

Brownlee LLP Legal Update – Off-Site Levy Checklist

We continue to receive many inquiries respecting Off-Site Levies. The enabling legislation is the *Municipal Government Act* R.S.A. c. M-26, as amended, (the ‘MGA’) and in particular ss. 648, 650, and 655, together with the *Principles and Criteria for Off-Site Levies Regulation* (Alta. Reg. 48/2004, the “Regulations”). Here is a checklist to review and apply when developing off-site levies for your community.

A. CHECKLIST

1. Recoverable Infrastructure Costs - MGA s. 648, s. 650 and s. 655

- a) **Infrastructure Type** – Off-site levies may be used for facilities listed in s. 648(2)
 - (i) **Water** - new or expanded facilities for storage, transmission, treatment or supply of water;
 - (ii) **Sanitary** - new or expanded facilities for treatment, movement or disposal of sanitary sewage;
 - (iii) **Storm** - new or expanded storm sewer drainage facilities;
 - (iv) **Transportation** - new or expanded roads required for or impacted by a subdivision or development; and
 - (v) **Lands** - land required for or in connection with any facilities described in the off-site levy provisions of the *MGA*.
- b) **Capital v. Maintenance** – off-site levies may be used for the recovery of capital costs.
- c) **Incidentals and Appurtenances** – “road” infrastructure is not limited to road surface or road geometry. “Road” as defined in s.616 and ss.1(1) of the *MGA* includes bridges and incidental structures.
- d) **Regional or Boundary Facilities** - the *MGA* does not require a municipality to extend its facilities beyond its boundaries or endeavour to recover costs by levy for facilities beyond its boundaries. A broad and purposive approach to Part 17 suggests that there may be circumstances where it is valid to impose an off-site levy for regional facilities (e.g. where an intermunicipal plan contemplates shared cost recovery for a boundary road). Options for cost sharing of facilities that benefit lands in more than one municipality could be explored.

2. **Consider Alternative Models** – neither the *MGA* nor the Regulations prescribes a particular model. Off-site levies are not a “one size fits all” form of cost recovery. The off-site levy should reflect the unique or special circumstances of the municipality.
3. **Access Skilled Professionals** – clear and technically supportable information is the basis for both fruitful negotiation with local developers and a solid legal defence in the event of court challenge. Skilled consultants can be vital for compiling data and preparing reports that backstop municipal efforts to:
 - a) compel developers to aid in addressing and defining existing and future infrastructure requirements;
 - b) identify a correlation between the levy and the impacts of new development;
 - c) develop a methodology that is consistent across the municipality, yet recognizes variations among infrastructure types;
 - d) meet municipal obligations to:
 - (i) develop a clear method of calculation for the levy; and
 - (ii) provide a levy calculation that includes a description of the facilities and benefiting areas, supporting technical data and estimated costs and mechanisms to address cost increases over time.
4. **Reference and Make Supporting Reports Available** – detailed levy calculations do not need to be on the face of the bylaw; rather, they may be part of the schedules or cross referenced in reports referred to within the bylaw.
5. **Duty to Consult and Negotiate** – the Regulations require that the levy calculation be determined in consultation with affected landowners and developers. Although a formal public hearing is not required, a similar process (sometimes called a non-statutory public hearing) is one avenue for consultation. The legislation and Regulations do not specify a particular form of consultation and negotiation. However:
 - a) **Good faith** – negotiations should be carried out in ‘good faith’ and in a manner that recognizes the uniqueness of the community;
 - b) **Informed Council** – Council should be kept informed and updated throughout the consultation and negotiation process;
 - c) **Stakeholders’ Input** – beneficiaries of a proposed development should be given the chance to participate, with full knowledge of the levies;
 - d) **Neighbours** – consider coordinating local infrastructure provisions, levies, and services with those of neighbouring municipalities.



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6. **Duty to Advertise** – a public hearing is not a requirement for an off-site levy bylaw, but the bylaw must be advertised (*MGA s.648(6)*).
7. **Ensure Proper Accounting Procedures** – procedures must be in place to effectively track payments and expenditures and to provide annual reporting. Again, skilled professionals can be of assistance.
8. **Re-evaluate Projects and Estimated Costs Periodically** – the underlying assumptions should be reviewed periodically and adjusted as new information becomes available.
9. **Development or Subdivision** – Off-site levies may be collected at the time of subdivision or development. The Bylaw should allow levies to be imposed at either stage.
10. **Deferred Payment** – it is common to collect off-site levies on issuance of a development permit (*MGA s.650(1)*) or subdivision approval (*MGA s.655(1)*). Collection can be triggered by subdivision or development and deferred to a later date (as specified in the development agreement). If the municipality defers payment, it may wish to require security. The municipality may also wish to include an escalation clause, such that the amount of the levy shall be the amount prescribed in the Off-Site Levy Bylaw in place at the time of payment (not subdivision or development).
11. **Inflation** - current market conditions demonstrate that inflationary factors can have a major impact on cost recovery calculations. For example, if there is net inflation of 15% per annum (increase in construction costs less investment revenue) a \$2 million project will, in three years time, cost \$2.9 million. Further, the levy calculation may include 'estimated costs and mechanisms to address cost increases over time' (Regulation s. 3(9)). Inflation can be minimized through a number of tools:
 - a) **Adjustments** - the Bylaw can contemplate adjustments for year of estimate versus year of collection;
 - b) **Limiting deferred payments** - If deferrals allowed, escalation clauses can require that the levy in place at the time of payment applies;
 - c) **Recalculation** - estimated costs can be recalculated annually;
 - d) **Pooling** - multiple projects can be included in one pool; and
 - e) **Staging** - construction can be staged continuously throughout the planning horizon.



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12. **Levy Credits** - A municipality may wish to require a developer, rather than the municipality construct some of the infrastructure contemplated under the Off-Site Levy Bylaw. A situation, sometimes referred to as a 'levy credit' occurs where the project cost exceeds the developer's off site levy contribution. While it may be possible for the municipality to structure repayment when levy payments are received from other developers, these agreements must be carefully drafted.
13. **Consider Alternative Cost Recovery Tools** – Off-Site Levy Bylaws are only one cost recovery tool, and they are not always the best tool.
 - a) **Time and Means of Collection** – An off-site levy may only be collected once. (MGA s.648(4));
 - b) **Carrying Costs** – it is expensive to front-end or finance infrastructure costs and await development or subdivision for levy collection.
 - c) **Significant effort and expense** - Council is faced with a difficult task in trying to achieve the appropriate balance for cost recovery.

B. SUMMARY

Off-site levies are a key tool for municipal capital cost recovery. In today's economic climate, these levies help address growth And increasing service demands. While there are some limitations to this tool, Off-Site Levy Bylaws have many significant benefits:

- a) **Facilities Beyond Adjacent Lands** - neither the MGA nor the Regulation specifies a maximum geographical distance between development lands and the location of infrastructure. By definition, an Off-Site Levy Bylaw may be used to assess costs for infrastructure not abutting the development lands.
- b) **Broader Recovery of Transportation Costs** - under an Off-Site Levy Bylaw, a municipality can recover costs for road construction or expansion arising from the broader impact of proposed development (MGA s.648(2)(c.1)).
- c) **Broad Local Discretion** - the Regulation sets out general principles for calculation of levies, but does not dictate to a municipality how to address specific factors. The Regulation expressly provides that the municipality is to retain the flexibility to negotiate the levy in a manner that recognizes the unique or special circumstances of the municipality.
- d) **No Petition** - unlike a local improvement levy, an off-site levy is not subject to a landowner right of petition.



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- e) **Consistency** – a well-conceived Off-Site Levy Bylaw eliminates piecemeal technical analysis and development agreement negotiations and provides a more consistent outcome with transparent charges.

- f) **Flexible over time** - an Off-Site Levy Bylaw allows a municipality to address infrastructure requirements over a significant time period. The bylaw can require a developer to contribute to off-site infrastructure it benefits from, whether the development precedes the construction of the off-site infrastructure, or the construction of the off-site infrastructure precedes the development.

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