The International Municipal Lawyers Association
82nd Annual Conference
Niagara Falls, Ontario, Canada
October 14-18, 2017

Tuesday, October 17th

University Cities Section Meeting: Issues in University Cities in Canada with Cross-Border Relevance

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Student Housing Challenges and Solutions in Oshawa

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[1] This paper was prepared for the International Municipal Lawyers Association 82nd Annual Conference at Niagara Falls, Ontario, Canada, October 14-18, 2017. The views expressed in this paper are the writer's, not necessarily consistent with the views of Council of the City of Oshawa, Ontario, Canada and are not a substitute for the reader's independent legal advice.

1. Oshawa, Ontario – A "Teaching City"

Oshawa, Ontario, has a proud history as a manufacturer of General Motors vehicles. More recently, Oshawa has also emerged as a college and university town. Oshawa is home to the Province of Ontario's newest University, the University of Ontario Institute of Technology ("UOIT"). It is also home to Durham College and to a campus of Trent University. Queen's University's Department of Family Medicine has established a program to train family doctors at Oshawa's Lakeridge Health.

In June, 2017, Oshawa, Durham College, UOIT, University of Toronto and Canadian Urban Institute struck a memorandum of understanding to develop Oshawa as a "living laboratory" and to establish the City as one focused on experiential learning, applied research and innovative teaching partnerships to address urban issues.[2]

University and College capital projects, employment and other operating expenditures are a driving economic force in Oshawa. Their contributions toward the diversification of the local economy are significant as noted in a 2010 staff report to Oshawa Council recommending a "Student Accommodation Strategy":[3]

> *"Post secondary education is an important part of Oshawa's future. Both the City's Community Strategic Plan and the Community Adjustment Strategy recognize post secondary education as critical in diversifying and growing the City's economy into one which is more knowledge based and capable of capitalizing on future trends and opportunities. Integral to the growth of post secondary education in Oshawa is the provision of an adequate supply of accommodations for students, both off-campus and on-campus, in appropriate locations and land use compatibility."*

Local economic success and adequate student accommodation are inextricably linked. To this end, the report's 37 recommendations focus on increasing the supply of residential accommodation in key arterial corridors in compliance with Provincial, Regional and City planning policy and widely held planning principles. Five themes underlie the 37 recommendations:

- Understanding and quantifying the demand for student accommodations;

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[2] http://www.oshawa.ca/modules/news/index.aspx?feedid=0e765813-d33e-4ba5-b464-3e0fff61eab4&newsid=4bdb5066-4102-4345-88f8-91b91ef8a8e7

http://civil.engineering.utoronto.ca/new-partnership-establishes-a-canadian-teaching-city-for-engineering-students/

[3] Report CM-10-11 dated Mar 31/10 to Apr 8/10 meeting of Oshawa Council in Committee of the Whole, "Student Accommodation Strategy": http://app.oshawa.ca/agendas/city_council/2010/2010_04_08_at_630/cm-10-11_student_accommodation_strategy.pdf

- Ensuring there are sufficient opportunities to physically accommodate the demand in the right locations;

- Facilitating the actual supply and creation of student accommodations in the right locations;

- Advancing compliance with City by-laws that regulate such matters as safety, health and welfare, property standards, zoning and land use compatibility; and

- Establishing Oshawa, its post secondary institutions and Student Association as leaders in the monitoring, planning and provision of appropriate student accommodations, land use compatibility and best practices

Virtually all of the report's recommendations were adopted by Oshawa Council as a "Student Accommodation Strategy".[4]

It is noteworthy that enforcement is only 1 of the report's 5 themes. Enforcement seeks to maintain standards related to the existing supply of student accommodation. However, the report's remaining themes underscore that a proper planning strategy requires consideration of the accommodation supply itself, the compatibility of uses - including various forms of residential uses - and the need for participation by the post-secondary institutions in the development and implementation of the strategy.

This paper overviews the City of Oshawa's student housing challenges and how they were addressed including a Superior Court application for injunctive relief, the establishment of the Province's first municipal residential rental licensing system and the Province's first municipal system of administrative monetary penalties. Ultimately, however, enforcement is concerned only with standards respecting the existing supply of housing options. This paper's key point is that proper land use planning is critical to ensure an adequate supply and variety of housing options serving both students and the community in which they live.

2. Oshawa (City) and Windfields v. Death et al.

Oshawa (City) and Windfields v. Death et al. was a Superior Court application by the City of Oshawa and its co-applicant, The Neighbourhoods of Windfields Limited Partnership, against 43 respondent landlords owning 34 properties adjacent to UOIT in the City's north end. The application sought injunctive and other relief restraining the respondents from continuing to use their properties as "Lodging Houses" contrary to the City's Zoning By-law. Motions by the landlords for an order striking certain affidavit evidence[5] and for a declaration that the

[4] See http://app.oshawa.ca/agendas/City_Council/2010/2010%20Minutes/2010_04_27_Minutes_StudentHousing.pdf

[5] [2007] O.J. No. 3042 (S.C.J.).

definition of "Lodging House" was impermissibly vague[6] were dismissed. Judgment was granted for the City in the application.[7] The landlords' appeal to the Ontario Court of Appeal[8] and their application for leave to appeal to the Supreme Court of Canada were dismissed. The Supreme Court of Canada also dismissed an application for leave to intervene by the Ontario Human Rights Commission.[9] Judgment was granted for the City in subsequent contempt proceedings.[10]

Following is an overview of the *Death* proceedings.

2.1. Planning Background

(a) Official Plan

Like all single and lower-tier municipalities in Ontario, the City of Oshawa ("the City") regulates growth and development through its Official Plan and Zoning By-law 60-94 ("the *ZBL*"). The *ZBL* is required by the *Planning Act* to give effect to the City's Official Plan[11]. The City's Official Plan is, in turn, subject to approval by the Regional Municipality of Durham ("the Region"), the upper tier authority designated under the *Planning Act*[12].

Official Plans of Regional municipalities must include policies and land use designations to implement the intent of the Regional Plan. They must establish processes and principles to guide residential intensification and the conversion of single detached dwellings into multiple units.[13] The City Official Plan allows for residential intensification only through a publicly reviewed process and only where such intensification is consistent with existing housing stock, the potential to accommodate a higher residential density and the community's character[14]. The "character" of a community includes its physical appearance as well as the "pride and industry" of its residents. It is defined by traits including streetscape, architecture, building types, heritage and socio-cultural identities related to common activities, traditions and lifestyle.[15] The Region encourages the maintenance and improvement of existing housing stock.[16]

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[6] [2007] O.J. No. 5081 (S.C.J.).

[7] [2008] O.J. No. 3298 (S.C.J.) ["*Death*"]

[8] [2009] O.J. No. 1324 (C.A.).

[9] [2009] S.C.C.A. No. 253 (S.C.C.).

[10] [2010] O.J. No. 1304 (S.C.J.).

[11] R.S.O. 1990, c.P.13, s. 24(1).

[12] R.S.O. 1990, c.P.13, ss. 17(2) and 17(4); *Death* ¶7.

[13] *Death* ¶8.

[14] *Death* ¶17.

[15] *Callow v. Winnipeg (City)*, [1977] 3 W.W.R. 97 (Man.Q.B.) at 98, varied on other grounds, [1977] 5 W.W.R. 470 (Man.C.A.), *Keystone Trading Inc. v. Toronto (City)*, 2004 CarswellOnt 7605 (O.M.B.) at ¶15.

[16] *Death* ¶8.

The City's Official Plan contains policies applicable to the whole municipality as well as land use designations and policies specifically targeting certain lands. These specific designations and policies are often included as Part II Plans, which become part of the Official Plan.[17] Among the City's Part II Plans is one for the Windfields Planning Area in the City's north end.
The Windfields Planning Area consists of approximately 500 hectares of land. It is bounded by Conlin Road to the south, the two branches of the Oshawa Creek to the east and west and the hydro/gas pipeline/407 alignment to the north.[18]

The Windfields Part II Plan was approved and has been in effect since July 9, 2003.[19] Consistent with the Regional Plan policies, the Windfields Part II Plan contemplates a diversity of housing densities and types throughout the Part II area. Medium and higher densities are directed to the Main Planned Commercial Centre and south from there along Simcoe Street. The area southeast of the Main Planned Commercial Centre and those to the east and north of the Durham College UOIT campuses are designated for lower density residential use.[20]

Included in this area zoned for low density development was an enclave subdivision known as the Neighbourhoods of Windfields Farm ("the Neighbourhoods"). The Neighbourhoods is designated as part of "a safe, liveable, family oriented community that is reflective of, and builds upon, the heritage and legacy of Windfields Farm" and founded on principles that include "a high quality and diverse residential community with attractive neighbourhoods and streetscapes".[21]

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[17] *Death* ¶9.

[18] *Death* ¶10.

[19] *Death* ¶10.

[20] *Death* ¶11. City planning staff and Windfields agreed on the land uses and policy directions for most of the Windfields Planning Area. However, there were issues for which there were significant differences. For example, Windfields proposed low density residential uses along the east side of Simcoe St. N. across from UOIT. City planning staff recommended a commercial plaza and higher density residential land uses in the same area. Windfields' proposal for reverse lot frontages and landscaped berms was also opposed by planning staff. In staff report DS-02-108, the City's Commissioner, Development Services noted:

> "*Windfields/Tribute are proposing a corporate vision for this area which reflects short term marketing objectives. Staff does not share this vision for Oshawa and particularly for this location along a major arterial road, transit spine and opposite the UOIT. Low density development, consisting of only single detached dwellings, hidden behind well landscaped buffers and berms, does not respond appropriately to the City's most significant arterial road and the community's main street. It is inconsistent with contemporary urban planning in North America and contrary to the principles of new urbanism and Smart Growth*."

Planning staff's views on these issues were not reflected in the Windfields Part II Plan, as ultimately adopted.

[21] *Death* ¶18.

The properties the subject of the *Death* Application were all located in the first phase of the Neighbourhoods ("Phase 1"). Phase 1 is all zoned "R1" – the lowest density residential designation - *directly across the road from UOIT*.

(b) Zoning

Zoning by-laws are authorized under section 34 of the *Planning Act* in order to control the use of land, regulate the erection, location, and use of buildings, and prevent development of environmentally unsuitable or contaminated lands. That authorization includes the right of a municipality to prohibit all but one or more uses on specific areas or parcels of land.[22] Zoning by-laws allow municipalities to promote desirable development, prevent undesirable development and limit the use of private property for the benefit of the public good.[23] The purpose of zoning by-laws is to establish a comprehensive and coherent land use scheme by classifying land uses and directing them to specified zones. If a zoning by-law is capable of an interpretation giving effect to that purpose, courts must adopt it.[24]

The City's *ZBL* is a comprehensive by-law that includes eight different residential zoning categories, each with its own permitted use or uses:

R1: single detached dwelling
R2: single, semi-detached, duplex and converted dwellings
R3: street townhouses
R4: block townhouse
R5: single and semi-detached dwellings, semi-detached building, duplex, converted dwelling, apartment building
R6: apartment building
R7: lodging house
R8: correctional group home.[25]

All of Phase 1 was zoned R1, meaning the only permitted use therein was a Single Detached Dwelling.[26]

A Single Detached Dwelling, by definition, can contain only one "Dwelling Unit", i.e. a unit "consisting of one or more rooms, which unit contains toilet and cooking facilities and which is designed for use as a single housekeeping establishment". The term "single housekeeping establishment" is not defined in the *ZBL*.[27]

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[22] *Death* ¶19; *R. v. Konakov* (2004), 69 O.R. (3d) 97 (C.A.), at ¶5 and 12. ["*Konakov*"].

[23] *Konakov*, at ¶7 and 18; *Toronto (City) v. Williams* (1912), 27 O.L.R. 186 (Div. Ct.) at 191.

[24] *R. v. Brown Camps Ltd*., [1970] 2 C.C.C. 363 (Ont. C.A.) at 365.

[25] *Death* ¶20.

[26] ZBL section 2, *Death* ¶20 and 54.

[27] ZBL section 2. See section 2.3 "Meaning of 'single housekeeping establishment'", below.

However, the *ZBL* does establish gradations in residential densities through the definitions of different types of uses such as "Single Detached Dwelling" and "Lodging House" and the yard regulation of residential buildings. These requirements limit the number of houses in a specified area and the size of those houses as a means of controlling population density. Different gradations of use intensity in residential zones are achieved through use and detailed yard regulations for the lower intensity uses and by net residential densities for medium and higher density residential uses.[28]

The Official Plan uses "units per hectare" to indicate the classification of residential densities. While the Official Plan does not explicitly state that "units" refers to Dwelling Units, this intent is reflected in the exact correlation between the number of "units" per hectare for higher density residential structures and the number of Dwelling Units per hectare used in the *ZBL*.[29]

(c) Zoning By-law Amendments

In 2000, the City's Development Services Committee ("DSC") reviewed the *ZBL* in a public process.[30] Council had to address the impact the new university - UOIT - would have on neighbouring R1 areas. The Windfields Part II Plan mandates that development of the UOIT campus is to be "integrated with the surrounding community and sensitive to the transition to abutting uses".[31]

The City was concerned about the growing number of houses in R1 areas around Durham College and UOIT being rented on a room-by-room basis to students, as such use contravenes the intensification criteria of the Official Plan, overwhelms residential neighbourhoods, and upsets the land use balance struck in the Official Plan.[32] The 2000 DSC Report explained the recommended amendments to zone definitions:

> *"There was some concern about the definition in Section 2 of lodging houses and the potential for proliferation of lodging houses catering to students in the vicinity of Durham College. Municipalities cannot "people zone" to regulate occupancy (e.g. define families or relationships or prohibit students). The amendments to the definition were intended to* ***better distinguish lodging houses from single detached dwellings in order to assist in zoning enforcement****."* **[emphasis added]**[33]

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[28] *Death* ¶46 and 53.

[29] *Death* ¶58.

[30] *Death* ¶26.

[31] City of Oshawa Official Plan, s. 8.6.2.1(e).

[32] *Death*, ¶26; http://app.oshawa.ca/agendas/development_services/2007/05-22/ds-07-133_interim_control_bylaw_north_oshawa.pdf , p. 5.

[33] *Death*, ¶26.

Prior to July 24, 2000 "Lodging House" in the ZBL read:

> *"LODGING HOUSE" means a building or part of a building* ***containing an owner-occupied dwelling unit and three to ten lodging units****, and shall include a rooming house, a boarding house, a fraternity or sorority house,* ***but shall not include*** *a hotel, a crisis care residence,* ***a residence associated with an educational facility****, a hospital, a group home, a correctional group home, a bed and breakfast establishment, nor a nursing home.* **[emphasis added]**

Prior to July 24, 2000, the definition of "Lodging Unit" read:

> *"LODGING UNIT" means one or more rooms within a lodging house, with its occupants sharing cooking or toilet facilities with other occupants of the building*.

The City adopted the DSC's recommendations and incorporated them into the *ZBL* on July 24, 2000 ("the 2000 Amendments"). The definition of Lodging House was amended to read:

> *"LODGING HOUSE" means a building or a part of a building,* ***containing three to ten lodging units, which does not appear to function as a dwelling unit****, although one may be included with the lodging units. It includes, without limitation, a rooming house and a boarding house, a fraternity or sorority house. It does not include a hotel, a crisis care residence, a hospital, a group home, a correctional group home, a bed and breakfast establishment nor a nursing home. A lodging house may involve shared cooking or washroom facilities. Meals may or may not be provided to residents. Common areas, such as living rooms, may or may not be provided.* **[emphasis added]**

The definition of "Lodging Unit" was amended to read:

> *"LODGING UNIT" means one or more rooms* ***within a lodging house used or designed to be used for sleeping accommodations****. Lodging units may contain cooking or washroom facilities, but not both.* [**emphasis added]**

Six key changes were made to the definitions of "Lodging House" and "Lodging Unit":

- The definition of Lodging House was amended to include the words "which does not appear to function as a dwelling unit" in order to permit a broad and purposive approach to the interpretation and enforcement of the by-law having regard to the manner in which it is used by its owner and occupants and the apparent impact of the building's use on the community;

- The definition no longer exempted residences associated with an educational facility;

- The definition no longer required the building to have an owner-occupied dwelling unit, allowing it to capture buildings operated by absentee landlords;

- The definition contemplated the existence of a single housekeeping unit within the building such that an owner cannot avoid the characterization of a Lodging House by having a single housekeeping unit as that term has traditionally been understood within the building;

- Lodging Unit was defined as a room used or designed to be used for sleeping accommodations – a bedroom – with possible ensuite bathroom or cooking facilities;

- Parking requirements were amended to include 0.5 spaces for every lodging unit plus one space if a lodging house also contained a separate dwelling unit.[34]

2.2. Landlords' Use of the Subject Properties

The respondent landlords misrepresented their properties as compliant with the *ZBL* when they swore statutory declarations that they would occupy the homes as their principal residences or completed building permit applications to add additional bedrooms while describing the use of their houses as "single family". Justice Howden found that the true purpose of these renovations was to add additional lodging units to rent to short-term occupants. He found that the landlords had made these representations in full knowledge that they were false and as a means of disguising the properties' true use.[35]

The operation of the landlords' properties included:

- Rental of rooms to between four and eight tenants per house;

- Occupants having no connection to each other than their common need for short-term rental accommodation;

- Individual commercial relationships between tenants and the landlords entitling the tenants to exclusive use of a bedroom – a Lodging Unit according to Justice Howden – and the use of shared washroom and kitchen facilities;

- Properties that were commercially insured as "Student Housing" and "Rooming Houses".[36]

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[34] *Death* ¶26-27.

[35] *Death* ¶95, 98 and 131-133.

[36] *Death* ¶77, 87, 90, 95, 99, 109, 113, 118, 124, 128, 131, 145.

The City argued that this re-design and use of these properties overwhelmed the infrastructure and services of Windfields – the exact problem the City was trying to prevent when it amended By-Law 60-94 in 2000. In a May 2007 report considering an interim control by-law limiting the number of bedrooms in houses in the City's north end, the City's Commissioner, Development Services stated:

> *"The creation of the UOIT has caused certain off-campus housing issues in the area. Many of the homes in the area are experiencing an intensification of use that has resulted in adverse impacts on the surrounding community. Formerly stable single detached residential areas such as the Niagara Drive area and new single detached subdivisions such as the* ***Windfields development are now experiencing intensification, instability and land use conflicts.*** *Three and four bedroom homes are having basements/cellars, dens, etc. converted/used for additional bedrooms.* ***This increased intensification has created significant land use compatibility issues."***[37] **[emphasis added]**

The Report further noted the receipt of "*serious and frequent complaints*" resulting from this intensification relating to noise, property standards, fire code violations, vandalism and personal and traffic safety issues.[38]

The Ontario Municipal Board concluded that the area had been significantly destabilized as a result of this use of single detached houses when it dismissed an appeal against the interim control by-law in October 2007.[39]

Under cross-examination during the course of the *Death* proceedings, the City's then-Manager of Development and Urban Design[40] explained:

> ***"There is certainly a problem in these single family areas that were once stable single family areas where students have occupied houses and it is in our staff report that we talk about the instability that has been created to these once stable single detached residential areas*** *and the need to look at moving forward with recommendations that would address the issue as best we can and the issues from a land use perspective deal with things like parking, landscape buffers, number of bedrooms, but certainly those are issues that we're looking at as part of the land use study."*[41] **[emphasis added]**

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[37] http://app.oshawa.ca/agendas/development_services/2007/05-22/ds-07-133_interim_control_bylaw_north_oshawa.pdf , p. 5.

[38] *Ibid*.

[39] *Lian v. Oshawa (City)* 23 October 2007, Oshawa/PL070611 (O.M.B.) at 2.

[40] Paul Ralph is now the City's Commissioner, Development Services Department.

[41] Cross-Examination of Paul Ralph, December 4, 2007, p. 14, q. 30.

This instability was further presented to the Court through affidavit and photographic evidence provided by resident homeowners in the Neighourhoods. Justice Howden accepted that "an intensity of population not planned for the area" resulted in the following impacts, relevant[42] to an interpretation of the *ZBL*:

- traffic congestion;
- excess vehicles parked illegally on lawns and paved boulevards;
- excess garbage (loose and in bags), left on lawns, porches and driveways;
- poorly maintained lawns and house exteriors;
- vandalism;
- frequent noisy parties;
- semi-public drug use; and
- an abnormal police presence.[43]

Ultimately, settlement was achieved in respect of 4 of the 34 properties and judgment was granted in respect of 28 of the remaining 30 properties.

2.3. Meaning of "single housekeeping establishment"

As noted, the material element of the ZBL definition of "Lodging house" is that it "does not […] function as a "Dwelling Unit". The ZBL defines "Dwelling Unit" to mean "a unit consisting of one or more rooms, which unit contains toilet and cooking facilities and which is designed for use as a ***single housekeeping establishment"***. The term, "single housekeeping establishment", is not defined.

Justice Howden determined that the distinction between a Single Detached Dwelling and a Lodging House was informed by the *ZBL* definition of Lodger –"any person who pays rent, fees or other consideration to a proprietor for living accommodation in which cooking or washroom facilities are shared with other persons". He found that the relationship of Lodgers to a Lodging House proprietor "is an economic or commercial one, unlike the relationship and function of a dwelling unit, commonly described as use by a single family or other similar basic living arrangement in society."[44]

Respecting the undefined term, "single housekeeping establishment", Justice Howden noted[45]:

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[42] *City of Barrie v. Brown Camps Residential and Day Schools* (1973), 2 O.R. 21 (H.C.J.) at 27; aff'd [1973], 2 O.R. (2d) 337 (C.A.) leave to appeal refused (1974), 2 O.R. (2d) 337n; *Vanhie v. London (City)*, 1996 CarswellOnt 164 (Gen. Div.) at ¶10.

[43] *Death* ¶78-84.

[44] *Death* ¶45 and 56.

[45] *Death* ¶59, 60 and 62 [emphasis added].

> *"[…] a single housekeeping establishment would generally approximate a typical family group of one or two adult persons, together with minor or adult children or a similar social unit either by relationship or some other common bond for living together as a housekeeping establishment, not simply the need by boarders for temporary sleeping quarters for which each pays rent to the landlord/landlady.*
>
> *"Another indicator comes from the density limits within the Official Plan and within By-law 60-94 for townhouses and apartments which are expressed in "dwelling units per hectare". The only possible rationale to zone and plan using such density calculations would be to regulate use intensity. Accurate planning for use intensity would be rendered meaningless if the definition of "single housekeeping establishment" could include any number of persons, each independent from each other, coming together for temporary short-term economic reasons to share the cost of accommodation.*
>
> *[…]*
>
> *"[…] I find that a single housekeeping establishment, when read in context, means a use typical of a single family unit or other similar basic social unit. For example, it could include a group of unrelated persons, one or more of whom are dependent on the other due to physical or related challenges; or one person, or a couple cohabitating with children (not theirs biologically), to whom they stand in loco parentis. There are many examples of such basic social units in today's society which do not follow the traditional family model. However, they involve more between them as a unit than simply short-term temporary sleeping quarters and shared facilities on a rental basis."*

Justice Howden found that the landlords' properties, though originally designed as Single Detached Dwellings, had been redesigned through the addition of extra bedrooms. By renting these commercial properties on a per-room basis to tenants with no connection between them beyond their common need for short-term accommodation, the landlords had also changed the function of these houses, from housing for groups composing family or similar units to commercial Lodging Houses.[46]

In sum, Justice Howden found the indicators of a Lodging House under the *ZBL* are:

- Short term accommodation: no longer than one year in length, though generally corresponding with the academic year;
- Rental on a per-bedroom basis, with shared washroom and cooking facilities;
- A lack of "singleness" between the occupants that approximates the types of connections indicative of a family unit. Rather, the occupants of a Lodging House are

[46] *Death* ¶77.

connected only by their need for short-term accommodation. The fact that they may also be friends is not determinative. A single lease does not change the property's actual design or function;

- The commercial nature of the enterprise, signified by heavy mortgages, modifications to add extra bedrooms and commercial insurance policies.[47]

2.4. Landlords' Appeals to Ontario Court of Appeal

On the landlords' subsequent appeals, the City argued that Justice Howden interpreted the *ZBL* in the manner mandated by the Ontario Court of Appeal and the Supreme Court of Canada. Municipal councils represent the level of government closest to the citizens affected and most responsive to local needs and distinctiveness[48]. They should be accorded deference in their lawmaking, especially where legislation is aimed at particular local needs and conditions.[49] Municipal by-laws should be interpreted in a broad and purposive way in light of the intent of council, the problem the by-law was intended to address and the purpose it was intended to achieve.[50] A purposive interpretation of a by-law will also include consideration of the by-law's evolution.[51]

In sum, municipal by-laws are to be interpreted in a way that allows municipalities to respond to municipal issues. As stated in the *Municipal Act, 2001*:

> *The powers of a municipality under this or any other Act shall be interpreted broadly so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality's ability to respond to municipal issues.*[52]

Further, zoning by-laws must be interpreted not only broadly and purposefully but also "in light of the by-law as a whole and its policy derivation and basis within the official plan."[53] While

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[47] *Death* ¶87, 90, 95, 99, 109, 113, 118, 124, 128, 131, 145.

[48] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 at ¶3.

[49] *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 at 244; *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342 at ¶36; *Croplife v. Toronto (City)* (2005), 75 O.R. (3d) 357 (C.A.) at ¶37, leave to appeal refused, [2005] S.C.C.A. No. 329.

[50] *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, s. 64; *Municipal Parking Corp. v. Toronto (City)* (2007), 38 M.P.L.R. (4th) 1 (Ont. C.A.) at ¶38-42; *Montréal (Ville) v. 2592-1366 Québec inc.* (2005), 15 M.P.L.R. (4th) 1 (S.C.C.) at ¶9, 10, 17 and 22; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)* (2004), 46 M.P.L.R. (3d) 1 (S.C.C.) at ¶6 and 8; *Hill & Hill Farms Ltd. v. Bluewater (Municipality)* (2006), 26 M.P.L.R. (4th) 1 (Ont. C.A.) at ¶22-23.

[51] *HSBC Securities (Canada) Inc. v. Davies Ward and Beck* (2005), 74 O.R. (3d) 295 (C.A.) at ¶51, leave to appeal to S.C.C. refused (2005), 208 O.A.C. 398 (note).

[52] *Municipal Act, 2001*, S.O. 2001, c. 25, s. 2 and 8.

[53] *Aon Inc. v. Peterborough (City)*, [1999] O.J. No. 1225 (S.C.J.) at ¶18; *Runnymede Development Corp. v. 1201262 Ontario Inc.* (2000), 10 M.P.L.R. (3d) 204 (Ont. S.C.J.) at ¶16.

licensing by-laws passed pursuant to the *Municipal Act* **cannot** prohibit otherwise lawful activity, the *Planning Act* **permits** a municipality to enact zoning by-laws prohibiting the use of land for all purposes except those specifically permitted.[54]

Justice Howden further noted that zoning by-laws restrict the use of land in order to reduce adverse impacts on neighbouring properties and implement a municipality's official plan. They are, therefore, distinct from licensing by laws, which regulate businesses and activities in the interests of public health and protection and consequently focus on the internal workings of a property.[55] As such, it was the City's position that the decision in *Good v. Waterloo*[56] had limited relevance to an interpretation of the *ZBL*. Not only was *Good* decided in a licensing context where the focus is the health and safety of tenants, but also in circumstances where lodging houses were a **permitted** use in the specified zone provided a license was obtained. Further, *Good* involved one building, entrenched within its neighbourhood for nearly three decades. It did not consider an entire neighbourhood being overrun, or a municipality's intent and vision respecting a new community being frustrated before the community was allowed to become established.

The *ZBL*, in contrast to the licensing by-law in *Good*, was a comprehensive and coherent land use scheme. It classified and distinguished land uses such as Single Detached Dwelling and Lodging House and directs them to specified zones. It expressly permitted Lodging Houses in R7 zones but prohibited them in R1 zones. The City specifically amended the *ZBL* to effect its intention for low density occupation in the single detached homes in the Neighbourhoods.

The City submitted that Justice Howden interpreted the *ZBL* in accordance with the above listed authorities. He found that the purpose of the *ZBL* was to modernize the City's zoning and to bring its zoning provisions into line with the Official Plan.[57] He found that the amendments in 2000 were passed for the valid planning purpose of regulating use intensity through gradations of residential zoning. As such, the definition of Lodging Houses was changed to include buildings that had initially been structured to function as single family homes but had taken on a different function through the conversion to bedrooms of rooms initially designed for other familial functions.[58]

A unanimous panel of the Ontario Court of Appeal dismissed the landlords' appeal noting[59]:

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[54] *Konakov*, at ¶5 and 12;

[55] *Death* ¶19, 71 and 74.

[56] (2004), 72 O.R. (3d) 719 (C.A.).

[57] *Death* ¶33-36 and 42-44.

[58] *Death* ¶57-60.

[59] [2009] O.J. No. 1324 (C.A.) at ¶2-4.

"Essentially, this was a fact-driven application. The application judge had to draw a line between two types of accommodation, single dwelling establishment and lodging house as defined in by-law 60-94 of the Corporation of the City of Oshawa. He identified a broad range of factors to consider in relation to the definitions of the two categories of houses and then applied those factors individually to the 30 houses in question.

"While there were some differences in the facts relating to the different landlords and their houses, the application judge found that generally the landlords purchased their houses for the purpose of renting out bedrooms on a room-by-room and a short-term basis to individual tenants, added extra rental bedrooms without building permits or with building permits that misrepresented use, and insured the properties as "rooming houses" and "student housing". He found that the essence of the relationship between the landlords and their renters was one of "lodger" and "proprietor" as defined in the by-law. He essentially found that there was no relationship between the renters other than their use and occupation of single rooms rented for short-term accommodation.

"We see no legal error in the application judge's treatment of the relevant statutory provisions and case law. In particular, we reject the submission that s. 35(2) of the Planning Act which prohibits "distinguishing persons who are related and persons who are unrelated in respect of the occupancy or use of a building" barred the application judge from considering as a relevant factor how the renters related amongst themselves when determining whether they constituted a "single housekeeping establishment". Moreover, his assessment of the factual situations with respect to 30 different houses and his application of the law to those houses is a matter of mixed fact and law and, therefore, is subject to review on a reasonableness standard."

2.5. *Death* – Summary

Despite the City's success in this and other enforcement proceedings, the "Lodging House" provisions of the City's Zoning By-law can be challenging to enforce to the extent that prosecution requires proof of a negative – the absence of a "single housekeeping establishment". Further, the result in *Death* respecting 32 properties can be seen very differently by different stakeholders. It was ultimately a fact-driven application.[60] However, some may mistakenly believe that *Death* means that students generally are incapable of forming "single housekeeping establishments". Others may mistakenly believe that municipal enforcement proceeds on the basis of that mistaken view.

Nevertheless, the result in *Death* has been very helpful. Specific deterrence was achieved in respect of 32 of the 34 properties. Further, the notoriety of the proceeding continues to contribute to general deterrence and to the amelioration of the negative impacts of sudden growth in the City's north end residential neighbourhoods. The "Lodging House" provisions of

[60] See footnote 59 and [2009] O.J. No. 1324 (C.A.) at ¶2.

the City's Zoning By-law continue to be an integral part of the City's enforcement strategy and Justice Howden's helpful analysis will continue to inform.

3. Residential Rental Licensing

During the course of the *Death* proceedings and other prosecutions under the Zoning By-law, it was apparent that illegal "Lodging Houses" were not exclusively the source of enforcement problems. Rather, within a relatively defined area comprising the neighbourhoods around UOIT, complaints and resulting investigations revealed that residential rentals generally – whether illegal lodging houses or permitted single housekeeping establishments – were often not compliant with life safety and other standards including under the *Building Code Act, 1992,* the *Fire Protection and Prevention Act, 1997* and their respective Codes and under various City by-laws including Lot Maintenance, Noise, Parking and Property Standards. Further complicating matters was the fact that enforcement responsibility was divided among 3 municipal departments – Building, Fire and Municipal Law Enforcement.

3.1. Availability of Licensing as an Enforcement Tool

In response to these challenges, consideration was given to establishing a system of residential rental licences. Establishing a system of licences is not without its challenges including the need to invest in resources and infrastructure to administer and enforce the system. However, in the circumstances of the neighbourhoods around UOIT, the investment was considered worthwhile to secure the several perceived advantages of a licensing system.

First, the threshold question – whether a residential property is rented – is more objectively and easily measured than whether a property functions as a "single housekeeping establishment" for the purpose of the Lodging House provisions of the ZBL.[61] Compliance with the ZBL (including not operating a "Lodging House") could continue to be a condition of obtaining and continuing to hold a licence. To this extent, a licensing regime would complement enforcement of the ZBL.

Second, "Lodging Houses" are not necessarily the only form of residential rental accommodation for which there may be a municipal regulatory interest. Rather, as noted, the track record of complaints respecting residential properties around UOIT revealed they were not limited to illegal Lodging Houses but related generally to residential rental properties. A geographically scoped licensing system applicable to residential rental properties generally was considered a more relevant and effective means of ensuring minimum health and safety and other municipal standards.

[61] Some question the clarity of by-law definitions of "Lodging Houses". See footnote 6, above re [2007] O.J. No. 5081 (S.C.J.) in which Howden J. dismissed the landlords' motion seeking a declaration that the City's Zoning By-law definitions of "lodging house", "lodging unit" and "dwelling unit" were vague and uncertain.

Third, a material advantage of licensing is that the licensed activity ceases to be "as of right". Rather, *before* engaging in the activity, an applicant must satisfy the licensing authority that the conditions to obtaining the licence have been satisfied. Similarly, on a go-forward basis, the right to continue to hold the licence is subject to continuing compliance with licensing conditions. The historical "as of right" rental of residential properties around UOIT had overwhelmed the neighbourhoods with substandard conditions. A licensing system was considered an effective means of turning the enforcement tables.

Similarly, a licensing process was considered a more effective means of coordinating the resources of the City's various enforcement departments. Licensing would permit a "one-stop" process to ensure compliance with the various health, safety and other standards for which these departments each had a role.

Licensing had become a viable tool as a result of several changes to the *Municipal Act, 2001* including by Bill 130, the *Municipal Statute Law Amendment Act, 2006*.

(a) Enhanced Licensing Powers[62]

First, municipal licensing powers were broadened.

The former Part IV of the *Municipal Act, 2001* conferred only *business* licensing powers on "local" municipalities (defined to mean single and lower-tier municipalities). However, the new Part IV of the Act is no longer limited to business licensing and it applies to all municipalities. Licensing powers are no longer limited to 3 purposes – consumer protection, health and safety and nuisance control. Subsection 151(5) of the Act now provides that business licensing powers under Part IV apply with necessary modifications to a "system of licences with respect to any activity, matter or thing for which a by-law may be passed under sections 9 [natural person powers], 10 [broad powers] and 11 [spheres of jurisdiction and broad powers] as if it were a system of licences with respect to a business." In fact, municipalities may now pass by-laws respecting any "thing that the municipality considers necessary or desirable for the public".[63] As well, the term, "licence" is defined by section 1 to include "a permit, an approval, a registration and any other type of permission".

Accordingly, business licensing became a subset of a much larger class of activities for which a municipality may apply an enhanced permission system. Those activities may now be regulated

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[62] For an overview of changes to the *Municipal Act, 2001*, see Rust-D'Eye, George, Bar-Moshe, Ophir and James, Andrew, *Ontario Municipal Law: A User's Manual – 2017* (2016 Thomson Reuters Canada Limited), Part II – General Municipal Powers and Part IV – Licences.

[63] Respecting broad powers, note in particular subsection 10(1) and paragraph 10(2)7 for single tier municipalities and subsection 11(1) and paragraph and 11(2)7 for lower-tier and upper-tier municipalities. The broad power for upper-tier and lower-tier municipalities is subject to the rules prescribed by subsection 11(4) which, for the most part, seek to retain the divisions of power between lower and upper-tier municipalities that existed under the Old Act.

in ways historically limited to businesses including the traditional powers to prohibit the activity except pursuant to a municipal licence, to suspend or revoke the licence and to impose conditions as a requirement of obtaining, continuing to hold or renewing a licence.

Until its repeal, O. Reg. 243/02 provided that a municipality *did not* have the power in a licensing by-law to license, regulate or govern the rental of a "residential unit". O. Reg. 243/02 defined "residential unit" to mean

> "a unit that,
> (a) consists of a self-contained set of rooms located in a building or structure,
> (b) is used as a residential premises,
> (c) contains kitchen and bathroom facilities that are used only by the occupants of the unit,
> (d) *is used as a single housekeeping unit*[64]*, which includes a unit in which no occupant has exclusive possession of any part of the unit*, and
> (e) has a means of egress to the outside of the building or structure, which may be a means of egress through another residential unit"

However, O. Reg. 583/06 replaced O. Reg. 243/02 as the regulation that imposes restrictions on licensing powers. Significantly, O. Reg. 583/06 no longer prohibits the licensing of the rental of residential units.

(b) Clearer Power to "Differentiate"

The second change that facilitated a system of residential licences was an enhanced or at least a more clearly expressed power to "differentiate". Section 8 of the *Municipal Act, 2001* permits most Municipal Act by-laws (including licensing) to "be general or specific in [their] application and [to] differentiate in any way and on any basis a municipality considers appropriate". This clarification was considered important to the extent that a system of licences was intended to apply only to the geographic area of the City from which the majority of residential rental complaints originated. The ability to scope the system geographically was considered critical to the extent that a system of residential rental licences applicable to the entire City would be impossible to administer. It was also considered unnecessary. Rather, it was thought that a system of residential licences should be scoped to more efficiently deploy scarce enforcement resources where they were most required.

In June, 2013, Oshawa staff recommended against extending the residential rental licensing system to a part of the City's west end around a newer campus of Trent University.[65] The

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[64] The "single housekeeping unit" criterion in paragraph (d) of the "residential unit" definition left open to municipalities the possibility of licensing and regulating residential rental accommodation which was *not* used as a "single housekeeping unit". In fact, some municipalities already licensed and regulated residential rental accommodation commonly known as "lodging houses" or "rooming houses" which, generally, are defined to distinguish them from single housekeeping units. See, for example, Oshawa Lodging House Licensing By-law 94-2002 at http://www.oshawa.ca/uploads/16/LodgingHouseBy-law94-2002.pdf?ts=636384856549953097 and its definitions, "Dwelling Unit", "Lodging House" and "Lodging Unit".

report responded to a Council direction to explore alternatives for establishing a City-wide system of residential rental licences and a second direction to consider the area around Trent University. Staff recommended against a City-wide extension of the residential licensing system and against extension of the system around the west-end Trent campus:

> *Municipal Law Enforcement resources are more efficiently and effectively deployed by focusing the RRL system on areas of the City for which*
>
> - *non-compliance with minimum standards in residential rental units is significant; and*
> - *the number of residential rental units is high.*
>
> *Based on the most recent census tract data (2006 Census), approximately 30% of the total number of private dwellings in the City of Oshawa are rented. Ownership and rental data from the 2011 Census will not be released until August 14, 2013 as part of Statistics Canada's National Household Survey report.*
>
> *There is no data to suggest that maintenance of minimum standards of maintenance, health and safety in residential rental units is a City-wide problem.*
>
> *Establishing a City-wide RRL system is, therefore, unnecessary and not recommended.*
>
> *[…]*
>
> *Statistics Canada information indicates that there are relatively few residential rental units in the area surrounding Trent University, Thornton Road Campus (''Thornton Road Area"). This is consistent with student population projections detailed in the 2010 Student Accommodation Strategy. Trent University has reported that a large percentage of its students currently live and will continue to live locally with family and will not require rental housing in the Thornton Road Area.*
>
> *Trent University Oshawa presently does not have on campus housing and has not identified a current demand to proceed with housing development.*
>
> *While present statistics indicate that the number of rental dwellings in the Thornton Road Area is low, it is anticipated that the Trent University Campus will be expanding and that eventually there will be a growing demand for off campus rentals.*
>
> *However, current and projected rental housing demands are, alone, not determinative of the need for a RRL System. Rather, as noted above, the City's enforcement resources will be more efficiently and effectively deployed by focusing the RRL system on areas of the City for which non-compliance with minimum standards in residential rental units is significant.*

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[65] See http://www.oshawa.ca/agendas/corporate%20services%20committee/2013/06-20/CORP-13-99-CM.pdf

There is presently no data to suggest that maintenance of minimum standards of maintenance, health and safety in residential rental units is a problem in the Thornton Road Area.

It is not recommended that a RRL System be established in the Thornton Road Area at this time. Staff will continue to monitor enforcement statistics and report back if necessary.

Oshawa staff did recommend further consideration for extending some form of residential rental licensing to the City's downtown Central Business District ("CBD"):

MLELS enforcement statistics respecting residential rental units in the CBD suggest that non-compliance with minimum standards is significant in comparison with other areas of the City.

Accordingly, a preliminary review indicates that the CBD satisfies both criteria - high number of residential rental units and significant non-compliance with minimum standards. The CBD is, therefore, worthy of further consideration for the extension of the RRL system.

A preliminary review also indicates differences between the current Rental Area and the CBD which could impact the design of any RRL system in the CBD. For example, most Rental Units in the current Rental Area are homogenous to the extent that most were constructed as 3 or 4-bedroom single-detached dwellings in R1 zones. By contrast, residential rental units in the CBD are heterogeneous to the extent that they are located in different zones, involve many alleged legal non-conforming uses and include a wide variety of built forms (eg., apartments, townhouses, duplexes, etc.).

It is, therefore, recommended that staff be authorized to conduct further research, initiate a public consultation process and prepare a draft by-law for Council's consideration that would establish a RRL system within the CBD.

The power to differentiate including by geographically scoping a residential rental licensing system can be controversial. See the discussion below in section 6, *Municipal Regulation of Residential Rental Housing and the Human Rights Commission*.

(c) Power to Establish Systems of Administrative Penalties

A third change was the introduction of the power to establish municipal systems of administrative penalties. The addition of a new class of licences would require additional enforcement resources. Superior Court proceedings consume significant legal resources and, generally, are reserved for the most egregious of contraventions. Prosecutions can be hampered by the persistent lack of judicial and other resources in the Ontario Court of Justice sometimes resulting in significant delays. Something less than punishment by prosecution may be sufficient in many circumstances to achieve compliance. Accordingly, an administrative penalty system was seen as an opportunity to enhance enforcement capacity and efficiency.

(d) Enhanced Powers to Delegate

The last change that facilitated a system of residential licences was an enhanced power for municipal councils to delegate powers including quasi-judicial and legislative powers.

Prior to Bill 130, municipalities were restricted to delegating administrative functions and could not, except where specifically authorized by statute, delegate their discretionary powers. Further, the former subsection 150(11) of the Act expressly required a municipal council to exercise the following powers which could not, therefore, be delegated:

- to refuse to grant a licence or to revoke or suspend a licence;
- to impose special conditions on a business in a class that have not been imposed on all of the businesses in that class in order to obtain, continue to hold or renew a licence; or
- to impose conditions, including special conditions, as a requirement of continuing to hold a licence at any time during the term of the licence.

Bill 130 amended the Act to permit municipal councils to delegate legislative and quasi-judicial powers, subject to restrictions that are set out in section 23.2 of the Act.

Pursuant to subsection 23.2(4) of the Act, a municipal council may now delegate *legislative* powers to an individual who is an officer, employee or agent of the municipality where "in the opinion of the council of the municipality, the power being delegated is of a *minor nature*". Subsection 23.2(5) lists as an example of a power of a "minor nature" the power to issue and impose conditions on a licence. Given the requirement that council must opine as to the "minor nature" of the power, it is prudent for a by-law that delegates legislative powers to an individual to express council's opinion.

An enhanced power to delegate was considered necessary in order to administer what would be an increasingly complex system of licences and administrative penalties including decisions to deny licence exemption requests, to deny, revoke, suspend or impose conditions on licences and decisions to issue administrative penalty notices. The exercise of rights of review and to appeal against such decisions would require the resources of Hearings Officers and others to whom the power to decide could be delegated.

3.2. Oshawa Residential Rental Licensing By-law

In February, 2008, Oshawa Council adopted a staff recommendation to license and regulate residential rental accommodation on approximately 80 streets in the neighbourhoods adjacent to UOIT in the City's north end. Staff reports noted that the City continued to be plagued by complaints respecting residential rental properties in areas around UOIT notwithstanding significant efforts to enforce municipal by-laws, the *Building Code Act, 1992* and the *Fire*

Protection and Prevention Act, 1997 and that a "*licensing initiative scoped to the specifically impacted residential areas is considered appropriate to complement minimum standards otherwise imposed by provincial legislation and City by-laws*."[66]

The residential rental licensing by-law:

- amended the City's licensing by-law to add definitions specific to the proposed licensing of "Rental Units";

- established a licence fee of $250 per "Rental Unit" per year (subsequently increased to $500);

- added a new Schedule to the licensing by-law that includes the specific provisions respecting "Rental Units"; and

- was limited in its application to "Rental Units" within the "Rental Area" which, in turn, is limited to areas of the City's north end the subject of significant complaints as noted above.

The residential rental licensing by-law permits the City's Director, Municipal Law Enforcement and Licensing Services ("Director"), to refuse to accept a licence application unless it includes, for each "Rental Unit":

- the name, municipal address, telephone number, facsimile number and e-mail address[67] of each "Landlord";

- the municipal address and legal description of the "Rental Unit";

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[66] See Oshawa staff report DS-07-214 dated Jul 4/07: http://www.oshawa.ca/agendas/Development_Services/2007/10-09/DS-07-214_Licensing_Residential_Rental_Units.pdf . See also Oshawa staff report DS-08-12 dated Dec 20/07 at http://www.oshawa.ca/agendas/Development_Services/2007/Jan14-08/DS-08-12_Licensing_Residential_Rental_Units.pdf . Report DS-08-12 was considered by the City's Development Services Committee at public meetings on Jan 14/08 and Jan 21/08. The Committee recommended that Council enact the proposed by-law in the form comprising Attachment 3 to Report DS-08-12, subject to certain amendments, at a special Council meeting which had been scheduled for Feb 11/08. One of the Committee's amendments was to exempt "Rental Units" occupied by all owners as their sole residence and in which are rented no more than 2 "Bedrooms".

[67] The Licensing By-law was also amended to expand the means of service of notices under the By-law (including penalty notices under the system of administrative penalties) to include service by facsimile transmission and by e-mail. As noted below, one of the conditions of continuing to hold a licence is that a Landlord notifies the Director in writing within two (2) days of any change to any information provided in connection to a licence application – including the Landlord's e-mail address.

- if a “Landlord” is a corporation, the name, address and telephone number of each director, officer and shareholder;

- if a “Landlord” is a partnership, the name, address and telephone number of each partner;

- the number of “Bedrooms”; and

- a statement by each “Landlord” certifying the accuracy, truthfulness and completeness of the application.

The residential rental licensing by-law permits the Director to refuse to accept a licence application that is not accompanied by the following in respect of each “Rental Unit”:

- a copy of the transfer/deed evidencing a “Landlord’s” ownership;

- if a “Landlord” is a corporation, a copy of the Landlord’s articles of incorporation and a corporation profile report issued by the Ontario Ministry of Consumer and Business Services;

- a floor plan of the “Rental Unit”, including, for each room, its dimensions and its proposed use;

- a maintenance plan identifying measures that the “Landlord” will implement for the purpose of complying with the City’s Lot Maintenance By-law 127-2007;

- a parking plan that complies with the City’s Zoning By-law 60-94, as amended, and that shows the location and dimensions of all parking spaces for vehicles on the “Rental Property”;

- Proof of placement of insurance that includes a limit of liability of not less than $2,000,000.00 (two million dollars) per occurrence for property damage and bodily injury, identifies the proposed use as residential rental and that requires that the Director be notified of any intended cancellation by the insurer no fewer than fifteen (15) days prior to such cancellation;

- evidence that the “Rental Property” and its proposed use comply with the *Fire Protection and Prevention Act, 1997* (Ontario) and its regulations;

- evidence that the “Rental Property” and its proposed use comply with the *Electrical Safety Code*, O.Reg. 164/99;

- evidence that the "Rental Property" and its proposed use comply with the *Building Code Act, 1992* (Ontario) and its regulations;

- proof of payment of any fine or fee owed to the City by any "Landlord" respecting the "Rental Property"; and

- payment of the licence fee.

The residential rental licensing by-law imposes conditions as a requirement of obtaining and continuing to hold the licence:

- the number of "Bedrooms" in the "Rental Unit" does not exceed four (4);[68]

- no more than 40% of the Rental Unit's basement may be comprised of Bedrooms provided that each such Bedroom must have been constructed in accordance with and must comply with all applicable law;

- no room within the "Rental Unit" is used as a Bedroom except a Bedroom depicted in the licence which, in turn, would be consistent with the floor plan submitted with the licence application;

- no more than 40% of the gross floor area of the Rental Unit's ground floor may be comprised of Bedrooms;

- each Tenant is a party to a written tenancy agreement with a Landlord;

- a Landlord does not directly or indirectly require or cause a Tenant to refuse to consent to lawful entry and inspection of a Rental Unit for the purpose of determining compliance with the Licensing By-law;

- a Landlord notifies the Director in writing within two (2) days of any change to any information provided in connection to a licence application;

- a legible copy of the licence and floor plan are posted and maintained prominently and visibly within one (1) metre of the interior of the Rental Unit's main entrance door;

- a Landlord maintains the insurance required pursuant to the application process;

[68] In response to a recommendation by the City's Development Services Committee's the licensing by-law permitted up to 6 "Bedrooms" in each "Rental Unit" on 3 streets within the "Rental Area" for a period of 3 years. On the 3rd anniversary, the limit reverted to 4 Bedrooms. By by-law 143-2011, the Rental Unit Bedroom limit was increased from 4 to 5 for certain properties along the Simcoe Street Corridor (arterial road along the eastern limit of UOIT). This amendment was consistent with the Student Accommodation Strategy which directed higher density development along the Corridor.

- the Landlord and the Rental Property comply with all applicable law including
  - the *Health Protection and Promotion Act* (Ontario) and its regulations;
  - the *Fire Protection and Prevention Act, 1997* (Ontario) and its regulations;
  - the *Electrical Safety Code*, O.Reg. 164/99;
  - the *Building Code Act, 1992* (Ontario) and its regulations;
  - the City's Zoning By-law 60-94, as amended;
  - the City's Property Standards By-law 1-2002, as amended;
  - the City's Lot Maintenance By-law 127-2007;
  - the City's Snow and Ice Removal By-law 92-2009, as amended;
  - the City's Unauthorized Parking By-law 97-2009, as amended; and
  - the City's Waste Collection By-law 113-2008;

- no fine, *administrative penalty*[69] or fee is owed to the City by any Landlord;

- the Landlord and the Rental Property comply with the maintenance plan submitted as part of the licence application; and

- no vehicle may be stopped or parked on any part of the Rental Property except within a parking space identified on the parking plan submitted as part of the licence application.

The Licensing By-law delegates to an independent "Hearings Officer" the authority to review decisions by the Director to deny a licence or to impose conditions in relation to a licence. The review process seeks to balance a person's rights and administrative efficiency:

- The person's right to request a review expires on the 10th day after notice of the Director's decision is given to the person at which time the Director's decision is final and not subject to review.

- The hearing of the review request is not scheduled until the person has paid the fee from time to time prescribed by the City's General Fees and Charges By-law.

- The person is given no fewer than 7 days' notice of the date, time and place of the hearing of the review request.

- The Hearings Officer is not to make a determination with respect to a review request unless the Hearings Officer has given each of the person and the Director an opportunity to be heard.

[69] See section 4, "*Municipal Licensing Administrative Penalty System*", below.

- The Hearings Officer may deny the application. Otherwise, the Hearings Officer may grant a licence and may also impose any conditions the Hearings Officer sees fit as a condition of obtaining, continuing to hold or renewing the licence.

- The decision of a Hearings Officer and any condition imposed by the Hearings Officer in relation to a licence granted by the Hearings Officer are final and not subject to review including review by any Court.

The Licensing By-law also delegates to the Director the authority to exempt any person from all or any part of the Licensing By-law "*where the Director is satisfied that the granting of the exemption would maintain the general intent and purpose of the Licensing By-law.*" For that purpose, the Director is also authorized to impose such conditions as the Director determines are appropriate in relation to an exemption granted by the Director. The person may request the Hearings Officer to review the Director's decision to deny an exemption or to impose conditions pursuant to a similar process as outlined above.

Pursuant to Oshawa Council's direction, the Licensing By-law also provides that where a Landlord appeals against or requests a review of a decision concerning a licence, no decision in the appeal or review may be made unless each owner of a "Lot" situate within 30 metres of the Rental Property the subject of the appeal or review has been given no fewer than 7 days' notice of the hearing of the appeal or review and has been given an opportunity to be heard at the hearing of the appeal or review. The hearing is to be open to the public.

By-law 9-2013 amended the residential rental licensing system to establish a demerit point system. Without prejudice to enforcement options otherwise available, a certain number of demerit points are assessed against a Rental Unit with respect to certain by-laws or parts of by-laws referenced in a "Demerit Point Schedule" upon each occurrence of any of the following events:

- the expiry of the period for appealing against a conviction in the Ontario Court of Justice;
- the confirmation of an administrative penalty; or
- the confirmation of an administrative order.

Demerit points remain in effect until the second anniversary of the date on which the demerit points were assessed. If the total of all demerit points in effect respecting a Rental Unit is at least seven, the Landlord may be required to attend a meeting with the Director, Municipal Law Enforcement and Licensing Services. If the Landlord fails to attend or to remain at the meeting, the Director may require the Landlord to attend a hearing before the Hearings Officer. If the total of all demerit points in effect respecting a Rental Unit is at least fifteen, the Director may require the Landlord to attend a hearing before the Hearing Officer. At the hearing the Landlord is afforded an opportunity to be heard and the Hearings Officer may revoke, suspend or impose conditions on the licence.

The residential rental licensing by-law's initial effective date was delayed to May 30/08 to afford landlords a transition period to plan for compliance. Implementation was not without its challenges for the City and landlords. However, the system of residential rental licences appears to be contributing toward greater compliance generally with minimum health, safety and other municipal standards.

4. Municipal Licensing Administrative Penalty System

An administrative penalty is, as the title suggests, a penalty imposed directly by the regulatory authority upon an offender within the context of an administrative process rather than a judicial process. A system of administrative penalties is an additional tool that may encourage compliance with a by-law without the threat of more serious administrative action, prosecution or Superior Court proceeding.

Subsection 151(1) in Part IV of the Act, as amended by Bill 130, permitted municipalities to establish a system of administrative penalties as a means of enforcing a system of licences:

> **Powers re licences**
> **151.** (1) Without limiting sections 9, 10 and 11, a municipality may provide for a system of licences with respect to a business and may,
> […]
> (g) require a person, subject to such conditions as the municipality considers appropriate, to pay an administrative penalty if the municipality is satisfied that the person has failed to comply with any part of a system of licences established by the municipality.

Effective May 30, 2017, the *Municipal Act, 2001* was amended to repeal paragraph 151(1)(g) and to add a new section 434.1 which expressly confers upon municipalities the jurisdiction to establish administrative penalty systems for the enforcement of all by-laws under that Act (ie., including licensing by-laws). The Minister of Municipal Affairs and Housing is delegated the authority to make regulations "*providing for any matters which, in the Minister's opinion, are necessary or desirable for the purposes*" of the section. No regulation has yet been made as at the date of this paper. O.Reg. 333/07 ("Parking Regulation") applies to a system of parking administrative penalties established by by-law passed pursuant to section 102.1 of the Act. Until a regulation is made pursuant to section 434.1 of the Act, the Parking Regulation may serve as a useful aid in the drafting of a by-law to establish a system of licensing administrative penalties.

Oshawa's Licensing By-law was amended to establish a system of administrative penalties at the same time that it was amended to establish a system of residential rental licences. The drafting of Oshawa's licensing administrative penalty system was informed by the Parking Regulation and incorporates the following features for the benefit of the person against whom an administrative penalty is imposed. Many of these features are consistent with those prescribed for a system of parking administrative penalties.

- *Penalty:* Oshawa's licensing administrative penalty is $250.[70] For purposes of licensing, a $250 penalty was considered modest and is less than the anticipated cost of the inspection and of administering the penalty notice.[71] The penalty has recently been increased to $500 for operating without a licence.

- *Notice*: A penalty notice must be given to the person as soon as is reasonably practicable and must include basic information that will inform the person of the contravention, the penalty, the person's right to request a review of the penalty and of the consequences in the event that the penalty is not reviewed. The person is also given reasonable notice of the date, time and place of the review hearing. As noted, a licensee's facsimile transmission number and e-mail address may be required as part of an application for a licence or renewal of licence. The licensee is bound to provide notice of any change to this information. Any notice *(including an administrative penalty notice)* may be given in writing by facsimile transmission or by e-mail.

- *Payment:* The Officer issuing the penalty notice may not accept payment of the penalty.

- *Director's discretion:* The Director has discretion to cancel an administrative penalty within ten (10) days of the date on which the Penalty Notice is issued. This is intended to address obvious errors without requiring a person to pursue a screening or an appeal.

- *Review by Screening Officer*. An opportunity for an administrative screening is a prescribed requirement for a parking administrative penalty system. There are no prescribed requirements for a licensing system. In its original form, Oshawa's licensing administrative penalty system did not include the right to an initial administrative screening. However, the system has since been amended to include a time-limited right to a review before a "Screening Officer" who has the jurisdiction to cancel or reduce or extend the time for payment of the administrative penalty and any administrative fees where the Screening Officer is satisfied that doing so would maintain the general intent and purpose of the licensing by-law *and* that there is reason to doubt that the person contravened the by-law, *or* that the person took reasonable steps to prevent the contravention. The review may be in writing in which case the person simply faxes, e-mails or delivers a screening request. Alternatively, the person may request a review in person before the Screening Officer. The administrative screening is beneficial to the City and to the person requesting the screening to the extent that any dispute may be resolved without the necessity of a formal hearing before the Hearings Officer.

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[70] The Parking Regulation provides that the amount of a *parking* administrative penalty must satisfy 2 conditions. It (a) shall not be punitive in nature and (b) shall not exceed the amount reasonably required to promote compliance with a designated by-law. As at May 30, 2017, two similar conditions have been incorporated into the new subsection 434.1(3) of the Act.

[71] See Oshawa staff report FA-07-221 at http://www.oshawa.ca/agendas/City_Council/2007/01-08/FA-07-221_Administrative_Penalties_Hearings_Officer.pdf

- *Appeal to Hearings Officer*: The person has a time-limited right to request a review of the administrative penalty by a "Hearings Officer". The right to review includes *a right to be heard* by the Hearings Officer.[72] The "Hearings Officer" has the same power to grant relief on the same grounds as are prescribed for the Screening Officer.

- *Hardship*: An additional ground upon which the Screening Officer or the Hearings Officer may cancel or reduce the administrative penalty and fees or extend the time for payment is where the Screening Officer or the Hearings Officer is satisfied that doing so is necessary to relieve undue financial hardship and that granting the relief will maintain the general intent and purpose of the licensing by-law.

- *Extensions of time*: The person has a time-limited right to request extensions of the time for requesting a review of the administrative penalty by the Screening Officer or the a Hearings Officer. The Screening Officer and the Hearings Officer may extend the time for requesting a review.

- *No review fee*: There is no fee for requesting a review of an administrative penalty.

- *Refund:* Where the person pays an administrative penalty that is subsequently cancelled or reduced, the person is refunded the difference.

- *"Mixed" System:* Oshawa's system of licensing administrative penalties is part of a "mixed system" of enforcement alternatives which also includes administrative proceedings related to the refusal to issue or revocation or suspension of licences, prosecutions in the Ontario Court of Justice and proceedings in the Superior Court of Justice. To this extent, the system of licensing administrative penalties differs from what would be permitted for a system of parking administrative penalties. Subsection 3(1) of the Parking Regulation contemplates a "segregated" system by requiring the municipality to "designate" the by-law or the part of the by-law to which the system of parking administrative penalties applies. Section 4 of the Parking Regulation provides that the *Provincial Offences Act* does not apply to the contravention of a "designated by-law". In practice, a segregated system of parking administrative penalties should not diminish the effectiveness of a parking administrative penalty system particularly where the parking of a vehicle is transitory and a modest administrative penalty is likely as effective as a traditional parking ticket. By contrast, a licensing by-law is more complex and regulates and imposes conditions on a licensee over a longer term. For the first contravention of any particular requirement of a licensing by-law, a modest administrative penalty may be sufficient to encourage compliance. However, a subsequent contravention of the same requirement by the same licensee may warrant

[72] The Director and the Officer who issued the penalty notice also have a right to be heard.

prosecution. Accordingly, a system of licensing administrative penalties may only be effective if it is part of a mixed system of enforcement alternatives.

- *No Double Jeopardy*: Where the person pays an administrative penalty within a prescribed time, the person will not be liable for an offence respecting the same contravention. It is particularly necessary to address this issue in a "mixed" system of enforcement alternatives.

- *Collection of Administrative Penalty:* An application for a licence or renewal of licence may be denied if the applicant is indebted to the City in respect of an administrative penalty. An administrative fee of $50 is imposed for late payment of an administrative penalty.

5. "Hearings Officer"

As noted, Oshawa's systems of residential rental licences and licensing administrative penalties include the right to be heard by a "Hearings Officer".

Oshawa's Hearings Officer exercises "Delegated Powers of Decision" which are defined to mean powers or rights that Council confers by specific by-laws to make decisions prescribing the legal rights, powers, privileges, immunities, duties or liabilities of any person, or the eligibility of any person to receive, or to the continuation of, a benefit or licence. As noted, the establishment of such Hearings Officers is aided by municipalities' enhanced powers to delegate including in relation to quasi-judicial and legislative powers.

The drafting of the Hearings Officer By-law was informed by the Parking Regulation which, as noted, requires a municipality to develop standards relating to the administration of the system of *parking* administrative penalties including "policies and procedures to prevent political interference in the administration of the system" and "guidelines to define what constitutes a conflict of interest in relation to the administration of the system, to prevent such conflicts of interest and to redress such conflicts should they occur".[73] The Hearings Officer By-law seeks to achieve these objectives in a number of ways:

- *Qualifications*: The Hearings Officer By-law contemplates the appointment of appropriately qualified candidates. Specifically, Hearings Officers are appointed by Council on the recommendation of the City Manager in consultation with the City Solicitor which recommendation gives preference to eligible candidates who are of "good character" and who have "knowledge of and experience in administrative law".

[73] See also Oshawa Enforcement By-law 92-2014, "*being a by-law to establish a transparent, consistent, fair, unbiased, and effective process for the enforcement and prosecution of alleged contraventions of municipal standards*": http://www.oshawa.ca/uploads/16/EnforcementBy-law92-2014.pdf?ts=636385652220583929

- *Conflicts of Interest*: City employees, City Councillors and their respective parents, spouses and children are ineligible. Debtors of the City (other than in respect of real property taxes or pursuant to an agreement in good standing) are also ineligible.

- *Fixed Term*: Each Hearings Officer's term is fixed for the term or remainder of the term of the Council that appointed the Hearings Officer and thereafter until the Hearings Officer is reappointed or her or his successor is appointed. Note that pursuant to Rule 1 of subsection 23.1(2) of the Act, a delegation may be revoked at any time without notice unless the delegation by-law specifically limits the municipality's power to revoke the delegation. Nevertheless, nothing appears to prevent a municipality from amending its delegation by-law including to change any limits on the power to revoke the delegation provided, of course, that any amending by-law is passed in good faith. The objective of a fixed term, however, is to underscore the Hearings Officer's independence from the Council that appoints her or him.

- *Independence*: Significantly, Oshawa's Hearings Officer By-law creates an offence to prevent others from interfering with the Hearings Officers in the exercise of their powers. Specifically, it is an offence for a person who attempts, directly or indirectly, to communicate with or influence a Hearings Officer respecting the determination of an issue respecting a Delegated Power of Decision in a proceeding that is or will be pending before the Hearings Officer, except a person who is entitled to be heard in the proceeding or the person's lawyer or licensed paralegal and only by that person or the person's lawyer or licensed paralegal during the hearing of the proceeding in which the issue arises. A Hearings Officer is not precluded from seeking or receiving legal advice including from a lawyer in the City's legal department.

The Hearings Officer By-law seeks to strike a balance between individuals' rights and efficiencies in the hearings processes:

- *SPPA:* Proceedings before the Hearings Officer are subject to the *Statutory Powers Procedure Act*.[74]

- *Certificate Evidence:* A statement respecting any matter related to the process or hearing purporting to be signed by the Director or by a person authorized by a City by-law to undertake inspections is, without proof of the office or signature of the Director or such person, receivable in evidence as proof, in the absence of evidence to the contrary, of the fact stated in the statement for all purposes in the process or hearing.[75]

[74] R.S.O. 1990, c. S.22.

[75] See similar "certificate evidence" rules in *Building Code Act, 1992*, S.O. 1992, c. 23, s. 37(2), *Municipal Act, 2001*, S.O. 2001, c. 25, s. 101(4) and 447.6(4) and *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, s. 79(1) and 455(1).

- *Representation:* A representative may act on behalf of and represent a person in respect of a proceeding or hearing before the Hearings Officer where the Hearings Officer is satisfied that:

  (a) the person is entitled to be heard by the Hearings Officer;

  (b) the representative is a lawyer, a licensed paralegal or a person who is exempt from the requirement to be licensed by by-law passed pursuant to the *Law Society Act*;

  (c) the person has authorized in writing the representative to act on behalf of and to represent the person in the particular proceeding or hearing; and

  (d) the written authorization has been filed in the proceeding or hearing before the Hearings Officer and remains in effect.

- *Recording Proceedings:* No person may take or attempt to take a photograph, motion picture, video recording or other recording capable of producing visual or aural representations by electronic means or otherwise, at any proceedings of the Hearings Officers otherwise open to the public, except in the following circumstances:

  (a) No fewer than 3 days prior to the proceeding, the person gives written notice to the City of the person's intention to request the Hearings officer for permission to record the proceeding which notice specifies the proposed means of recording;

  (b) The person bears all costs related to the proceeding;

  (c) Where the person proposes verbatim transcription:

    i) the recording is undertaken by a qualified verbatim reporter;
    ii) all testimony and submissions respecting the proceeding are recorded; and
    iii) the person delivers to the City no fewer than 2 certified copies of the transcript prepared by the qualified verbatim reporter within 3 days of the reporter's completion of the transcript;

  (d) the Hearings Officer determines that the proceeding will not be disrupted or delayed if approval is given;

  (e) the Hearings officer determines that the approval will not result in any prejudice to any party to the proceeding;

(f) prior to the commencement of the proceeding, the Hearings Officer authorizes the recording and has not revoked the authorization; and

(g) the recording is undertaken only in accordance with the Hearings Officer's approval including any terms or conditions to such approval.

- *Interpreter*: If a person requires an interpreter for the purpose of any proceeding before a Hearings Officer, the person must provide the interpreter at the person's own expense.

6. Municipal Regulation of Residential Rental Housing and the Ontario Human Rights Commission

The Ontario Human Rights Commission has taken an interest in municipal regulation of residential rental housing.

As noted, in *Death*, the Commission sought leave to intervene on the landlords' application for leave to appeal to the Supreme Court of Canada. In her supporting affidavit, Chief Commissioner Barbara Hall stated:[76]

> *"While this case did not arise out of a human rights complaint, it does have at its core issues of access to housing. The effect of the decisions below limits choices of housing for students attending UOIT or Durham College in Oshawa. The Commission is aware of issues in other Ontario municipalities where increased demand for housing for post-secondary students has led municipalities to consider using zoning by-laws to limit accommodation for students. […]*
>
> *"In 2007, the Commission initiated a province-wide consultation with respect to rental housing and human rights in order to increase public understanding of discrimination issues associated with rental housing. Following extensive meetings and consultations, the Commission published a report on May 29, 2008, entitled Right at home: Report on the consultation on human rights and rental housing in Ontario.*
>
> *"The Commission's 2008 report included, inter alia, an observation that a wide range of consultees expressed concern about the use of zoning definitions to exclude certain Code-protected groups from living in particular areas. During the consultation, Ontario's Ministry of Municipal Affairs and Housing advised the Commission that a zoning by-law should not regulate the user, as opposed to the use of land, or define the use by reference to personal characteristics.*

[76] Affidavit of Chief Commissioner Barbara Hall sworn July 24, 2009, ¶7-10.

> *"The Commission's interest in this application stems from the observations in the decisions in the courts below, which suggest that the zoning by-law in question in this case has been found to regulate the use of land by reference to characteristics of the users […]"*

In its supporting Memorandum of Argument, the Commission stated:[77]

> *"Whether Oshawa's intention in enacting the zoning by-law was to limit people's access to rental housing in an area zoned as R1 is irrelevant. The effect of the by-law is to limit access to rental housing to students in their late teens and early 20's. The effect of the by-law is to impose restrictive covenants on young people, which restrictions are not imposed on older renters who have a relationship, described by the application judge as "a single family or other similar basic living arrangement in society".*
>
> *[…]*
>
> *"The effect of Oshawa's by-law, as interpreted in the courts below, is to restrict students' access to rental housing in a districted zoned as R1, because of the nature of the students' relationship to one another. A group of students renting a house together while pursuing post-secondary education do not form a "typical family group" or a "similar social unit" as described by the application judge.*
>
> *[…]*
>
> *"The effect of Oshawa's by-law, as interpreted by the courts below, is to restrict students' access to rental housing in a district zoned as R1, because the students are not related to one another in the way envisaged by the application judge that a "typical family group" or "similar social unit" would be related. This interpretation of Oshawa's by-law is inconsistent with subs. 35(2) of the Planning Act, which provides that a municipality does not have authority to pass a zoning by-law that has the effect of distinguishing between persons who are related and persons who are unrelated, including in the occupancy or use of a single housekeeping unit."*

There is no doubt that the Ontario *Human Rights Code* is fundamental, quasi-constitutional law, applicable both to private citizens and public bodies. It must be recognized as being the law of the people and given expansive meaning and broad application.[78]

The Ontario *Human Rights Code*, s. 47(2) provides:

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[77] Ontario Human Rights Commission Memorandum of Argument dated August 4, 2009, ¶12, 14 and 16.

[78] *Werbeski v. Ontario (Director of Disability Support Program, Ministry of Community & Social Services)* (2006), [2006] 1 S.C.R. 513, 266 D.L.R. (4th) 287 at ¶13 and 33.

> ***Act binds Crown***
> *47. (1) This Act binds the Crown and every agency of the Crown.*
>
> ***Act has primacy over other Acts***
> *(2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.*

For the purposes of subsection 47(2) of the *Code*, the *Planning Act* does not provide that it applies notwithstanding the *Code*. Accordingly, although the *Planning Act* permits a municipality to pass zoning by-laws, section 47 of the *Code* prevents any interpretation of the *Planning Act* that would give a municipality the power to enact zoning by-laws that are inconsistent with the provisions of the *Code*.[79]

The *Code* also prohibits unintentional discrimination:

> ***Constructive discrimination***
> *11. (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,*
>
> *(a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or*
>
> *(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.*
>
> ***Idem***
> *(2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.*

In response to the Commission's application, the City argued that its efforts to enforce existing standards prescribed by the ZBL were not aimed at students or any particular group. They were aimed at a specific use – Lodging Houses – not permitted in any R1 zone. Its efforts applied equally to students or others seeking short-term by-the-room occupancy in low density residential neighbourhoods that have been destabilized by the use of homes therein as Lodging Houses.

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[79] See *Werbeski* at ¶34.

The City also argued that the *ZBL* does not prevent the rental of two rooms to unconnected occupants as of right. However, if more than two rooms are to be rented, the premises must function as a single housekeeping establishment – in a manner commonly associated with "single-family" dwellings. This was consistent with the decision in *Smith v. Tiny*[80], and its codification[81] in section 35(2) of the *Planning Act*. It was a violation of the *ZBL* to rent more than two rooms to occupants who do not have this "singleness" and function instead as Lodgers in a Lodging House.

The City argued further that the landlords' properties were not "single housekeeping establishments" was evidenced by the rates charged per rental room, on average $500 per month. With four to eight rooms rented per property, the aggregate monthly rental income per property was between $2,000 and $4,000. If the landlords' tenants really made up a "single housekeeping establishment" they would rent the houses in their entirety. The unchallenged evidence was that single detached houses in the Neighbourhoods could have been rented as a whole for approximately $1,500 per month.

Moreover, the attempt to frame the appeal as involving discrimination against students raised a fresh issue which was not argued at any point during the Application (the only challenge to the *ZBL* being on the ground of vagueness) and did not appear in the landlords' initial Notice of Appeal.

The landlords' application for leave to appeal and the Ontario Human Rights Commission's application for leave to intervene were ultimately dismissed by the Supreme Court of Canada.

In the writer's opinion, the fundamental flaw in the theory of the Commission's case was its premise that students (including young students) are generally incapable of forming single housekeeping establishments in compliance with the City's ZBL. That flaw led to the Commission's mistaken conclusion that the ZBL or its enforcement respecting 34 properties resulted in the "*exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination"* contrary to subsection 11(1) of the *Code*.

In March, 2010, the Commission released its "*Comment of the Ontario Human Rights Commission on the City of Oshawa's Student Accommodation Strategy*",[82] noting:

> *"It is important to note that although many believed that the Supreme Court of Canada's declining leave to appeal in [Death] put to rest any human rights concerns regarding the*

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[80] *Smith et al. v. Township of Tiny* (1980), 27 O.R. (2d) 690 (Div. Ct.) at 695, affirmed 29 O.R. (2d) 661 (C.A.), leave to S.C.C. refused, 29 O.R. (2d) 661n.

[81] *Phi Delta Beta of London Inc. v. London (City) Chief Building Official* (1995), 25 M.P.L.R. (2d) 140 (Ont. S.C.J.) at ¶21, aff'd (1996), 36 M.P.L.R. (2d) 319 (Div. Ct.).

[82] http://www.ohrc.on.ca/en/resources/submissions/oshawastudenthousing

definition of lodging houses, this is not the OHRC's interpretation. None of the lower court cases examined any of the human rights issues. The Supreme Court of Canada dismissed the application for leave to appeal without examining the merits of the case, leaving these issues open, and questions remain about the intersection between human rights and the occupancy and zoning of lodging houses."

In 2011, the Commission released "*In the Zone: Housing, human rights and municipal planning*."[83] The Commission describes it as a guide that

> *"offers an overview of the human rights responsibilities of municipalities in housing. It offers information about the various legislated tools municipalities have, and shows some examples of how municipal planners, councillors, Housing Service Managers, District Social Service Boards and others can use "best practices" to overcome discriminatory neighbourhood opposition and promote housing that is free from discrimination. The guide can also be a resource for organizations and advocates who are working with municipalities to advance human rights in housing."*[84]

In May, 2013, the Commission released, "*Room for everyone: Human rights and rental housing licensing.*"[85] The Commission describes it as a guide that

> *"addresses how licensing provisions in municipal bylaws may disadvantage groups protected by Ontario's Human Rights Code (the Code), gives an overview of human rights responsibilities in licensing rental housing, and makes recommendations to help municipalities protect the human rights of tenants."*[86]

The Commission recommends that municipalities do the following when considering rental housing licensing:

1. Consider the Ontario Human Rights Code before drafting the by-law and refer to the Code in the by-law;

2. Consult with Code-protected groups;

3. Make sure that meetings about the by-law do not discriminate;

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83 http://www.ohrc.on.ca/sites/default/files/In%20the%20zone_housing_human%20rights%20and%20municipal%20planning_0.pdf

84 http://www.ohrc.on.ca/en/zone-housing-human-rights-and-municipal-planning

85 http://www.ohrc.on.ca/sites/default/files/room%20for%20everyone_human%20rights%20and%20rental%20housing%20licensing_accessible.pdf ["Room for everyone"]

86 http://www.ohrc.on.ca/en/room-everyone-human-rights-and-rental-housing-licensing

4. Roll out the bylaw in a consistent, non-discriminatory way;

5. Work to secure existing rental stock (eg., "grandparenting" existing homes or providing for variances);

6. Avoid arbitrary bedroom caps ("*municipalities should allow the number of bedrooms based on the original floor plan of the house, or the existing floor plan if alterations were done with municipal approval, in compliance with the Building Code, and/or are consistent with other housing in the area*");

7. Avoid gross floor area requirements that exceed the Building Code;

8. Eliminate per-person floor area requirements;

9. Eliminate minimum separation distances;

10. Enforce the by-law against the property owner, not the tenants;

11. Protect tenants in cases of rental shut down;

12. Monitor for impacts on Code groups; and

13. Make sure licensing fees are fair.

7. Conclusions

Post-secondary institutions contribute significantly to their host municipalities. Their students require a variety of accommodation. Municipalities inevitably have a role respecting an adequate supply of accommodation that meets minimum health, safety and other municipal standards. An effective planning strategy requires consideration of the accommodation supply itself, the compatibility of uses - including various forms of residential uses - and the need for participation by the post-secondary institutions in the development and implementation of the strategy.

Municipalities enjoy enhanced powers to establish more effective enforcement systems including for licensing and administrative penalties. Any enforcement initiative requires adequate resources. In particular, systems of licences and administrative penalties require additional administrative infrastructure. A licensing system is most effective when non-compliance is sufficiently significant such that the proposed licensed activity should cease to be "as of right".

The most effective standards are those for which evidence of compliance or non-compliance is discernible and objectively measured. For example, a bedroom limit-per-dwelling unit is likely

more discernible and objectively measured than whether a residential property functions as a "single housekeeping establishment".

It is also important to manage enforcement expectations. For example, the mistaken belief that young persons (including students) are incapable of establishing single housekeeping establishments has fueled controversy. There is no doubt that young persons and students *are* capable of establishing single housekeeping establishments. In fact, Justice Howden's judgment in *Death* reveals a low threshold for the establishment of a single housekeeping establishment – some common bond other than simply the need for short term accommodation. In *Death*, evidence of that material fact was absent in 28 of the 30 properties for which judgment was rendered. However, the Court of Appeal reminds us that *Death* was a fact-driven application. For the prosecution, proving a negative – the absence of a "single housekeeping establishment - remains challenging. For landlords and their occupants, proving the existence of some common bond comprising a "single housekeeping establishment" remains possible. The result is that the "Lodging House" provisions of the ZBL are not the enforcement panacea that some may expect.

Municipalities should monitor carefully the Ontario Human Rights Commission's interest in municipal land use planning and enforcement. As noted, the Ontario *Human Rights Code* supersedes the *Planning Act* and the *Municipal Act, 2001* to the extent of conflict between those statutes and the *Code*. The *Code* also prohibits unintended "constructive" discrimination. Accordingly, consideration should always be given to the potential for constructive discrimination and, where appropriate, to consultation with the Human Rights Commission. Equally, it is important to remember that all municipal regulatory by-laws – zoning by-laws in particular - restrain the activities of some people in some way. *Death* was a fact-driven application respecting 34 properties. As the result in *Death* illustrates, not all regulatory restraint and related enforcement can be characterized as contrary to the *Code*. Finally, it is important that, when consulting, municipalities do not abdicate or fetter their jurisdiction by agreement or otherwise while seeking to balance competing interests.

Perhaps the most important lesson learned is that earlier implementation of a comprehensive planning strategy that addresses an appropriate supply and variety of housing choices may ameliorate to a degree the conditions that ultimately may require significant enforcement initiatives.

/djp