP is "illegal" and does not conform to the Province's current legislative framework. Related to this assertion, they contend that the County's "Best Efforts" recovery methodology is not legal or appropriate in this case.

These assertions ultimately led to the developer, through their legal counsel, to request the County to enter into a cost sharing agreement to share the cost of the required infrastructure, with the County to upfront all the required costs and later be reimbursed by the proportionate share of benefitting lands as they are developed. In other words, the proponent is requesting that the County initially fund the local services needed to facilitate their development, rather than the developer initially funding those works.

These assertions are directly in contrast to the County's current policies and practices. This would differ from how the County has treated all developers in similar circumstances over the past several decades and would essentially put the burden of implementing local services of a private development onto the taxpayers of the County, allowing a private, profit-making venture to progress using public funds.

As a result, Council passed a resolution directing staff to seek legal advice related to the cost sharing request to see if any changes should be made to the LSP, and report back to Council.

## **ANALYSIS:**

To meet this request, staff reached out to the consultant that prepared the County's most recent Development Charges Background Study and related LSP, Watson & Associates Economists Ltd (Watson), as they are experts in this field and have been involved in the development of and defending numerous by-laws and policies of this nature in the Province. We then engaged their solicitor to provide the legal opinion as requested. Staff provide the solicitor with: the Council resolution from August 29, 2023; the Letter from the developer's legal counsel and access to the tape recording of the meeting to gain a full understanding of the request. The full legal opinion is being provided to Council as part of the Closed Session Agenda because it is subject to solicitor-client privilege.

In summary, it has been confirmed that the County's Local Service Policy and related Best Efforts Recovery policy and practices conform to all Provincial legislation, regulations and all case law.

Specifically, the opinion clarifies the items in question as follows:

### **Site Plan Conditions**

The developer's counsel states that it is beyond the jurisdiction of the County to require applicants to construct significant municipal infrastructure through a condition of Site Plan approval. While our legal opinion agrees this statement is technically accurate, it does not mean the County cannot continue to require that the necessary services be in place outside of the site plan approval process. The County can require these works be in place to make the site compliant with applicable zoning and building permit requirements. As these services are deemed Local Services and the responsibility of the developer, the County can enact a different form of agreement not tied to the Site Plan conditions (e.g. external services agreement) if required. The County's past practice of combining the two agreements into one was intended to expedite a process and enter one agreement that covered both areas, rather than entering two separate agreements. If the developer does not wish to enter one agreement to cover off both site plan and local servicing requirements, the County is able to proceed with two entirely separate agreements. The overall result will be the same.

### **The Development Charges Act & Local Services Policy**

The opinion reviews the various legislative sections of the Development Charges Act (DCA) and related case law in relation to the assertions made by the developer's lawyer. The opinion very clearly points out that Local Services is not defined under the DCA. The DCA does however, prohibit the collection of Development Charges for infrastructure that is considered Local Services. This is also supported by recent case law at the Ontario Land Tribunal (OLT). It has also been confirmed at the OLT that Local Services do not need to be limited to works that are internal to the site. As such, it is the solicitor's opinion that the determination of what constitutes Local Services is at the authority of Council. More

over, if Council were to consider these works as Development Charge eligible, it would in fact be in contravention of the DCA, the Municipal Act and the County's approved by-law and policies.

Ultimately, based on the County's current definition of Local Services and the Development Charges by-law, these works must be considered Local Services. This determination cannot be amended without opening up the Development Charges by-law which is a very lengthy and legislative process, nor is this recommended by staff. Under the revised DCA and regulations, a DC bylaw is required to be reviewed every 10 years (increased from 5 years) through a comprehensive study and public consultation process. Although the County's current by-law does not need to be updated until 2029 under the revised legislation, a comprehensive DC bylaw review is scheduled to start in late 2023 due to all the legislative changes and the increased capital costs associated with growth related infrastructure included in the current by-law (essentially, our current fees have not kept pace with inflation). It is worth noting that the current proponent participated in the most recent public consultation process which resulted in Council adopting the current Local Servicing Policy.

### Cost Sharing Principles

As outlined in the legal opinion the County received, while it is recognized that all benefitting landowners should pay their proportionate share of the works constructed, it does not mean the County has any legal obligation to enact such a recovery, let alone bear the financial risks associated therein. Despite this fact, the County is prepared to use its best-efforts to recover the proportionate share of the construction costs from benefitting landowners as these parcels are developed. This process means the County will do its best to recover these costs from benefitting land owners as they develop their properties, but there is no guarantee these funds will be recovered. This is not uncommon and there is no legal requirement for the County or the taxpayers to guarantee these recoveries.

The County is doing what it can to ensure that the principle of cost sharing is advanced without imposing financial obligations on its taxpayers for services that have been deemed the responsibility of the developer through Council approved policies and past practices, as well as after consideration of public consultation related to the DC by-law review process. As such, there is no requirement under any applicable legislation that would require the County to entertain such a cost-sharing agreement and to be responsible for the payment of costs that it has, under policy, defined as local services.

The opinion notes, that entering into such an agreement, would in fact raise concerns about the unequal application of the County's own policies in favour of one development over another throughout the County.

Given the above legal review, staff are of the opinion there is very little the County can do to accommodate the developer's request. As it stands, this request would violate a number of Provincial statutes as well as County approved by-laws and policies. To amend these at this time, in addition to being a very lengthy process, would represent a paradigm shift in the County's past practices and would certainly have financial implications for the County as a whole.

At this time, the County could offer a commitment to enacting a Capital Recovery by-law to facilitate the best efforts recovery of the applicable costs from benefitting land owners as they are developed.

Additionally, the County can commit to expediting the preparation and marketing of the County owned property that benefits from the construction of these works.

## **FINANCIAL/LEGAL IMPLICATIONS:**

If the County were to enter into the proposed cost sharing agreement, the legal issues noted above aside, there would be significant financial implications to the County. First and foremost, the County would be guaranteeing future financial payments that may not be realized in the future. This is a financial risk that the current policies are intended to avoid. Additionally, there a number of other similar

situations across the County currently in various phases of development that would surely request a similar approach.

The underlying principle is that these costs are related to specific developments, from which the developer will benefit financially. If the County takes these cost/risks on, it is the taxpayers that bear the risk and the developer makes substantially more profits. Additionally, these local service costs have not been noted as an impediment to development in the past and we are growing at historical rates. It is not felt that amending the current policy would facilitate more development, only add additional profits to developers. As noted, this would be a fundamental shift in how these types of costs have been funded in the past.

The proposed infrastructure, as it is deemed local services and the responsibility of the developer, is not budgeted in any current or future capital budgets. As such, given these costs are not eligible under our current DC by-law, there is no dedicated funding source for these unplanned growth related costs. Given the County's current infrastructure deficits (as noted in our most recent Asset Management Plan and capital forecasts), the County would likely be required to debt finance these works, impacting the County's debt capacity and flexibility to fund our planned capital program.

As noted, any proposed by-law and policy changes would add numerous works currently considered the responsibility of the developer. These are not planned in any future budgets nor currently eligible for Development Charges. Even if our DC by-law were updated to include these costs, given the recent DCA amendments, it is likely a portion of these works would not be DC eligible. This would again require alternative funding sources and most likely require front-end financing agreements under the DCA with the developers currently responsible for these costs already. This could significantly impact the County's long term financial plans and available debt capacity.

## **STAKEHOLDER IMPACTS:**

Although finance staff administer the application of the County's Local Service Policy and related agreements, planning and engineering staff have worked closely with the developer on all previous and proposed phases of the development in question.

As noted, any changes to the current policies or practices would have implications on a number of past, current and future developments, and ultimately the financial position of the County.

## **REPORT IMPACTS:**

Agreement: No

By-law: No

Budget Amendment: No

Policy: No

## **REFERENCES:**

None.

## **ATTACHMENTS:**

None.