OBA Submission on Proposed Inclusionary Zoning Regulation

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Submitted to:

Ministry of Municipal Affairs
Local Government and Planning Policy Division
Provincial Planning Policy Branch

Submitted by: Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The Ontario Bar Association ("OBA") appreciates the opportunity to make a submission to the Ministry of Municipal Affairs on the regulation proposed under the *Planning Act* related to inclusionary zoning, which is intended to implement Bill 7, the *Promoting Affordable Housing Act, 2016*.

The OBA

Established in 1907, the OBA is the largest voluntary legal organization in Ontario, representing approximately 16,000 lawyers, judges, law professors and law students. In addition to providing legal education for its members, the OBA is pleased to analyze and assist government with many policy and legislative initiatives each year – both in the interest of the profession and in the interest of the public.

This submission was prepared by members of the OBA Municipal Law Section, which has approximately 350 lawyers who are leading experts in municipal and land use planning law matters representing proponents, municipalities, residents, developers, and other stakeholders. Members of the Municipal Law Section often advocate before municipal councils and committees, all levels of court in the Province of Ontario, and the various tribunals that comprise the Environment and Land Tribunals Ontario, including the Ontario Municipal Board and, in the near future, the new Local Planning Appeal Tribunal.

Overview

Bill 7, the *Promoting Affordable Housing Act, 2016* received Royal Assent on December 8, 2016. The purpose of Bill 7, as reported by the Province, is to give municipalities the option of requiring affordable housing units ("AHUs") as part of residential developments. The framework for inclusionary zoning has been set out in Bill 7, but numerous details regarding implementation and obligations for both municipalities and developers have been deferred to the regulations.

On December 18, 2017, the Ministry of Municipal Affairs released the summary of proposed content for the regulation proposed under the *Planning Act* related to inclusionary zoning (**Environmental Registry Number 013-1977**).

Similar to a comment made in the OBA's recent submission concerning the proposed Bill 139 Transitional Regulations, and as a general comment, it is impossible to fully understand the legal implications of the proposed regulation for inclusionary zoning without the draft text of the regulation itself. We therefore strongly recommend the release of the full text of the proposed regulation and that we be provided with an opportunity to make submissions on this regulation in order to properly evaluate the regulation's intended and actual impact.

Based on the information available, however, we are pleased to put forward the following feedback regarding the proposed regulation related to inclusionary zoning. As always, we remain available to discuss any of the proceeding comments in detail.

Regulation Proposal 013-1977: Proposed regulation under the *Planning Act* related to inclusionary zoning

As the OBA represents both the public and private sector bar, our comments regarding regulation proposal 013-1977 are limited to questions regarding the clarity and intent of the proposal in relation to Bill 7, and not the substance of the proposal itself.

Restrictions on use of s. 37 of the *Planning Act*

Section 37 of the *Planning Act* authorizes municipalities to grant increases in height and density of development that exceed a site's otherwise permitted zoning in exchange for the provision of "facilities, services or matters" – also known as community benefits.

Per the regulation proposal, in exercising the authority to use s. 37 with respect to the development or redevelopment with inclusionary zoning, the AHUs (or the gross floor area ("GFA") proposed to be occupied by the AHUs) that could be required by the unit set aside rate under an inclusionary zoning by-law "could not be used to determine community benefits under s. 37."

However, it is unclear whether the intent of the proposal is to:

(1) exclude AHUs or the GFA occupied by AHUs from the calculation of community benefits that would otherwise be required under s. 37 (i.e. the value of providing required AHUs by the developer would not be subtracted from the s. 37 payment, which would allow municipalities to "double-dip"), or

(2) clarify that the additional height and density attributed to AHUs would not be counted against the developer when calculating the quantum of s. 37 community benefits (i.e. if a 10-storey building is permitted as-of-right, but the proposal is for 20 storeys, with one storey being set aside for AHUs, the incremental increase in additional height and density for purposes of determining potential s. 37 benefits is calculated at 9 storeys).

It would be helpful to clarify the intent of the restrictions on use of s. 37, as a municipality's ability to use its authority under s. 37 is specifically subject to the prohibitions or restrictions contained in the proposed regulation.

Maximum unit set aside rate

The regulation proposal sets the maximum unit set aside rate at 5% of the total units OR 5% of the total GFA of residential development, excluding common areas. The maximum rates are increased

to 10% where the development is located in a high density transit-station area identified in an official plan.

However, it is unclear whether a municipality is proposed to have the discretion to require the greater of AHUs based on total units or total GFA, or whether the limit for AHUs is capped at the lesser of 5% (or 10%) of total units or GFA.

Reduction in parking requirements as financial contribution

The regulation proposal states that municipalities are required to pay a 40% financial contribution to the development to help accommodate AHUs. This financial contribution can be satisfied by, among other things, a reduction in parking requirements.

However, it is unclear how the value of this reduction in parking requirement will be calculated. Is the value to be based on the difference from the parking requirement under the existing municipal zoning by-law? Or is the value to be based on the parking requirement that would otherwise be required by the municipality for the proposed development, excluding the AHUs, recognizing that many multi-unit residential developments are approved with site-specific parking requirements? Also, what happens if there is a disagreement between the municipality and the developer as to the value of reduced parking? Clarity on these questions will promote consistent understanding of the requirement and avoid unnecessary disputes.

Off-site units

The proposal states that off-site units shall be ready for occupancy no later than three years after the transfer of the AHUs from the proposed development. However, it is unclear from the proposal, or the wording of Bill 7, when a transfer of AHUs would be triggered. For example, would the development need to receive planning approvals, building permits, or begin construction before the three year period starts to run?

Exemptions from inclusionary zoning by-laws

Clauses 8(a) to (d) of the proposal provide a list of developments or redevelopments that would be exempted from the application of an inclusionary zoning by-law. However, it appears that the word "or" instead of "and" should be used between clause 8(c) and 8(d), as the list appears to be disjunctive as opposed to conjunctive.

Matters not addressed by regulation

Although the regulation proposal provides further clarity to key elements of the inclusionary zoning framework, including unit set aside rates, affordability periods, and potential measures and incentives, the proposal is silent on a number of matters that must be addressed before a municipality can require AHUs. Some of these matters may have been intentionally excluded from the proposal to allow for further flexibility and discretion at the municipal level, but we raise these matters now to ensure that there is no misunderstanding as to the Province's intent:

1. **Requirements and standards:** Under Bill 7, an inclusionary zoning by-law must contain requirements and standards for AHUs as specified in the regulations. In the absence of such regulations, the requirements and standards set out in the by-law prevail. As the proposal does not address requirements and standards for AHUs, it is our understanding that municipalities will have the discretion to determine their own requirements and standards.

2. **Procedures to monitor affordability:** Under Bill 7, a municipality that passes an inclusionary zoning by-law must establish a procedure for monitoring and ensuring that the required AHUs are maintained as AHUs during the affordability period. The procedure must contain the provisions, if any, that are prescribed by regulation. Aside from the requirement to provide a report documenting the status of AHUs every two years from the date the inclusionary zoning by-law is passed, the current proposal does not provide any provisions for monitoring affordability. Accordingly, it is our understanding that municipalities will have the discretion to monitor the affordability of AHUs.

Conclusion

Our membership understands the challenges faced by the public and private sectors in order to address the need for affordable housing in Ontario. While the regulation proposal provides further clarity to the framework as to how inclusionary zoning practices may be implemented, a number of questions remain, as identified in this submission. We hope that the above feedback, based on the high-level information currently available, is helpful moving forward. Again, we hope that we will have an opportunity to review and provide comments on the full text of the proposed regulation, as well as any other proposed regulation(s) under Bill 7 that may be released in the future.

We thank you for considering our input and look forward to responding to any questions you may have regarding our submission.