May 27, 2019

ARTICLE

Bill 108 Amends The Education Act — Schedule 4

Schedule 4 of Bill 108 amends the Education Act with the apparent aim of reducing land acquisition expenditures for school boards and the corresponding education development charges that developers are required to pay for growth-related net education land costs.

On May 2, 2019, the Government of Ontario introduced Bill 108, the *More Homes, More Choice Act, 2019*. Bill 108 proposes changes that the government believes will help bring new housing to market sooner by making sweeping changes to the land use planning regime.

Schedule 4 of Bill 108 amends the *Education Act* with the apparent aim of reducing land acquisition expenditures for school boards and the corresponding education development charges (EDCs) that developers are required to pay for growth-related net education land costs. This bulletin discusses the following three proposed amendments:

- Alternative Projects: With ministerial approval, school boards will be permitted to allocate EDC funds to Alternative Projects that would have the goal of reducing land acquisition costs;
- Localized Development Agreements: With ministerial approval, school boards will be permitted to acquire an interest in land from a developer in exchange for a reduction in EDCs that would otherwise be payable by the developer; and
- Ministerial Oversight: Schedule 4 also proposes allocating increased decision power to the Minister of Education away from school boards regarding school site acquisitions and the allocation of EDC funds.

Alternative Projects

Schedule 4 provides few details regarding what type of arrangements would constitute Alternative Projects and leaves many details to forthcoming amendments to O. Reg. 20/98. School boards are already empowered to acquire various different interests in real property for pupil accommodation, including leaseholds, so it is difficult to imagine what kind of new leasing arrangements would reduce net education land costs.

An Alternative Project that could conceivably reduce land costs would be to permit school boards to allocate EDC funds to certain types of capital building costs. Examples of capital costs that could reduce education land costs might include:

- allocating funds to increased building density that would reduce site area (*e.g.*, adding a third storey to new school sites and reducing overall site area below existing standards);
- structured parking to reduce land area requirements for surface parking;
- community access improvements (*e.g.* a pedestrian bridge over a major arterial road that would increase the catchment area of an existing school site); and
- purchase of a strata interest in a larger development.

However, the allocation of EDC funds to capital costs appears to conflict with the existing statutory framework that requires developers to pay EDCs only in respect of land costs and not building costs. School boards can only spend EDCs on land acquisition and ancillary costs. Section 257.53(3) of the *Education Act* expressly prohibits school boards from allocating EDC funds to "any building to be used to provide pupil accommodation".

The proposed amendments are silent as to whether ministerial approval of an Alternative Project would override the requirement to limit EDC expenditures to growth-related net education land costs. Therefore, even if a school board determined that land costs would be reduced by purchasing a strata interest instead of a fee simple interest, the fact that a strata interest presupposes acquisition of both an interest in land and building costs may prevent approval as an Alternative Project.

Localized Development Agreements

Localized Development Agreements would allow a school board to accept a real property interest in development land (or other prescribed benefit) that would be dedicated to pupil accommodation in lieu of the developer paying EDCs.

It is unclear how Localized Development Agreements would provide mutual benefits to school boards and developers beyond the status quo under the *Education Act*. School boards (and the Minister) would presumably only agree to a reduction in EDCs charged to a developer that is commensurate with the market value of the real property interest that would be acquired in exchange for the reduction. In other words, the opportunity to exchange an interest in land for a reduction in EDC obligations would presumably hit a market equilibrium that would be no different than an acquisition of real property on the open market.

One possible benefit might be the ability to pre-pay or guarantee EDC obligations in advance of development. Prepayment is sometimes utilized in municipal development charges given that municipalities have broader powers than school boards to waive or amend development charge obligations. Certainty of future costs might incentivize a developer to offer a school board an interest in land at a below market value, all other factors being equal.

Increased Ministerial Oversight over Land Acquisition and Expropriation

Expropriation of school sites is relatively rare given the increased costs of acquiring land under the *Expropriations Act,* but it is increasingly necessary in densifying urban neighbourhoods when greenfield planning for school sites and other options for land assembly are not available. The additions to Section 195 of the *Education Act* essentially provide the Minister with a new power to veto a school board's decision to expropriate for a school site. School boards with school sites targeted for potential expropriation will have to ensure cooperation from the ministry or find alternative sites.

Proposed subsection 257.101(a.1) also appears to be a broad "catch-all" provision that could provide the Minister with regulatory powers to allocate how EDC funds are spent. Again, it remains to be seen how limited or broad the Minister's powers will be, including the power to allocate EDC funds to capital costs, until draft amendments to O. Reg. 20/98 are available.

Impacts on the EDC By-law Process and LPAT Appeals

Alternative Projects and Localized Development Agreements present an opportunity to reduce education land costs, but will have limited efficacy if an absolute restriction on allocating EDC funds to capital costs remains core to the statutory regime. While it remains to be determined if forthcoming amendments to O.Reg 20/98 will provide additional guidance, there will likely have to be an amendment to the statutory definition of net education land costs in order to generate the revenue necessary to allocate EDC funds towards an Alternative Project. One thing that appears clear is that O. Reg. 20/98 will have to prescribe timelines for the Minister to notify a school board that there is no approval to proceed with an Alternative Project and a school board to notify the Minister if there is a proposed change to an Alternative Project. This could extend the normal timeline for passing an EDC by-law and possibly require additional public meetings.

It is likely that Alternative Projects and Localized Development Agreements will require extensive negotiations with private landowners. Requiring approval of these agreements before passage of an EDC by-law (which can have a term of up to five years) may require a new by-law to be passed after every agreement that is negotiated and then approved by the Minister. This seems likely to cause delay in processing developments and run counter to the intention behind other Bill 108 measures to reduce costs and expedite housing development.

The increased role of ministerial oversight in shaping Localized Development Agreements also changes the dynamic of an appeal of the EDC by-law to the Local Planning Appeal Tribunal (LPAT). The Minister's role in approving the by-law is currently limited to approving factual information such as public counts and the list of required school sites. Other school board policy choices that inform the background study and the overall EDC rate charged to developers remain the purview of the school board. If the Minister is approving these new agreements *per se*, it raises the questions of whether the Minister is responsible for defending the decision upon appeal to the LPAT and whether developers would challenge the EDC by-law on the basis of unfair treatment as between developers due to ministerial policy decisions.

How BLG Can Help

Our Municipal and Planning Law Group has extensive experience advising clients on all aspects of EDCs including the interpretation of the *Education Act* and appeals to the LPAT. Our group is well positioned to assist you in understanding the strategic implications of Schedule 4 of Bill 108 including the anticipated amendments to O. Reg. 20/98.

By: Andrew Baker

Services: Land Use Planning, Municipal & Land Use Planning, Expropriation, Government & Public Sector

---