Opinion on the Provisions of Group Homes in the City-wide Zoning By-Law of the City of Toronto

Submitted to the City Solicitor's Office of Toronto

Sandeep K. Agrawal, PhD, AICP, MCIP

Terms of Reference

This report has been prepared at the request of the City Solicitor's Office of Toronto. The intent is to present an objective review and analysis of issues related to the definition of group homes (excluding correctional group homes), as well as the mandatory separation distances to which these homes are subject, and to provide an expert opinion for City Council's consideration. The following is the scope of work for this report:

1. Brief overview of the provincial and municipal legislative and policy framework governing group homes in Ontario and specifically in the City of Toronto.

2. Description and analysis of the nature and purpose of the "group home" use, as it is understood in provincial and municipal legislation and policies.

3. Literature review and analysis of the origins and development of the definition of "group home" in provincial and municipal land use legislation, specifically in the City of Toronto.

4. Literature review and analysis of the land use planning rationale/objective for separation distances in municipal by-laws and the origins and development of the separation distances provisions that apply to group homes in the City of Toronto through current zoning by-laws and the November 8, 2012, draft of the proposed City-wide Zoning By-law.

5. a) An opinion on whether each of the following is supported by accepted land use planning principles and objectives:

   i] the definition of "group home" in the November 8, 2012, draft of the City-wide Zoning by-law for the City of Toronto and specifically the definition's use of the terms "by reason of their emotional, mental, social or physical condition or legal status"; and

   ii] a separation distance between group homes generally and in particular, the one specified in the November 8, 2012, draft of the City-wide Zoning By-law for the City of Toronto

   b) This opinion should include consideration of the City's jurisdiction under the Ontario *Planning Act*, the Provincial Policy Statement 2005, and the City's Official Plan.

6. a) An opinion on whether each of the following is consistent with the Ontario *Human Rights Code* and section 15 of the *Canadian Charter of Rights and Freedoms:*

   i. the definition of "group home" in the November 8, 2012 draft of the City-wide Zoning By-law of the City of Toronto and specifically the definition's

use of the terms "by reason of their emotional, mental, social or physical condition or legal status"; and

ii. a separation distance between group homes, generally and as provided for in the November 8, 2012, draft of the City-wide Zoning By-law for the City of Toronto

b) This opinion should include analysis of whether, pursuant to the Ontario *Human Rights Code*, the definition of "group home" and the separation distance in the November 8, 2012 draft by-law are reasonable and bona fide, in the circumstances. The analysis should include a response to the following questions, required by human rights analysis:

i) Are there reasonable alternative ways to define the "group home" use other than the definition in the November 8, 2012 draft of the City-wide Zoning By-law for the City of Toronto and its reference to the terms "by reason of their emotional, mental, social or physical condition or legal status?"

ii) Does a separation distance between group homes in the City of Toronto draft by-law accomplish the land use planning purpose/objective for which it was designed?; and

iii) Are there reasonable alternative ways to achieve the land use planning purpose/objective other than through the separation distance provisions? If so, what are they?

Summary

The definition of group homes in the City of Toronto zoning by-law (No. 438-86)[1] appears to have originated with the 1978 Provincial Policy on Group Homes and recommendations from the City's Working Committee on Group Homes in 1978. Initially, the City struggled with the definition of group homes and the idea of separation distances; separation distances were included in various versions of by-laws before 1978. The City of Toronto's efforts to tackle the issue of group homes through zoning by-laws started even before the City had any clear guidance from the Province. The validity of separation distances seemed to have gained force from the recommendations of a Provincial Inter-ministerial Working Group. In 1978, these recommendations became the Provincial Policy on Group Homes.

The City of Toronto (pre- and post-amalgamation) has followed the provincial interest and the objectives of provincial policies on deinstitutionalization and community living by allowing group homes in all residential zones. However, even though separation distance is a legitimate and valid zoning tool to mitigate unwanted impacts from particular types of land uses, the report[2] expresses reasonable concern that City's current and proposed definitions and separation distances for group homes fail to stand up when examined in relation to the Ontario *Human Rights Code* and the *Canadian Charter of Rights and Freedoms*.

This report could not find a sound, accepted planning rationale behind the current definition and separation distance included for group homes in the City of Toronto's zoning by-law (No. 438-86). It also did not come across evidence of any reasonable alternative options explored by the City to accommodate residents of group homes. It does however find that the City's efforts to address the issue of group homes thus far have been done in good faith.

The report recommends that the part of the definition that identifies the characteristics of the people in group homes be deleted from the by-law, as the Human Rights Tribunal of Ontario or a Court could deem this part of the definition inconsistent with section 35(2) of the *Planning Act* or the Ontario *Human Rights Code* and section 15 of the *Canadian Charter of Rights and Freedoms*.

Whether or not the Human Rights Tribunal or a Court would conclude that the separation distance for group homes is inconsistent with the Ontario *Human Rights Code* and the *Canadian Charter of Rights and Freedoms*, this report concludes that there is sufficient merit to this perspective that a different approach should be adopted.

Although I have not been provided with any evidence of hardship, under the City's current zoning by-law or without it, the changes proposed in this report should not cause any undue hardship to the City. In fact, they may reduce some of the hardship the City now experiences in its enforcement of the current zoning by-laws.

[1] The current zoning by-law includes several different zoning by-laws from the pre-amalgamation municipalities. Here only the City of Toronto zoning by-law is being referred to.
[2] References reviewed and cited are listed at the end of this report. Cited case law is available in footnotes.

The report makes the following recommendations for the proposed City-wide Zoning By-law:

- Delete the phrase "by reason of their emotional, mental, social or physical condition or legal status".
- Replace "3 to 10 residents" with "a maximum of 10 persons."
- Use the following definitions of group homes and residential care homes:

  Group home means premises used to provide supervised living accommodation as per the requirements of its residents, licensed or funded under the Province of Ontario or Government of Canada legislation, for a maximum of 10 persons, exclusive of staff, living together in a single housekeeping unit.

  Residential Care Home:
  Means supervised living accommodation that may include associated support services, and is:
  i. Licensed or funded under Province of Ontario or Government of Canada legislation;
  ii. Meant for semi-independent or group living arrangements; and
  iii. For more than ten persons, exclusive of staff.

- Remove the requirement for a separation distance for group homes, but not for residential care homes.
- Before adopting the proposed City-wide Zoning By-law, review all its provisions in the context of the Ontario *Human Rights Code*, the *Accessibility for Ontarians with Disabilities Act*, and the *Canadian Charter of Rights and Freedoms*.
- If the City has a reason to believe that a land use has an unwanted impact on its surroundings, then separation distances could be considered to alleviate such an impact. These distances, however, need to be appropriately rationalized based on the findings of a thorough study of facilities, activities, and functions associated with the specified land use and their impacts, along with public consultation.
- Develop a Citizen's Guide to the proposed City-wide Zoning By-law, which could include, among other things, clarifications about and considerations respecting sensitive or incompatible uses and a brief rationale behind separation distances, if they are included.
- Initiate a training program for the City's land use planners and policy makers to help them understand and apply the provisions of the Ontario *Human Rights Code*, the *Accessibility for Ontarians with Disabilities Act*, and the *Canadian Charter of Rights and Freedoms* in the context of municipal planning policies and practice.

Recognizing the Province as a key and important player in the issue of group homes, the report offers the following as suggestions for the Province to consider:

- Remove the expression "by reason of their emotional, mental, social or physical condition or legal status" from the definition of group homes in the two key pieces of provincial legislation that guide municipal governance – the *Municipal Act* and the *City of Toronto Act*.
- Instruct municipalities across Ontario to modify their definitions of group homes and make them consistent with the Ontario *Human Rights Code* and the *Canadian Charter of*

Rights and Freedoms and remove separation distances for group homes, if they exist, from all zoning by-laws.

- Include a reference to the Ontario *Human Rights Code* as well as the *Accessibility for Ontarians with Disabilities Act* in the Provincial Policy Statement and advise readers that the Policy Statement should be read in conjunction with the Ontario *Human Rights Code* and the provisions in the *Accessibility for Ontarians with Disabilities Act*.
- Add a provision to the Provincial Policy Statement requiring municipalities to ensure that their by-laws are consistent with the Ontario *Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act*.
- Initiate an educational program for municipal land use planners to help them understand the provisions of the Ontario *Human Rights Code*, the *Accessibility for Ontarians with Disabilities Act*, and the *Canadian Charter of Rights and Freedoms* and their implications for planning policies and practice at the municipal level.

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1. The provincial and municipal legislative and policy framework governing group homes in Ontario and the City of Toronto.

All three levels of government are involved in approving, licensing, funding, and siting group homes. For example, the federal and provincial governments, among others, have been largely responsible for funding these homes. Provincial government has the added responsibility of approving and licensing. Depending on the nature of group homes (whether they are for children, adults with specific disabilities, and so on), several ministries are involved in the licensing process. For example:

- The provincial Ministry of Children and Youth Services is authorized by law to approve and issue a licence to operate a group home that houses children with developmental disabilities and special needs. It is the Ministry's responsibility to assess whether basic care and safety requirements, set out in the *Child and Family Services Act*, as well as other regulations and policies, are being met and to take action when these requirements are not being met.
- The Ministry of Community and Social Services, under legislation such as the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act*, the *Developmental Services Act* and regulations (repealed in 2011), and the *Charitable Institutions Act* (repealed in 2010), regulates certain group homes.
- The Ministry of Correctional Services through the *Ministry of Correctional Services Act* is involved in the operation of Correctional Group Homes. Given the agreed scope of work, Correctional Group Homes are not discussed in this report.
- The Ministry of Health and Long-Term Care under its mandate from the *Homes for Retarded Persons Act* (repealed in 2001) has in the past played a role in overseeing group homes.

Municipal governments, within the provisions of land use legislation such the *Planning Act*, the Provincial Policy Statement[3], municipal official plans, zoning by-laws, site planning requirements, and minor variances guide the location of these facilities and make sure that the group homes comply with local building, health, occupancy, and fire safety standards. Under the *Municipal Act*, a municipality can issue a business licence to operate a group home (as long as a by-law has been passed under section 34 of the *Planning Act*) after confirmation of conformity with zoning by-laws, compliance with Building and Fire standards and other applicable by-laws, and above all, licensing and funding approval from the Provincial government.

The *City of Toronto Act* 2006 allows the City to issue a licence for group homes, as long as the City has passed a by-law under section 34 of the *Planning Act* that permits the establishment and use of group homes in the City. However, to date the City has not adopted a by-law to license group homes.

The City of Toronto has taken the position that group homes are and should remain a provincial responsibility. Its representatives have long argued that since the Province of Ontario has legislative responsibility for group homes, as well as the major responsibility for funding them, it is logical that authority to license or approve group homes should rest with the Province. They

[3] The Provincial Policy Statement provides policy direction on matters of provincial interest related to land use planning and development.

have further argued that "funding at the provincial level, combined with licensing at a municipal level, would lead to duplication and fragmentation of supervision, responsibility and fiscal accountability."[4]

2. The nature and purpose of the "group home" use as it is understood in provincial and municipal legislation and policies.

The idea of group homes emerged from shifts in the way society provided residential facilities for people who have physical or mental disabilities that prevent them from living in home situation without supports. For many years, these services were provided by the government in government-operated institutions, which tended to be large, self-contained, and separated from urban centres.

With the advent of the idea of community living and deinstitutionalization in the 1970s, it was thought that people who had earlier been confined to institutions could, if placed in a more homelike setting in the community and given appropriate supervision, training and support, lead more satisfying and productive lives. This transition from institutional to residential living led to the concept of group homes, as well as the group home zoning problem.

The *Municipal Act* of 1980 attempted to define and describe group homes. The Act has been amended and replaced several times, most recently in 2006, but the definition of group homes has remained unchanged:

> a residence licensed or funded under a federal or provincial statute for the accommodation of three to 10 persons, exclusive of staff, living under supervision in a single housekeeping unit and who, by reason of their emotional, mental, social or physical condition or legal status, require a group living arrangement for their well being.

This same definition was used in the *City of Toronto Act* 2006, which created a framework of broad powers for the City.

A slightly different definition had been proposed by Ontario's Cabinet Committee on Social Development for the Inter-ministerial Working Group on Group Homes in 1978. The Working Group had been formed in response to the government's deinstitutionalization of living arrangements for people with disabilities and special needs to provide guidance for the orderly development of new homelike care facilities in a community setting. Two equal but opposite forces were in play at the same time – one to ensure that municipalities accepted group homes, and the other to support restrictive zoning by-laws.

The Working Group defined group homes in the following way:

> A Group Home is a single housekeeping unit in a residential dwelling in which three to ten unrelated residents (excludes staff and receiving family) live as a family under responsible supervision consistent with the requirements of its residents. The home is licensed or approved under Provincial statute in compliance with municipal by-laws.

[4] *Group Home Primer*, 1984.

A model by-law proposed by the Working Group supported and encouraged separation distances between group homes and other residential land uses.

While the City of Toronto largely followed the provincial guidelines emanating from the Working Group on Group Homes report, its definition of group homes remained slightly different from the provincial proposal. Its zoning by-law (No. 332-78) defined group homes as follows:

> A residence for the accommodation of six to ten persons exclusive of staff, who by reason of their emotional, mental, social or physical condition or legal status require a group living arrangement for their well-being where:
> - The facility is supervised, or members of the group are referred, by a hospital, court or government agency; or
> - The facility is funded wholly or in part by a government, other than funding provided solely for capital purposes; or
> - The facility is regulated or supervised under a general or special Act.

Although the provincial and city definitions were similar in many respects, they differed in the following three ways:

- In the City's zoning by-law (No. 332-78), a group home was called a *residential care facility*.
- The City's definition allowed for six to ten residents, because the City defined a group of up to five unrelated persons occupying a single dwelling unit as a family.
- The City's definition included the terms "by reason of their emotional, mental, social or physical condition or legal status."[5]

The City's definition, especially, the phrase "who by reason of their emotional, mental, social or physical condition or legal status" seems to have emerged from the recommendations of the City Working Committee on Group Homes 1978.

The definitions of group homes across Ontario municipalities (today and pre-amalgamation) are similar. However, some definitions encapsulate various types of group homes, such as foster homes, homes for the elderly, residential care facilities, crisis care facilities, emergency shelters, correctional group homes and others. Some use the terms "by reason of their emotional, mental, social or physical condition or legal status" – at least until very recently[6] – while others have restrictions placed on the locations of these facilities, including separation distances. In some municipalities, separation distances vary based on number of residents living in the dwelling unit as well as whether the group home is inside or outside of the urban boundary. Barring a handful, by and large, Ontario municipalities allow group homes in all residential zones.

3. The origins and development of the definition of "group home" in provincial and municipal land use legislation, specifically in the City of Toronto.

[5] Group Home Primer, 1984.
[6] Kitchener and Sarnia have removed the reference to prohibited grounds, as a result of reconsidering it, given the human rights challenge.

The origins and development of the definition of "group homes" at the provincial level can be traced to the report produced by the Inter-ministerial Working Group in 1978. Among other things, the Working Group was charged with defining group homes as well as recommending approaches to encourage or require municipalities to amend restrictive zoning by-laws. The following recommendations of the working group are relevant to this section.

1. That the following definition of a group home should be used:

   A Group Home is a single housekeeping unit in a residential dwelling in which three to ten unrelated residents (excludes staff and receiving family) live as a family under responsible supervision consistent with the requirements of its residents. The home is licensed or approved under Provincial statute in compliance with municipal by-laws.

2. That planning guidelines and the model by-law should be conveyed to municipalities through municipal associations and promoted by the community planning advisory branch of Housing and the Ministry of Community and Services branch.

3. That municipalities should be encouraged to develop by-laws governing group homes.

4. That a letter should be sent to municipalities pointing out their responsibilities to provide accommodation for social service cases in a community setting and asking that they not prohibit group homes by zoning.

5. That a similar letter should be sent to the Ontario Municipal Board outlining the provincial policy on group homes in relation to municipal zoning.

6. That an amendment should be made to the *Municipal Act* to permit municipalities that already provided for group homes in their zoning by-laws to require that such homes be registered.[7]

Later the same year, the Working Group's recommendations were accepted as the provincial group homes policy.[8]

In October 1979, following the recommendation of the Inter-ministerial Working Group, the Provincial Secretariat for Social Development, in cooperation with the Ministry of Housing, released draft planning guidelines for group homes.

The planning guidelines recommended that group homes be permitted in all designated residential zones. It went on to state:

> in order to prevent an undue concentration of group homes in specific areas of municipality, standards requiring a minimum distance separation between these facilities will be incorporated in the implementing restricted area by-law.

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[7] *Group Homes*.1978. Report of the Inter-ministerial Working Group.
[8] Marshall, J., 1984. Zoning Law for Group Homes and Community Residences; passing reference in Birch's report 1983.

The response from the Association of Municipalities of Ontario (AMO) in January 1981 indicates confusion about what was required of the municipalities. The AMO was of the opinion that the guidelines were not mandatory. The AMO took exception to the Secretariat's recommendation to introduce separation distance factors in the by-laws in order to limit the number of group homes in a residential area and also raised the spectre of a municipality's being subject to litigation if it did so. This warning was prescient.

A year later, a section was added to the *Municipal Act 1980* to permit the council of a local municipality to pass by-laws requiring the registration of group homes, following the Provincial Policy of 1979.

This move was followed by the development of a resource manual on group homes prepared by Margaret Birch, Provincial Secretary for Social Development, in 1983. The report's objectives were to give municipal officials a clearer understanding of the provincial policy; the types of group homes that could be licensed or approved; the way in which group homes should be established, regulated, and assessed; and the most appropriate means of effecting corresponding changes in municipal official plans and zoning by-laws.

The question of group homes and related zoning arguably first arose in the City of Toronto in the early 1970s, well before the Province began to take action on the issue. The 1970s saw a trend towards community living for children and adults requiring special services who had previously been living in large, government-run institutions. This deinstitutionalization process resulted in service providers' setting up group homes in communities, but many ran into opposition from residents in the affected neighbourhoods. At the same time, other neighbourhoods were experiencing undue concentrations of group homes. To address these issues of neighbourhood opposition and unequal distribution, in 1974, Toronto council passed a motion of intent regarding group homes that included the following definition:

> A group home is defined as one where an agency-operated home provides care for 4 or more children in a family-type setting where the emphasis is on meeting the specialized needs of adolescents or seriously disturbed youngsters for whom institutional care is contra-indicated, or on the study and/or treatment of disturbed children through the use of this setting.

To put the issue to rest, in 1977 the City passed a zoning by-law (No. 219-77) regarding Therapeutic Group Homes that included a definition of this type of facility:

> Therapeutic group home means the whole of a building comprising a single habitable unit which is neither owned nor operated for the purpose of gain and which is occupied as the permanent residence of not more than 8 persons residing therein for the purpose of receiving medical, social or psychological care from, and being at all times under the control of, at least one adult person and not more than two adult persons qualified to provide such care, provided that where such home is occupied by children there is present in the home at all times that children are present one such adult person for every four children, or fraction thereof, under the age of sixteen years and one such adult person for

every six children, or fraction thereof, who are sixteen years of age or over, but does not include any use or establishment otherwise defined by this by-law.

This by-law raised concerns among almost everyone interested in the establishment or operation of group homes, from residents' associations to funders and providers such as the Ministry of Community and Social Services and the Children's Aid Society.

That same year, a Working Committee on Group Homes was struck by the City to look into the issue, which recommended repealing the Therapeutic Group Homes by-law and replacing it with a new one with the following definition:

> A residential care facility is any community-based group living arrangement for six to ten individuals exclusive of staff with social, legal, emotional, mental or physical handicaps or problems that is developed for the well being of its residents through self-help and/or professional care, guidance, and supervision unavailable in the resident's own family or in an independent living situation.
> - Residential care facility may locate in a single family dwelling, boarding or lodging house, or converted dwelling house, or any building built for that purpose, but which in all cases must be fully detached and occupied wholly by that use.
> - Residential care facility includes group homes, group foster homes, halfway houses, residences for the physically or mentally handicapped or disabled persons and special care boarding or lodging houses, but does not include anything else defined in this by-law.

The City's Working Committee proposed replacing this definition with a new definition that would be more inclusive and would cover all types of residential care facilities for adults and children.

The City Council accepted the Committee's advice and passed a new zoning by-law (No. 332-78) that included the following, slightly different, version of the definition:

> Residential care facility means a residence for the accommodation of six to ten persons, exclusive of staff, who by reason of their emotional, mental, social or physical condition or legal status require a group living arrangement for their well being, and
> a) Such facility is supervised, or the members of group are referred, by a hospital, court or government agency; or
> b) Such facility is wholly or in part by any government, other than funding provided solely for capital purposes; or
> c) Such facility is regulated or supervised under a general or special act.

This definition, adopted in 1978, remains in effect in the City of Toronto's current zoning by-law (No. 438-86).

Note that one of the mandates of the provincial Inter-ministerial Working Group, discussed earlier, was to address the controversy that had arisen in the City of Toronto at that time and, at

the same time, provide guidance for a consistent definition and acceptance of group homes across the city as well as the province.

It is important to note that the current zoning by-laws in the City of Toronto are a collection of 43 different zoning by-laws inherited from the six pre-amalgamation municipalities. These remain in force today. Each former municipality has its own history related to the definition of group homes, which are beyond the scope of this report. However, Appendix 1 lists the definitions as they current exist in the zoning by-laws and are applied in each former municipality.

4. The land use planning rationale/objective for separation distances in municipal by-laws and the origins and development of the separation distance provisions applicable to group homes in the City of Toronto in force through zoning by-laws and the November 2012 draft of the City-wide Zoning By-law.

Separation distances have long been used in municipal zoning by-laws. Zoning has its roots in New York City in 1916. It was developed to cure the ill-effects of incompatible land uses – for example, noxious industries located near homes – and to prevent nuisances by focusing on the designation and separation of land uses. Maximum heights and minimum setbacks were also added for public health reasons to ensure light and air in tenements.

Separation distances in zoning are intended to control the unwanted land-use impacts of a specific type property on the surrounding properties and on the city as a whole. Zoning is also used to manage the potential overconcentration of certain types of land use, services, or housing in a neighbourhood.

While zoning is an important and legal way of managing land use and future development in the Province of Ontario, it is subject to criticism. Many Canadian planning scholars (Finkler and Grant, 2011; Hodge and Gordon, 2008; Skelton, 2012) have proclaimed that zoning is inherently exclusionary, overly technical and rigid, and, more generally, irrelevant in today's cities.

According to Hodge and Gordon (2008), who wrote the well-known textbook *Planning Canadian Communities*, a land use determination is usually based on three components – facilities, activities, and functions[9].

- Facilities: a description of the physical alterations made to parcels of land and public rights-of-way, especially buildings and other structural features. The type of building (e.g., detached house, office building) needs to be noted, because this designation will indicate the form and quantity of indoor space available to users.
- Activities: a description of what actually takes place on parcels of land and in public spaces. This involves observing the various users and the form their use takes, usually focusing on relationships of people obtaining goods and services and the mode of transportation involved. Thus, a house is normally used for residential activities, a fire hall for emergency protection activities, a parking lot for vehicle-storage activities.

[9] Hodge and Gordon. 2008. P 144.

- Functions: a description of the basic purpose of an enterprise or establishment located on a parcel of land. Individuals, firms, and institutions use a specific location for places of residence, business, government, or assembly, and it is these latter purposes that need to be noted.

The origins of separation distance provisions applicable to group homes in the Toronto zoning by-law lie in the following motion of intent passed by Toronto City Council in 1974:

> Be it resolved that City Council declare its intent to enact a by-law that would provide that no therapeutic group home be permitted to be established within a distance of 800 feet of any building being used for a similar purpose in all 'R' districts for the purpose of group home as defined above.
>
> Your Committee also recommends that the intent declared by City Council in adopting Clause 4 of Report No. 5 of the Committee on Buildings and Development on February 22, 1974, which applied a minimum of 400 feet spacing between therapeutic group homes in the area bounded by Parliament Street, St. James Cathedral, the Don River and Gerrard Street be varied to conform to the above general intent for all 'R' districts.

Before this motion of intent, there was no separation distance requirement in Toronto's zoning by-law and the term "group home" was not used.

In 1977 the City passed a zoning by-law (No. 219-77), which included a definition of "Therapeutic Group Home," along with a distance requirement of 800 feet, the length of approximately two city blocks. The by-law caused considerable controversy. To respond to the controversy, the City set up a Working Committee on Group Homes, which recommended that the by-law concerning "Therapeutic Group Home" be repealed. The Working Committee also recommended varying distances between group homes, depending on the number of residents, while continuing to permit such facilities in all residential areas, subject to rigid spacing requirements. In Committee's view, "by controlling the factors of the numbers of residents, the distance between homes, and the type of dwelling house, neighbourhoods will be adequately protected from concentration and from reasonable or unmanageable intrusion."

The Committee clarified the intent behind its recommended policies by stating that "it was to distribute residential care facilities equitably throughout all residential areas…" (p. 915) and to address neighbourhood fears and anxieties regarding such facilities. It further said that the potential effect of the policies would be that "there would be no further concentration of residential care services in areas where the number of facilities were excessive."

While the definition of a residential care facility that included group homes was accepted, the proposal to vary separation distances was not included in the new 1978 Residential and Crisis Care by-law (No. 332-78). Heeding the view of the City Solicitor of the time that this provision could not be legally implemented, the Council settled on a uniform distance of 800 feet. In the subsequent reorganization of this by-law, the distance requirement was carried over, except that it was converted from feet to metres (that is, 800 feet became 245 metres).

The Inter-ministerial Working Group and subsequent Provincial Policy on Group Homes reinforced the idea of separation distances. The Working Group suggested:

> The by-law should provide that a group home cannot locate closer than a specified distance to another group home facility. This spacing requirement would alleviate municipal and community fears concerning concentration of group homes and over-taxing of social/educational facilities. The requirement could be expressed in urban by-laws as a sliding scale of 600 to 1000 feet depending upon the number of residents or a standard distance in suburban or rural areas.

The City's zoning by-law (No. 438-86) currently in force allows group homes in any residential area, but requires a separation distance of 245 metres between them. In other pre-amalgamation municipalities, group homes are allowed in all residential zones, albeit the separation distance ranges between 300 metres and 800 metres.

Scarborough has a different zoning regime from the other former municipalities. It is governed by approximately 33 community by-laws, all of which require that group homes be at least 300 metres from any other group home, except for by-law no. 25278, the Upper Rouge – Hillside Community by-law, which has a minimum separation distance of 800 metres.

Table 1 contains a list of separation distances used in the by-laws of today and pre-amalgamation municipalities until 2007; it has been updated wherever information was available. This list is by no means exhaustive and may not have captured all recent changes. Nevertheless, it suggests a wide range of separation distances employed by Ontario municipalities.

5 Support in land use planning principles for the definition of group homes and the use of separation distances, and consideration of the City's jurisdiction in these matters under the *Planning Act*, the Provincial Policy Statement, and the City's Official Plan.

The City of Toronto regulates the use of land through its Official Plan, zoning by-laws, minor variances and other means. This authority is granted by the *Planning Act*, which sets out the ground rules for land use planning in Ontario and describes how land uses may be controlled, and who may control them. The Official Plan sets out the municipality's general planning goals and policies that will guide future land use. Zoning by-laws set the rules and regulations that control development as it occurs. Minor variances allow some relief from the zoning by-law and deals with minor problems in meeting provisions in the zoning by-law. A minor variance does not amend the zoning by-law, but allows variations to specific by-law requirements on a site specific basis, provided the applicable test under the Planning Act is met. In other words, it simply excuses an individual property owner from a specific requirement of the by-law and allows them to obtain a building permit. For this, one has to apply to the Committee of Adjustment appointed by the City Council. The Committee's decisions can be appealed to the Ontario Municipal Board (OMB).

Under the *Planning Act*, the Minister of Municipal Affairs and Housing may, from time to time, issue provincial statements on matters related to land use planning that are of provincial interest. In other words, the Provincial Policy Statement provides policy direction on matters of

provincial interest related to land use planning and development. For instance, the Provincial Policy Statement, 2005 contains overall policy directions to promote a planning system that recognizes the complex inter-relationships among and between environmental, economic and social factors in land use planning.

Before passing a zoning by-law, the City Council evaluates it against criteria such as:

- conformity with the official plan and compatibility with adjacent uses of land
- suitability of the land for the proposed purpose, including the size and shape of the lot(s) being created
- adequacy of vehicular access, water supply, sewage disposal

The Council's decision about a zoning by-law must be consistent with the Provincial Policy Statement issued under the Planning Act.

As discussed in the previous section, a land use is determined usually by looking at three components – facilities, activities, and functions – of land. No evidence has been provided by the City of external impacts such as parking, traffic, or garbage associated with group homes, beyond those of a normal residential use. Nor can I find any analysis of the facilities, activities, and functions of group homes that would justify treating group homes as a separate use. On these bases alone, one might choose to eliminate group homes as a separate use category. However, because group homes are licensed facilities, are supervised, and their residents are cared for by group home operators (as opposed to living independently), these facilities should be maintained as a separate residential use for zoning purposes.

In its November 8, 2012, draft of the City-wide Zoning By-law (Appendix 2), the City of Toronto uses the following definition of group homes:

> Group home means premises used to provide supervised living accommodation, licensed or funded under the Province of Ontario or Government of Canada legislation, for three to ten persons, exclusive of staff, living together in a single housekeeping unit because they require a group living arrangement by reason of their emotional, mental, social or physical condition or legal status.
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> Residential Care Home:
> Means supervised living accommodation that may include associated support services, and is:
>
> *iv.* Licensed or funded under Province of Ontario or Government of Canada legislation;
> *v.* Meant for semi-independent or group living arrangements by reason of their emotional, mental, social or physical condition or legal status.; and
> *vi.* For more than ten persons, exclusive of staff.

The proposed definition keeps the terms "by reason of their emotional, mental, social or physical condition or legal status" and allows 3 to 10 persons, as opposed to 6 to 10 in the by-law currently in force.

According to the City's *Primer on Group Homes*, published in 1984, the City's reason for limiting the number of residents to between 6 and 10 was the fact that the City defined a group of

up to 5 unrelated persons, occupying a single dwelling unit, as a family[10]. However, there may be good planning reasons for limiting the number of persons residing in one dwelling unit. Perhaps an explanation based on the intensity of the use, the density of the use, the character of the use, the purpose of the use and the needs of the users is better way to clarify this point.[11]

In any event, the range of 3 to 10 residents is consistent with the Inter-ministerial Working Group's suggestion, the Provincial Policy adopted in 1978, as well as the *Municipal Act* of 1980. The Working Group considered any home with more than 10 residents as a small institution and argued that such institutions should be located outside residential areas. The Metropolitan Toronto's Social Services and Housing Committee[12] report on group homes policy in 1979 also suggested capping the maximum number of residents at 10.

I see no reason for requiring a minimum of 3 residents. A maximum number could be justified based on the *intensity of use*, impact, and compatibility. In *Haydon Youth Services v. Keaney (Town) 1997*[13]("*Haydon*"), the Ontario Municipal Board allowed a restriction on the number of residents living in a group home to reduce impact and increase compatibility. The Toronto proposed City-wide zoning by-law could stipulate the maximum number of residents, but should not set a minimum. The provincial licensing process also acts a control mechanism on the activities of group homes.

In the case of residential care home, which in the City-wide Zoning By-law is distinguished from group home as a facility accommodating more than 10 residents. Here, there is a merit in having a minimum of 10 as this number is usually more than number of people living together in a home setting and can be justified based on the intensity of use, negative impact and incompatibility that it may cause.

The use of terms "by reason of their emotional, mental, social or physical condition or legal status" is problematic, as it, in my view, refers to the personal characteristics or qualities of the users of the facility. This could amount to "people zoning" as per *Bell v. The Queen*[14] as well as section 35(2) of *Planning Act*.[15]

In the *Bell case*, the personal qualification in question was whether occupants were family, which triggered the enquiry into marital/family status, which the Court found inappropriate in a zoning by-law. The Supreme Court agreed with a lower-court judge who had said that the by-law "was not regulating the use of building, but who used it." The Supreme Court also agreed with the appellate judge, who said:

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[10] *Primer on Group Homes*. 1984. Pp 6.
[11] *Toronto (City) Zoning By-law No. 138-2003, 1984* OMB.
[12] Until amalgamation in 1998, Metro Toronto was composed of the City of Toronto, the towns of New Toronto, Mimico, Weston, and Leaside; the villages of Long Branch, Swansea, and Forest Hill; and the townships of Etobicoke, York, North York, East York, and Scarborough.
[13] Haydon Youth Services v. Kearney (Town) 1997 O.M.B.R. 124
[14] *Bell v. The Queen*, [1979] 2 S.C.R. 212
[15] The relevant section of the Planning Act reads: "The authority to pass a by-law under section 34, subsection 38 (1) or section 41 does not include the authority to pass a by-law that has the effect of distinguishing between persons who are related and persons who are unrelated in respect of the occupancy or use of a building or structure or a part of a building or structure, including the occupancy or use as a single housekeeping unit."

> I do not think personal qualifications of this type or other personal characteristics or qualities have even been suggested here as a proper basis for control of density or any issue relevant to land use or land zoning.

Case law subsequent to *Bell*, however, does not take such a strong position. Zoning definitions that refer to personal attributes have been upheld subsequently by the Courts. One such example is *Smith et al. v. Township of Tiny* 1980[16] ("*Smith*"), which came after *Bell*. In the *Smith* case, Robins J. noted:

> Land use restricted to a particular type or group of persons may be unreasonable or discriminatory and hence ultra vires. However, in my view, a restriction based upon a definition of "family" which incorporates most types of arrangement usual for people living together as a simple housekeeping unit in premises commonly described as "single family" dwellings cannot be said to be either unreasonable or discriminatory or to constitute zoning based on the relationship of the occupants. In invoking the definition of "family" used in the by law, it appears to me the township employed a valid zoning device to regulate the "use" and "character" of residential premises.

Upholding a zoning restriction based upon a definition of "family", he further added:

> I do not read the judgment of Spence, J., who spoke for the 3:2 majority in *Bell*, as rendering invalid every zoning by-law making occupation of residential premises referable to a definition of "family" which includes in it consanguinity and marriage simply because consanguinity and marriage are included. The decision, in my opinion, does not go that far and must be interpreted in light of the particular by-law prohibition in issue in the case and the Court's conclusion as to the unreasonable and inequitable consequences which flow from it…
>
> However, in my view, a restriction based upon a definition of "family" which incorporates most types of arrangement usual for people living together as a simple housekeeping unit in premises commonly described as "single-family" dwellings cannot be said to be either unreasonable or discriminatory or to constitute zoning based on the relationship of the occupants. In invoking the definition of "family" used in the by-law, it appears to me the township employed a valid zoning device to regulate the "use" and "character" of residential premises. This argument of the plaintiff must accordingly fail.

The City, therefore, could argue that the reference to personal characteristics was merely a convention i.e. a general agreement on or acceptance of practice in planning to provide an accurate definition of the "use." It could further argue that a separation distance has been applied to group homes and not to some other uses, in order to create a distinction based upon valid land-use planning grounds of positive deconcentration, impact and compatibility. And for this, it

[16] *Smith et al. v. Township of Tiny* (1980), 27 O.R. 690 (Div. Ct.); leave to appeal refused (1980), 29 O.R. (2d) 661n (Ont. C.A.).

could rely upon the above as well as OMB decisions in the *Haydon*,[17] *Kitchener Official Plan Amendment (No. 58) 2010* [18] ("*Kitchener*"), and *Toronto (City) Zoning By-law No. 138-2003 2004*[19] ("*Deveau*") cases.

Having said this, if we refer again to the recommendations of the Provincial Inter-ministerial Working Group, which became the Provincial Policy on Group Homes, we find that there is no reference to the characteristics of the residents of group homes in its definition. The definition without people's characteristics seems to provide an adequate idea of what the use is. The phrase describing the residents' characteristics does not serve any valid legal or zoning purpose, in my opinion.

Regarding the separation distance, the draft harmonized by-law states:

> A group home or a residential care home must be a minimum distance of 250 metres from any lot containing an existing group home or residential care home, measured in a straight line from nearest property line to nearest property line.

Although no clear documented evidence has been provided by the City, it is likely that the City chose 250 metres as it was the lowest minimum distance prescribed and thus the least restrictive measure among the six pre-amalgamation municipalities (East York, Etobicoke, North York, Scarborough, Toronto, and York). In a memo to the Planning and Growth Committee on June 4, 2012, the Acting Chief Planner of the City of Toronto justified the 250-metre distance by stating that this distance is consistent with the separation distance introduced by the City-wide Municipal Shelters By-law 138-2003, which was upheld by the Ontario Municipal Board in 2004 (*Toronto (City) Zoning By-law No. 138-2003)* (pp. 9).

This argument can be rebutted on two points. First, while there is merit in the point, shelters are different from group homes. Second, in *Toronto (City) Zoning By-law No. 138-2003, 2004*, the OMB upheld the by-law because there were sound planning reasons for trying to avoid the overconcentration of shelters, particularly family emergency shelters. Overconcentration of shelters could over-burden community services, intensify the use of the area, and possibly change the character of a neighbourhood permanently. No such planning evidence or justification has been put forward by the City with respect to group homes. The 2010 OMB decision *Advocacy Centre for Tenants Ontario v. Kitchener (City)* (2010)[20] ("*ACTO*") upheld the idea of positive deconcentration as a valid planning tool, but said that such efforts must be balanced with the requirements of the *Ontario Human Rights Code*.

As discussed earlier, separation distances are a legitimate and valid zoning tool to mitigate the impacts, nuisances, and externalities generated by certain types of land use. However, I have not found any documented evidence of any kind of negative externality generated by group homes. For example, since most of the residents of group homes do not drive, they do not contribute to parking and traffic problems. It appears the separation distance was introduced as a compromise

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[17] *Haydon Youth Services v. Kearney (Town)* 1997 O.M.B.R. 124.
[18] *Kitchener Official Plan Amendment (No. 58)* 2010 O.M.B.D. 666.
[19] *Toronto (City) Zoning By-law No. 138-2003* 2004 O.M.B.D. No. 280.
[20] *Advocacy Centre for Tenants Ontario v. Kitchener (City)* (2010) O.M.B.D. Case No. PL050611.

at the time solely to alleviate community fears concerning overconcentration of group homes and over-taxing of social/educational facilities, while allowing these homes to locate in residential areas. Such fears alone, without any evidence of nuisance caused by the use, are, however, not an accepted land use planning rationale that would justify a separation distance.

On the other hand, in the case of residential care home, I would argue for a separation distance as this is an accommodation with more than 10 residents that could increase the intensity of use, negative impact and incompatibility with its surrounding.

The City's amendment to the zoning by-law to create drive-through facilities as a separate use subject to separation distances presents itself as a useful model to rationalize a separate use and the separation distance associated with it. The amendment was based on a thorough study of such facilities and their functions and activities. The staff report to the Council on drive-through facilities (dated August 26, 2002) presented a cogent and convincing planning rationale for making this a separate type of land use. This drive-through study and its outcome should be used as a guide for developing a planning rationale for distinguishing other specific land uses.

6 a. Consistency of the City's definition of group homes and use of separation distances with the Ontario *Human Rights Code* and section 15 of the *Canadian Charter of Rights and Freedoms*.

The Ontario *Human Rights Code* protects individuals with disabilities or perceived disabilities from discrimination in several social areas, including the provision of services and occupancy of accommodation. Discrimination under the *Code* can be direct (such as a refusal to grant a job because of disability), indirect, or constructive (adverse effect). The *Code* defines constructive discrimination and the defences of *bona fide* occupational requirement or qualification ("BFOR") and undue hardship at section 11:

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

Social actors bound by the *Code,* such as the City of Toronto, have a duty to accommodate individuals who are protected under the *Code* on the basis of grounds mentioned in the *Code*, such as disability. The City is required to make every reasonable effort, short of subjecting itself

to undue hardship, to accommodate a protected individual. If that individual can demonstrate that he or she is the subject of discrimination, the burden shifts to the City to establish that the *prima facie* discriminatory standard can be justified.

In analysing these questions, the courts have identified two main issues:

- whether a *prima facie* discriminatory standard is a *bona fide occupational requirement* (a "BFOR"), and
- whether accommodating the individual would impose undue hardship on the impugned party.[21]

The first issue, BFOR, reflects the concern that it would be unreasonable to prohibit employers (or other social actors like the City of Toronto) from imposing reasonable standards with regard to the abilities required of persons employed in particular positions. For example, while a policy requiring that all employees have the ability to see might be *prima facie* discriminatory against the blind, such a policy might be permissible as a BFOR for an airline pilot.[22]

In *British Columbia Public Service Employee Relations Commission v. BCGSEU* (commonly known as *Meiorin*),[23] the Supreme Court of Canada adopted a three-part test to determine whether a particular standard, requirement, factor or rule is a BFOR. Each of the following must be established on a balance of probabilities (that is, "more likely than not"):

- The standard, requirement, factor or rule was adopted for a purpose **rationally connected** to the function being performed;
- The standard, requirement, factor or rule was adopted in an honest and **good faith** belief that it was necessary to the fulfillment of that purpose or goal; and
- The standard, requirement, factor or rule is **reasonably necessary** to the accomplishment of that purpose or goal. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individuals sharing the characteristics of the claimant without imposing *undue hardship*.[24] Here the employer must thoroughly consider all reasonable options for accommodation.

The *Canadian Charter of Rights and Freedoms* also protects certain rights. Any laws or government programs that are inconsistent with the *Charter* are held to be of no force or effect. The first step of a *Charter* analysis is to determine whether a particular law is a *prima facie* infringement of one of the rights protected by the *Charter*. If so, it remains open to the state actor (in this case, the City) that passed the law to argue that the law is nevertheless justified under section 1 of the *Charter* as being "demonstrably justified in a free and democratic society."

Section 15 of the *Charter* provides as follows:

Equality before and under law and equal protection and benefit of law

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[21] Note that much of the case law refers to the obligations of an "employer," because the cases have arisen in the employment context. The framework discussed here, however, applies equally to group homes.
[22] Canadian Human Rights Commission, "Preventing Discrimination: Bona Fide Occupational Requirement," online: http://www.chrc-ccdp.ca/preventing_discrimination/default-eng.aspx.
[23] [1999] 3 SCR 3.
[24] *Ibid* at 54. This test is essentially codified in s. 11(1) of the *Code*, which is reproduced above.

> (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.
> ***Affirmative action programs***
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The leading case on section 15 is *Andrews v. Law Society of British Columbia*[25] ("*Andrews*"). In that case, the Supreme Court of Canada articulated an interpretive framework for the application of section 15 in equality rights cases. In general terms, in order to prove discrimination, a claimant must show the following:

- The law imposes (directly or indirectly) on the claimant a disadvantage (in the form of a burden or withheld benefit) in comparison to other comparable persons.
- The disadvantage is based on a ground listed in or analogous to a ground listed in Section 15.
- The disadvantage constitutes an impairment of the human dignity of the claimant.

A claimant who establishes these three matters is entitled to a finding of discrimination—meaning that the challenged law is in breach of section 15. The burden then shifts to the state actor to justify the discriminatory law under section 1 of the *Charter* by following the steps laid out by the Supreme Court of Canada in *R. v. Oakes*[26] ("*Oakes*"), section 1 of the *Charter* provides as follows:

> 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.

In *Oakes*, the Supreme Court unanimously laid down the following criteria to establish that a limit is reasonable and demonstrably justified in a free and democratic society:

1. Sufficiently important objective: the law must pursue an objective that is sufficiently important to justify limiting a Charter right.
2. Rational connection: the law must be rationally connected to the objective.
3. Least drastic means: the law must impair the right no more than is necessary to accomplish the objective.
4. Proportionate effect: the law must not have a disproportionately severe effect on the persons to whom it applies.

Where these four criteria are met, a discriminatory law will be permitted to remain in force. However, the *Oakes* test is a high standard to meet. Only in a very few cases has a law that has been found to be *prima facie* discriminatory been upheld under section 1 of the *Charter*. Furthermore, all four parts of the *Oakes* test must be met for a piece of legislation to be "saved"

[25] *Andrews v. Law Society of British Columbia* [1989] SCR 143.
[26] *R. v. Oakes* [1986] 1 SCR 103.

—if one of the parts of the test cannot be met, a court will not move on to examine the following steps and the legislation will remain void.

In the context of these provisions of the Ontario *Human Rights Code* and the *Canadian Charter of Rights and Freedoms* and the tests involved in each, I now turn to the definition of group homes in the City-wide Zoning By-law and the associated separation distance and subject them to the two tests (the *Code* and the *Charter*).

The Ontario Human Rights Code test

> ***Step 1**: Was the standard, requirement, factor or rule adopted for a purpose rationally connected to the function being performed?*

The focus at this step is not on the validity of the particular *standard*, but rather on the validity of its more general *purpose*. On this score, the City has not clearly demonstrated the *purpose* of using either the phrase "by reason of their emotional, mental, social or physical condition or legal status" in its definition nor the *purpose* of the separation distance of 250 metres in its proposed City-wide Zoning By-law. The definition and the separation distance seem to have been simply copied from definitions and measures put forward in the late 1970s and early 1980s.

I have not been provided with any clear evidence to show that these two provisions of group homes have ever been examined and tested in relation to a planning purpose or objective. The City documents prepared in late 1970s and early 1980s suggest that the separation distance was introduced to prevent overconcentration based upon some concerns that there would be negative externalities attached to group homes and their overconcentration (as acknowledged in some provincial documents).

The City, however, could argue that the reference to personal characteristics was merely a convention, a generally accepted practice in planning, to "make the bylaw specific and explicit" and to provide an accurate definition of the land use. It could further argue that a separation distance has been applied to group homes and not to some other uses, in order to create a distinction between group homes and other uses. This distinction is based upon valid land use planning grounds of positive deconcentration, impact, and compatibility. And for this, the City could rely upon the OMB decisions in the *Kitchener*, *Haydon*, and *Deveau* cases cited earlier.

The 2010 OMB decision in the *ACTO* case upheld the idea of positive deconcentration as a valid planning goal, but said that such efforts must be balanced with the requirements of the Ontario *Human Rights Code*. However, the City of Toronto has provided no clear evidence to support this concern or its purpose in achieving deconcentration, especially given the fivefold increase in group homes in the past 25 years or so[27].

[27] Today, there are about 500 group homes in the City of Toronto. While a locational study of these facilities is beyond the scope of this work, their street addresses suggest that most are located in the city centre. This pattern could be a product of the restrictive by-laws prevalent in various pre-amalgamation suburban municipalities, as well as the availability of transit, community services, and other facilities in the centre. Real estate prices also played a role in siting group homes at the time.

Therefore the definition of and separation distance applied to group homes in the zoning by-law does not meet the requirement of the first test under the Ontario *Human Rights Code*.

> *Step 2: Was the standard, requirement, factor or rule adopted in an honest and good faith belief that it was necessary to the fulfilment of that purpose or goal?*

Once the legitimacy of the impugned standard's more general purpose is established, the impugned party (the City) must demonstrate that it adopted the particular standard with an honest and good faith belief that it was necessary to the accomplishment of its purpose, with no intention of discriminating against the claimant. Here, the analysis shifts from the general purpose of the standard to the particular standard itself.

Even though there are reasonable concerns about the rational purpose behind the parts of definition and separation distance, it appears that the City adopted the current wording of the definition as well as the separation distance in good faith. It is arguably the first municipality in Ontario (if not in Canada) that tried to clarify and implement the concepts of deinstitutionalization and community living while dealing with strong public opposition as well as negative public perception of group homes (such as claims that they reduce nearby property values, affect neighbourhood safety, and cause disruptions).

The City followed the provincial objectives and interest in good faith, even though the provincial policies and acts that governed the City had and still have conflicting language on group homes. Clearly, the wording of the definition and the inclusion of separation distance were not motivated by discrimination. Furthermore, the City was dealing with the group home zoning issue at a time when the Ontario *Human Rights Code* and the *Charter of Rights and Freedoms* were very new and not yet well understood.

Therefore the definition of and separation distance applied to group homes in the zoning by-law does meet the requirement of the second test under the Ontario *Human Rights Code*.

Step 3: Is the standard, requirement, factor or rule reasonably necessary to the accomplishment of that purpose or goal? Is it possible to accommodate individuals sharing the characteristics of the claimant without imposing undue hardship on the City?

To meet the third part of the *Meiorin* test, the impugned party (the City) must demonstrate that the impugned standard (the group home by-law) is reasonably necessary to accomplish its purpose, which by this point has been demonstrated to be rationally connected to the fulfillment of that purpose. The impugned party must establish that it cannot accommodate the claimant and others adversely affected by the standard without itself experiencing undue hardship.

Assessing the "reasonableness" of a standard is therefore inextricable from assessing whether undue hardship has been established. Put another way, the undue hardship analysis is part of assessing whether a standard is reasonable, and this test is often where most of the analysis will

occur. It has been held that in this analysis, the procedure to assess accommodation is as important as the substantive content of the accommodation.[28]

I did not find evidence that any other reasonable alternative options were considered by the City in the past, although the City in the proposed by-law has adopted the least restrictive distance of all the six pre-amalgamation municipalities. Minor variances, site-specific zoning, and site plan controls are among several other land use control options available, although these may be more onerous. But I have not come across any evidence that these or any less discriminatory approaches were considered or whether any other real and meaningful efforts were made to accommodate the needs of group homes while deciding upon the separation distance.

I have also not been provided with any evidence to support the conclusion that the removal of the separation distance and the modification to the proposed definition of group homes will cause the City any undue hardship. In the absence of any such evidence, one might ask if the enforcement of the current definition and separation distance is, on the contrary, causing greater hardship for the City (although no evidence to that effect has been provided to me either).

Therefore the definition of and separation distance applied to group homes in the zoning by-law does not meet the requirement of the third test under the Ontario *Human Rights Code*.

To remain within the scope of work, the following section limits itself to the analysis of section 15 of the *Charter* as it applies to the City's by-law. Under section 15, the onus is on the claimant to demonstrate the following test, not a public body such as the City in this case.

The Charter (section 15) test

> ***Step 1**. Does the law impose, directly or indirectly, a disadvantage (in the form of a burden or withheld benefit) on the claimant in comparison with other comparable persons?*

The role of comparison at the first step is to establish a "distinction". In the recent decision of *Withler v. Canada (Attorney General) 2011*[29]("*Withler*"), the Supreme Court held that:

> [i]nherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).
> ...
> In some cases, identifying the distinction will be relatively straightforward, because a law will, on its face, make a distinction on the basis of an enumerated or analogous ground (direct discrimination).... In other cases, establishing the distinction will be more difficult, because what is alleged is indirect discrimination: that although the law purports

[28] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* [1999] 3 S.C.R. 868, at para. 66.
[29] Withler v. Canada (Attorney General) [2011] SCC 12

> to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds.[30]

With more recent cases, such as *Withler,* the focus at this stage of the analysis has been on the distinction or disadvantage, rather than on identifying a comparator group. However, the distinction or disadvantage may be illustrated in this case, for example, by the claimant's showing that the law treats the claimant less favourably than it does a member of the comparator group. In this case, persons with disability living in group homes could be compared to individuals who reside in regular family residences.

It is possible for a claimant suffering from a disability to argue that the restrictive provisions in City's zoning by-law allow differential treatment of those who live in shared accommodation (i.e., group homes) because of their mental or physical abilities. The claimant could further argue that by including the characteristics of people housed in group homes, the City is in effect making its intention clear that people with disabilities are subject to additional restrictions and prohibitions, in relation to services and accommodation, restrictions that are not imposed on people who do not have disabilities.

As mentioned before, the City could argue that a separation distance has been applied to group homes to distinguish this land use from other land uses. This distinction is based upon valid land use planning grounds, not upon the personal characteristics of persons who reside in group homes. The reference to personal characteristics was merely a convention, an accepted practice in planning, to provide an accurate definition of the "use." And for this argument, it could rely upon the OMB decisions in the *Kitchener*, *Haydon*, and *Deveau* cases.

In *Haydon*, the OMB ruled:

> The permission for "group homes" is in reality an exception that allows an institutional use to locate within a residential dwelling in a residential zone. As an exception, the by-law can be specific and explicit. In addition, it is not discriminatory in the constitutional meaning, but is discriminatory in the sense that a by-law must be in order to organize land use in such a fashion that a municipality can service and be satisfied that no adverse impact will befall the community.

In the absence of clear evidence (or cited evidence) from the City (or a claimant) going to the *Charter* test, as well as the uncertainty created by the jurisprudence, it is a hard to conclude whether the Human Rights Tribunal or a court may find the law impose, directly or indirectly, a disadvantage or burden on the claimant.

> *Step 2: Is the disadvantage based on a ground listed in or analogous to a ground listed in section 15 of the Charter?*

Yes, the current definition of group homes describes the people living in group homes by citing their disabilities or status. Disability is a listed ground under section 15.

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[30] *Ibid.,* at paras. 62, 64.

Step 3: Does the disadvantage constitute an impairment of the human dignity of the claimant?

The analysis at the final stage of the test has shifted away from the "impairment of human dignity" requirement in *Andrews,* and now focuses on the less abstract concept of discrimination. In *Withler,* the Supreme Court restated the question at this stage as "whether, having regard to all relevant factors, the distinction the law makes between the claimant group and others discriminates by perpetuating disadvantage or prejudice to the claimant group, or by stereotyping it."[31]

"Discrimination" was defined by the Supreme Court in *Andrews* as follows:

> . . . 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. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.[32]

The analysis at this step involves looking at the circumstances of members of the group and the negative impact of the law on them. The inquiry is contextual and requires an examination of the actual situation of the group and the potential of the impugned law to worsen their situation. *Withler* suggests two manners in which substantive inequality may be established:

(i) by showing that the impugned law, in purpose or effect, perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1). Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group. Here, relevant evidence is that which goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected; or

(ii) by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group. Typically, such stereotyping results in perpetuation of prejudice and disadvantage.[33]

Withler requires that the focus of the analysis be on the actual impact of the impugned law, taking full account of social, political, economic, and historic factors concerning the claimant group. The result may reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. However, the inquiry may also show that differential treatment

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[31] *Ibid.*
[32] *Andrews, supra* note 1 at 174-175.
[33] *Withler, supra* note 3 at paras. 35 – 38.

is required in order to improve the situation of the claimant group, in which case discrimination and a violation of section 15, would not be established.[34]

The claimant could argue that provisions in the City's by-law are prejudicial towards them by restricting the supply of housing for people with disabilities, diminishing the well-being of people with disabilities, perpetuating negative attitudes towards people with disabilities, and increasing social costs for people with disabilities, as argued by The Dream Team in *The Dream Team v. The City of Toronto* 2012 at the Human Rights Tribunal of Ontario.

It is also important to cite a ruling from the Manitoba Court of Appeal, which said that a zoning by-law breached section 15 of the *Canadian Charter of Rights and Freedoms* because it restricted the location of group homes for older persons, people with disabilities, persons recovering from addictions, and discharged penal inmates to a limited number of zones and required minimum separation distances (*Alcoholism Foundation of Manitoba v. Winnipeg (City)*.[35] The City of Winnipeg did not offer any evidence to evaluate whether the infringement could be justified under section 1 of the *Charter*. If there had been sufficient evidence to meet the applicable test under section 1, in other words, the 4-part *Oakes* test, the violation of Section 15 could have been upheld.

Summary

While the provisions for group homes in the City of Toronto's zoning by-law may (or may not) be rational and created in good faith, in the absence of evidence that a different approach would be an undue hardship on the City and its residents, it is difficult to regard it as meeting the Ontario *Human Rights Code* test.

Under the *Charter*, section 15, it is possible that a claimant could convincingly argue that the City's by-law provisions on group homes treat them differently, single them out, and discriminate against them by perpetuating disadvantage or by being prejudicial to them. If a claimant established these three findings at the Human Rights Tribunal or a court, the challenged zoning by-law on group homes might be considered in breach of section 15 of the *Canadian Charter of Human Rights and Freedoms*.

I have also not been presented with a section 1 "case" by the City. So, the section 1 test of the *Charter* analysis remains an open question. In the absence of evidence from the City or a claimant, compounded by the uncertainty created by the jurisprudence, I would suggest that the City err on the side of caution and modify the definition of group homes and remove the separation distance.

6 b. Questions required by human rights analysis

Question 1: Are there reasonable alternative ways to define the "group home" use other than the definition in the November 8, 2012, draft of the City-wide Zoning By-law for the City of Toronto

[34] *Ibid.*, at para. 39.
[35] [1990] M.J. No. 212.

and its reference to the terms "by reason of their emotional, mental, social or physical condition or legal status"?

The suggested alternative definitions of group home and residential care home are:

> Group home means premises used to provide supervised living accommodation as per the requirements of its residents, licensed or funded under the Province of Ontario or Government of Canada legislation, for a maximum of ten persons, exclusive of staff, living together in a single housekeeping unit.
>
> Residential Care Home:
> Means supervised living accommodation that may include associated support services, and is:
> a) Licensed or funded under Province of Ontario or Government of Canada legislation;
> b) Meant for semi-independent or group living arrangements; and
> c) For more than ten persons, exclusive of staff.

Question 2: Does a separation distance between group homes in the City of Toronto draft by-law accomplish the land use planning purpose/objective for which it was designed?

No. The provision relating to separation distance should therefore be removed.

Question 3: Are there reasonable alternative ways to achieve the land use planning purpose/objective other than through the separation distance provisions? If so, what are they?

Yes, within the current regime of the zoning by-law, there are other alternative ways to regulate group homes, for instance, through site-specific zoning, site plan control or minor variance. But they may be more onerous on the residents of group homes. The bigger question is: why are group homes being subjected to such special, potentially excessive measures? Other than to combat negative public perception, there is no planning rationale for subjecting this use to extra restrictive zoning measures.

In any event, site-specific zoning tends to result in the objection by immediate neighbours who may agree that group homes should exist, but do not want them next door. This process would be more burdensome than the current by-laws which permit such uses as of right in residential areas.

Site plan control is usually applied to large-scale developments. It allows the City to regulate over and above the provisions in applicable zoning by-laws and consider the design and technical aspects of the proposed development to ensure it is attractive and compatible with the surrounding area.

Minor variance is one mechanism currently available to allow a property owner to seek a variance—that is, ask for relief from the provisions of the by-law. In the City, these requests are heard by a locally appointed body called a Committee of Adjustment (CoA). Such appeals are meant only for "minor" variances to the by-law and not something major such as changes to the use of land, which require an amendment to the by-law by City Council. The CoA holds public

hearing on the application which allows input from the members of the immediate community for or against the variance sought. However, this process can be divisive.

Given the prevailing trends in planning thought, the City should devote more attention to allowing or even requiring appropriate mixes of uses and less to separating them. The Province's *Places to Grow Act 2005* encourages this approach.

Part of the group home zoning problem may be attributed to the static nature of zoning by-laws. Cities change over time and so do building types, development technologies, and the characters of neighbourhoods. City governments often play catch-up in trying to ensure that their zoning reflect these changes.

Performance zoning is another way to address the issue of the static nature of zoning. The logic of performance zoning goes like this – "Many zoning provisions are really trying to avoid a bad impact on neighbours by creating distance between them or setting a numerical limit on some dimension of development. Why don't we just prohibit the bad impact and let the developer figure out how to do it?" Elliott (2008, pp. 23-24). Performance zoning advocates for quantifying the levels of noise, smoke, emissions, density, traffic and other bad impacts that are tolerable at the property lines. This approach makes a lot more sense for commercial and industrial land uses where the amount of impacts can be "measured". This level of flexibility makes it a useful tool, but also makes it difficult to administer. Currently, no large city has a zoning code based completely on performance zoning. Chicago has used a hybrid approach for its manufacturing districts, using performance standards in addition. Variations of this approach have also been tried in the Town of Morinville, Alberta and in the "Kings" in Toronto.

Perhaps a better approach to zoning is to include "dynamic" standards that change over time in predictable ways. One way of doing this is through "contextual" zoning provisions in certain situations, as Elliott (2008) suggests. For instance, instead of prescribing an exact distance for a setback, the required setback could be linked to the predominant from setback of existing buildings in the vicinity or to the setback used by either of the closest houses on either side. Interestingly enough, this approach is often used by property owners asking for a minor variance before the Committee of Adjustment.

Another example Elliott (2008, p. 176) proposes comes from land use separation distance provisions in zoning by-laws. Cities justifiably require that some land uses be separated from others of the same type (e.g. adult uses from one another) or from uses of other types that are perceived as sensitive (e.g. jails from schools). But the effect of these regulations can change over time. For example, if a new school is built, it may carry with it a "bubble" within which adult uses or jails cannot be built. Or, if a school closes down, that may open up new possible activities on land that would previously have been too close to the school. The point is that zoning could be made more common-sensical, with some added flexibility so that it is easier to keep pace with development trends and changing societal values, as also reflected in court decisions.

Final Considerations

Looking beyond group homes, the City of Toronto should subject the entire City-wide Zoning By-law to a review under the *Human Rights Code* and *Disabilities Act*, and the *Canadian Charter of Rights and Freedoms* before adopting it. It should also invest in developing a Citizen's Guide to the City's zoning by-law, which could include, among other things, clarifications about and considerations respecting sensitive or incompatible uses and a brief rationale behind separation distances, if they are retained.

Another important and a key player here is the Province. Provincial interest in group homes and the Province's stand on separation distance for group homes should be consistent throughout all its planning and planning-related legislation and policy documents. To achieve this consistency, first, the Province should remove the expression "by reason of their emotional, mental, social or physical condition or legal status" from the definition of group homes in the two key pieces of provincial legislation that guide municipal governance—the *Municipal Act* and the *City of Toronto Act*.

Second, the Provincial Policy Statement regarding planning should include references to the *Human Rights Code* as well as the *Accessibility for Ontarians with Disabilities Act*.[36] These actions will help avoid any confusion in the future and bring further clarity to Province's respect and commitment to its *Human Rights Code* and *Disabilities Act* in planning matters.

A further way to mitigate future human rights issues concerning zoning is by initiating an educational program for municipal land use planners across Ontario to help them understand the provisions of the Ontario *Human Rights Code*, the *Accessibility for Ontarians with Disabilities Act*, and the *Canadian Charter of Rights and Freedoms* and their implications for planning policies and practice at the municipal level.

[36] The *Accessibility for Ontarians with Disabilities Act* enacted in 2005 sets out accessibility standards to improve the identification, removal, and prevention of barriers faced by persons with disabilities. Therefore, it applies to group homes as well.