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The Lawyer
The Problem with Inclusionary Zoning Regulation

The promise of inclusionary zoning in the draft of the regulation and the reality of what was actually passed by the province is radically different

by Tara Welat

One of the legacies of the Kathleen Wynne government is the total reversal by the province of its position on inclusionary zoning. The promise of inclusionary zoning in the draft of the regulation that was released by the province in December 2016, and the reality of what was actually passed by the province on April 11, 2018 is radically different. Municipalities across Ontario are now equipped with expansive and discretionary tools to mandate affordable housing in any new residential development with 10 or more units – which includes both condominium and purpose-built rental projects.

Whereas the draft of the policy imposed a cap of 5 to 10 per cent on the amount of affordable housing units that could be mandated in a particular project and obligated municipalities to provide financial incentives to offset the financial burden, the actual regulation imposes none of the above protections for developers. In fact, aside from providing the municipality with expansive powers to mandate affordable housing, there is little framework that is provided.

For example, municipalities are permitted to set the following with respect to inclusionary zoning policies and bylaws:

- Target areas (site specific or area wide) within a municipality where inclusionary zoning will be required;
- Minimum number of required affordable units in a subject development;
- The affordability period (i.e. how long the units must be kept as affordable);
- The price of the affordable units (rental or sale);

- Incentives to offset the developers costs in making housing units affordable;
- Provision of offsite affordable units, in addition to those required at the development site;
- Mandate a portion of net proceeds from the sale of an inclusionary zoning unit to be distributed to the municipality (up to a maximum of 50 per cent of net proceeds); and
- The process by which the above are implemented and reported.

Although the extra height/density caused by the inclusion of required affordable units would be excluded from the height/density calculations for the purposes of s. 37 payments, developers are not permitted to provide the municipality with money in lieu of the required units.

What we will see in the coming months is each municipality engaging an independent body to prepare an assessment report to address the current and planned housing supply and the potential market impacts of inclusionary zoning before they can go on to develop official plan policies authorizing inclusionary zoning as part of general or site-specific zoning bylaws. Once such policies or bylaws are enacted, they will generally not be appealable to the Local Planning Appeal Tribunal.

The upshot of the inclusionary zoning regulation is that municipalities will now wield even greater powers, which should be a cause for consternation among developers. It is important to keep in mind, however, there is also opportunity for municipalities to provide incentives, such as increased density, streamlined approvals, cuts to development charges, cash incentives and tax benefits, just to name a few, which could potentially create a win-win situation for all.

If municipalities approach inclusionary zoning solely as a stick with which to force affordable housing onto developers, it will certainly have a chilling impact on not only affordable housing but all development, and it will make the "non-affordable" units in a new development even more unaffordable as a result. The success of inclusionary zoning will rest on whether municipalities can skillfully tailor attractive incentives for developers and use them as a metaphorical carrot to induce inclusionary developments.

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