ISSUE DATE:
March 15, 2004
DECISION/ORDER NO:
0569

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

PL030313

Robert Deveau, Daniel Pikelin, Mirka Macalik and others have appealed to the Ontario Municipal Board under subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, against Zoning By-law 138-2003 of the City of Toronto
OMB File No. R030064

APPEARANCES:

Parties	**Counsel**
City of Toronto	B. O'Callaghan K. Franz
The MUC Shelter Corporation (Sojourn House)	C. MacDougall C. Lantz
Advocacy Centre for Tenants Ontario	K. Laird T. Yao T. Young
Confederation of Residents and Ratepayers Association	D. Vallance
Hastings Corporation Ltd., R. Deveau, D. Pikelin, J. Fine, S. Ackerman, A. Joram, P. Schmelzer, J. Smith, L. Mak, F. Kober Renbaum (Hastings Corporation)	C. Williams
M. Macalik	

DECISION DELIVERED BY S. D. ROGERS

INDEX

1. INTRODUCTION

2. ISSUES ARISING DURING THE COURSE OF THE HEARING

3. FINDINGS AND DECISION OF THE BOARD

4. PLANNING

a. Background
b. Sections 2(ii) and 2(iii) – Arterial Road and Separation Distance Requirements
c. Section 2 (iv) – Council Approval of Location
d. Remainder of the By-law and Planning Conclusion

5. JURISDICTION

a. Requirement to Give Notice of a Constitutional Question Pursuant to Section 109 of the *Courts of Justice Act*
b. Jurisdiction of the Board to Amend By-law 138-2003 Based on a Contravention of Section 15 of the *Canadian Charter of Rights and Freedoms*

6. CHARTER ISSUES

a. Do Section 2(ii) and 2(iii) of By-law 138-2003 Violate the Rights of the Homeless Contrary to Section 15 of the *Canadian Charter of Rights and Freedoms.*

1. INTRODUCTION

This hearing commenced at the end of September 2003, and continued over the course of two and a half months, including 11 days of argument. The key matter in issue is the appropriateness of the location requirements contained in Zoning By-law 138-2003, passed by the City of Toronto in February of 2003.

By-law 138-2003 is one of very few attempts by the amalgamated City of Toronto, to date, to pass a uniform City-wide by-law, outlining a consistent set of zoning permissions throughout the City for a specific use, that use being a municipal emergency shelter for persons finding themselves temporarily homeless. Currently, most of the zoning by-laws in force in the City of Toronto remain by-laws passed by the former area municipalities (which were ultimately combined to form the amalgamated City of Toronto). These remnant zoning by-laws do not have any City-wide application and provide diverse and inconsistent regulation across the City.

The original appeals of the by-law were filed by parties primarily interested in certain site-specific exemptions contained in the by-law. However, certain interest groups, specifically the Advocacy Centre for Tenants Ontario and the Confederation of Residents and Ratepayers Association, sought and obtained party status from the Board, otherwise constituted, on the date originally scheduled for the commencement of the hearing in July 2003. Once obtaining party status, these interest groups identified additional substantive legal and constitutional issues which they sought to be addressed by the Board, and which were added to the issues list at that time.

The hearing was adjourned in July of 2003 to allow all parties to prepare to address the additional issues. On a motion dealt with by this panel of the Board, the Board deferred the hearing of the issues with respect to the exemption accorded to Sojourn House at 101 Ontario Street under the by-law, until certain court applications were determined. However, the parties primarily interested in that issue, Sojourn House and Hastings Corporation, continued to play a limited role in the consideration by the Board of the issues related to the general requirements of the by-law.

At the commencement of the hearing, the Board was advised that the Confederation of Residents and Ratepayers Association was withdrawing from the hearing because it could not afford to attend or participate during the full length of the hearing. Apparently, the lengthening of the hearing as a result of the addition of the issues advanced by the Advocacy Centre for Tenants Ontario (ACTO) made it unfeasible for the Association to participate.

The hearing took a total of 21 days over two and a half months as opposed to the 3 weeks or 15 days originally scheduled. Included in that time was a night meeting where interested participant groups attended before the Board and made their views known about the provisions in the by-law.

A substantial amount of hearing time was devoted to complicated legal and constitutional issues, which are not normally the subject of consideration by this Board. It was an unusual case, in that the issues identified by the parties prior to the hearing were not of particular assistance in understanding the arguments and positions of the parties. The hearing was quite fluid, both in terms of evidence and

argument, with additional associated issues arising from time to time. In the end, the Board conducted an exhaustive examination of all of the issues raised by the parties, through evidence and in law.

The Board heard from nine witnesses called by the parties, as well as from Ms. Macalik, one of the appellants. The City called a planner and the City's Manager of Planning and Development, Hostel Services, in support of the by-law as written. ACTO called a City planner, the City's Acting Director, Housing and Homelessness, the Director of Woodgreen Emergency Shelters, a professor of planning and poverty, and an expert in human rights. Both Hastings Corporation and Sojourn House called planners in respect to the issues. The Board also heard from eight witnesses at a night meeting held to consider participant submissions. Most, though not all, of those witnesses represented associations who advocate for homeless people, or those living in poverty or having other special needs.

The Board carefully considered the evidence of each witness in the context of the issues raised before it in arriving at its decision, whether or not a particular witness is named in this decision. The Board also carefully considered the submissions of the parties with respect to the evidence, and the legal principles which arose and were argued in this case.

2. ISSUES ARISING DURING THE COURSE OF THE HEARING

The issues, which arose in this hearing, relate to the specific regulations contained in Section 2 of By-law 138-2003.

By-law 138-2003 states in the preamble, that City Council has recognized that there is a continued need for emergency shelter accommodation within the City and that the City is prepared to provide such services throughout the City. However, the by-law <u>only</u> regulates those emergency shelter services, which are provided "by, or for, the City of Toronto". Services such as hostels and crisis care facilities, which are not provided by or for the City (such as shelters for abused women which are currently exclusively funded by the Province), are not regulated by this by-law and remain under the auspices of the existing zoning by-laws.

Section 1 of the by-law states:

> "1. For the purposes of this By-law, "Municipal Shelter" means a supervised, residential facility operated by or for the City of Toronto or any agency of the City of Toronto, which provides short-term emergency accommodation and associated support services."

Nothing in Section 1 was considered an issue by the parties. It was the requirements contained in Sections 2 (ii), (iii) and (iv) which were the crux of the controversy before the Board. Section 2 states as follows:

> "2. Notwithstanding any other general or specific provision in any By-law of the City of Toronto or of its former municipalities, municipal shelters shall be a permitted use in all zones or districts of the City of Toronto, provided:
>
> (i) any new buildings or additions comply with all other applicable zoning provisions of the zone or district;
>
> (ii) the lot on which the municipal shelter is located is on a major arterial road or minor arterial road as described on the Road Classification System, as amended, for the City of Toronto;
>
> (iii) the lot on which the municipal shelter is located is at least 250 metres from any other lot with a municipal shelter or emergency shelter, hostel or crisis care facility; and
>
> (iv) the municipal shelter, including its location, has been approved by City Council."

Section 3 of the by-law provides that any such facility that lawfully existed or for which a building permit had issued on the date the by-law was passed, is deemed to comply with Section 2 of the by-law. Section 4 deals with some site-specific exemptions to the by-law requirements. The Board was advised during the course of the hearing that it was not the intention of Council to include in Section 4 an exemption from the requirements of Section 2(i) of the by-law, and thus, the Board will amend the by-law to remove that exemption. The remaining sections in the by-law deal with amendments to existing zoning by-laws required to implement the intent of By-law 138-2003.

It is an interesting aspect to this matter that all parties wished to see the by-law approved, albeit in different forms.

The relief sought by ACTO, and supported by Sojourn House, was that the Board should approve an amended zoning by-law that deletes all reference to the requirements contained in Sections 2(ii), (iii) and (iv). The basis for this request for relief was that these requirements had no legitimate planning basis, and that at least one of the requirements - Section 2(iv) - was an inappropriate and illegal provision for a zoning by-law. In the alternative, these parties argued that the Board must amend the zoning by-law to remove the disputed sections, because the sections result in a violation of the rights of a group that is, or should be, protected under Section 15 of the *Canadian Charter of Rights and Freedoms*: the homeless.

The City's position, supported by Hastings, was that the zoning by-law should be approved as passed by the City of Toronto. This position was amended somewhat during the course of the hearing based on the evidence of Hastings' and the City's planning witnesses, Mr. Stagl and Mr. Butler. Based on the evidence given, and after some questions by the Board to these witnesses, Mr. Butler suggested some modifications to Section 2 (ii) of the by-law, which the Board will adopt, as will be discussed later in this decision.

While the issues were very simply stated in the issues list prior to the hearing, it became evident during the hearing that the issues could not be so simply viewed, and that a number of related issues were necessary to be canvassed with the witnesses and with counsel, and then considered and decided by the Board.

The issues, which the Board decided in the course of determining this matter, are as follows:

1. Do the location requirements contained in Subsections 2(ii), (iii), and (iv) have any legitimate planning basis and are they appropriately included in By-law 138-2003?

2. Should the provision exempting 717 Broadview Avenue from the location requirements contained in the by-law continue to be included in Section 4?

3. Does By-law 138-2003 implement the applicable planning policy documents and does it constitute good planning?

4. Where a constitutional issue is raised with respect to a municipal zoning by-law, is the party raising the issue required to notify the

provincial and federal Attorneys General, pursuant to Section 109 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43?

5. Does the Board have the jurisdiction to amend Zoning By-law 138-2003 so as to strike certain provisions, on the basis that those provisions violate the *Canadian Charter of Rights and Freedoms* (the "*Charter*")?

6. Do the provisions of Subsections 2(ii), (iii), and (iv) violate Section 15 of the *Charter*, and if so, are the provisions in the by-law saved pursuant to Section 1 of the *Charter*?

3. FINDINGS AND DECISION OF THE BOARD

For the reasons set out herein the Board finds as follows:

1. Subsections 2(ii) and 2(iii) of By-law 138-2003 are location requirements that direct the City's emergency shelter facilities towards appropriate priority areas within the City. The location requirements direct these emergency shelter uses towards areas which will assist the City in achieving its objectives of:

   - facilitating a wider distribution of facilities across the amalgamated City,
   - increasing the availability of sites for such uses,
   - allowing a quicker response to issues of homelessness, by providing a vastly increased area within which such facilities may appropriately locate without engaging in a lengthy rezoning process.
   - ensuring the accessibility of the facility for the users, and ensuring the accessibility of services, required by the users of the facility.

   These requirements are, therefore appropriately included in this zoning by-law. However, the Board will order an amendment to the by-law which somewhat expands the arterial road requirement in Section 2 (ii) to include an arterial road <u>corridor</u>, to conform with the evidence heard by the Board in this regard.

2. Subsection 2(iv) of By-law 138-2003 is not a requirement that has any foundation in established planning principles, nor is it founded on any

recognizable planning rationale nor in any applicable planning policy or legislation. It therefore does not constitute a regulation that ought to be included in the zoning by-law.

3. Subsection 2(iv) creates uncertainty in the application of the by-law, and therefore ought not to be included in a zoning by-law.

4. By-law 138-2003, as modified by this Board, conforms to the principles of good planning, and all applicable planning policy documents, and is supported by sound planning rationale. The by-law conforms with the intent of the Provincial Policy Statement, and Metroplan, the only official plan that applies across the amalgamated City. Furthermore, the by-law will facilitate the achievement of the City's program and service delivery objectives with respect to homelessness. The by-law will increase the number of sites across the City available for use as an emergency shelter, and properly directs the emergency shelter use to locations, which will meet the needs of the users, while minimizing the possible impacts of the use on neighbourhoods.

5. The provisions exempting 717 Broadview Avenue from some of the requirements of the by-law have been included for valid and appropriate planning reasons.

6. ACTO notified the federal and provincial Attorneys General of the constitutional question being put to this Board, and the Board did not need to decide the question as to whether such notice is a requirement under the *Courts of Justice Act*.

7. The Board does not have jurisdiction to amend a zoning by-law of general application by striking certain provisions contained therein, on the basis only, that the provisions in the by-law offend the provisions of the *Canadian Charter of Rights and Freedoms*. Furthermore, the Board has no jurisdiction to determine the issue of the validity of the zoning by-law as a freestanding matter. The Board therefore should not have considered the *Charter* arguments advanced to it by ACTO and has no jurisdiction to grant the remedy requested as a result of those arguments.

8. If the Board is wrong with respect to its jurisdiction, the Board finds that Subsections 2(ii) and (iii) of By-law 138-2003, do not offend Section 15 of the *Charter*. The Board need make no ruling on Subsection 2(iv) given that the Board has determined that it ought not to be part of the by-law on other grounds.

9. The Board need not decide, therefore, whether the impugned provisions are saved pursuant to Section 1 of the *Charter*.

The Board therefore allows the appeal in part and will approve an amendment to the zoning by-law for the City of Toronto in accordance with the version of By-law 138-2003, modified by the Board with respect to Sections 2(ii) and 2(iv), and Section 4 and, together with Schedule 1 to the by-law, is appended hereto as Attachment 1; with the exception of Section 4(a) which provision will be determined in a continuation of this hearing. (Please note that the Board has made some technical and form changes to the by-law for the purposes of consistency and ease of interpretation and reference.)

The Board will give the City 21 days from the date of this decision to advise the Board of any issues it may have with the form or wording of the by-law amendment, provided no such advice modifies the intent of this decision. If the Board has not heard from the City in this regard within the time specified, the order of the Board approving the zoning by-law amendment will issue forthwith.

4. PLANNING

a. Background

It is important to provide information on the process leading up to the passing of this by-law so as to understand the context and thus the arguments and, to a certain extent, the reasons of this Board.

The origins of this by-law began with a Task Force on Homelessness set up by the Mayor of Toronto to examine what had become an alarming problem in the City in the late 90's. City Council had determined that there were an inadequate number of emergency facilities (let alone long term solutions) to address the problem in the newly amalgamated City, and directed City staff to design a program which would ease the timing and the process of setting up emergency shelters across the City.

The Board was advised that in most areas of the City, particularly outside the old City of Toronto, such emergency facilities could not be located without a zoning by-law amendment. As a result, and with the exception of some family shelters located in motels in the eastern part of the City, most of the emergency shelters, hostels and crisis care facilities in the amalgamated city were located in the

downtown areas of the old City of Toronto, where such uses were specifically permitted in CR, MCR, RA, and Q zones.

As an immediate response, the City interpreted the meaning of the term "Essential Services" found in several former municipalities' zoning by-laws to include the provision of emergency shelter accommodation. This allowed the City to locate emergency shelters in some areas where such a service had previously not been situate. However, more direct, and wide-ranging solutions were desired.

Two departments at the City began to work in tandem to design solutions: Urban Development Services and Community and Neighbourhood Services. The Urban Development Services department began the design of a City-wide zoning by-law that would facilitate the ease with which the shelters could be established across the City within the context of the planning regime in Ontario. At the same time, the Community and Neighbourhood Services Department embarked on the formalization of the process by which the department identified suitable locations and sites for such facilities, and involved the local community in the decision-making process.

In July of 2001 a report issued from the Commissioner of Urban Development Services that proposed a draft zoning by-law that provided that City emergency shelter uses would be permitted in all areas of the City subject only to the requirement that any additions or new buildings must conform to the applicable zoning standards of the zone in which the use located, (the requirement now contained in Section 2(i) of By-law 138-2003). The proposed by-law was then subject to an extensive community consultation process, which lasted up to February 2003, when the final version of the by-law was passed.

The community consultation process was a story in itself, with extensive public participation and an untold number of community meetings before City Council, before the local Community councils and out in the community. It was, as suggested by Mr. Butler, the planner called by the City, a rigorous and comprehensive process.

While there were reasoned and thoughtful responses to the proposed zoning by-law which outlined legitimate and rational support for, or opposition to, the way in which the by-law was originally framed, there were also many extreme, somewhat

nasty letters, submissions and oral deputations targeted at the assumed character, or lack thereof, of the people who found themselves in such dire circumstances. ACTO insisted on bringing many of these submissions to the attention of the Board, and filed an entire volume of such submissions as an exhibit.

It is the Board's view that much of the resistance to the way in which this by-law is framed, is founded on the reactions of well-intentioned people trying to bring some measure of relief and dignity to the lives of the homeless; to the emotional, irrational, and sometimes hateful verbiage of other members of the community on this subject. There is no doubt that many of the people seeking to provide relief to the homeless were offended by the type of discourse which arose during the public consultation process.

The Board must note, however, that no matter how offensive the discourse may have been, such verbiage is not unique, either for this process or in relation to this type of use. This kind of discourse has been heard in other similar proceedings before municipalities and before this Board, when there are proposed changes to neighbourhoods; whether it is proposed to introduce homeless shelters or smaller residential lots. People tend to fear the consequences of change, whether it is a change in use (e.g. from residential to commercial) or whether there is a change in the character of a use which is already established (e.g. from single-family residential to townhouse or higher density residential uses). Sometimes that fear is driven by an apprehension of the kinds of people who will be attracted to, or access the use, and concern as to whether the new people will be different from those existing in the area, and as to the consequences of that potential difference. These apprehensions are often made known to the Board under the guise of planning objections.

Interestingly enough, no offensive discourse arose during the proceedings before the Board in this case. All parties before the Board sought to facilitate the provision of relief to homeless persons. The disagreement was as to whether the manner chosen by the City was appropriate in the context of planning considerations and in the context of the constitutional guarantees of human rights and human dignity in this country.

In any event, as the Board consistently advised the parties before it in this matter, the Board does not make decisions based on any assessment of the character or type of people who will access the use. It makes decisions on the basis of the applicable planning policies, the physical layout of the property, the built form of the structures accommodating the proposed use, the type of activity to be generated by the use, the intensity of that activity, and whether the neighbourhood context and the use are compatible, one to the other. In other words, the Board makes a determination as to whether the neighbourhood is an appropriate one for the type of use, and whether the use is one which will either not adversely impact the neighbourhood, or only do so to a minimal extent.

During the course of the public consultation process at the City, there were a myriad of concerns raised by members of the community, which prompted suggestions from councillors to consider changes to the zoning by-law that would more precisely identify where these uses would locate and how they would be operated. In the final report to Council in February 2003, staff indicated the following at page 10:

> An important and over-riding message that staff heard through this public consultation exercise is that while the provision of municipal shelters throughout the City is necessary, the draft by-law and related policies and procedures should be more restrictive and afford greater scrutiny than what was being proposed.

Some of the changes that were suggested were criteria in the by-law which would put limits on the number of beds to be provided in the shelters, or on the number of people that should be accommodated in any shelter, limits on the number of shelters in a particular ward of the City, distance separation requirements between facilities, restrictions on the types of areas within which the facilities would locate, and Council vetting of the location of each facility. It is noted by the Board, that Council chose to include some of these suggestions and not others in the final version of the by-law.

None of the suggested criteria were considered by planning staff or by staff from the Social Services Department to be suitable for inclusion in the zoning by-law. However, virtually all of the suggested criteria were considered appropriate for inclusion in the protocol required to be considered by staff before recommending funding of a shelter location proposal. Repeatedly, staff opined in City staff reports

that such restrictions or location criteria contained in a zoning by-law would restrict the availability of sites in the city.

The Board notes that such an opinion is self-evident and that zoning by-law requirements or restrictions are intended to direct uses **to** areas and **away** from other areas. It is further self evident that where such requirements are contained in a by-law, the number of opportunities for siting a use is less than if there are no location directions or requirements in the by-law.

In the end, the decision made by City Council was to include in the by-law, the additional three requirements found in Subsections 2(ii), (iii) and (iv) of By-law 138-2003, and to leave the remaining suggested criteria for locating shelters to be considered in the process staff used to identify suitable sites for the shelters and shelter funding.

The Board observes that throughout this hearing, the Advocacy Centre for Tenants Ontario ("ACTO") focused on the original draft of the by-law, which would allow an emergency shelter use anywhere in the City subject only to the applicable zoning performance standards, as the only appropriate means for achieving the goals of the City program. In taking this approach, it relied on the preferences of City staff, and discounted completely the express wishes and preferences of many of the residents of the City and the suggestions made by councillors and members of the public. ACTO also dismissed any suggestion that City Council had an obligation to consider the information provided, concerns raised, or suggestions made during the public consultation process and interpreted City Council's actions as a cynical attempt to mollify unreasonable and irrational elements of the City's populace.

As a general observation, the Board must note that it disagrees, for the most part, with the interpretation and representation of the evidence heard by the Board on this matter; particularly as that evidence is presented in Volume 2 of ACTO's written submissions.

Furthermore, the Board notes that exactly how and why Council arrived at the conclusion it did on how to achieve the goals of addressing homelessness in the City, cannot be ascertained with any degree of certainty, given a 44-member Council. Thus, speculation in that regard is not particularly useful. Suffice it to say that Council, as decision-makers, made a decision to balance their staff's

recommendations that emergency shelters should be located anywhere in the City subject only to a set of guidelines established by staff, with the public's concern that the by-law should be more directed and focused, and acted on that decision.

In so doing, City Council intelligently and appropriately exercised its decision-making powers, in the Board's view. The Board cannot attribute any sinister or cynical purpose to this decision, notwithstanding many would find some of the public discourse leading up to that decision offensive. The Board need only ask whether the decision made by Council is supported by sound planning reasons and applicable planning policy, in order to support the decision.

b. Sections 2(ii) and 2(iii) – Arterial Road and Separation Distance Requirements

These two requirements were the focus of the challenges raised by ACTO and Sojourn House and vigorously defended by the City and by Hastings. Section 2(ii) requires that any municipal shelter be located on a major or minor arterial road, (the "arterial road requirement") and Section 2(iii) requires a minimum separation distance of 250 metres between such facilities; and between such facilities and other similar facilities not run by or for the City (the "separation distance requirement").

The Board heard from three planners who gave the opinion that neither of the location requirements was based on land use planning principles. The suggestion was that the requirements were restrictions placed on shelters by City Council for the sole purpose of ensuring that such facilities were not located within residential neighbourhoods and as a thinly disguised attempt to appease members of the community who objected to homeless people being located within their neighbourhood.

It was stated by these planners that they viewed the requirements as a strictly cynical political response to the extreme reactions of some community members during the consultation process and as a way for Council to appease that reaction by distancing the persons requiring the use of the facilities from persons living in other residential dwellings. According to the planners called by ACTO and Sojourn House, these were restrictions based on a deep-seated prejudice as to the nature and character of persons finding themselves homeless and therefore without planning rationale.

The Board also heard strong evidence that supported a clear planning rationale for these location requirements. Furthermore, the Board notes that not all of the restrictions proposed during the consultation process were included in this zoning by-law, and that a clear choice was made by City Council as to what it considered were appropriate criteria to include in the by-law.

The Board heard from the witnesses from the City involved in the provision of shelter services, Ms. F. Murray and Ms. A. Longair, that the focus of the City's shelter program, going forward, was to:

i. achieve international standards in terms of the provision of the shelter accommodation, and

ii. increase the number of shelter beds, while replacing the shelter beds lost as a result of the goal to conform to international standards in the provision of shelter accommodation, and

iii. achieve optimum cost efficiency in the provision of the accommodation, and

iv. provide, or make available, the necessary support services to assist homeless persons in finding permanent solutions to their circumstance, and

v. distribute the availability of shelter accommodation across the City to communities where there is a need, and

vi. reduce the time required to obtain the planning and building approvals necessary to establish City emergency shelters in communities across the City.

The paramount objective of the program is to provide the necessary assistance and services to homeless persons that will enable them to move to a more independent and permanent type of housing at the earliest possible opportunity.

The Board heard evidence of the nature of the funding provided for such shelters by the Province, resulting in a need by the City, when providing these services, to ensure cost efficiencies. There was also evidence that the City was particularly (although not exclusively) aiming at addressing a growing need for

appropriate shelters for homeless families who are currently housed, for the most part, in motel accommodation in the easterly part of the City.

In a report prepared by the Commissioner of Community and Neighbourhood Services dated June 7, 2002 (Exhibit 13b, Tab 2), which reported on the Multi-Year Shelter Strategy for the City of Toronto, the Commissioner stated at page 2:

> … this multi-year strategy is focused on making improvements to existing shelter capacity, addressing some of the shortfalls in current capacity and expanding the focus on services to help people leave the street or shelter. To accomplish this goal the City will require the support of the provincial and federal governments to increase emergency shelter per diems and to provide cost sharing for capital funding.
>
> Since shelter is not the solution to homelessness, the Division will also advocate for more opportunities for people who are homeless outside of the shelter system. These opportunities include transitional, supportive and affordable housing as well as access to adequate incomes, mental health programs, addiction treatment, skills development and employment supports.

The report goes on at page 7:

> Minimum space standards for shelters in Toronto have been proposed and will be before the June 2002 Community Services Committee in a report titled "New Shelter Standards". The 7 % of beds that do not meet the proposed new space standards (280 beds) should be replaced. In addition, mats should be completely eliminated from the permanent, full-time shelter system.

At page 10, the report states:

> Rationale
>
> Increasing family shelter capacity across the City is important to maintain families' connections to the communities in which they live. It is also important to prevent unnecessary school disruption for children and youth and to minimize the impact of concentration on local schools.
>
> Small scale transitional shelters for single adult men and women should be developed outside the downtown core to de-concentrate services in some Community Council Districts. Small scale transitional shelters are appropriate because they foster opportunities for single men and women to re-connect to a local community and build a network of social and other supports. (emphasis added)

The above information confirms the City's identified need to provide all kinds of shelter facilities across the City, outside the downtown core concentration, in all the communities where there is a need.

The Board also heard from Ms. Murray, Manager, Planning and Development, Hostel Services, that the optimum size targeted for the City shelters, given the funding formula and the services required, was a 40 to 60 bed facility with some communal kitchen, recreation and service facilities. It was a consistent theme that the facilities must provide accommodation for the supporting social, legal, medical, psychological, employment skills and food services, to name just some of the support services required by the users to assist them in achieving independent living.

The evidence was, therefore, and the Board finds, that while there would be a need for shelters both larger and smaller, the optimum size for future shelters funded by the City is a 40 to 60 bed shelter, with accommodation for the services required to be provided. Although this is clearly not the only size of shelter to be funded within the City's program, this size of facility is the most cost efficient level of service according to Ms. Murray, and the type of facility the City hoped to provide most often. Given that the zoning by-law was passed to assist in implementing the shelter program, this evidence was of considerable assistance to the Board.

The evidence indicated that there is no consistent type of built form for shelters. The Board can therefore, not assess this by-law on the basis of built form impacts. However, it is clear that the type of shelter most targeted by this by-law and by the City program is a larger scale shelter, which would require a larger scale building, which may not be appropriately located in many areas of the City.

The Board notes that the issue of built form will be dealt with by virtue of the requirement in Section 2(i) which requires that the use will be accommodated in an existing built structure (by which one can assume that the form is appropriate for the built form context); or, if any addition or new building is required, the building will conform to zoning requirements applicable for the zone or district.

The Board must therefore analyze the disputed by-law location requirements, in terms of the characteristics of the use.

The opponents of the by-law requirements urged upon the Board that it must consider this use as “housing”, because the policies addressing this kind of use are found in the “Housing” policies of the Metro Official Plan. Unfortunately, merely classifying this use as “housing” or as “residential” is far too categorical and simplistic, and is not of any assistance in this case. It is the character of the use, the density of the use, the intensity of the use, the purpose of the use, and the needs of the users, and the relationship of the use to its context, that are factors that are of assistance in addressing the issues that have been raised.

The opponents of the requirements in the by-law claim that an emergency shelter use is simply another residential or housing use. The Board finds, however, that this use is not a standard residential use, as that term is generally understood. The standard residential use involves an unsupervised, long-term, independent, self-sufficient living arrangement, rarely, if ever, requiring in-house support services on any long-term basis. There is generally an intention by the users of the standard residential dwelling unit to live for a lengthy period of time in, and become part of, the community within which the residential unit is located.

None of these characteristics defines the types of shelters being envisioned by the City and under consideration here. In this regard, this kind of facility can be clearly distinguished from group homes, which are a form of assisted residential living, which is intended to be long-term, with the intention that the residents live relatively independently and self-sufficiently, and with the minimum necessary in-house support and supervision. There is also a clear objective that the residents of group homes be integrated completely into and become part of the surrounding community.

The Board finds that the targeted shelter use under consideration here is a more transient, institutional, communal type of residential facility intended to provide <u>short-term</u> accommodation, supervision and a full range of supportive services in-house. This use is more in the nature of a seniors’ residence in terms of the typical size, and the type of in-house services and support that are provided, without the longer term accommodation; and even more in the nature of a hotel, which provides short term accommodation with residential facilities such as beds, bathroom, sometimes kitchens, communal eating areas, but not the kind of institutional support services found in a shelter.

However, none of these other uses involves the kind of communal living which the users of the shelter experience, including shared bedrooms, bathrooms, recreation space, and kitchen facilities, with supervision and support. According to the Director of the Woodgreen Shelters, Ms. S. Longley, this type of communal living is not a preferred type of living arrangement, and thus, it is the objective of both the users and the service providers that the users move to more independent living as soon as possible. This creates the high turnover of residents and hence, the transient nature of this residential accommodation.

Thus the Board finds from the evidence that the goal in providing these shelter facilities is to have the users out of the shelter program at the earliest opportunity and into more permanent, independent, self-sufficient living quarters. The goal in providing this facility is not to integrate the users into the community in which the shelter is located, as residents of the shelter. The goal is to attempt to ensure that the persons finding themselves homeless do not lose their supports in, and contact with, the community in which they resided, and to re-integrate the users as independent self-sufficient residents into whatever community the users choose to ultimately reside.

However, according to the evidence of Ms. Longley, there is an intent to ensure that the users of the shelter are considered part of, and supported by, the community while they are accommodated at the shelter. These shelters are facilities that rely heavily on community services and neighbourhood support. Ms. Longley, Director of Woodgreen Shelters, gave evidence on which the Board relies, as she was the only witness before the Board who had operated within the shelter environment on a day-to-day basis for many years. She spoke to the need for the cooperation of schools, the need for ready access to social, medical, legal, counseling, job training, psychological, transportation and other services in the area, as well as in-house. She spoke to the need for the neighbourhood to accept the facility and support it in terms of fund-raising and financial support, as well as by way of volunteer assistance.

The Board heard a very detailed and sophisticated analysis of the planning reasons for locating these facilities in arterial road corridors, and for imposing a separation distance, from Mr. Stagl, the planner giving evidence on behalf of

Hastings. The analysis was added to and supported by the City's planning witness, Mr. Butler. The Board accepts the evidence of both these planners as given and will highlight the key factors which convinced the Board that both location requirements are appropriate, based on sound planning reasons, and will ensure the establishment of these facilities in suitable and fitting locations.

Persons who become homeless are not a homogeneous group. Anyone can be homeless, whether they are single men or women, couples, children or teenagers, or one-or two-parent families. They can be chronically homeless, periodically homeless, new to the country or city, or homeless for the first time in their lives because of catastrophic circumstances.

The evidence indicated that one of the key reasons for the need to pass a City-wide by-law providing permissions for emergency shelters across the City, was that many areas of the City, particularly areas outside of the old City of Toronto, did not permit such uses. There is one exception where, as a result of a particular interpretation of a zoning by-law, homeless families have been accommodated in a concentration of motels in the very easterly part of the City.

No matter the particular group, then, the homeless in this City are now forced to leave whatever community they resided in, unless they lived in the downtown area of the City or perhaps in the particular area of the City where family shelter motels are located. This is a particular hardship for the children, who are forced to leave their schools, their friends and the support they have in the community.

The evidence showed that a key objective for this by-law and indeed for the shelter program is to try to provide the service in the community where the need exists, so that the homeless individual can maintain contacts and support within a community. There is, therefore, a compelling need to overcome the inertia of siting shelters in the downtown area of the City where they have historically located (although there remains a need for such facilities in that area), and out to the areas where such services are not presently provided. The objective of trying to distribute the shelters across the City, to service needs throughout the City, is therefore clear and supportable.

As well, the users of an emergency shelter draw heavily on the social and community support services that are available in a neighbourhood. In establishing

shelters, therefore, there must be consideration of the need for the users to access services, and/or for the services to easily access the shelter. It is, thus, important to locate emergency shelters where accessibility to services is made as easy as possible. In addition, the shelters themselves should be in locations which are easily accessed, given that the circumstances attendant on being homeless do not often afford the homeless the means to travel to remote or inaccessible locations.

Locating shelters within arterial road corridors achieves at least three clear purposes. It makes the shelter more accessible for the users, it improves accessibility to the required services by the users, and it encourages the distribution of the shelters on a wider basis across the City.

As Mr. Stagl stated, arterial roads are by their nature and by virtue of their planned function, the foci of services, both hard and soft. Thus arterial roads often indicate areas where there is a high concentration and accessibility of services such as transportation, community support, commercial, and institutional services. Arterial corridors are intended to be the draw for such services. Thus locating shelters in these corridors achieves the goal of accessibility and support for the users of the shelter.

Because arterial roads are generally major transportation corridors, they connect areas of the City and run through all areas of the City. Locating shelters on the arterial road does not necessarily ensure, but clearly will, in conjunction with the separation distance criteria, facilitate the distribution of the shelters throughout the City, and avoid the concentration of shelters in a particular area.

The evidence was uncontradicted that arterial roads are located within every conceivable kind of area within the City, including low, medium and high-density residential areas, commercial, industrial and institutional areas. It is therefore conceivable that a shelter could be located in any type of use area in the City, including low-density residential areas.

However, there is a claim by the objectors that the requirement for location on an arterial road relegates such uses (which the objectors characterize as residential, but which the Board finds is other than a strictly residential use) to the periphery of neighbourhoods, without planning reason.

Firstly, the Board rejects the notion that an arterial road location necessarily implies a peripheral location. It is clear from the information provided by the City on major and minor arterial roads that these roads can and do run through neighbourhoods, including single-family residential neighbourhoods. Locating on an arterial road could place a use in the middle of a neighbourhood; albeit in a busier part of a neighbourhood from the point of view of transportation and other services.

In any event, the Board does not accept that there is no planning reason for locating such facilities in areas that may be peripheral to a neighbourhood, particularly when neighbourhood peripheries are where services often concentrate and where the accessibility of services and the accessibility of the shelter can most easily be achieved. The Board rejects the notion that these facilities, whatever the size, naturally belong in the interior of residential neighbourhoods, where the shelter may be less accessible for the users, and where the types of services required by the users may be particularly remote.

Finally, the types of shelters on which the City is intending to focus in its programs are larger scale, and thus, inevitably more intense types of uses and, more often than not, incompatible with low-to-medium density residential neighbourhoods. General planning theory holds that higher density residential uses most often locate on the peripheries of residential neighbourhoods, and in particular on major and minor arterial roads. The types of shelters to be the focus of this program are higher density and intensity uses, for which arterial road locations are very appropriate. Having said that, there are major and minor arterial roads located in the middle of low-density residential neighbourhoods, on which single-family residential homes are located, and a shelter would be permitted, under this by-law, in one of those locations in accordance with the built form permitted in that area.

With respect to the separation distance between such facilities, the Board accepts the evidence that the purpose of this requirement was to encourage distribution of the shelters throughout the City and to avoid concentration of shelters in any one location as has happened in the past. The Board has already indicated the legitimacy of those goals.

The opponents of the by-law claim that there is no planning basis behind the 250-metre distance. The Board heard evidence that there was a history behind the 250-metre minimum, which originated in the use of that distance to separate group homes one from the other. As well, such a separation distance has been used in relation to crisis care facilities, hostels, and seniors residences. The Board also heard that other distances were suggested in the process, up to and including a 1000 metre minimum separation distance. Council chose a familiar and time-tested distance by choosing 250 metres.

The Board accepts the planning goal that the minimum separation distance together with an arterial road requirement will serve to ensure a dispersal of shelters across the City and avoid a concentration of shelters in any one area. The opponents of the by-law as adopted, claim that the separation distance will not achieve the purpose of distribution, and that, in any event, there is no negative consequences to the concentration of shelters.

The Board is at a loss to understand these challenges to this requirement. The question is not whether the exact distance chosen to separate these facilities will work <u>ideally</u> to disperse the shelters. The question is whether there is a sound land use purpose to the requirement, which is here, to encourage distribution across the City, and whether that requirement will operate to <u>facilitate</u> such a goal. The Board finds that the separation distance will facilitate this goal.

Furthermore, the Board finds that there are valid reasons for trying to avoid concentrations of shelters. The Board again relies on the evidence of Ms. Longley, the only shelter operator to give evidence, who, when questioned by the Board, indicated that a concentration of shelters is difficult for shelter operators, because of the pressure put on the community in terms of the need for services and the need for community support in the way of fund raising, and volunteer assistance. She, in fact, felt that 250 metres might be too short a separation distance.

Furthermore, in answer to a question put by the Board, Ms. Longley indicated that it was better for children who find themselves homeless not to be located in an area where there are many children in the same circumstances. It is preferable to locate children in areas where there are children who come from a wide variety of circumstances. This is both to enhance the experience of the child and to ensure

that child-centred services that can assist children, who find themselves in such circumstances, are adequate and available to address the needs of the children.

The Board notes that there is a distinction in the kinds of concerns Ms. Longley expressed with respect to the issue of the concentration of emergency shelters, from the kinds of concerns ACTO interpreted arose from the public consultation process. For example, the concern expressed by Ms. Longley about school services being overburdened was in regard, not to the overcrowding of schools, which can occur in any neighbourhood with or without emergency shelters, but in regard to the ability and capacity of the staff of any school to address the unique needs of the children using the shelter.

This confirms the Board's finding that a concentration of any emergency shelters, and in particular family emergency shelters, could have the effect of over-burdening community services, and intensifying the use of an area and possibly changing the character of the neighbourhood. The Board finds, on the evidence, that such a result may not be desirable for the users of the shelter; nor is it likely to be desirable for the community within which the shelter locates.

The opponents of the by-law raised the concern that there may be circumstances where it is appropriate and desirable to locate shelters within the minimum distance separation, or on sites not situate on arterial roads.

This is possible, and in fact probable. This is a City-wide by-law, and in the absence of a comprehensive study of all the possible desirable locations for such a use in the City, (which would require many years of study and many dollars of investment), the City must rely on supportable general planning principles to arrive at a broad-brush, and yet reasonably targeted, approach to the identification of appropriate areas within which this use could be sited. It is neither sufficient nor persuasive to argue that the City may, by directing the location of a use to certain specific areas within the City, miss some sites that would be entirely appropriate. There are opportunities under the *Planning Act,* as there are with every other zoning by-law, to apply to amend or vary a zoning requirement after due process; should someone identify a desirable site not covered by the by-law.

By-law 138-2003 speaks to the locations that the City sees as preferable for emergency shelters with which the City is involved, and channels and directs these

uses to the areas in the City which best suit the use, in the City's view. The fact that other similar facilities, with which the City is not involved, will remain subject to the old regulatory regime and are not affected by this by-law, is of no relevance to a consideration of the propriety of this by-law, in the Board's view, and does not make the by-law either discriminatory, arbitrary or bad planning. It simply reflects how the City wishes to direct the location of facilities it is involved with.

With one qualification, therefore, the Board finds that these two zoning requirements are reasonable and appropriate and based on sound land use planning principles.

The evidence given by the planners spoke to arterial road "corridors" as opposed to arterial roads. The planning basis for the requirement does not in fact, fully support a strict adherence to an arterial road location. In fact, the permissions currently existing in the old City of Toronto tended to be areas zoned along arterial roads but consisting of corridors which followed the arterial road locations but included lands some distance back from the road itself.

The planners who supported this by-law responded to a Board question in this regard by suggesting alternative wording for the by-law which would include permissions on lands a distance back from an arterial road. Mr. Stagl and Mr. Butler both recommended to the Board the addition of the following wording to Section 2(ii):

> "…including lots located on flanking streets to an arterial road to a depth of 80 metres from the corner or to a laneway whichever is the lesser."

The planners advised the Board that the 80-metre depth or the distance to a laneway on a street flanking an arterial road generally demarks the approximate depth of the MCR zones around arterial roads in the City of Toronto. Crisis care facilities and hostels are permitted in the City of Toronto in MCR zones.

The Board accepts the 80 metre distance as appropriate to use to demark an arterial road corridor, but sees no rationale behind limiting that depth in this circumstance, where a laneway may happen to exist between the corner and the 80-metre distance back from the corner.

The Board finds that the arterial road corridor location should include any lot, the whole or part of which, is located on a flanking street to an arterial road to a

distance of 80-metres from the corner of the arterial road and flanking street. The Board finds that such a demarcation of an arterial road corridor would generally and appropriately define the arterial road corridor location to which the City seeks to direct its emergency shelters, according to the evidence presented to this Board. The Board will therefore modify Section 2(ii) accordingly.

The Board would like to address the suggestion that the by-law would be better served by attaching the Road Classification System, rather than simply referring to it in the text of the by-law. The Board finds that for ease of reference and for clarity, the list of roads which constitute Schedule 4 of the Road Classification System, and includes the classification of City Streets, should be appended to the by-law. The Board finds that amendments to the Road Classification System can easily be accommodated by a technical amendment to the by-law from time to time as the Road Classification System evolves.

c. Section 2(iv) – Council Approval of Location

There was a remarkable degree of consensus among the planners with respect to this requirement. All of the planners agreed that the requirement in Section 2(iv) requiring that City Council approve a municipal shelter, including its location, is a redundancy. It was agreed before this Board that the provision simply stated what was a necessary administrative process for obtaining Council approval for the funding and siting of an emergency shelter under this by-law.

To explain, it was agreed among the parties that in order for a facility to be covered by the by-law, it would have to be run by, or funded by, the City. There is in place, in conjunction with this by-law, an administrative process that will be followed before the establishment or funding of such a facility, will be considered by the City, referred to throughout the proceedings as the “Due Diligence Process”. That process will involve the assessment of many factors, including siting and location factors which are not formalized in the zoning by-law; and will include a process for community consultation. These matters will all be put forward for the consideration of Council before the final decision is made as to whether Council will fund such a facility.

Thus, the location of an emergency shelter facility is one of the aspects of the facility, which will be approved by Council before it makes a decision whether to fund

the facility. A City decision to fund the facility then brings the facility within the definition of “Municipal Shelter” found in the by-law, and the facility is governed by the zoning by-law.

There were opinions expressed and submissions made that the inclusion of such a provision is appropriate in the by-law, because it provides notice to operators or proponents of a facility seeking City funding, that such matters, especially location, must be approved by the City. There were submissions made that such a provision was benign and only a statement of an approved administrative process. There was a suggestion that it was required for certainty in order for the Buildings Department to complete its work in issuing any permits that may be required for the facility. The City planner who gave evidence for ACTO in opposition to the requirements contained in Sections 2(i) and 2(ii) indicated that he had no issue with the inclusion of this provision.

The Board rejects all of the attempts to justify the inclusion of this provision. It was admitted by every planner before this Board that the purpose of the provision was to state, in a zoning by-law, what was essentially an administrative funding process. The Board heard no land use purpose or justification for the inclusion of such a provision in the by-law.

The Board rejects the claim that the provision creates certainty and finds that in fact it creates uncertainty in the by-law. In order for the Chief Building Official to determine whether the by-law applies, he need only refer to the appropriate by-law or resolution of Council, which approves the funding for the establishment of the shelter. The definition of Municipal Shelter is sufficient for the Chief Building Official to be directed to that end. It is not necessary to include an additional provision with respect to Council approval for the Chief Building Officials’ purposes.

Furthermore, the Board finds that the provision creates uncertainty in the by-law by creating location criteria for which there is no clarity on the face of the by-law. Such a provision runs counter to the essence of what a zoning by-law is; which is to provide definition and clarity as to where in a municipality a use can be situate, and how the structures that accommodate that use can be located on any site. By way of emphasis, issues would clearly arise as to how such a provision could be varied pursuant to Section 45 of the *Planning Act.*

The Board also finds that such a provision has repeatedly been rejected by the courts as discriminatory, and an illegal or inappropriate use of the zoning powers accorded municipalities. As long ago as 1951, the Supreme Court of Canada, in Verdun v. Sun Oil Co. Ltd. [1952] 1 D.L.R. 529, in considering a zoning by-law which also included a provision permitting the City on a case by case basis to grant or deny permission to locate a gas station stated at page 534:

> The mere reading of s. 76 is sufficient to conclude that in enacting it, the City did nothing in effect but to leave ultimately to the exclusive discretion of the members of the council of the City, for the time being in office, what it was authorized by the provincial Legislature, under s. 426, to actually regulate by by-law. Thus, s.76 effectively transforms an authority to regulate by legislation, into a mere administrative and discretionary power to cancel by resolution, a right which,….. could only…be regulated. (emphasis added)

This statement of principle is confirmed by the Ontario Court of Appeal in Re Neon Products Ltd. And Borough of North York et al. (1974) 5 O.R. (2d) 736, at page 738:

> We are also of the opinion,… that where the Council has reserved to itself a control in that it has included in the by-law, in more than one place as a condition to the entitlement to a permit, the expression "provided that authority has been obtained therefore by resolution of the Council", it has attempted to confer on itself a power to discriminate that wholly defeats the purpose of the by-law to prohibit or regulate in accordance with the by-law.

In response to the argument made by Hastings, that the recently in force *Municipal Act* accords the City "person powers" which would enhance the kinds of powers a municipality can assume, and therefore affords the City authority to expand the kinds of provisions that may be included in zoning by-laws, the Board finds that the enhanced "person powers" included in the *Municipal Act* are powers that can be relied on in the context of a municipality exercising its corporate and administrative powers, such as entering into contracts, and implementing provincial legislation or municipal by-laws. This power does not amend the limits imposed on the legislative powers of a municipality such as the power to enact zoning by-laws. Thus the Board finds that the provisions of the new *Municipal Act* do not operate to change in any way the limits on the exercise of the power to zone land.

The Board therefore finds that Section 2(iv) of By-law 138-2003 compromises the integrity of the by-law as a zoning mechanism, is redundant, and without any land use purpose, creates uncertainty, and should not be included in the by-law.

d. Remainder of the By-law and Planning Conclusion

The Board heard evidence with respect to the reasons and purpose of the remaining provisions of the by-law, including the reasons for the exemptions contained in Section 4 (with the exception of Sojourn House at 101 Ontario Street in Section 4(a)).

In particular, the Board heard from Ms. Macalik, a resident owning property abutting 717 Broadview Avenue, which property is exempted under Section 4(b) of the by-law. She spoke in support of the Board retaining all of the requirements contained in the by-law, particularly Section 2(iv), requiring Council approval. She was deeply dissatisfied with the process that was undertaken when the City chose to purchase the property at 717 Broadview Avenue (which is currently a seniors' residence) and eventually convert it into an emergency shelter.

It was Ms. Macalik's suggestion, therefore, that all three of the disputed requirements be kept in the by-law and that the property at 717 Broadview Avenue not be exempted from these requirements. The Board heard from the City that the exemption is required because of the time, money and staff resources which have already been invested in the project. A final change in use, however, is not scheduled until a few years in the future.

The property is on an arterial road. No other municipal shelter, crisis care facility or hostel is currently located within 250 metres of the site. The Board for the reasons stated has declined to include Section 2(iv) as an appropriate requirement and this requirement is therefore no longer an issue. The only concern, according to the City, therefore, is to ensure no issues arise, should another facility such as a hostel or crisis care facility locate within the 250 metre distance separation required in the by-law prior to the actual change in use.

The Board finds that the reasons for exempting this property and the other properties contained in Sections 4(c) and (d) are satisfactorily explained. The Board, unfortunately, cannot assist Ms. Macalik with her concerns about the process

undertaken by the City in making the decision to purchase the premises and establish a shelter at this location. The purchase was pursuant to a process for which there is no appeal to this Board. The building exists, the City has purchased the building, and the use is proposed to change. The proposed use currently conforms to the location requirements, which the Board has seen fit to approve. The City is merely protecting itself and the investment it has made, in the event another facility locates so as to render this facility non-conforming. The Board finds this a suitable reason for including this site as exempted.

The Board also finds that the proposed by-law conforms with the intent of the Provincial Policy Statement and Metroplan, the only official plan that applies across the amalgamated City.

The Board was repeatedly directed to Policy 1.2.c of the Provincial Policy Statement. That provision requires all planning jurisdictions to encourage housing forms and densities designed to be affordable to moderate and lower income households. It is the Board's view that this policy does not in any clear way address the issue of emergency shelters, in that shelters can not truly be considered "housing" in the traditional and generally understood meaning of the word. These facilities are a temporary solution to a "lack of housing", and thus a response to a City's inability to encourage housing forms tailored to lower income households as required by the Provincial Policy Statement.

Instead the Board finds that this type of facility is properly considered a *public service facility* which is defined as meaning lands, buildings and structures which accommodate programs and services provided or subsidized by a government or other public body, including social assistance, and health and educational programs. ("Definitions" in the Provincial Policy Statement)

In that regard, the Board finds that the proposed by-law implements Policy 1.1.3, of the Provincial Policy Statement which states that long term economic prosperity will be supported by planning documents that provide that public service facilities will be available to accommodate projected growth. This is the explicit purpose of this by-law.

Furthermore, the requirements in the by-law that these facilities are to locate within an arterial road corridor, with separation distances between the facilities,

conform directly with Policy 1.1.2, which requires that land use patterns will be based on densities, which efficiently use land, resources, infrastructure and public service facilities. The effect of the by-law to direct municipal shelters, which are a public service facility, to arterial road corridors, where services tend to congregate, with a view to ensure the draw on this and other services does not overwhelm those services, by use of a separation distance, conforms and implements this policy in every respect.

Metroplan which is the only official plan which currently applies across the amalgamated City states in Policy 123 that zoning by-laws shall provide *opportunities* within each Area Municipality for transitional and emergency accommodation. Policy 123 is found under the heading "Policies Respecting Housing Availability" and this particular part of the policy dealing with transitional and emergency accommodation is clearly aimed at addressing situations where housing is not readily available. There was no disagreement from any witness before this Board on the purpose and effect of this by-law. It would increase the opportunities for emergency accommodation, and was directed to ensure those opportunities existed across the entire amalgamated City of Toronto. This by-law implements Metroplan Policy 123 entirely.

The Board heard argument with respect to whether or not this by-law constituted "people zoning" as that term is understood in the line of cases following R v. Bell [1979] 2 S.C.R. 212. There is nothing in this by-law directed at regulating who uses the emergency shelter facilities or that attempts to regulate or define the relationships between those who use the facilities. Thus the by-law cannot in any reasonable understanding of that line of cases fall within the prohibitions laid down by the courts in that regard.

The Board finds that By-law 138-2003 generally targets the most appropriate locations in the City for emergency shelter uses and directs the uses to these areas. The approach is well conceived and well founded in planning principles and will facilitate the achievement of the City's program objectives in respect to the issues of homelessness in the City, by:

- facilitating a wider distribution of facilities across the amalgamated City.

- increasing the number of sites available for locating emergency shelters across the City.

- allowing a quicker response to issues of homelessness, by providing a vastly increased area within which such facilities may appropriately locate without engaging in a lengthy rezoning process.

- providing clarity and certainty in directing where the City sees the most appropriate locations for emergency shelters.

The Board therefore finds that the by-law, as modified by this Board constitutes good planning.

5. **JURISDICTION**

a. Requirement to Give Notice of a Constitutional Question pursuant to Section 109 of the *Courts of Justice Act*

As an alternative argument to that claiming that Sections 2(ii), (iii) and (iv) should be removed from By-law 138-2003 for lack of planning support, ACTO argued that if the Board found that these sections were sustainable on planning grounds, the Board should still amend the by-law to remove the sections as invalid because they offended the provisions of Section 15 of the *Canadian Charter of Rights and Freedoms,* (the "*Charter*").

During the course of the hearing, the Board asked ACTO if it had complied with the requirements of Section 109 of the *Courts of Justice Act.*

Section 109 states:

Notice of constitutional question

109. (1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.

2. A remedy is claimed under subsection 24 (1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

Failure to give notice

(2) If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

Time of notice

(2.2) The notice shall be served as soon as the circumstances requiring it become known and, in any event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise. 1994, c. 12, s. 42 (1).

Notice of appeal

(3) Where the Attorney General of Canada and the Attorney General of Ontario are entitled to notice under subsection (1), they are entitled to notice of any appeal in respect of the constitutional question.

Right of Attorneys General to be heard

(4) Where the Attorney General of Canada or the Attorney General of Ontario is entitled to notice under this section, he or she is entitled to adduce evidence and make submissions to the court in respect of the constitutional question.

Right of Attorneys General to appeal

(5) Where the Attorney General of Canada or the Attorney General of Ontario makes submissions under subsection (4), he or she shall be deemed to be a party to the proceeding for the purpose of any appeal in respect of the constitutional question. R.S.O. 1990, c. C.43, s. 109 (3-5).

Boards and tribunals

(6) This section applies to proceedings before boards and tribunals as well as to court proceedings. 1994, c. 12, s. 42 (2).

ACTO had been clear from the start of this hearing that it was raising a constitutional issue with respect to this by-law. The Board was concerned as to whether notice had been served and whether the Attorneys General were of a mind to call evidence and participate in the proceedings.

ACTO advised the Board that no notice had been given because it was ACTO's view that Section 109 did not apply to proceedings involving by-laws before the Ontario Municipal Board. The Board then ordered the parties to prepare to argue the application of Section 109.

As it turned out, no argument was made, as ACTO chose to notify both Attorneys General in the middle of the hearing, and the Board adjourned the hearing for a few days to ascertain what response would be received from the governments. Both Attorneys' General declined to participate in the proceedings before the Board, but indicated that they may wish to participate, should the matter be appealed to the courts.

Even though the notice was not served in accordance with Section 109(2.2), that is, 15 days before the matter was to be argued, the Board ruled that the notice was sufficiently served, and thus, that Section 109 had been complied with.

b. Jurisdiction of the Board to Amend By-law 138-2003 Based on a Contravention of Section 15 of the *Canadian Charter of Rights and Freedoms*

Throughout these proceedings the City maintained that the Board had no jurisdiction to grant the remedy requested by ACTO and therefore ought not to hear the *Charter* argument advanced by ACTO. ACTO on the other hand insisted that, given the Board's broad powers to adjudicate on all matters of fact and law within its jurisdiction, and given the pronouncements of the courts on this matter, the Board not only had the jurisdiction, but the duty, to adjudicate on the issues raised by ACTO relating to the *Charter.*

Both parties agreed that the issue is governed by four cases decided by the Supreme Court of Canada: Douglas/Kwantlen Faculty Association v. Douglas College [1990] 3 S.C.R. 570, Cuddy Chicks Ltd. V. Ontario (Labour Relations Board)[1991]2 S.C.R. 5, Tetrault-Gadoury v. Canada (Employment and Immigration Commission) (1991) 81 D.L. R. (4th) 358, and Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur [2003] S.C.C. 54.

The basis on which courts and tribunals deal with constitutional challenges is found in the *Constitution Act, 1982*. Section 52(1) of the *Constitution Act* states:

> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

However, there is a specific remedy provided in the *Charter* portion of the *Constitution Act, 1982*, in Section 24(1), which states:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The cases in relation to this matter centre around the wording in Section 24(1) which requires that a remedy be granted by a "court of competent jurisdiction" and the provisions of the *Constitution Act, 1982*, which deems any provision of any law, of no force or effect if the provisions are inconsistent with the Constitution.

In the Douglas College case (supra), two faculty members filed grievances with respect to a provision in their collective agreement that required mandatory retirement at the age of 65, on the basis that the provision violated Section 15 (1) of the *Charter*. One of the issues was whether or not the arbitration board appointed to resolve the grievance had jurisdiction to hear and determine a grievance based on a Charter argument. At page 595-596 the Court held:

> Section 52(1) of the *Constitution Act*, 1982 provides that any law that is inconsistent with the provisions of the Constitution of Canada – the supreme law of the land – is, to the extent of its inconsistency, of no force or effect. A tribunal must respect the Constitution so that if it finds invalid a law it is called upon to apply, it is bound to treat it as having no force or effect….
>
> Where, however, a tribunal is asked to determine whether Charter rights have been infringed, or to grant a remedy under Section 24(1), the situation is different. The tribunal's power is that conferred by its statutory mandate……… In a word, an administrative tribunal is limited to exercising its statutory mandate.
>
> It follows from this that….. the jurisdiction of a statutory tribunal must be found in a statute and must extend not only to the subject matter of the application and the parties, but also to the remedy sought. In the exercise of that jurisdiction, it can in the exercise of its mandate find a statute invalid under the Charter.
>
> The distinction I have attempted to make between the exercise of the power conferred by s.24(1) and the duty of a tribunal to apply the Constitution in the course of performing its statutory mandate has been well expressed in Tetreault-Gadoury V. Canada (Canada Employment and Immigration Commission), supra…. Lacombe J., speaking for the court, had this to say at pp 254-55:
>
>> In the case at bar it is subsection 52(1) of the *Constitution Act*, 1982 that is relied on, not subsection 24(1) of the Charter. The

> applicant has <u>not asked</u> the Board of Referees or this Court to find that section 31 of the Unemployment Insurance Act, 1971 should be amended to make it consistent with section 15 of the Charter or <u>to order a remedy that would require the adoption of appropriate legislative adjustments</u>.(emphasis added)

The Board takes from these statements that the jurisdiction of a tribunal to consider Charter arguments is predicated on three things:

1. When exercising its jurisdiction, a tribunal must operate strictly within the parameters of, and in the course of exercising its statutory mandate.

2. The remedy available to an administrative tribunal in addressing an issue under the *Charter* arises from Section 52(1) of the *Constitution Act*, which provides that if a statute is inconsistent with the Constitution it is of no force or effect. It is incumbent on a tribunal when considering its jurisdiction on a matter referred to it, to determine whether it can apply the statute which it is called on to apply. If the statute is of no force or effect for any reason, including the provisions of Section 52(1) of the *Constitution Act, 1982*, a tribunal ought not to apply the statute. Thus, a tribunal accorded powers to determine matters of fact and law within its statutory jurisdiction may be called upon to determine whether the law that it is being asked to apply, is in effect or not under the Constitution, for the purposes of determining the matter before it.

3. A tribunal may not, however, be asked to make any legislative amendments or adjustments in order to make legislation consistent with the *Charter.*

In the <u>Cuddy Chicks</u> case (supra), a union had filed an application for certification before the Ontario Labour Relations Board. An argument arose as to whether the workers were agricultural workers and therefore not subject to the *Labour Relations Act.* The union filed notice that it would request that this provision of the *Labour Relations Act* be ruled invalid as being contrary to the Section 15 of the *Charter*. The jurisdiction of the Board to determine the *Charter* question with respect to its enabling statute was raised as an issue. At page 14, the Court ruled:

> It is essential to appreciate that s. 52(1) does not function as an independent source of an administrative tribunal's jurisdiction to address constitutional issues. Section 52(1) affirms in explicit language the supremacy of the constitution but is silent on the jurisdictional point per se. In other words, s. 52(1) does not specify which bodies may consider and rule on Charter questions and cannot be said to confer jurisdiction

> on an administrative tribunal. Rather, jurisdiction must have expressly or impliedly been conferred on the tribunal by its enabling statute or otherwise. This fundamental principle holds true regardless of the nature of the issue before the administrative body. Thus, a tribunal prepared to address a Charter issue must already have jurisdiction over the whole of the matter before it, namely, the parties, subject matter, and remedy sought.

The Court goes on at page 17:

> Furthermore, a formal declaration of invalidity is not a remedy, which is available to the Board. Instead, the Board simply treats any impugned provision as invalid for the purposes of the matter before it. Given that this is not tantamount to a formal declaration of invalidity, a remedy exercisable only by the superior courts, the ruling of the Board on a Charter issue does not constitute a binding legal precedent, but is limited in its applicability to the matter in which it arises. (emphasis added)

In the Nova Scotia case the Court had this to say at paragraph 27:

> This Court has examined the jurisdiction of administrative tribunals to consider the constitutional validity of a provision of their enabling statue in Douglas College, supra, Cuddy Chicks, supra and Tetreault-Gadoury, supra (together, the “trilogy”). On each occasion, the Court emphasized the strong reasons, of principle as well as policy, for allowing administrative tribunals to make such determinations and to refuse to apply a challenged provision found to violate the Constitution. (emphasis added)
>
> … The invalidity of a legislative provision inconsistent with the Charter does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s.52(1). Thus, in principle, such a provision is invalid from the moment it is enacted, and a judicial declaration to this effect is but one remedy amongst others to protect those whom it adversely affects.

At paragraph 31, the Court then had this to say:

> …. In addition, the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by a tribunal that a provision of its enabling statue is invalid pursuant to the Charter is not binding on future decision makers, within or outside the tribunal’s administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases. Therefore, allowing administrative tribunals to decide Charter issues does not undermine the role of the courts as final arbiters of constitutionality in Canada. (emphasis added)

It was undisputed, and the Board accepts, that it has very broad powers to determine questions of law and fact on all matters within its jurisdiction. Section 35 of the *Ontario Municipal Board Act* states:

> 35. The Board, as to all matters within its jurisdiction under this Act, has authority to hear and determine all questions of law or of fact. (emphasis added)

There are clearly limits to the Board's jurisdiction. Quite simply, the Board does not have the jurisdiction to determine any question of law that happens to be brought before it by any party to a proceeding. The Board must make a determination as to whether the question is relevant and necessary for it to continue to exercise the jurisdiction accorded it under its enabling legislation. This is the meaning of Section 35 of the *Ontario Municipal Board Act*.

Determining whether or not to apply a provision contained in this Board's enabling statute would inevitably be a fundamental part of determining the extent of its jurisdiction. It there is a claim that the legislative provision under which the Board is operating, and which is to be applied in a particular case, is inoperative because it violates the Constitution of this country, then this claim must be considered before the Board can proceed to apply the provision in the case before it. In such a situation, the parties, the subject matter, and the remedy are clearly within the purview of the Board.

However, it seems that the Supreme Court is also saying that the courts are the ultimate arbiters of the constitutionality of any legislation. In this regard, administrative tribunals are limited in the remedies they may employ. Any determination is not to be binding on any other decision makers "within or outside the tribunal's administrative scheme" (Nova Scotia (supra)). Furthermore, the tribunal cannot offer any remedies that involve amending legislation to make it consistent with the Charter. (Tetreault-Gadoury (supra)).

It appears therefore that if a constitutional question is relevant and necessary for the Board to decide, in order for it to exercise its jurisdiction, then the Board has the jurisdiction and the obligation to consider and decide constitutional questions of law.

However, it seems that the remedies accorded administrative tribunals in this regard are limited. The Court consistently reaffirms that the courts are the final arbiters of legislative legitimacy under the *Charter* and the *Constitution.* The Board notes that in each of the leading cases, the administrative tribunal was being asked to apply a statutory provision to a set of facts in the case before it. The

administrative tribunals were being asked to determine whether the legislation to be applied was constitutional. In those cases, the Court has ruled that if the tribunal finds that the legislation is in fact unconstitutional, the tribunal can decline to apply the legislation to the matter before it because Section 52(1) of the *Constitution Act, 1982*, states that any law found to violate the Constitution is of no force or effect.

In the case before the Board, it is dealing with a legislative instrument. It seems trite law to characterize a zoning by-law as a legislative power, but the Board cites a phrase of Mr. Justice Howden in <u>Ontario Mission for the Deaf v. the Corporation of the City of </u>Barrie (2003) 64 O.R. 55 at page 61:

> Counsel for the City conceded that it is a basic principle of municipal law that a municipality cannot use its legislative zoning power as contractual consideration or as a bargaining tool to fetter its discretion in the future…..

The Board also refers to <u>Verdun v. Sun Oil</u> (supra) as well as to <u>Re McGill and City of Brantford</u> (1980) 28 O.R. (2d) 721 in which the Ontario High Court of Justice, Divisional Court, Henry, Reid and Linden JJ state:

> Of fundamental importance is the proper recognition of the function of a municipal council in the body politic. Its conduct of a "hearing" under s. 446 of the Municipal Act must be governed by the nature of that function. The Council has the role of legislating on local matters delegated to it by the provincial Legislature. Although a delegee, having critically defined powers, <u>it is nevertheless a law-making body</u>. <u>Within its delegated jurisdiction it makes laws that are binding on citizens that have the force of statute. Its duty is to legislate in the interests of the citizens of the municipality as a whole</u>. The members of the Council are elected representatives who, in a democracy, are responsive to the concerns of their constituents, who have given them their mandate. It goes without saying that they are not Judges….. (emphasis added)

Although ACTO was careful not to request that the Board “strike” the impugned sections of the by-law, it clearly requested that the Board amend the legislation to remove the impugned sections to make it consistent with the *Charter*. Amending by-laws is clearly a remedy that this Board can grant. However, the Board finds that if it were to amend the by-law to make it consistent with the *Charter*, it would be acting contrary to the doctrine laid out by the Supreme Court of Canada in the four cases discussed above. It would be taking an action that would have the effect of being a “general declaration of invalidity”.

To explain – should the Board agree that a portion of a by-law contravenes the *Charter* and decide to amend the by-law by removing the offending section, unless that specific decision were appealed to the courts, the Board's decision on the constitutionality of that section would stand for all time. No other administrator, legislator, board or court would be able to re-visit the issue, because the offending provision would not exist to be considered – the apparently offensive section would no longer be in the by-law. Thus, the Board would be effecting legislative amendments, which would be binding on all future decision makers. The Board would therefore become the final arbiter of the constitutionality of the zoning legislation.

This result would seem to be directly contrary to the pronouncements of the Supreme Court with respect to the jurisdiction of administrative tribunals to consider constitutional and *Charter* issues. The Board cannot conclude from these cases that the courts intended that this Board could make a decision granting a remedy, which, according to the courts, should only be granted by the courts.

Nor can the Board conclude from these decisions that a determination as to whether the Board is the final arbiter of the constitutionality of a municipal legislative instrument should depend entirely on, and be left to the vagaries of, the means of, and the interest of, the parties before the Board in the particular case, in deciding whether to bring the decision of the Board to the attention of the courts on appeal.

Furthermore, and importantly, the Board does not need to determine whether the impugned sections of the by-law offend the *Charter* in order for it to exercise its jurisdiction under the *Planning Act*. The Board need only determine whether or not the by-law in whole or in part constitutes good planning, is based on sound planning principles and conforms to the applicable planning policy documents and legislation. The question of the conformity of certain sections of this by-law to the *Charter* is a separate and discrete question from the question of whether the zoning by-law should be amended on planning grounds.

And while it may seem strange that a Board could approve a by-law that may, if properly analyzed and fully argued, offend certain sections of the Constitution of Canada, it appears that the question of the constitutional validity of a by-law is

particularly suited to being brought to the courts under Section 273 of the *Municipal Act*. Section 273(1) of the Municipal Act provides:

> 273. (1) Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality. (emphasis added)

The Board relies on the recent decision of the Court of Appeal in City of Toronto v. Goldlist Properties Inc. October 14, 2003, Docket C38589, where the Court was considering the Board's jurisdiction to determine the legal validity of Official Plan Amendment No. 2 of the City of Toronto. At page 13 of the decision the Court states:

> With respect to Section 35 (of the Ontario Municipal Board Act), we think it is implicit that one matter within the Board's jurisdiction to decide in a proceeding, for the purpose of carrying out its mandate, is the scope of its jurisdiction in that proceeding.

And the Court states at page 16:

> Neither, in the present case, should the OMB's decision be regarded as determining the validity of the by-law that adopted the official plan for all purposes, but rather only for the purpose of deciding the Board's jurisdiction. (emphasis added)

And at page 18, the Court states:

> This appears to draw the distinction between the Board dealing with the validity of a by-law as a free-standing issue, which it cannot do, and making a decision on a question of law as incidental to its administrative functions, which it can do. (emphasis added)

On page 20, the Court defined the issue before it as one where the Board was determining if the document before it was an official plan, in order to determine its jurisdiction to deal with the appeal of an Official Plan. In the matter before this Board, there is no such issue. The instrument before the Board is clearly a zoning by-law. The remedy being sought by ACTO is to make amendments to the legislative instrument on the basis that certain parts of the by-law offend *Charter* right protections.

Thus it appears good law that the Board has jurisdiction to decide matters of law, including constitutional law, where those determinations are necessarily incidental to a determination of the Board's jurisdiction, or where it is necessary for the Board to determine the matter before it. It also appears to be good law that the Board cannot and should not deal with a matter where the issue is the "validity of the by-law as a free-standing issue."

Furthermore, it is a far more efficient and rational approach to the issue of the compliance of a zoning by-law with the *Charter* to have the final form of the by-law determined by this Board based on planning principles, and thereafter, leaving it to any person to apply to the Court for relief under the *Charter* should any person feel that the final version of the zoning by-law offends the *Charter*.

Section 34(30) of the *Planning Act* provides:

> If one or more appeals have been filed under subsection (19), the by-law does not come into force until all of such appeals have been withdrawn or finally disposed of….

Thus, a by-law is not effective until it is in final form, as approved by the municipality if there is no appeal, or as finally disposed of by the Ontario Municipal Board if there is an appeal to it. Once the appeal is disposed of, then the by-law is in force. Any person in the municipality who feels there is an issue with the by-law may then apply to the Court, **with** a final version of the by-law, for a determination of the constitutionality of the by-law. The courts then know exactly what the legislative instrument provides, and can make a determination of the *Charter* issues with a clear understanding of what it is dealing with. The matter can be brought to the court by anyone who has concerns, and the court hearing the matter will not be dependent only on the means and interests of the parties to the Board hearing as to whether the matter will be brought to the court's attention. The constitutionality of the instrument will be determined by a court, which, according to the Supreme Court, ought properly to be the final arbiter of such issues. This approach lends efficiency, certainty and rationality to the resolution of the issues.

For example, in the matter before the Board, the Board heard *Charter* arguments focused very specifically on the wording of the impugned sections contained in the by-law passed by the City and presented to this Board. However,

the Board has made a determination, based on planning principles, that the by-law should be amended by deleting subsection 2(iv) and by amending subsection 2(ii). Thus the time spent arguing about the constitutionality of Section 2(iv) has been wasted. And the Board has no idea what the position or arguments of the complainants ACTO would be, had they known that the Board would approve a by-law amended as the Board has ordered. Specifically, this Board does not know what ACTO's position would be on the amended Section 2 (ii) in relation to the *Charter*.

The Board therefore finds that the remedy requested by ACTO is for a legislative amendment that is tantamount to a "declaration of invalidity", which the courts have indicated is a remedy reserved for the courts alone. This is to be distinguished from the circumstances, which existed, in the leading cases decided by the Supreme Court in this regard, where the legislative provisions continued to exist until a court ruled on the matter, but might not be applied in particular cases by the administrative tribunal. Therefore, on a careful reading of the leading Supreme Court of Canada cases, the Board finds that the remedy is not available to this Board.

Furthermore, the remedy requested by ACTO amounts to a request to determine the "validity of the by-law as a freestanding issue", which, according to the Court of Appeal of this province, this Board cannot do. The Board does not need to determine the issue of whether this by-law violates the *Charter* in order to exercise its jurisdiction under the *Planning Act*. It can properly proceed to exercise its jurisdiction with respect to the impugned provisions, on the basis of planning legislation, planning policy documents and the principles of good planning. And it may well be that, in exercising that jurisdiction, the *Charter* issues will no longer be apparent.

The Board finds therefore, that it has no jurisdiction to consider the *Charter* issues as raised before it, nor to accede to the remedy requested. The Board finds that these issues are not issues that should have been brought to the Board or considered in this forum. This is a matter that should go directly to the courts, pursuant to Section 273 of the *Municipal Act*, once the final form of the by-law has been determined by this Board on planning principles.

6. **CHARTER**

a. Does Section 2 (ii) and 2(iii) of By-law 138-2003 violate the rights of the homeless contrary to Section 15 of the Canadian Charter of Rights and Freedoms.

The Board agreed that, whether or not it determined it had jurisdiction to rule on the *Charter* issues raised in this case, it would still provide a ruling on the *Charter* issues, given the time spent at this hearing arguing these issues. The Board will therefore do so. However, it will only be considering Section 2(ii) (arterial road requirement) and Section 2(iii) (250-metre distance separation), as it has ruled that, on other grounds, Section 2(iv) (Council approval) ought not to be included in the by-law.

The Board had a great deal of difficulty throughout the hearing determining the essence of the case being made by ACTO. The Board attempted repeatedly to ascertain as clearly as possible ACTO's position during the course of the hearing. ACTO declined offers to make a detailed opening statement and was reluctant on repeated questioning by the Board throughout the hearing, to give any clear explanation of the nature of the claim, the theory of the case, and the remedy being sought, in advance of making its argument. This often made it difficult for the Board to understand the evidence and actions taken by ACTO during the hearing.

However, it is now the Board's understanding, from the summary of submissions contained in Volume 3 of the Written Submissions made by ACTO, that it is asking this Board to determine the following:

1. Homeless persons are appropriately recognized as a group entitled to protection under s.15(1) of the *Charter* because they share the characteristics of other groups whose status has been recognized as being protected under the *Charter*.

2. The location restrictions contained in By-law 138-2003 constitute differential treatment of homeless persons, by imposing a burden upon or withholding a benefit from homeless persons, specifically the "right" to be housed in an emergency shelter that is located on a non-arterial road or within 250 metres of another shelter.

3. By including restrictions in a zoning by-law that restrict emergency shelters to arterial roads and outside of the 250-metre distance

separation, the City has enacted discriminatory legislation that reflects the stereotypical application of presumed group or personal characteristics, which have the effect of perpetuating the view that homeless persons are less capable, or less worthy of recognition or value as a human being or as a member of Canadian society.

4. The reason that the restrictions should be considered discriminatory is because they are contained in a legislative document and thereby impose inflexible and arbitrary requirements. It is ACTO's position that these restrictions should be contained in a policy, which allows staff and Council to apply the restrictions more flexibly and treat them as criteria rather than direction. ACTO alleges that "by enacting locational criteria … as legislative restrictions in the by-law, Council has arbitrarily disqualified otherwise appropriate shelter locations, and communicates a message to the public that reinforces the negative stereotypes that dominated the public debate at Council and before Council Committees about the shelter by-law."

5. The violation of Section 15(1) of the *Charter* is not saved by the provisions of Section 1 of the *Charter*.

(Above found in ACTO Written Submissions, Volume 3, "Charter of Rights Challenge")

In responding to this argument, the Board, in addition to the reasons set out hereunder, relies on the reasons set out in the PLANNING section of this decision.

Section 15(1) of the *Charter* provides as follows:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 1 of the *Charter* provides as follows:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Board is not going to recite the whole of Section 34 of the *Planning Act,* which defines what zoning by-laws are. Suffice it to say that the general power is clearly set out in Section 34(1):

34(1) Zoning by-laws may be passed by the councils of local municipalities:

> 1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway.

Thus the inclusion of location restrictions in a zoning by-law is the essence of what a zoning by-law is. City councils can, under this legislation, which is not challenged, decide that certain uses may not go in certain areas of the municipality, thereby directing them to areas within the municipality where they may be permitted. This is what has occurred here. The municipality has decided, for reasons, which this Board has determined, are legitimate planning reasons, that emergency shelters ought properly be located on or near arterial roads and not within a certain distance of each other. The Board has found that this is a proper use of the zoning powers in that the requirements are founded on clear and supportable planning and public interest objectives.

ACTO stated that there is a "right" that the homeless possess, that would allow them to find an emergency shelter on any street in any district of the City, and that specifically, the homeless have a "right" for those shelters NOT to be restricted to arterial roads, and NOT to be separated from other shelters, hostels, or crisis care facilities by 250 metres.

The Board had difficulty ascertaining the basis of that "right" as it was expressed in ACTO's submissions. It is the Board's view that if the homeless do in fact have that right, it takes the homeless outside of the mandate of the *Planning Act*.

The only clarity the Board can attribute to this argument is that it is based on an assumption that the homeless are treated differently than other citizens of the City, in that the facilities that could provide them shelter are subject to these two zoning restrictions and that these restrictions constitute differential treatment of homeless persons within the meaning established in Law v. Canada (Minister of Employment and Immigration) [1999]1 S.C.R. 497. The Board cites paragraph 88 of that decision, p. 536:

> Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:

(A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantageous position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

(B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds? And

(C) Does the differential treatment discriminate by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

ACTO claims that the provisions in the zoning by-law effect differential treatment amounting to discrimination by applying location limitations on emergency housing for homeless persons that do not apply to residential accommodation for persons who are able to rent or purchase permanent housing. In other words, no other person is restricted to locating their residence on arterial roads, or a distance from similar facilities, and therefore, the homeless are receiving differential treatment.

No evidence was proffered to support this claim. In fact, the evidence and common sense simply negates such a claim.

Firstly, the Board has already found that this type of accommodation is not the standard residential type of use and therefore cannot and should not be considered or compared to "housing" as that term is meant in the traditional sense of the word. These shelters are supervised public service facilities and should be considered such. According to the evidence of Ms. Longley, previously referenced in this decision, people do not access these facilities as a choice of residence or to establish a life. These are public service facilities, which are available in times of need. The objective in making use of these facilities is not to continue to "reside" there, but to obtain the emergency and long term services required to be able to return to a more permanent, independent type of housing and life.

Secondly, it was undisputed that high-density residential developments, as just one example, are often restricted to arterial roads, away from lower density

residential development. Thus persons who choose to, or can only afford to, live in a high-rise condominium or rental development are, more often than not, forced to live on or near arterial roads. Similarly, more institutional types of residences, such as seniors' homes, are often restricted to arterial or collector roads. A recently passed zoning by-law regulating seniors' residences restricts these homes to certain roads, AND imposes a separation distance. ACTO claims that there are reasons, such as the density of the use, for restricting such residences to arterial road locations. The Board finds that similar reasons of density and intensity of use can be used to support the location of emergency shelter facilities proposed by the City on or near arterial roads. However, as the Board has found, there are many more reasons, most of them related to the well-being of the users of the shelter, for emergency shelters to be located in arterial road corridors.

Thirdly, as the Board has already found, restricting these facilities to arterial roads does not prevent this use from locating in any type of neighbourhood in the City. As the Board has found, arterial roads in this City pass through every type of neighbourhood, including low density, single-family residential neighbourhoods. Thus this by-law will provide opportunities for facilities of this kind to be located in almost any neighbourhood in the City, contrary to the claims by ACTO that the reason for the location restrictions was to keep emergency shelters out of neighbourhoods.

The Board cannot find differential treatment amounting to discrimination in regulations designed to locate these emergency service facilities in locations where the needs of homeless persons are most easily met.

Further, the Board gives no credence whatsoever to the claim that these restrictions reinforce negative stereotypes of the homeless or perpetuate the view that persons without permanent housing are less worthy members of society. While the public debate before Council appeared to be rife with negative perceptions and stereotyping of homeless persons, there was no evidence before this Board that the effect of the restrictions reinforces those perceptions or stereotyping. In fact, the effect of this by-law, with the location requirements approved by the Board, will as the Board has found earlier in this decision:

- facilitate a wider distribution of facilities across the amalgamated City.

- increase the number of sites available for locating emergency shelters across the City.
- allow a quicker response to issues of homelessness, by providing a vastly increased area within which such facilities may appropriately locate without engaging in a lengthy rezoning process.
- provide clarity and certainty in directing emergency shelters to the most appropriate locations, where the shelters are most easily accessed, and where services are the most accessible for the users of the facility.
- facilitate the siting of shelters in a way, which will best ensure community support and acceptance, and so that the neighbourhood services required to support the users are available, and not unduly overburdened.

The Board is at a loss to see how the effect of this by-law can offend the dignity of homeless persons or reinforce prejudicial or stereotypical perceptions about the homeless. The Board finds that the by-law is very directly aimed at, and supportive of, a City-wide program intended to provide relief and support services to the homeless to improve their circumstances and assist them in regaining independence, self-sufficiency and dignity.

The Board can, therefore, find no basis in the evidence or in law on which this by-law could meet the tests of discrimination as set out in Andrews v. Law Society of British Columbia [1989] 1 S.C.R. 143 at pp. 174-175, and cited in Nova Scotia (Workers Compensation Board) v. Martin 2003 S.C.C. 54 at para. 84.

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

There is no distinction based on personal characteristics of a group or individual, nor any distinction of any kind apparent, implied, or as a result of this by-law. Any person may access the facilities if they find themselves homeless and there is capacity at the shelter. Furthermore, there was no evidence to support the claim that these types of facilities are being treated differently in this by-law (with the

elimination of the requirement for Council approval) than any other facility or use is treated under a zoning by-law of this type. All uses that are the subject of a general zoning by-law of this nature are directed **to** certain locations and/or **away** from other locations.

There was no evidence that the provision of opportunities for the establishment of these facilities in the locations desired by the City would have the effect of imposing burdens, obligations or disadvantages on any individual or group that is not imposed upon others. In fact the evidence demonstrated the opposite. The Board has found that the evidence demonstrated an acute sensitivity to what would be the most appropriate locations for such facilities in terms of the needs of the users, and their relationship to the neighbourhoods in which they would be temporarily located.

Again, the evidence indicated that rather than withholding or limiting access to opportunities, benefits and advantages for the homeless, this by-law, with the location criteria, would have the effect of substantially expanding the available opportunities for the establishment of shelters across the City, thereby expanding the benefits and advantages afforded the homeless by these sophisticated public service facilities.

Finally, while ACTO may think it more appropriate that these location criteria be included in a more flexible policy or protocol that is applied by City staff and Council, and which could be amended or ignored by Council at any time, without any legislatively enshrined public process; City Council clearly does not agree. The Board can find no reason in any of the evidence provided to it during this lengthy hearing to support ACTO's view of how these restrictions should be treated; or that would persuade the Board to agree with ACTO's view of the matter.

In fact, ACTO's view is only one view of the matter. Council arrived at its view of the matter after three years of public debate and continuous staff and other advice. The Board has found that Council's decision, for the most part, and except for those sections which do not meet the tests required to be applied by this Board, is well-supported by planning and public interest objectives. There is no reason that the Board can conceive of to prefer ACTO's view of the matter over Council's view of the matter.

Furthermore, the Board has found that the restrictions are not “arbitrary” but well supported by public service program delivery objectives, planning policy documents, and the principles of good planning.

As well, it is undisputed that if a superior site is found that is not permitted as of right by this by-law, there is a statutory means by which that site can be approved under the provisions of the *Planning Act.* Operators of shelters, and the City can continue to do what they have always done, and apply for a rezoning. Thus there is no validity to the claim that the location restrictions in By-law 138-2003 create inflexibility. In fact, the entire planning process is predicated on the thesis that planning is a process to manage change and address situations, which are not, and cannot be, immediately apparent or anticipated in the framing of planning policy and regulation. That process of change is to be open, public and transparent and take place within a legislative and policy framework, with appropriate checks and balances in the form of public meetings, decisions of Councils and committees, and appeals to an adjudicative body. That process is set out in, and governed by the *Planning Act.*

The Board finds, therefore, that the facts of this case do not support the legal claims made by ACTO in respect to the constitutionality of this by-law under the *Charter*. The Board finds that there is no differential treatment of homeless persons as a result of these restrictions, either apparent on the face of the by-law, or in effect. The Board also finds that there is no discrimination in purpose or effect against any group of people contained in this by-law. In fact, this by-law and the requirements approved by the Board should have the effect of facilitating the location of these shelters in areas where the service providers can best achieve the goals of <u>enhancing</u> the dignity of homeless persons, and <u>promoting</u> the view of homeless persons as worthy of recognition and value as human beings and as members of Canadian society. The approval of this by-law as modified by the Board should have the effect of supporting the service providers, in not only providing emergency food and shelter in locations easily accessed by homeless persons, but in providing the necessary support services to assist these persons in moving forward in their lives to a more desirable, independent, and dignified life circumstance.

For the above reasons, the Board need not determine if the homeless can be considered an "analogous" group for the purposes of Section 15 of the *Charter.* Nor need the Board move to a consideration of Section 1 of the *Charter.*

For the above reasons, and the reasons set out in the PLANNING section of this decision, therefore, the Board finds that the impugned provisions of this by-law do not offend or violate Section 15(1) of the *Charter*.

"S. D. Rogers"

S. D. ROGERS
MEMBER

CITY OF TORONTO

BY-LAW NO. 138-2003

Municipal Shelter By-law

WHEREAS City Council has recognized that there continues to be a need for emergency shelter accommodation within the City; and

WHEREAS Council is prepared to provide such services throughout the City; and

WHEREAS authority is given to City Council by Section 34 of the *Planning Act,* R.S.O. 1990, c. P.13, as amended, to pass this by-law; and

WHEREAS City Council has provided adequate information to the public and has held at least one public meeting in accordance with the *Planning Act*;

The Council of the City of Toronto HEREBY ENACTS as follows:

1. For the purposes of this by-law, "municipal shelter" means a supervised, residential facility, operated by, or for, the City of Toronto, or any agency of the City of Toronto, which provides short-term emergency accommodation and associated support services.

2. Notwithstanding any other general or specific provision in any by-law of the City of Toronto or of its former municipalities, municipal shelters shall be a permitted use in all zones or districts of the City of Toronto, provided:

   (i) any new buildings or additions comply with all other applicable zoning provisions of the zone or district;

   (ii) the lot on which the municipal shelter is located is on a major arterial road or a minor arterial road as described on the City of Toronto Road Classification System road list, appended hereto as Schedule 1 to this by-law; or the lot or any part of the lot on which the municipal shelter is located is on a flanking street to a major or minor arterial road within a distance of 80 metres from the corner of the major or minor arterial road and the flanking street;

   (iii) the lot on which the municipal shelter is located is at least 250 metres from any other lot with a municipal shelter or emergency shelter, hostel or crisis care facility.

3. Any supervised residential facility, operated by or for the City of Toronto or any agency of the City of Toronto, which provides short-term emergency

accommodation and associated support services and that is lawfully existing on, or for which a building permit has been issued by February 11, 2003, is deemed to comply with Section 2 of this by-law.

4. Subsection 2(ii) and 2(iii) of this by-law shall not apply to prohibit a municipal shelter use at the following locations:

   (a) 101 Ontario Street in the former City of Toronto: (under appeal)

   (b) 717 Broadview Avenue in the former City of Toronto;

   (c) Part 11, Expropriation Plan 9457, Part Lot 19, Concession 1, West of Yonge Street, also known as 25 Canterbury Place in the former City of North York; and

   (d) 8 Warrendale Court in the former City of Etobicoke.

5. By-law No. 7625 of the former City of North York is amended in section 2.34 by adding “municipal shelter,” after “but shall not include a”, so that section 2.34 reads as follows:

   “2.34 **Essential Services** means the construction, installation, alteration, operation or maintenance by a government, government agency or public utility corporation of any building, line, sewer, pipe or work, and incidental structure which is necessary to the provision of a public service, but shall not include a municipal shelter, public parking lot, parking station, or office building.”

6. By-law No. 438-86 of the former City of Toronto is amended as follows:

   (a) In Subsection 11(1), add the following words following clause (iii):

   “except the permissions in paragraph 1 shall not permit the use of any land, building or structure as a municipal shelter.”; and

   (b) In Section 2, add “a municipal shelter,” after “does not include” in the definition of “*hostel*”, so that the definition reads as follows:

   “*’hostel’*
   means a building or part of a building that contains dwelling accommodation consisting of rooms without culinary facilities, but does not include a municipal shelter, a rooming house or a crisis care facility;”.

7. By-law No. 1-83 of the former City of York is amended in clause 3.1.2 by adding “and except where the use is a municipal shelter” after “except a G District”, so that the clause reads as follows:

> “The local municipal corporation or any local Board or agency thereof, may use any land or erect or use any land or use any building or structure in any district except a G District and except where the use is a municipal shelter, provided that such use of a building or structure located in any R District shall be in substantial compliance with the height, coverage and yard regulations prescribed for such district, but there shall be no exterior storage in yards of goods, materials or equipment in any R District. Any building erected or used under the provisions of this Section shall be of a character and maintained in general harmony with residential buildings of the type permitted in said district.”

8. The Zoning Code for the former City of Etobicoke is amended as follows:

   (a) Section 330-7, Public Services and Utilities, (former Village of Long Branch) is amended by adding “but not including a municipal shelter” after “may, for the purposes of the public service”, so that the section reads as follows:

> “Notwithstanding anything contained in this chapter, the village or any local board thereof as defined in the Department of Municipal Affairs Act, any telephone or telegraph company, a transportation system owned or operated by or for the village, any department of the Dominion or Provincial Government, including the Hydro-Electric Power Commission of the Province of Ontario, may, for the purposes of the public service, but not including a municipal shelter, use any land or erect or use any building or structure in any district notwithstanding that such building or structure or proposed use does not conform to the provisions of this chapter for such district, provided that such use, building or structure, if located in any R District, shall be in compliance with the height, coverage and yard regulations prescribed for such district but that there shall be no exterior storage in yards of goods, materials or equipment in any R District and that any building erected or used under the provisions of this section shall be of a character and maintained in general harmony with residential buildings of the type permitted in the said district.”

   (b) Section 340-11, General Permitted Uses, (former Town of Mimico), subsection A, is amended by adding “but not including a municipal shelter” to the end of the sentence, so that the subsection reads as follows:

"A Essential public services authorized by the Town of Mimico, the Mimico Public Utilities Commission, the Municipality of Metropolitan Toronto, the Province of Ontario or other government board, agency or authority, but not including a municipal shelter."

(c) Section 350-10, Public Services and Utilities, (former Town of New Toronto), is amended by adding "but not including a municipal shelter" after "may, for the purposes of the public service", so that the section reads as follows:

"Notwithstanding anything contained in this chapter, the Town of New Toronto or any local board thereof as defined in the Department of Municipal Affairs Act, any telephone or telegraph company, a transportation system owned or operated by or for the Town of New Toronto, any department of the Dominion or Provincial Government, including the Hydro-Electric Power Commission of the Province of Ontario, may, for the purposes of the public service, but not including a municipal shelter, use any land or erect or use any building or structure in any use district notwithstanding that the proposed use does not conform to the provisions of this chapter for such a district, provided that such use, building or structure, if located in any R District, shall be in compliance with the height, coverage and yard regulations prescribed for such district but that there shall be no exterior storage in yards of goods, materials or equipment in any R District and that any building erected or used under the provisions of this section shall be of a character and maintained in general harmony with residential buildings of the type permitted in the said district."

9. By-law No. 1916 for the former Borough of East York is amended by:

(a) adding in Section 6.2.1, (Permitted Uses in R1A Density Zones), "but not including a municipal shelter" after "a facility owned by the Corporation of the Borough of East York", so that the section reads as follows:

"Residential; a day nursery operated in a municipally-owned community center, or in a public library, or in a school, or in a church building existing at the date of the passing of this By-law; Institutional; a facility owned by the Corporation of the Borough of East York but not including a municipal shelter; a public park; a playground. Uses accessory to the foregoing."

(b) adding in Section 6.3.1, (Permitted Uses in R1B Density Zones), "but not including a municipal shelter" after "a facility owned by the Borough of East York", so that the section reads as follows:

"Residential; a day nursery operated in a municipally-owned community center, or in a public library or in a school or in a church building existing at the date of the passing of this By-law; Institutional; a facility owned by the Borough of East York but not including a municipal shelter; a public park; a playground. Uses accessory to the foregoing."

10. By-law No. 6752 for the former Borough of East York as amended by:

(a) adding in Section 7.2.1, (Permitted Uses in R1A Density Zones), "but not including a municipal shelter" after "facilities owned by the Corporation of the Borough of East York", so that the section reads as follows:

"Residential; facilities owned by the Corporation of the Borough of East York but not including a municipal shelter; a day nursery operated in a municipally-owned community center, or in a public library, or in a school, or in a church building existing at the time of passing of this By-law. Uses accessory to the foregoing."; and

(b) adding in Section 7.3.1, (Permitted Uses in R1B Density Zones), "but not including a municipal shelter" after "facilities owned by the Corporation of the Borough of East York", so that the section reads as follows:

"Residential; facilities owned by the Corporation of the Borough of East York but not including a municipal shelter; a day nursery operated in a municipally-owned community center, or in a public library, or in a school, or in a church building existing at the date of passing of this By-law. Uses accessory to the foregoing.".

ENACTED AND PASSED THIS 11th day of February, A.D. 2003.

CASE OOTES, Deputy Mayor

ULLI S. WATKISS, City Clerk

(Corporate Seal)