

Use it Or Lose It

Policy Discussion Report

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Use It or Lose It Policy Discussion Report

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EXECUTIVE SUMMARY

Altus Group Economic Consulting was retained by the Federation of Rental-housing Providers of Ontario (“FRPO”) to provide analysis on the impact a potential ‘Use It or Lose It’ (“UILI”) policy could have on housing supply in Ontario.

This study was prompted by recent commentary made by the Minister of Municipal Affairs and Housing (“MMAH”) that heading into the next Housing Supply Action Plan (“HSAP”) for 2024 the provincial government is seeking to implement a UILI policy to improve housing supply by increasing the utilization of existing development approvals.

The Minister’s comments build on previous work done by the Ontario Housing Affordability Task Force (“HATF”), which provided a recommendation that:

43. Enable municipalities, subject to adverse external economic events, to withdraw infrastructure allocations from any permitted projects where construction has not been initiated within three years of building permits being issued. (emphasis added)

This study also provides possible alternative policy approaches to UILI and outlines how to minimize unintended or negative outcomes from a UILI enactment.

Background

UILI policies as they relate to land development, are characterized as inducements, typically in the form of penalties, to incentivize builders to expedite the use of pre-existing approvals to encourage more robust housing supply. In reviewing various forms of UILI policies for this report, they were found to be broadly characterized in two categories:

1. The partial or full loss of development entitlement; or
2. A financial penalty, such as an on-going tax or one-time charge.

Commentary

A significant basis for promoting UILI policies is the claim that it will prevent or disincentivize homebuilders from diluting governmental efforts to address housing supply through the act of ‘land banking’.

While speculation does occur within the development process, it is difficult to quantify its exact unproductive nature. The inventory of approvals (land

banking) is a key component for continuity of a homebuilder's business. They cannot stop and restart their business repeatedly to await the assembly of lands and garner regulatory approval.

What should be understood about the function of land banking is that it acts as a hedge against planning risk, and it is critical to have an inventory of land with development approvals, either by maintaining existing entitlements, having a sufficiently large base-level of as-of-right zoning, or both, to act as a cushion for economic shocks on both the homebuilding and housing demand sides of the equation. Removing this fail-safe device for market shocks could have potential economy-wide implications.

While the province has made some efforts at reforming planning permissibility to address housing options and expand the quantum of developable land, much of this work is still in its infancy or incomplete. The work that has been completed to date has had little time for market participants to respond to changes, with the caveat that marginal changes (e.g. accessory dwelling units and multiplexes) will only ever result in marginal impacts.

Depending on a UILI policy before substantive planning reforms are instituted would be a pre-mature step with significant risks. There are foreseeable scenarios where large quantities of approvals could expire just before current economic headwinds recede.

This would likely impact future growth recovery as homebuilders, which are a major contributor of general economic activity, scramble to re-seek entitlements instead of constructing housing as economic demand for it picks up. The bureaucratic system is unlikely to be able to handle such a surge in application in a timely manner that matches economic forces, and therefore a mismatch between supply and demand will persist.

So long as housing demand moves at the speed of economic forces, and the supply of approvals happens at the speed of bureaucracy, there will always be a need to bridge this gap with an inventory of development approvals to deal with the uncertainty created by the mismatch.

It is imperative that the government understand how actors within a UILI system weigh the costs and benefits of the choices being imposed. While outside may determine that a choice has beneficial upsides, frequently

viewing this from their own circumstance, this is often not the case for parties that must make a decision and bear the burden of that action.

When a system fails to provide appropriately reasonable options to participants, then the actors within that system often try to either find additional options that were not intended, or they seek restitution through other systems of actions.

Under a harsh UILI policy system, late communications, delayed permit approvals, postponed construction of infrastructure, and other regular occurrences that can cause delays for a new home project launching would result in directly attributable financial damages. This would create immense amounts of ill-will between participants in the development application process, pushing them farther away from co-operation.

This could also lead to significant amounts of litigation both within the planning regime, as well as outside its framework if parties feel they can no longer find reasonable restitution through mechanism such as appeals to the Ontario Land Tribunal (“OLT”).

There are also questions about how a UILI policy can operate with other provincial policies, such as minimum designated land requirements or when a new zoning by-law is required to be adopted to conform with a recently enacted official plan. It is often incumbent on landowners to bring their sites into conformity through site-specific rezoning requests.

If a zoning UILI policy were imposed on site-specific rezoning requests, clarity would have to be provided by the province as to how situations would be dealt with where zoning would revert back out of conformity with official plans or provincial policy.

The financial implications of a potential UILI policy would also not solely just flow to homebuilders. Municipal finances could also see a hit through a decrease in parkland dedication cash-in-lieu and CBC contributions as these are based on extracting a portion of the total land value as determined close to the building permit stage.

With matured entitled lands close to the penalty date establishing comparable market-prices for valuations for developments proceeding towards the building permit stage, the contributions owed to municipalities could consequently be lower than they otherwise would be without a UILI policy.

Disputes could erupt between homebuilders and cities over how to incorporate valuations of UILI penalties when determining required contributions, which would ultimately hinder housing construction.

Escalating disputes over valuations would also not be limited to affecting just development contributions. The property tax system also depends on the assessment of land that includes the valuation of development permissions.

Municipal Property Assessment Corporation (“MPAC”), the agency responsible for setting land assessments for property tax purposes, would have to track entitlement losses and incorporate them within their valuations. Should a UILI policy lead to a significant number of properties losing their entitlements, MPAC would be responsible for updating assessments, which is unlikely to happen if there are many cases of penalties being imposed that make tracking difficult. This is likely to result in escalation of taxation disputes between landowners and municipalities, which could make financial planning more difficult for cities and negatively impacting the stability of municipal finances.

It should be acknowledged that not all possible iterations of UILI necessarily have the potential to create significant conflicts. It is possible to design a UILI policy that compliments provincial housing objectives.

Where there are water and wastewater limitations, a potentially beneficial UILI design would be to provide a time-bound expiry in relation to servicing allocations. In these instances, if a homebuilder is not ready to proceed with development, a servicing allocation UILI mechanism can help to prevent delays to others that are prepared to move forward.

This UILI penalty would result in the homebuilder moving to the proverbial back of the line and having their servicing allocation redistributed to others that are ready to proceed, which would incentivize homebuilders without having entitlements, which are a key component to the economic value of their land, being infringed upon.

Recommendations for UILI Policy Design

While no public announcement with details has been made at the time of this report on the exact nature of the Use It or Lose It (“UILI”) policy being considered, several best practices can be contemplated for a wide range of potential policy structures. These include:

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- Requiring municipalities to conduct a self-financed background study to implement a UILI by-law that:
 - Outlines the geographic area that the UILI policy would apply to;
 - Demonstrates a need for such a policy by providing information on the number of approvals not yet under-construction;
 - Sets out the length of time approvals have not been used for;
 - Specifies the entitlements that the policy would apply to; and
 - Requires periodic (e.g. annual) reporting updates for the by-law to stay in effect.
 - Providing for provincially statutory exemptions, including:
 - For sites with occupied residential and commercial tenants;
 - For projects that include an affordable housing component;
 - For applications that have been delayed by either a provincial or municipal agency (e.g. planning department, ministry of transportation, OLT, etc.)
 - Where there are reasonable demonstrable extenuating circumstances, such as:
 - Trades or services necessary to construct housing are unavailable;
 - Economic shocks such as a slump in new home sales; and
 - Where infrastructure construction or lack of availability impacts a site.
 - Considering additional conditions that municipalities should meet before being permitted to bring a UILI by-law into effect include:
 - Having zoning within the area of the UILI up-to-date and in conformity with provincial policy and official plans;
 - Requiring municipalities have more units approved than being considered at the OLT;
 - Removing sites where a UILI has been applied to against phasing requirements in secondary plans to hinder other projects.

The province should also outline when and how an appeal can be made either against the entirety of a by-law or in its application in specific circumstances. As well, notice requirements to entitlement owners should be

detailed for both the adoption of a UILI by-law and when municipal decision makers choose to apply it in specific situations. Finally, the province should lay out when and how potential extensions can happen or must be provided to avoid the appearance of favouritism or politicization of the process.

Other Considerations

A UILI policy cannot change economic factors that regulate the pace of home building, such as new home sales and construction cost factors. If a project is slated to lose a significant amount of financial value should it be forced to proceed, then the net result will be for land to lose the entitlement rather than for home construction to commence as financing partners will not support projects that are not profitable.

There are significant and serious risks to both the homebuilding industry and wider economy that a UILI policy could create with unintended outcomes. This could de-stabilize valuations and make future projects riskier to finance. This could also lead to higher costs to homebuyers and create more economic uncertainty.

The most fruitful application of a UILI policy would be around servicing allocations. There are instances where development can proceed but due to infrastructure limitations and allocations being tied-up elsewhere, they are unable to move forward. Should the province feel the need to implement a UILI policy, then it should focus its efforts on this aspect of development, however, keeping the scope as narrow as possible to avoid negative externalities.

While the current bottleneck in home construction is a lack of economic demand, this will not be the case forever. The government should use this interlude period before the next economic expansion to create more opportunities for home building by reforming provincial policies and municipal zoning, regulating design guidelines to lower their complexities, and investing in the adoption of innovative construction techniques. This will help to reduce costs, increase housing options, increase competition between builders and ultimately help to address the affordability crisis with much greater gains than any UILI policy can provide in the short or long-term.

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1 INTRODUCTION

This section provides information on the scope of study, background on terminology, and an opening discussion on Use It or Lose It policies.

1.1 SCOPE OF STUDY

Altus Group Economic Consulting was retained by the Federation of Rental-housing Providers of Ontario (“FRPO”) to provide analysis on the potential of a ‘Use It or Lose It’ (“UILI”) policy.

This study was prompted by recent commentary made by the Minister of Municipal Affairs and Housing (“MMAH”) that heading into the next Housing Supply Action Plan (“HSAP”) for 2024 the provincial government is seeking to implement a UILI policy to improve housing supply by increasing the utilization of existing development approvals.

The Minister’s comments build on previous work done by the Ontario Housing Affordability Task Force (“HATF”), which provided a recommendation that:

43. Enable municipalities, subject to adverse external economic events, to withdraw infrastructure allocations from any permitted projects where construction has not been initiated within three years of build permits being issued. (emphasis added)

This study provides an understanding of what a UILI policy is, key considerations for implementation, and potential impacts on housing supply. As well, possible alternative policy approaches to UILI, and an outline for how to minimize unintended or negative outcomes from a UILI enactment are given.

1.2 DEFINING USE IT OR LOSE IT

The concept of Use It or Lose It (“UILI”), also sometimes called a sunset clause along with other terms, generally denotes a requirement of action by a person or entity, usually but not always within a specified period of time, with the consequences of failing to do so resulting in a loss of an entitlement¹ or application of penalty. The reason for creating such a framework is to promote a particular outcome(s) while allowing for independent choice or agency on the part of the person or entity.

¹ A right to a benefit(s) specified by law or contract.

The concept of a UILI policy is not specific to land-use planning alone. The most familiar common occurrence of the term typically relates to the usage of vacation days. Employees are commonly required to use vacation days within a specified time-period ('use it'), typically within a calendar or fiscal year, or risk losing entitlement to the days ('lose it') subject to provisions and conditions under their work contract and Ontario's *Employment Standards Act, 2000*.

The purpose of creating vacation UILI policies is to encourage employees to take time off to recharge and stay productive in the long-term (e.g. prevent burnout) and to prevent a large accumulation of unused days that may become a financial liability for the employer. Employees have agency on when they can take time off, subject to the time-bound period that they must use those days within and needs of on-going work projects, but failure to do so results in a penalty of lost days or cash payouts in-lieu of time off depending on the circumstance.

Within the context of land use planning, there are many entitlements that both municipalities and homebuilders enjoy that are subject to requirements that result in a loss or penalty for failure to undertake an action. Examples include heritage listings and designations for municipalities and lapsing provisions for draft plans of subdivisions for builders, among other policies.

In discussions around UILI policies, the provision is characterized as an inducement, typically but not always in the form of a penalty, to promote builders to utilize pre-existing development approvals at a faster rate than they otherwise would prefer to individually do so to collectively encourage more robust housing supply and all the benefits towards affordability that flow through from that.

In reviewing various forms of 'Use It or Lose It' policies for this report, they can be broadly put into two categories:

1. The partial or full loss of development entitlement; or
2. A financial penalty, such as an on-going tax or one-time charge.

1.3 USE IT OR LOSE IT & LAND BANKING

A significant basis for promoting UILI policies is the claim that it will prevent or disincentivize homebuilders from diluting governmental efforts to address housing supply through their acts of 'land banking', which is a poorly contextualized term in public discussions.

In the traditional act of land banking, parcels are purchased for the purpose of facilitating future development. Examples include buying undeveloped land near an urban boundary before it is designated for allowable uses beyond agriculture as part of a long-term strategic decision, or buying several lots within a city block until a sufficient area has been acquired to facilitate a larger infill project than otherwise would be possible. This is also known as 'land assembly', which is the acquisition of property (or properties) to facilitate a future development project.

The land that is assembled is then 'banked', where its use is unchanged until the land has sufficiently progressed through the internal development pipeline of its owner and the external regulatory process to a point where it is ready to proceed towards construction or sold to someone else for that purpose based on a need or demand for it. Land banking within the land assembly context may be done by both the private and public sectors.

It is important to note that banked lands often provide rental income, which represents an opportunity cost (i.e. forgone rents) that must be accounted for, among other costs, when decisions to proceed with development are made. For rural lands, the rents are often in the form of agricultural land leases, while in more urban infill contexts, rents represent income from existing residential or commercial tenants.

Governments often land bank to facilitate future infrastructure and public facilities, such as future rail/transit corridors, parks, community centres, etc. It can often be in the strategic financial interest of public entities to purchase land before significant development has occurred in an area to secure the property at significantly lower prices than otherwise would be possible once growth has begun.

An example of public entity land banking is the Town of Oakville's purchase of North Park in 1991 for approximately \$6.6 million, which saw significant amounts of development occur around the park many years later. Had the Town decided to purchase the land 20 years later, closer to when it was needed, they would have had to pay at least 1,600% more than what they had originally paid, or otherwise bought a smaller parcel or one located in an alternative location.²

² See Altus Group's report *New Homeowner Money in the Government's Bank*, page 28

In discussions around why UILI policies are necessary, land banking is often framed as the unnecessary inventorying of residential development approvals, which weakens efforts to increase housing supply as approvals are unable to reach the actual homebuilding stage in a timely manner and therefore lowers the availability of homes to purchasers, which increases prices.

The implication that follows from this view is that land banking primarily occurs because entitlement owners attempt to 'time the market'³ or otherwise regulate housing supply to increase the economic value of approvals to maximize profits. The additional profits generated by entitlement owners are taken from homebuilders who purchase the lands, who themselves then recoup the additional costs by passing them onto home purchasers.

However, there are multi-faceted problems with this view of the new home market, such as ignoring the fact that builders are not exceptional in their attempts to time markets. Other market participants also attempt to maximize their own temporal beneficial outcomes, such as individual sellers in the used-home market, which represents a large component of the overall housing market, as well as purchasers of homes themselves. Timing is a normal exercise both buyers and sellers, as well as households and firms across industries, do as part of their responses to macro economic conditions and internal financial dynamics. It is not an activity that itself provides definitive proof of a dysfunctional market or negative speculative activity.

Without fully considering the complexities of the development process, potential financial impacts to both builders and cities, economics of homebuilding, current challenges in homebuilding, unintended reactions, lack of an evidence-based approach, or legislative requirements, it is possible to reasonably arrive at a conclusion on land banking and Use It or Lose It policies that misses potentially major issues. These issues have a significant degree of risk to become highly disruptive to a properly functioning housing market and planning system, which this report seeks to explore.

³ John Lorinc. *The Tories' Use-It-Or-Lose-It Housing Ruse*. Spacing Magazine. Sept 7th, 2023

2 OVERVIEW OF USE IT OR LOSE IT POLICIES

This section covers various types of UILI entitlement and financial penalties that exist both within Ontario, as well as in other jurisdictions located in the United States. It also investigates UILI policy-trends by examining a recently enacted sunset clause in the Town of Aurora. The purpose of this section is to establish the current policy environment and provide initial analysis of potential pitfalls of UILI policies.

2.1 EXAMPLES

2.1.1 Ontario – Existing Use It or Lose It Penalties

The current provincial planning framework and building code already provide for UILI-like requirements in terms of both partial-entitlement losses and financial penalties/incentives. Without being exhaustive, and in varying scenarios, municipalities in Ontario are already allowed to set expiry requirements to:

- plans of subdivision (after 8 years);⁴
- draft plans of subdivision (after a minimum of 3 years);⁵
- consents (2 years);⁶
- minor variances (conditions set by Committee of Adjustment);⁷ and
- building permits (6 months to a year depending on circumstance).⁸

The *Development Charges Act* (“DCA”) also provides financial penalties towards builders that fail to move forward with their project in at least two ways with regards to demolition and lock-in rates.

While the DCA does not explicitly state that a development charge (“DC”) reduction must be provided for a unit(s) being demolished, municipalities provide them under the basis that there was some underlying infrastructure need previously being met that was already paid for, which needs to be accounted for when determining the increase in need as outlined in the Act⁹.

⁴ See *A Place to Grow: Growth plan for the Greater Golden Horseshoe (2020)* Policies 5.2.8.2 to 5.2.8.4

⁵ See *Planning Act* Section 52 subsections 32 to 33.3

⁶ See *Planning Act* Section 53 (43)

⁷ See *Planning Act* Section 45 (9)

⁸ See *Building Code Act* Section 8 subsection 10.b and 10.c

⁹ See *Development Charges Act* Section 2 (1)

The requirement to provide a reduction for demolished homes and under what condition those reductions may expire has also been litigated in several Ontario Municipal Board (“OMB”) cases spanning several decades that are beyond the scope of this report to delve into other than to note the OMB – now the Ontario Land Tribunal (“OLT”) - has affirmed the requirement to provide reductions. Nevertheless, many municipalities subject demolition reductions to UILI expiry requirements, for example in Toronto Development Charge By-law 1137-2022¹⁰.

In the case of Toronto, should a homebuilder demolish an existing residential structure, such as an older apartment building, and not proceed with construction after a 60-month timeframe, then they lose out on their entitled DC reductions. This loss of reduction can in many cases amount to significant sums of money, providing a financial incentive to not to leave developable and entitled land vacant.

In-lieu of creating new UILI policies, there is the potential for the province to regulate this aspect of DCs to further encourage builders not to demolish structures until they are more readily able to proceed with construction to develop existing vacant land more quickly.

Section 26.2 of the DCA sets out when a DC is determined, which “locks-in” the rate for two (2) years when a complete application acknowledgement is made for either a zoning by-law amendment application or site plan approval application – which ever is later. However, it should be noted that the lock-in rate is not completely frozen and subject to an annual interest rate of the prime rate plus 1% until the day that the DC charge is payable at building permit issuance.

The assumed benefit to builders under this framework is that it creates certainty towards what the charge will be in the future given DC rates can change by large amounts in short periods of time and incentivizes them to begin construction as soon as possible after receiving an approval or risk losing their ‘lock-in’ rate that is, in theory, lower than the applicable rate would otherwise be.

¹⁰ See section 415-7 A

While the lock-in rate is an example of both a UII financial incentive and penalty, in practice, due to approval timelines, the pressure builders feel from this policy is less significant than it otherwise could be.

In the 2022 GTA Municipal Benchmarking Report, Altus Group estimated that in the City of Toronto, zoning by-law amendments take approximately 30 months (2.5 years) from a complete application date to decision, while site plan approval applications take 34 months (2.8 years). Recently released City of Toronto development timeline metrics¹¹ report that the five (5) year average application timelines for zoning by-law amendment was 26 months (2.2 years), while for site plans it was 29 months (2.4 years). Similar timelines were also reported by Toronto for applications approved in just the last year (2023) for both zoning and site plan applications.

By the time many applications are approved by municipalities, the 'lock-in' period of two (2) years has expired or is near expiry. Without timely approvals on the part of municipalities, developers lose a significant financial incentive to proceed directly to construction.

This is an issue that the province should examine remedying if it wants to increase the potential effect of this UII policy. One solution would be to extend the lock-in period so that delays do not totally wash out the benefits of this policy, without extending it so long that the incentive also becomes diluted for builders. A compromise timeframe based on analysis of average application timelines would suggest three (3) years as an appropriate choice.

2.1.2 United States

As with Canada, where land use planning is largely within the realm of provincial responsibility, in the United States land use planning is within the general purview of individual states, with specific application being conducted by municipalities. Rhode Island, Massachusetts, Connecticut, and New York were all found to have UII policies pertaining to plans of subdivision, special permits, variances, and building permits along with

¹¹ See City of Toronto Planning and Housing Committee Item 2024.PH9.2

variations in the ability to extend timelines permissions for good cause and other extenuating circumstances.^{12 13}

The examples from America of partial entitlement retraction schemes from jurisdictions with similar planning regimes points to Ontario potentially becoming an outlier among its major continental peers should it adopt a full entitlement penalty system where a land-use designation or zoning could be reverted or taken away. The province could find itself in uncharted territory without the benefit of relying on experience or examples from other jurisdictions. While it is disputable if a full-entitlement loss ULI policy has significant benefits, it should be acknowledged that it is a high-risk policy choice and, importantly, an unprecedented one.

2.1.3 Town of Aurora – Partial and Full Entitlement Penalty

In April 2022, the Town of Aurora’s municipal council passed a motion introduced by its mayor directing staff to:

1. Now Therefore Be It Hereby Resolved That staff be directed to add the appropriate sunset clauses to all future site-specific zoning by-law amendments passed by:
 - i. If a building permit has not been issued under the Building Code for any building or structure so authorized within a specified time frame from enactment of the Zoning By-law Amendment that is appropriate for the development, then the bylaw will automatically repeal and if so repealed, the zoning of the property will revert to the original zoning; and
 - ii. In addition, staff be directed to include existing Official Plan Servicing Allocation “Use it or Redistribute It” policies in all future residential draft plan of subdivision and site plan application approvals that will stipulate the applicant shall proceed to register the appropriate development agreement within a given time frame or receive an extension from Council and obtain a building permit within a specified time frame for said project. If the applicant does not satisfy the time frame requirements of the agreement or receive an

¹² Dane Ardente and Kelley Morris Salvatore. If You Don’t Use It, You May Lose It: Land Development Approvals. <https://www.jdsupra.com/legalnews/if-you-don-t-use-it-you-may-lose-it-2271596/>

¹³ Anthony S. Guardino. Use It or Lose It. New York Law Journal

extension from Council, the development approvals and servicing allocation may be revoked.

Aurora's council motion is an example of both a partial and full entitlement loss UILLI policy. The sunset clause (i) represents a full removal of entitlements over applicable land where the rights owner loses all ability, and therefore benefits, to develop the land should they fail to meet the time-bound criteria set out by the municipality.

To re-establish their entitlements, a builder would have to reapply for the majority or entirety of the planning application process. This could setback a development for a significant amount of time and potentially cause significant financial distress to the entitlement owner.

The second clause of the motion (ii) provides for a partial loss of development rights. Should the first clause not be applied, the entitlement owner still retains the legal right to develop their property as agreed upon in the planning process, however, the practical ability to develop their lands is still hindered. With their servicing allocation removed, they would have to reapply for it once again and lose priority relative to other applicants, delaying the development but not preventing it.

This would likely still cause a significant financial penalty to the entitlement owner, but it would be significantly less likely to become financially fatal compared to the first clause in the motion.

An example of the actual 'sunset' clause is provided by a zoning-bylaw amendment (ZBA-2022-06) passed by the Town in late 2023, which states:

If a building permit that is appropriate for the development has not been issued under the Building Code Act, 1992, S.O. 1992, c. 23, as amended, for any building or structure so authorized within three (3) years from enactment of this By-law, then this By-law shall automatically repeal and if so repealed, the zoning of the lands will revert to the original zoning.

It is not clear how such a clause can operate within requirements of the provincial planning framework and upper-tier official plan policy components. However, these issues will be addressed in more detail in the next section of this report.

Its important to also note that the sunset clause cites no statutory authority that it draws from, which is typically seen in other by-laws, either from provincial legislation or from another municipal by-law in effect, nor does

the zoning by-law amendment itself point to any statutory authority that would otherwise permit such an action. While the clause does cite the *Building Code Act* (“BCA”) as the mechanism to determine when an action to satisfy the clause has occurred, that Act itself does not provide for zoning by-law reversal within it.

Determining the existing legality of such a clause within a zoning by-law is beyond the scope of this report. No Ontario Land Tribunal (“OLT”) or higher court final decision regarding the clause could be found at the time of this report’s writing to provide more analysis on the issue of legality. Given the basis for this clause derives from a council motion that was passed within the previous 24 months of this report undertaking, it is unlikely that any litigation involving the clause has matured to a sufficient stage where a final decision over its status has been decided.

It is important to acknowledge for discussion later in this report that the Town’s sunset clause provides for no notice, no decision-making standards, no exemptions, and no appeal. Also, beyond high-level statements and anecdotal references, the Town has not conducted any formal exercise to demonstrate a need for such a clause and no significant background work could be found completed by planning staff to establish evidence that validates that this policy would create intended beneficial outcomes towards encouraging housing supply.

As well, there seems to have been little to no outreach to the development community, or to their representatives, on the development of this policy as well to the wider public for commentary or input. While councils are free to pass motions requesting actions by staff, having the insertion of sunset clauses into specific zoning by-laws based on a council motion would seem to violate basic tenants of established public policy making.

The clause’s enforcement, if found to be legal, would be automatic but also arbitrary in application based on its current written form. Should a builder find themselves facing an issue in failing to receive a building permit within the specified time frame due to actions outside of their control, such as on the part the municipality or region delaying other required approvals or due to economic circumstances such as a recession, which the Housing Affordability Task Force alluded to in their recommendation, there is no recourse under the clause to consider those factors.

To suspend the requirements of the clause would require another zoning by-law amendment be passed by council, which it is not clear if they'd be bound by any standard, regulation, or law in their deliberations regarding their assessment to grant or deny removing/amending the clause.

If a scenario were to come to fruition where the clause is found to be within the bounds of the existing planning framework, or the framework is changed provincially to allow for such a clause as it is conceived in Aurora, it could become a very negative example of "let's make a deal planning" where opaque decision-making occurs behind closed doors without clear rules or procedures that establish accountability or transparency to promote public trust. This could lead to further litigation, accusations of extortion or favouritism, and other legal or political issues that could delay projects that are necessary to meet current and future housing needs.

The problems highlighted by Aurora's attempt at instituting a UILI policy based on a council motion and clauses inserted within zoning by-laws show the perils that such a policy can have without pre-established processes that contain the actors and decision makers within it and set procedural steps for various potential circumstances and actions. The Town's development guidelines available online for zoning by-law amendments provide no mention or warning to the clause's existence and therefore provide no minimal fair notice about this conditional requirement as the barest form of proactive notification step.

UILI policies can increase costs, risk, uncertainty, barriers to market entry, and decrease overall competition, however, UILI policies outside formally established frameworks or ones without well-established procedures, such as the one created by Aurora, can create an amplification of negative unintended and intended consequences.

While Aurora's actions have not caused major disruptions in land markets and housing construction within the Town, it's pre-mature to conclude that this would not occur on a province-wide basis. Many market actors are still unaware to the existence of the Town's sunset clause and there are also questions about its enforceability, both conditions which would not be present should the province seek to emulate this policy.

3 CONSIDERATION OF ISSUES

This section provides consideration of issues around the adoption of a Use It or Lose It (“UILI”) policy that have a significant degree of risk to become highly disruptive to a properly functioning housing market. The purpose of this section is to provide cautionary analysis to help avoid problems that could negatively metastasize into economic, planning, legal, and political aspects of homebuilding in Ontario.

3.1 DEVELOPMENT PROCESS

While speculation does occur within the development process, it is difficult to quantify its exact unproductive nature. Land banking is an important component of the homebuilding process, as Sir Oliver Letwin¹⁴ noted in his 2018 report on build-out rates¹⁵ to the British Parliament:

...the large amount of land held in one way or another by major house builders – has a plausible explanation. The fact that a major house builder holds large amounts of land, is explained by the fact that the major house builders need to maintain a sustainable business and seek to do this by ensuring that they, rather than their competitors, hold as much of the land on which they will later wish to build as is compatible with their capital constraints. This may well enable them to minimise market entry and thereby enable them to maintain market share while building out at a stately pace; but it does not, in itself, drive slow build out rates. Indeed, if anything, one would expect faster rates of build out to require builders to hold larger supplies of land – since we have been told by market analysts that the stock-market valuations of house builders depend not only on the current annual profits of those builders but also on the degree to which those profits are made sustainable by the holding of supplies of land that can be developed in coming years. The faster the land is used, the larger the need for a back-up supply of land that can be used in future. (emphasis added)

...I cannot find any evidence that the major house builders are financial investors of this kind. Their business models depend on generating profits out of sales of housing, rather than out of the increasing value of land holdings; and it is the profitability of the sale of housing that they are trying to protect by building only at the ‘market absorption rate’ for their products. I have heard anecdotes concerning landowners who seek

¹⁴ Former member of parliament (“MP”) in the United Kingdom and emeritus professor at the London School of Economics

¹⁵ Sir Oliver Letwin. *Independent Review of Build Out Rates – Draft Analysis*. June 2018. Ministry of Housing, Communities and Local Government

to speculate in exactly this way by obtaining outline permission many years before allowing the land to have any real development upon it – and I am inclined to believe that this is a serious issue for the planning system. But it is not one that is consistent with the business model of the major house builders.

The inventory of approvals (land banking) is a key component for continuity of a homebuilder's business. They cannot stop and restart their business repeatedly to await the assembly of lands and garner regulatory approval. It is important to acknowledge, as Letwin does, that speculation in the housing system occurs, but its systemic nature is difficult to ascertain. What should be understood about the function of land banking is that it acts as hedge against planning risk, which the Centre for Cities expands upon in their 2020 report¹⁶, stating:

Discretionary planning permissions create uncontrolled uncertainty for developers. If demand suddenly increases, they cannot just buy more land to satisfy it, as more development requires a new permit. Alternatively, they may receive far fewer planning permissions in the next period than they expected and need to sustain production. The amount of land that they can develop tomorrow is fundamentally unknown...

This planning risk has two effects for developers. First, they demand more land and units than they suspect can actually get planning permission, in the expectation that some applications are unsuccessful. Second, they then hoard the land which is granted planning permission to spread planning risk over time. As developers' access to equipment, finance, and workers is relatively fixed in the short term, this 'hamster-like' behaviour is rational as it means they will always have land on which those assets can be operating, even if planning permissions temporarily dry up...

Crucially, this behaviour is caused by discretionary rationing in the planning system. This approach to controlling the supply of land actually changes developers' demand for land, making it difficult for planners to calculate local supply and demand for new homes. If instead it were possible for developers to just buy land and build on it, they would demand only as much land as they needed, as their strategic response to uncertainty would be unnecessary...

Within the United Kingdom ("UK") there has been a push to require the adoption of formal zoning codes to secure development rights (entitlements)

¹⁶ Anthony Breach. *Planning for the future: How flexible zoning will end the housing crisis*. Centre for Cities. June 2020

and make their planning system less discretionary to lower planning risk and increase homebuilding certainty. While Ontario's planning system already incorporates formal zoning codification of development property rights, and therefore it would be assumed to be immune to the issues highlighted in the UK, the Centre for Cities points out that very ridged planning systems, such as Ontario's, can become discretionary, stating:

However, housing shortages are not just found in discretionary planning systems. Multiple cities in the US with zoning systems have housing crises too, including New York City, Boston, and Seattle.

In these places with zoning codes and housing crises, there is in theory more flexibility about development. But in practice, their zoning codes are often highly restrictive, with each zone corresponding to a single possible use, or imposing tight limits on density. In effect, these inflexible zoning systems have replicated the problems of discretionary planning...

Because of rigidity of Ontario's planning system, homebuilders in the province contend with many of the same planning risks that their peers in the UK also must account for. A poorly designed ULI policy that makes development rights less secure could substantially increase planning risk, which would then encourage a greater hoarding of lands where there is a belief that rapid entitlements could be achieved and make homebuilding less certain.

The discretionary nature of Ontario's planning system also encourages the creation of certain actors within the development process that may be viewed as undertaking a purely speculative function, but in reality, provide highly specialized and critical services in particular stages of the home production value-chain. These 'developers' typically strictly only assemble land and take it through the regulatory process to sell to other specialized actors who only focus on financing, design, project management of construction, and/or various other facets of development.¹⁷

Most participants in the home construction process do not own the absolute entirety of the production-chain within the development process that they operate in, nor have the internal capabilities, from teams that focus and pursue land assembly opportunities, to on-staff professionals such as lawyers and urban planners to facilitate regulatory approval, to having their own

¹⁷ Brandon Donnelly. Use-it-or-lose-it entitlements. <https://brandondonnelly.com/2022/10/10/use-it-or-lose-it-entitlements/>

work crews and machinery that build the final product. Not all developers have the same financing abilities, staff capabilities, investor outlook, or desire to emulate the structure and organization of other companies or competitors.

While developers that take land through the regulatory process provide, in essence, a highly specialized service to homebuilders that lack it, this is the component of development most likely to be susceptible to speculative activity or viewed as such. However, proper zoning reform, or ‘upzoning’, that addresses land and entitlement scarcity would remove much of the reasons for ‘spot zoning’ speculative activity by making lands identified for growth enabled from the outset to facilitate new housing.

It should be acknowledged that opponents of broad upzoning have noted that such an action could increase land values and consequently profit existing landowners with little benefit to governmental coffers, who would then be responsible to spend significant sums of money to facilitate new housing through the provision of infrastructure.

It is beyond the scope of this report to delve into the debate about increasing land values from upzoning and who profits from it, however, it’s important to note that there is already a policy system in place to capture portions of the land-value uplift to the benefit of municipal governments.

With the passing of Bill 108 and the reform of section 37 of the *Planning Act* that deals with density bonusing (now community benefits charges, “CBCs”), the incentive to under-zone as a method of land value capture to allow for ‘let’s make a deal planning’ has been removed since it is now an automated process.

This is likely a factor for why many municipalities now agree that zoning reforms are necessary despite years of previous opposition. The provincial government should continue to encourage and facilitate progression on upzoning as a method to deal with issues related to land banking, spot zoning, speculation, and ultimately increase homebuilding.

3.2 POTENTIAL FINANCIAL IMPACTS

As part of any consultation process to establish UII policy, the province should ensure that it seeks input not just from typical participants in the homebuilding process (e.g. municipalities, resident groups, home builder associations, planners’ association, etc.) but also include representatives from the construction financing and appraisal industries.

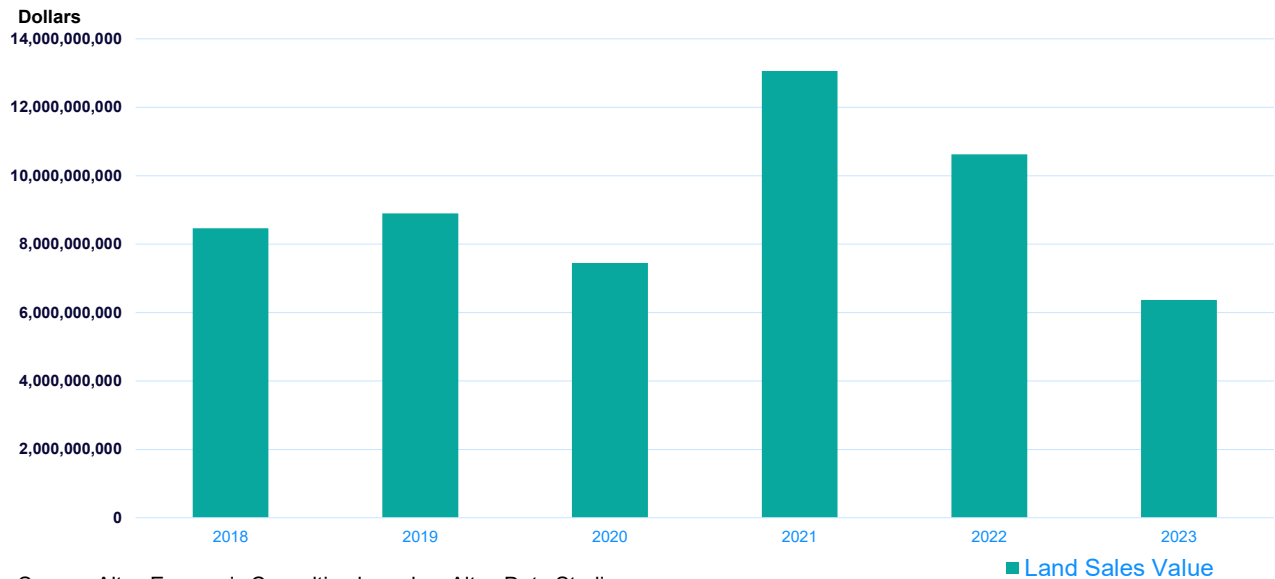
In interviews with senior members of Altus Group’s appraisal team, several serious concerns were raised with a potential full-entitlement loss UILI. First, there was a worry that the banking industry would become more hesitant to finance projects where full-entitlements (i.e. land use designation or zoning) were time-bound to expire as this could increase risks and therefore decrease loan worthiness. At a minimum, the issue was raised that this could increase initial land acquisition financing costs and potentially become a factor when those loans are refinanced at the construction phase of projects.

As well, there was a great deal of concern that a full-entitlement UILI could create large and immediate disruptions within the land market that would significantly impact the normal operations of transactions, similar to what was experienced during the initial onset of the COVID-19 pandemic. Since the appraisal industry has never dealt with such a policy factor before, assessments for sites, which many loans and bank asset valuations depend on, would become difficult to conduct until the market had time to judge the impacts from such a policy change.

Impacting land sales could also have knock-on effects towards the collection of land transfer taxes by both the province and City of Toronto through diminished transactions. Figure 1 shows total residential land sales volumes by dollar value for the Greater Toronto Area (“GTA”) between Q1 2018 to Q4 2023, showing that land sales are already being negatively impacted by the rapid increase in interest rates. A new UILI policy could potentially provide an unwelcomed additional negative disruption to an already weakened market.

Figure 1

Residential Development Land Sales, Greater Toronto Area, Q1 2018 to Q3 2023



The long-term outlook provided on the effects of a full-entitlement UIIL was estimated to decrease the value of entitled sites while increasing the value of non-entitled lands. This is because the value of zoning that entitled lands incorporate within their total valuation would become a riskier and therefore a less beneficial asset to acquire the closer it is to the penalty date. Sites that are without entitlements, but that could potentially acquire them quickly, would become more valuable as a result. These land market distortions could end up affecting municipal finances in various ways.

One effect on municipal finances could be a decrease in parkland dedication cash-in-lieu and CBC contributions as these are based on extracting a portion of the total land value determined close to the building permit stage.

With matured entitled lands close to the penalty date establishing comparable market-prices for developments proceeding towards the building permit stage, the contributions owed to municipalities could consequently be lower than they otherwise would be without a UIIL policy.

Disputes could erupt between homebuilders and cities over how to incorporate valuations of UIIL penalties when determining required contributions, which would ultimately hinder housing construction.

Escalating disputes over valuations would also not be limited to affecting just development contributions. The property tax system also depends on the assessment of land that includes the valuation of development permissions.

Through interviews with Altus Group property tax experts, it was noted that MPAC (Municipal Property Assessment Corporation), which is responsible for setting land assessments for property tax purposes, would have to track entitlement losses and incorporate them within their valuations. Should a UILI policy lead to a significant number of properties losing their entitlements, MPAC would be responsible for updating assessments, which is unlikely to happen if there are many cases of penalties being imposed that make tracking difficult. This is likely to result in escalation of taxation disputes between landowners and municipalities. This could make financial planning more difficult for cities and negatively impact the stability of municipal finances.

The conclusion provided at the end of the interviews was that homebuilding financing partners' paramount concerns are risk management and profitability and won't allow land to be developed at a loss just because there is a UILI policy present. A badly designed UILI could make these financial partners become more hesitant to loan to the homebuilding industry, potentially making financing a new bottleneck to overcome alongside currently anemic economic demand, permitting issues, and construction cost escalation.

3.3 ECONOMICS OF HOME BUILDING

There is a misconception that the ultimate decision to build housing rests with the builder, but this is a misunderstanding of how market forces and development work in tandem. The final choice by builders is dictated by factors also outside of their ability to control as they must have a market ready, able, and willing to absorb the homes they build, otherwise, they cannot make a reasonable decision to proceed with development.

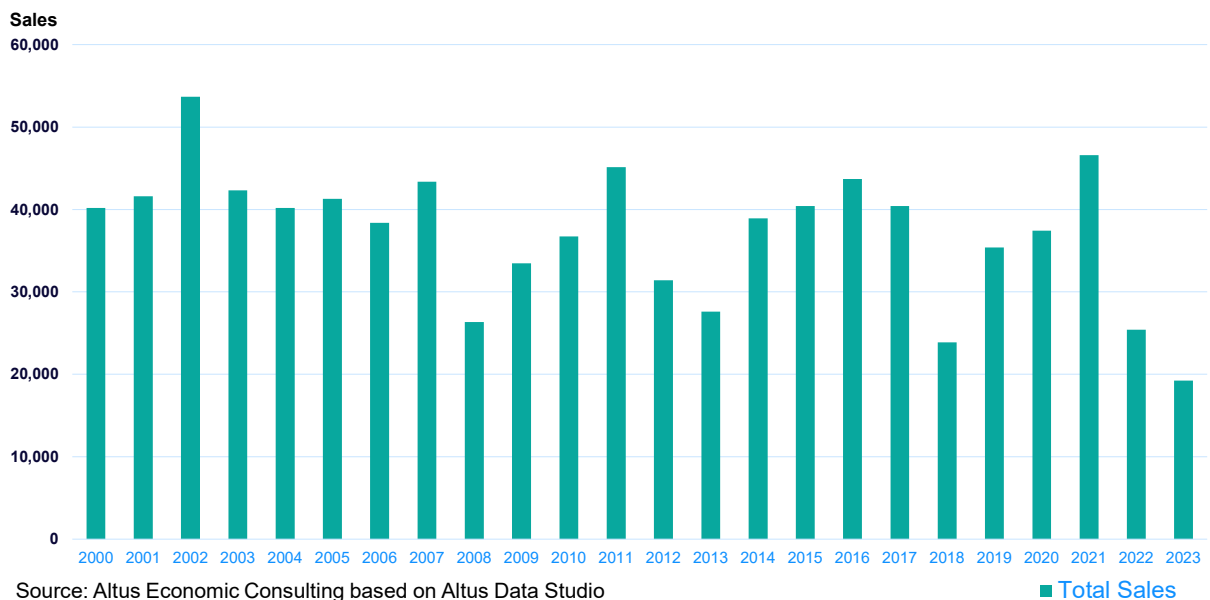
While there is currently strong demographic demand for new housing based on the pace of recent population growth, this factor should not be confused with economic demand, which is the willingness of people to live in a particular type of home, in a specific location, at a given price that covers the cost of development. If it is not possible to recover the cost of construction, land, development charges etc. for a given housing project, not even non-

market or non-profit housing will proceed with development as non-profit housing does not mean ‘no-money’ or ‘lose-money’ housing.

Figure 2 shows the annual new homes sales for low and high-rise development in the Greater Toronto Area (“GTA”)¹⁸ from 2000 to 2023 using information from Altus Data Studio. New home sales are at their lowest recorded point in the 24-years covered by Altus data. This indicates that housing starts are expected to struggle moving forward into 2024 as the high interest rate environment has sapped economic demand for new homes.

Figure 2

New Homes Sales, Low and High Rise, Greater Toronto Area, 2000 to 2023



Unlike CMHC absorption statistics, which are based on occupation of units at completion, Altus sales figures provide an indication of absorption based on market conditions in 6 to 12 months preceding a recorded housing start. This means that Altus absorption data is a leading indicator, whereas CMHC absorption data and housing starts are a more laggard one.

One thing to note about absorption rates is they reflect the planning system limits on what developers can provide the market in terms of housing choices, making it difficult for people to find homes that meet their needs, preferences, and circumstances. As Letwin notes in his report:

¹⁸ City of Toronto and regions of Peel, Halton, York, and Durham

The fundamental driver of build out rates once detailed planning permission is granted for large sites appears to be the ‘absorption rate’ – the rate at which newly constructed homes can be sold into (or are believed by the house builder to be able to be sold successfully into) the local market without materially disturbing the market price. The absorption rate of homes sold on the site appears, in turn, to be largely determined at present by the type of home being constructed (when ‘type’ includes size, design, context and tenure) and the pricing of the new homes built...

...the homogeneity of the types and tenures of the homes on offer in these sites, and the limits on the rate at which the market will absorb such homogenous products, are the fundamental drivers of the slow rate of build out.

Letwin’s view that homogeneous housing options act as a bottleneck to absorption is further reinforced by opinion from the Centre for Cities, which states in their report:

At its core, this absorption rate is an artefact of the discretionary design of the planning system.

If developers could instead just buy land and develop it without applying for a planning permission, then “planning gain” and thereby the absorption rate would both disappear. The price of land would reflect local demand and, as firms would and could only buy what they immediately needed, they would be forced to build new housing as quickly as possible to outcompete rival firms that could now do the same...

A UILI policy cannot correct for a lack of housing options that, in combination with the current high interest rate environment, inhibits absorption rates and makes it infeasible to proceed towards development. While the province has made some efforts at reforming planning permissibility to address housing options and expand the quantum of developable land, much of this work is still in its infancy or incomplete. The work that has been completed to date has had little time for market participants to respond to changes, with the caveat that marginal changes (e.g. accessory dwelling units and multiplexes) will only ever result in marginal impacts.

Depending on a UILI policy before substantive planning reforms are instituted would be a pre-mature step with significant risks. There are foreseeable scenarios where large quantities of approvals could expire just before current economic headwinds recede. This would likely impact future growth recovery as homebuilders, which are a major contributor of general

economic activity, scramble to re-secure entitlements instead of constructing housing as economic demand for it picks up. The bureaucratic system is unlikely to be able to handle such a surge in application in a timely manner that matches economic forces, and therefore a mismatch between supply and demand will persist.

So long as housing demand moves at the speed of economic forces, and the supply of approvals happens at the speed of bureaucracy, there will always be a need to bridge this gap with an inventory of approvals to deal with the uncertainty created by the mismatch.

This is why it is critical to have an inventory of approvals, either by maintaining existing entitlements, having a sufficiently large base-level of as-of-right zoning, or both, to act as a cushion to economic shocks on both the homebuilding and housing demand sides of the equation. Removing this fail-safe device for market shocks could have potential economy-wide implications.

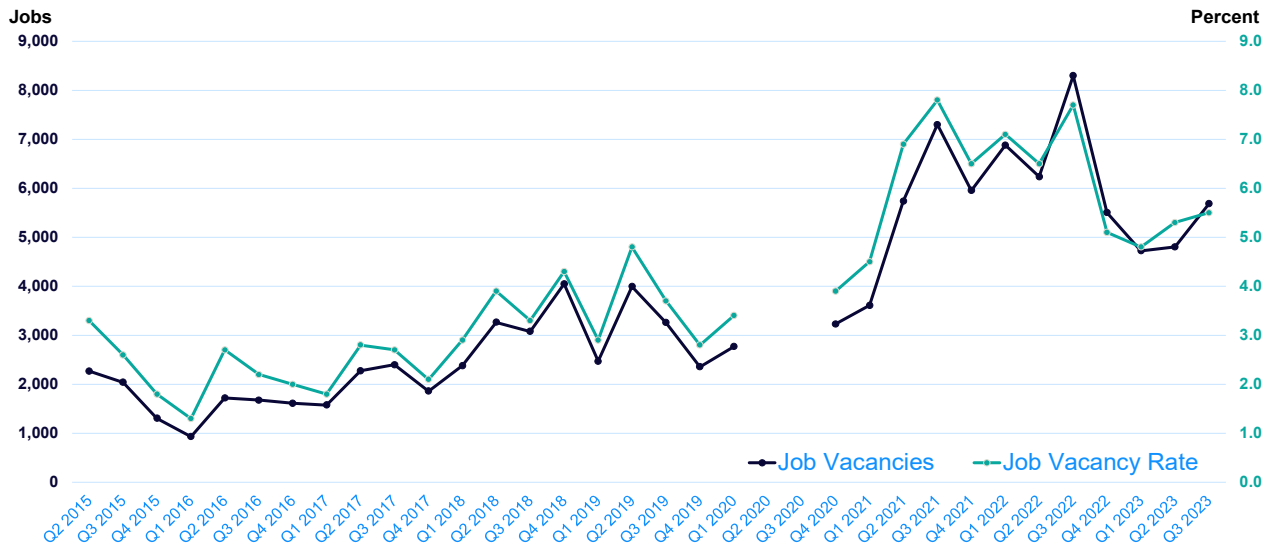
3.4 CHALLENGES IN HOMEBUILDING

While the largest driver for the current lag in construction rates in the immediate term is the lack of new home sales, another large factor is the availability of labour and cost of construction that any UILI policy design will have to contend with to avoid becoming a punitive penalty.

Figure 3 shows the total number of job vacancies and the vacancy rate for construction of buildings in Ontario from between Q2 2015 to Q3 2023. While the construction sector has been able to fill jobs vacancies between 2022 to 2023, the two most recent quarters (Q2 and Q3 2023) have seen vacancies begin to rise again. As well, even after many jobs were filled in 2022, the current rate is still significantly above pre-COVID/ pre-2019 norms, suggesting that labour continues to be a bottleneck on the throughput of the residential construction sector.

Figure 3

Job Vacancies and Vacancy Rate, Construction of Buildings, Ontario, Q2 2015 to Q3 2023



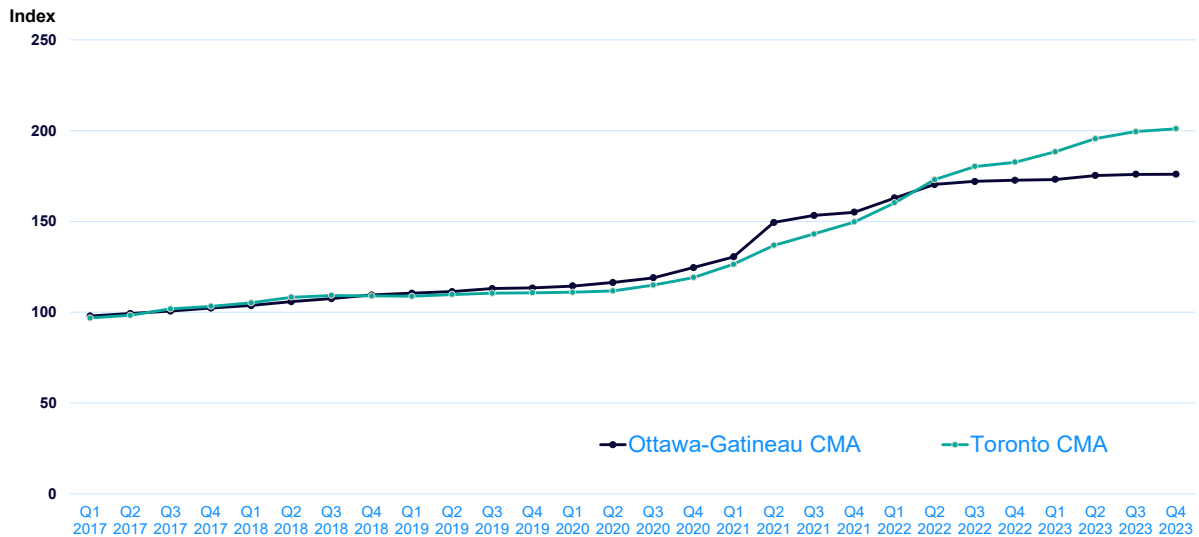
Source: Altus Economic Consulting based on Statistic Canada Table 14-10-0326-01
 Note: Data for Q2 2020 and Q3 2020 are not available due to the COVID-19 Pandemic

Figure 4 shows the Building Construction Price Index (“BCPI”) for residential building in the Toronto CMA and Ottawa-Gatineau CMA, which are the only two areas in Ontario that Statistics Canada covers in analysing construction cost inflation.

While construction cost inflation has levelled off in Ottawa-Gatineau, the price level continues to remain elevated. In the Toronto CMA, construction cost growth continues to increase, albeit it at a diminishing rate. Overall price levels for residential building in the Toronto CMA remain a significant challenge and barrier to homebuilding.

Figure 4

Building Construction Price Index, Residential Buildings, Ontario, Q1 2017 to Q4 2023, Toronto CMA and Ottawa-Gatineau CMA

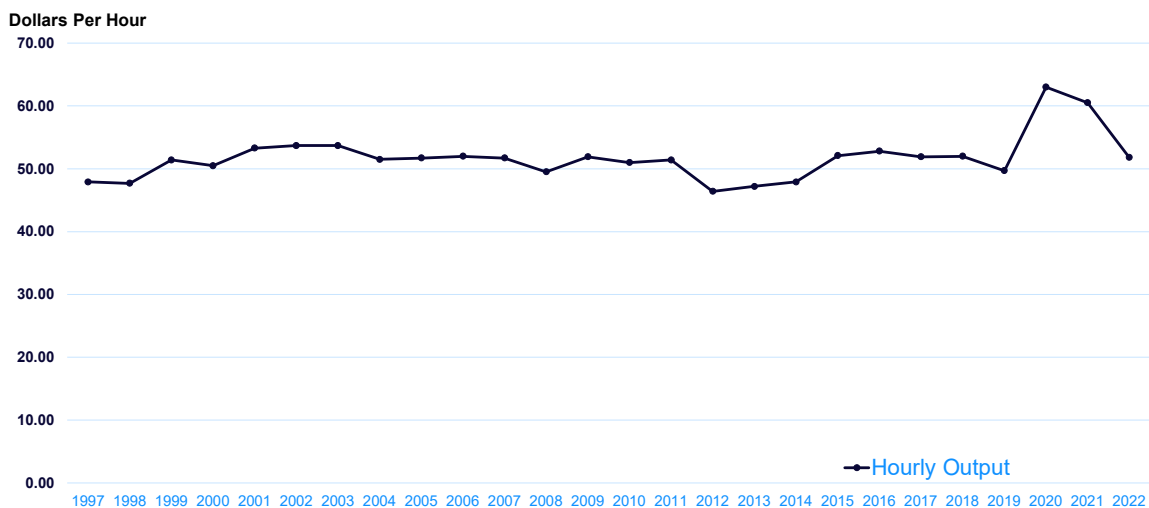


Source: Altus Economic Consulting based on Statistic Canada Table 18-10-0276-01

Figure 5 shows the labour productivity for residential building construction as expressed in dollar per hours worked, chained at 2012 dollars for Ontario between 1997 to 2022. Overall productivity remains generally flat, which is a major issue for the industry in its ability to scale construction levels. Without improvements in long-term productivity, the cost for housing construction will continue to rise, especially under conditions of labour shortages.

Figure 5

Labour Productivity, Residential Building Construction, Ontario, 1997 to 2022



Note: Chained 2012 Dollars Per Hour

Source: Altus Economic Consulting based on Statistic Canada Table 36-10-0480-01

A potentially more beneficial course of action over a UILI policy would be for the provincial government to examine how it can improve construction productivity. One potential industrial action would be to support the development modular or panelised housing construction.

In conversation with modular manufacturers, they expressed that design requirements (e.g. step-back or 'layer caking') hindered their ability to scale production due the complexity that the constraints imposed. While it was possible to use modular housing techniques in instances where there are request for intricate design elements, this would require more individual unique modular types rather than more repeatable ones to facilitate such requirements, removing much of the financial benefits that derive from economies of scales that could otherwise be achieved.

As part of a housing industrial policy, the province should seek to regulate design requirements that municipalities impose on new homes, particularly in relation to angular planes and step backs as they can significantly complicate and increase construction costs with little demonstrable benefits.

This policy proposal was also itself included part of the Ontario Housing Affordability Task Force recommendation 12 c) and d), which stated:

Create a more permissive land use, planning, and approvals system:...

- c) Establish province-wide zoning standards, or prohibitions, for minimum lot sizes, maximum building setbacks, minimum heights, angular planes, shadow rules, front doors, building depth, landscaping, floor space index, and heritage view cones, and planes; restore pre-2006 site plan exclusions (colour, texture, and type of materials, window details, etc.) to the Planning Act and reduce or eliminate minimum parking requirements; and (emphasis added)
- d) Remove any floorplate restrictions to allow larger, more efficient high-density towers.

3.5 UNINTENDED REACTIONS

Where the potential loss from developing a site supersedes the cost of a UILI policy, which is likely to often be the case, the UILI penalty becomes a punitive financial cost creating a scenario where only bad options are available to choose from.

Simply creating a penalty significant enough to rise above the large potential development losses could see homebuilders exit the market en-masse as that

would deny them any profitable path forward and therefore create no incentive to participate in the construction of new homes.

It is imperative that the government understand how actors within a UILL system weigh the cost and benefits of the choices being imposed. While outside observers may determine that a choice has beneficial upsides, frequently viewing this from their own circumstance, this is often not the case for parties that must make a decision and bear the burden of that action.

An example of this lack of foresight into agent decision making is the reaction by municipalities with regards to Bill 109's application rebate program. Whereas the province intended to speed up the application process, the Bill 109 rebate program created a dynamic where municipalities were faced with what they perceived as only two bad options – either approve housing that they've had little say in shaping or lose application fees that fund a large portion of their planning staff operations.

Altus Group Economic Consulting warned about issues related to Bill 109 in its 2022 GTA Municipal Benchmarking Report, stating that:

Given that both municipalities and many applicants agree that the difficulty attracting and retaining planning staff is a major issue that contributes to long approval timelines, removing three-quarters of planning application fees, which go towards funding staff salaries, is unlikely to have any positive effects on the ability of municipal planning departments to be adequately resourced to improve application timelines.

Faced with two highly undesirable options, municipalities opted to seek an unintended third option outside of the original rebate program's design. This resulted in reforms to their development application process in a manner that was beneficial towards retaining application fees but not beneficial to applicants in terms of speeding up approvals.¹⁹ This has resulted in many conflicts between municipalities and the development industry, with numerous cases now being litigated before the OLT instead of more homes being approved faster and built more quickly.

When a system fails to provide appropriately reasonable options to participants, then the actors within that system often try to either find additional options that were not intended, or they seek restitution through

¹⁹ Noor Javed. *Doug Ford new planning rule actually slowing housing construction, say builders*. Toronto Star. Feb 6 2024

other systems of actions. An example of the latter course of action is the award in 2023 to a homebuilder of \$5 million against the City of Winnipeg after a judge in Manitoba found that two municipal planners deliberately stalled a major development at the behest of a local councillor.²⁰

In the Manitoba case, the planning framework could not contain or deal with municipal officials delay tactics, so instead, the developer chose to use the judicial system and seek monetary restitution. A poorly designed UILI program could result in similar cases cropping up in Ontario where municipal officials might find themselves being held liable for actions or lack thereof, especially in cases where actions/inactions now come with potentially serious consequences for homebuilders.

Under a harsh UILI policy system, late communications, delayed permit approvals, postponed construction of infrastructure, and other regular occurrences that can cause delays for a new home project launching would result in directly attributable financial damages. This would create immense amounts of ill-will between participants in the development application process, pushing them farther away from co-operation.

While it is not possible to know exactly how homebuilders are likely to react to a punitive UILI system, such a system is likely to create large inadvertent incentives for developers to seek out third options in whatever capacity that they may find them to be available in. This could also lead to significant amounts of litigation both within the planning regime, as well as outside its framework if parties feel they can no longer find reasonable restitution through mechanism such as appeals to the OLT.

3.6 LACK OF EVIDENCE BASED APPROACH

In order to address issues of speculation and unbuilt housing, better and more publicly available data is necessary, which requires co-operation between municipalities, the provincial government, and the homebuilding industry, as well as transparency with the public.

The need for a public planning information return (“PIR”) was highlighted in Altus Group Economic Consulting 2022 GTA Municipal Benchmarking study. As well, the lack of data guiding planning policy decision making was

²⁰ Jeff Keele. *\$5M awarded to developer after court ruling finds city planners purposely stalled major development*. CTV News. July 2023

noted by the Auditor General in their December 2021 *Value for Money Audit: Land-Use Planning in the Greater Golden Horseshoe*.

While the ministry of Municipal Affairs and Housing (“MMAH”) has taken steps to address the lack of planning data available, these efforts are still in an early phase of development. As well, the data being collected by the ministry does not include extensive historical information, which would be necessary to ascertain the depth of the approval inventory issue.

Organizations, like the Regional Planning Chairs of Ontario (“RCPO”), have claimed²¹ there are approximately 330,000 residential approvals that are ‘development ready’, however, the ability to review this statistic for accuracy or further insights is not possible with the publicly available information at-hand. Making such data available would help to determine what projects are under construction, which are being actively sold, and those that remain unbuilt with no activity.

There is a frequently made claim made by municipal planning officials that municipalities are approving a greater number of homes than are being built. However, there are several issues with the methodology behind these claims.

Using the goalpost of ‘unbuilt units’ as a stand-in statistic for unused approvals has many issues. Beginning with leaving out homes that are under construction, which over inflates the suggested issue. Even after removing the number of homes under construction, the unused/unbuilt approvals statistic still does not fully capture development activity. Further reductions should be made to account for units being actively sold but not yet under construction, otherwise known as pre-construction (‘pre-con’) units in common real estate jargon.

As Ontario’s housing mix has shifted from low-rise to high-rise, lead times in construction – time between a home’s approval to it being built have also naturally increased, contributing to a larger number of ‘unbuilt’ homes. The City of Toronto acknowledged in their Development Pipeline Q2 2022 Profile that construction timelines have escalated as a result of their increasing size, noting:

Over time projects have become larger and more complex and subsequently require a longer review and construction process...

²¹ Thom Hunt, Brian Bridgeman, Steve Robichaud. *Regional Planning Commissioners of Ontario issue inventory of Ontario’s unbuilt housing supply*. Regional Planning Chairs of Ontario. March 2023

There will always be a gap between the number of residential units a municipality approves and the number that get built. This onto itself does not provide proof that there is an issue with land banking and intervention is required to address it, or there is also a sufficient progression of approvals to meet housing demand.

There is a lack of basic data and evidence available to demonstrate a UILI policy is warranted, necessary, or even will be beneficial. While there are anecdotal case studies that are frequently referred to in public discussions, these individual occurrences do not demonstrate that there is a systematic problem that needs to be addressed.

3.7 LEGISLATIVE REQUIRMENTS

Any UILI policy design should include consideration of both the provincial policy framework and municipal official plans to avoid creating unintended inter-policy conflicts that could potentially further delay housing rather than speed it up.

With regards to the provincial framework, land banking is a requirement that municipalities are supposed to indirectly facilitate under the Provincial Policy Statement (“PPS”). As one example, section 1.4.1.b states that municipalities are supposed to provide at least a three (3) year supply of residential homes through suitably zoned lands.

It is not clear how the province can allow municipalities to fully retract entitlements to land (i.e. removing or rewinding zoning and/or land-use designations) as a penalty for failing to build while ensuring that that the requirement for the supply of pre-approved lands is adhered to. Should such a UILI policy system be enacted, the province would have to closely monitor the application of penalties to ensure that no municipality is falling behind their supply requirements.

One issue of note with policy 1.4.1.b is that the requirements to have three (3) years (four (4) years when counting the reporting year) of approved land supply does not distinguish between type of housing. Also, the very concept of having three (3) years supply is based on a heuristic that has not been re-examined for its appropriateness in some time.

The Centre for Urban Research and Land Development (“CUR”) pointed out in a report²² released in May 2023 that:

There is a severe shortage of shovel ready land for ground-related housing single-detached and semi-detached houses and townhouses. The years’ supply is just 1.9 years compared to the required minimum of 4.0 years under the PPS with annual monitoring;

Currently, the inventory of shovel-ready land for ground-related housing is in a serious deficit of 4,817 net hectares (10,346 net acres) to satisfy the PPS’s minimum inventory requirement.; and

The supply of shovel-ready sites for apartments exceeds the minimum PPS requirement,

They recommended that:

...the Province should:

Put more emphasis on increasing the supply of affordable options which are closer substitutes to ground-related housing (e.g., stacked townhomes, garden apartments and quadruplexes) than high-rise apartments; and

Make maintaining an ample supply of shovel-ready land by unit type by municipalities a high priority of the provincial government. That is, municipalities must monitor their shovel ready land inventories regularly in compliance with the Provincial Policy Statement (Policy 1.4.1b)...

The analysis in this paper is based on the **minimum** shovel-ready land requirement of the PPS. Our research suggests a need for a minimum shovel-ready inventory of five to six years with annual monitoring to provide a competitive land marketplace allowing for choice and uncertainty about the future. (emphasis added)

The proposal put forward by CUR compliments the observations made in both the Letwin and Centre for Cities reports that restrictive zoning, a lack of approved lands, an uncertain regulatory approval environment, along with homogeneous supply in many locations regulate absorption rates and are major causes of bottlenecks for new home construction.

By reforming policy 1.4.1.b to separate housing supply by type and increasing the requirements for the supply of land, the province would be achieving the objectives of a UILI policy to increase housing output without

²² Frank Clayton, David Amborski, Graeme Paton. *Expanding Housing Supply and Improving Housing Affordability in the GGH Are Pipedreams Without an Ample Inventory of Shovel-Ready Sites*. Centre for Urban Research and Land Development. May 2023

the complications involved in how such a policy can co-exist with other policy, economic, and financial considerations.

With regards to the mechanics of how a zoning UILI would operate, it is not clear how such a policy would be consistent with the requirements of *Planning Act* sections 16(9) and 26(9), which deal with updating zoning by-laws after a new official plan or official plan update have come into effect.

In many cases, municipalities regularly fail to update their zoning to bring them into conformity with official plans within the prescribed timelines, facing no sanction or oversight action by MMAH. It is often incumbent on landowners to bring their sites into conformity through site-specific rezoning requests.

If a zoning UILI policy were to come into effect that imposed on site-specific rezoning requests, clarity would have to be provided by the province as to how situations would be dealt with where zoning would revert back out of conformity with official plans or provincial policy.

While a possible solution would be to revert both official plan and zoning together, this would then conflict with PPS and Growth Plan requirements for designating land supply, providing housing options, etc. and potentially conflict with municipal policies such as phasing.

In both Oakville and Milton, several secondary plans have phasing requirements that stipulate between 60% to 75% of the gross developable area needs to have approvals of draft plan of subdivision, registered plan of subdivision, or site plan approval before allowing the next phase of development to commence. Depending on the UILI design, this could result in lands within later phases being denied the ability to proceed forward with development on expected timelines as applications in earlier phases must be redone.

It should be acknowledged that not all possible iterations of UILI necessarily have the potential to create significant conflicts with provincial or municipal policies. It is possible to design a UILI policy that compliments provincial housing objectives, however, the scope of such a policy would be narrow.

Where there are water and wastewater limitations, a potentially beneficial UILI design would be to provide a time-bound expiry in relation to servicing allocations. In these instances, if a homebuilder is not ready to proceed with

development, a servicing allocation UILI mechanism can help to prevent delays to others that are prepared to move forward.

This UILI penalty would result in the homebuilder moving to the proverbial back of the line and having their servicing allocation redistributed to others that are ready to proceed, which would incentivize homebuilders without having entitlements, which are a key component to the economic value of their land, being infringed upon.

4 UILI BEST PRACTICES, RECOMMENDATIONS, & CONCLUSION

4.1 USE IT OR LOSE IT BEST PRACTICES

While no public announcement with details has been made at the time of this report on the exact nature of the Use It or Lose It (“UILI”) policy being potentially considered, based on the previously conducted analysis, several best practices can be contemplated for a wide range of potential policy structures. These include:

- Requiring municipalities to conduct a self-financed background study to implement a UILI by-law that:
 - Outlines the geographic area that the UILI policy would apply to;
 - Demonstrates a need for such a policy by providing information on the number of approvals not yet under-construction;
 - Sets out the length of time approvals has not been used for;
 - Specifies the entitlements that the policy would apply to; and
 - Requires periodic (e.g. annual) reporting updates for the by-law to stay in effect.
- Providing for provincially statutory exemptions, including:
 - For sites with occupied residential and commercial tenants;
 - For projects that include an affordable housing component;
 - For applications that have been delayed by either a provincial or municipal agency (e.g. planning department, ministry of transportation, OLT, etc.)
 - Where there are reasonable demonstrable extenuating circumstances:
 - Trades or services necessary to construct housing are unavailable;
 - Economic shocks such as a slump in new home sales ; and
 - Where infrastructure construction or lack of availability impacts a site.
- Considering additional conditions that municipalities should meet before being permitted to bring a UILI by-law into effect, including:

- Having zoning within the area of the UILI up-to-date and in conformity with provincial policy and official plans;
- Requiring municipalities have more units approved than being considered at the OLT;
- Removing sites where a UILI has been applied to against phasing requirements in secondary plans to avoid hindering other projects.

The province should also outline when and how an appeal can be made either against the entirety of a by-law or in its application in specific circumstances. As well, notice requirements to entitlement owners should be detailed for both the adoption of a UILI by-law and when municipal decision makers choose to apply it in specific situations. Finally, the province should lay out when and how potential extensions can happen or must be provided to avoid the appearance of favouritism or politicization of the process.

4.2 CONCLUSION

A UILI policy cannot change economic factors that regulate home building, such as a lack of sales or high construction costs. If a project is slated to lose a significant amount of financial value should it be forced to proceed, then the net result will be for land to lose the entitlement rather than for home construction to commence as financing partners will not support projects that are not profitable.

There are significant and serious risks to both the homebuilding industry and wider economy that a UILI policy could create with unintended outcomes. This could de-stabilize valuations and make future projects riskier to finance. This could also lead to higher costs to homebuyers and create more economic uncertainty.

The most fruitful application of a UILI policy would be around servicing allocations. There are instances where development can proceed but due to infrastructure limitations and allocations being tied-up elsewhere, they are unable to move forward. Should the province feel the need to implement a UILI policy, then it should focus its efforts on this aspect of development, however, keeping the scope as narrow as possible to avoid negative externalities.

While the current bottleneck in home construction is a lack of economic demand, this will not be the case forever. The government should use this

interlude period before the next economic expansion to create more opportunities for home building by reforming provincial policies and municipal zoning, regulating design guidelines to lower their complexities, and investing in the adoption of innovative construction techniques. This will help to reduce costs, increase housing options, increase competition between builders and ultimately help to address the affordability crisis with much greater gains than any UILI policy can provide in the short or long-term.