

Ontario Human
Rights Commission

Office of the Chief Commissioner

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Attachment to
MM49.5



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Gloria
Chris

April 14, 2010

Mayor David Miller
Toronto City Hall
2nd Floor, 100 Queen St. West
Toronto, ON
M5H 2N2

MAYORS OFFICE

Dear Mayor Miller:

David

Re: Land use planning and the Human Rights Code

I wanted to write to you about some recent developments involving land use planning and the Ontario *Human Rights Code* (*Code*). Two legal decisions have resulted in many questions to the OHRC about the impact of the *Code* on municipal zoning.

In November 2009, the Supreme Court of Canada dismissed an application for leave to appeal by several landlords in the case *Death v. Neighbourhoods of Windfields Limited Partnership*.¹ The landlords attempted to challenge a Court of Appeal decision that affirmed that they were operating lodging houses in breach of the City of Oshawa's zoning by-law, which prohibits this form of housing in certain neighbourhoods. The Court of Appeal indicated that a relevant factor was how the renters related amongst themselves when determining whether they constituted a "single housekeeping establishment". However, neither the Superior Court nor the Court of Appeal examined this issue from the perspective of the *Code*.²

The OHRC had applied to intervene in the Supreme Court application because of the potential human rights impact on students and other groups protected by the *Code*. However, the Supreme Court refused to hear the appeal and therefore it did not examine the merits of the case or the human rights issues involved.

Afterward, some people suggested that the *Death* case laid to rest any human rights concerns regarding lodging houses. That is not the OHRC's interpretation. There are still unresolved questions around zoning related to lodging houses, and restricting the ability of people to share accommodation based on their relationship to one another. Municipalities should be cautious when enacting or enforcing by-laws that rely on a narrow understanding of "family" to define the use, occupancy or zoning of a structure, as this may give rise to concerns of discrimination and open municipalities to human rights challenges.

The January 2010 decision of the Ontario Municipal Board (OMB)³ made it clear that municipalities are bound by the *Code*, and have to consider the needs of everyone – including people with disabilities or people in receipt of social assistance – when enacting by-laws. In that

¹ *Death v. Neighbourhoods of Windfields Limited Partnership*. (2009) S.C.C.A. No. 253.

² *Neighbourhoods of Windfields Limited Partnership v. Death* (2008) O.J. No. 3298; *Neighbourhoods of Windfields Limited Partnership v. Death* (2009), ONCA 277, respectively.

³ *Advocacy Centre for Tenants Ontario v. Kitchener (City)* (2010) O.M.B.D. Case No. PL050611.

case, the OMB stated that when restricting prospects for housing for persons with disabilities or receiving social assistance, a sufficient planning analysis was required. This planning analysis should have included consideration of the *Code* and whether or not the City had engaged in "people zoning", which is prohibited.⁴ Although the context of the case involved people with disabilities and single-person, low-income households, these are broad general principles that should be applied when considering municipal by-laws that may affect any *Code*-protected group, including immigrants, young people, older individuals, people from racialized and Aboriginal communities, single people, people with children, and women.

The OMB indicated that the *Code* appears to prohibit by-laws and planning instruments that have discriminatory effects on groups protected by the *Code*. A municipality that seeks to justify a discriminatory by-law might be expected to demonstrate that the by-law was established in good faith, was reasonable, and that real and substantial efforts were made to accommodate the needs of persons who were adversely affected. The OMB also stated, "[A municipality] might also be expected to establish, on a substantive level, that it is not possible to accommodate, short of undue hardship."

The OHRC will continue to use its mandate to work with municipalities, the provincial government, and community stakeholders to help answer questions that have been raised about land use planning and by-laws which may be inconsistent with the *Code*. One of our goals is to provide clarity on the expectations of the *Code*. We invite you to be part of a continuing dialogue on this issue and will be following up in the coming months with further information.

In the meantime, you might wish to review the OHRC's submission to the City of Oshawa about its student accommodation strategy. This submission discusses in greater detail many of the issues outlined in this letter and can be found in English and French on the OHRC's website at www.ohrc.on.ca.

Should you have concerns or questions, please contact me or Anya Kater, Senior Policy Analyst, at 416-314-4551.

Yours truly,



Barbara Hall, B.A, LL.B, Ph.D (hon.)
Chief Commissioner

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⁴ The OMB drew its analysis of "people zoning" from the Supreme Court of Canada decision in *R.v. Bell* (1979), (S.C.C.), 98 D.L.R. (3rd) 255, in which the Court struck down a by-law limiting dwelling occupants to family members.