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Advocacy Centre For Tenants Ontario, Paul Dowling, House of Friendship and Waterloo Region Community Legal Services have appealed to the Ontario Municipal Board under subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the Regional Municipality of Waterloo to approve Proposed Amendment No. 58 to the Official Plan for the City of Kitchener
OMB File No. PL080333

Advocacy Centre For Tenants Ontario, Circa Development Services Co-op Inc., Paul Dowling, House of Friendship and others have appealed to the Ontario Municipal Board under subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, against Zoning By-law 2005-91 of the City of Kitchener
OMB File No. R050129

APPEARANCES:

Parties	**Counsel**
Advocacy Centre for Tenants Ontario	K. Hale, D. Williamson
City of Kitchener	K. Mullin, B. Kussner
Regional Municipality of Waterloo	R. Brookes
House of Friendship	T. Dueck

INTERIM DECISION DELIVERED BY M. C. DENHEZ AND ORDER OF THE BOARD

1. INTRODUCTION

This was called by the parties an "unprecedented" case at the nexus between land-use controls and human rights. The appeal was against Official Plan Amendment 58 ("OPA 58"), and Zoning By-law Amendment 2005-91 ("ZBA") of the City of Kitchener (the "City").

The appeal concerned the City's Cedar Hill area (the neighbourhood), in the Region of Waterloo (the "Region"). City estimates said almost 20% of Cedar Hill's residents are persons with disabilities and/or persons in receipt of public assistance (the "target population"), living in, e.g., an overnight men's shelter, an

interim triage centre for foster children, a group home for the developmentally-challenged, rent-to-income housing etc. Such statistics (uncontested) led the City to inferences, which the Board categorizes as follows:

Issue 1: The City posited that the area's "over-concentration" of "single person, low income households" and "residential care facilities and social/supportive housing" compromised its residential mix.

Issue 2: The City sought less "centralized" deployment of these facilities.

Issue 3: The City posited that concentration of such households, facilities and housing were "an unhealthy social environment" which put the neighbourhood on a "downward trajectory".

Issue 4: The City sought to restrict any further development in the neighbourhood, for such households, notably care facilities and social/supportive housing ("restrictive measures").

The City enacted an Interim Control By-law in 2003 (not appealed), with restrictive measures, and undertook to explain same, in a first study (the "Study") on this "over-concentration", property values, crime, etc.

That Study, and professional input from City and Region staff, also called for a second study (the "second study") to promote "the development of new… lodging houses and residential care facilities in all other appropriate areas". However, although labeled a "high priority", the Council of the day (2005) formally rejected doing it, instead proceeding immediately to adopt restrictive measures (in OPA 58 and the ZBA), notably a neighbourhood ban on all new facilities for the target population, and on all new dwellings other than single detached, except where approved on a "site-by-site basis" (a "placeholder" By-law).

The Region approved OPA 58 two years later. However, the OPA and ZBA were appealed by six Appellants, notably the Advocacy Centre for Tenants Ontario ("ACTO"), supported by Legal Aid Ontario. A second Appellant, the House of Friendship, withdrew. Two others changed status from parties to participants (Waterloo Region Community Legal Services, and Paul Dowling); and two did not appear (Circa Development Services Co-op Inc. and Minh Le).

The Ontario Human Rights Commission also made a written submission (Exhibit 2), arguing that the Board had the right and duty to consider whether the

appealed instruments were inconsistent with the Ontario *Human Rights Code.* Notice was given to the Attorneys General of Canada and Ontario, of the prospect that the appeal would include constitutional grounds.

OPA 58 and the ZBA also contained uncontested provisions. OPA 58 "encouraged" new dwellings "to be occupied by the property owner"; it also deleted "General Industrial" from the list of the neighbourhood's potential designations. The ZBA, for its part, also rezoned lands at St. Joseph's School in accordance with an agreement with school authorities.

The Board has carefully considered all the evidence, and the able submissions of Counsel, during a hearing of some four weeks. The Board also had regard to Decisions of City Council and the Region, and to the supporting information/ material thereto, including the planning aspects from the standpoint of intent, preparation, and mechanics/implementation. The Board also considered the *Code* and *Charter*. In summary:

Issue 1: The Board **accepts** the City and Region's finding of concentration. Their objectives of decentralizing institutions, and fostering a neighborhood mix, are fully supported by Provincial policy and the Official Plan. Indeed, the Board found support even in the testimony of ACTO's planning expert.

Issue 2: The Board **agrees** with the City and Region, concerning the aspects of this initiative which positively seek to distribute such facilities throughout other parts of the City.

Issue 3: The "downward trajectory" theory is **moot.** Council was already justified, on planning grounds at Issues (1) and (2) above, to pursue facility decentralization and neighbourhood mix; so Council was under no obligation to *further* attempt rationalizing such initiatives on the controversial theory of "unhealthy social environment". For *Planning Act* purposes, that theory was superfluous, and hence irrelevant.

Issue 4: The Board divides the mechanics of the initiative into two parts:

A. The uncontested provisions of the OPA and ZBA are **accepted.**

B. The Board finds that the restrictive measures are **premature**:

- Granted, municipal spokespersons at this hearing were at a

disadvantage, due to gaps in supporting information/material – not surprisingly, since an entire "high priority" report was never done.

- If municipal authorities propose measures on topics *specified* as Provincial interests (in the *Planning Act*, or the Provincial Policy Statement), then as a matter akin to due diligence, their planning analysis must show that these specified aspects received the consideration required by law, e.g.:
  - Section 2 of the *Planning Act* calls for "regard" to "accessibility for persons with disabilities";
  - Section 3(5) requires consistency with the Provincial Policy Statement (PPS), which calls for "improving accessibility for persons with disabilities", and "removing and/or preventing land-use barriers" for them.
  - The City's Official Plan ("OP") contains similar objectives, for persons with disabilities and/or low incomes, including the importance of housing based on "household income and physical and mental health and ability".
  - Yet the Board was **not shown a *single* sentence, in six years of paper trail, indicating that these factors were considered** by the municipalities in this initiative.
  - That gap was problematic for statutory compliance.
- The paper trail also lacked analysis of the mechanics of this municipal initiative – a "placeholder by-law" (where Council intentionally rezones for as-of-right development for which there is *no expectation*, as a device intended to reserve for itself the discretion to proceed *ad hoc)*. There was no outline of supporting authority for this mechanism.
- Another question was whether this initiative was "people zoning": it appears the City did not apply the same criterion as the Courts.
- Finally, municipalities – and this Board – are bound by the *Code*. Although the paper trail discussed those topics at least in a perfunctory way, several key questions remained unaddressed.

However, rather than treat these analytical shortcomings as fatal to this *part* of the initiative, the Board offers municipal authorities a

further process to address these matters.

The outcome, at this interim stage, is therefore the following:

a) The Board **accepts** the principle of an OPA to decentralize institutional facilities.

b) The Board also **accepts**, in principle, the uncontested portions of OPA 58 and the ZBA.

c) For reasons outlined herein, it is appropriate for the City to **redraft** the OPA and ZBA, to reflect what municipal authorities now wish to do, e.g. in positively supporting decentralization.

d) As for the restrictive measures in OPA 58 and the ZBA, the City and Region will need to *plan*:
   - If they wish to restrict prospects for housing persons with disabilities and/or in receipt of public assistance, then they will need to do the **preparation** required by the *Planning Act* and other relevant legislation, for the underlying rationale in light of statutory requirements.
   - This means the City and Region will need to supply the relevant planning analysis (including applicable PPS provisions, authority for “placeholder” By-laws, consideration of "people zoning", and *Code/Charter* dimensions) – commensurate with the thrust of the measures which today’s municipal authorities wish to pursue.

e) For the purposes of (c) above (redrafting) and (d) (attention to statutory considerations), the Board will **reconvene** in fifteen (15) months to consider updated versions of the OPA and ZBA. The parameters for that reconvened hearing are outlined herein.

The details and reasons are set out below.

2. GEOGRAPHIC AND HISTORICAL CONTEXT

2.1 Background

The ten-block Cedar Hill neighbourhood of 2,400 residents is the smallest of six "planning communities" surrounding Downtown Kitchener. It was originally composed of single-detached homes (though the House of Friendship’s care facility has been there for sixty years). Photographic evidence (Exhibit 34)

suggests what must have been a pleasant-looking area of attractive gabled houses and substantial private greenspace. Many of those features survive, and there was no dispute that the area is a worthy candidate for revitalization. The character of the area, however, was affected by the interventions below.

In 1967, in accordance with Urban Renewal theories of the day, it was massively upzoned for highrise redevelopment, with an arterial road; but instead of prompting a proliferation of highrises, these measures destabilized the community with what one City expert, Dr. Filion, called "planning blight".

Owners speculated on redevelopment, letting properties decay. 30% of detached homes and 50% of duplexes passed into the hands of absentee landlords. The resulting lack of on-site supervision, said Dr. Filion, was "problematic". Extra traffic was not helpful either.

Property values became “depressed” – attracting cost-conscious social service providers. Planner Jeffrey Willmer of the City added that transit access also attracted them, but the main factor remained affordability. Once some moved in, this allegedly depressed prices further – attracting still other providers, in a self-perpetuating cycle. Persons with disabilities in supportive housing (plus one men’s shelter) reached 8% of the neighbourhood's population; when one added low-income housing residents (another 12%), the total proportion of the area’s population with disabilities and/or in receipt of public assistance (the “target population”) reached almost 20%, second highest in the inner city.

The last two such complexes, totaling 67 units, prompted what the City called "a perception that Cedar Hill had reached a saturation point". It said residents of care facilities, supportive housing and assisted housing "became magnets for drug dealers and other predators". Mr. Willmer spoke of a neighbourhood "reputation for drug trade, prostitution and other unwanted activities". The City responded in the 1990s with a "Take Back the Streets” campaign, more police presence, and a "priority" crackdown on poor maintenance, which Dr. Filion attributed to absentee landlords (by comparison, he called the social service facilities "well-landscaped and well-maintained").

These efforts were "successful to a degree". Indeed, the overall population decline of the early 1990’s was reversed; but not perceptions. Public attention

turned not only to absentee landlords, but also to the presence of social service agencies, their facilities, and their clients.

In 2003, the City Council of the day undertook to limit such facilities in the neighbourhood: an Interim Control By-law (ICB) under Section 38 of the *Planning Act*, banned new ones. That ICB was not appealed. The City also commissioned the *Cedar Hill Land Use and Social Environment Study* (the Study).

2.2 Terminology

The Study described target properties in four generic groups:

- **"Supportive housing",** i.e. housing with mainly non-financial support – notably counseling and/or lifestyle support for people with physical or psychological disabilities.
- **"Assisted housing",** i.e. with financial support for people in economic need.
- **Lodgers:** These were occupants of "highly affordable" premises – with a bathroom, or kitchen, but not both. City-wide planning instruments allowed up to three lodgers in a dwelling without a zoning change, and without the premises being considered a "lodging house".
- **Social service establishments** (non-residential): these might include
  - Counseling on site, or
  - No counseling, e.g. agency offices, and/or deployment operations.

As mentioned, a fifth of the neighbourhood's residents live in supportive housing, assisted housing, or lodging houses (the second-highest proportion in the inner City), with premises categorized in planning instruments as follows:

- **Lodging houses** (four lodgers or more); there are two licensed in the neighbourhood, and there "may be ten unlicensed ones".
- **Residential care facilities**: these are more highly supervised housing, in two main subcategories:
  - "**Large Residential Care Facilities**", of 8 residents or more.
  - **Group homes** (3-10 residents): the neighbourhood has:
    - one for the developmentally challenged,

  - one for people with mental difficulties,
  - and one children's aid-type facility.
- **Other residential facilities**: the area has:
  - one men's hostel,
  - one halfway house for young offenders,
  - and one facility for special needs residents (currently focused on mental health).
  - There is also one facility for low-income seniors, though it was not listed as the kind of facility targeted by the City's initiative.
- There are also rent-to-income units.
- **Co-op housing**: this is not-for-profit housing, usually self-managed. There was no co-op housing in the neighbourhood.
- **Social service establishments** (non-residential), with or without counseling. None are now in the neighbourhood, but two school sites could (theoretically) have been converted to such use, plus some commercial premises in the abutting district of Mill Courtland

The existing comprehensive Zoning By-law offers the following definitions:

Group Home:	A residence licensed or funded… for the accommodation of three to ten persons… under supervision… who, by reason of their emotional, mental, social or physical condition or legal status, require a group living arrangement….
Lodging House:	A dwelling (of)… one or more lodging units designed to accommodate four or more residents. The residents may share common areas… and do not appear to function as a household. This shall not include a group home....
Lodging Unit:	... May contain either a bathroom or kitchen but does not contain both...
Residential Care Facility:	A dwelling… occupied by three or more persons… who by reason of their emotional, mental, physical or social condition or legal status, are cared for… in a supervised group setting. This shall include, for example, a group home, crisis care facility, residence for socially disadvantaged persons or nursing home, but shall not include a lodging house, foster care home or hospital.
Social Service Establishment:	An office of a non-profit social service agency….

Users of care facilities might have disabilities, and/or be on low incomes. For the purposes of this Decision, they are referred to as the target population.

3. THE POLICY FRAMEWORK

3.1 The Planning Framework

The *Planning Act* specifies factors which must be taken into account in the

- intent,
- preparation,
- and implementation

of planning instruments. For intent and preparation, it specifies, at Section 2, a list of topics which "the Council of a municipality... shall have regard to":

Provincial interest	The Minister, the council of a municipality… and the Municipal Board, in carrying out their responsibilities under this Act, shall have regard to, among other matters, matters of Provincial interest…"

Section 2 goes on to list those Provincial interests, including:

(h.1)	The accessibility for persons with disabilities to all facilities, services and matters to which this Act applies;
(i)	The adequate provision and distribution of... health (and) social... facilities;
(j)	The adequate provision of a full range of housing;
(m)	The coordination of planning activities of public bodies.

At Section 3(5)(a), the *Act* requires further that instruments be "consistent" with certain Provincial policy statements:

Policy statements and Provincial plans	A decision of the Council of a municipality and… the Municipal Board, in respect of the exercise of any authority that affects a planning matter… shall be consistent with the policy statements issued (by the Province) under subsection (1)….

The PPS, in turn, calls for similar considerations – and adds that accessibility, for persons with disabilities, must be not only maintained, but "improved":

1.1.1 Healthy, liveable and safe communities are sustained by:

b) Accommodating an appropriate range and mix of residential… uses to meet long-term needs;

(f) Improving accessibility for persons with disabilities... by removing and/or preventing land-use barriers which restrict their full participation in society....

1.4.1 To provide for an appropriate range of housing types...

1.4.3 Planning authorities shall provide for an appropriate range of housing types… (for) the regional market area by:

(a) Establishing and implementing minimum targets for the provision of housing which is affordable to low and moderate income households...;

(b) 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; and

2. All forms of residential intensification and redevelopment...

(e) …Development standards for residential intensification....

1.6.1 ... Public service facilities shall be provided in a coordinated, efficient and cost-effective manner… (for) projected needs.

Under Section 24(1) of the *Act*, By-laws must also "conform with" applicable Official Plans. In this case, the existing Regional Official Policies Plan ("ROPP") includes the following objectives:

2.1 …Safe, prosperous communities through proactive policies and appropriate economic, social and physical growth.

7.6.4.5 Group homes will be permitted within all residential designations…

The City's Municipal Official Plan (MOP) also calls on the City's decision-making process to address both people with disabilities and those on low incomes, along with residential mix and decentralization of institutional facilities:

Part 2 1. (To) take into account... household income and physical and mental health and ability….

1(i) To provide opportunities for a wide variety of housing options with

> the aim that all residents in the City of Kitchener and all income ranges are able to afford adequate safe and good quality housing in an appropriate community setting which meets their needs.
>
> 1.1.1 …A land-use pattern which mixes and disperses a full range of housing types...
>
> 1.1.3 …The need for lodging houses, garden suites and residential care facilities and supports the integration of these housing types at appropriate locations in all residential areas.
>
> 1.4.3 …Community design… which makes housing accessible to all residents regardless of their physical developmental and sensory abilities.
>
> 3.2 …A wide range of other facilities required in a City to meet the social... needs of its citizens.... The City recognizes the importance of these facilities and shall endeavour to make provisions for them throughout the community.
>
> 3.2.1 The City shall promote the decentralization of institutional facilities...

There is also a neighbourhood Secondary Plan, which foresees a variety of densities, including relatively high densities in the northwest corner.

3.2 The Human Rights Framework

ACTO and the Ontario Human Rights Commission cited the Ontario *Human Rights Code* (the "*Code*") and *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The *Code* addresses discrimination based on "disability", and discrimination in accommodation based on "receipt of public assistance"; but it also has another clause for disputed measures which are nonetheless "reasonable and *bona fide* in the circumstances" (e.g., reasonably necessary to achieve legitimate objectives, and there were no other, less discriminatory means, or no accommodation possible, short of undue hardship):

> 1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.
>
> 2. 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.

> 11(1) A right of a person… 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….
>
> 11(2) … 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….

The *Charter* covers similar ground, with a general principle at Section 15(1), and another provision for "reasonable limits" at Section 1:

> 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.
>
> 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.

4. LEGISLATIVE HISTORY OF THE MUNICIPAL INITIATIVE

4.1 Previous Enactments

City-imposed limitations on such facilities are longstanding:

- In 1992, by separate By-law 92-58, the City introduced a city-wide "Minimum Distance Separation" of 400 metres between group homes.
- In 1994, the City banned "large residential care facilities" from the neighbourhood.
- In February 2002, City Council adopted a "Downtown Action Committee recommendation to consider the issue of the perceived concentration of social services in the Inner City"

- That year, the City also produced a document called *Cedar Hill Action Plan Social Issues*, which, in the later words of another City study (Exhibit 5, page 704), repeated concerns over "fear of expansion and proliferation of social agencies and housing, too many absentee landlords, too many lodging houses in the neighbourhood", etc.

- In May 2003 (Exhibit 5, Tab 16), staff expressed concern over "issues raised by the Cedar Hill neighbourhood as attributable to the proximate location of a large number of social services, supportive and/or assisted housing".

The City, said Mr. Willmer at the hearing, intended to “take steps against further concentration” of such facilities in the area. In 2003, it adopted Interim Control By-law 2003-87 (“ICB”), under Section 38 of the *Planning Act* (and not appealed), banning new residential care facilities, lodging houses, multiple dwellings, and social service establishments. The ICB was renewed (By-law 2004-85) and the Board was told it still applies today – notwithstanding that it has been around for six years – because the replacement ZBA is still under appeal.

4.2 The Study

Use of Section 38, introducing an ICB, requires a “study”. In this case, it was named the *Cedar Hill Land Use and Social Environment Study*, whose Terms of Reference (“TOR”, July 2004) amply addressed questions about perceptions of the neighbourhood, its property values, its crime rate etc.

In contrast, the TOR were *almost* silent on the impacts of “corrective” action on care facilities or their users, or social service users or providers – except for the TOR’s call for a second study ("social impact analysis”):

> Land use policies and property standards enforcement… can, in the short run, only address a small component of the overall issue. Another, and perhaps larger component of the issue, is beyond the control of the City and will require a multifaceted approach involving the City as only one of many stakeholders with a role to play. This will constitute a second phase of the study: Phase II Multifaceted Social Impact Analysis and will of necessity require a recognition that this phase will involve other levels of government, social agencies and the larger community…. Phase II of the study will be considered after May 2005.

The Study itself was completed in February, 2005. Dr. Filion, one of its co-authors, assembled *data*, whereas the lead consultant Dr. Stanley (retired City Planning Commissioner) handled its 22 *Recommendations* and compliance with planning legislation; but he was said to be too ill to testify, so Dr. Filion had to serve as his stand-in. The Study stated:

> Two key findings (are): the Cedar Hill community clearly has an over-concentration of residential care facilities and supportive housing and second: Cedar Hill has the highest percentage of absentee landowner duplexes of the downtown communities studied (Exhibit 5, page 809).

Those findings represented what the Board labels **Issue 1** (concentration), and the basis of **Issue 2** (the desirability of dispersal). However, matters did not stop there. These “two key findings” led to speculation about what Dr. Filion called a "trajectory to neighbourhood decline" (**Issue 3**). In response to this perceived prospect of a “ghetto for small, low-income households”, Dr. Stanley produced 22 Recommendations, which the Board divides into five categories, including restrictive measures (**Issue 4**):

- One Recommendation was to discourage absentee landlords;
- One was to ban all new dwellings except single-detached;
- Most Recommendations were for restrictions on social service agencies and their clients;
- Several Recommendations were to consider various government programs (federal, provincial, municipal) for area revitalization; and
- One was for the second study, “Phase II” social impact analysis.

Neither the Study, its “Research Questions”, or its Recommendations mentioned improving accessibility for persons with disabilities (or related services, land-use barriers to same, or alternative provision of housing which would be affordable to low and moderate income households) – except for the following reference to the second study (“Phase II”) to address coordination of planning activities of public bodies (Recommendation 22):

> That the City of Kitchener proceed with the second phase of the Cedar Hill Study: Phase II Multifaceted Social Impact Analysis.

The Study did, however, repeat that the second study was intended to address involvement of "social service agencies and the larger community" etc.:

> There are other components that impact community well-being and quality of the social environment that are beyond the control of the City. A good example would be the extent to which various social agencies house their clients within the neighbourhood under the umbrella of supportive housing in existing single, duplex and multiple dwellings. To address these matters will require a multifaceted approach involving the City as only one of many stakeholders with a role to play. This is seen as constituting a second phase of the study. Phase II Multifaceted Social Impact Analysis to be successful will, of necessity, require a recognition that other levels of government, social service agencies and the larger community will need to be involved, and that the implementation will be less regulatory and more collaborative.

City planning staff then produced its own report dated March 29, 2005. It attached the Study, but added no significant comments of its own pertaining to accessibility for persons with disabilities, related services, land-use barriers to same, or alternative provision of housing for low/moderate income households. It did, however, reiterate the importance of planning for dispersal:

> (The Study) recommends appropriate public planning to create a diversity of housing types and tenant types.... The Study suggests that (supportive/ assisted) forms of housing should not be concentrated in one area, but dispersed across the City to: 1) avoid ghettoization; and, 2) provide opportunities for the socially disadvantaged to have choices about which neighbourhood they live in.

But where was that "public planning" to "provide opportunities" for dispersal? There was no claim that it was in existing analysis – hence the need for the second study. Planning staff called Recommendation 22, for the second study, a "high priority", along with Recommendation 19 (economic development):

> That recommendations 19 and 22, relating to non-regulatory and community economic development tools, be given high priority, and that planning staff and community services staff be directed to investigate opportunities to implement these recommendations together with neighbourhood stakeholders....

Council's Development and Technical Services ("DTS") Committee, at its meeting of April 4, 2005, agreed that those Recommendations for study should

> be given high priority, and Planning and Community Services staff be directed to investigate opportunities to implement these

> recommendations together with neighbourhood stakeholders....

A further staff report, dated April 28, 2005, repeated that message – with even greater specificity, calling for research to "facilitate" "opportunities" for dispersal of facilities "in all other appropriate areas of the City":

> That Planning staff… be directed to report back to DTS Committee, with opportunities for the Municipality to encourage and facilitate the development of new duplexes, multiple dwellings, lodging houses and residential care facilities in all other appropriate areas of the City.

4.3 City Council and the Municipal Instruments

The Study was tabled for review in March 2005. Its Recommendations to restrict social service providers, supportive housing and assisted housing proved controversial. The House of Friendship's then Executive Director (now Director of Housing for the Region) challenged the premise of "over-concentration" (Issue 1), the theory of "neighbourhood decline" (Issue 3), and the restrictive measures (Issue 4). ACTO also objected, at Council's DTS Committee Meeting of April 4, 2005. The Board was not shown how municipal officials responded.

The question returned to Council's DTS Committee on May 2, 2005, where the Committee reiterated its recommendation for a second study:

> That planning staff, in conjunction with all applicable agencies and levels of government, be directed to report back to the… Committee, with opportunities for the Municipality to encourage and facilitate the development of new duplexes, multiple dwellings, lodging houses and residential care facilities in all other appropriate areas of the City...

But when the matter moved to full Council on May 9, 2005, it took a different turn. The "high priority" proposal for a second report, to address "opportunities" to deal with the affected populations, was formally rejected. Council resolved:

> To remove the last clause containing direction to staff.

At that Meeting, Council proceeded immediately to adopt two instruments to implement the Study: OPA 58, and Zoning By-law Amendment 2005-91 (ZBA). It adopted the ZBA on the apparent premise that the latter was already allowed under existing Official Plans, and that OPA 58 was strictly for good measure. It

was undisputed that the timing of OPA 58 and the ZBA made them subject to the 2005 PPS, but that they were not yet captured by transitional provisions of the *Places to Grow Act* or the *Growth Plan for the Greater Golden Horseshoe*.

OPA 58 opened with a written "Basis of the Amendment", linking “care facilities” and “social/supportive housing” (along with absentee landlords) directly to “an unhealthy social environment” (Issue 3):

> The Study concluded that this area has an over-concentration of single person, low income households, created due to the concentration of absentee landlord rental homes, duplexes and triplexes, residential care facilities and social/supportive housing. This concentration has created an unhealthy social environment in jeopardy of worsening.

OPA 58 then banned the following from this residential neighbourhood:

- New lodging houses,
- New social service establishments,
- New residential care facilities,
- New dwelling units under 85 square metres, and
- New dwelling units with over two bedrooms.

The only new residential buildings allowed, as of right, would be single detached (of at least 85 square metres but no more than two bedrooms). All else would be considered “on a site by site basis through site specific zoning amendments”.

OPA 58 further specified that in an abutting corner of the adjoining “planning community” of Mill Courtland, there would be

- A similar ban on new lodging houses, care facilities, and dwelling units with less than 85 square metres or more than two bedrooms.
- That area would also have the same “site by site” Council control over residential development.
- However, instead of banning *all* new social service establishments there, as in Cedar Hill, it banned only
    - “crisis care facilities”
    - and those “which provide counseling on site”.

OPA 58 also included uncontested provisions.

- It referred to absentee landlords (Section 10), saying that residential properties were "encouraged to be occupied by the property owner".
- It also repealed MOP Policy Section 13.3.3, pertaining to the “General Industrial” designation in the Cedar Hill Secondary Plan.

“Almost simultaneously” with OPA 58, City Council also adopted the ZBA. It did not refer to the uncontested OPA provisions above, but in all other significant respects, it mirrored OPA 58, though with more specificity. Except for a few site-specific exceptions, existing zones throughout the neighbourhood were replaced with three new zones (residential, commercial, institutional) prohibiting the same range of uses as the OPA, and limiting new residential development to single-detached. The ZBA also contained site-specific provisions of its own, pertaining to St. Joseph's School, of which more will be said later.

Although single-detached became the only residential development as-of-right, the Board heard no expectation thereof (Mr. Willmer called it "extremely unlikely"). The municipal evidence was that this zoning, for a development format for which there was no expectation (a “placeholder” By-law), was strictly intended as a device to force proponents of future projects to seek rezoning, thereby allowing Council to assess proposals "site by site".

The ZBA was appealed to the Board in 2005, by parties listed earlier.

4.4 The Region

OPA 58 required approval of the Region of Waterloo, where approval authority rests not with Regional Council, but was delegated to a Regional official (the Commissioner). By letter to the City a month before City Council’s Decision (Exhibit 5, Tab 40), Regional staff echoed the professionals’ view that the second study of “social aspects” should proceed “as soon as possible”:

> The City of Kitchener is strongly encouraged to begin its examination of the social aspects as soon as possible, as many neighbourhood trends appear to be more symptomatic of social challenges than land-use issues.

The Board saw no documentation of any such further “examination”. In January 2006 (Exhibit 5, Tab 43), Regional staff added concerns with “conformity issues”, noting “impacts on social services” and “community housing”:

> Regional and City staff discussed modifying the content of the Amendment. In July, proposed wording was reviewed; however Regional staff was not satisfied that conformity issues had been addressed. Further questions arose after meeting with the Region's solicitor in the Fall and proposed to the City. Outstanding questions and issues remain and consequently a decision has not been issued. Regional staff supports initiatives to improve the quality of life for the residents and stakeholders of the Cedar Hill neighbourhood. The Region also has a number of broader public interests to consider, including impacts on social services, community housing, land use and general alignment with broader strategic goals....
>
> Regional staff continues to be involved with and supportive of the Cedar Hill Study: Phase II Multifaceted Social Impact Analysis.

The Phase II Analysis never happened. Despite recommendations for analysis of alternative "opportunities", in Mr. Willmer’s words, there was

> a shortage of leadership resources…. Those efforts were not successful in having a new leader step up, and there were competing calls for resources.

After the correspondence about “conformity issues”, two years elapsed. Then matters took a different turn again. In February 2008, the Region produced a planning staff report (Exhibit 5, Tab 39), now endorsing OPA 58 – while the Regional Commissioner, exercising his delegated authority, approved OPA 58. The City and Region said this delay was due to “back and forth” negotiations:

- The City and Region pointed to a new exemption for group homes from the OPA ban (though new group homes were not allowed in the neighbourhood anyway, under a separate by-law); and
- The revised OPA took no position on downzoning to single detached: MOP permission for high-density development at, e.g., the northwest corner of the neighbourhood appeared unchanged – though now subject to “site by site” consideration.

The Region’s planning staff report now asserted that there was compliance with the *Planning Act* and the PPS.

But like the Study and the City staff report, the Region's report contained no discussion of improving accessibility for persons with disabilities, related services, land-use barriers to same, or alternative provision of housing for low/ moderate income households. For that matter,

- although it cited other PPS and *Planning Act* provisions calling for "safe and healthy communities",
- it cited none of the PPS provisions pertaining to disabilities, access to housing etc.

OPA 58, as approved by the Regional Commissioner, was then also appealed.

4.5 Caveats

At the hearing, the City and Region insisted that these measures were less sweeping than they first appeared:

a) **"Grandfathering":**

The OPA and ZBA had *no* immediate effect on *existing* facilities, which were "grandfathered" as *legal non-conforming uses*; and unlike in some other municipalities, the ROPP and MOP expressed no expectation that non-conforming uses must eventually become conforming.

b) **Existing Restrictions:**

In any event, the exercise was largely cosmetic, since as the City observed, Council had *already separately banned most such new facilities in the neighbourhood anyway*:

i) **Group Homes:** The Region's reinstated OPA wording allowing "group homes" (though not reinstated in the ZBA) was cosmetic: by separate By-law in 1992, the City had set a 400-metre Minimum Distance Separation between them; by that calculation, *no available locations were left* in Cedar Hill.

ii) **Large Residential Care Facilities:** There was no effect on creating new Large Residential Care Facilities, as those had *already been banned separately*, since 1994.

iii) **Social Service Establishments:** There was little immediate effect on social service establishments, since (aside from two potential locations on what is today school property) the City's zoning did not allow them in this neighbourhood anyway.

iv) **Lodging Houses:** Similarly, there was no immediate effect on lodging houses, because under yet another by-law from 2006, there was also a 400-metre Minimum Distance Separation between lodging houses; by that calculation, *no available locations were left*.

Furthermore, the city-wide provision allowing up to three lodgers in *other* dwellings was unchanged.

c) **Funding:**

The City also had alternative leverage over new publicly-funded projects: it could refuse to participate in funding.

d) **Exceptions for Dwelling Size:**

The wording of OPA 58 was that "new individual dwelling units shall generally be at least 85 square metres". The word "generally", said the Region, meant there might be exceptions.

ACTO's planning expert, Mr. Gladki, opined that with so many *other* City restrictions on such facilities, notably (b) above, the OPA and ZBA were "window dressing". Only a narrow range of new facilities had not been banned already. However, it was undisputed that the OPA and ZBA would restrict future activities by, and facilities for, social agencies to some extent. For example, any expansion of existing facilities (e.g., the triage centre for foster children, or the group home for the developmentally-challenged) would need approval of the Committee of

Adjustment; and social agencies like, say, United Way or Meals on Wheels could not have offices in the area – though there are no such offices now.

5. THE POSITIONS

The written intent of this City initiative (the “Basis of the Amendment”) was to address “an over-concentration of single person, low income households”, notably by targeting “residential care facilities and social/supportive housing”.

The City and Region said the initiative responded to an objective quantitative problem, duly ascertained. Section 16 of the *Planning Act* authorized it to "manage and direct physical change and the effects on the social... environment", meaning it could preempt any "trajectory toward neighbourhood decline" in the manner it did. In any event, the MOP already authorized it to "promote the decentralization of institutional facilities", i.e. their dispersal.

They vigorously denied blaming this “trajectory” on the facilities’ residents themselves. Dr. Filion said U.S. literature suggested such groups were not predators, but prey: their concentration in a district attracted undesirables from outside, to entice them to "fall off the wagon". “Large facilities (also) attract more crime because they provide a mass of prospective victims”. Neighbour participants, a driving force behind the 2003 ICB and this municipal initiative, similarly denied being motivated by NIMBY (Not-In-My-Back-Yard). The Board was told that unless the demographic balance were shifted away from single-person households toward families, there was an ongoing risk of school closures. The Board was also told how tedious and frustrating it was, to be saddled with the label of being a resident of "*that* neighbourhood". It was clear that both the City and neighbours were anxious to change the area’s image.

In terms of planning, the City argued that the *net* impact of the OPA and ZBA was very modest, both substantively and geographically. Even without this OPA and ZBA, no new lodging houses, group homes or large residential care facilities could have been introduced into the area *anyway*. Furthermore, on a city-wide basis, there were many potential locations for such facilities elsewhere.

The City and Region insisted they had complied with all statutory and PPS prerequisites. Granted, no documentation or written checklist showed that the

municipal corporate mind had addressed items like "improving accessibility" etc.; but that did not mean this was not done. On the contrary, said their planners, "there certainly was consideration of those issues throughout the process".

First, the uses banned here were still allowed in most of the City, as of right. Ms Kutler, the Region's planner, said "the fact that the uses are permitted elsewhere satisfies the test". Second, the City and Region had indeed created new facilities elsewhere, during the six years since the ICB was in force. "With no other policy or financial incentives", said Mr. Willmer, "we have been able to achieve a broad distribution of group homes". Functionally, they said, no actual discrimination could be proven to be taking place.

Furthermore, even if there had been any shortcomings in the City's original consideration of the *Planning Act* and PPS, those shortcomings had since been "cured" by the time of the hearing.

ACTO challenged the premise that users of care facilities and/or social services caused neighbourhood decline – if such decline existed at all. ACTO also said authorities had not observed the *Planning Act* and PPS, notably in terms of "having regard" for the *Act*'s objectives for persons with disabilities etc., and "being consistent" with PPS objectives on those accounts. ACTO further argued that the City's zoning, for a kind of development for which there was no expectation, was an inappropriate device, to vest Council with undue discretion.

ACTO added that the entire initiative was an exercise in "people planning" instead of "land-use planning" – an exercise in "social engineering". The Study, it argued, had Terms of Reference and Study Questions which did no more than focus on rationalizing the direction which the City had already predetermined.

ACTO also argued that even if the City and Region had wanted to redistribute such facilities city-wide, the correct approach should have been one of positive enticement elsewhere, not a negative ban within this neighbourhood – “All carrots, no sticks” – i.e., Issue 2 (dispersal), but not Issue 4 (restrictive measures). The ban, ACTO said, could not avoid being discriminatory – arguably in its intent, and certainly in its effect.

Finally, ACTO agreed with the Ontario Human Rights Commission's submissions, which said:

> If the OMB finds that OPA No. 58 is inconsistent with the *Code*, it can make modifications to OPA No. 58, or it can refuse to approve OPA No. 58, pursuant to its specific powers in subs. 17 (50) (of the *Planning Act*). Pursuant to its general powers, the OMB can direct that modifications be made to OPA No. 58.
>
> If the OMB finds that By-law 2005-91 is inconsistent with the *Code*, it can repeal or amend the By-law, or direct the repeal or amendment of the By-law, pursuant to its specific power in subs. 34 (26) (of the *Planning Act*).

The City countered that ACTO had provided insufficient proof of actual discrimination. Even if it had, the City's initiative was saved by the "reasonable and *bona fide"* provision of the *Code* – and even if not, a declaration of By-law invalidity would be improper on the Board's part, since that function is reserved for the Courts.

6. OBSERVATIONS AND FINDINGS

6.1 Introduction

ACTO called the City's initiative — and this case — "unprecedented". The Region's planner, Ms Kutler, used the phrase "somewhat of a unique amendment". It gave rise to a 181-point written argument by ACTO, and a 144-point written response by the City, plus a further 22-point response from the Region. This dispute can be divided into several main components:

A) Factual: Was there a substantive underlying problem, requiring a City response?

(i) Was there was an over-concentration of facilities (Issue 1), and

(ii) Did this cause a downward trajectory (Issue 3)?

B) Planning / Policy: Did the municipal instruments comply with the preparatory, technical and other requirements of the *Planning Act* and the PPS, concerning

(i) Positive dispersal (Issue 2), and

(ii) Restrictive measures (Issue 4)?

C) Legal / Constitutional: Did the *Code* and *Charter* allow the City to do what it did? If not, what were the Board's options?

It was undisputed that much of this case was about optics: aside from the OPA and ZBA under appeal, a web of other controls limited any social service provider's ability to build anyway – to the point that ACTO's Mr. Gladki called the impugned instruments "window dressing". Whether the OPA and ZBA stood or fell, actual prospects for the neighbourhood were not expected to change much. The Board's Order was, however, expected to represent vindication – of what the City called a "legitimate exercise of municipal zoning powers", but what ACTO treated as "test case litigation... in the area of housing and shelter rights".

ACTO invited the Board to look behind the motives of the City, and neighbours, to find that this initiative was driven by NIMBY. The Board, however, is circumspect: bad faith is never presumed. In any event, the Board is satisfied that matters can be resolved on more objective legal/planning grounds.

6.2 Issue 1 – Concentration

Was the City in error, in believing there was an over-concentration of care facilities in this neighbourhood, compromising its residential mix?

The statistics appear modest. An area where 8% of residents are disabled, and 12% live in assisted housing, is hardly unique in Ontario; many areas have more dramatic figures. Even in the Kitchener downtown area, Cedar Hill does not have the highest such statistics, but the second-highest.

The Board is unwilling, however, to challenge the judgment of the Council of the day. Although Cedar Hill is only one of seven Downtown planning areas, and the smallest, it had 53% of the care facilities in the Downtown, and 23% of the entire City's.

More importantly, care facilities are, in key respects, like hospitals: they are designed to meet certain community needs of a physical, psychological and/or sociological nature. Although Provincial policies and expert advice guide optimal allocation, the ultimate geographic deployment is usually a decision within the municipality's discretion to reach, within reason. It is no more unseemly

for a municipality to conclude that there was a geographic imbalance in care facilities, than it would be to conclude that its hospitals were too centralized.

The Board therefore takes no exception to Council's finding that the neighbourhood needed a different mix.

6.3 Issue 2 – Positive Action for Decentralization of Facilities

Having found that the City was within its rights to address concentration, the next question was what to do about it. In the parlance of the hearing, it could introduce "carrots" and/or "sticks" – “carrots" to entice a broader decentralization of facilities, and/or "sticks" to restrict such activities in the neighbourhood itself.

The "carrots" side of the equation was unchallenged. Indeed, ACTO's Counsel and witnesses spoke favourably, in principle, of any positive initiatives in that regard. ACTO’s witness Mr. Gladki said “I don’t have a problem with dispersal”. On cross-examination, he called decentralization “a good thing”.

The Board agrees that the City should pursue positive decentralization. Section 3.2.1 of the MOP fully authorized the City to "*decentralize*" facilities, to pre-empt what the City, in another document, labeled a facilities "ghetto". The Board finds the merits of that OPA feature undisputed.

However, it is appropriate to develop this policy thrust further, for three reasons. First, more development of such policy was a constant theme of expert advice in the Study and among municipal staff. Even at the hearing, there was acknowledgment of the paucity of the existing policy framework. Although the City’s Mr. Willmer said with clear pride, that "with no other policy or financial incentives, we have been able to achieve a broad distribution of group homes", that statement underscores the absence of "other policy", and begs the question of what would be feasible if “other policy” existed. The Board also finds that the repeated calls for the second study, from the experts including municipal staff, clearly anticipated further policy development.

The second reason for the City to revisit the subject is to assure cohesion with and among the various uncontested aspects of the City initiative. For

instance, OPA 58 had included two other important undisputed items. Paragraph 10 (i.e., proposed Policy 13.3.1.10) stated:

> That any new duplex dwelling, or multiple dwelling with less than 6 units, are encouraged to be occupied by the property owner.

Next, in the OPA adopted by Council (Exhibit 5, Tab 31), there were references to the Cedar Hill Secondary Plan, which had included a list of Land Use Designations, at Policy 13.3.3. The City wished to delete the "General Industrial" designation from that list. That "housekeeping" deletion, referred to at Subsection 4(1)(h) of OPA 58, again elicited no dispute.

The ZBA had also rezoned lands at St. Joseph's School. There were certain last-minute modifications. That site-specific rezoning had one aspect in common with disputed Sections of the ZBA, namely an apparent restriction on counseling services by social service establishments. On the other hand,

- The terms had been negotiated directly between the City and the School Board (Exhibit 50); and
- More importantly, the Board heard no objection from ACTO or any other Appellant.

However, the Board was not advised of any opportunity, on the part of the City, to integrate those disparate elements into a coherent policy.

The third reason to revisit such policy is the lapse of time. The initiative dates from 2005 – or 2003, if one reckons from the date of the Interim Control By-law. After these many years, the current Council may have further thoughts.

To recap, the Board agrees with the desirability of positive planning instruments to promote wider and less centralized distribution of care facilities, lodging houses etc. The Board also finds that it would be appropriate to be more precise in what the City wishes its policy thrust for decentralization to say, and it will presumably wish to update its wording accordingly. The mechanics are provided for, at the end of this Decision.

6.4 Issue 3 – The Neighbourhood Trajectory Theory

The Board has found that the clear wording of the MOP authorized it to pursue decentralization for decentralization's sake.

That begs the question: if the City was so authorized *regardless* of any theories about a supposed "neighbourhood trajectory" or its causes, then why did the City even *need* to invoke any other rationale than decentralization?

The Board finds no such need. The controversial theory about care facilities causing a "downward trajectory" was superfluous. For *Planning Act* purposes, it is hence unnecessary for the Board to probe into its merits.

That is fortunate for the City, because the theory had evidentiary problems. The Study itself had stopped short of suggesting hard evidence of any cause-and-effect relationship between care facilities and the "trajectory": the closest it came was to suggest:

> The U.S. Department of Housing and Urban Development… looked at the impact of supportive housing on neighbourhood property values and crime rates.

HUD comments on U.S. "projects" led the Study's authors to hypothesize a similar cause-and-effect relationship in Cedar Hill; but in testimony, Dr. Filion picked his words carefully: "We cannot prove this relationship, but in reviewing the (U.S.) literature, there may well be a connection". However, there are hazards in assuming that the dynamics of an area like Cedar Hill in Kitchener are the same as, say, Watts in Los Angeles or Pruitt-Igoe in St. Louis. More conclusively, when asked on cross-examination if there was a "clear causal link" in the literature between care facilities and crime, Dr. Filion's answer was no. At the hearing, conclusive proof of a relationship between care facilities and a "downward trajectory", was neither claimed, nor found.

To recap, the theory of downward trajectory is superfluous to the City's case. The Board closes the book on that question.

6.5 Issue 4 – Restrictive Measures

The disputed provisions dealt not with “carrots”, but “sticks”; but not all restrictions (“sticks”) were in dispute, notably By-law enforcement (e.g. licensing, and maintenance/occupancy standards). The Board heard no hint of opposition on that point. By-law enforcement appears to represent a worthy prospective addition to the overall strategy under Issue 2, mentioned earlier.

For example, if ten lodging houses in Cedar Hill were operating illegally, where was By-law enforcement there? And if those landlords ignored licensing, what *other* requirements were they ignoring? At the risk of speculation, improvements on that account might have been part of the "multifaceted" approach that had been repeatedly recommended.

The measures in dispute, however, were different. The City initiative excluded three groups/populations from new development in the neighbourhood:

- **Persons with mental or physical disabilities**, who are (without dispute) the primary users of "residential *care* facilities";
- **Recipients of public assistance,** who were the primary users of *assisted* housing and lodging houses; and
- **Social service establishments**, of all kinds.

Having undertaken to produce an OPA and ZBA to restrict the above, did the City and Region then also pay the required attention to statutory considerations? Indeed, for this initiative, did the City *plan*?

Implicit in ACTO’s 181-point argument was a challenge to that premise on several fronts, at the level of

- Intent,
- Preparation, and
- Implementation.

Before assessing that fundamental challenge, it is useful to begin with first principles. Both the *Planning Act* and PPS apparently found it unnecessary to define the word "*planning*"; however, in common parlance, and in the definition of the verb "to plan" (*Shorter Oxford English Dictionary*), it means “to arrange beforehand”. That interpretation is consistent with Section 16 of the *Act*, which says Official Plans contain goals, objectives and policies “to manage and direct physical change”. It is also consistent with the PPS, which refers to pursuing a “vision”, based on a “policy-led system”, for “wisely managing change and promoting efficient land use and development patterns".

In contrast to the *Act’*s scant wording on what that intellectual exercise *does*, both the *Act* and PPS specify what that exercise *contains*, notably in preparing a planning instrument. The legislation contains specific instructions concerning what, in a corporate context, might be called due diligence – or, more colloquially, homework. Those provisions are in three categories:

- Analysis which shows **“regard”** for Provincial interests specified at Section 2 of the *Planning Act.* (Section 2.1 now also says there must also be “regard” to relevant decisions of a Council or approval authority, and to “supporting information and material” thereto.)

- Verification that the proposed measures are **“consistent”** with the PPS, under Section 3(5) of the *Act*; and

- Analysis of whether the measures **“conform”** to the relevant Official Plan(s), under Section 24(1) of the *Act.* (Section 12 of the *Places to Grow Act* now also says Official Plans must also “conform” to a Growth Plan under that *Act*.)

Those categories of policy parameters are the objective standards which the Board is mandated to apply. Although conventional wisdom often assumes that the Board acts on the basis of sweeping discretionary authority (an assumption which may arguably have been more accurate decades ago), the *Planning Act* now says differently: it declares, at Section 1.1 (b), that Ontario's is a "planning system led by Provincial policy"; and the PPS reasserts that this system is "policy-led". The Board gives effect to that policy; it does not invent it.

First, Section 2 outlines “Provincial interests” which municipalities and the Board “shall have regard to”. One such “interest”, at Subsection 2(h.1), is

> the accessibility for persons with disabilities to all facilities, services and matters to which this Act applies.

What does this statutory obligation of “regard” entail? In ***Concerned Citizens of King Township v. Township of King*, 42 O.M.B.R. 3 (Div. Ct.)**, the Divisional Court considered the definition of the phrase “have regard”:

> The question is whether the planning authorities and the OMB must seriously, conscientiously, and carefully consider the Provincial policy guidelines or whether it is sufficient simply to pay lip service to them… To "have regard to" falls somewhere on the scale that stretches from "recite them then ignore them" to "adhere to them slavishly and rigidly".

The Court agreed with the finding in ***Ottawa-Carleton (Regional Municipality) Official Plan Amendment 8 (Re)*, (1991) 26 O.M.B.R. 132,** repeated by the Divisional Court in ***Juno Developments (Parry Sound) Ltd. v. Parry Sound (Town),* (1997) 30 O.M.B.R. 1** (Div. Ct.), that the phrase “having regard” to policies means:

> To consider them carefully in relation to the circumstances at hand, their objectives and that the statements as a whole, and what they seek to protect... then to determine whether and how the matter before it is affected by, and complies with, such objectives and policies, with a sense of reasonable consistency in principle.

The next provision of the *Act* on point is Section 3(5). It says decisions of Councils and the Board must not only have “regard”, but “shall be consistent” with the PPS. For example, PPS Policy 1.1.1(f) calls for:

> Improving accessibility for persons with disabilities… (and)
>
> Removing and/or preventing land-use barriers which restrict their full participation in society....

Next, Section 24(1) of the *Act* says that “no By-law shall be passed for any purpose that does not conform” with the Official Plan. The City’s Municipal Official Plan (MOP) calls for:

> Community design… which makes housing accessible to all residents regardless of their physical developmental and sensory abilities (Section 1.4.3), (and)
>
> A wide range of other facilities required in a City to meet the social... needs of its citizens.... The City recognizes the importance of these facilities and shall endeavour to make provisions for them throughout the community (Section 3.2).

So did the City's initiative (i) have "regard" to Provincial interests above, (ii) was it "consistent" with that PPS policy, and (iii) did it conform to MOP purposes? Did municipal authorities comply with the preparatory provisions required by law?

Municipal professionals knew those instructions. The paper trail contains ample reflection on whether, e.g., the initiative was consistent with PPS policies on intensification (which were well provided for). But what about the other objectives? 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 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.

When cross-examined on where the Study had analyzed impact on users, co-author Dr. Filion replied there was no such analysis: "That's a mistake on our

part"; but he added that the topic had not been in the Study's Terms of Reference. In follow-up, when Counsel for ACTO asked him to confirm that there had been no discussion of impact on users, Dr. Filion answered: "You're right".

In fairness to Dr. Filion and the other professionals, there was supposed to be an entire second study. That was a constant theme of the documents throughout those years (the Study, Minutes, and municipal correspondence). That "social impact" study never materialized. It is a matter of conjecture whether that second study would have addressed all the necessary components of the *Act,* PPS, and MOP; the only certainty is that the City did not analyze all the issues that the professionals had recommended, as a matter of "high priority".

That, in turn, is not to suggest that the Council of the day was oblivious to that recommendation either. On the contrary,

- The proposal for the second study was formally and overtly before Council, at its Meeting of May 9, 2005;

- Whereupon Council formally *excised* it from the City's work plan.

That is problematic. Although Board appeals often involve claims that preparation for planning instruments was inadequate (often a question of interpretation), it is another matter when the evidence of regard is non-existent. In this case, the concern is not that the public record on compliance (with those requirements of the *Act,* PPS and MOP) was perfunctory, but that it was blank.

The Board is unable to find that the two municipal governments paid the attention to statutory considerations required by law, before approving the OPA and ZBA. Not only does the paper trail lack evidence of regard; but as ACTO pointed out, the one time that City Council faced the prospect of pursuing such topics further (the proposal for a second study), its response was an overt refusal to delve into them. Where was the evidence of Council "regard", let alone "consistency"? The Board finds even less evidence of "regard" or "consistency" in this case than there was in the *Township of King* case.

Furthermore, 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, but with the very concept of "*planning*".

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

6.6 Follow-up to the Question of Preparation

Counsel for the City acknowledged the paucity of the paper trail, but advanced three further arguments. First, even if there were a failure of "regard" and/or "consistency" *at the time of adoption* of the OPA and ZBA, this was allegedly "curable" if attention was paid *subsequently* – even at this Board hearing itself. This, they said, was the necessary corollary of the Board's process being "*de novo*".

Furthermore, they argued that both before and after May 2005, there had otherwise been sufficient provision for "regard" and "consistency", on two accounts. First, the fact that impact on the disabled was not *written down* didn't prove it was ignored; indeed, the planners testified that the subject had been amply in their thoughts. And what were those thoughts? The planners' argued that the City and Region had adequately provided for the objectives of the *Act* and PPS, by simply not banning care facilities elsewhere:

- "The fact that the uses are permitted elsewhere satisfies the test".
- Furthermore, the planners posited that "the overall impact on the ability to deliver services was negligible in light of the broader public interest in the amendment".

But first, was a failure of "regard" "curable" retroactively? Did subsequent consideration of the topic – even at the late stage of the Board hearing – redeem earlier shortcomings? And even *if* a failure of attention to statutory considerations (at the time of adopting the OPA and ZBA) were "curable" retroactively (a counterintuitive proposition for a statute about arranging *beforehand*), did the planners' two substantive arguments actually "cure" that problem? Did those thoughts "satisfy the test" of attention to statutory considerations, for regard/consistency to "improving accessibility" and "removing barriers" etc.?

The Board is unconvinced that those staff thoughts, presented at the hearing, “cured” anything. *Council,* not staff*,* is the primary spokesperson for any municipality. The *Act* imposes the duty to "have regard" or “be consistent” on *Council’s* Decisions; the Board was not shown how activities in some *other* venue – unconnected to Council – could relieve Council of shortcomings in its own statutory duty. For good measure, Section 2.1 of the *Planning Act* points the Board specifically at what Council decided, and the supporting information/ material thereto. Staff members could have whatever thoughts they wanted, but the Board was not persuaded that these spoke for the municipality – particularly in the face of a Council vote refusing a study to commit such thoughts to writing.

As to the substantive merits of those thoughts, the municipal argument that the “test had been satisfied” might have been more compelling, if municipal professionals had not repeated for years that there should be a second study. Why did professional opinion hold, so consistently, that there was unfinished business? Although those calls did not demand that findings of the second study precede any Council action, there was no hint – during the four-week hearing – that this further analysis was expendable. The Board finds that professional opinion had been unanimous that more preparation was expected.

Next, what were the substantive merits of the planners’ two arguments,

- That it would have been sufficient merely to observe that the affected population could “go elsewhere”?

- Or that questions about this population’s future were “outweighed”?

The Board does not find that those two arguments “satisfy the test”. The PPS specifically refers to "improving accessibility" and "removing barriers" – both manifestly proactive measures; so the PPS required some thought, on how this initiative complied with those positive objectives. The question is this: can one fulfill the municipal duty to “improve” accessibility, by simply declining to decrease accessibility elsewhere? Does that "satisfy the test"? Can one fulfill a positive obligation of “improvement" by doing nothing – on the premise that one hasn't worsened matters elsewhere?

The logic of that argument was not shown. If it were true, one could satisfy all requirements of the PPS by doing nothing at all. The Board was given no authority for such a notion. It is not sufficient to suppose that the statutory criteria have been met, by the mere fact that no similar measures have been introduced in other districts. Furthermore, that approach has nothing to do with "arranging beforehand", or "managing change"; from all appearances, it is not "planning".

Nor was the Board shown that one may downplay a stated requirement of the *Act* or the PPS, by announcing that it was “negligible in light of the broader public interest”. That is the path to ignoring stated Provincial interests altogether.

In short, in terms of “regard”, “consistency” and “conformity”, the Board found no sufficient evidence on which to say that OPA 58 and the ZBA "satisfied the test" for attention to statutory considerations, either before *or after* adoption of those instruments. As described later, however, the Board will provide the municipalities with the opportunity to address those gaps.

6.7 "People Zoning" and the *Planning Act*

ACTO challenged not only the City’s preparation, but also its planning intent. It called the City initiative "people zoning". The City acknowledged “that municipalities cannot lawfully engage in ‘people zoning'…, (but) there is nothing in the instruments before the Board which purports in any way to regulate the *relationship* between persons".

This concern about “people zoning” stems from the Supreme Court of Canada decision in ***Bell v. The Queen*, (1978) 98 D.L.R. (3d) 255**, where the Court struck down a by-law limiting dwelling occupants to family members. The Court agreed with a lower-court Judge who had said the By-law "was not regulating the use of the building but *who* used it". The Supreme Court also agreed with the appellate Judge who said:

> I do not think personal qualification of this type or other personal characteristics or qualities have ever been suggested here as a proper basis for control of density or any issue relevant to land use or land zoning.

In that light, did the municipal initiative target *uses*, or *people* (“personal characteristics or qualities”)? The paper trail is problematic for the City:

- The written "Basis of the Amendment" for OPA 58 did not say *uses* were undesirable,
- but that certain *people* were, namely the “*over-concentration of single-person, low-income households*”.

Furthermore, when asked why counseling services were also being banned from the nearby Mill Courtland area, the City's planner replied that the community did not want social service users walking through the neighbourhood to counseling: "That would add to the negative social environment". That left little doubt that the focus was not on the uses, but the users.

The City argued, however, that this initiative was distinguishable from *Bell:*

- Unlike *Bell*, where the "personal qualification" in question was whether occupants were "family" (hence triggering enquiry into marital/family status, which the Court found inappropriate in a zoning by-law),
- Here, the "personal qualification" was the combination of being low-income and single (as in "single-person household", not in terms of marital status). Counsel for the City said this did not pertain to a "*relationship* between persons", and was hence not “people zoning”.

But was the City using the correct test for identifying “people zoning”?

- The apparent assumption, in the City's argument, was that the test for “people zoning” was whether the zoning pivoted on "*relationships*"; if it pivoted on some personal characteristic *other* than “relationships”, in the City’s argument, it was not “people zoning”.
- However, there is a possibility of confusion. Granted, the question of “distinguishing between persons who are *related* and persons who are *unrelated*” is the correct test elsewhere, under Section 35(2) of the *Planning Act*. But is it the same test for “people zoning”?

- Not according to the wording in *Bell*. The Court's written criterion in *Bell* was *not* confined to "*relationships*", but extended to all "personal qualification of this type or other personal characteristics or qualities". That is clearly a broader test than a simple family "relationship".

The Board saw no planning analysis which assessed this initiative in light of the *Bell* criterion for "people zoning". Similarly, although the characteristic of being in a "single-person, low-income household" would appear (at least at first glance) to be a "personal qualification", the Board saw no municipal rationale to distance this initiative from "people zoning". As a matter of preparation, this question should have been studied further.

As described later, however, the Board will provide the municipalities with the opportunity to address those gaps.

6.8 "Placeholder" By-laws and the *Planning Act*

ACTO also argued that, as to implementation, the City used a questionable mechanism, when it zoned the area for development which it did *not* anticipate – with the overt purpose of empowering Council to consider alternative applications "site by site". "What are we doing", asked ACTO Counsel, "zoning for something that's not going to be built?"

There was no dispute that this was what the City did, intentionally. Counsel for the City replied, however, that Councils often adopted "placeholder" By-laws, outlining as-of-right development which they never expected to materialize – as a device to reserve discretion to treat applications *ad hoc.*

ACTO said that was the equivalent of opting out of "planning", and cited ***Deveau et al. v. Toronto (City),* [2004] O.M.B.D. 569,** where the Board considered a by-law under which Council reserved for itself a site-by-site veto:

> Such a provision runs counter to the essence of what a zoning by-law is; which is to provide definition and clarity as to where in a municipality a use can be situate, and how the structures that accommodate that use can be located on any site.

In *Deveau*, the Board based that conclusion on the Supreme Court of Canada decision in ***Verdun v. Sun Oil Co. Ltd.,*** **(1952) 1 D.L.R. 529**, dealing with a gas station by-law which purported to reserve to Council the right to consider applications on a site-by-site basis. The Court held:

> In enacting it, the City did nothing in effect but to leave ultimately to the exclusive discretion of the members of the council of the City, for the time being in office, what it was authorized by the Provincial Legislature… to actually regulate by by-law. Thus, s.76 effectively transforms an authority to regulate by legislation, into a mere administrative and discretionary power to cancel by resolution, a right which,….. could only…be regulated.

The Board added that the above "statement of principle" was confirmed in ***Re Neon Products Ltd. and Borough of North York et al.*** **(1974) 5 O.R. (2d) 736**, where the Ontario Court of Appeal disallowed what it called a Council's attempt

> to confer on itself a power to discriminate that wholly defeats the purpose of the by-law to prohibit or regulate in accordance with the by-law.

The above quotations appeared to draw placeholder by-laws into question – which, according to Counsel for the City, made no sense. The City also pointed to ***Liptay v. Toronto (City) Committee of Adjustment,*** **[2006] O.M.B.D. 3529**, where the Board called a placeholder By-law "a *de facto* development control mechanism". There, Council had adopted By-law standards stricter than the existing predominant building form, with the overt intent of creating a "process to take place (to) allow changes" *ad hoc*. An applicant then obtained a variance (with "no City concerns") – but neighbours appealed, saying the applicant should be *held* to the new standards. The Board was unconvinced that this was the By-law's intent, and authorized the variance. Counsel for the City also cited ***R. v. Konakov*****, [2004] O.J. No. 114 (C.A.),** where the Court of Appeal dealt with a body rub parlour By-law intended "to enable Council to consider the impact of the proposed use on a case by case basis". The Court upheld that by-law, on the premise, among others, that an unsuccessful rezoning application in this site-by-site process would still have an objective recourse:

> The Ontario Municipal Board (would still)… have jurisdiction to deal with a refusal to amend the By-law to permit a site-specific use on the basis the refusal was not related to a legitimate planning purpose or otherwise amounted to impermissible discrimination.

The above, said Counsel for the City, was authority for placeholder by-laws, "to require applications for site-specific zoning amendments on a case-by-case basis *as an alternative to pre-zoning specific areas or sites*".

The Board was not convinced that it had been shown sufficient legal authority to either support or challenge the placeholder mechanism. *Liptay* was about a variance; it was *not* a finding on the appropriateness of the placeholder mechanism; nor was the Board persuaded that upholding the body rub parlour by-law in *Konakov* was authority for placeholder by-laws generally.

The *Planning Act* already has mechanisms for Councils to deal with temporary situations, situations *ad hoc*, and/or ones involving more hands-on control, e.g. “H” (Holding) provisions at Section 36, site plan control by-laws under Section 41, and the Development Permit System at Section 70.2 (which the City had considered). However, each of those Sections of the *Act* still outlines predictable parameters: planning is, after all, still about "arranging beforehand". Holding by-laws and Development Permit by-laws are exceptional, however; the primary thrust of planning is to replace *ad hoc* decision-making with a “policy-led” system of forethought and predictability. A placeholder by-law does the exact opposite: it sets out an as-of-right use which is precisely *not* what the municipality is planning for. Its purpose is to *avoid* offering predictability, so that it can instead vest discretion – but without the statutory framework of Sections 36, 41, or 70.2.

The Board expresses no opinion on the validity of the placeholder mechanism at this time. The Board observes, however, that in preparing a by-law, it is normal to cite the authority under which the by-law is adopted. As will be described later, the Board is providing the City with the opportunity to amplify its planning analysis; so this topic would be a logical component of that amplified analysis, and would presumably include some discussion of why this approach escapes the Supreme Court’s criticism, in *Verdun v. Sun Oil*, of attempts “to transform an authority to regulate by legislation into a mere discretionary power”.

6.9 The *Code* and *Charter*

The binding authority of the Ontario *Human Rights Code* (the *Code*), and of the *Canadian Charter of Rights and Freedoms* (the *Charter*), was largely

undisputed in this case. In ***Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504**, the Supreme Court of Canada said:

> Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the Courts: see *Douglas College, supra*. In LaForest J.'s words, "there cannot be a Constitution for arbitrators and another for the Courts".

That Court also quoted, with approval, the following from McLachlan J. in ***Cooper v. Canada (Human Rights Commission),* [1996] S.C.R. 854:**

> The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful for ordinary people, then it must find its expression in the decisions of these tribunals.

Similar reasoning was applied to the *Code*. In ***Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513**, the Supreme Court of Canada held:

> The importance of the *Code* is not merely an assertion of this court. The Ontario legislature has seen fit to bind itself in all its agents through the *Code*: section 47(1). Further, it has given the *Code* primacy over all other legislative enactments: section 47(2).

The City, however, argued that the above was moot: its initiative was not discriminatory, and there was no proof of same; even if it were, it was reasonable and *bona fide* in the circumstances; and anyway, the Board had no jurisdiction to reach a finding of invalidity, since that prerogative belonged to the Courts.

Was the municipal initiative discriminatory? The “Basis of the Amendment” had indicated that its purpose was to limit the number of neighbourhood residents who were in certain identifiable groups (namely users of care facilities, supportive housing and assisted housing – i.e., persons with disabilities and/or recipients of public assistance). The City did not deny that these were identifiable groups, or that they were specifically mentioned in the *Code* and *Charter*; but the City argued that since it had not banned similar facilities elsewhere, then

- Why didn't these people just go elsewhere?
- That wasn't discriminatory, was it?
- Besides, if it were an encroachment on human rights, it was just a small one, and for "a greater good".

The world has heard those arguments before. The Board was unconvinced that their potential consequences had been fully considered.

As described later, however, the Board will provide the City with the option of (i) recasting this initiative, and (ii) substantiating same, in accordance with normal attention to the law – and in accordance with whatever new configuration the current Council wishes to give this initiative. The Board expects that in doing so, the City will bear in mind the *Code* and *Charter*; and if *Code* and *Charter* considerations are triggered, the Board expects there will be commensurate analysis, in sufficient depth for Council to make an informed decision.

In light of vigorous debate over the Board's own jurisdiction in *Code* matters, however, the Board feels compelled to clarify. Much of that debate was about *Deveau.* There, a by-law limiting the location of homeless shelters was appealed on grounds including the discrimination argument. The Board Member was asked "to remove the impugned sections to make (the by-law) consistent with the *Charter"*. She replied that the Board had authority to make constitutional determinations when "necessarily incidental to the Board's own jurisdiction", but not where the constitutional factors were "*free-standing*". If a discriminatory provision were in this Board's *enabling legislation* (e.g., the *Ontario Municipal Board Act* or the *Planning Act*), then this Board could refuse to give effect to that provision; but if elsewhere, notably in Council-created subordinate legislation under Board review (the *impugned By-law itself*), then she said the Board

> has no jurisdiction to consider the *Charter* issues as raised before it, nor to accede to the remedy requested. The Board finds that these issues are not issues that should have been brought to the Board or considered in this forum. This is a matter that should go directly to the courts… once the final form of the by-law has been determined by this Board on planning principles.

That reasoning raised questions. Although the Decision cited *Martin*, where the Supreme Court warned against any "need for parallel proceedings before the Courts", why did *Deveau* do the opposite? And why would the admonition against invalidating by-laws "as a *free-standing* issue" even apply to by-law appeals on which the Board was seized? How were the latter "free-standing", and not "necessarily incidental" to the Board's responsibilities?

More importantly, *Deveau* was decided before *Tranchemontagne.* There, initially the Divisional Court had agreed with the Social Benefits Tribunal (SBT) that it lacked jurisdiction to base Decisions on the *Code* (partly due to legal limitations in its mandate). On appeal, the Ontario Court of Appeal concluded that the SBT did not lack jurisdiction, but the topic still would be better addressed in a different forum. The Supreme Court was split: the minority would have dismissed the appeal, but the majority found otherwise. It upheld the tribunal's right – and obligation – to consider the *Code*, without reference to *Deveau*'s jurisdictional distinction between enabling legislation and other legislation:

> The *Code* is fundamental law. The Ontario Legislature affirmed the primacy of the *Code* in the law itself, as applicable both to private citizens and public bodies…. The Legislature has thus contemplated that this fundamental law could be applied by other administrative bodies….
>
> 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 in front of them…. The presumptive power to look beyond the tribunal's enabling statute is triggered simply where a tribunal (with the authority to decide questions of law) is confronted with "issues... that arise in the course of a case properly before" it….
>
> Although consideration of the external source in the present appeal might lead to the inapplicability of a specific provision, this does not imply that the process is analogous to that of constitutional invalidation….
>
> It is undesirable for a tribunal to limit itself to some of the law while shutting its eyes to the rest of the law….

> The SBT is presumed able to consider any legal source that might influence its decision…. Since the SBT has not been granted the authority to decline jurisdiction, it cannot avoid considering the *Code* issues in the appellants' appeals…. The Legislature defines the jurisdiction of the tribunals that it creates and, so long as it defines their jurisdiction in a way that does not infringe the Constitution, it is not for those tribunals (or the Courts) to decide that the jurisdiction granted is in some way deficient…. Tribunals should be loath to avoid cases on the assumption that the Legislature gave them insufficient tools to handle matters within their jurisdiction.

The above appears unequivocal, concerning the expectation that a tribunal – including this Board – would "consider the whole law" of any human rights aspect in a case "properly before it". There is no reference whatever, as in *Deveau*, to "leaving it to any person to apply to the Court for relief"; and there are clear admonitions about declining jurisdiction.

It is premature, at this point, to speculate on how *Code* and *Charter* matters might resurface at the Board. It goes without saying, however, that in the event that they do appear, the Board will follow the lead of the Courts. On the jurisdictional question, *Deveau* has been superseded. The *Code* would appear to prohibit a by-law or planning instrument that had a discriminatory effect, subject to the statutory defence of "reasonableness and *bona fide* under the circumstances", notably undue hardship. 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/requirement/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.

For its part, the Board is as bound by the *Code* as municipalities are, and must conduct itself accordingly.

7. CONCLUSION

The Board has considered the four Issues, and each of the instruments in terms of their intent, preparation, and implementation. The Board has upheld the municipalities on Issues 1 (concentration) and 2 (dispersal). The Board found the City's trajectory theory (Issue 3) superfluous.

On Issue 4 (restrictive measures), the Board has found some such measures acceptable – though they were not the focus of the City's initiative. As for the ones that were central (notably the limitations on facilities for the target population, and the placeholder by-law), the Board has given due regard to the Decision of Council and to the information on which it was based. The Board has found the underpinnings of several City mechanisms unsubstantiated and hence premature, on various grounds. However, rather than dismiss the City's initiative on that basis, the Board considers it more appropriate to offer the City the opportunity to recast its initiative.

The Board therefore directs all the parties to prepare for a "Phase 2" of this hearing. That is an outcome, parenthetically, which is in keeping with the testimony of the City's own planners and consultants:

- It allows the City to conduct at least some of the "high priority" analysis which the professionals recommended for years – including analysis that was intended for the second study;

- It assists the City to articulate its decentralization strategy under Issue 2, which in turn assists in updating relevant wording of the OPA and ZBA;

- It allows the City to consider what other mechanisms are most appropriate at this time – and to pay the attention to statutory considerations that go with those measures;

- Finally, it allows Council to update its file. The restrictive measures in question date from an earlier Council: the Interim Control By-law was adopted in 2003, and the measures under appeal date from early 2005. The current Council may have its own views. The Region too should have the opportunity to update its file.

The Board is prepared to give the municipalities up to fifteen (15) months for the above purpose.

THE BOARD ORDERS:

1. This hearing will reconvene approximately fifteen (15) months from the date of Issue of this Interim Decision. The Board's planner shall consult with the City, the Region and ACTO to set an appropriate date.

2. A date may be set earlier, by agreement of the City, the Region, ACTO, and the Board.

3. The purpose of the reconvened hearing will be to give final consideration to OPA 58 and the ZBA, subject to whatever revisions are advanced by municipal authorities in the interim. That consideration will be guided by the following:

   a) **Issue 1,** concentration, has now been determined, and will not be revisited.

   b) **Issue 2,** decentralization, has now been approved in principle. Merits of that principle will not be revisited.

   c) The wording of municipal instruments for **Issue 2**, positively promoting decentralization, will need revisiting, in light of any further analysis to provide specificity to decentralization strategies.

   d) The Board will not entertain further discussion of **Issue 3** – "trajectory" and its supposed connection to the target population.

   e) On **Issue 4** (restrictive measures), the Board expects further analysis of what the municipalities actually wish to achieve. Some such measures (like enforcement of licensing, maintenance and occupancy By-laws) were undertaken in earlier years (though not mentioned in the OPA and ZBA); reintegrating them into an overall legislative package is not expected to elicit much dispute.

   f) Other restrictive measures, on accommodation for the target population, would need to be supported by appropriate analysis of relevant considerations in the *Planning Act,* PPS and Official Plans. It is not sufficient to suppose that the statutory criteria have been met, by the mere fact that no similar measures were introduced in other districts; nor is it sufficient to assert that statutory

considerations, or policies in the PPS, have been “outweighed”.

g) The mechanics of the measures would also need to be supported by relevant authority. For example, if an initiative is to avoid the label of "people zoning", then the rationale should be outlined – using the correct criterion; and if the desired mechanism is a placeholder By-law, then the analysis should outline proper authority for same.

h) 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".

4. To recap, **“Phase 2” of this hearing will address the following topics:**

i) **Decentralization of facilities (Issue 2):** *consolidated* strategy/measures to attract facilities into other neighbourhoods, including positive measures (enticement) and uncontested negative restrictions (e.g. enforcement of existing By-laws).

ii) **Other restrictive measures (Issue 4):** proposed measures (if any, and updated) to restrict facilities *based on analysis* showing required attention to the Act, PPS and MOP, notably:

- **Regard** for the statutory Provincial interest in accessibility for persons with disabilities to all facilities, services and matters to which the *Planning Act* applies;

- **Consistency** with PPS policies (a) to improve accessibility for persons with disabilities, by removing and/or preventing land-use barriers which restrict their full participation in society, and (b) permitting and facilitating all forms of housing required to meet the social, health and well-being requirements of current and future residents, including special needs requirements;

- **Conformity** with the MOP purposes of (a) taking into account household income and physical and mental health and ability, (b) the need for lodging houses and residential care facilities at appropriate locations in all residential areas, and (c) housing accessible to all residents regardless of their physical, developmental and sensory abilities.

iii) Other restrictive measures, if based on "**personal qualification or other personal characteristics**", would also require analysis showing how they avoid the Supreme Court of Canada's restrictions on "people zoning".

iv) A **placeholder by-law** would require a statement of the enabling authority therefor, and how it avoids the Supreme Court of Canada's admonition against “mere discretionary power”.

v) Restrictive measures targeting the accommodation of persons with a **disability, or in receipt of public assistance**, would require analysis of how they comply with the *Code* and *Charter*.

5. This analysis may appear in such format and in such order as the municipalities consider appropriate. It is not, for example, the Board’s expectation that the analysis would necessarily appear in a series of stand-alone reports.

6. The above is expected to have been approved by City Council by way of Resolution, and by the Regional approval authority. To be clear, however, the Board does *not* consider the above to be new instruments, requiring a new process, new notifications and meetings etc. The

Board's expectation is that City Council and the Regional approval authority will treat this as the unfolding of an existing file, of which the Board remains seized.

7. The Board expects that Counsel for the City, Region and ACTO will exchange updated information in such format and according to such scheduling as they mutually agree upon. If there are difficulties, the Board may be spoken to.

8. To the extent the parties require any further clarification or direction in relation to this Interim Decision, the Board may be spoken to.

9. This Member remains seized.

It is so Ordered.

"M. C. Denhez"

M. C. DENHEZ
MEMBER