

## COMMENT OF THE ONTARIO HUMAN RIGHTS COMMISSION

on

### The Provincial Policy Statement, 2005

The Ontario Human Rights Commission (the OHRC) thanks the Ministry of Municipal Affairs and Housing (MMAH) for the opportunity to comment on the Provincial Policy Statement, 2005 (PPS). The Province of Ontario (the Province) is requesting submissions as part of the five-year review of the PPS. The OHRC will focus its comments on sections that may have human rights implications, and in particular on elements that have implications for including or excluding people from Ontario *Human Rights Code*-protected groups.

The OHRC's comments are based on its expertise as a human rights body with a broad mandate to protect and promote human rights consistent with international principles. The OHRC's mandate and powers are grounded in the Ontario *Human Rights Code (Code)*. The comments included here are based on the OHRC's work on housing, including its report, *Right At Home: Report on the consultation on human rights and rental housing in Ontario*, its *Policy on Human Rights and Rental Housing*, relevant case law, and its submission to MMAH's affordable housing strategy.

All OHRC documents are available online at [www.ohrc.on.ca](http://www.ohrc.on.ca).

### Housing as a human right

The international community has long recognized that housing is a fundamental and universal human right that must be protected in law. Canada has ratified several international human rights instruments that recognize the right to housing.<sup>1</sup> In doing so, Canada has endorsed the view that housing is a human right. The challenge is to make these high-level principles a lived reality for Canadians. Human rights bodies, federal, provincial and municipal governments play critical roles in making this happen. Municipalities, including municipal councils, policy makers, planners and program designers, have unique opportunities to ensure people's human rights are respected when designing and delivering housing and housing legislation.

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<sup>1</sup> T.S. 1976 No. 46. The United Nations General Assembly adopted and proclaimed the *Universal Declaration of Human Rights* in 1948. The *ICESCR* was adopted by the United Nations in 1966 and entered into force in 1976. Canada ratified the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* in 1976. Other international treaties that Canada has signed that uphold the right to housing include the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination Against Women* and the *Convention on the Rights of the Child*; *Universal Declaration of Human Rights*, signed Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A1810 at 71 (1948); *International Covenant on Economic, Social and Cultural Rights*, (1976) 993 U.N.T.S. 3, Can.

The OHRC is providing comment on the PPS because the PPS has the potential to affect the housing rights of many people who are marginalized and from *Code*-protected groups across Ontario who require affordable housing like group homes, seniors' residences, shelters, lodging houses and social housing. The right to be free from discrimination in housing under section 2 of the *Code* could extend to preventing restrictions on the development of affordable housing that is affordable for people and groups identified by the *Code*.

Through their decisions and official plans, planning authorities such as municipalities are responsible for implementing the policies of the PPS, including policies related to affordable housing.<sup>2</sup> Section 3 of the *Planning Act*, as amended by the *Strong Communities (Planning Amendment) Act, 2004*, specifically states that all decisions made by municipalities and other planning authorities affecting land use planning "shall be consistent with" the PPS.<sup>3</sup>

### **The Provincial Policy Statement, 2005 and human rights**

The OHRC views the PPS as a valuable tool, and if it integrates human rights principles and considers the *Code*, it can bring progressive action on ensuring accessible, healthy, affordable and equitable housing across Ontario. In particular, the PPS could be used to outline how to prevent and remove land-use barriers that contribute to discrimination against groups protected by the *Code*. Because human rights can be affected by land-use planning, they therefore should be part of a comprehensive, integrated and long-term planning approach.

Section 1.1.1(b) of the PPS states that healthy, liveable and safe communities are sustained by accommodating an appropriate range and mix of residential and other uses and improving accessibility for persons with disabilities and "the elderly" by removing and/or preventing land-use barriers (section 1.1.1.(f)). Land-use barriers may contribute to discrimination if they exclude people from these groups from being integrated fully in society. However, land-use barriers may also result in discrimination for other groups protected by the *Code*, particularly when these barriers adversely affect people who live in affordable housing.

Discriminatory neighbourhood opposition, more commonly known as "NIMBYism," creates a formidable land-use barrier to building affordable housing projects. Negative attitudes and stereotypes about the intended residents of a housing project result in affordable housing development being unnecessarily delayed, halted or restricted. In a 2001 survey conducted by the Canada Mortgage and Housing Corporation (CMHC) and

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<sup>2</sup> *Provincial Policy Statement, 2005*, online: <http://www.mah.gov.on.ca/Asset1421.aspx> at section 4.5 (PPS).

<sup>3</sup> *Ibid* at section 4.2.

the Federation of Canadian Municipalities (FCM), municipalities of different sizes identified NIMBYism as the top barrier to affordable housing development.<sup>4</sup>

In the OHRC's housing consultation, many people raised concerns about how municipal processes and by-laws, including zoning by-laws, may contribute to opposition to affordable housing projects. Concerns were raised that by-laws and processes may result in restrictions or extra requirements for housing that serves people from *Code*-protected groups, which may prevent people from living in the neighbourhoods of their choice. When planning policies or practices are directed towards or disproportionately affect *Code*-protected populations in a negative way, they may be seen to violate the *Code*.

This resistance to affordable housing development means that the goal of the PPS of promoting more affordable housing is not being realized. For this reason, the PPS must be strengthened. Planning decisions about affordable housing should be reviewed to make sure they do not result in land-use barriers, which could be attitudinal, policy-based or legislative, that may have a discriminatory impact on people from *Code*-protected groups.

One way to overcome these barriers is to clearly and consistently make the connection between human rights and the policies and procedures that govern housing.

## **Recommended revisions to the Provincial Policy Statement**

To better reflect a commitment to human rights, the OHRC recommends the following revisions to the PPS:

### **1. Amend the Provincial Policy Statement to confirm a commitment to human rights.**

In carrying out their responsibilities under the PPS, the *Municipal Act, 2001*, the *Planning Act*, and any policies and programs, municipalities must make sure they do not violate the *Code*. Because of its quasi-constitutional status, the *Code* has primacy over all other provincially-operating legislation, unless the legislation explicitly states it applies notwithstanding the *Code*.

The PPS' Preamble states that, "The Provincial Policy Statement provides for appropriate development while protecting resources of provincial interest, public health and safety, and the quality of the natural environment." The OHRC agrees that appropriate development must take into account environmental sustainability, public health and safety and the resources of provincial interest. The OHRC would recommend adding "protecting human rights" to this list of key considerations.

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<sup>4</sup> Survey of Canadian Municipalities: Regulatory Measures for Housing Affordability and Choice. CMHC, Socio-economic Series Issues 87, 2001.

Integrating this language in the PPS' Preamble would signal from the outset that the Province recognizes that regulating land-use and development can affect human rights. Also, it could signify that protecting human rights is an important provincial goal that contributes to enhancing Ontarians' quality of life.

Making this position explicit would be consistent with the aim of the *Code*, which, among other things, is to recognize the dignity and worth of every person. An amended statement in the PPS Preamble would also be consistent with the work that the OHRC has recently undertaken with MMAH to produce a handbook for municipalities to offer best practice examples to overcome discriminatory opposition to affordable housing and promote housing that is free from discrimination.

In addition, the Province should consider adding an addendum to the PPS, which elaborates on the link between affordable housing and human rights. The addendum's aim would be to help planning authorities better understand how "comments, submissions or advice that affect a planning matter" can have human rights implications, what their respective rights and obligations are under the *Code*, and why housing-related legislation is subject to the primacy of the *Code*. The addendum could include such principles as:

- Everyone in Ontario has the right to be free from discrimination based on membership in a *Code*-protected group in housing
- People should be able to live in the community of their choice without discrimination
- People do not have the right to choose their neighbours
- Landlords, housing providers, neighbourhood associations, municipalities, appeal bodies like the Ontario Municipal Board and the courts all have an obligation to make sure that people do not face discrimination in housing
- Opposition to affordable housing projects can be in the form of policies, legislation, actions, attitudes or language used that create barriers for people from *Code*-protected or disadvantaged groups.

## **2. The Provincial Policy Statement should lay out expectations for municipalities to review and remove barriers to affordable housing development that could lead to discrimination against groups protected by the *Human Rights Code*.**

The PPS should outline a requirement for municipalities to review by-laws, policies, rules or restrictions that govern affordable housing and affordable housing development, and to remove any restrictions if they result in unequal access to housing for people from marginalized communities who are identified by *Code* grounds. This is in addition to the expectation to remove and prevent land-use barriers for people with disabilities and the "elderly," laid out in section 1.1.1.(f). The *Ontarians with Disabilities Act, 2001* (ODA)<sup>5</sup> also contains procedural obligations for municipalities that complements this section in the PPS.

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<sup>5</sup> *Ontarians with Disabilities Act, 2001*, online: [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_01o32\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_01o32_e.htm).

Section 11 of the ODA requires that municipalities prepare an accessibility plan each year. This accessibility plan “shall” report on measures taken or intended to identify, remove and prevent barriers to persons with disabilities in the municipality’s by-laws and in its policies, programs, practices and services.<sup>6</sup> There is also a duty to consult<sup>7</sup> and make the plan available to the public.<sup>8</sup>

For example, the OHRC and others have raised wide-spread concerns about the arbitrary use of minimum separation distances between group homes, and how these represent land-use barriers that restrict affordable housing for people with disabilities from being built in a municipality. These issues are currently the subject of human rights claims made at the Human Rights Tribunal of Ontario. In addition, by-laws restricting rooming or lodging houses from some or all residential zones may prevent people with disabilities and people receiving social assistance from living where they choose in a municipality. Types of restrictions on affordable housing that should not occur are requiring public consultation on “as-of-right” housing developments for *Code*-protected groups, or requiring design changes such as adding fences or frosting windows, to prevent residents from looking out on their neighbours.<sup>9</sup>

Not all restrictions placed on affordable housing are discriminatory. Municipalities may believe that by-laws or policies that result in restrictions to affordable housing are legitimate and *bona fide*. Where this is the case, a municipality should be expected to apply a human rights analysis. That is, it should be able to show that the rule or restriction was adopted in good faith, is rationally connected to the function being performed, and that it is not possible to accommodate the group using less restrictive methods without incurring undue hardship.<sup>10</sup>

A recent case at the OMB supports this recommendation. The January 2010 decision of the Ontario Municipal Board (OMB)<sup>11</sup> 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 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 analysis should have included consideration of the *Code* and whether the City of Kitchener had engaged in “people zoning”, which is prohibited.<sup>12</sup>

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<sup>6</sup> *Ibid* at section 11(2).

<sup>7</sup> *Ibid* at section 11(1).

<sup>8</sup> *Ibid* at section 11(4).

<sup>9</sup> Ontario Human Rights Commission, *Right at home: Report on the consultation on human rights and rental housing in Ontario*, 2008, (Toronto: Queen’s Park Printer), at 80 and 82.

<sup>10</sup> To establish a *bona fide* requirement, the Supreme Court laid out this three-step test in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, (1999) 3 S.C.R. para 68 [“*Meiorin*”].

<sup>11</sup> *Advocacy Centre for Tenants Ontario v. Kitchener (City)* (2010) O.M.B.D. Case No. PL050611.

<sup>12</sup> 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.

Although this case involved people with disabilities and single-person, low-income households, these are broad general principles that should be applied when considering by-laws that may affect any *Code*-protected group, including immigrants, young people, older individuals, people from racialized and Aboriginal communities, single people, women and people with children.

### **3. The Provincial Policy Statement should lay out mechanisms of accountability for removing discriminatory barriers to affordable housing development.**

Should the PPS be amended to include the expectation of municipalities to review and remove discriminatory barriers to affordable housing development, the OHRC recommends that the PPS also lay out the expectation that municipalities report on these efforts, either to the public or to the Province.

The Province should outline additional accountability methods consistent with section 4.10, to establish performance indicators with municipalities to monitor progress on implementation and removing discriminatory barriers.

Also, consideration should be paid to MMAH's role in upholding human rights. Consistent with the OHRC's submission to MMAH's long-term affordable housing strategy, the OHRC thinks that MMAH must take steps to address the human rights issues that arise in housing and that have the potential to impede a person's access to housing opportunities. As the provincial ministry with primary responsibility for housing, MMAH is in the best position to make sure that housing planners and providers are aware of their rights and responsibilities under the *Code*, and that these rights and responsibilities are upheld.

The OHRC therefore recommends that section 4.4 be modified to state that the Minister of Municipal Affairs and Housing may take into account other considerations, including the Ontario *Human Rights Code*, when making decisions to support strong communities, a clean and healthy environment and the economic vitality of the Province.

### **4. The Provincial Policy Statement should outline clearer expectations that municipalities will increase affordable housing in their communities.**

The OHRC's *Human Rights and Rental Housing* identified a clear link to poverty, human rights and access to housing. People who have experienced historical disadvantage and are identified by *Code* grounds are more likely to experience low social and economic status. Poverty is linked closely with inequality, particularly for women (especially lone mothers and elderly women), Aboriginal people, racialized groups and people with disabilities. Therefore, policies and practices that disadvantage people with low incomes are likely to disproportionately disadvantage members of *Code*-identified

groups.<sup>13</sup> In *Right at Home*, the OHRC recommended that the Province adopt a provincial housing strategy that, among other things, included measurable targets and providing enough funds to accelerate progress on ending homelessness and ensuring access of all Ontarians to housing of an adequate standard.<sup>14</sup>

The Government of Ontario has also acknowledged the connection between poverty and human rights. Section 2(2)3 of the *Poverty Reduction Act, 2009*<sup>15</sup> recognizes, “That not all groups of people share the same level of risk of poverty. The poverty reduction strategy must recognize the heightened risk among groups such as immigrants, women, single mothers, people with disabilities, aboriginal peoples and racialized groups.”

Section 2(3)3 of the Act also identifies “housing” as one of the key determinants of poverty and accordingly requires annual reporting on indicators to measure its success. In its submission to MMAH’s long-term affordable housing strategy, the OHRC states that an increased availability of adequate and affordable housing will go a long way toward combating poverty in Ontario.<sup>16</sup>

The affordable housing provisions in the PPS are critical, but need to be strengthened. The OHRC will rely on others’ expertise to make specific recommendations about how municipalities can use tools to increase levels of affordable housing. The OHRC supports the submissions of the Advocacy Centre for Tenants Ontario (ACTO) and the Wellesley Institute, which provided substantive comment on how the PPS could be made stronger to reflect the expectation of municipalities to increase levels of affordable housing.

In particular, the OHRC supports the comments made by these organizations regarding strengthening the PPS with respect to:

- Providing adequate supplies of housing that reflect the needs of people of all income levels for housing they can afford<sup>17</sup>
- Ensuring that the loss of rental units is prevented<sup>18</sup>
- Outlining obligations for municipalities to use their powers and resources in a proactive way to provide affordable housing<sup>19</sup>

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<sup>13</sup> OHRC, *Human Rights and Rental Housing* (2009), online: [www.ohrc.on.ca](http://www.ohrc.on.ca) at 29 [OHRC Housing Policy]. The connection between membership in a group identified under the *Code* and the likelihood of having low income has been recognized by the Human Rights Tribunal of Ontario in several decisions, as well as by the Courts: see, for example, *Kearney v. Bramalea Ltd. (No. 2)* (1998), *ibid*.

<sup>14</sup> OHRC, *Right at home: Report on the consultation on human rights and rental housing in Ontario*, 2008, (Toronto: Queen’s Park Printer), recommendation 6 at 86.

<sup>15</sup> *Poverty Reduction Act, 2009*, S.O. 2009, c.10:  
[www.ontla.on.ca/web/bills/bills\\_detail.do?locale=en&BillID=2147](http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2147).

<sup>16</sup> OHRC, *Submission of the Ontario Human Rights Commission to the Ministry of Municipal Affairs and Housing’s long-term affordable housing strategy* (December 23, 2009), online: [www.ohrc.on.ca](http://www.ohrc.on.ca) at 3.

<sup>17</sup> Advocacy Centre for Tenants Ontario. Provincial Policy Statement Review, at 7.

<sup>18</sup> *Ibid* at 6.

<sup>19</sup> The Wellesley Institute, *Strengthen Ontario’s Provincial Policy Statement as one tool to meet the province’s housing needs – Submission by Wellesley Institute to PPS five-year review*, online: [www.wellesleyinstitute.com/wp-content/uploads/PPSsubmissionfinal-edit.pdf](http://www.wellesleyinstitute.com/wp-content/uploads/PPSsubmissionfinal-edit.pdf) at 5 (Wellesley Institute).

- Setting fair, measurable and demanding affordable housing targets for each municipal jurisdiction<sup>20</sup>
- holding municipalities accountable for meeting their targets, particularly by the province setting common performance standards and ensuring municipalities are subject to clear and consistent rules.<sup>21</sup>

With respect to this last point, the Wellesley Institute submits that municipalities are currently able to set their own affordable housing targets without any clear and consistent provincial guidelines or rules. At best, this creates an arbitrary and inconsistent patchwork of targets. At worst, it leaves ample opportunity for municipalities to trim their obligations.<sup>22</sup>

The OHRC agrees that targets must be set in a way that clearly holds all municipalities to a common performance standard. The targets must ensure that all municipalities are providing for a fair share of affordable housing.

## **5. Language in the Provincial Policy Statement should be updated to be more inclusive**

With the revision of the PPS, the Province has an opportunity to use language that better reflects human rights principles, and promotes dignity and respect for every person. The OHRC makes the following recommendations:

Under Part 1, the PPS' Preamble states that, "As a key part of Ontario's policy-led planning system, the Provincial Policy Statement sets the policy foundation for regulating the development and use of land. It also supports the provincial goal to enhance the quality of life for the *citizens of Ontario* (emphasis added)."

The OHRC is pleased that the Province recognizes that regulating the development and use of land supports Ontario's goal of improving Ontarians' quality of life. To make this statement more inclusive, however, the OHRC recommends modifying the language to "...enhance the quality of life *for all Ontarians* (emphasis added)." Ontario is home to millions of people, some of whom are Canadian citizens and others that may be recent immigrants, seeking Canadian citizenship status.

However, the word "citizens" in the PPS' Preamble may be interpreted to imply that regulating land-use and development is focused only on improving the lives of Ontarians that have Canadian citizenship status. This does not reflect the province's current and projected demographics, or likely the intent of the PPS.

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<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

In addition, all references to the word “elderly” in the PPS, including the definitions section, should be replaced with the term “older persons.”<sup>23</sup> Please see the OHRC’s *Policy on discrimination against older people because of age* at [www.ohrc.on.ca](http://www.ohrc.on.ca) for more details.

Finally, in section 1.4.3, reference is made to “Planning authorities”. The OHRC recommends that a definition of “Planning authorities” be included in the PPS’ definitions section so that there is clarity with respect to whom this term refers.

## **Conclusion**

The OHRC appreciates the opportunity to provide the above recommendations to MMAH as part of a province-wide effort to consider ways the PPS can be made more effective and responsive to addressing emerging land-use issues in Ontario. The OHRC looks forward to seeing the links between housing, poverty, discrimination and human rights explored more fully in the final version of the PPS.

The OHRC’s work in the area of housing has provided it with insight on steps that might be taken to address some of the province’s housing issues. The OHRC will continue to be available to MMAH to share its knowledge and expertise on how to incorporate human rights principles and considerations in the PPS. The OHRC will continue to work with MMAH on a handbook, which has the potential to be an excellent resource for planning authorities, including municipalities, as they engage in land-use planning decisions and work to ensure compliance with the PPS.

The OHRC’s policies on accommodation emphasize the principles of dignity, individualization and opportunity to fully take part in the community. From a human rights perspective, an effective and responsive PPS will also promote these concepts: it will result in housing that responds to individual needs, promotes full activity in the community, and allows for a high degree of dignity.

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<sup>23</sup> The term “older” is not meant to denote “old age” or stigmatize persons in any way. Rather it is simply being used as a relative concept meaning older than people who are less likely to face the particular types of discrimination being discussed. See OHRC, *Policy on discrimination against older people because of age*, online: [www.ohrc.on.ca](http://www.ohrc.on.ca) at 6.