Room for everyone:

Human rights and rental housing licensing

Ontario

Ontario Human Rights Commission

Commission ontarienne des droits de la personne

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Introduction

Over the past six years, the Ontario Human Rights Commission (OHRC) has monitored and reviewed various municipal approaches to regulating private rental housing. The OHRC's mandate includes protecting the human rights of people who are vulnerable because of their age, receipt of public assistance, disability, family status, and other factors. This mandate applies to rental housing, because so many people who identify with grounds of the Ontario *Human Rights Code* (the *Code*) are renters. Our goal is to make sure that rental housing regulatory practices, even unintentionally, do not create barriers and discrimination in housing for vulnerable people.

In 2011, the OHRC released *In the Zone: Housing, human rights and municipal planning*. The OHRC examined how zoning provisions in municipal bylaws can affect the availability of housing for *Code*-protected groups. This guide is a companion to *In the Zone*, with a focus on licensing.

Room for everyone: Human rights and rental housing licensing addresses how licensing provisions in municipal bylaws may disadvantage groups protected by Ontario's *Human Rights Code* (the *Code*),[1] gives an overview of human rights responsibilities in licensing rental housing, and makes recommendations to help municipalities protect the human rights of tenants.

Licensing bylaws seek to regulate rental housing by requiring that landlords operate their properties according to certain standards. Licensing bylaws may reasonably contain provisions relating to garbage and snow removal, maintenance, health and safety standards and parking. However, the OHRC is concerned about some other provisions, such as gross floor area requirements for bedrooms and living spaces that go beyond what is required by the Building Code, bedroom caps and minimum separation distances. These provisions may reduce the availability and range of rental housing (which is a key element of healthy neighbourhoods), and might contravene the *Code* by having an adverse impact on groups who are protected under the *Code*.

The main focus of this guide is on small-scale rentals. However, rooming or boarding houses are occasionally captured by rental housing licensing bylaws. This is one reason why we include information in this guide on

[1] *Human Rights Code*, R.S.O. 1990, c.H.19, as amended.

minimum separation distances. For more discussion on how *Code*-protected groups might be affected by zoning bylaws that restrict rooming and boarding houses from operating in certain parts of a municipality, see *In the Zone* (pages 24-25).

Rental housing licensing is a relatively new and evolving concept – and so are ideas on what best practices might be. So, instead of citing "best practices," this guide includes a series of "promising practices" – to convey that there are many opportunities for municipalities to enhance their work to advance human rights in rental housing.

What the legislation says

Under the *Municipal Act, 2001* and the *City of Toronto Act, 2006*, municipalities have broad powers to pass bylaws (subject to certain limits) on matters such as health, safety and well-being of the municipality, and to protect persons and property.[2]

Both Acts also give municipalities the specific authority to license, regulate and govern businesses operating within the municipality. This includes the authority to pass licensing bylaws covering the business of renting residential units and operating rooming, lodging or boarding houses/group homes.

With this authority to license also comes a human rights responsibility. The *Code* has primacy – in other words, takes precedence – over the *Municipal Act* and the *City of Toronto Act*, and requires that municipal programs, bylaws and decisions such as licensing consider all members of their communities. The *Code* requires that decisions do not target or have a disproportionate adverse impact on people or groups who identify with *Code* grounds.[3]

[2] Before 2007, municipalities could license rental housing only if that housing did not constitute a "residential unit." Among other things, a "residential unit" was defined as being a "single housekeeping unit." The Courts found that a "single housekeeping unit" was one where there was collective decision making about control of the premises (*Good v. The Corporation of the City of Waterloo* (2003), 67 OR (3d) 89 (Ontario Superior Court), aff'd (2004), 72 OR (3d) 719 (Ont. C.A.)) or where there was a use "typical of a single family unit or other similar basic social unit." (*Neighbourhoods of Windfields Limited Partnership v. Death*, [2008] O.J. No. 3298 at paragraph 62, aff'd [2009] O.J. No. 1324 (Ont. C.A.), [2009] S.C.C.A. No. 253 leave to appeal to S.C.C. refused, 33210 (June 15, 2009)).

Due to amendments to the *Municipal Act*, and the creation of the *City of Toronto Act*, both of which came into effect January 1, 2007, the "residential unit" exemption was removed and municipalities were given more power to license rental housing.

[3] Municipalities' licensing activities are also subject to the *Charter of Rights and Freedoms*. Under section 32(1) the *Charter* applies to the "legislature and government of each province in respect of all matters within the authority of the legislature of each province." Municipalities are part of the government structure in the province of Ontario, and are therefore subject to the *Charter*.

The Ontario *Human Rights Code*

The *Code* prohibits actions that discriminate against people based on a protected *ground* in a protected *social area*.

Protected grounds are:

- Age
- Ancestry, colour, race
- Citizenship
- Ethnic origin
- Place of origin
- Creed
- Disability
- Family status
- Marital status (including single status)[4]
- Gender identity, gender expression
- Receipt of public assistance (in housing only)
- Record of offences (in employment only)
- Sex (including pregnancy and breastfeeding)
- Sexual orientation.

Protected social areas are:

- Accommodation (housing)
- Contracts
- Employment
- Services
- Vocational associations (unions).

[4] In *Swaenepoel* v. *Henry* (1985), 6 C.H.R.R. D/3045 (Man. Bd. Adj.), the Manitoba human rights tribunal (called the "Board of Adjudication") found that three single women, residing together, were discriminated against by the respondents because of the respondents' assumptions about the characteristics of single people of the same sex, who did not conform to the nuclear family model.

In *Gurman* v. *Greenleaf Meadows Investment Ltd.* (1982), C.H.R.R. D/808 (Man. Bd. Adj.) the same Manitoba tribunal found that the respondent discriminated against two sisters and a brother, because they were a group of single adults of mixed sexes.

In *Wry* v. *Cavan Realty(C.R.) Inc.* (1989), 10 C.H.R.R. D/5951 (B.C.C.H.R.), the British Columbia Human Rights Tribunal found that a single man was discriminated against because the respondent only wished to rent to families and married couples. The tribunal found that there was discrimination based on sex and marital status.

In *Vander Schaaf v. M & R Property Management Ltd.* (2000), 38 C.H.R.R. D/251 (Ont. Bd. Inq.) the Ontario Board of Inquiry (the precursor to the Human Rights Tribunal of Ontario) found that a landlord who preferred married couples had discriminated based on marital status by not renting to two single women who wanted to be roommates.

See, however, *Simard v. Nipissing Condominium Corporation No. 4*, 2011 HRTO 1554 and *Nipissing Condominium Corporation No. 4 v. Kilfoyl*, 2010 ONCA 217.

Rental housing bylaws discriminate if they cause someone to be disadvantaged in a protected social area – like housing – because of the person's association with a protected ground.

If a bylaw is found to be discriminatory, a municipality would have to show that the absence or variation of the bylaw would cause them "undue hardship" in terms of health and safety or cost ramifications.

In some cases, the absence of the bylaw will not cause "undue hardship" because less discriminatory alternatives to the bylaw exist, that would meet the same fundamental goals. For example, if a municipality argues that its bylaw is required to meet a certain standard for preventing fires, but existing *Fire Code* provisions apply a lesser standard (which causes less disadvantage to *Code*-protected groups) then it is arguable that the absence of the bylaw does not cause the municipality undue hardship.

Licensing bylaws are a *Code*-protected "social area"

The OHRC looks at rental housing licensing bylaws from the perspective of two social areas under the *Code*: services and housing.

Services

Municipalities provide a service to their residents through residential rental licensing bylaws. For example, a rental housing licensing bylaw may provide renters (and other residents in the area) with the comfort of knowing that the landlord has established a maintenance and snow removal plan, or has met health and safety standards, for his or her house.

Housing

The *Code* prohibits indirect discrimination. Section 9 provides:

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

Although a municipality is not a landlord or housing provider, it has a responsibility to ensure that it does not indirectly discriminate with respect to the social area of housing when it licenses rental housing through a bylaw.

Licensing bylaws can disadvantage *Code*-protected groups

The OHRC conducted a consultation on human rights and rental housing in 2007. It reported on this consultation in *Right at Home: Report on the consultation on human rights and rental housing in*

Ontario, and the consultation helped to form the OHRC's *Policy on human rights and rental housing*.

During the consultation, the OHRC heard that certain *Code*-protected groups rely on rental housing, and can be disadvantaged by measures that limit it. Examples of groups that may be affected include:

- Aboriginal people (ancestry)
- Racialized groups (race, colour, ethnic origin)
- Newcomers (place of origin, citizenship, ancestry)
- Lone parents (family status and marital status)
- Seniors (age, sometimes disability or receipt of public assistance)
- Large families (family status, sometimes creed, ancestry or ethnic origin).[5]

During the consultation and also through its recent inquiries into rental housing licensing in Waterloo and North Bay, the OHRC also heard that groups not as obviously connected to *Code* grounds – such as students and low-income individuals – might be disadvantaged by measures that limit affordable rental housing.

Sometimes the link to the *Code* is clear. For example, if a student is told that they cannot rent a unit because they are single, then they have experienced a disadvantage (denial of a rental opportunity) because of their association with a *Code* ground (marital status). But what if someone appears to have experienced a disadvantage because of their student status, or because of their low-income status?

If student status, or low-income status, are "one of the many identifying features" of being a member of a particular *Code* group, or are "inextricably bound up together" with being a member of a *Code* group, then student status or low-income status are a *proxy* for that *Code* group. In that case, there will be a link between any adverse impacts experienced by students or low-income groups, and a *Code* ground. For example, if student status is significantly or overwhelmingly associated with being young,

[5] Family size and composition can be strongly influenced by a number of *Code* grounds or combinations of grounds, such as ethnic origin, ancestry, creed, race and/or place of origin. As a result, discrimination based on family size can be found to be discrimination based on a number of *Code* grounds.

For example, in a 2003 case called *Cunanan v. Boolean Development Ltd.*, 2003 HRTO 17, the Human Rights Tribunal of Ontario found that an apartment owner discriminated against a mother and three teenage sons, when he would not rent them a three-bedroom apartment because of his policy of applying a "Canadian standard" of "ideal family" numbers per bedroom size.

See also *Fakhoury v. Las Brisas Ltd.* (1987), 8 C.H.R.R. D/4028 (Ont. Bd. Inq.).

then actions that disadvantage students will disadvantage people protected by the *Code* ground of age.[6]

Students

Though students may be more likely than some other community residents to move away after a few years, they are still residents of a community. Students contribute greatly to the economic and social life in their communities. They are as entitled to housing as any other resident.

Student status could be a proxy for age, because the two characteristics appear to be inextricably bound up together. In general, while students may range in age, an overwhelming majority of students are young people. Data from Statistics Canada shows that in 2010, 49% of university graduates were between the ages of 15 and 24, and over 76% of university graduates were under age 30.[7] The data also shows that over 63% of college graduates were under the age of 24, and over 76% were under age 30.[8]

Large percentages of young people are students. For example, 79% of 18-20 year-olds are students.[9] In communities where students are commonly referred to as "young people," "kids" or other age-related terms, the association between student status and the *Code* ground of age is even clearer.

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[6] In a case called *Espinoza v. Coldmatic Refrigeration of Canada Inc.* (1995), 29 C.H.R.R. D/35 (Ont. Bd.Inq.) (appeal to Ontario Court of Justice denied), a man reported being ridiculed and treated differently in the workplace for his use of the Spanish language. The company argued that there cannot be discrimination based on language, because it is not a protected ground. The Tribunal found that:

> In my view, language as a protected ground is not the issue. To the extent that language can be incorporated in the protected ground of "ethnic origin" or "place of origin," it can be addressed, not as a sub-category, but as one of many identifying features of "ethnicity."

In a recent case called *Oxley v. Vaughan (City)*, 2012 HRTO 1937, the Tribunal identified language as a proxy, and food as a potential proxy, for *Code* grounds such as place of origin.

In another recent case called *Addai v. Toronto (City)*, 2012 HRTO 2252, the Tribunal stated:

> …there are circumstances which are so inextricably bound up with a prohibited ground that they made [sic] be said to be a proxy for that ground. In pregnancy cases it is not a defence to an allegation of sex discrimination that a woman was denied benefits on the basis of pregnancy. Pregnancy and sex are so inextricably bound up together that denying a service to a woman because of pregnancy is synonymous with denying a service on the basis of sex.

In that case, the Tribunal went on to find that the man's status as a taxi owner was not so inextricably bound up with his race, colour, ethnic origin and place of origin that any disadvantage he experienced as a taxi driver was synonymous with disadvantage based on those personal characteristics.

[7] *University graduates by age group, 1992-2010*. Statistics Canada, Postsecondary Student Information System (PSIS).

[8] *College graduates by age group, 1992-2010*. Statistics Canada, Postsecondary Student Information System (PSIS).

[9] *Participation, Graduation and Dropout Rates*, Statistics Canada, www.statcan.gc.ca/pub/81-595-m/2008070/6000003-eng.htm.

Student status may be a proxy for single status. A significant proportion of single people are students. Forty-four percent of single people in Canada are between the ages of 15 and 30 – and as noted above, 76% of college and university students are under age 30.[10] The link between student status and single status is more clear in communities where students are commonly seen as being incompatible with a "family lifestyle."

Student status may also be a proxy for receipt of public assistance. According to a Statistics Canada study, approximately 34% of post-secondary students in Canada receive a Canada Student Loan.[11] OSAP is essentially a combination of Canada and Ontario Student Loans, so 34% is a very rough approximation of Ontario students receiving social assistance. These numbers do not, of course, take into account students receiving other types of social assistance, such as Ontario Disability Support Program (ODSP) benefits.

If student status is a proxy for age, marital status or receipt of public assistance, elements of the bylaw that disadvantage students because of their student status will be discriminatory and contrary to the *Code*.[12]

Low-income groups

Low income or socioeconomic status is not a protected ground under the *Code*.[13] However, it directly connects to the ground of receipt of public assistance.

In its work on housing, the OHRC has repeatedly heard that people who identify with certain *Code* grounds or combinations of grounds are more likely to be tenants, and are more likely to experience poverty or to have lower average incomes than the general population.[14] The *Code* may be found to apply when low income is connected to grounds such as age, ancestry, disability, ethnic origin, family status, gender identity, place of origin, race, or being in receipt of public assistance.

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[10] Statistics Canada, Age distribution of college and university students, 1992 and 2007. See also www.globalnews.ca/single+in+the+city/6442719179/story.html.

[11] *Canada Student Loans Program, Annual Report*, 2010-2011.

[12] While similar arguments have been raised (see, for example, *Allen v. Canada (Canadian Human Rights Commission)* [1992] F.C.J. No. 934, *Wong v. University of Toronto*, [1989] O.J. No. 979, and *London Property Management Assn v. London (City)*, [2011] O.J. No. 4519), the OHRC is not aware of a decision which establishes that student status is a proxy for a *Code* ground.

[13] See, for example, *Sugarman v. Sugarman*, 2010 HRTO 1049.

[14] See the OHRC's *Policy on human rights and rental housing*, 2009; *Consultation paper: Human rights and rental housing in Ontario*, 2007; *Right at Home: Report of the consultation on human rights and rental housing in Ontario*, 2008; *In the zone: Housing, human rights and municipal planning*, 2012.

For example, in *Kearney v. Bramalea Ltd.*[15] the Ontario Human Rights Board of Inquiry found that:

> [Expert witness] Dr. Ornstein's extensive analysis of the census and other surveys is clear evidence that income criteria [requiring that individuals meet a rent-to-income ratio in order to be eligible to rent a unit] differentially affect groups protected by the *Code* – groups defined on the basis of sex, marital and family status, age, citizenship, race, immigration status, place of origin, and being in receipt of public assistance. The result is to significantly restrict the housing choice of protected groups whose members often end up in higher priced accommodation of poorer quality.

On average, *Code*-protected groups have lower incomes than other groups in society. As a result, low income can sometimes be a proxy for those *Code*-protected groups, and rules that affect low-income people may affect a disproportionate number of *Code*-protected people.

Lower-income tenants have fewer choices in the rental market because many of the housing options are out of their price range. Also, more low-income households move per year compared with higher-income households,[16] and when people move into new private rental units they may have to pay significantly higher rent.[17]

This means that a municipality's actions that directly or indirectly restrict or reduce the availability of low-cost market rental and other affordable housing can have an adverse impact on *Code*-protected people. Some groups of people who are more likely to have lower incomes and who may also be protected by specific grounds of the *Code* include:

- Aboriginal Peoples (ancestry)
- Newcomers (citizenship, ethnic origin, place of origin)
- Racialized people (race, colour, ancestry, ethnic origin)
- Young or lone-parent families or growing families seeking larger accommodation (family status, marital status)

[15] [1998] O.H.R.B.I.D. No. 21 at para. 124. The case was appealed to the Ontario Superior Court of Justice and varied – but not with respect to this point – see [2001] O.J. No. 297.

[16] See the OHRC's *Right at Home: Report of the consultation on human rights and rental housing in Ontario*, 2008.

[17] Rent increases for ongoing tenancies are regulated under the *Residential Tenancies Act*, 2006 and are capped at a maximum of 2.5% per year, but these protections do not extend to new tenancies. See *Residential Tenancies Act*, S.O. 2006 c.17, s.120(1)-120(2).

- Older people with low and fixed incomes (age, receipt of public assistance)
- Students (age, marital status, receipt of public assistance)
- People with disabilities (disability)
- People receiving funds under OSAP, Ontario Works (OW) Ontario Disability Support Program benefits (ODSP), or other types of public assistance (receipt of public assistance)
- Transgender people (gender identity, gender expression)
- Women (sex, family status, age).

Discrimination issues in rental housing often arise because of a combination of *Code* grounds. For example, a lone mother who is receiving social assistance might experience discrimination based on her sex, family status, marital status and receipt of social assistance. Similarly, young people who are looking for rental housing may experience discrimination based on their age and marital status.

Avoiding the discriminatory impacts of rental housing licensing

When drafting, reviewing and monitoring licensing bylaws, municipal planners should apply a human rights lens, to see if they might have an impact on *Code*-protected groups. Situations can change, and so municipalities should regularly monitor for these impacts.

If people experience a disadvantage due to rental housing licensing (such as being forced out of housing, or having a harder time finding housing) because of their connection to *Code* grounds (like age, family status, etc.) then municipalities may be violating the *Code* unless they can prove:

- The municipality adopted the bylaw, or a particular element of it, to achieve a rational planning purpose
- The municipality held a good faith belief that it needed to adopt the bylaw or the requirement to achieve that purpose
- The bylaw requirement was reasonably necessary to accomplish its purpose or goal, in the sense that other, less discriminatory alternatives would present undue hardship relating to health and safety or financial factors.

Bylaws that are arbitrary – that have no clear connection to their stated goal – are particularly vulnerable to being found to be discriminatory, contrary to the *Code*.

In embarking on rental housing licensing, the OHRC advises municipalities to:

1. Consider the Ontario *Human Rights Code* before drafting the bylaw and refer to the *Code* in the bylaw
2. Consult with *Code*-protected groups
3. Make sure that meetings about the bylaw do not discriminate
4. Roll out the bylaw in a consistent, non-discriminatory way
5. Work to secure existing rental stock
6. Avoid arbitrary bedroom caps
7. Avoid gross floor area requirements that exceed the Building Code
8. Eliminate per-person floor area requirements
9. Eliminate minimum separation distances
10. Enforce the bylaw against the property owner, not the tenants

11. Protect tenants in cases of rental shut down
12. Monitor for impacts on *Code* groups
13. Make sure licensing fees are fair.

1. Consider the Ontario *Human Rights Code* before drafting the bylaw and refer to the *Code* in the bylaw

In carrying out their responsibilities under the Provincial Policy Statement, the *Municipal Act, 2001*, the *Planning Act, the City of Toronto Act, 2006* 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 provincial legislation, unless the legislation explicitly states it applies notwithstanding the *Code*. In other words, if there is a conflict between the *Code* and other laws, the *Code* will prevail. Integrating language about the *Code* into the bylaw signals that the municipality takes these responsibilities seriously, and has thoroughly considered its obligations under the *Code* when drafting the bylaw, and also when monitoring its impact.

Municipalities that specifically cite in their bylaws the need to comply with the *Code* show that human rights must be considered in land use planning decisions. They also show that protecting human rights is an important municipal goal that contributes to improving the regulation of residential rental properties. This is consistent with the aim of the *Code*, which includes recognizing the dignity and worth of every person.

This message may be reinforced when municipalities issue materials to people applying for rental housing licences. In its work on housing, the OHRC has heard that landlords sometimes exhibit discriminatory attitudes toward tenants because of their connection with *Code* grounds – and so this type of education would be extremely valuable.

Promising practice

The City of Waterloo refers to human rights principles, and the Ontario *Human Rights Code*, in its bylaw. Among other things, it notes that one of its purposes in regulating rental units is to "protect the health and safety and human rights of the persons residing in rental units."

2. Consult with *Code*-protected groups

Consulting with groups who are likely to be affected by a bylaw is a best practice because it can help prevent *Code* violations before they occur. Sometimes regular public meetings may not be accessible to everyone who may be affected, or people may not be aware

of the meeting because the usual ways of publicizing the meeting and the process are not effective in reaching them. Or, a municipality may see that certain *Code*-protected groups have been underrepresented in public meetings. Conducting targeted outreach to vulnerable or marginalized groups makes sure that their voices are heard, and can help to remove unanticipated barriers to housing access that bylaws can create.

3. Make sure that meetings about the bylaw do not discriminate

Municipalities can use meetings to send the message that any licensing bylaw is about the housing stock being rented, not the people who might live there.

It is important for municipalities to highlight, at meetings and other discussions of the bylaw, that the purpose cannot be discriminatory. Municipalities should lay out ground rules at the beginning of meetings stating that discriminatory language will not be tolerated, and should actively interrupt and object to this type of language when it happens.

Municipalities should provide community education about their bylaws and enforcement activities, to ensure that all residents understand the purposes of the bylaw. Community education can also build relationships between renters and other residents of the municipality.

4. Roll out the bylaw in a consistent, non-discriminatory way

If a bylaw is meant to serve legitimate planning or safety purposes, it should be needed by – and applied to – every part of the municipality. A bylaw that is applied first or only to a particular area of the municipality is more likely to be arbitrary, and could be seen to be targeting the people within that particular area. If the people in that area identify with certain *Code* grounds – for example, they belong to a racialized community, or they are mostly students – then the municipality may be targeting that group of people and could be susceptible to being found to be discriminatory, contrary to the *Code*.

Promising practice

Waterloo applied its bylaw to the entire city, right away.

5. Work to secure existing rental stock

Grandparenting of existing homes, or variances for purpose-built homes, can help to make sure existing rental housing stock is retained so that *Code*-protected groups are not sharply affected when a licensing bylaw is introduced.

In accordance with the 2005 *Provincial Policy Statement*,[18] municipalities should provide for an appropriate range of housing types and densities required to meet projected requirements of current and future residents by, among other things, establishing and implementing minimum targets for providing housing that is affordable to low and moderate income households.

6. Avoid arbitrary bedroom caps

If setting limits on the number of allowed bedrooms in rental units, municipalities should allow the number of bedrooms based on the original floor plan of the house, or the existing floor plan if alterations were done with municipal approval, in compliance with the Building Code, and/or are consistent with other housing in the area. Arbitrary bedroom caps can reduce the availability of housing for *Code*-protected groups. They can exclude large families with children, or extended families.

Municipalities that set bedroom caps based on medians and averages of demographic data may penalize any family or household that is not "average." The negative impact could be substantial: according to the 2006 census, nearly half a million households in Ontario had five people or more. Family or household size can be strongly influenced by ethnic origin, ancestry, creed and place of origin – each a *Code* ground. Recent studies suggest there is also a rise in multi-generational households across cultural backgrounds.

Municipalities need to carefully examine whether the caps they are considering are arbitrary. If they are meant to address parking or other planning concerns, then have they allowed for variances for houses that were originally constructed to have more bedrooms than the cap allows? If they have established caps for rental homes, what is their explanation for not applying those same caps to owned homes that have the same built form? If municipalities cite safety reasons – why do those same safety reasons not apply to owned homes?

Promising practice

The City of North Bay has a cap of five bedrooms, but allows landlords with more than five bedrooms to apply for an exception if their houses were originally constructed to contain more than five bedrooms. While a municipality is best protected against a *Code* complaint if it has no arbitrary bedroom caps at all, allowing for variances may limit negative impacts.

[18] *Provincial Policy Statement*, Government of Ontario, 2005, section 1.4 (Housing).

Some municipalities do not have caps, but rather have a system where properties that rent more than a certain number of units are regulated by a separate lodging house regime. If that separate regime is arbitrarily onerous, then this type of system can create the same issues, and can contravene the *Code* just like a cap might.

7. Avoid gross floor area requirements that exceed the Building Code

The Building Code sets out requirements for floor areas of different rooms and spaces in all housing. Bylaw floor area requirements that are more stringent than Building Code regulations could be found to be arbitrary – and could contravene the *Human Rights Code*.

For example, if gross floor area requirements that limit the percentage of a home that can be devoted to bedrooms are not placed on people in owned homes, this could have an adverse effect on *Code*-protected groups.

8. Eliminate per-person floor area requirements

People should be able to share a bedroom, if they choose, without the landlord or the municipality peeking through the keyhole. In fact, any related questioning or investigation could lead to human rights complaints.

Requirements that dictate how much space a rental unit, or a room in a rental unit, must have *per person* may violate the *Code*.

O. Reg. 350/06, made under the *Building Code Act*, 1992 requires 7 square metres per bedroom, or as little as 6 if there are built-in cabinets;[19] and 9.8 square metres per master bedroom, or 8.8 if built-in cabinets are provided.[20] It also allows for bedroom spaces in combination with other spaces in dwelling units, with a minimum area of 4.2 square metres.[21]

Many rental houses or units have bedrooms sized to comply with Building Code regulations, which could accommodate two or more people.

"Per occupant" references can severely limit housing options for people who commonly share rooms, such as couples, families with children, and many other people who identify

[19] Building Code, 1992, Article 9.5.7.1.

[20] *Ibid.*, Article 9.5.7.2.

[21] *Ibid.*, Article 9.5.7.4.

under *Code* grounds. Unless there is a *bona fide* or necessary reason why rented units should be required to meet requirements that exceed those in the Building Code (when owned homes do not face such a requirement), the OHRC finds "per occupant" references to be discriminatory.

Promising practice

The City of North Bay does not include per-person floor area requirements in its rental housing licensing bylaw.

9. Eliminate minimum separation distances

People zoning – where planning is used to control people based on their relationships, characteristics or perceived characteristics, rather than the use of a building – has been illegal for many years.[22]

In the OHRC's view, minimum separation distances for housing are a form of "people zoning."

Minimum separation distances were originally used to separate land uses such as industry and housing.[23] Their application has broadened over time.

Some municipalities apply minimum separation distances to "lodging houses" – *i.e.*, rental units that are not apartment buildings, but which have a large number of rooms. This means that if one lodging house is established in a certain neighbourhood, others cannot be established within a certain distance or radius.

These minimum separation distances aren't about regulating buildings. A similar, owned house does not have this restriction. Minimum separation distances are about regulating people, and often flow from stereotypes associated with renters.

[22] In *R v. Bell*, [1979] 2 SCR 212, the Supreme Court of Canada heard a challenge to a North York bylaw that limited the use of certain residential zones to dwellings designed or intended for use by an individual or one family. Family was defined as a group of two or more persons living together and related by bonds of consanguinity, marriage or legal adoption.

Justice Spence, speaking for the majority of the Court, found that the bylaw, in adopting "family" as the only permitted occupants of a self-contained dwelling unit, amounted to oppressive and gratuitous interference with the rights of people subject to the bylaw, and that:

> the legislature never intended to give authority to make such rules and the device of zoning by reference to the relationship of occupants rather than the use of the building is one which is ultra vires of the municipality under the provisions of The Planning Act.

[23] See, for example, Finkler, L. & Grant, J., "Minimum separation distance bylaws for group homes: The negative side of planning regulation" (2011) 20:1 *Canadian Journal of Urban Research* 33-56 at 36, for a discussion of the typical use of minimum separation distances (to limit the impact of noise, odour or dust on others), and the movement by municipalities over time to other uses.

Instead of planning for inclusive neighbourhoods, minimum separation distances can limit the sites available for development and restrict the number of sites that are close to services, hurting people who are in need of housing.

In its submission to the OHRC's Housing Consultation in 2007, the Ministry of Municipal Affairs and Housing indicated that separation distance requirements should be justified on a rational planning basis, passed in good faith, and in the public interest.

Arbitrary separation distances can contravene the *Human Rights Code*. Some municipalities may try to use minimum separation distances to manage "overconcentration" of some types of housing within one neighbourhood. Minimum separation distances are basically restrictions – and can adversely affect renters by restricting the options available to them. Municipalities should consider incentives and ways to encourage affordable housing throughout the municipality. This is a positive approach, rather than the punitive one that minimum separation distances often cause.

The OHRC has intervened in two cases where bylaws establishing minimum separation distances were alleged to be discriminatory. The first case, at the Ontario Municipal Board, concerned a City of Guelph bylaw and is described below.

The second case, at the Human Rights Tribunal of Ontario, was launched by the Dream Team, an organization that advocates supportive housing for people with disabilities. In this case, the Dream Team challenged the City of Toronto's minimum separation distance requirements for group homes for people with disabilities. An expert hired by the City of Toronto to examine issues arising from the City's imposition of minimum separation distances to group homes said in his report that he could not find a "sound, accepted planning rationale" for those minimum separation distances and recommended that they be removed. [24]

The OHRC also became a party to a proceeding at the Ontario Municipal Board that was launched by Lynwood Charlton against the City of Hamilton, after the City had refused to grant a site-specific amendment to a zoning bylaw requiring minimum radial separation distances for group homes for persons with mental disabilities.

[24] Sandeep K. Agrawal, *Opinion on the Provisions of Group Homes in the City-wide Zoning By-Law of the City of Toronto*, at pages 3 and 28, released February 28, 2013 by the City of Toronto, as a supplementary report to the *Planning and Growth Management Committee, in Final Report on the City-wide Zoning By-law: Supplementary Report on Human Rights Challenge to Group Home Zoning Regulations*, PG13020.

Promising practices

A City of Guelph bylaw used minimum separation distances to limit rental houses with accessory apartments and also reduced the number of units that could be rented in lodging houses. It appeared that these provisions might keep young people out of neighbourhoods, and would also result in a loss of affordable rental housing that would affect other people who identified with *Code* grounds (such as seniors, newcomers, people with disabilities, single-parent families and people in receipt of public assistance). The OHRC intervened in a challenge of that bylaw before the Ontario Municipal Board. In February 2012, before the matter proceeded to a hearing, the City of Guelph repealed the bylaw, and has committed to working with the OHRC to effectively deal with rental housing issues while at the same time promoting the human rights of tenants.

In 2010, the City of Sarnia changed its bylaws to make sure that people with disabilities do not face additional barriers in finding supportive housing. A group of psychiatric survivors had filed a human rights complaint against the City, alleging that its zoning bylaws violated the human rights of people with disabilities living in group homes. The City changed the bylaw so that:

- distancing requirements for all group homes were removed
- the requirement that group homes with more than five residents be located on an arterial or collector road was removed
- group homes may now be included in all zones allowing residential use
- residential care facilities are a permitted use in any residential zone.[25]

10. Enforce the bylaw against the property owner, not the tenants

If rental housing licensing really is to regulate rental housing (rather than the people in it – which is not an appropriate goal in licensing) then property owners rather than renters should be held responsible for any licensing violations. This should be established clearly in the bylaw, and communicated to tenants and property owners alike.

11. Protect tenants in cases of rental shut down

Sometimes, a licensing bylaw will justifiably cause a rental unit to be shut down. For example, certain safety standards may not be met.

Municipalities should consider the impacts on tenants of any decisions to shut down their rental housing, and work to make sure that tenants are not displaced without recourse or assistance. Tenants should also be informed of

[25] OHRC, *In the zone: Housing, human rights and municipal planning*, 2012, p. 26.

Promising practice

The City of Waterloo rental housing licensing bylaw contains the following provision:

> 5.3 The Director of By-Law Enforcement, before revoking or suspending a licence pursuant to section 5.2 of this by-law, shall consider:
>
> a) the impact of any such licence revocation or suspension on any Tenants; and,
>
> b) imposing terms or conditions on any such licence revocation or suspension that would minimize the adverse impact on any Tenants, including the possibility of providing a reasonable time period before the licence revocation or suspension takes place to permit Tenants to find new housing or to seek relief in a Court or before the Ontario Landlord and Tenant Board.

health and safety issues when they are first raised, rather than simply facing eviction on short notice.

12. Monitor for impacts on *Code* groups

Municipalities should commit to monitor and evaluate the impact of their licensing bylaws on tenants at least every five years, to assess whether the bylaws have a discriminatory effect relating to *Code* grounds.

One way to minimize liability under the *Code* is to establish a program that regularly monitors impacts of the bylaw. More information about data collection that could help municipalities can be found in the OHRC handbook *Count Me In!* Data gathered for monitoring purposes should be broken down by *Code* ground, and collected in a manner consistent with the *Code*. For example, a municipality could gather information from a representative sample of tenants and landlords through phone interviews, door-to-door visits, surveys or focus groups. The municipality could then follow up with participants over a period of time.

The municipality should report its findings on a regular basis. A monitoring program will be strengthened if it is conducted in consultation with an expert in data collection.

Promising practices

Both the Cities of North Bay and Waterloo have committed to ongoing monitoring and evaluation of their licensing bylaws.

13. Make sure licensing fees are fair

Certain constitutional rules apply to fees imposed by public bodies such as municipalities. While municipalities are entitled to charge licensing fees, "a nexus must exist between the quantum charged and the cost of the service provided." In other words, there must be a reasonable connection between the cost of the service and the amount charged.[26]

Fees associated with licensing, if passed on to renters, might drive up the price of housing.[27] The OHRC has heard that increased costs associated with housing can have a particularly adverse impact on *Code*-protected groups. For example, in its *Right at Home* consultation, the OHRC heard from the Children's Aid Society of Toronto that a mandatory $30 apartment insurance fee has an adverse impact on lower-income people, households on social assistance, poor single parents, youth and new-comer families. The OHRC also heard from the Centre for Equality Rights in Accommodation and the Social Rights Advocacy Centre that the same fee could pose a financial barrier for Aboriginal people and members of racialized communities.[28] As the OHRC noted in *In the Zone*, municipalities can encourage development of affordable housing by reducing or waiving fees.[29]

Promising practice

The City of North Bay reports that it was cautious with the fees it imposed – and instituted a licensing fee that is not 100% cost recovery – to limit any hardship for people affected by the bylaw.

[26] *Eurig Estate (Re)*, [1998] 2 S.C.R. 565 at para. 21.

[27] Other costs associated with licensing, such as fees for certain inspections, will probably not raise *Code* concerns if the inspections serve a legitimate health and safety purpose, are uniformly enforced among housing of the same type, and the fees are reasonably connected to the cost of the inspection.

[28] *Right at Home*, OHRC, page 33.

[29] *In the Zone*, OHRC, page 28-29.

Conclusion

Bylaws that limit housing availability for *Code*-protected groups could be found to be discriminatory. The Ontario Municipal Board discussed this concept in *Kitchener (City) Official Plan Amendment No. 58*. In that case, the Board investigated a municipal initiative to decrease the "over-concentration" of "single person, low-income households" and "residential care facilities and social/supportive housing" in certain areas.[30] The City argued that there was no discrimination because, among other things, "people [could] just go elsewhere."[31] The Board found that:

> Depending on the ultimate content of revised municipal measures, municipal analysis and preparation may need to include the *Code* and *Charter*. That analysis is glib, if it merely assumes that telling persons with disabilities and/or on public assistance to "just go elsewhere" is no encroachment on human rights, or that it was just a small one, or that it was for "a greater good."[32]

Bylaws that limit housing availability for *Code*-protected groups may also be in breach of planning principles. The Ontario Municipal Board stated in the *Kitchener* case:

> As a matter of elementary preparation, if the City proposed to revise the rules for care facilities, it was incumbent on the City to devote at least some visible thought to what it was going to do with them. That is consistent not only with the Act and the PPS [Provincial Policy Statement], but with the very concept of "*planning*."

[30] *Kitchener (City) Official Plan Amendment No. 58*, [2010] O.M.B.D. No. 666 at para. 2.

[31] *Ibid.* at para. 137.

[32] *Ibid.* at para. 149.

One does not undertake to reorganize the aquarium, without devoting at least some thought to where to put the fish.[33]

"Housing is a fundamental human right. While rental housing licensing can be a valuable tool for promoting the safety and security of tenants, the ability to license must not be a licence to discriminate."

– Barbara Hall, Chief Commissioner, Ontario Human Rights Commission

[33] *Ibid.* at paras. 107-108.

Also in the *Kitchener* case, the OMB commented that the *Planning Act* and other instruments including the Provincial Policy Statement require the council of a municipality and other parties to consider matters of provincial interest including adequately providing a full range of housing (para. 21). Based in part on these principles, the OMB found that:

> …Although it is fashionable in some circles to reduce all Provincial planning policy to a single glib focus on intensification, that oversimplification overlooks the specific PPS [Provincial Policy Statement] direction (in the explanatory text at Part III) that "a decision-maker should read all the relevant policies as if they are specifically cross-referenced with each other." Where was the attention to "improving accessibility," "preventing barriers" etc.?
>
> That is where there is an evidentiary problem. The required planning analysis need not be encyclopaedic; but where the core of an OPA or By-law involves topics specifically itemized by the Province, one would expect at least some overt attention to those specified interests. Indeed, given that care facilities, the disabled, and assisted housing are the direct and intended targets of this initiative, then as a "planning" matter, one would have expected some municipal consideration of the impacts on arrangements for this population, even in the absence of the interests itemized in the Act and PPS.
>
> Yet in the mass of writings during the six years following the ICB in 2003 – including the lead-up and follow-up to OPA 58 and the ZBA – neither the City nor Region were able to point to a *single sentence* showing how the impacts on this population were considered, let alone that Subsection 2(h.1) of the Act or PPS Subsection 1.1.1(f) had been considered in even the most perfunctory way (para. 99-101).

For more information

The following resources are available online:

Ontario Human Rights Commission
www.ohrc.on.ca

In the zone: Housing, human rights and municipal planning

Policy on human rights and rental housing

Human rights for tenants – brochure

Human rights in housing: an overview for landlords – brochure

Writing a fair rental housing ad

Ontario Ministry of Municipal Affairs and Housing
www.mah.gov.on.ca

Affordable housing

Planning Act Tools

Ontario Housing Policy Statement

Municipal Tools for Affordable Housing

To make a human rights complaint – called an application – contact the Human Rights Tribunal of Ontario at:

Toll Free: 1-866-598-0322

TTY Toll Free: 1-866-607-1240

Website: www.hrto.ca

To talk about your rights or if you need legal help, contact the Human Rights Legal Support Centre at:

Toll Free: 1-866-625-5179

TTY Toll Free: 1-866-612-8627

Website: www.hrlsc.on.ca

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