Balancing Municipal Planning with Human Rights: A Case Study

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Résumé
Comment la planification municipale peut-elle être équilibrée avec les droits de la personne? Cet article examine un cas juridique de haut niveau sur l'implantation récente de foyers de groupe à Toronto, Canada. Il utilise la loi ontarienne des droits de la personne, la Charte canadienne des droits et libertés, la jurisprudence pertinente et des principes d'urbanisme pour analyser les règlements de zonage de la ville de Toronto proposés en 2012, en ce qui concerne les foyers de groupe et les droits de la personne. L'implication pour la pratique de l'urbanisme et l'aménagement urbain est que les municipalités devraient éviter d'utiliser des distances de séparation obligatoires pour en réglementer les utilisations, sauf si elles sont fondées sur les résultats d›une étude approfondie des installations, des activités et des fonctions liées à leur utilisation et aux impacts d'aménagements spécifiés ainsi qu'à un processus de consultation publique. Une analyse rigoureuse des conséquences de l'utilisation du sol et des règlements d'urbanisme est nécessaire pour les questions où les préoccupations relatives aux droits de la personne peuvent être impliqués, tels les espaces de stationnement pour les personnes handicapées, l'accès au logement et l'emplacement des foyers de groupe, des abris, des foyers d'accueil et des lieux de culte.

Mots clés: droits de la personne, la Charte des droits et libertés, urbanisme, les foyers de groupe, Toronto, Canada

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Abstract
How can municipal planning be balanced with human rights? This paper examines a recent high-profile legal case over the siting of group homes in Toronto, Canada. It uses Ontario's human rights legislation, the Canadian Charter of Rights and Freedoms, relevant case law and planning principles to analyze Toronto's city-wide zoning bylaw as proposed in 2012 as it relates to group homes and human rights. The implication for planning practice is that municipalities should avoid using mandatory separation distances when regulating uses, unless they are based upon the findings of a thorough study of facilities, activities, and functions associated with the specified land use and impacts, along with public consultation. Rigorous analysis of the land use implications of planning regulations is needed for issues where human rights concerns may be involved, such as parking spaces for the disabled, access to housing, and the location of group homes, shelters, foster homes and places of worship.

Keywords: Human rights, Charter of Rights and Freedoms, planning, group homes, Toronto, Canada

1. *Introduction*

Human rights are the rights one has simply by virtue of being human (Clement, Silve, and Trottier, 2012). They represent the dignity and "equal, inalienable and universal rights" of all human beings. The Universal Declaration of Human Rights (1948) and other international treaties on civil, political, economic, social, and cultural rights assert the significance of human rights globally. Constitutional instruments such as Canada's *Charter of Rights and Freedoms* (1981), the U.S. *Bill of Rights* and *Civil Rights Act* (1964), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) have attempted to balance government powers with respect for and protection of the rights of their citizens.

Recently, land-use planning issues such as squatters' rights, greenfield development, property rights, "single-family" zones, and the siting of places of worship, emergency shelters, and residential care facilities in North America, Europe, and elsewhere have been contested on the grounds of human rights. Yet, the implications of human rights for planning are not well understood by planners nor by scholars in the planning field.

Literature on constitutional rights related to property includes studies on "exclusionary zoning" in the United States, Canada and elsewhere. Aloi and Goldberg (1971) Babcock and Bosselman (1973), Holtman (1999), Ihlanfeldt (2004) Pendall (2000), and Silver (1997), have written on racial and income segregation. Little planning scholarly literature however exists on the role of human rights in the practice of local planning. The search in planning literature unearthed only four papers, all of which deal with property rights.

Golay and Cismas (2010) note that the right to property is enshrined as a human right in international law—both conventional and customary—through universal and regional treaties and national constitutions. This right recognizes the right of all people to peacefully enjoy their property and protects both individual and communal property. Limits to this right are permissible provided they respect the principles of legality and

proportionality and advance the public interest.

Enemark et al. (2014) advocate for a land administration system built on human rights. They argue that the right to live in security, peace and dignity, cannot be achieved or enforced without functioning land administration systems for managing the people-to-land relationship.

Jacobs (2013) argues for private property as a foundation to citizenship and human rights, although its current form may vary in future.

Finally, Alfasi and Fenster (2014) discuss social justice in planning and human rights using Rawls's Theory of Justice (1971). They show how human rights, with their emphasis on fairness and reasonableness, become contentious among planners, architects and geographers as well as between them and government and non-government organizations in implementing human rights in the planning context.

Canada has almost no planning literature on the subject. There are, however, significant court cases addressing rights and land use regulation, notably the Supreme Court of Canada's decision in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*. Supreme Court decisions in *re Noble and Wolf v. Alley* and in *re Drummond Wren* involve restrictive covenants. Makuch, Craik and Leisk's (2004) book on Canadian municipal law also considers human rights and land use regulation.

This paper focuses on municipal planning and zoning bylaws, using a case study of group homes. It uses a systematic analysis to evaluate the soundness of a municipal bylaw under the Ontario Human Rights Code and the Canadian *Charter of Rights and Freedoms* as well as accepted planning principles bylaw.

The paper begins with an overview of human rights in the Canadian context, followed by a brief description of their evolution in Ontario. The two subsequent sections analyse a specific case in the City of Toronto, first using the Charter and Ontario's Human Rights Code, and then using planning principles. The final section provides concluding observations and recommendations. The author of this paper was retained as the human rights and land use expert by the City of Toronto. This paper is based on his report (Agrawal, 2013) to the City Council in March 2013, which was reviewed by the Council and by the City's planning and legal staff.

2. *The Charter of Rights and Freedoms and human rights legislation*

Human rights are grounded in the presumption of the equal worth and dignity of all human beings. In addition to the right to life and human dignity, the freedom to determine one's own destiny and equality of opportunity are primary human rights principles.

In 1982, human rights guarantees were entrenched in the Constitution of Canada through the *Canadian Charter of Rights and Freedoms*. Section 15 of the Charter sets out the rights and freedoms of people in relation to government activities. Government employees, such as police officers, must respect these rights and freedoms as well as federal and provincial laws. Meanwhile, Section 1 places "reasonable limits [on rights] prescribed by law as can be demonstrably justified in a free and democratic society."

The Charter does not apply to non-government activities. Interactions between individuals and organizations (such as employers or landlords) are governed by other

human rights legislation. Provincial human rights commissions deal with matters specified in their governing legislation, for example, discrimination based on race, religion, age, or sexual orientation.

The rights and freedoms in the Charter are not always included in other human rights laws and the remedies for violation of those rights may not be the same. However, human rights legislation and the Charter may overlap where the issue is an act of government occurring in the context of employment or the provision of services, facilities, or accommodation.

3. *Human rights in Ontario*

The province of Ontario has had a progressive history of human rights legislation. The province amended its *Conveyancing and Law of Property Act* (1950) to end discriminatory real estate provisions that disallowed selling properties to any person of Jewish, Black or coloured race or blood. Its pioneering *Fair Employment Practices Act* (1951) prohibited discriminatory employment practices, and the *Fair Accommodation Practices Act* (1954) prohibited discrimination in services, facilities, and accommodations in public spaces.

Ontario's first Human Rights Code, proclaimed June 15, 1962, prohibited discrimination in signs, services, facilities, public accommodation, or by employees and trade unions on the grounds of race, creed, colour, nationality, ancestry, or place of origin. In 1986, the Code was amended to bring it in line with the Charter of Rights and Freedoms with the addition of sexual orientation.

In 2008, Ontario's human rights system was reformed. The Ontario Human Rights Commission was redirected to work on systemic or root causes of discrimination, while the Human Rights Tribunal of Ontario heard individual complaints. The Ontario Human Rights Commission promotes the need to apply a human rights lens to the land use planning and appeal system, access to housing, separation distances, and zoning restrictions (OHRC, 2012).

4. *Case study: Group homes*

Group homes are residential facilities in which a small number of unrelated people in need of care, support, or supervision live together. They include correctional group homes, juvenile group homes, residential care facilities, and group foster homes. This case study looks at group homes for people with chronic mental or physical disabilities. These homes are staffed 24 hours a day by trained caregivers.

The creation of group homes emerged from shifts in the way society provided for people who have physical or mental disabilities that prevent them from living at a home without support. Formerly, services were provided in government-operated institutions, which tended to be large, self-contained, and separated from the larger community. In the 1970s, it was thought that people who had been confined to such 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.

In 1998, the City of Toronto was created through an amalgamation of six municipalities with the former Metropolitan Municipality of Toronto, which led to

the preparation of a new zoning bylaw that would apply to the whole city.

In 2010, the "Dream Team," a housing advocacy group made up of psychiatric survivors, challenged the City of Toronto's proposed city-wide zoning bylaw[1] at the Ontario Human Rights Tribunal.[2]

The Dream Team contested the bylaw's definition of a group home, which identified occupants "by reason of their emotional, mental, social or physical condition or legal status," alleging that the City had singled out one group of people for a specific set of provisions in the bylaw. They also claimed that the bylaw's a mandatory separation distance of 250 metres between any two group homes restricted the number and location of housing facilities, limited the availability of their housing options, and placed restrictions on where they might live. They argued that these restrictions had a fundamental and negative impact on their dignity, treatment, and ability to participate as members of the community.

The City's legal counsel objected to the jurisdiction of the Tribunal and argued that the appropriate forum for the Dream Team's claim was the Ontario Municipal Board (OMB), a provincial tribunal that adjudicates land use disputes. The City asserted that the application was vague, speculative, and hypothetical, and did not indicate a *prima facie* case of discrimination under the Code. In January 2012, however, the Tribunal issued an interim ruling that the Dream Team could present the substance of its human rights complaint.

In March 2012, the City applied for judicial review of the Tribunal's decision in the Divisional Court. The City argued that there was no evidence that persons with disabilities had experienced discrimination as a result of the bylaws and that the Tribunal did not have jurisdiction to hear the case. The City lawyers again asserted that arguments should be heard before the OMB.

In August 2012, the Divisional Court refused the City's request and returned the petition to the Tribunal on the grounds that first, the Tribunal gave clear reasons why it rejected the City's motion to dismiss the application, and second, no exceptional circumstances warranted the court's intervention for a judicial review of an interim decision of an administrative tribunal.

The City lawyers then asked the Dream Team to agree with the City to retain an independent land use and human rights expert to advise on the matter. The City asked the expert to analyse the definition of group homes and the mandatory separation distances to which these homes are subject, and provide an opinion to City Council on the merits of the group homes bylaw supported by considerations of planning principles, the Ontario Human Rights Code, and the Canadian Charter of Rights and Freedoms.

5. *Relevant cases and tests*

One of the major challenges was finding an instrument to evaluate a municipal bylaw, especially a zoning bylaw, against the Human Rights Code and the Charter.

The Ontario Human Rights Code protects individuals with disabilities or perceived disabilities from discrimination in 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).

Organizations bound by the Code, such as the City of Toronto, have a duty to accommodate individuals who are protected on the basis of grounds mentioned in the Code, such as disability. The City must 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);
- whether accommodating the individual would impose undue hardship on the impugned party.[3]

The BFOR reflects the concern that it would be unreasonable to prohibit employers 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 would be permissible as a BFOR for an airline pilot (Canadian Human Rights Commission, n.d.).

In *British Columbia Public Service Employee Relations Commission v. BCGSEU* (commonly known as *Meiorin*[4]), 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;
- 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*.[5] Here, the employer must consider all reasonable options for accommodation.

Furthermore, any laws or government programs that are inconsistent with the Canadian Charter of Rights and Freedoms are held to be of no force or effect.

The first step in 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 under section 1 of the Charter as being "demonstrably justified in a free and democratic society." Section 15 of the Charter provides equality before and under law and equal protection

and benefit of law for all.

The leading case on Section 15 is *Andrews v. Law Society of British Columbia*,[6] in which the Supreme Court of Canada interpreted Section 15 in equality rights cases. In general terms, in order to prove discrimination, a claimant must show that:

- 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 considered 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*, where the Supreme Court set 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 is permitted to remain in force. However, the *Oakes* test is a high standard. Very few laws deemed *prima facie* discriminatory have 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"; if one of the parts of the test cannot be met, a court will not examine the remaining steps and the legislation will be declared void.

6. *Analysis*

This section analyses the definition of group homes in the Toronto's proposed zoning bylaw of 2012 and the associated separation distance using the *Meiorin* and *Andrews* tests.

The Ontario Human Rights Code: Applying the Meiorin test

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

The focus here is not on the validity of the particular *standard*, but rather on the validity of its *purpose*. On this score, the City did not clearly demonstrate 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 in the proposed City-wide Zoning Bylaw. The definition and the separation distance seem to have come from definitions and measures used in the late 1970s and early 1980s.

The research could not find clear evidence that these two provisions had ever been tested in relation to a planning objective. City documents from the late 1970s and early 1980s suggest that the separation distance was introduced because of concerns about 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 to "make the bylaw specific and explicit" and provide an accurate definition of the land use. It could further argue that a separation distance was applied to group homes and not to other uses, to distinguish between group homes and other land uses. This distinction is based upon valid land use planning grounds of positive deconcentration, impact, and compatibility. For this, the City could rely upon the OMB decisions in *Haydon Youth Services v. Kearney (Town)*, *Kitchener Official Plan Amendment (No. 58)*, and *Toronto (City) Zoning Bylaw No. 138-2003* ("*Deveau*").

The OMB decision in the *Advocacy Centre for Tenants Ontario v. Kitchener (City)* (2010)[7] 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 provided no clear evidence to support this concern or its purpose in achieving deconcentration, which it could have provided if it existed, given the fivefold increase in group homes in the previous 25 years.[8]

Therefore the definition of and separation distance applied to group homes in the proposed zoning bylaw 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?

The City must demonstrate that it adopted the particular standard with no intention of discriminating against the claimants. Here, the analysis shifts from the purpose of the standard to the particular standard itself.

Despite concerns about the purpose of the definition and separation distance, it appears the City adopted the wording of the definition and the separation distance in good faith. It is arguably the first municipality in Ontario (if not in Canada) to clarify and implement the concepts of deinstitutionalization and community living while dealing with public opposition of group homes and their tenants (such as claims that the homes reduced nearby property values and their tenants 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 a 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 new and not well understood.

Therefore the definition of and separation distance applied to group homes in the proposed zoning bylaw meets 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 City must demonstrate that the group home bylaw is reasonably necessary to accomplish its purpose, which has been demonstrated to be rationally connected to the fulfillment of that purpose. The City must establish that it cannot accommodate the claimants and others adversely affected by the standard without itself experiencing undue hardship.

Undue hardship analysis is part of assessing whether a standard is reasonable, and this test is often where most analysis occurs. In this analysis, the procedure to assess accommodation is as important as the substantive content of the accommodation.[9]

The study found no evidence that the City had considered any other reasonable alternative options, although the City in the proposed bylaw has adopted the least restrictive distance of all the six pre-amalgamation municipalities. Minor variances, site-specific zoning, and site plan controls are among other land use control options available, although these may be more onerous. But there was no evidence that these or other less discriminatory approaches had been considered or that meaningful efforts were made to accommodate the needs of group homes while deciding upon the separation distance.

The research also found no evidence to support the conclusion that the removal of the separation distance and the modification to the proposed definition of group homes would cause the City undue hardship. Indeed, one might argue that enforcement of the current definition and separation distance could cause *greater* hardship for the City,for instance, by requiring extra staffing resources (although no evidence to that effect was provided).

Therefore, the definition of and separation distance applied to group homes in the proposed zoning bylaw does not meet the requirement of the third test under the Ontario Human Rights Code.

The following section analyses Section 15 of the Charter as it applies to the City's bylaw. Under Section 15, the onus is on the claimant to demonstrate the test, not the City.

The Charter (Section 15): Applying the Andrews 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 first step is to establish a "distinction." In the decision of *Withler v. Canada (Attorney General) 2011*, the Supreme Court ruled:

> Inherent 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 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.[10]

The distinction may be illustrated by the claimant's showing that the law treats the claimant less favourably than it does a member of a comparator group. In this case, persons with disabilities living in group homes could be compared to individuals who reside in regular family residences.

A claimant suffering from a disability could argue that the provisions in the City's zoning bylaw allow differential treatment of those who live in group homes, because of their mental or physical abilities. The claimant could further argue that by defining the characteristics of people in group homes, the City intends to subject people with disabilities to additional restrictions and prohibitions in relation to services and accommodation, restrictions that are not imposed on people who do not have disabilities.

The City could argue that a separation distance is 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 residing in group homes. The reference to personal characteristics was merely a convention to accurately define the "use." 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 bylaw can be specific and explicit. In addition, it is not discriminatory in the constitutional meaning, but is discriminatory in the sense that a bylaw 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.[11]

In the absence of evidence from the City or a claimant going to the Charter test as well as the uncertainty created by jurisprudence, it is hard to conclude that the Human Rights Tribunal or a court would find that the law imposes, 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.

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

The analysis at this stage shifts away from the "impairment of human dignity" requirement in *Andrews,* and focuses on the less abstract concept of discrimination. In *Withler,* the Supreme Court restated the question 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."[12]

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

> 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.[13]

The analysis involves examining the actual situation of the group and the potential of the 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. [14]

Withler requires that the analysis focus on the impact of the law, taking 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 is required to improve the situation of the claimant group, in which case discrimination and a violation of Section 15, would not be established.[15]

The claimant could argue that provisions in the City's bylaw are prejudicial 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 in *The Dream Team v. The City of Toronto* 2012 at the Human Rights Tribunal of Ontario.

A ruling from the Manitoba Court of Appeal is relevant here. It states that a zoning bylaw 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.[16] The City of Winnipeg offered no 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 (the four-part *Oakes* test), the violation of Section 15 could have been upheld.

Summary

While the provision for group homes in the City of Toronto's zoning bylaw is arguably rational and created in good faith, in the absence of evidence that a different approach would represent 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, a claimant could argue that the City's bylaw provisions on group homes single them out, and discriminate against them by perpetuating disadvantage. If a claimant established these three findings at the Human Rights Tribunal or a court, the challenged zoning bylaw on group homes might be considered in breach of Section 15 of the Charter.

This paper does not consider a Section 1 "case" by the City, which remains an open question. In the absence of evidence, the City should err on the side of caution by modifying the definition of group homes, and removing the separation distance requirement.

7. *Analysis based on planning principles*

This section analyses the definition of group homes and the mandatory separation distance by subjecting them to accepted planning principles.

Definition

A land use is usually determined in reference to three components of land—facilities, activities, and functions[17]—(Hodge and Gordon, 2014, 166). The research found no analysis of the facilities, activities, and functions of group homes to justify treating group homes as a separate use. Nor was there any evidence of neighbourhood impacts such as excess parking, traffic, or garbage associated with group homes, beyond those of a normal residential use. However, because group homes are licensed, and residents are supervised and cared for by group home operators, these facilities should be maintained as a separate residential use for zoning purposes.

In its November 8, 2012, draft of the proposed city-wide zoning by-law, the City of Toronto used the following definitions:

> 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:
>
> i. Licensed or funded under Province of Ontario or Government of Canada legislation;
>
> ii. Meant for semi-independent or group living arrangements by reason of their emotional, mental, social or physical condition or legal status; and
>
> iii. For more than ten persons, exclusive of staff.

According to the City's *Primer on Group Homes*, published in 1984, the City limited the number of residents to between 6 and 10 because it defined a group of up to five unrelated persons, occupying a single dwelling unit, as a family. However, there may be good planning reasons for limiting the number of persons residing in one dwelling unit. An explanation of the intensity, density, character, and purpose, and the needs of the users would clarify this point.[18]

In any event, the range of 3 to 10 residents is consistent with the suggestion of the Inter-ministerial Working Group on Group Homes (1978), the Provincial Policy adopted in 1978, and the *Municipal Act* (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. Metropolitan Toronto's Social Services and Housing Committee report on group homes policy (1979) also suggested capping the maximum number of residents at 10.

The author sees no reason to require a minimum of three residents. A maximum number could be justified based on the intensity of use, impact, and compatibility. In *Haydon*, the Ontario Municipal Board allowed a restriction on the number of residents

in a group home to reduce impact and increase compatibility. The Toronto City-wide zoning bylaw could stipulate a maximum number of residents, but should not set a minimum. The provincial licensing process also controls the activities of group homes.

In the case of residential care homes, which the city-wide zoning bylaw distinguishes from group homes as facilities accommodating more than 10 residents, 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 clause "by reason of their emotional, mental, social or physical condition or legal status" is problematic, as it refers to the personal characteristics or qualities of the users of the facility. This could amount to "people zoning" as in *Bell v. The Queen* as well as Section 35(2) of *Planning Act*.

In the *Bell* case, the personal qualification in question was whether occupants were related, which triggered an inquiry into marital and family status, which the Court found inappropriate in a zoning bylaw. The Supreme Court agreed with a lower-court judge who had said that the bylaw "was not regulating the use of building, but who used it."

Case law subsequent to *Bell* does not take such a strong position. Zoning definitions that refer to personal attributes have been upheld subsequently by the courts.

The City, therefore, could argue that the reference to personal characteristics was merely a general practice in planning to provide an accurate definition of the "use." It could further argue that a separation distance is applied to group homes and not to other uses, to create a distinction based upon valid land-use planning grounds of positive deconcentration, impact, and compatibility, relying upon OMB decisions in the *Haydon*, *Kitchener*, and *Deveau* cases.

Nevertheless, the Provincial Inter-ministerial Working Group (1978)'s recommendations, which became the Provincial Policy on Group Homes, identified that without defining residents' characteristics, the definition provides an adequate idea of the use. In the author's opinion, the phrase describing the residents' characteristics serves no valid legal or zoning purpose.

Separation distance

Regarding the separation distance, the city-wide zoning bylaw 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.

Separation distances 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.

Some Canadian planning scholars, however (Finkler and Grant, 2011; Hodge and Gordon, 2014; Skelton, 2012), have proclaimed that zoning is inherently exclusionary,

overly technical and rigid, and, more generally, irrelevant in today's cities.

Although the City provided no documented evidence, it likely chose 250 metres as the lowest minimum distance found in the zoning bylaws of 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 Bylaw,[19] upheld by the OMB in 2004.

This argument can be rebutted on two points. First, shelters are different from group homes. Second, the OMB upheld *the Deveau case* because there were sound planning reasons for avoiding the overconcentration of shelters, particularly family emergency shelters. Overconcentration of shelters could overburden community services, intensify the use of an area, and change the character of a neighbourhood. No such justification has been put forward by the City with respect to group homes. The 2010 OMB decision in the *Advocacy Centre for Tenants Ontario* case in Kitchener 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.

The study found no evidence of any negative externality generated by group homes. For example, since most of the residents do not drive, they do not contribute to parking and traffic problems. It appears the separation distance was introduced to alleviate community fears about group homes, while allowing these homes to locate in residential areas. Such fears alone, without any evidence of nuisance caused by the use, or NIMBY-ism (extensively documented by Hill 1994; Pendall, 1999; Schively, 2007 and others) are not an accepted planning rationale that would justify a separation distance.

On the other hand, in the case of a residential care home, one can support a separation distance, as this accommodation has more than 10 residents, and could increase the intensity of use, leading to negative impacts and incompatibility with its surrounding.

The City of Toronto's amendment to the zoning bylaw to define drive-through facilities as a separate use, subject to separation distances, is 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 Toronto Council on drive-through facilities (August 26, 2002) presented a 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.

Summary

Based on this analysis, the study recommends that the City delete the phrase "by reason of their emotional, mental, social or physical condition or legal status" from the definition of group homes. The phrase identifies the people who would inhabit group homes, which is not necessary to define a zone, and violates Ontario's *Planning Act*. The analysis also suggests replacing "3 to 10 residents" with "a maximum of 10 persons." The following definition of group homes and residential care homes is proposed:

> 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.

The City should remove the requirement for a separation distance for group homes but not for residential care homes.

Concluding thoughts

The foregoing analysis and tests could help municipal planners evaluate a bylaw under dispute on specific human rights grounds.[20] This approach may help resolve a conflict before issues fester and opponents become entrenched, thereby helping ensure more inclusive planning policies and process, and avoiding costly and time-consuming litigation.

Furthermore, every Canadian municipality should subject existing or proposed zoning bylaws to a review under provincial human rights and disabilities legislation as well as the Canadian Charter of Rights and Freedoms.

If a municipality has reason to believe that a land use has an unwanted impact on its surroundings, then separation distances may 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.

Municipalities should also consider developing citizens' guides to zoning bylaws, which could include, among other things, clarifications about sensitive or incompatible uses and a brief rationale behind separation distances, if they are retained.

All provinces should include a reference to human rights and disabilities legislation in documents that set policy direction on matters of provincial interest related to land use planning and development. They [21] should also require municipalities to ensure that their bylaws are consistent with provincial human rights and disabilities legislation.

Finally, an educational program to help municipal land use planners understand the provisions of provincial human rights and disabilities legislation, the Canadian Charter of Rights and Freedoms, and their implications for planning policies and practice at the municipal level should be introduced.

Notes

[1] This was enacted as the new city-wide zoning bylaw 569-2013 on May 9, 2013.
[2] The Dream Team had successfully challenged similar provisions in Kitchener and Sarnia, smaller Ontario cities. Both municipalities changed their bylaws in 2012 to drop separation distances following the legal challenges. Only the City of Toronto decided not to amend its bylaw.
[3] 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.
[4] The British Columbia government established minimum physical fitness standards for its forest firefighters, including an aerobic standard. The claimant, Ms. Meiroin, a female firefighter who had in the past performed her work satisfactorily, failed to meet the aerobic standard and was dismissed. The claimant's union brought a grievance on her behalf. At issue was whether the aerobic standard unfairly excluded women from forest firefighting jobs. The Supreme Court decided that the aerobic exercise was discriminatory and that the Government could not show that aerobic exercise is reasonably necessary to the accomplishment of the Government's purpose, which is to identify forest firefighters who can work safely and efficiently. [1999] 3 SCR 3.
[5] [1999] 3 SCR 3 at 54. This test is essentially codified in Section 11(1) of the *Code*, reproduced above.
[6] Mr. Andrews was a British citizen and lawyer who moved to Canada and applied to join the Law Society of British Columbia. He passed all the tests for individuals with international degrees; but was refused membership because the *Barristers and Solicitors Act* (now the *Legal Profession Act*) limited membership to Canadian citizens. He sued the Law Society, claiming that this provision was contrary to Section 15 of the *Charter*. The Law Society was successful at trial, but this decision was overturned on appeal. [1989] SCR 143.
[7] 2010 OMBD, Case No. PL050611.
[8] Today, there are about 500 group homes in the City of Toronto, mostly in the city centre. This pattern could be a product of the restrictive bylaws in pre-amalgamation suburban municipalities, real estate prices and/or the availability of transit, community services, and other facilities in the centre..
[9] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* [1999] 3 S.C.R. 868, para. 66.
[10] *Withler,* paras. 62, 64.
[11] 1997 OMBD 124.
[12] *Withler,* paras. 62, 64.
[13] *Andrews,* note 1, 174–175.
[14] *Withler,* note 3, paras. 35–38.
[15] *Withler,* para. 39.
[16] *Alcoholism Foundation of Manitoba v. Winnipeg (City)* [1990] MJ No. 212.
[17] Facilities are the physical alterations made to land and public rights-of-way, such as buildings. Activities describe what takes place on land and in public spaces. Functions describe the purpose of an enterprise or establishment.
[18] 2004 OMBD 280.

[19] Toronto (City) Zoning By-law No. 138, 2003, p. 9; 2004 OMBD 280.
[20] As of June 2014, based on the recommendations of the author's report and extensive public consultations, all zoning previsions pertaining to group homes have been amended by the City Council. Staff report is available at http://www.toronto.ca/legdocs/mmis/2014/pg/bgrd/backgroundfile-69372.pdf.
[21] Based on author's recommendation, Ontario's provincial policy statement of 2014 now requires all municipal policies, plans and by-laws be consistent with the Ontario *Human Rights Code* and the *Canadian Charter of Rights and Freedoms*.

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