AdvantAge Ontario

Advancing Senior Care

Submission on *Bill 141: Life Lease Act, 2023*

February 7, 2024

Submission on *Bill 141: Life Lease Act, 2023* February 2024

Introduction

For more than 100 years, AdvantAge Ontario has been the voice of not-for-profit seniors' care in Ontario. We represent close to 500 providers of long-term care, seniors' housing, supportive housing, and community service agencies, including 98 per cent of all municipal long-term care homes and 83 per cent of all not-for-profit long-term care homes.

We are the only provincial Association representing the full continuum of seniors' care and the only one representing life lease operators in the province. The Association has consulted with dozens of our members with life lease housing who provided valuable insights to the proposed *Bill 141: Life Lease Act, 2023*, which we have outlined in this submission.

We appreciate the opportunity to share input on behalf of our members to the Standing Committee on Heritage, Infrastructure and Cultural Policy. Our submission provides valuable insights from the perspective of the not-for-profit seniors' housing sector. We provide both overall comments on the Bill, as well as comments specific to its separate sections.

Our Association acknowledges that Bill 141 will set the legislative framework for operating life leases in Ontario, which is a significant sector that contributes to providing affordable housing for seniors and currently does not have governing legislation.

However, this sector is very complex to understand as there are many different approaches that have developed over many decades and have existed – based on the needs and wishes of the residents living in these communities.

Additionally, it is governed by over a dozen pieces of legislation. Thus, it is important to ensure that provincial-led legislation accurately captures these elements. It is also important to ensure there is a compelling reason to directly regulate life leases in Ontario, and if there is a compelling reason, that legislation should reflect the diversity and flexibility of the sector.

We are also aware that there are many elements in the legislation that require further specification on the obligations of sponsors through the regulations, which have yet to be drafted. Therefore, we strongly recommend that the responsible ministry consult extensively with the life lease sector in Ontario before proceeding.

Most importantly, the legislation appears to be drafted with limited understanding that life leases in Ontario do not operate as they do in Manitoba, the jurisdiction on which the Bill seems to be based on, nor are they residential tenancies.

We are deeply concerned that this proposed legislation could result in limiting the development of future life lease projects and compromising the stability of current life lease communities, which are an important affordable housing option for seniors. This would not be desirable, particularly given the province's commitment to providing housing solutions that respond to the needs of Ontario's seniors. Life lease housing has filled the void left by the reduction in government-funded housing programs for not-for-profit operators over the decades. Therefore, any legislation that deters future life lease development will have serious consequences for the continued viability of this much needed industry.

Overall Comments on the Bill

Unclear Rationale for Legislation

Although the life lease sector in the province has been absent of government regulation, it has evolved over the years into a viable and valuable option for providing much needed, affordable housing and support services to help seniors age in place.

These projects are almost exclusively run by not-for-profit organizations, some of which also serve specific cultural or religious groups. The characteristics of life leases in the province are very diverse and truly depend on the needs of the community. Many operate on a campus of care and are co-located with other seniors' care services, such as supportive housing, long-term care, or retirement homes.

Not-for-profit life lease operators play a crucial role in the continuum of care for seniors by offering an option to age in their communities with autonomy and dignity.

The purposes for regulating a sector that has worked well up to now without a legislative framework are not clear. While the intention of this legislation could be setting guidelines for operating life leases and protecting the rights of purchasers, this is not apparent in this draft of the Bill, and it does not consider the financing and operational needs of sponsors.

We recognize that one of the potential benefits to regulating this sector could be related to security for developers in financing capital costs to build life leases, as sometimes finding funding for this sector might be challenging. However, we have heard that financing for capital development is typically not an issue as credit unions and other lenders recognize the positive health and socio-economic impacts to communities of these projects.

It is important to recognize the potential downsides to regulating the life lease sector and the disproportionate effects on access to affordable seniors' housing, given that most life lease projects are developed by charitable, non-profit, or municipal organizations.

If not done properly, it could potentially have negative effects on innovation and flexibility to tailor projects to local needs, driving up the costs of life lease housing and leading to project delays. Because life lease is working in Ontario, any benefits to regulation are outweighed by red tape and the administrative and financial burden that it will place on sponsors.

The province should consider the impact of prescriptive regulation on the not-for-profit delivery of seniors' housing, and whether legislation will reduce access to safe and affordable options for seniors' independent living at a time when efforts need to be focused on increasing affordable housing supply.

To mitigate this risk, we recommend that the Standing Committee carefully evaluate the consequences for passing this legislation and gather a full scope of its impact on existing providers. Understanding that this legislation has so far moved fairly quickly through the Legislature without consultations with the sector, the unintended risk of reducing access to safe and affordable housing for seniors is high.

General Application

The proposed legislation seems to be influenced by life lease legislation in Manitoba. This needs to be reconsidered as there are many elements of the sector that are unique to Ontario, outlined in this submission, and it needs to reflect the context of the province we are in.

The Bill uses terminology from the *Residential Tenancies Act, 2006* (the "RTA"), for example, "tenant", "landlord", "lease" and "tenancy agreement". The RTA does not generally apply to life leases, and using the RTA's terminology may confuse seniors and other prospective purchasers and may suggest that the RTA does apply to all forms of life lease.

We do not believe that life lease in Ontario requires governing legislation, but if the government decides to proceed with the legislation, it should avoid the potential for confusion, especially in a consumer protection context.

The term "rental" is also used quite often and should be removed throughout the legislation, as it is a completely different form of housing. If life lease were to be incorporated under the *Residential Tenancies Act, 2006,* it would change its makeup entirely and deter the ability of sponsors to finance and develop further life lease projects.

Occupants of life leases live in residential units, not rental units, and they pay monthly occupancy fees, not rent. These fees are paid to the operators to provide the services that the resident needs to live independently, such as maintenance, dining or housekeeping.

Furthermore, life lease agreements in the legislation are described as "tenancy agreements", which is also not accurate as they should be described as contracts or agreements between the sponsor and the occupant since they fall under Contract Law and not the *Residential Tenancies Act, 2006*. Life lease operates as a separate entity that is atypical to a condominium structure. The legislation also does not recognize that each life lease agreement is unique based on the sponsor's operational needs and that there are numerous models of life lease in existence in Ontario, including Declining Balance, Fixed Value, Market Value, etc.

There are several inaccuracies and outdated requirements that are specified in the proposed legislation, with one example being the definition of "occupancy date" in the legislation. The reference to an occupancy date meaning *the first day of the month after the month in which an occupancy permit for the complex is issued by an authority having jurisdiction to issue the occupancy permit,* is not relevant as occupancy permits are no longer issued by municipalities.

There needs to be a better understanding of how agreements are structured in the life lease sector in order to accurately describe it in the legislation. For instance, life lease agreements can be arranged when the occupant wants to purchase an interest in the property that offers affordable housing with fewer maintenance responsibilities and accessible social and health supports to live independently in the community.

Additionally, the proposed legislation does not specify the eligibility criteria for occupants. Assuming that the regulations would share more details, legislation should acknowledge that life leases are for seniors typically above the age of 55 and sometimes for their caregivers/families.

Lack of Flexibility for Innovation

Any legislation that regulates life lease housing needs to support and encourage the flexibility, innovation and creativity that have contributed to the success of existing projects. It should be designed to avoid negative impacts on pre-existing life lease agreements, which might compromise the stability of existing life lease communities and the investments of the seniors that have chosen to live in them.

We understand that the legislation and its regulations will apply to every life lease unit that comes into existence before or after this Act comes into force. However, there are many requirements in the legislation that are restrictive for existing operators, especially those who have specific by-law policies that may not allow them to easily adjust to these requirements.

Part of the attractiveness of life lease for not-for-profit organizations is the flexibility that they provide. This legislation may eliminate that aspect and limit the development of future projects that are tailored to address community needs. Some type of grandfathering clause for existing life lease projects will help current providers stay in the business.

This legislation does not acknowledge the operational and governance differences, and this will have negative impacts for sponsors who are not able to amend life lease agreements on existing buildings.

It is also important to consider that some life lease buildings operate under different legislations, such as those that provide assisted living services and refer to the requirements under the 2023 Assisted Living Services Policy. The reference to existing agreements must include a provision that the regulations will be introduced through attrition/resales of existing units.

Without any flexibility to meet the proposed requirements, it will be very challenging to get buy-in from potential developers and it will allow existing operators to consider exiting the market.

There are other conditions in the legislation that do not depict how life leases can operate, such as *the right of occupancy for life or for a fixed term of not less than 50 years*. While the average stay for life leases is 10 years, some operate under shorter fixed terms, or the majority can run into perpetuity.

Some life leases may also offer the right to transfer to a beneficiary under the resident's will or have succession agreements. These conditions, among many others listed throughout this submission, do not allow for much flexibility to develop life lease agreements based on the unique needs and characteristics of community members.

To continue to support and grow this significant sector, we strongly recommend that the province consult with the sector to get an accurate understanding of how life leases operate and how different they are from one another.

Section-Specific Comments on the Bill

Payments and Disclosure

We understand that the proposed legislation requires the disclosure of information to the purchaser before the occupancy date, including estimated entrance fees, completion dates, and any other information that the regulations under the Bill may require. We recognize that the form of disclosure will be set through the regulations. Most life lease agreements already contain disclosure provisions; however, the type of disclosure is based on the unique operational requirements of each sponsor.

Although these requirements will be helpful in ensuring that the disclosure requirement is carried out in a completely transparent and consistent manner, it is important to acknowledge that most life leases operate at market value and likely do not use deposits nor entrance fees. Occupants typically remit a prepayment amount or may use the deposits as part of the purchasing process.

Many operators also disclose a variety of different corporate and operating policies before entering into agreements, such as guest policies, requirement for residents' association, admissions and eligibility, standard of independence, and transfer fees.

Many life lease operators have a Standard of Independence Policy, which outlines considerations for when the occupant can no longer be independent and would need the support of the sponsor to work through the next stage in getting the care they need.

Additionally, the timeline of 14 days for pre-lease payments in legislation is very tight and does not depict real life circumstances. A more appropriate timeline would be 30 days to allow the trustee and sponsor negotiation time with the purchaser.

Entrance Fees Held in Trust

The requirements related to entrance fees being held in trust and for sponsors to appoint a trustee to receive and administer entrance fees can be restrictive as some homes do not have a trustee, and instead have a lawyer who handles these matters in accordance with the *Trustee Act, RSO 1990,* which is not mentioned in this legislation. Although a trustee is a prudent requirement for the initial residents of a new life lease project, this typically is not a requirement for subsequent purchasers as the life lease is simply being transferred from one resident to the next and there are no development risks associated with such transfers.

While there are many requirements with respect to the responsibilities for trustees, there are no guidelines for how to appoint one and the qualifications are not clear.

As mentioned above, most of the time, corporate lawyers may act as the trustee who is then responsible for handling the finances and transferring fees including the reserve fund in accordance with the *Trustee Act, RSO 1990*. This is another example of where this legislation needs to acknowledge and reference existing legislative frameworks that life leases currently operate under.

Furthermore, there are other areas of this legislation that require details that are of sufficient importance to be in the Bill itself and not just the regulation.

Section 19 leaves to the regulation to identify the requirements that the sponsor must meet before the trustee can release deposits or entrance fees as well as the permitted use of funds.

Section 8 (2) leaves to the regulation the circumstances in which a sponsor must refund a deposit or entrance fee in full.

These are significant sections that should have clarity in the legislation.

Permitted Payments

The requirements that detail when entrance fees are permitted can add additional cost burdens to the transfer process by having the trustee be involved with the refund as outlined in Section 5 (5): A landlord may receive or permit a trustee to receive an entrance fee from a tenant if, (e) *where the entrance fee is refundable, the landlord has appointed a trustee to administer a refund fund*. If it is already outlined in the agreement, there is no need for this additional step.

Sections 5 (2) and 5 (4) are also unclear as written and/or the intent of the clauses are unknown.

Pre-Lease Payments

While the conditions of cancellation rights make sense, Section 7 of the Bill states that a sponsor must refund a pre-lease payment *if becomes reasonable to conclude that the development of the residential complex will not be completed by the projected completion date disclosed*.

This is unnecessarily inflexible, and sponsors should have the ability to amend completion dates to reflect reasonable or unavoidable delays, such as labour issues and/or bureaucratic delays.

This requirement can have negative impacts on not-for-profit sponsors who need these funds to secure financing for paying off capital loans. The inflexibility of the requirement may also penalize the sponsor for circumstances that are beyond its control.

It is also unclear what happens with respect to the sponsor's obligation to refund the payment if the tenant wishes to continue his or her involvement in the project and accept an amended completion date.

Section 10 also specifies requirements related to the failure to give possession including that, *a tenant of a rental unit who has not been given vacant possession of the rental unit 30 days after the projected completion date may, by written notice to the landlord before being given vacant possession of the unit, cancel his or her life lease*. While the intention to protect the rights of occupants is understood, 30 days is not reasonable given the risks of construction delays and labour strikes that may occur. A more reasonable timeframe would be 90 to 120 days.

Additionally, the requirements in Section 11 pertaining to the sponsor to give written notice of notice of the possession date to be at least 60 days is not enough time, as most residents will have to sell an existing home. Five to six months is a common notice period for occupancy and would be more reasonable.

Reserve Funds, Insurance and Annual Reporting

This section should require a reserve fund study to be completed within the first year of operation and no less than every five years thereafter. The study should be undertaken by a qualified engineering firm and the monthly contributions remitted by residents must comply with the study recommendations.

Section 12 of the legislation outlines the requirement for prescribed sponsors to, *at all times after the occupancy date of the complex, maintain a reserve fund to pay for any unforeseen major repair to or replacement of assets of the complex, including, without limitation, roofs, exteriors, buildings, roads, sidewalks, sewers, heating, electrical or plumbing systems, elevators and laundry, recreational and parking facilities.*

While we understand that further explanation will be provided in the regulation, the legislation shares no detail to specify who these prescribed sponsors are, how they will be selected, and for what purposes.

Details on how the reserve fund may or may not be used will limit the sponsor's financial budgets and quality of services. Flexibility on the collection and use of reserve funds is necessary, as are reserve fund studies, in order to accurately analyze the unique needs and characteristics of each life lease project.

The requirements under Section 12 of the legislation, regarding the use of reserve funds, should refer to the requirement for the funds to be held and invested under *the Trustee Act, RSO 1990*, to help provide occupants with additional protections.

Additionally, there are requirements related to the use of reserve funds that do not take into consideration the current operation of life leases, such as Section 12 (2) *under no circumstances shall the reserve fund maintained for a residential complex be used for any purpose related to another complex.*

This requirement will create significant limitations for sponsors who have life lease arrangements that are physically located within retirement or long-term care home settings and have shared operating budgets, thus relying on the reserve funds collectively.

We recommend the following amendment to subsection 12(2) of the Act to provide some flexibility: "(2) the reserve fund maintained for a residential complex shall not be used for any purpose related to another complex, except as permitted by the regulations."

In addition to repairs and renovations, sponsors may use the reserve funds for emergencies and capital development to expand their projects, which may come out partially from monthly fees if the reserve fund is not enough to cover the rising costs.

In many cases, some organizations are using other assets and revenue streams to support life lease, such as capital reserves. Having existing buildings meet specific capital reserve allocations could create a hardship for residents when the parent organizations have other sources to contribute. It would be helpful to create exemptions or grandfathered clauses for parent organizations that have shared budgets to support capital needs rather than ensuring a separate reserve fund.

One of the advertised benefits of many life lease communities is that occupants may have access to amenities and services, including some care services, of the adjoining or co-located retirement, long-term care, or assisted living in supportive housing facilities.

These different types of accommodation may even be operated by the same charitable or not-for-profit operators as part of a seniors' community – in other words on a campus of care.

Meetings

The legislation puts significant focus on resident engagement and participation in life lease governance and operating matters.

While the intention of setting such requirements may be to increase transparency and improve communication, it is important to consider that many life leases have different approaches to engagement, which is unique to their own situations and not reflected in the legislation.

Some life leases allow occupants to attend certain board meetings as listening participants, and some have resident advisory committees in lieu of resident participation in the Board of Directors. Also, given the age of the resident population in life lease projects, many residents simply wish to enjoy their retirement without the necessity of participating in the management of their building. This is one of the marketed benefits of a life lease: affording the residents the ability to be free of the worries and headaches associated with the care or maintenance of their home.

Notice of Board Meeting

The legislation outlines requirements to ensure representation has been selected by other occupants in accordance with the regulations but details a lack of clarity on how representatives are selected, how many are selected and their duties.

As part of section 15 (2), which outlines the right of *a tenant representative, or his or her alternate, is entitled to place matters on the agenda for a board meeting and to attend and speak at the meeting,* we recommend a Residents' Association be required (many life lease operations already have one) and that the chair of the Association be a member of the Board.

While engagement is important, it is also important to consider that life leases have different operating policies that do not allow the involvement of occupants in any board meetings as they might be related to governance and have specific by-law requirements that prevent them from doing so.

The requirements pertaining to the representative having the right to attend board meetings, to add items to the meeting agenda, and to speak at the meeting will be challenging for sponsors to implement, especially if their board meetings relate to governance matters with voting obligations that are restrictive towards occupants.

Some life leases are part of a much larger organization that has shared governing structures, so resident participation, copies of minutes and audited statements are difficult to distribute as they are time consuming to produce and may be meaningless to the residents.

Many of our members noted that they cannot allow occupants to attend board meetings due to confidentiality of personal information relating to occupants and staff personnel.

While our concern is partially acknowledged under Section 15 (3) of the Bill, that a *landlord may restrict the rights of a tenant representative under subsection (2) to matters that do not involve personal information pertaining to individual tenants or to personnel of the landlord,* the ability to restrict participation should be broader and extend to matters that do not relate to the complex.

Audited Financial Statements

The requirement pertaining to sharing copies of the meeting minutes to the occupant representative is also subject to privacy concerns mentioned previously, especially if discussion items include confidential health information of occupants. This contradicts the following requirement in Section 16 (3), that *the landlord must take reasonable steps to avoid disclosing personal information pertaining to personnel of the landlord.*

Furthermore, there are also requirements in the proposed legislation pertaining to prescribed sponsors (to be identified in the regulation) to – at the request of the majority of occupants -- obtain and provide a copy of the audited financial statements for the complex for the preceding and subsequent years.

Life lease sponsors have different governance structures that may not allow them to share such information, and this will require tremendous time and resources to meet such requirements.

Finally, the requirement to have four meetings a year is unnecessary and inefficient. Two meetings a year, which is what typically currently happens, is more than sufficient.

Rather than prescribing a specific approach to occupant engagement, life lease sponsors should, as part of the initial disclosure, describe the nature and extent of involvement that will be available based on their own governance structures.

The requirements in this proposed Bill are very restrictive and technical, modelled after landlord and tenancy agreements, and are not conducive to life lease agreements.

Offences and Penalties

The legislation sets out penalties for the offence of false or misleading statements relating to the making or development of the complex as well as any contraventions.

While it is important to hold those accountable for perpetrating those residing in life leases, it is also important to acknowledge that it may be difficult to find and hold board members under threat of such penalties. This risks the viability of life lease projects generally.

Creating strict enforcement mechanisms for a sector that has never been regulated before in the province and yet continues to work well in communities can deter potential sponsors who want

to enter the business or even existing ones who may need to carry out transformative changes in order to meet these requirements.

We recommend that the Act incorporate exemptions and mitigations for penalties for not-for-profit sponsors and members of not-for-profit boards.

Conclusion

As the only Association representing life lease providers in Ontario, we have the experience and expertise to provide meaningful feedback on the proposed *Bill 141: Life Lease Act, 2023,* in consultation with our members.

As there are several substantial challenges outlined in this legislation as proposed, we strongly recommend that extensive consultations with the life lease sector occur before any Bill is passed to get a comprehensive understanding on how they are built, operated, and governed.

This is crucial to ensure any legislation supports the innovation and diversity of this sector's current landscape that provides affordable housing for seniors.

If the province undertakes this level of legislating and regulating life leases, sponsors will need the administrative resources to carry out these requirements. If these resources are not provided by the province, they will increase the cost of this option, which is the last thing we want in a housing affordability crisis.

The Association is also a provider of education for the seniors' care sector and would be happy to support any new requirements with education and training for life lease operators.

We hope our feedback will be considered by the Standing Committee on Heritage, Infrastructure and Cultural Policy and that the legislation can be restructured to accurately reflect the operation of life leases in Ontario.

Information Contact:

Lisa Levin
Chief Executive Officer
905.851.8821 x 230
llevin@advantageontario.ca