April 8, 2026

Delivered by Email

Grand Highlands Home Builders' Association
7 Clair Rd W.
Guelph, ON N1L 0A6
Attn: Melissa Jonker, CEO

Dear Ms. Jonker:

Re: Legal Opinion on the imposition of affordable housing through a CPP By-law; City of Guelph Draft Downtown CPP By-law – April 2026 revision

You have asked for our Firm's opinion on whether municipalities may impose affordable housing as a condition of a community planning permit pursuant to a community planning permit (CPP) by-law, and more particularly whether the City of Guelph's draft Downtown CPP By-law (the "Downtown CPP") exceeds the authority granted to it through the Planning Act and is *ultra vires*.

For the reasons set out herein, we conclude that while 'affordable housing' can theoretically be a condition that can be imposed in certain situations as a condition of approval pursuant to a CPP by-law, the manner in which Guelph has approached it is not compliant with the *Planning Act* or its regulations. The fact that the proposed affordable housing requirements have significantly changed between the December 2025 and April 2026 Downtown CPP drafts does not change our opinion.

1. Overview of Statutory Regime for CPP Systems

Section 70.2 of the Planning Act establishes the authority for cabinet to create regulations respecting community planning permit systems (also formerly known as a Development Permit system) as an alternative to zoning by-laws, minor variances and site plan control. Section 70.2.2 also enables the Minister to order a municipality to adopt or establish such a system. The argument made by proponents of CPP systems is that they theoretically speed up development by combining zoning (including any minor variances) and site plan control into a single permit, with legislated 45-day approval windows before appeal rights are triggered. An analysis of the efficacy of CPP systems is beyond the scope of this opinion, as we are focused solely on what can legally be imposed as a condition of approval of a CPP permit. In 2016, O.Reg. 173/16 was established to create the enabling framework for municipalities to adopt CPP by-laws. While the uptake was initially very slow, many municipalities (including Guelph) are leveraging federal

Reply to Guelph Office: ☒
ADDRESS
245 Hanlon Creek Boulevard, Unit 102, Guelph, ON N1C 0A1
T 519 837 2100 TF 800 746 0685 F 519 837 1617

Reply to Fergus/Elora Office: ☐
MAILING ADDRESS
P.O. Box 128, Fergus, ON N1M 2W7
ADDRESS
294 East Mill Street, Unit 108, Elora, ON N0B 1S0
T 519 843 1960 F 519 843 6888

svlaw.ca

Housing Accelerator Fund monies to study, draft and implement CPP policies in their official plans and ultimately CPP by-laws.

O.Reg. 173/16 governs the scope of authority available to municipalities when enacting a CPP By-law and imposing conditions on development approvals. Breaking down this regulation:

Section 4 outlines what shall and may be included in a CPP Bylaw, as well as preconditions and limits on those items. Subsection 4(2)(i) requires that where a municipality wishes to impose conditions in making decisions on a CPP permit, it must outline those conditions in its CPP by-law.

Subsection 4(4) is clear that where a condition is outlined in a CPP by-law, it shall:

(a) be of a type that is permitted by the official plan;

(b) be reasonable for and related to the appropriate use of the land; and

(c) not conflict with federal and provincial statutes and regulations.

Subsection 4(5) sets out a list of example types of conditions. While ‘affordable housing’ is not explicitly listed, the non-exhaustive nature of this list does not automatically rule such a condition out. Importantly, paragraph 5 of subsection 4(5) authorizes: “A condition that requires the provision of specified facilities, services and matters in exchange for a specified height or density of development, which may be within the ranges set out under clause (2)(c) or outside those ranges as set out under clause (3)(f)” [emphasis added]. It is this generic entitlement that Guelph relies upon to justify the imposition of affordable housing as a mandatory condition to achieve certain heights in the downtown (which heights were already approved through Official Plan Amendment 106 (“OPA 106”)).

Notably, the phrase “facilities, services and matters” is not defined in O. Reg. 173/16 (or anywhere), nor does the regulation provide a list of what may fall within that category. Its scope is instead framed by structural limitations. Subsection 3(5) permissively allows official plan policies to be adopted relating to the application of paragraph 5 of subsection 4(5), and subsection 4(6) clarifies that a condition [relating to the provision of a facility, service or matter] may only be imposed if:

a) the official plan sets out policies relating to the application of that paragraph;

(b) the by-law specifically identifies the area of the municipality in respect of which a condition described in that paragraph may be imposed; and

(c) the by-law establishes a proportional relationship between the quantity or monetary value of the facilities, services and matters that may be required and the height or density of development that may be allowed. O. Reg. 173/16, s. 4 (6).

2. Inclusionary Zoning

Inclusionary zoning (“IZ”) is a tool that allows municipalities to require developers to include affordable housing units in new residential projects. It was first introduced in 2016 through amendments to section 16 and the introduction of section 35.2 of the Planning Act, but only became possible once the enabling regulation was promulgated in 2018 (O.Reg. 232/18).

The legislative authority for IZ in Ontario is primarily found in sections 16(4) and 35.2 of the Planning Act.

A. Section 16(4) – Official Plan Policies

Section 16(4) of the Planning Act mandates that an official plan of a prescribed municipality must contain policies authorizing IZ. Currently, no municipality is prescribed for the purposes of IZ.

Subsection (5) provides that a municipality that is not prescribed under subsection (4) may still include IZ policies in its official plan, but only in specific areas, where there exists a Protected Major Transit Station Area ("PMTSA"), to support transit-oriented development. The policies may also apply to areas where a community planning permit system is adopted or established in response to a Minister's order under subsection 70.2.2(1) of the Planning Act.

In order for any municipality to enact an IZ by-law, whether prescribed or not, its official plan must first contain policies that expressly authorize and enable IZ (Planning Act, section 16(5.1)).

These official plan policies must outline the approach to authorizing IZ, including the minimum size of development (no less than 10 residential units), specific locations where IZ by-laws would apply, the range of household incomes to be addressed, and the range of housing types and sizes. The development of these policies must also be informed by an assessment report, as required by subsection 16(9) of the Planning Act.

Subsection 5.1 clarifies the procedural requirement for adopting IZ.

It provides that IZ policies may be adopted as part of:

i. An official plan, or

ii. An amendment to an official plan,

but only if that same official plan or amendment also contains policies that formally identify the area as a PMTSA ((5)(a)), or include the policies required before a development permit system may be adopted or established ((5)(b)).

As described under the Planning Act, IZ must be integrated into a broader land use planning structure. The effect of subsection 5.1 is that the municipality cannot insert IZ policies in isolation. The official plan must properly designate the area as a PMTSA or include the necessary framework policies for implementing a development permit system. O.Reg. 232/18 sets out the regulatory framework that municipalities must follow if they choose to implement IZ through their official plans and by-laws (O. Reg. 232/18, s. 3(1)).

B. Section 35.2 – By-laws to give effect to inclusionary zoning policies

Section 35.2 of the Planning Act governs the by-laws passed to give effect to the IZ policies described in subsection 16(4). A municipal council *shall* pass one or more by-laws under section 34 of the Planning Act to give effect to official plan policies described in subsection 16(4) if the municipality is prescribed for that purpose (Section 35.2(1)(a)). If the municipality is not prescribed, its council *may* pass such by-laws (Section 35.2(1)(b)).

Additionally, IZ by-laws passed under section 34 to give effect to policies described in subsection 16(4) must include specific provisions (Section 35.2(2)):

i. It must require that the development or redevelopment include a specific number of affordable housing units or affordable housing units occupying a determined gross floor area. This determination is made either under regulations or, in their absence, by the by-law itself (Section 35.2(2)(a)). For developments within a PMTSA, the required number of units or gross floor area shall

not exceed 5% of the total residential units or 5% of the total floor area of all residential units (section 3(1)(5)i-ii, O. Reg. 232/18).

ii. The by-law must require that affordable housing units be maintained as affordable for a period determined by regulations or the by-law (Section 35.2(2)(b)). For PMTSAs, this period shall not exceed 25 years.

C. Ontario Regulation 232/18 – Inclusionary Zoning

O. Reg 232/18 is the principal regulation governing IZ. It establishes a comprehensive and prescriptive framework that regulates how municipalities may impose mandatory affordable housing requirements.

Section 3 of O. Reg. 232/18 prescribes the mandatory content of official plan policies authorizing IZ. Those policies must expressly set out:

- The minimum size of development or redevelopment to which IZ applies, which cannot be less than 10 residential units (s. 3(2)1).
- The specific locations and areas where IZ by-laws may apply (s. 3(2)2).
- The range of household incomes to be addressed by the affordable housing requirements (s. 3(2)3).
- The range of housing types and unit sizes to which IZ will apply (s. 3(2)4).
- The maximum percentage of residential units, or of gross floor area, that may be required to be affordable (s. 3(2)5).
- The 25-year period during which affordable units must remain affordable (s. 3(2)6).
- Requirements for monitoring and reporting, including the obligation to report at least every two years on the number of affordable housing units secured through IZ (s. 3(2)7; s. 9).
- Policies governing off-site affordable units, where permitted (ss. 7–8).
- Provisions respecting developments involving non-profit housing providers, including prescribed ownership and continued affordability requirements.

The regulation also prohibits municipalities from accepting cash in lieu of required affordable units.

Through an amendment on May 12, 2025 (O.Reg. 54/25), O. Reg. 232/18 was revised to impose substantial limits on municipal authority for IZ. Now, municipalities may not require more than 5% of the total number of residential units or 5% of the total residential gross floor area to be affordable. Further, affordable housing units can only be required to remain affordable for a maximum of 25 years.

Further, in January of this year, in response to sluggish housing starts, the Province enacted O.Reg. 15/26, which paused IZ in Toronto, Mississauga and Kitchener (being the three municipalities that had developed IZ policies and zoning requirements as of that time). O.Reg. 15/26 does not prohibit other municipalities from moving ahead with IZ, but does send a strong signal that the Province may intervene should they choose to do so.

The intersection of the CPP regime and the IZ regime are what we are particularly interested in for this opinion and is explored further below:

3. How CPP Systems relate to IZ

CPP Systems (and Development Permit system permissions) in the Planning Act long pre-date formal IZ. What is important for our analysis is how they interrelate, whether they overlap, or whether the introduction of the IZ regime 'covers the field' in terms of mandatory imposition of affordable housing. When the Province first introduced the Development Permit / Community Planning Permit systems, the provision of affordable housing units through a CPP system was certainly contemplated[1]. However, when IZ became formalized through 2018 amendments to the Planning Act, in our opinion, it created a single 'stream' to impose affordable housing. Notably, on the same day that the implementing IZ regulation (O.Reg. 232/18) came into force, a companion regulation (O.Reg. 234/18) made amendments to the then-existing CPP regulation (O.Reg. 173/16). The regulation is very short, so it is reproduced here in full:

> **Amending O. Reg. 173/16**
>
> **(COMMUNITY PLANNING PERMITS)**
>
> **1. (1) Subsection 4 (2) of Ontario Regulation 173/16 is amended by adding the following clause:**
>
> (c.1) give effect to the policies described in subsection 16 (4) of the Act, if the municipality is prescribed for the purposes of that subsection;
>
> **(2) Subsection 4 (3) of the Regulation is amended by adding the following clause:**
>
> (d.1) give effect to the policies described in subsection 16 (4) of the Act, if the municipality is not prescribed for the purposes of that subsection;
>
> **(3) Section 4 of the Regulation is amended by adding the following subsections:**
>
> (3.1) Before the parts of a community planning permit by-law referred to in clauses (2) (c.1) and (3) (d.1) are passed, the official plan in effect in the municipality must contain the policies described in subsection 16 (4) of the Act.
>
> (3.2) Subsections 35.2 (2) to (9) of the Act, except clause 35.2 (2) (e), apply with necessary modifications if a community planning permit by-law gives effect to the policies described in subsection 16 (4) of the Act.
>
> **Commencement [omitted]**

Breaking down this amending regulation:

1. Subsections 1(1) and (2) modify subsections 4(2) and 4(3), respectively, of the CPP regulation (O.Reg. 173/16). These sections add new clauses 4(2)(c.1) and 4(3)(d.1) to 'give effect to the policies in subsection 16(4) of the Planning Act'. As noted earlier in this letter, subsection 16(4) of the Planning Act is what enables IZ policies in an official plan. Therefore, CPP by-laws (in addition to traditional zoning by-laws) may now 'give effect' to IZ official plan policies.

2. Subsection (3.1) (paraphrased) notes that before the parts of a community planning permit bylaw [that implement IZ] are passed, the official plan in effect must contain IZ policies

3. Finally, subsection (3.2) cross-references over to section 35.2 of the Planning Act (which as noted above is the enabling section allowing municipalities to pass by-laws implementing IZ), and notes that such section applies with necessary modifications if a community planning permit gives effect to [IZ policies].

[1] https://www.ontario.ca/page/community-planning-permit-system (although this page has a warning that it is out of date due to more recent legislative and regulatory amendments)

4. Analysis and Discussion

In this section, we discuss the interrelationship between IZ and CPP, and whether in light of the limitation on IZ, a CPP by-law can be used as a 'workaround' to implement affordable housing outside the strict confines of IZ. For the reasons that follow, in our opinion the answer is a clear 'no'.

Amending regulation O.Reg. 234/18 is the key link. Not only did O.Reg. 234/18 explicitly incorporate IZ into the CPP regime and explicitly allow CPP by-laws to implement IZ in the same manner as traditional zoning by-laws, it went a step further and made it abundantly clear that a) you must first have the necessary OP policies regarding IZ in place and b) all of the substantive and procedural requirements and limitations of IZ as set out in the Planning Act apply (with necessary modifications) if a municipality is seeking to impose IZ through a CPP by-law rather than through a traditional zoning by-law. In short, the Legislature recognized the confusion that might arise as CPP by-laws permissibly allow 'facilities, services and matters', which could conceivably allow for affordable housing as a condition with few limitations, whereas the IZ regime is highly constrained. To avoid any uncertainty, O.Reg. 234/18 amended O.Reg. 173/16 to explicitly incorporate IZ by reference into the CPP regime, ensuring that CPP by-laws could not be used as an 'alternate track' to impose affordable housing outside the scope of the constrained IZ regime. While the undefined 'facilities, services and matters' is certainly extremely open-ended in terms of what it can include, rules of statutory interpretation mean that it must necessarily exclude mandatory affordable housing that is akin to IZ.

In *Calloway REIT v Mississauga*[2] the OLT considered appeals under s. 17(24) of the Planning Act challenging the City of Mississauga's Official Plan Amendment No. 115 ("OPA 115"). The decision addressed whether certain affordable housing policies adopted by the City were authorized within the IZ framework. The Tribunal ultimately determined that significant portions of OPA 115 were *ultra vires* and inconsistent with the Planning Act.

The central issue before the OLT was whether the affordable housing policies embedded in OPA 115 were, in substance, IZ. Although Mississauga attempted to frame the affordable housing requirements as general housing policies (the City acknowledged it didn't have an IZ regime at the time), the Tribunal examined whether they effectively imposed mandatory affordable housing requirements on development. The analysis focused on whether the City had complied with the legislative requirements governing IZ, including the procedural and substantive preconditions set out in the Planning Act and its regulations, and whether the policies exceeded municipal authority.

The Tribunal concluded that certain prescriptive housing requirements were *ultra vires* because they imposed mandatory affordable housing obligations without adhering to the statutory IZ regime. In particular, the policies did not comply with the legislative structure governing IZ, including the requirement to address practicability and the detailed regulatory framework that constrains how and where mandatory affordable housing may be imposed. By effectively creating mandatory affordability requirements outside that framework, the City exceeded its authority under the Planning Act.

Importantly, the decision draws a clear distinction between policies that encourage or incentivize affordable housing and policies that mandate affordable housing as a condition of development. The latter must strictly comply with the statutory IZ framework. The Tribunal directed that the impugned policies be revised to remove their mandatory components so that they would align with lawful municipal authority.

This decision reinforces that municipalities cannot achieve indirectly what the Legislature has confined to the specific IZ regime to be implemented directly. Where affordable housing requirements are mandatory in nature, they must be grounded in, and compliant with, the statutory and regulatory framework governing IZ.

---

[2] Calloway REIT (Mississauga) Inc. v Mississauga (City), 2023 CanLII 83079 (ON LT), <https://canlii.ca/t/k039f>

Any attempt to impose such requirements through parallel mechanisms risks being found *ultra vires*, particularly where it circumvents the detailed caps established by the provincial government.

5. Analysis of City of Guelph policies and the draft Downtown CPP By-law

Before reviewing the draft Downtown CPP by-law an examination of the underlying official plan policy is required. At the time that Guelph implemented the initial Stone/Edinburgh CPP pilot, it adopted OPA 105 to establish to overarching policy framework for the Community Planning Permit System (CPPS) in the City. Notable policies in that amendment include:

> **10.11 Community Planning Permit System**
>
> 1. The City may adopt one or more Community Planning Permit By-law under Section 70.2 of the Planning Act to establish a Community Planning Permit System in one or more geographic area of the City, or city-wide. Any Community Planning Permit System will support, at a minimum, the following objectives, as applicable:
>
> […]
>
> ii. To support housing diversity and housing affordability
>
> a. Prioritize development applications that contribute to diverse, inclusive, and affordable housing options in accordance with the City's State of Housing Report and Housing Affordability Strategy;
>
> […]
>
> d. Require the provision of new affordable housing.
>
> […]
>
> 5. Pursuant to the provisions of the Planning Act, a Community Planning Permit By-law shall:
>
> i. Contain a description of the area to which the by-law applies, which must be within the boundaries of the area identified in the Official Plan;
>
> ii. Set out and define permitted and discretionary uses;
>
> iii. Set out a list of minimum and maximum development standards with specified minimum and maximum standards;
>
> […]
>
> viii. Outline any conditions of approval that may be imposed;
>
> […]
>
> 20.The City may impose the following types of conditions as a condition of approval:
>
> i. A condition that is permitted by section 34, 40, 41 or 42 of the Planning Act.
>
> […]
>
> vii. A condition related to the provision of affordable housing units.

> viii. A condition requiring the provision of specified facilities, services and matters in exchange for a specified height or density of development as identified in the Community Planning Permit by-law, in accordance with policy 10.11(22) of this Plan.
>
> […]
>
> 22.The Community Planning Permit By-law may establish a condition that requires the provision for specified facilities, services or matters or in-kind contributions in exchange for a specified height or density of development which may be within the minimum and maximum development ranges set out in the by-law or the possible variations from the standard that may be authorized. The Community Planning Permit By-law shall establish a proportional relationship between the quantity or monetary value of the facilities, services and matters that may be required and the height or density of development that may be allowed.
>
> 23.The Community Planning Permit By-law will prioritize using facilities, services, and matters to incentivize the creation of affordable housing units.

OPA 105 was adopted on April 8, 2025. At the same meeting, Council also adopted OPA 106, which was the culmination of the downtown heights study and resulted in significant increases in maximum permitted heights. The result was an amendment to Schedule D of the Downtown Secondary Plan (being chapter 11.1 of the Guelph OP).

Though OPA 106, an additional policy was added, presumably seeking to provide alignment with ss. 3(5) and 4(6) of O.Reg. 173/16:

> 11.1.7.2.7
>
> In the Downtown, the Community Planning Permit System may establish a framework for implementing the maximum building heights of the Official Plan and required facilities, services and matters.

The policy is silent on affordable housing. In contrast, OPA 105 (which established the underlying authority in the City to enact CPP by-laws generally) purported to allow the City to impose a condition related to the provision of **affordable housing** units (policy 10.11.20.vii).

The overall problem with Guelph's approach is that it appears to be under the mistaken impression that the provision of affordable housing as a mandatory condition of a CPP permit is an alternative pathway that allows a municipality to avoid the strict requirements of the IZ regime. Indeed, the staff report when the Downtown CPP was first introduced states this explicitly at page 7:

> Inclusionary Zoning **<u>is another tool</u>** whereby municipalities may require affordable housing. Inclusionary Zoning was permitted in 2016 through Bill 7: Promoting Affordable Housing Act which amended the Planning Act to allow municipalities to establish inclusionary zoning policies and By-laws. O. Reg 232/18 - Inclusionary Zoning allows that a maximum of 5 per cent of units could be required as affordable for a 25-year period. Bill 108: More Homes More Choice Act limited the implementation of Inclusionary Zoning policies to Protected Major Transit Station Areas (PMTSA) and to CPP By-laws. In Guelph, the Downtown Area is a PMTSA and an area where Inclusionary Zoning could be implemented. Inclusionary zoning does not allow for the flexibility permitted through a CPPS. It does not allow for Cash-in-Lieu of affordable housing and the Province caps the affordable

> housing requirements at 5 per cent – the regulations do not allow a municipality to identify a higher proportion, even if supported by financial analysis [emphasis added][3].

It would seem that staff and external consultants have interpreted O.Reg. 173/16 as removing constraints on affordable housing that would otherwise be in place in a formal IZ regime. This was the pretext used in the first draft by-law presented in January 2026 to propose a 33% affordable housing requirement as a 'facility, service, or matter' to be imposed as a mandatory condition to realizing the 'uplift' in heights specifically for those properties in downtown that had their maximum heights increased through OPA 106. This is clearly not permitted through an IZ regime, and staff are certainly not suggesting that Guelph has (or has even attempted to develop) any IZ policies in its official plan. Rather, the statutory justification for this is that O.Reg. 173/16 permits broad conditions, including the provision of 'facilities, services, and matters' in exchange for increases of heights and density, either within the ranges (i.e. a Class 1 permit), or outside the ranges (i.e., a Class 2 or 3 permit), in accordance with paragraph 5 of subsection 4(5) of O.Reg. 173/16.

Such an interpretation would render the O.Reg. 234/18 amendments to O.Reg. 173/16 meaningless, as there would be no reason to specifically permit IZ through a CPP, including incorporating the section 35.2 procedural requirements of the *Planning Act*, if affordable housing could simply be required as a condition of a Class 2 or 3 permit (or, in Guelph's case, even as a condition of a Class 1 permit, as discussed below). Similar to the OLT's analysis in *Calloway*, official plan policies and zoning/CPP provisions will be deemed *ultra vires* where they seek to create a regime that is tantamount to IZ, without adhering to the strict technical requirements of the Planning Act (subsections 16(4), (5), and 35.2) and O.Reg. 232/18. The regulations under the Planning Act must be read harmoniously, and if the City's interpretation were correct, the amendments via O.Reg. 234/18 would be unnecessary. Courts (and the OLT) will interpret the legislation in accordance with the ordinary rules of statutory interpretation which requires that every provision be given meaning. Any interpretation which suggests that paragraph 5 of subsection 4(5) of O.Reg. 173/16 can be used as an alternative or parallel authority to impose mandatory affordable housing outside of an IZ regime would render clauses 4(2)(c.1) and 4(3)(d.1) redundant and therefore such an interpretation cannot be accepted. Whereas prior to the introduction of IZ, and in particular prior to the amendments that incorporated IZ explicitly into the CPP regulation, it would have been arguable that affordable housing could be a 'matter' under para. 5 of 4(5) that could be imposed as a condition of achieving additional height, that door is now closed. The Legislature has effectively 'covered the field' in terms of mandating the provision of affordable housing through zoning bylaw or CPP systems.

6. Analysis of changes to draft CPP through the April 2026 revisions

On Thursday, April 2, 2026, the City released its updated draft. Following the initial public meeting in January, numerous comments were submitted questioning the City's legal authority to impose 33% affordable housing on the 'uplift' in height granted by OPA 106. Staff have significantly revised the draft Downtown CPP by-law in response, including by reducing the mandatory imposition of affordable housing to 5% of all 'increased' floors. The 33% requirement has been limited to any 'bonused' floors above OPA 106 heights, in accordance with Policy 10.11.24 (adopted via OPA 105), to a maximum of a 20% increase in height. A 25-year affordability requirement has also been added, which is perhaps a nod to the IZ requirement.

Unfortunately, this amended draft Downtown CPP by-law remains, in our opinion, in contravention of O.Reg. 173/16, as well as section 35.2 of the Planning Act. In addition, there is no proportionality analysis. Both O.Reg. 173/16 (clause 4(6)(c)) and Guelph OP policy 10.11.22 require that a CPP by-law establish a proportional relationship between the quantity or monetary value of the facilities, services and matters that may be required and the height or density of the development that may be allowed.

[3] https://pub-guelph.escribemeetings.com/filestream.ashx?DocumentId=69944

It is the CPP by-law itself that must set out the proportional relationship between any facilities, services and matters imposed as conditions of 'bonused' height or density, in accordance with clause 4(6)(c). However, while seeking to impose a blanket 33% affordable housing requirement on all bonused height, the City also reverses the onus and seeks to require an applicant to demonstrate as part of a complete application that the facilities, services and matters proposed to be provided are *proportional* in quality or monetary value to the number of additional dwelling units proposed. This is not only contrary to the requirements of O.Reg. 173/16, but is at odds with how Guelph's OP policy 10.11.22 reads.

There are various other examples of non-conformity of this draft Downtown CPP By-law with Guelph's OP that would, in and of themselves, be grounds for appeal. However, the scope of this opinion is constrained to focus specifically on the legality or *vires* of the proposed bylaw in light of the Planning Act and its regulations.

Ultimately, both the 5% (within the Schedule C2 height limits) and the 33% (bonused height) affordable housing condition requirements are not permitted as mandatory minimums. While affordable housing in exchange for bonused height (above OPA 106 maximums) is something that can be sought and negotiated (and is permissible pursuant to OP policy 10.11.24), the imposition of a hard cap is an impermissible workaround of the IZ regime. While 5% affordable housing 'within the Schedule C2 height limits' is much more reasonable than the first draft of the by-law, it still represents an attempt to achieve indirectly what the Planning Act prohibits directly, as there are no IZ policies in Guelph.

Notably, the Town of Innisfil is mentioned in the Staff Report for the April 15th Council Meeting as an exemplar CPP that influenced Guelph's draft. However, even a cursory review of how Innisfil deals with height demonstrates that Guelph's approach is significantly different and more restrictive. Innisfil sets out maximum heights (which conform with its Official Plan maximum heights). A Class 1 permit for development up to that maximum height does not require any facilities, services, or matters ("FSM"). For a Class 2 permit, limited *bonused* height can be achieved in exchanged for FSM, and even more bonused height can be achieved through a Class 3 permit[4]. To provide just one example, in Innisfil's Mixed Use Precinct, the maximum height for an apartment is 14m under a Class 1 permit. A class 2 permit allows *bonused* height up to 20m, and a Class 3 permit is required for anything greater than 20m. FSM (including affordable housing) can be imposed only on the bonused height above the baseline permissions (although in our opinion Innisfil also is in contravention of O.Reg. 173/16 in imposing affordable housing with hard caps as it has done).

In contrast, Guelph relies on the "facilities, services and matters" provisions of O. Reg. 173/16 to seek to secure affordable housing contributions just to achieve the height permissions that ought to be as-of-right through a Class 1 permit. This not only contravenes O.Reg. 173/16, but also does not conform with OPA 106. The policy statement in 11.1.7.2.7 that the CPP by-law will establish a 'framework to implement the maximum building heights and required FSM' is not a panacea that allows Guelph to override the structural limitations of FSM and IZ as set out in O.Reg. 173/16.

Conclusion

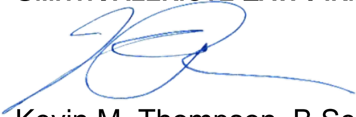
For the reasons noted above, we believe that as currently drafted, the Downtown CPP by-law is in contravention of the Planning Act and O.Reg. 173/16, and 232/18 (as amended). In light of clauses 4(2)(c.1) and 4(3)(d.1) of O. Reg. 173/16, which expressly contemplate the implementation of Inclusionary Zoning within a Community Planning Permit By-law, the use of paragraph 5 of subsection 4(5) to impose mandatory affordable housing requirements exceeding the limits of O. Reg. 232/18 – particularly as a condition of

[4] https://www.innisfil.ca/media/file/community-planning-permit-by-law

accessing official plan approved height rather than bonused height – constitutes an impermissible workaround of the Inclusionary Zoning regime.

Should you have any questions, please contact the undersigned.

Yours Very Truly,
SMITHVALERIOTE LAW FIRM LLP



Kevin M. Thompson, B.Sc. (Hons.), J.D.
Practising through a professional corporation
KMT\lm

direct line: 519-821-4146
email: kthompson@svlaw.ca
assistant email: lvandermeer@svlaw.ca