

# Goodmans<sup>LLP</sup> Update

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## Ontario Enacts Overhauled Inclusionary Zoning Regulations

In December 2016, Ontario enacted legislation expanding municipalities' powers to require the provision of affordable housing in new residential developments through inclusionary zoning (see our December 19, 2016 Update, *Ontario Enacts Inclusionary Zoning Legislation to Promote Affordable Housing*). On April 11, 2018, the province enacted its final form of inclusionary zoning regulation (the "**Regulation**"), outlining how municipalities may implement these new powers. In contrast to a previous draft circulated for public comment, the Regulation gives municipalities wide discretion to determine how their inclusionary zoning regimes will function, including how many affordable units must be provided as part of market-rate developments and how the municipality will offset the costs to developers through incentives.

Municipalities that wish to take advantage of their new inclusionary zoning powers may now begin the process of preparing the requisite reports, official plan policies and zoning by-laws to require developers to provide affordable units in market-rate developments. Once introduced, these provisions, which are not generally subject to appeal, will have significant implications for developers.

The key provisions of the Regulation are outlined below.

### Background: A Shift in Regulatory Approach

The recently-enacted Regulation is not the first iteration of regulatory guidance the province has provided on its inclusionary zoning legislation. In December 2017, the province released a summary of a draft regulation for public comment (see our February 6, 2018 Update, *Ontario's Summary of Proposed Inclusionary Zoning Regulations*). The draft indicated that the province intended to impose limitations on municipalities' inclusionary zoning authority, including a cap on the amount of affordable units municipalities may require from developers (of 5% or 10%, depending on location) and an obligation on municipalities to make financial contributions to offset the associated costs to developers. The draft regulation also indicated that the inclusionary zoning scheme was geared toward providing affordable ownership, rather than rental, units.

The draft regulation prompted significant backlash from municipalities and affordable housing advocates, who argued that the costs to municipalities were too high and the amount of affordable units that would be delivered through the scheme as proposed was too low. The focus on affordable ownership to the exclusion of affordable rental housing was also criticized.

The province appears to have heard these critics loud and clear, as the final form of the Regulation as enacted represents a significant shift in the province's overall approach to inclusionary zoning. As outlined in more detail below, the Regulation as enacted gives municipalities wide latitude to determine how their inclusionary zoning regimes will function.

### Wide Municipal Discretion on Inclusionary Zoning Matters

Under the Regulation as finally enacted, each municipality has wide discretion to define what inclusionary zoning will look like within its borders. The primary restriction in the Regulation is that inclusionary zoning cannot be applied to developments containing less than 10 residential units. Beyond this size qualification, each municipality has significant discretion to establish the parameters of its inclusionary zoning regime through official plan policies, including:

- the locations where inclusionary zoning would apply;
- the range of household incomes for which the units would need to be affordable;
- the range of housing types (e.g. applicable to apartments, townhouse units, etc.) and the sizes of the affordable units;
- the number of affordable units, or the total affordable gross floor area, that would be required;
- the period of time for which the affordable units must be maintained as affordable;

- how the price or rent of affordable units would be determined; and
- how the proceeds flowing from the resale of an affordable ownership unit would be shared between the municipality and the unit owner, though the municipality's share is limited to 50%.

Under the Regulation as enacted, municipalities are free to exercise their inclusionary zoning powers in respect of projects that propose purpose-built rental units as well as those that propose ownership units. While the draft regulation exempted purpose-built rental buildings from inclusionary zoning requirements, this exemption was removed in the final form of the Regulation, consistent with the overall shift toward providing municipalities with greater flexibility to implement inclusionary zoning regimes as they see fit.

In a similar vein, the Regulation as enacted also gives municipalities full freedom to determine what measures and incentives may be provided to offset the costs associated with providing affordable housing units. As noted in our previous publications on inclusionary zoning, studies of similar programs in other jurisdictions have concluded that such incentives are critical to an effective inclusionary zoning regime that facilitates an increase in affordable housing supply along with an increase in market-rate supply. If incentives are inadequate, inclusionary zoning requirements can suppress the supply of both market-rate and affordable units, if they make development economically infeasible.

The draft regulation addressed incentives through a requirement on municipalities to cover 40% of the difference between the average market price of units provided as affordable housing and the affordable price of those units. In contrast, the Regulation as finally enacted is much less prescriptive; it simply gives each municipality the discretion to determine what measures and incentives will be provided. Common incentives in other jurisdictions include fee waivers, fast-tracked approvals, reduced parking requirements and density bonuses. What incentives are provided, and the extent to which those incentives offset the costs associated with providing affordable housing, will likely vary depending on the circumstances in each municipality.

## **Section 37 Benefits**

Section 37 of the *Planning Act* permits municipalities to collect financial contributions and other benefits in return for increases in height and density through a zoning amendment. In a municipality where inclusionary zoning is in effect, a portion of the additional height or density permitted through a zoning amendment may be devoted to affordable housing units. The Regulation as enacted provides that, in such circumstances, the additional height or density attributable to the affordable housing units cannot 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.

## **Off-Site Units**

The general intent of inclusionary zoning is to require the provision of affordable housing units within the same development as market-rate units. However, the Regulation permits affordable units to be provided off-site in certain limited circumstances. Specifically, municipalities may permit the provision of off-site units if:

- the municipality has adopted official plan policies permitting the provision of off-site units;
- the off-site units are located in close proximity to the proposed development;
- the lands on which the off-site units are situated are zoned for inclusionary zoning; and
- 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.

The draft regulations provided that no more than 50% of the units in the off-site development could be affordable units obtained through inclusionary zoning. However, this limitation was removed in the final Regulation, indicating that developers may be able to satisfy their inclusionary zoning obligations through a stand-alone, off-site development that is exclusively comprised of affordable units, if the municipal official plan permitted it.

## Transition

The Regulation provides for transition for development applications that are in progress at the time official plan policies or zoning by-laws implementing inclusionary zoning are adopted or enacted. Specifically, applications are exempt from the application of an inclusionary zoning by-law where:

- on or before the day an official plan policy authorizing inclusionary zoning is adopted by council, a zoning by-law amendment application and, if required, an official plan amendment application was made, in conjunction with either an application for subdivision or condominium approval; or
- on or before the day an inclusionary zoning by-law is passed, an application was made for a building permit or site plan approval (or for a development permit or community planning permit, where such systems are in effect).

These transition provisions suggest that those with development applications in process should consider making a site plan application if they wish to protect themselves from inclusionary zoning requirements.

## Next Steps

Now that the Regulation is enacted in its final form, municipalities may begin preparing assessment reports as a precursor to developing official plan policies authorizing inclusionary zoning. The assessment report must include an analysis of existing and planned housing supply, housing affordability, average market prices for different unit types in different locations of the municipality, and an analysis of the potential impacts that inclusionary zoning may have on the housing market and the financial viability of development in the municipality.

Once an assessment report is prepared, municipalities may 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 are not subject to appeal, other than by the Minister of Municipal Affairs and Housing.

We will continue to provide updates as municipalities begin implementing their new inclusionary zoning powers. In the meantime, for more information, please contact any member of our Municipal Law Group.

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