Goodmans LLP Update

Municipal Law

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Ontario's Summary of Proposed Inclusionary Zoning Regulations

On December 18, 2017, a year after the Ontario legislature enacted legislation expanding the powers of municipalities to require the provision of affordable housing in new residential developments (see our December 19, 2016 Update, *Ontario Enacts Inclusionary Zoning Legislation to Promote Affordable Housing*), the Province of Ontario released a summary of its proposed regulations that outlines in greater detail how the inclusionary zoning regime may function.

According to the province's summary of its proposed regulations, the inclusionary zoning scheme is focused on the provision of affordable ownership, rather than rental units. The proposed regulations would permit municipalities to require developments containing 20 or more residential freehold or condominium units to provide up to 5% or 10% (depending on the location) of the total units or residential gross floor area of the development as affordable housing. The affordable units would be made available to those with qualifying household incomes at a price established through a municipal by-law, and would remain affordable for up to 40 years. Importantly, to offset the costs to developers, municipalities would be required to make a financial contribution to cover 40% of the reduced sale price of the affordable units relative to market-rate units through reductions in application fees, cash-in-lieu of parkland fees, development charges or parking requirements. In recognition of this contribution, municipalities would be entitled to share in the proceeds of resales of affordable housing units with the unit owner for up to 40 years after first occupancy.

The province's summary also provides clues as to how in-progress applications may be transitioned when inclusionary zoning policies and by-laws are enacted.

If enacted, the proposed regulations will have significant implications for developments across the province. The key provisions of the proposed regulations, and the reaction of municipalities to these provisions, are outlined below.

What Developments are Subject to Inclusionary Zoning Requirements?

The proposed regulations would empower municipalities to determine, through their official plans and zoning by-laws, the areas of the municipality where inclusionary zoning requirements will apply. Within those areas, developments proposed with 20 or more residential condominium or freehold units would be required to set aside units for affordable housing. In contrast, purpose-built rental developments would not be subject to the inclusionary zoning requirements.

5% or 10% Affordability Requirements and Possibility of Off-Site Units

Under the proposed regulations, zoning by-laws may require developments subject to inclusionary zoning to provide different amounts of affordable housing depending on whether the property is located in an area intended for high density development. Specifically:

- If the development is in a high density transit-station area identified in an official plan, a zoning by-law may require up to 10% of the total units or residential gross floor area of the proposed development to be provided as affordable housing.
- In all other areas, a zoning by-law may require up to 5% of the total units or residential gross floor area of the proposed development to be provided as affordable housing.

While the general intent of the inclusionary zoning regime is to require the provision of affordable housing units within the same development as market-rate units, the proposed regulations would permit affordable units to be provided off-site in

certain limited circumstances. Specifically, the municipality may permit the provision of off-site units if:

- the off-site units are located in close proximity to the proposed development;
- the lands on which the off-site units would be situated are zoned for inclusionary zoning;
- the off-site units are ready for occupancy no later than 36 months after the transfer of the affordable units from the proposed development;
- the off-site units do not count towards the satisfaction of any inclusionary zoning requirements to which the off-site development would otherwise be subject; and
- no more than 50% of the units in the off-site development are affordable units obtained through inclusionary zoning.

Resale Rules

Whether provided on-site or off-site, affordable units provided through inclusionary zoning are to be subject to rules regarding the price at which they can be resold and who can share in the proceeds. The proposed regulations will establish two different periods during which different rules apply to the affordable units:

- ***The 20 to 30-year period.*** For the first 20 to 30 years, affordable units may only be sold at a price to be determined in accordance with a municipal by-law. Further, the municipality would be entitled to share in the proceeds of any resale during this period in a manner set out in its by-law.
- ***The further 10-year period.*** For the next 10 years, an affordable unit may be sold at market rate, but the municipality would be entitled to share in the proceeds of the first resale of the unit during this time in accordance with a sharing schedule. The proposed sharing schedule provides that the municipality would be entitled to 90% of the proceeds relating to the equity if the owner owned the unit for less than two years at the time of sale, with the municipality's share declining gradually to 10% if the owner owned the unit for 20 years or more. The municipality's right to a share of the proceeds would end after the first sale during this 10-year period.

Incentives and Measures to Offset Costs to Developers

As noted in our previous publication on inclusionary zoning, studies of similar programs in other jurisdictions have concluded that incentives to offset the costs associated with providing affordable housing units are essential to an effective inclusionary zoning regime. The proposed regulations indicate that the province envisions municipalities providing various forms of incentives to offset 40% of the reduced sale revenue developers will receive from the affordable units. Specifically, where a development is not subject to a community planning permit system, municipalities must make a financial contribution to cover 40% of the difference between (i) the average market price of the units provided as affordable housing, and (ii) the affordable price of the units provided as affordable housing. Both the market price and the affordable price would be determined in accordance with formulas set out in the municipality's official plan and zoning by-law. There is currently no community planning permit system in place in Toronto, so the financial contributions noted above would apply in all areas of the city where inclusionary zoning is implemented.

The proposed regulations empower municipalities to use various forms of incentives and measures to make up the 40% financial contribution, including reductions in application fees, cash-in-lieu of parkland fees, development charges or parking requirements. However, unlike in many other jurisdictions, municipalities cannot authorize an increase in height or density as an incentive for providing affordable units through inclusionary zoning.

Section 37 Benefits

The legislation enacted in 2016 to facilitate inclusionary zoning provides that, subject to any restrictions contained in the regulations, municipalities may continue to obtain community benefits under section 37 of the *Planning Act* in respect of developments that are required to provide affordable housing units through inclusionary zoning. Under this legislative scheme, the key is what restrictions, if any, are contained in the regulations.

According to the province's summary of the proposed regulations, the key restriction on section 37 benefits proposed is that no such benefits may be obtained in respect of units provided as affordable housing through inclusionary zoning. However, the municipality would be free to obtain section 37 benefits in respect of the market-rate units in the development.

Benefits under section 37 of the *Planning Act* may only be secured by a municipality when it increases, through a zoning amendment, the height or density limits applicable to a site to permit a proposed development. In a municipality where inclusionary zoning is in effect, a portion of the additional density permitted by the zoning amendment may be devoted to affordable housing units. The province's summary of the proposed regulation indicates that, in such circumstances, the additional density attributable to the affordable housing units will not be used to determine the section 37 benefits owing on the site. As a result, municipalities may still obtain section 37 benefits in respect of the market-rate portions of a development that includes affordable housing units, but they will not be able to obtain section 37 benefits in respect of the affordable portions of the development.

Transition

According to the province's summary, the proposed regulations will provide for transition for applications that are in progress at the time official plan policies or zoning by-laws dealing with inclusionary zoning are adopted or enacted. Specifically, applications will be exempt from the application of an inclusionary zoning by-law where:

- an application for a building permit or site plan approval was made before an inclusionary zoning by-law was passed; or
- concurrent applications were made and accepted by the municipality for an official plan amendment, zoning by-law amendment, and either site plan, plan of subdivision or condominium approval before an official plan policy authorizing inclusionary zoning was adopted by council.

Municipal Reaction and Next Steps

Ontario municipalities have been calling on the province to deliver inclusionary zoning regulations for years. However, a number of municipalities have criticized the province's proposed regulations for not going far enough, and for unduly limiting flexibility in the ability of municipalities to deliver affordable housing through inclusionary zoning. The City of Toronto, for example, questioned the exclusion of purpose-built rental housing from the proposed inclusionary zoning scheme and the focus on ownership housing (rather than rental) more generally, recommended an increase in the minimum affordability rate (even for non-transit-station area sites) to 10%, an increase in the minimum affordability period, and indicated that the financial incentives and contributions required from municipalities are infeasible.

These comments and others were submitted to the province in early February during the statutory comment period. The province has since indicated it is looking closely at the feedback it has received and that the first draft of the regulations will not be the final version. Changes, it seems, will be made.

Once the regulations are enacted in their final form, municipalities may begin preparing assessment reports as a precursor to developing official plan policies authorizing inclusionary zoning. The assessment reports currently must include an analysis of existing and planned housing supply, housing affordability and average market prices for different unit types in different locations of the municipality. Municipalities may also begin preparing official plan policies, as well as zoning by-laws to implement those policies. As indicated in our previous publication on inclusionary zoning, official plan policies and zoning by-laws dealing with inclusionary zoning will not be subject to appeal, other than by the Minister of Municipal Affairs and Housing.

We will continue to provide updates as the details of Ontario's inclusionary zoning scheme become available. In the meantime, for more information, please contact any member of our Municipal Law Group.

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