

IMPENDING IMPLEMENTATION OF ONTARIO'S INCLUSIONARY ZONING REGIME IN TORONTO AND THE GTA

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When it comes to municipalities addressing the lack of “affordable housing”, the use of inclusionary zoning by-laws, passed pursuant to section 35.2 of the [Planning Act](#), is becoming an important tool in their arsenal. For those with forthcoming development applications in the City of Toronto and the GTA more generally, such policies may have a significant impact on the bottom line for your development. In this bulletin, we provide a summary of the recent history of the use of inclusionary zoning policies in Ontario together with an important update on the status of such policies in the City of Toronto and other GTA municipalities.

Background

Inclusionary zoning is a land-use planning tool which permits municipalities to require new development or redevelopment to dedicate or maintain a portion of new residential units as affordable housing. Section 35.2 of the Planning Act contains express permission for municipalities to implement inclusionary zoning provisions. These provisions have existed since 2016 when the Province passed the [Promoting Affordable Housing Act, 2016](#) (Bill 7).

In order to implement an inclusionary zoning by-law, a municipality's official plan must contain policies authorizing inclusionary zoning policies which require the inclusion of affordable housing units within certain residential projects, and maintenance of those units over time. Where a municipality has not been prescribed by an Order of the Minister of Municipal Affairs and Housing (“**Minister**”) as requiring such policies, it may nevertheless elect to establish such policies; that said, amendments under the [More Homes, More Choice Act, 2019](#) (Bill 108) have made it so that a non-prescribed municipality is limited to implementing inclusionary zoning in only certain areas (as more particularly detailed below).

Recently the Province enacted the [COVID-19 Economic Recovery Act, 2020](#) (Bill 197) which amended the Planning Act to enhance the Minister's order-making powers respecting inclusionary zoning. In particular, the Minister now has the ability to require the inclusion of affordable housing units in the development or redevelopment of specified lands, buildings or structures.

At the Provincial Level

As noted above, under the current legislative regime, a municipality which is prescribed by an Order of the Minister to implement an inclusionary zoning by-law must (and a municipality which is not prescribed may) include in its official plan policies which authorize inclusionary zoning. At the time of the writing of this bulletin, there are currently no prescribed municipalities. The required content for such policies is set out in [O. Reg. 232/18](#) (e.g., range and types of housing and size of units).

Per the recent amendments under Bill 108, a municipality that is not prescribed may only provide inclusionary zoning for an area that is:

1. A protected major transit station area (“**PMTSA**”)[\[1\]](#), or
2. An area subject to a Development Permit System (“**DPS**”) as ordered by the Minister under s.70.2.2 of the Planning Act.[\[2\]](#)

Of note, there is no appeal to the Ontario Land Tribunal (formerly the Local Planning Appeal Tribunal) in respect of an official plan amendment (“**OPA**”) or zoning by-law amendment (“**ZBA**”) giving effect to inclusionary zoning policies,[\[3\]](#) nor are minor variances to inclusionary zoning by-laws permitted. While an inclusionary zoning by-law may provide for the provision of affordable units off-site, payment-in-lieu will not be permitted.

As a prerequisite to implementation of inclusionary zoning policies, a municipality must first conduct an assessment report, which then needs to be updated every 5 years to determine whether amendments are required. Such reports need to consider, amongst other things, housing supply, population, household incomes, and the potential impact of such policies on the housing market. Municipalities must also prepare status reports every 2 years after passing an inclusionary zoning by-law.

Given the significant impact that such requirements may have on existing and future development proposals, the transition policies will be of particular importance. Pursuant to the Planning Act a development will not be subject to an inclusionary zoning by-law passed by a municipality if:[\[4\]](#)

- The development contains fewer than 10 residential units; or
- The development is proposed by (i) a non-profit housing provider, or (ii) a partnership in which a non-profit housing provider has an interest greater than 51% and at least 51% of the units are intended to be affordable housing; or
- On or before the day an official plan authorizing inclusionary zoning was adopted by Council, application has been made for an OPA (if required) and for a ZBA in respect of the development along with an application for either (i) approval of a plan of subdivision under s.51 of the *Planning Act*, or (ii) or approval of a description or amendment under s.9 of the *Condominium Act*, SO 1998, c 19; or

- On or before the day an inclusionary zoning by-law is passed, an application has been made for a building permit, a development permit, a community planning permit or site plan approval.

Of particular note, application for an OPA (if required) and ZBA alone will not be enough to exempt a development from inclusionary zoning policies pursuant to the *Planning Act*; it will either need to be accompanied by application for a plan of subdivision approval, approval of an application under s.9 of the *Condominium Act*, a building permit, a development permit, a community planning permit or site plan approval.

Importantly, however, any municipality implementing inclusionary zoning policies will not be able to implement transition provisions more stringent than those provided for in the *Planning Act* – in other words, a municipality may elect to provide less stringent exceptions or a more relaxed, longer transition period. As detailed below, such a less stringent and more relaxed approach to transition is presently being considered by the City of Toronto in its initial draft inclusionary zoning policies.

An Update on the Status of The City of Toronto's Proposed Inclusionary Zoning Policies

The City of Toronto (the “**City**”) began working to implement inclusionary zoning policies in 2018, and a draft Assessment Report comprised of a Housing Need and Demand Analysis and a Financial Impact Analysis has been prepared. In September 2020, the City published for comments a [draft OPA](#) and a [draft ZBA](#) in respect of its proposed inclusionary zoning regime. As of the writing of this bulletin, it is understood that these drafts will be subject to further revision and that the revised drafts are intended to be published by September 2021. A final Assessment Report will also be considered by Council together with the draft OPA and draft ZBA proposed for adoption. Before this time, the City intends to have a further public open house and receive additional comments from the public. Those who are interested may request to be added to the relevant notice list.

City of Toronto – Areas Subject to Inclusionary Zoning

As currently drafted, the City's inclusionary zoning policies introduce the concept of a “strong or moderate market” and narrow the application of such policies from those under the *Planning Act* to either: (1) a PMTSA within a strong or moderate market, or (2) an area subject to a DPS (as ordered by the Minister under s.70.2.2 of the *Planning Act*) within a strong or moderate market. We understand from conversations with City representatives that this “formula” is not intended to be revised in the forthcoming amendments.

Of note, neither a DPS nor any PMTSAs are currently in place in the City. While the City could choose to implement its own DPS, this would not suffice for the implementation of inclusionary zoning as the *Planning Act* requires such DPS to be Ordered by the Minister. Therefore, the City is currently focusing its efforts on

having PMTSAs adopted and approved (which approval, we note, impacts more than inclusionary zoning policies).

In June 2020, City Planning initiated the Growth Plan Conformity and Municipal Comprehensive Review (the “**MCR**”) which includes the delineation of 180+ Major Transit Station Areas (“**MTSAs**”) to meet Provincial intensification requirements by July 2022.^[5] As of the writing of this bulletin, there are currently 2 OPAs for proposed City PMTSAs before the Minister for approval: (i) OPA 482 for Finch West Transit Station Area and Sentinel Transit Station Area, and (ii) OPA 483 for the Keele Finch Secondary Plan Area. An OPA for another 16 PMTSAs within the Downtown Secondary Plan area is anticipated to be brought forward and adopted by Council in the fourth quarter of 2021, and subsequently sent to the Minister for approval.^[6] The Minister’s decisions with respect to PMTSAs are not appealable.

City of Toronto – Affordable Housing to be Secured

Per the City’s draft inclusionary OPA and ZBA, affordable housing is required to be secured at affordable rents or ownership prices with a minimum range of 3 - 10% of the residential gross floor area (depending on the zone) secured at 80% of affordable rents for a period of 99 years from the date of the first residential occupancy.

Under the City’s draft ZBA, an “affordable housing unit” may be either an affordable rental housing unit or an affordable ownership housing unit. An “affordable rental housing unit” is defined based on “total monthly shelter cost”, being the least expensive of 100% of the Average Market Rent by dwelling type, affordable to a certain range of percentile income base on dwelling unit type. An “affordable ownership housing unit” is defined based on the total monthly shelter cost, being below 30% of gross annual income for households within a moderate income range and affordable to a certain range of percentile income based on dwelling unit type.

City of Toronto – Transition to Inclusionary Zoning

With respect to transition, Ch. 600.30.15.1 of the City’s most recent draft inclusionary zoning OPA provides that the inclusionary zoning policies will not apply to a development for which a building permit application, complete ZBA application, complete minor variance application or complete site plan approval application has been filed on or prior to January 1, 2022. This is significant because this provides for a broader, more flexible transition than what is currently set out in the *Planning Act* – namely, that a complete ZBA application or minor variance application would alone be sufficient to exempt a development.

Notably, the transition provisions do not currently address when the inclusionary zoning policies will apply to developments that get added to a PMTSA after the inclusionary zoning policies come into effect (e.g., after January 1, 2022).

It is understood that the City has received numerous comments regarding the current transition provisions, including uncertainty in their interpretation. Based on feedback we have received, it is anticipated that these provisions will be amended in the next draft OPA to be released by the City. Developers will want to closely monitor any changes to the transition provisions as it is possible for the City to revert to the more stringent *Planning Act* transition provisions that require more than OPA and ZBA applications to have been made in order to qualify for exemption from the inclusionary zoning policies. This means developers may need to be prepared to submit applications for either a plan of subdivision or site plan approval if they wish to be exempt from the application of the inclusionary zoning policies. We will be closely monitoring the City's Inclusionary zoning policies in the anticipated September 2021 draft and will certainly update our bulletin if there are any changes.

An Update on Inclusionary Zoning Policies in the GTA

Although the City of Toronto is the most advanced, other municipalities in the GTA are also taking steps to implement inclusionary zoning policies. In doing so, it appears that the concept of “market strength” as put forth by the City of Toronto may also be adopted by other GTA municipalities.

For example, the Region of Peel, City of Mississauga and City of Brampton, in consultation with N. Barry Lyon Consultants (“**NBLC**”), have recently determined that inclusionary zoning may be feasible for residential condominium projects within the Region's stronger market areas such as the Hurontario corridor from Port Credit to Uptown and Downtown Brampton (c.f., [Report to Region of Peel Planning and Growth Management Committee](#), meeting dated April 29, 2021). Subject to the outcome of a peer review and council approval, such policies may find their way into the Region's 2041+ Municipal Comprehensive Review Official Plan Amendment (available on the Region's [website](#)).

Further, inclusionary zoning forms part of various municipalities' “Affordable Housing Strategies”, such as the City of Brampton (see [here](#)) and the City of Markham (see here: [Affordable and Rental Housing Strategy \(Draft\), 2020](#)).

Closing Thoughts

Ontario will soon see its first inclusionary zoning policies implemented in the City of Toronto, with other GTA municipalities following suit. How these policies will be applied to both existing and future development proposals remains undetermined as the final form of these policies continues to be amended following public consultation. Continued monitoring of the implementation of PMTSAs and inclusionary zoning policies by these municipalities is thus recommended so that any potential impacts to a proposed development or redevelopment may be timely identified and addressed.

[1] [ps2id id='1' target="']Note that “Projected Major Transit Station Areas” are subsets of “Major Transit Station Areas” (“**MTSA**”) as defined in [A Place to Grow: Growth Plan for the Greater Golden Horseshoe \(2019\)](#), as “The area including and around any existing or planned higher order transit station or stop within a settlement area; or the area including and around a major bus depot in an urban core. Major transit station areas generally are defined as the area within an approximate 500 to 800 metre radius of a transit station, representing about a 10-minute walk.”

[2] [ps2id id='2' target="']*Planning Act*, RSO 1990, c P 13, at s.16(5).

[3] [ps2id id='3' target="']*Planning Act*, RSO 1990, c P 13, at s.17(24.1.2), s.34(11.0.6) and s.34(19.3).

[4] O. Reg. 232/18, s.8, made under the *Planning Act*, RSO 1990, c P 13.

[5] [Draft Delineations for the Protected Major Transit Station Areas within the Downtown Secondary Plan and Draft Citywide Major Transit Station Areas \(MTSA\) Policy Directions](#).

[6] For more information respecting the City of Toronto’s PMTSAs, see the [Official Plan Review](#).

by [Mary Flynn-Guglietti](#), [Annik Forristal](#), [Kailey Sutton](#), and [Kendra Wilson](#) (Student-at-Law)

A Cautionary Note

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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