

Developer-Friendly Changes Proposed For Ontario's Record Of Site Condition Regime



The Ontario Ministry of the Environment, Conservation and Parks (the “**Ministry**”) has [proposed amendments](#) to the Record of Site Condition (“**RSC**”) regime to support building homes faster by reducing the need for an RSC where it is not supporting brownfield developments. “Brownfield” properties are vacant or underutilized properties where past industrial or commercial activities may have left environmental contamination behind, which now present opportunities for redevelopment and revitalization in the province. While the stated intention of the proposed amendments is to streamline brownfield development, such changes in fact appear of limited application to brownfield projects. They may, however, affect other types of development projects as well as commercial transactions involving contaminated land.

This bulletin summarizes the current RSC requirements under [O. Reg. 153/04: Records of Site Condition](#) (the “**RSC Regulation**”) and the Ontario [Environmental Protection Act](#) (the “**EPA**”) and the amendments proposed by the Ministry.

When is an RSC required?

Under the EPA, an RSC is required to be filed with the Ministry before a person can change the use of a property from a less sensitive to a more sensitive use (e.g., industrial to

residential use). To file an RSC, a qualified person (“QP”), being an environmental consultant with designated experience and qualifications under the EPA, is required to conduct at minimum a Phase I Environmental Site Assessment (“ESA”) and often a Phase II ESA to confirm the environmental condition of the property meets the standards required for the more sensitive use. In the case of brownfields, additional investigation and remediation work is usually required to ensure the property meets the environmental standards for the planned more sensitive use.

For context, a Phase I ESA assesses potentially contaminating activities historically and currently at the property, identifies areas of environmental concern and is prepared based on a review of public searches, historical environmental reports, interviews with the property owner or operator and a site visit, but importantly does not include any sampling. A Phase II ESA, on the other hand, investigates the areas of environmental concern identified in the Phase I ESA through sampling to confirm if contaminants are in fact present at the site. While this sampling usually focuses on soil and groundwater, it may also include surface water, indoor air or vapour where appropriate.

There are many instances, however, where a party will file an RSC despite it not being required under the EPA, including to comply with contractual obligations, because it is required as a condition of financing or a municipality’s land use planning approval, or a property owner believes it will increase the value of the property or support a sale transaction.

What changes are proposed?

There are two main changes proposed to Ontario’s RSC regime. The first would prohibit the submission of an RSC for filing when the RSC is solely based on a Phase I ESA. Currently, this may occur where no Phase II ESA is required (meaning no potentially contaminating activities or areas of potential

environmental concern were identified by the QP for that property during the Phase 1 ESA review). Strangely, the prohibition would be subject to an exception where the property owner *wants* to file an RSC at their own discretion, but this exception to the prohibition is not available if the filing is a requirement of another person (such as a purchaser or a municipality).

How the Ministry would police whether a person wanted to file an RSC based on a Phase I ESA for their own interest rather than in satisfaction of a third party's requirement is unclear. Presumably, this amendment is targeted at municipal RSC requirements, however, it appears to go beyond this intent. Further, it is not difficult for a developer to obtain an RSC based solely on a Phase I ESA (because this means there is no need for a Phase II ESA or any other environmental investigations or remediation work), so it is unclear how this would actually ease the regulatory burdens of a brownfield developer. Also, if only a Phase I ESA is required to support an RSC filing, arguably the property is not a true brownfield as no potentially contaminating activities or areas of potential environmental concern have been identified at that property.

The second proposed change would alter section 15(1) of the RSC Regulation. Currently, there is an exemption from RSC filing requirements for a change in property use of existing buildings used for commercial or community use if the following criteria are met:

0. After the change, the property will continue to be used for commercial or community use, but with the addition of residential use, institutional use, or both;
1. Before and after the change, the building must have no more than six storeys;
2. The change in use (i.e., the intended residential or institutional uses) must be restricted to the floors above the ground floor;

3. The property on which the building is located cannot be, and cannot have been historically, used for an industrial use, a garage, a bulk liquid dispensing facility, or for the operation of dry-cleaning equipment; and
4. The building envelope will not change and there will be no additions to the exterior portions of the building.

The proposed change would remove the six-storey height limit in (b) above and modify (e) to allow additions to the exterior of the building on floors above the ground floor and to modify the ground floor for the sole purpose of meeting current standards for safety and accessibility or adding attached outdoor structures like a portico. This would allow a taller building, for example an existing office tower, to be changed to mixed use with residential on the upper floors and commercial on the bottom level, without the need to have an RSC filed prior to this change. This amendment would assist developers and property owners seeking to change the use of an existing building without the need to go through the RSC filing process, however, this change also does not seem to benefit brownfield developers in particular as it relates to renovation projects rather than redevelopment.

The comment period for these proposed amendments is open until January 10, 2025 and can be accessed [here](#). As a result, the ultimate impacts of these changes to brownfield developments, municipal approvals and commercial transactions remains to be seen until any final amendments to the EPA's RSC requirements are enacted in 2025. For additional information on how the proposed amendments to RSC requirements may impact your projects, business or transactions, please reach out to Talia Gordner, Ralph Cuervo-Lorens, Marc Kemerer, Annik Forristal or Kailey Sutton.

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific

legal advice should be obtained.

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