

# HUMAN RIGHTS AND LAND USE PLANNING

**ONTARIO EAST MUNICIPAL CONFERENCE**

**Presented by Tony Fleming**

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# Overview

- Statutory framework
  - Ontario Human Rights Code
  - Charter
  - Planning Act
  - Provincial Policy Statement
- Legal principles from the cases
  - People zoning
  - Jurisdiction – what can the OMB do?
  - What is the test?
- Planning implications

# Statutory Framework

- Ontario Human Rights Code

**2.** (1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, disability or the receipt of public assistance.

**9.** No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

**47.** (2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.



# Statutory Framework

- Ontario Human Rights Code

**11.** (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or

(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

# Statutory Framework

- Ontario Human Rights Code

(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.

# Statutory Framework

- Charter of Rights and Freedoms

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

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

# Statutory Framework

- Planning Act

2. The Minister, the council of a municipality, a local board, a planning board and the Municipal Board, in carrying out their responsibilities under this Act, shall have regard to, among other matters, matters of provincial interest such as,

(h.1) the accessibility for persons with disabilities to all facilities, services and matters to which this Act applies;

(j) the adequate provision of a full range of housing, including affordable housing;

# Statutory Framework

- Planning Act

s. 41 (7) As a condition to the approval of the plans and drawings referred to in subsection (4), a municipality may require the owner of the land to,

(a) provide to the satisfaction of and at no expense to the municipality any or all of the following:

4.1 Facilities designed to have regard for accessibility for persons with disabilities.

s. 51 (24) In considering a draft plan of subdivision, regard shall be had, among other matters, to the health, safety, convenience, accessibility for persons with disabilities and welfare of the present and future inhabitants of the municipality

- Applicable to consents to convey as well (s. 53(12))





# Statutory Framework

- Provincial Policy Statement

1.1.1 Healthy, liveable and safe communities are sustained by:

- improving accessibility for persons with disabilities and the elderly by removing and/or preventing land use barriers which restrict their full participation in society;

1.4.3 Planning authorities shall provide for an appropriate range of housing types and densities to meet projected requirements of current and future residents of the *regional market area* by:

- establishing and implementing minimum targets for the provision of housing which is *affordable to low and moderate income households...*
- permitting and facilitating:
  1. all forms of housing required to meet the social, health and well-being requirements of current and future residents, including *special needs* requirements;

# Statutory Framework

- Provincial Policy Statement

*special needs* means any housing, including dedicated facilities, in whole or in part, that is used by people who have specific needs beyond economic needs, including but not limited to, needs such as mobility requirements or support functions required for daily living. Examples of special needs housing may include, but are not limited to, housing for persons with disabilities such as physical, sensory or mental health disabilities, and housing for the elderly.

# Statutory Framework

- The statutory framework establishes that accommodating persons with disabilities and facilitating affordable housing must be part of land use planning
- The key consideration for land use planners is to identify legitimate land use concerns and distinguish them from matters that may create or perpetuate discrimination based on factors not related to land use planning
  - Public controversy (are concerns related to planning or discrimination/stereotypes?)
  - Site planning issues (buffering, fencing)

# Legal Principles

- People Zoning

**35.** (2) 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.

(3) A provision in a by-law passed under section 34, subsection 38 (1) or section 41 or in an order made under subsection 47 (1) is of no effect to the extent that it contravenes the restrictions described in subsection (2).

# Legal Principles

- People Zoning
- Use versus user
  - R. v. Bell (SCC) – defined “family” as a group of related persons and regulated single family dwellings accordingly (3-2 decision)
    - Planning Act allows zoning of the “use” of land, not the “users” of land
  - Alcoholism Foundation of Manitoba v. Winnipeg (CA, leave to SCC denied)
    - “It is simply not acceptable since the advent of the Charter to prohibit a use of land with reference to the attributes of those who may use it, at least where the attributes are those which distinguish members of a disadvantaged group and where there is no evidence to show that such a prohibition is one which can be demonstrably justified as reasonable in a free and democratic society.”

# Legal Principles

- People Zoning
- Use versus user
  - Neighbourhoods of Windfield v. Death (CA)
    - Lodging house regulation for students
    - It is lawful to zone a use of premises that accords with what typically occurs in a “single family dwelling” provided the definition of “family” is broad enough and does not exclude on the basis of personal relationships
    - The individual circumstances of how the physical premises were set up was determinative as to whether or not it was a “single family residence”
    - The test was whether the unit was “designed to function as a single housekeeping establishment” – this test (and definition) were not illegal as offending s. 35(2)

# Legal Principles

Does the OMB have jurisdiction to deal with the Ontario Human Rights Code and the Charter?

- **Tranchemontagne v. Ontario (SCC) (OHRC)**
  - Statutory tribunals empowered to decide questions of law are presumed to have the power to look beyond their enabling statutes in order to apply the whole law to a matter properly before them.
- **Ontario Municipal Board Act**

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

# Legal Principles

- The OMB has jurisdiction to deal with the Ontario Human Rights Code and the Charter
- The OMB's jurisdiction is limited to considering whether a planning decision complies
- No freestanding right to invalidate ZBL or OP (Goldlist Properties)
- The OMB assesses the planning merits of decisions, it does not apply its own enabling legislation to a decision
- The only remedy that the OMB has is to refuse to approve an instrument that violates the OHRC or the Charter



# Legal Principles

- What is the test?
- Recall section 2 of the OHRC
- Recall section 1 of the Charter
- Dowling v. Kitchener
  - A municipality which sought to justify the imposition of a discriminatory standard/requirement/policy might be expected to establish that it made real and meaningful efforts to accommodate the needs of persons adversely affected by the standard/requirements/policy, or sought less discriminatory approaches to achieving the objective. It might also be expected to establish, on a substantive level, that it is not possible to accommodate, short of undue hardship.

# Legal Principles

- What is the test?
- Meiorin (SCC) (OHRC)
  - Identify the general purpose of the impugned standard and determine whether it is rationally connected to its goals
  - Demonstrate that the standard was adopted with an honest and good-faith belief it was necessary to accomplish its purpose
  - Demonstrate the impugned standard is reasonably necessary to accomplish the purpose

Similar to the standard for Charter review – “reasonably demonstrable in a free and democratic society”

# Planning Implications

- What does this mean for planners?
- Where is the line between discrimination and land use planning?
- The “test” described above provides some guidance

# Planning Implications

- Zoning by-laws by their very nature are discriminatory
- This is accepted and acceptable, provided that the discrimination is based on legitimate and demonstrable land use planning grounds
- Land use planning grounds must transcend perception and be founded in fact
  - What legitimate impacts/compatibility issues are possible
  - What are the range of mitigation measures available
  - What is the least intrusive means of addressing compatibility issues
  - Do the planning restrictions balance human rights with protection of legitimate planning goals?



# Planning Implications

- Guidance from the cases
  - Lodging houses/group homes/shelters
  - Retirement homes
  - Secondary suites
  - Methadone clinics
  - Affordable housing/assisted housing
  - Subdivision approval

# Planning Implications

- Lodging houses/group homes/shelters
  - Dowling v. Kitchener
    - OMB accepted the conclusion there was an overconcentration of residential care facilities
    - It was open to the City to conclude there was a geographic imbalance in distribution and to attempt to disperse those uses
    - Accepted as legitimate the planning goal of decentralizing residential care facilities
    - The OMB was critical of the means chosen to achieve the goal, particularly whether the planning instruments considered accommodation of disadvantaged groups
    - No guidance provided as to what would be better, if anything
  - In the OHRC context, process is a freestanding ground to invalidate a decision – not part of planning jurisprudence yet

# Planning Implications

- Retirement homes
  - S. 15(2) Charter
    - (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.
  - S. 15 OHRC
    - 15. A right under Part I to non-discrimination because of age is not infringed where an age of sixty-five years or over is a requirement, qualification or consideration for preferential treatment.
  - Separation distances might be an issue
    - Kitchener OPA 58 (Dowling)

# Planning Implications

- Secondary Suites
  - Planning Act

16(3) Without limiting what an official plan is required to or may contain under subsection (1) or (2), an official plan shall contain policies that authorize the use of a second residential unit by authorizing,

(a) the use of two residential units in a detached house, semi-detached house or rowhouse if no building or structure ancillary to the detached house, semi-detached house or rowhouse contains a residential unit; and

(b) the use of a residential unit in a building or structure ancillary to a detached house, semi-detached house or rowhouse if the detached house, semi-detached house or rowhouse contains a single residential unit.

35.1 (1) The council of each local municipality shall ensure that the by-laws passed under section 34 give effect to the policies described in subsection 16 (3).



# Planning Implications

- Secondary Suites
  - City of Kingston
    - Bobb appeal
    - Considerations for zoning amendments
      - Servicing - no mechanism to provide as-of-right approvals while reserving the right to reject site specific developments on the basis of servicing
      - Servicing is a legitimate constraint that is not discrimination
      - Parking – legitimate consideration
      - Character of the neighbourhood
        - Difficult issue – is this people zoning or discrimination (NIMBY)
        - What compatibility or other legitimate planning issues arise?
        - Massing?

# Planning Implications

- Methadone Clinics
- Typically litigated through interim control by-laws
- Interim control by-laws are valid unless passed in bad faith or have no planning rationale
  - Bad faith is unreasonable, arbitrary behavior or actions that are not fair, open and impartial
    - Targeting one single property
    - Improper purpose/discrimination
    - No planning purpose is evidence of bad faith
  - No planning rationale
    - Regulating users rather than use (limited to methadone, not other dependencies)
    - No legitimate public safety rationale (other clinics had similar statistics)

# Planning Implications

- Methadone Clinics
- Ontario Addiction Treatment Centers v. London
  - Interim control by-law upheld by the OMB –proactive planning response
  - Extensive land use planning evidence to demonstrate a legitimate rationale that required further study
    - Land use conflicts
    - Locational requirements – how best to deliver the service
    - Traffic and parking
    - Loitering, littering and nuisance activities
  - No evidence or discussion before the Board related to the Human Rights Code/Charter

# Planning Implications

- Affordable housing/assisted housing
  - Recall Provincial Policy Statements
  - Recall people zoning discussion
  - What land use distinction can legitimately be drawn between residential uses based solely on the economic status of the user?
- The more interesting question is how more affordable housing can be encouraged through land use planning instruments
  - This requires an assessment of zoning standards and whether they apply equally to all forms of housing

# Planning Implications

- Subdivision approval
- Humanics Universal Inc. v. Ottawa
  - Alleged subdivision conditions infringed Charter rights of expression, the right to life, liberty and security of the person and equality
  - The Board found a subdivision is a “pure economic right” and therefore there are no Charter rights at play
  - Freedom of expression may include aspects of one’s own home,, but does not include the right to subdivide one’s own the land
  - The process of negotiating a subdivision approval is not discriminatory in the Charter sense

Questions?

# Profile

Tony Fleming is a Partner in the Land Use Planning, Development and Environmental Group and the Municipal Group at Cunningham Swan. Tony is recognized by the Law Society of Upper Canada as a Certified Specialist in Municipal Law (Local Government/ Land Use Planning and Development). As a Certified Specialist, Tony has demonstrated expertise in the fields of municipal law and land use planning and development law.

Tony provides advice to municipalities and private sector companies on all aspects of land use planning and development as well as environmental law. Tony appears regularly before the Ontario Municipal Board, the Assessment Review Board and the Environmental Review Tribunal. In addition, Tony appears in all levels of Ontario Courts on administrative law matters, including prosecuting and defending by-laws.

Prior to joining Cunningham Swan, Tony was Senior Legal Counsel with the City of Kingston. Tony focused on providing advice on land use planning and development and environmental law with the City of Kingston, building on his experience in private law firms in Toronto where Tony practised as a land use planning and environmental lawyer. Tony has defended large and small corporations and municipalities

against Ministry of the Environment orders and manages regulatory investigations and prosecutions (Environment, Labour and Fisheries and Oceans).

