

## **Condominium Conversions: A Legal Pendulum**

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### **1. Introduction**

According to the *Oxford English Dictionary*, the word condominium is defined as, “1. Joint rule of sovereignty.”<sup>i</sup> By its very name, the concept evokes an inward inconsistency. As opposed to singular ownership and control, condominiums are owned and governed by a collective. Within their very makeup are the seemingly irreconcilable concepts of private and communal ownership. True to form, condominiums also evoke many outward inconsistencies. They are often thought of as a novel method of homeownership as evidenced by the fact that Ontario’s *Condominium Act* was first passed in 1967. That said, “[t]his system of individual space ownership coupled with co-ownership of common property has a long history; the ancient Hebrews, Babylonians and Romans all referred to it. By the Middle Ages, this unique type of housing had become widespread in Europe.”<sup>ii</sup> In addition, condominiums have become an incredibly popular choice of homeownership forming 36% of all new homes built in Canada in 2006.<sup>iii</sup> The widespread and increasing popularity of condominium ownership, however, is sharply contrasted with the considerable opposition to converting rental accommodation to condominiums. These ‘conversions’ have been the focus of much study, debate, and legislation in Ontario over the past twenty years. True to their inconsistent origins, despite the frenetic pace of new condominium construction, condominium conversions evoke controversy and opposition.

This contrast is seen perhaps no where in Ontario in sharper focus than in the City of Toronto. Obvious to even the most casual visitor, condominium construction has become widespread. With the push for more intensive land development, condominium living appears to be the ‘new normal’. Somewhat surprisingly, however, the City of Toronto has waged war against condominium conversions. With the increasing demand for rental accommodation, coupled with a traditionally low vacancy rate, and cemented by an unofficial moratorium on private sector rental accommodation construction, the City of Toronto has viewed condominium conversions as a threat to the supply of existing rental housing. Although this opposition has been consistent, the legal ability to oppose conversions has not. In fact, the ability for any municipality in Ontario to prohibit conversions has ebbed and flowed, akin to a clock’s pendulum. At times municipal powers have verged on the omnipotent, at other times they have been in outright doubt.

As background, this paper shall first explore the challenges that have faced the City of Toronto’s rental housing market in order to develop an understanding of the policy considerations opposing conversions. This will then be followed by charting the pendulum’s movement over the past twenty years, examining how the legal ability to oppose conversions has dramatically shifted. This paper will

explore the new provisions within the *City of Toronto Act, 2006*, S.O. 2006, c.11, Schedule A, concluding that the pendulum's arc has moved to its greatest height. Finally, this paper will discuss whether the current 'zenith' or 'nadir' of condominium conversions could actually solve the challenges facing rental housing in Toronto, and will then discuss whether further or alternative options are available to both the Province of Ontario and the City of Toronto.

## **2. Rental Housing in the City of Toronto**

For many, a central component to the Canadian dream has been home ownership. The ability to build equity, the opportunity to borrow against it at lower interest rates, the concept of eventual 'mortgage freedom' and ending the cycle of perpetual rent payments, have led many Canadian families to strive towards this goal. Despite the many positive aspects of homeownership, either by choice or by circumstance, this dream is not shared by all. This is acutely seen in the City of Toronto. Despite the Canadian average of 65% percent of households being owned, in the City of Toronto this number dips to 50%.<sup>iv</sup> Additionally, of those households that rent, considerable pressures exist. These challenges include; tenure, affordability and supply.

### **a. Tenure**

Tenure is meant to distinguish between the two significant methods of maintaining residential accommodation. Ownership includes having title to the home, even if it is not fully paid for, while renting includes paying the owner of the property, even if it is provided without cash rent, at a reduced rent, or as a part of a cooperative.<sup>v</sup> Despite the explosion of homeownership during the post war boom, the City of Toronto actually saw a growth in rental accommodation. In 1951, thirty percent (30%) of Toronto households rented. Twenty years later, by 1971, this number had grown to 50% percent.<sup>vi</sup> According to the City of Toronto's recent comprehensive study on accommodation, this is attributed to:

"This mushrooming of renter households was driven by the general economic prosperity of the time, along with the associated immigration and the maturing of the leading edge of the baby boom, and made possible by the boom in apartment construction."<sup>vii</sup>

This 50% figure has remained virtually static for the past forty years and continues to this day. As a result, almost a near perfect split exists in the City of Toronto between renters and home owners.<sup>viii</sup> In contrast, in the Greater Toronto Area, excluding the City of Toronto, eighty percent (80%) of households are owned.<sup>ix</sup> Pooling all renters in the Greater Toronto Area, 75% of renters live in the City of Toronto. This is compounded by the fact that 80% of recent immigrants live in rental housing, and between 2001 and 2006 approximately 440,000 new immigrants came to the City of Toronto. In fact, half of all rental housing residents in the City of Toronto are immigrants.<sup>x</sup>

Although renters come from many walks of life, some overall consistencies appear. Renters are more likely to be younger, comprise a lower income bracket (in 2000, Toronto's median household income for renters was only about half that of owners: \$35, 270 compared to \$68, 975<sup>xi</sup>) are single or lone parents, or are immigrants. Home owners on the other hand, consist of those who are who are married, older, and earn a higher income. In addition, the younger a home owner, the more likely it is to be in the GTA, excluding the City of Toronto. In sum total, given all of the considerations, "...household age and income are the most important factors in explaining tenure choice."<sup>xii</sup>

Given these percentages and makeup, currently there are considerable demands on the City of Toronto for an adequate rental supply.

Despite these challenges, both the City of Toronto and the Province support the City accommodating significant growth by 2031, somewhere between 225, 000 to 325,000 households.<sup>xiii</sup> The demand for rental housing is projected to grow by 93, 471 households, or by 19.7%, a 15.4% increase over 2001.<sup>xiv</sup> As a result, there is a high demand for rental accommodation for the young, lower income households and immigrants. These groups are often considered the more vulnerable segments of our society.

#### **b. Affordability**

If the earlier facts and figures depict a high and growing demand for rental accommodation in the City of Toronto, renters also have unique affordability challenges when they find rental accommodation. In a companion 2006 study, the City of Toronto released "Perspective on Housing Affordability". In keeping with the Provincial Policy Statement 2005<sup>xv</sup>, it has been a consistent goal for the City of Toronto to provide a mix and range of affordable housing opportunities for residents. What the study revealed was the significant financial pressure on renters in Toronto to maintain their homes.

In 2001, in the City of Toronto, the average household income was \$80,621.00, with an average shelter cost of \$1,062. This means 15.9% of income was allocated to housing.<sup>xvi</sup> To determine the affordability of shelter, a household is considered to have an affordability problem when more than 30% of its income is allocated to housing.<sup>xvii</sup> In 2001, 33% of all City of Toronto households were spending 30% or more of their household income on shelter costs. This burden, however, was disproportionately carried by renters, who comprised 65% of this group.<sup>xviii</sup> In addition, in 2001 it was identified that 137,000 in Toronto had a shelter income of 50% or more. Of this group, 70% were renters.<sup>xix</sup> Given these statistics, twice as many renters have affordability problems as owners.

#### **c. Supply**

In addition to high demand and the growing challenge of paying for such accommodation, the supply of rental housing in the City of Toronto has been under chronic scrutiny. According to the Canada Mortgage and Housing Corporation, in October of 2003 the vacancy rate for rental apartments in Toronto rose 3.9%. “This represented the first time the City’s vacancy rate had exceeded 2.5 percent since 1971.”<sup>xx</sup> One significant reason for the traditionally low supply of rental housing is the near moratorium of rental construction. Prior to 1971 this was not a challenge. As the City of Toronto commented: “[u]ntil the Condominium Act came into force in 1967, all apartment construction was for rental housing.”<sup>xxi</sup> By 2004, however, there were only 800 more rental units than in 1996. Condominium and ownership construction currently prevail. In its 2004 submissions to the Province of Ontario, the City of Toronto commented:

“In last few years, over 95 percent of all new production was for the ownership market, while purpose-built rental housing made up less than five percent of all residential completions. From 2000 to 2003, Toronto saw only about 500 purpose-built rental units constructed.”<sup>xxii</sup>

As the City opined, “[u]nfortunately, the modest amount of new rental that has been built has barely risen above the number needed to replace older units that reverted to ownership occupancy.”<sup>xxiii</sup>

Overall then, within the City of Toronto, three major forces are at work which challenge the provision of available and affordable rental accommodation. First, there is a downward pressure on homeowners in Toronto due, perhaps in part, to large groupings of immigrants, the young and lower income households. Added to this is an affordability problem and a supply that has been traditionally low. All three challenges are generalized into the terms of tenure, affordability and supply.

### **3. Conversions: The Pendulum’s Arc**

#### **a. The Rental Housing Protection Act**

A condominium in Ontario is a legal entity governed by the *Condominium Act, 1998*, S.O. 1998, c.19; (“the Act”). It is a form of real property ownership in which a person owns a deed to at least one unit, often a dwelling, within a larger group of units. Each unit owner also has an undivided interest in the common areas and amenities, the costs of which the unit owners share proportionately.<sup>xxiv</sup> Unlike a rental building, a condominium’s ownership is dispersed amongst the unit owners, who in turn are governed by an elected board of directors, although, it is conceivable to have one owner owning all of the units. Given the existence of a deed, which can be encumbered (ie: a secured mortgage) condominiums represent a form of home ownership.

A condominium conversion, in this instance, takes already existing residential rental housing, and converts the rented dwellings and surrounding building into a condominium. Condominiums, including conversions, have traditionally had to satisfy two significant pieces of legislation to be created: 1) a municipally approved plan of condominium, pursuant to section 51 of the *Planning Act*,<sup>xxv</sup> and 2) specific registration requirements as mandated by the *Condominium Act*. In Ontario, soon-after condominiums were legally created in 1967 there became a growing motivation for owners of rental buildings to convert their properties into condominiums. During the 1970's and 1980's, the dual pressure of rent controls and high inflation, put considerable pressure on property owners, as apartment rents generally did not keep with inflation.<sup>xxvi</sup> As a result, in the City of Toronto between January 1978 and April 1985, demolitions, conversions, and renovations requiring evictions were undertaken or proposed in 240 rental buildings containing approximately 9,000 units.<sup>xxvii</sup> Needless to state, the increasing popularity of condominium conversions soon caught the attention of both the City of Toronto and the Province of Ontario.

In 1982, Stuart Thom was appointed by the Ontario Government to conduct an inquiry to examine the status of rental accommodation in the Province. In his report he concluded that rent regulation had depressed rents and returns on investment in the controlled sector, and that the existence of rent regulation would likely accelerate the conversion of controlled buildings.<sup>xxviii</sup> As rent controls became more and more onerous through successive legislative acts and corresponding regulations, rental property owners were increasingly tempted to find relief. These options included,

- “1. a sale as freehold for conversion into single family housing;
2. a condominium or co-op conversion;
3. demolition for replacement by non-rental uses;
4. renovation, resulting in luxury higher rental (and unregulated accommodation); or,
5. conversion to apartment hotels.”<sup>xxix</sup>

These circumstances were keenly displayed when in November of 1982, at the Inquiry's mid-point, a series of rapid transactions, or 'flips', changed the ownership of Cadillac Fairview's 11,000 rental units. These properties were sold and resold, doubling the price in the process.<sup>xxx</sup> To stem the effects of the rapid inflationary pressure such transactions would have caused, the Provincial Government seized the rental units. The Province of Ontario appointed the Clarkson Gordon Company to distribute the properties to the market, who in turn eventually suggested a maximum return on the assets via the conversion of the properties to condominiums.<sup>xxxi</sup> The suggestion shocked tenant associations, including the potent Federation of Metro Tenants Association, who aggressively lobbied, by then, the newly installed Liberal minority government of Premier David Peterson. The government formed by Premier Peterson was a tenuous

minority government, reliant upon the support of the New Democratic Party, led by Bob Rae.

In response, in July of 1986 the *Rental Housing Protection Act*, (*RHPA*),<sup>xxxii</sup> was passed by the Ontario legislature. In net effect, it created a ‘temporary’ two-year moratorium on conversions, the prohibition being implicit in that a condominium conversion could only be approved by the applicable local council. Unlike demolition controls which applied only to municipalities in excess of 50,000 people, the ability to prohibit conversions applied to all municipalities. The then Minister of Housing, the Honourable Alvin Curling stated:

“*The Rental Housing Protection Act* will provide breathing space while the pressures for demolition, conversion and luxury upgrading are reduced through our rent review and housing supply initiatives. The legislation is, in large part, a response to municipal requests for broader controls.”<sup>xxxiii</sup>

The approval process however was appealable to the Ontario Municipal Board. Via regulation, the appropriate municipal council was required to consider the conversion by reference to a variety of stringent provincially mandated policies, most notably:

- “3. the applicant agreed to provide the same number of units with similar rents in the same area and to provide accommodation in the same area of similar quality and rent to tenants required to vacate as a result of the approval; or,
4. the proposal did not adversely affect the supply of affordable rental housing in the municipality.”<sup>xxxiv</sup>

Although it permitted a municipality to prohibit conversions, it did set a very high bar for applicants wishing to convert their rental property. The *RHPA* applied to any residential property greater than four units. An unapproved conversion could net an offending party both a \$50,000.00 fine and up to one (1) year in prison.

The *RHPA* was a coup for those defending the supply of rental housing stock. In contrast, the *RHPA* was considered by property owners to be a draconian, almost punitive action. The pendulum had apparently arced definitively towards the protection of rental housing and away from a property owner’s desire to convert his or her rental site.

## **b. The Tenant Protection Act**

The ‘temporary’ two year passage of the *RHPA* was eventually extended throughout Premier Bob Rae’s entire 1990-95 NDP government. The *RHPA* had its desired effect. In the City of Toronto, “[h]istorical records show that between

1968 to 1985, 1,929 rental units were converted to condominium, compared to the conversion of only 20 units from 1986 to 1998, while the *RHPA* was in effect”, in the City of Toronto.<sup>xxxv</sup> Only with the election of Premier Mike Harris’ Progressive Conservative government in 1995 did the pendulum for conversions begin to arc towards the interests of property owners. In the discussion paper entitled, “*New Directions for Discussion: Tenant Protection Legislation*”<sup>xxxvi</sup> the provincial government canvassed ending the freeze of condominium conversions in favour of security of tenure for those who occupied the unit at the time of conversion. The Provincial Government, in a marked departure from the late 1980’s stated that:

“Conversions can provide affordable home ownership opportunities for tenants...Given the age of Ontario’s rental stock, and its condition in many cases, major renovation or development should not be discouraged. In addition, the density of development for many old buildings may not reflect the changes to the neighborhood over the past few decades.”<sup>xxxvii</sup>

In June of 1998 these concepts were formalized into law with the passage of the *Tenant Protection Act*<sup>xxxviii</sup>, (“*TPA*”), and the corresponding repeal of the *RHPA*. The *TPA* did not oppose condominium conversions, rather, provided security of tenure for a tenant, which would survive a conversion, would offer the tenant the right of first refusal to purchase the converted unit, and despite a sale, would preserve the tenancy.<sup>xxxix</sup> In fact, although considered to be a withdrawal from rental accommodation protection in favour of condominium conversions, the then Minister of Municipal Affairs, the Honourable Al Leach stated in the legislature:

“While we are changing the *Rental Housing Protection Act*, we have made no changes whatsoever to the authority of municipalities to adopt official plan policies restricting condominium conversions. Municipalities can still discourage condominium conversions through their official plan policies that exist in the present City of Toronto, if they feel conversion is not in the best interest of their community.”<sup>xl</sup>

As a result, condominium conversions could no longer be outrightly prohibited by resorting to provincial legislation. Instead, such matters would fall back to the *Planning Act* approval process, meaning applications for a plan of condominium, and the corresponding requirements of conformity with provincial policy statements, regional and local official plans, and final oversight from the Ontario Municipal Board. With municipalities no longer having a blanket ability to prohibit conversions, opposition to a proposed plan of condominium would have to be based upon the planning merits, seen through the prism of the labyrinth of applicable planning instruments.

### **c. City of Toronto – Official Plans**

In response to this perceived swing of the pendulum, the City of Toronto resorted to amending its Official Plan to stem the ability of property owners to convert their rental properties to condominiums. In 2000 the City of Toronto, passed an amendment to its Official Plan, stating that conversions involving six or more rental housing units was neither in the public interest, nor should it be approved, unless one of the two following conditions were met:

- “a) the rental apartment vacancy rate for the City of Toronto, as reported by the Canada Mortgage and Housing Corporation, has been at or above 2.5% for the proceeding two –year reporting or;
- b) all of the rental housing units have rents that exceed mid-range rents at the time of the application.”<sup>xli</sup>

Some opponents considered such amendments to be a bold attempt by the City of Toronto to use the section 16 provisions of the *Planning Act* to recoup powers lost via the repeal of the *RHPA*.<sup>xlii</sup> A review of the criteria required to approve a plan of condominium involving a conversion would lead many to query if a conversion could ever be approved. Only recently has the City of Toronto experienced sustained vacancy rates in excess of 2.5%.<sup>xliii</sup> Given the combined effects of demand and a near static supply, one may wonder if the duration of these vacancy rates will continue. In addition, given that only high-end rents could qualify for conversion, this would exclude the overwhelming majority of tenancies in the City of Toronto. On April 3<sup>rd</sup>, 2007, upon approval of the OMB a further amendment to the City of Toronto’s Official Plan was implemented. It went further in stating that conversions containing six or more units should not be approved unless a sustained vacancy rate of 3.0% was met for a period four (4) consecutive years. The policies also provided for an increased range of criteria not easily amenable to an objective analysis. Take, for example, the following:

“a) All of the ternal housing units have rents that exceed mid-range rents at the time of application, or;

b) In Council’s opinion, the supply and availability of rental housing in the City has returned to a healthy state and is able to meet the housing requirements of current and future residents. This decision will be based on a number of factors, including whether:

- (i) rental housing in the City is showing positive, sustained improvement as demonstrated by significant net gains in the supply of rental housing including significant levels of production of rental housing, and continued projected net gains in the supply of rental housing;



- (ii) the overall rental apartment vacancy rate for the City of Toronto, as reported by the Canada Mortgage and Housing Corporation, has been at or above 3.0% for the preceding four consecutive annual surveys;
- (iii) the proposal may negatively affect the supply or availability of rental housing sub-sectors including affordable units, units suitable for families, or housing for vulnerable populations such as seniors, persons with special needs, or students, either in the City, or in a geographic sub-area or a neighbourhood of the City, and;
- (iv) all provisions of other applicable legislation and policies have been satisfied. [emphasis author's]<sup>xliv</sup>

As a result, it appeared that by utilizing other statutory provisions, namely the ability pass and amend changes to the Official Plan, the pendulum may have swung back in favour of protecting rental housing supply from conversions but a series of cases once again forced the pendulum on a see-saw journey without a definitive result.

#### **d. The Goldlist Cases**

In 2000, the above mentioned amendments to the City of Toronto's Official Plan were appealed to the OMB by the development agency Goldlist, eventually reaching the Court of Appeal. (*see Goldlist Properties Inc. v. Toronto (City)* 2003 CarswellOnt.3965.; "Goldlist I") Central to the appeal was whether the City of Toronto could legally control conversion via the use of official plan provisions of the *Planning Act*. On a motion to declare the amendments as invalid and illegal, the Board concluded that such changes were illegal, as they collided with the *TPA*. The OMB found that the *TPA* was a complete code and, by the repeal of its outright prohibition on conversions, the amendment was merely an impermissible, "reclaim by the City of municipal powers that have been otherwise repealed by the Ontario Legislature."<sup>xlv</sup> The matter was eventually appealed, first to the Divisional Court, and finally to Ontario's Court of Appeal. The Court of Appeal overturned the decision of the OMB. It found that section 16(1)(a) of the *Planning Act* allowed official plans to deal with change, including changes beyond the physical. Furthermore, the Court of Appeal interpreted that the official plan permissions under the *Planning Act* must be read broadly and expansively, given the legislature's desire that all relevant planning purposes be contained therein.<sup>xlvi</sup> The Court of Appeal also drew upon the Supreme Court of Canada jurisprudence from *Spraytech*<sup>xlvii</sup>, finding that the courts "...should accord municipal powers a liberal and benevolent interpretation." In his commentary, author Toby Young stated:

“...the decision confirms the authority of municipalities to pass by-laws on rental housing, in this case addressing the encouragement, preservation and replacement of rental housing. It is important to note, however, that as the Board effectively disposed of the appeals on OPA No. 2, the planning merits of the OPA No. 2 were not determined.”<sup>xlviii</sup>

As a result, although the City of Toronto clearly won the eventual ruling and the changes to the Official Plan were upheld, the ruling did not disturb the fact that opposing condominium conversions would still require a denial based on planning grounds. Although the City of Toronto could turn to OPA No. 2 as a strong ally in this opposition, the matter was still appealable to the Ontario Municipal Board.

This was seen in the companion case of *York Official Plan Amendment No. 128 Re. 2000CarswellOnt 6032*; (“Goldlist II”). In this case the City of Toronto refused an application to permit the conversion of two twelve storey apartment buildings, totaling 246 residential dwellings. The developer proposed 380 new units, of which 117 would remain rental. The City of Toronto opposed the application because it violated the then operative York Official Plan. York’s OP encouraged rental housing along with the preservation of and maintenance of existing rental units, thereby opposing conversions. The developer appealed to the Ontario Municipal Board. Despite the Official Plan’s requirement to preserve rental housing, and the pursuit of having at least 25% of rental housing being affordable housing, the Board approved the conversion. The Board did impose a variety of restrictions, including increasing the rental unit target from 117 to 146 and a comprehensive tenant assistance package, including a) ten year leases in the new apartment building; b) controlled rents; and, c) reimbursement for moving costs. The OMB commented that:

“The Board realizes that the proposal before it only partially addresses a much larger housing problem in the City of Toronto and this decision only presents a partial solution. But in these circumstances, the Board is satisfied that overall the public interest has been satisfactorily addressed, and a reasonable compromise has been achieved. In this case, the Board must balance the interest of the City of York (now the City of Toronto), the tenants in the existing buildings, the developer and the people in the area with the overall public interest. The proposal is an acceptable and reasonable compromise, and represents good planning.”<sup>xlix</sup>

As a result, despite the unambiguous objectives of the City of Toronto, the OMB permitted the partial conversion of the rental property into condominium. Absent the provisions of the *RHPA*, the City of Toronto had to oppose proposed conversions on the grounds of planning merit. Given this, it was conceivable that applications for conversions, albeit with significant concessions and impositions

upon the developer, could potentially be approved. With the success of the Goldlist II case, it appeared that the pendulum had reached its greatest distance from the passage of the *RHPA*, only twelve years prior.

In the City of Toronto, during the repeal of the *RHPA*, from 1998 to 2001 there were 298 rental units that were approved by Council for conversion to condominium. By March 1, 2004, there were outstanding applications in Toronto for the conversion of 1,203 rental units that were refused by Council and appealed to the OMB.<sup>i</sup> In reaction to this growing threat to protecting the rental housing stock, “[i]n a report adopted July 30 to August 1<sup>st</sup>, 2002, Council recommended that the Provincial Government bring back the repealed *RHPA*. Neither request was implemented.”<sup>ii</sup>

Once again, however, politics and circumstance ensured that the pendulum would not rest.

#### **e. Ontario’s 2003 Provincial Election**

In October of 2003, Dalton McGuinty and the Provincial Liberal Party won a majority of seats in the Ontario Legislature, ousting the right of centre government of Premier Ernie Eves, the successor to Premier Mike Harris. Premier McGuinty had campaigned on a variety of issues, but central to the overall message was a renunciation of the Common Sense Revolution, and its right wing foundations. In the fall of 2002, the Liberal Party provided their platform - a manifest of the ideas and policies to be implemented if elected. Contained therein was the following language:

“The Harris-Eves government betrayed tenants by gutting rent controls and abandoned our poorest families by refusing to support affordable housing. We will provide real protection for tenants and invest in affordable housing.”<sup>iii</sup>

As one municipal law practitioner and commentator wrote in the fall of 2003 shortly after the election of Premier McGuinty, these statements, “...can be considered as early indicators of the legislative change which is expected from the new Government”<sup>iiii</sup> Clearly the pendulum was on the move.

#### **f. Ontario’s Residential Tenancy Reform Consultation Paper**

Following the October 2003 election, on April 20<sup>th</sup>, 2004, the Minister of Municipal Affairs and Housing, the Honourable John Gerretsen released a “Residential Tenancy Reform Consultation Paper”. The Province of Ontario, the Minister explained, “was committed to providing real and balanced protection for landlords and tenants, and encouraging the growth and proper maintenance of the stock of rental housing across the Province.” The Minister furthered, “we will consult

extensively with tenants, landlords and others effected by these issues to hear what they think.” The Paper outlined a variety of areas involving landlord and tenant matters, including the concept of condominium conversions.

The Paper outlined the battle ground clearly between those for and against conversions. It stated:

“Many municipalities have sought control over the demolition and conversion of existing rental housing stock in order to protect affordable rental housing...They believe there is a need to protect existing rental housing stock since little new rental housing is being built, particularly at affordable levels. However, many landlords and developers argue that controls on demolitions and conversions restrict the best and highest use of the land. They are against restrictions that could prevent them from earning a better rate of return on the land and structure in another use.”<sup>liv</sup>  
[emphasis author’s]

The Paper went on to recognize that with the repeal of the *RHPA*, the *TPA* did “...not include a municipal approval process for conversion and demolitions.”<sup>lv</sup> Although, in keeping with the Goldlist I decision at the Court of Appeal, the Paper recognized that official plan policies “may use a range of measures or criteria to evaluate proposed conversions.”<sup>lvi</sup> To that end, for the purposes of generating input from the public, the Paper offered three possible solutions “...to ensure that municipalities with low vacancy rates are able to protect existing housing from conversion.”<sup>lvii</sup> It offered:

- “1. Bring in laws requiring cities and towns to have an approval process for demolition or conversion, based on rules set out by the provincial government.
2. Bring in laws allowing each city or town to decide whether to have an approval process for demolition or conversion, based on rules set out by the provincial government.
3. Bring in laws allowing each city or town to decide whether to have an approval process for demolition or conversion, based on their own rules.”<sup>lviii</sup>

Clearly there was a hierarchy of suggestion commencing with a highly supervised option of a mandatory conversion approval process with provincial criteria (option 1), to a permissive approval process based on municipal criteria (option 2). Suggestions were canvassed from the public.

#### **g. The City of Toronto’s Response**

With the opportunity to recapture comprehensive controls to prevent conversions, the City of Toronto provided a comprehensive and studied submission to the Provincial Government. To highlight, the Planning and Transportation Committee Report, which was ratified by Council on June 24<sup>th</sup>, 2004, advocated for the following:

1. That the Province of Ontario enact a temporary freeze on rental housing conversions, until permanent legislative solutions could be enacted;
2. That the Province Ontario bring forward legislation, permitting municipalities to control conversions, and being able to deny to such applications, until the rental housing market had returned to a healthy state, based on extensive criteria, largely orbiting vacancy rates & supply.<sup>lix</sup>

In fact, the criteria proposed echoed the language as contained in the City of Toronto's Official Plan. The purpose of this suggestion, it appeared, was to export the spirit and intent of the Official Plan controls out of the *Planning Act* and into a new sphere of legislative control akin to the *RHPA*. By that action the appeal procedures to the OMB, as seen in Goldlist II, would now be unavailable to an aggrieved applicant. The City of Toronto clearly articulated that there was a void left by the repeal of the *RHPA*, leaving municipalities only to official plan policies to regulate conversions.<sup>lx</sup> The City of Toronto clearly took issue with the fact that its powers had been repeatedly challenged since 1998, and inconsistent interpretations from the OMB had led "at least in one recent case, to the approved conversion of 500 rental units contrary to the City's refusal of the application."<sup>lxi</sup>

#### **h. The City of Toronto Act, 2006**

In response, the pendulum once again moved, perhaps in its greatest single arc to date. On January 1<sup>st</sup>, 2007, the Province of Ontario proclaimed into force the *City of Toronto Act, 2006*, which contained section 111. In keeping with the entitlements pursuant to the *RHPA*, the passage of section 111 of the *City of Toronto Act 2006* now permits the City of Toronto to regulate the demolition and conversion of all rental housing containing 6 or more dwelling units. The provision is both sparse and potent. It is also mirrored in the recently amended *Municipal Act*, S.O. 2001, c.25, section 99. Both sections operatively state:

**"Demolition and conversion of residential rental properties** – The City [or a local municipality] may prohibit and regulate the demolition of residential rental properties and may prohibit and regulate the conversion of residential rental properties to a purpose other than the purpose of a residential rental property."

The provision is not mandatory, rather permissive, and unlike the suggestion as posited by the City of Toronto, there are no provincially mandated criteria that the City of Toronto must follow. Instead, the City of Toronto may pass a by-law outrightly prohibiting conversion of rental properties to condominium. Given these powers, as contained in the *City of Toronto Act, 2006*, they are not analogous to the powers as contained in the *Planning Act*. Those *Planning Act* powers, including the ability to adopt and amend official plan policies, zoning by-laws and plans of condominium are appealable to the OMB. Section 111 has no appeal mechanism, save and except the traditional oversight of the Superior Court of Justice via the traditional common law remedies of bad faith, discrimination or illegality. The significant difference between this provision and that of the *RHPA* is the absence of criteria to consider conversion applications. Such criteria existed in the *RHPA*, via attending regulations. A comparable process is not mandated in section 111 in the *City of Toronto Act*. The only requirement is that the provision only applies to properties including more than six units, and a corresponding by-law must be passed.

**i. City of Toronto Municipal Code 667; By-law 885-2007**

In response the City of Toronto Act, the City of Toronto passed Municipal Code Chapter 667, Residential Rental Property Demolition and Conversion Control pursuant to the new power provided contained within section 111 of the *City of Toronto Act*. As the Planning Staff Report ambitiously stated, “[a]doption of the draft by-law will permit the City’s policies and practices on demolition and conversion to be applied to all qualifying rental housing properties, extending this protection beyond current authorities that are limited to approvals under the *Planning Act* or the *Condominium Act*.”<sup>xii</sup> The eventual By-law passed by the City of Toronto goes beyond OPA 2. It unambiguously states:

- S.667-4(a) No person shall convert a residential rental property, or cause a residential rental property to be converted, to a purpose other than the purpose of a residential rental property unless the person has received a section 111 permit for the conversion of the residential rental property and except in accordance with the terms and conditions of the section 111 permit and any preliminary approval<sup>xiii</sup>

The challenge therefore now rests in acquiring approval from the City of Toronto. The By-law indicates consultation and conditions that may be imposed on such an approval, but such conditions are not read as conditions precedent which entitle the applicant to the conversion. To the contrary, they are the reverse, the conditions are permissive tools the Council may impose should they elect in their discretion to permit a conversion. Such conditions may include notification

procedures to the tenants, cost impact studies on tenants, and restrictions on the transfer, charge or other dealings with the applicable lands.<sup>lxiv</sup> That said, such controls are at the discretion of the Council. Presumably, the Council would rely on the recommendation of planning staff to determine any application. They, in turn, would rely upon an analysis borne from the provisions of the Official Plan policies, and a study of the City of Toronto's rental housing stock, including tenure, vacancy and affordability. That said, the power granted via section 111 of the *City of Toronto Act*, may be exercised in a comparatively arbitrary fashion, and planning arguments may only be incidental to the analysis or decision. In short, if the City of Toronto's Council wished to oppose a conversion, despite vacancy rates being in excess of 10%, with a rental construction being widespread, and rents being low and affordable, the City of Toronto would still theoretically have the power to oppose conversions, despite the absence of any planning arguments.

By the recent passage of the *City of Toronto Act, 2006*, and the passage of By-law No. 885-2007, some may view the pendulum as at its greatest height in favour of protecting rental housing stock from condominium conversion. The City of Toronto has now been given and has accepted the power to outrightly prohibit the process, devoid of either the controls imposed by the *Planning Act*, or oversight from the OMB. The ebb and flow of this pendulum will likely continue, for the significant reason that the challenges facing the City of Toronto's rental housing stock continue. Rents are expensive comparative to income, demand is high, and supply is low. It is a cocktail of challenges. Does outrightly prohibiting conversions solve this problem? Time will tell, but the existence of the *RHPA* did not appear to solve the triumvirate of problems facing rental housing in the City of Toronto.

#### **4. Conclusion**

Condominium conversions do provide a measure of social good. Some consider home ownership is a higher form of property, as the Province's Consultation Paper described, to 'the highest good.' By effectively restoring a moratorium on condominium conversions, the City of Toronto has likely chilled any potential construction of residential rental housing. Developers may indirectly build rental housing via the construction of condominiums and rent out units via, what is commonly referred to as, the secondary market. But as the consistent statistics have demonstrated in the City of Toronto, purpose built primary residential housing built from the private sector verges on the non-existent. In fact, the only appreciable impact from primary residential housing construction occurred in the early 1990s and was almost entirely attributable to social housing funded by the provincial government.<sup>lxv</sup>

One must wonder if the dogmatic opposition to condominium conversions by the City of Toronto has aided in the efforts to stem the three major heads of rental housing accommodation. These statistics have remained constant, almost intransigent, despite the swing of the pendulum, begging the question as to

whether condominium conversions are really to blame. Social policy has been described by some as a variety of levers to be carefully operated to effect positive change. Perhaps the persistent opposition to conversions by the City of Toronto should be reconsidered in favour of other levers. Providing tangible incentives to developers to build rental accommodation in the primary market should be canvassed. By allowing such construction to be exempt from the moratorium after a period of 15 to 20 years may entice otherwise reluctant developers to re-enter a market currently viewed with great skepticism. Perhaps greater public resources should be put into building affordable accommodation, via the public purse. This begs the question, why should private developers be saddled with the costs of providing accommodation to solve goals pronounced from either the Province of Ontario or the City of Toronto? Perhaps conversions should be encouraged, in order to spread the rental accommodation needs equitably amongst the constituent municipalities of the GTA. The City of Toronto carries a disproportionate burden in providing rental accommodation. If supply was restricted by conversion, it may force renters to seek accommodation outside. In addition, if conversions are permitted, greater capital may be afforded to developers. Although conversions generally experience an upgrade prior to sale, such condominium units may be eligible for purchase by the otherwise perpetual renter or tenant. Perhaps a greater goal would be to tackle the fifty percent rental figure, which is inconsistent with overall figures, both in the Greater Toronto Area and Canada. Homeownership also provides a significant number of benefits. Allowing conversions to occur may increase the supply of affordable condominiums units, which otherwise would be beyond the reach of the tenants. That said, in the City of Toronto, for the time being, the pendulum has swung in favour of the perceived importance of protecting the rental housing supply. How long it shall remain there is the guess of others.

## **Endnotes**

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