City of Kingston
Report to Administrative Policies Committee
Report Number AP-24-010

To:	**Chair and Members of the Administrative Policies Committee**
From:	**Paige Agnew, Commissioner, Growth & Development Services**
Resource Staff:	**Tim Park, Director of Planning Services**
Date of Meeting:	**February 8, 2024**
Subject:	**Surety Bond Policy**

Council Strategic Plan Alignment:

Theme: Policies & by-laws

Goal: 1.1 Promote increased supply and affordability of housing.

Executive Summary:

The following is a report to the Administrative Policies Committee seeking approval to implement a Surety Bond Policy in connection with development agreements entered into under the *Planning Act*. In order to secure performance of an owner's obligations under the development agreement (such as a Site Plan Control agreement or subdivision agreement), the City collects financial securities from the owner. The City currently accepts securities in two forms: letters of credit and certified cheque (cash securities). Prompted by the desire to incentivize housing, by feedback provided by applicants, as well as anticipated changes to the *Planning Act*, City staff have proactively developed a policy for the acceptance of surety bonds as a third option for the submission of securities.

With the introduction of Bill 109, the *Planning Act* has been amended, allowing the Minister of Municipal Affairs and Housing to make regulations that prescribe and define the use of surety bonds. As of the date of this report, no regulations have been posted; however, in recognition of the need to facilitate expeditious housing development in the City, staff are proposing to implement a policy to accept surety bonds in advance of any mandated requirements under the *Planning Act*.

Recommendation:

That the Administrative Policies Committee recommends to Council:

That Council adopt the Surety Bond Policy, attached as Exhibit A to Report Number AP-24-010, to allow City staff to accept surety bonds as securities; and

That Council authorize the Chief Financial Officer & City Treasurer to make any amendments required to the Surety Bond Policy to comply with the provisions of the *Planning Act*.

Authorizing Signatures:

ORIGINAL SIGNED BY COMMISSIONER

Paige Agnew, Commissioner,
Growth & Development Services

ORIGINAL SIGNED BY CHIEF ADMINISTRATIVE OFFICER

Lanie Hurdle, Chief
Administrative Officer

Consultation with the following Members of the Corporate Management Team:

Jennifer Campbell, Commissioner, Community Services	Not required
Neil Carbone, Commissioner, Corporate Services	Not required
David Fell, President & CEO, Utilities Kingston	Not required
Peter Huigenbos, Commissioner, Major Projects & Strategic Initiatives	Not required
Brad Joyce, Commissioner, Infrastructure, Transportation & Emergency Services	Not required
Desirée Kennedy, Chief Financial Officer & City Treasurer	☑

Options/Discussion:

Existing Securities Options

When a property owner enters into a development agreement with the City under the *Planning Act*, the owner is required to deliver financial securities to the City to guarantee performance of the owner's obligations under the development agreement. The two forms of financial securities that are currently accepted by the City are letters of credit and cash securities. The dollar amount of securities required varies significantly between projects but can be expected to be anywhere from tens of thousands of dollars to millions of dollars.

Cash securities are financial securities that are provided in the form of certified cheque to the City to hold until certain milestones under the development agreement are met. Cash securities are generally used for smaller projects and letters of credit are often the preferred option for developers for large-scale projects.

Letters of credit are guarantees by a bank that the funds are set aside and available if the owner defaults in its obligations under the development agreement. Should the City be required to undertake work to remedy the default, the letter of credit can be drawn on to provide the capital necessary to undertake the work at no cost to the City.

Cash securities and letters of credit are the most secure forms of payment and provide the greatest level of protection for the City; however, they do require developers to set aside large sums of money and can limit the developer's financial capability to undertake multiple development projects at once.

Surety Bonds Background

A surety bond is a form of financial guarantee and is an agreement between three parties: the principal (the developer), the obligee (the City), and the surety. In the current context, the surety, which is either a provincially licensed bond company, would provide a promise to the City that it will be liable for the debt, default or failure of the developer under a development agreement. In most cases, the surety will rigorously vet the financial means, expertise, resources, and operational controls of the principal to bring a development project to completion prior to issuing the surety bond.

The surety bond that is purchased will be in an amount that meets the financial security requirements of the City under the development agreement. Should, at any point, the developer fail to meet their obligations under the development agreement, the City can make a demand to the surety in an amount commensurate with the default.

Surety bonds were commonly accepted by municipalities until the 1980's and have been a common form of Home Buyer Warranty since the establishment of the Tarion Warranty Corporation ('Tarion') in 1976. An analysis of securities held by Tarion in 2020 showed that approximately 89% of Home Buyer Warranty securities held were in the form of surety bonds.

In the 1980's, municipalities began moving away from surety bonds towards letters of credit and cash securities. At the time, municipalities were required to meet a burden of proof in order to access the available funds through a surety bond. While these securities were rarely used, the risk of not meeting the requirements of the surety imposed too great a risk for the municipality. Letters of credit mitigated this risk by allowing the municipality access to funds set aside by the developer without requiring the municipality to meet any burden of proof. To compete with the shifting market, modern surety bonds have become much more flexible and are able to be drafted to afford municipalities the same level of protection and access to funds as a letter of credit.

With the increasing flexibility of surety bonds, they are starting to once again be accepted by municipalities as a form of security under development agreements. The flexibility provided to municipalities in drafting the terms of the bond, including the ability to add a 'cashable on demand' provision is an important change in addressing the previous risk inherent in a surety bond over a letter of credit. The success of this change in practice is yet to be tested, as it was difficult to find any examples to date where a demand for payment was required by a municipality for non-performance under a surety bond. This could also be as a result of the extensive prequalification process that is undertaken by the sureties prior to a bond issuance, as detailed below.

Municipalities that are accepting surety bonds include Sault Ste. Marie, Bracebridge, Innisfil, Hamilton, and Pickering. Due to this increased use, several applicants have approached the City about the use of surety bonds as they do not unnecessarily tie up funds and instead allow applicants to commit more finances towards the development of properties within the City.

Bill 109, More Homes for Everyone Act, 2022

Through amendments made in Bill 109 the following section has been added to the *Planning Act*:

70.3.1 (1) The Minister may make regulations,

(a) prescribing and defining surety bonds and prescribing and further defining other instruments or the purpose of this section;

(b) authorizing owners of land, and applicants for approvals in respect of land use planning matters, to stipulate the specified types of surety bond or other instrument to be used to secure an obligation imposed by the municipality, if the municipality requires the obligation to be secured as a condition to an approval in connection with land use planning, and specifying any particular circumstances in which the authority can be exercised.

This section, while not yet in force, will compel municipalities to accept surety bonds as a form of financial securities and allow the Minister to prescribe and define their use. By proactively implementing the use of surety bonds now, it allows the City to incentivize the building and completion of housing developments faster by freeing up capital for use by the applicant that would otherwise be unavailable to them (letter of credit or cash). The surety bond option also takes a more proactive and less reactive stance on their use and gives City staff the opportunity to become comfortable with their use before provincial regulations are enacted.

Benefits of Surety Bonds

Research has been undertaken by City staff to ensure that the benefits and risks of allowing surety bonds were thoroughly reviewed before a recommendation was made. Surety bonds offer the following benefits to both the developer and the City:

- Sureties generally undertake a more comprehensive prequalification process for surety bonds than letters of credit. This pre-qualification process often includes:
  - An assessment of the developer's working capital;
  - A review of the developer's credit history;
  - Examination of the developer's track record and work in progress; and
  - An assessment of the developer's expertise, resources, and operational capacity to complete the project;
- The use of surety bonds will make available additional bank financing, giving the developer access to more funds;
- A surety bond gives the developer access to idle cash that would otherwise be used to secure a letter of credit;
- The security reduction process for surety bonds is handled the same as with letters of credit where partial reductions and multiple draws are permitted; and
- Modern surety bonds can be drafted as "Pay on Demand", which provide similar benefits and security to a letter of credit with no right for the surety to question the legitimacy of the payment demand.

At this time, the language of the proposed provincial legislation is unclear in terms of whether or not the municipality will be able to dictate the structure of the surety bond to provide the same benefits as a letter of credit, as outlined in the proposed policy attached as Exhibit A. As such, staff are recommending that the Treasurer be authorized to make required amendments to the policy to comply with any future amendments to the *Planning Act*.

Municipalities Allowing Surety Bonds

The use of surety bond policies in Pickering, Sault Ste. Marie, Hamilton, Bracebridge, and Innisfil were reviewed, and the following lessons learned were noted and implemented in the draft policy attached as Exhibit A:

- The surety bond must reference the specific agreement for which it provides security;
- The surety bond should act as standby security. It is only anticipated to be cashed in the event of a default;
- The surety bond should be cashable by the municipality on demand, without cause or regard for the equities. This means that while the municipality would be required to provide notice to the surety that it considers the developer to be in default, the municipality is not required to justify or provide evidence of the default in order to cash

the bond and the surety has no right to dispute the determination of default by the municipality. The terms of the bond should be adjusted to allow as much control as possible for the municipality in order to minimize any risk of loss;

- The surety bond should be irrevocable, meaning it can't be cancelled or modified in any way without the consent of the parties;
- The surety bond should not expire or should provide for automatic renewals;
- Partial draws should be permitted by the municipality where the cost of remedying a default is less than the value of the bond;
- In its bond policy, municipalities should be permitted to require a replacement security if the credit rating of the issuer falls below what is considered acceptable. This is intended to ensure that the security provided by the developer remains suitable throughout the life of the obligations under the agreement; and
- A surety must be a a licensed bond company that
    - Has a minimum credit rating of A- or higher, as assessed by Standard and Poor's or an equivalent rating from Dominion Bond Rating Service Limited (A (low)), Fitch Ratings (A-) or Moody's Investors Service Inc (A3); and
    - Is regulated by the Office of the Supetintendent of Financial Institutions ("OFSI") and is required to comply with OFSI's minimum capital requirements.

Public Engagement

While there has not been official or legislated public consultation, City staff have continually been approached by applicants with regard to the acceptance of surety bonds. The feedback received has been that letters of credit tie up capital and, in some cases, the applicant can only afford to finance one housing project at a time because of the financial contribution required for the letters of credit. Applicants also believe that due to the changes in modern surety bonds, they should afford the municipality the protection that is required without undercutting the financial capacity of the developer to bring multiple projects and housing supply forward at the same time.

It is expected that coordination with the applicants on surety bonds will continue as further provincial regulations are released.

Existing Policy/By-Law:

None

Notice Provisions:

None

Financial Considerations:

None

Contacts:

Garret Hoegi, Manager, Development Engineering, 613-546-4291 extension 3294

Other City of Kingston Staff Consulted:

Jenna Morley, Director, Legal Services & City Solicitor

Lana Foulds, Director, Financial Services and Deputy Treasurer

James Bar, Manager, Development Approvals

Exhibits Attached:

Exhibit A Surety Bond Policy

Surety Bond Policy

Policy #	[To be assigned]
Effective Date	[Insert date]
Final Approver	City Council

1.0 Interpretation

1.1 In this policy, unless the context requires otherwise:

"***City***" means The Corporation of the City of Kingston;

"***City Solicitor***" means the person appointed as the city solicitor for the *City* or their designate;

"***City Treasurer***" means the person appointed as the Treasurer of the *City* or their designate;

"***development agreement***" means an agreement entered into between the *City* and an *owner* pursuant to the *Planning Act* in which the *owner* is required to provide *security* to the *City*, and includes a site plan control agreement, a condominium agreement, a development agreement, a subdivision agreement, an off-site works (construction) agreement, an off-site works and cost recovery agreement, or a pre-servicing agreement;

"***owner***" means the registered owner or developer of lands to be developed in accordance with the *Planning Act*, and may include an individual, an association, a partnership or corporation;

"***Planning Act***" means the *Planning Act*, R.S.O. 1990, c. P.13;

"***security***" means an amount to be paid by an *owner* to the *City* to guarantee performance of the *owner's* obligations under a *development agreement*;

"***surety bond***" means a bond issued by a *surety provider* in connection with a contract, which secures the performance and fulfillment of the undertakings, covenants, terms, conditions and agreements contained in the contract; and

"***surety provider***" means a company licensed, either federally or by a provincial insurance regulatory body, to issue *surety bonds* in the Province of Ontario.

1.2 In this policy, "include", "includes" and "including" indicate that the subsequent list is not exhaustive.

1.3 A reference to any legislation, regulation, by-law, rule, policy or provision thereof includes a reference to any legislation, regulation, by-law, rule or provision thereof enacted in substitution thereof or amendment thereof.

1.4 A reference to legislation includes all of the regulations made thereunder.

1.5 A reference to the position or title of any *City employee* includes a reference to any position or title created in substitution thereof.

2.0 Policy Statement & Purpose

2.1 It is the policy of the *City* to require the provision of *security* to ensure the satisfactory performance and completion of works under a *development agreement*.

2.2 The purpose of this policy is to establish the *City's* minimum standards for the acceptance of *surety bonds* as a form of *security* for *development agreements*.

3.0 Application

3.1 This policy applies to all *surety bonds* received by the *City* as a form of *security* for *development agreements*.

4.0 *Surety Provider* Requirements

4.1 All *surety bonds* delivered to the *City* must be issued by a *surety provider* that:

(a) has a minimum credit rating of:

(i) A- or higher, as assessed by Standard and Poor's;

(ii) A- or higher, as assessed by Fitch Ratings;

(iii) A (low) or higher, as assessed by Dominion Bond Rating Service Limited; or

(iv) A3 or higher, as assessed by Moody's Investors Services Inc.; and

(b) is regulated by the Office of the Superintendent of Financial Institutions ("***OFSI***") and is required to comply with *OSFI*'s minimum capital requirements.

4.2 The *owner* is responsible, at its cost, for providing all information or documentation required by the *City* to demonstrate that the minimum requirements set out in subsection 4.1 above have been met, which information or documentation must be in a form satisfactory to the *City Treasurer*.

4.3 If, at any time, the *surety provider* fails to maintain the minimum requirements set out in subsection 4.1 above, the *City* may require the *owner* to provide a replacement *surety bond* that meets the minimum requirements set out in this policy or other *security* that is satisfactory to the *City Treasurer*. If a replacement *surety bond* or other *security* satisfactory to the *City Treasurer* is not provided within 30 days after demand by the *City*, the *City* reserves the right to demand payment of the full amount of the original *surety bond* and hold the non-interest bearing cash *security* in the same manner as the *surety bond*.

5.0 ***Surety Bond*** Requirements

5.1 All *surety bonds* delivered to the *City* must be prepared on the *City's* standard template set out in Appendix 10.1 of this policy.

5.2 Despite subsection 5.1, the *City* may, in its sole discretion, accept a *surety bond* that is not on the *City's* standard template, provided that the *surety bond*:

(a) is printed on letterhead from the *surety provider;*

(b) states the date of issuance;

(c) is issued in Canadian dollars in the amount required by the *City*;

(d) references the specific *development agreement* for which it provides *security*;

(e) confirms that it is cashable by the *City* on demand, without cause, regard for the equities, or the requirement for further documentary evidence of obligation;

(f) states that it is irrevocable by the *surety provider*, such that it may not be revoked or amended without the mutual consent of the *City*, the *owner* and the *surety provider*;

(g) does not contain an expiry date, or provides for automatic renewals, whereby the *surety bond* will be automatically renewed without formal amendment for a specified period beyond the stated expiry date;

(h) indicates that:

(i) the *City* will be given at least 60 days' notice by registered mail or courier if the *surety bond* is to be terminated;

(ii) the *surety bond* will only terminate upon the expiry of such 60-day period if the *owner* has provided *security* to the *City* in at least the same amount as the *surety bond*, in a form acceptable to the *City*; and

(iii) if the *owner* does not provide such *security* to replace the *surety bond*, then the *surety bond* will remain in full force; and

(i) permits partial reductions and multiple demands,

and provided further that the form of *surety bond* is otherwise acceptable to the *City Treasurer*.

5.3 At any time upon the written request of an *owner*, the *City* may exchange a *surety bond* or other allowable form of *security*, provided that the replacement *surety bond* conforms to this policy or the other form of replacement *security* is to the satisfaction of the *City Treasurer*. The *owner* must provide the replacement *security* to the *City* prior to the release of the previous *security*.

6.0 Responsibilities of *City* Employees

6.1 The *City Treasurer* is responsible for:

(a) administering this policy and approving any departmental operating procedures and processes under this policy;

(b) holding and maintaining all *surety bonds* provided to the *City* pursuant to this policy; and

(c) reviewing requests for deviations or exceptions to this policy, including *surety bonds* issued by *surety providers* that do not meet the minimum requirements of this policy, and approving and/or denying such requests, as the case may be.

In exercising its authority under this policy, the *City Treasurer* may, in their sole discretion, decline a *surety bond* for any reason.

6.2 At the request of the *City Treasurer*, the *City Solicitor* is responsible for providing advice related to this policy and the acceptance, collection, substitution or release of any *surety bond* delivered pursuant to this policy.

6.3 All *City* employees who receive *surety bonds* on behalf of the *City* are responsible for:

(a) reading and abiding by the requirements set out in this policy; and

(b) forwarding the *surety bonds* to the *City Treasurer* for evaluation and administration.

7.0 Administration

7.1 All requests for reduction or release of a *surety bond* will be administered in accordance with the *development agreement* and the *City's* standard practices and procedures.

8.0 Approval Authority

Role	Position	Date Approved
Quality Review	City Treasurer.	
Subject Matter Expert	Director, Financial Services.	
Legal Review	City Solicitor.	
Management Review	CMT.	
Final Approval	City Council.	

9.0 Revision History

Effective Date	Revision	Description of Change
[Insert date]	1	New Policy

10.0 Appendix

10.1 City of Kingston Development Agreement Surety Bond Template

DEVELOPMENT AGREEMENT SURETY BOND

BOND NUMBER: Click or tap here to enter text. **AMOUNT: $** Click or tap here to enter text.

KNOW ALL PERSONS BY THESE PRESENTS THAT

Click or tap here to enter text.
as principal (the “**Principal**”)

-and-

Click or tap here to enter text.
(the “**Surety**”)

are held and firmly bound unto The Corporation of the City of Kingston, as obligee (the “**Obligee**”), in the amount of Click or tap here to enter text.Dollars ($Click or tap here to enter text.), in lawful money of Canada, 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, firmly by these presents.

WHEREAS the Principal has or will be entering into a(n) Choose an item. agreement with the Obligee in respect of those lands municipally known as Click or tap here to enter text.in the City of Kingston (City of Kingston File Number Click or tap here to enter text.) (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, in the opinion of the Obligee, fully performs all of the obligations set forth in the Development Agreement in accordance with its terms and fully indemnifies the Obligee from all costs and expenses which the Obligee may suffer by reason of the Principal’s failure to do so, 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 is 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 will notify the Principal and the Surety in writing of such default and make a written demand for payment, in the form attached to this bond as Schedule “A” (the “**Demand**”).

2. Within fifteen (15) days after receiving a Demand from the Obligee, the Surety will make payments to the Obligee in the amount of the Demand.

3. Except as otherwise set out herein, this bond is irrevocable and payment will be made despite any objection by the Principal. The Demand shall be accepted by the Surety as conclusive

evidence of its obligation to make payment to the Obligee, and the Surety will 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 under the Development Agreement; 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 in accordance with the Development Agreement.

4. The Surety's liability under this bond is unconditional and will 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 the 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 any arrangement, alteration or forbearance is made without the Surety's knowledge or consent).

5. All payments by the Surety will be made free and clear, without deduction, set-off or withholding.

6. The Obligee may make multiple Demands under this bond.

7. The amount of this bond may be reduced from time to time as advised by notice in writing by the Obligee to the Surety.

8. Each payment made by the Surety under this bond will reduce the amount of this bond by the amount of such payment.

9. In no event will the Surety be liable for a greater sum than the amount specified in this bond.

10. No right of action will accrue upon or by reason hereof to or for the use or benefit of any person other than the Obligee.

11. Upon (i) completion by the Principal of all works required by the Development Agreement to the Obligee's satisfaction, (ii) the expiry of all maintenance and rectification periods contained within the Development Agreement, and (iii) the issuance by or on behalf of the Obligee of any final certificates of approval contemplated in the Development Agreement, where applicable, the Obligee will return this bond to the Surety for termination or advise the Surety in writing that this bond is terminated.

12. If the Surety at any time delivers at least 60 days' prior written notice to the Obligee and to the Principal of its intention to terminate this bond, the Principal will deliver to the Obligee, not less than 30 days prior to the termination of this bond, financial security in the amount of this bond in a form acceptable to the Obligee. If the replacement financial security is not provided by the Principal or is not accepted by the Obligee, this bond shall remain in full force and effect.

13. Nothing in this bond shall limit the Principal's liability to the Obligee under the Development Agreement.

14. 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 the Surety hereby irrevocably and unconditionally attorn to the jurisdiction of the courts of the Province of Ontario.

15. 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, 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 written notice of the new address to the other parties in accordance with this section.

To the Surety:	**To the Principal:**	**To the Obligee:**
Click or tap here to enter text.	Click or tap here to enter text.	The Corporation of the City of Kingston 216 Ontario Street Kingston, ON K7L 2Z3 Attention: Director, Financial Services Email: FinanceDivision@cityofkingston.ca

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:

CLICK OR TAP HERE TO ENTER TEXT.
(**Principal**)

Per: ________________________________
Name:
Title:

Per: ________________________________
Name:
Title:

I/We have authority to bind the corporation.

CLICK OR TAP HERE TO ENTER TEXT.
(**Surety**)

Per: ________________________________
Name:
Title:

Per: ________________________________
Name:
Title:

I/We have authority to bind the corporation.

Schedule "A"

DEMAND – NOTICE OF DEFAULT

Date:	Click or tap here to enter text.
Name of Surety:	Click or tap here to enter text.
Address:	Click or tap here to enter text.
Attention:	Click or tap here to enter text.

Re: Development Agreement Bond No.: Click or tap here to enter text. ("Bond")
Principal: Click or tap here to enter text. ("Principal")
Obligee: The Corporation of the City of Kingston ("Obligee")
Agreement: Click or tap here to enter text. ("Development Agreement")

To the above named Surety:

The Obligee hereby certifies to the Surety, with reference to the Bond, that the Principal is in default under the Development Agreement.

The Obligee hereby demands payment in the amount of Click or tap here to enter text. under the terms of the Bond.

Please pay the required amount in accordance with the following payment instructions no later than 15 days after your receipt of this Demand:

Payment Instructions: Click or tap here to enter text.

Yours truly,
THE CORPORATION OF THE CITY OF KINGSTON