

**Local Planning Appeal Tribunal**  
Tribunal d'appel de l'aménagement  
local



**ISSUE DATE:** November 18, 2019

**CASE NO(S):** PL180082

The Ontario Municipal Board (the "OMB") is continued under the name Local Planning Appeal Tribunal (the "Tribunal"), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

**PROCEEDING COMMENCED UNDER** subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Jeff Hodgart
Appellant:	Alexis Leino
Appellant:	Desirée Narciso
Appellant:	Westhaver Boutique Residences Inc.
Subject:	By-law No. BL 1452-2017
Municipality:	City of Toronto
OMB Case No.:	PL180082
OMB File No.:	PL180082
OMB Case Name:	Hodgart et al. v. Toronto (City)

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Subject:	By-law No. BL 1453-2017
Municipality:	City of Toronto
OMB Case No.:	PL180082
OMB File No.:	PL180083

**Heard:** August 26 – September 4, September 9 and October 15, 2019 in Toronto, Ontario

**APPEARANCES:****Parties****Counsel**

City of Toronto (“City”)

Sarah O’Connor, Benjamin Baena and  
Thomas Wall

Fairbnb Canada (“Fairbnb”)

Monica Poremba and Eric Gillespie

Westhaver Boutique Residences Inc.

Jason Cherniak

Whitehall Suites Inc.

Red Maple Suites Inc.

Royal Stays Inc.

Livingsuites Toronto Inc.

IHM Limited

Premium Suites Inc. (“Westhaver”)

Alexis Leino

Sarah Corman and Hilary Brown

Desirée Narciso

Leo Longo

**DECISION DELIVERED BY S. TOUSAW AND ORDER OF THE TRIBUNAL**

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**INTRODUCTION**

[1] The City of Toronto (“City”) passed two Zoning By-laws on December 8, 2017 to regulate the short-term rental (“STR”) of residential premises across the City. Zoning By-law No. 1452-2017 establishes provisions for STRs and applies to all lands in the City. Zoning By-law Amendment No.1453-2017 amends the city-wide Zoning By-law No. 569-2013 and various former municipality zoning by-laws that remain in force. The effect of the by-laws is to permit and regulate STRs in all residential zones and in the residential component of mixed use zones (collectively “residential areas”).

[2] Certain STR operators appealed these zoning by-laws to this Tribunal, and additional Parties, both for and against, were added during the pre-hearing conferences leading up to this hearing.

[3] The abbreviations used in this Decision are listed as follows and are identified again at their first appearance in the text.

“Act” – *Planning Act*

“GP” – A Place to Grow: The Growth Plan for the Greater Golden Horseshoe, 2019

“LNC” – legal non-conforming

“OP” – City of Toronto Official Plan

“PPS” – Provincial Policy Statement, 2014

“PR” – principal residence

“STR(s)” – short term rental(s)

“ZBA(s)” – Zoning By-law No. 1452-2017 and Zoning By-law Amendment No. 1453-2017

“ZBL” or “existing ZBL” – Zoning By-law No. 569-2013 or a predecessor remaining in force

[4] For the reasons set out in this Decision, the Tribunal upholds the decision of the City and dismisses the appeals. No Party in this proceeding disputes that Toronto is experiencing a crisis in the availability and affordability of housing. The provision of housing as places to live for residents is a provincial and City priority. The provision of accommodation as places to stay for visitors must also be addressed, but does not receive the same policy emphasis. In keeping with policy, the ZBAs regulate the primary use of a dwelling unit as a principal residence (“PR”) for a household, while also allowing for the provision of accommodation within a PR to travellers and others requiring short-term accommodation.

## **STR ZONING**

[5] The central dispute focusses on the definition of STR in the ZBAs as follows:

3.(6) Short-term Rental means all or part of a dwelling unit, that:

(A) is used to provide sleeping accommodations for any rental period that is less than 28 consecutive days; and

(B) is the principal residence of the short-term rental operator.  
(ZBA 1452-2017)

[6] The ZBAs permit STRs in a dwelling unit, in up to three bed-sitting rooms in a dwelling unit, and in a secondary suite. The PR requirement also applies to a secondary suite:

4.(3) the secondary suite is exclusively and separately occupied as a principal residence. (ZBA 1452-2017)

[7] By permitting STRs as defined and regulated above, the ZBAs prohibit the use of dwelling units and secondary suites for STR purposes that are not the PR of the operator. The ZBAs intend to stop persons or companies from purchasing or leasing a dwelling unit for the sole purpose of offering STR accommodations year-round. Such operations are variously referred to as “dedicated STRs,” “commercial STRs” or “ghost hotels.” The Tribunal will use the most neutral term, dedicated STRs.

[8] Owners and tenants who reside in a unit as their PR may provide STR accommodations under the ZBAs. Residents of a unit may offer STR accommodations while they are present in the dwelling or while they are away. Both arrangements are referred to as “home sharing.” By operation of the secondary suite PR clause and the STR definition, only the occupant of the secondary suite may operate a STR in the secondary suite. A person who owns and resides in a main dwelling unit would not be permitted to operate a STR in the secondary suite within that dwelling.

[9] A rental period of 28 days or longer is, by definition, not a STR. Any dwelling unit rented essentially on a monthly basis or longer is not affected by these ZBAs.

[10] The City also passed a by-law to establish licensing and registration requirements in the Toronto Municipal Code for STRs. The by-law is to come into force on the date the ZBAs come into effect. The licensing by-law is not before this Tribunal.

[11] This case brings several facts into focus that are relevant to the questions in dispute. While not all witnesses agree fully with the accuracy of these facts, generally the divergence of opinion is relatively narrow and would not alter substantially the Tribunal's reliance on the information when making findings. With these qualifications, the Parties generally agree on the following statements.

- As a snapshot of the STR industry in the City, approximately 21,000 active listings of STRs operated by about 14,000 hosts appeared on popular websites on April 30, 2019 (Airbnb dominates with the vast majority of all listings).
- STR listings in Toronto have tripled since 2015.
- STR offerings are distributed across the City, but with the heaviest concentration in the downtown, including the waterfront, and a secondary concentration in the Yonge Street – Sheppard Avenue area.
- Entire homes or apartments (either home sharing or dedicated STRs) account for two-thirds of all listings. The remainder are individual room STRs.
- Approximately 30% of listings are not in a PR of the operator (i.e., dedicated STRs) and account for more than half of all STR room nights sold.
- Toronto's rental housing vacancy rate is 1.1%, substantially lower than 3% considered to be a healthy vacancy rate, with implications for availability and affordability of rental housing.
- About half of Toronto's population lives in rental housing, accommodated in over 500,000 rental housing units, previously the majority in purpose-

built rental housing (primary rental market) but declining in market share given the rise of rented condominium units (secondary rental market).

- Almost 90% of visitors to Toronto come to see friends and relatives (46%), for pleasure (27%) or for business (15%).
- Toronto hotels sell approximately 6.7 million nights annually (2016), and STRs sell approximately 1.8 million nights annually (2018).
- Toronto hotels maintain an occupancy rate of 78%, well above the industry average. The rate of hotel growth has not kept pace with increases in population or jobs in the City. Hotel supply in the downtown has not increased for several years.

## **LEGISLATIVE TESTS**

[12] In making a decision under the *Planning Act* (“Act”) with respect to these appeals, the Tribunal must have regard to matters of provincial interest as set out in s. 2 of the Act and must have regard to the decision of the approval authority and the information considered by the approval authority under s. 2.1(1) of the Act.

[13] The decision must be consistent with the Provincial Policy Statement, 2014 (“PPS”) and must conform or not conflict with A Place to Grow: The Growth Plan for the Greater Golden Horseshoe, 2019 (“GP”) under s. 3(5) of the Act. Under s. 24(1) of the Act, the ZBAs are required to conform with the City of Toronto Official Plan (“OP”). On the basis of these tests, the Tribunal may make a finding on whether the ZBAs constitute good land use planning.

## **WITNESSES**

[14] Eleven witnesses testified at the hearing, comprising six experts who were qualified by the Tribunal in various disciplines, three Appellants who operate dedicated

STRs, and two Participants, both of whom also operate STRs.

[15] The City called three staff experts in support of the ZBAs. Caroline Samuel, Registered Professional Planner (“RPP”) and Senior Planner, Zoning Section, City Planning, was qualified to provide opinion evidence in the area of land use planning. Larissa Deneau, Manager, Policy and Research, Economic Development and Culture, was qualified to provide opinion evidence in the area of economic development and tourism policy. Narmadha Rajakumar, Senior Planner, Strategic Initiatives, City Planning, was qualified to provide opinion evidence in the area of housing policy.

[16] In support of the ZBAs, Fairbnb called Dr. David Wachsmuth, a professor of planning at McGill University and a leading Canadian academic on STRs. Dr. Wachsmuth was qualified to provide opinion evidence in the areas of planning and urban governance.

[17] A brief *voir dire* was held on Dr. Wachsmuth’s eligibility to provide opinion evidence in planning as challenged by Alexis Leino with support of Westhaver. The Tribunal recessed to review Dr. Wachsmuth’s qualifications and returned to qualify him as noted above, with assurance to the opposing Parties of a full opportunity to cross-examine the witness and to make arguments as to the weight to be given to his evidence.

[18] Against the ZBAs, Westhaver called Michael Manett, RPP, who was qualified to provide opinion evidence in the area of land use planning and Appellant Clarence Westhaver who testified to his business of operating dedicated STRs.

[19] Appellant Alexis Leino testified to his operation of a dedicated STR in his basement secondary suite, and also called Peter Thoma, RPP and land economist, who was qualified to provide opinion evidence in the areas of land use planning, land economics, economic impact and market analysis.

[20] Appellant Desirée Narciso testified to her operation of dedicated STRs in two

basement suites.

[21] Participant Wayne Murdock spoke to his current operation of three dedicated STRs in condominium buildings. Participant George Mazomenos spoke to his STR of a part of his own dwelling as well as a dedicated STR in another dwelling.

## **FUNDAMENTAL POSITIONS**

[22] In this contest, the Parties begin from fundamentally different positions on two overlapping issues:

- Does the existing ZBL, before the passing of these ZBAs, permit STRs?  
and,
- Is a dedicated STR, where the dwelling unit is not the PR of the operator, a commercial use?

[23] To the first question, the Appellants argue that the existing ZBL contains no limitation on the length of stay permitted in a dwelling unit. They rely on the ZBL definition of dwelling unit with its reference to “living accommodation” to contend that so long as the unit is used for the habitation of persons, the residential use is permitted whether the occupants reside there for one day or 365 days. Mr. Manett opines that the ZBL only regulates residential building types and does not restrict the tenure or duration of occupancy. Thus, the Appellants posit that the existing ZBL permits STRs and the ZBAs move to prohibit some of these permitted rental arrangements.

[24] In contrast, the City focusses on the distinction in the ZBL between “living accommodation” with reference to dwelling units, and “sleeping accommodation” required by the “travelling public” with reference to tourist homes and hotels. The City submits that dwelling units are where people “live,” whereas other forms of accommodation such as tourist homes or hotel rooms are where people “stay” while travelling or otherwise residing temporarily in a location.



[25] The City notes that the structure of zoning by-laws authorizes only those uses listed as permitted in a particular zone and that permitted uses may not be interpreted as including another use. The absence of a specific use permitting STRs and the permissions for a tourist home, for example, as a different use than a dwelling unit, are cited as supporting the City's position that the existing ZBL does not permit STRs.

[26] To the second question, the Appellants prefer the term "dedicated" STR rather than "commercial" STR when referring to an STR that is not someone's PR. Similar to their positions above, the Appellants argue that the use of a dwelling unit by a guest for a short period of time is identical to the use by an owner or tenant for a longer period. Both are residential in nature and use a dwelling unit for its intended purpose of living. They argue that whether the unit happens to be someone's PR is irrelevant and at no time is the use not residential.

[27] The City takes the opposite view. The PR requirement ensures that the use remains residential by requiring the dwelling unit to be a place of living first, and only secondarily as a place for travellers to sleep or otherwise stay. The City sees the ZBAs as permitting home sharing without derogating from the primary purpose of residential areas, and prohibiting commercial STRs where people stay but where no-one actually lives. The City considers dedicated STRs as commercial uses akin to a hotel.

[28] In short, the Appellants view the ZBAs as substantially restricting what is currently allowed, while the City views the ZBAs as introducing flexibility and opportunity with the newly permitted land use of STRs.

## **ISSUES, ANALYSIS AND FINDINGS**

[29] The Procedural Order ("PO") presented on consent and approved for this hearing contains some 32 issues under various headings. Some issues overlap and intertwine with other issues. Often the same planning, housing or economic evidence is used to support a Party's position in relation to several issues. Each of the witnesses in their evidence and counsel in their argument approached the issues in various combinations,

owing to the inherent complexity and subtlety of the connections between issues. The Tribunal does the same in addressing the array of issues through the subsections that follow.

[30] While foreshadowing some of what is to come, the Tribunal is not bound to answer every issue listed in an approved PO. A review of the issues must be sufficiently complete to arrive at a supported and reasonable conclusion relative to the legislative tests for the planning instruments in question. The Tribunal carries an obligation to consider all of the issues, and after due consideration of the facts and arguments, may find that it is unnecessary or inappropriate to answer a particular issue. In such cases, reasons should be given and that approach is employed here. With a few of the issues, the Tribunal finds that it either cannot answer a question on the evidence available, or should not answer a question on the basis of law.

### **Policy Environment**

[31] The provincial and local planning documents provide a hierarchical and cascading set of policies and provisions that, in their totality, provide the basis and context for these contested ZBAs. The relevant sections of various documents are reviewed with reference to the positions advanced by the Parties.

[32] Starting with the Act, residential unit is defined in s. 1(1) as follows:

“residential unit” means a unit that,

- (a) consists of a self-contained set of rooms located in a building or structure,
- (b) is used or intended for use as a residential premises, and
- (c) contains kitchen and bathroom facilities that are intended for the use of the unit only.

[33] This term is used in s. 16(3) of the Act requiring official plans to contain policies allowing two residential units in a detached house, semi-detached house or rowhouse or in a building ancillary to these house types.

[34] Under s. 2 of the Act, regard must be given to matters of provincial interest. Ms. Samuel and Ms. Rajakumar point to:

- (h) the orderly development of safe and healthy communities;
- (j) the adequate provision of a full range of housing, including affordable housing; and
- (p) the appropriate location of growth and development.

[35] In addition, Mr. Manett directs attention to:

- (i) the adequate provision and distribution of educational, health, social, cultural and recreational facilities.

[36] Section 3(5) of the Act requires that a decision affecting a planning matter “shall be consistent with” the PPS and “shall conform with” or “not conflict with” the GP. The Parties agree that the relevant PPS policies in this case are as follows.

- 1.1.1 Healthy, liveable and safe communities are sustained by: ...
  - b) accommodating an appropriate range and mix of residential (including second units, affordable housing and housing for older persons), employment (including industrial and commercial) ... and other uses to meet long-term needs;
- 1.3.1 Planning authorities shall promote economic development and competitiveness by:
  - a) providing for an appropriate mix and range of employment and institutional uses to meet long-term needs;
  - b) providing opportunities for a diversified economic base, including maintaining a range and choice of suitable sites for employment uses which support a wide range of economic activities and ancillary uses, and take into account the needs of existing and future businesses; ...
- 1.4.3 Planning authorities shall provide for an appropriate range and mix of housing types and densities to meet projected requirements of current and future residents of the regional market area by: ...
  - b) permitting and facilitating:
    - 1. all forms of housing required to meet the social, health and well-being requirements of current and future residents ...
- 1.7.1 Long-term economic prosperity should be supported by:
  - a) promoting opportunities for economic development and community investment-readiness; ...
  - g) providing opportunities for sustainable tourism development; ...

[37] The GP contains similar policy directions, with the City's witnesses emphasizing housing policies and the Appellants' witnesses highlighting both housing and economic policies.

[38] The GP Vision seeks "an increase in the amount and variety of housing available" and a "sufficient housing supply that reflects market demand and what is needed in local communities." Vibrant urban centres will "provide a diversity of opportunities for living, working and enjoying culture" and collectively, the Greater Golden Horseshoe ("GGH") "will function as Canada's principal international gateway" and "centres of influence for commerce, culture and innovation." Its guiding principles include:

- Provide flexibility to capitalize on new economic and employment opportunities as they emerge, while providing certainty for traditional industries, including resource-based sectors.
- Support a range and mix of housing options, including second units and affordable housing, to serve all sizes, incomes and ages of households.
- Provide for different approaches to manage growth that recognize the diversity of communities in the GGH.

[39] For planning and managing growth, the GP assigns a population forecast of almost 3.2 million persons to Toronto, or about one-third of the regional population by 2031 (s. 2.2.1.1). The second principle above related to providing a range and mix of housing for all types of households is repeated in the Growth Management policies (s. 2.2.1.4(c)) and in the Housing policies below. The Housing policies (s. 2.2.6) require municipalities, in consultation with stakeholders, to:

- a) support housing choice through the achievement of the minimum intensification and density targets in this Plan, as well as the other policies of this Plan by:
  - i. identifying a diverse range and mix of housing options and densities, including second units and *affordable* housing to meet projected needs of current and future residents; and
  - ii establishing targets for *affordable* ownership housing and rental housing;

- b) identify mechanisms, including the use of land use planning and financial tools, to support the implementation of policy 2.2.6.1a); ...
- d) implement [these policies] through official plan policies and designations and zoning by-laws.

[40] In the OP the professional witnesses again largely agree which policies are relevant. The City underscores the provision of housing for residents while the Appellants balance that with the cultural, tourism and business needs of the region.

[41] Section 2.1 of the OP, Building a More Liveable Urban Region, sets the context for housing on a regional basis “to offer a broader choice of housing type, tenure and affordability, both within Toronto and beyond” and cites the important role of the City in “fields as diverse as education, health, culture, entertainment, tourism and retailing.” The policies call for the City, with its municipal and provincial partners, to address growth which:

...

- b) makes better use of existing urban infrastructure and services; ...
- f) encourages GTA municipalities to provide a full range of housing types in terms of form, tenure and affordability, and particularly encourages the construction of rental housing in all communities;
- g) increases the supply of housing in mixed use environments to create greater opportunities for people to live and work locally; ...

[42] In accordance with the GP, s. 2.1.3 of the OP repeats the projections:

Toronto is forecast to accommodate 3.19 million residents and 1.66 million jobs by the year 2031.

[43] The non-policy discussion within s. 3.2.1 of the OP provides context for the Housing policies. It states that ownership housing, especially condominium apartments, is in abundant supply and calls for a healthier balance of housing including purpose-built rental housing. It recognizes that these unmet housing needs require “policies, incentives and assistance,” because “more than half of Toronto households rent, yet little new affordable rental housing is being built.”

[44] What the OP identified as issues and context in 2010 is now referred to as a “housing crisis” by the professional witnesses, making the other contextual statements of s. 3.2.1 even more pertinent today:

**Preserving what we have** - As long as there is insufficient new supply to meet the demand for rental housing, our existing stock of affordable rental housing is an asset that must be preserved. In this sense, rental housing is not unlike our heritage buildings – we need to do all we can to prevent the loss or deterioration of units.

**Making efficient and effective use of the City’s own housing resources to achieve a range of housing objectives** – The private sector cannot meet the housing needs of our most vulnerable populations  
...

[45] The witnesses refer to the following housing policies in s. 3.2.1 of the OP:

1. A full range of housing, in terms of form, tenure and affordability, across the City and within neighbourhoods, will be provided and maintained to meet the current and future needs of residents. A full range of housing includes: ownership and rental housing, affordable and mid-range rental and ownership housing, social housing ...
2. The existing stock of housing will be maintained, improved and replenished. The City will encourage the renovation and retrofitting of older residential apartment buildings. New housing supply will be encouraged through intensification and infill that is consistent with this Plan.

...

10. Second units will be encouraged in order to increase the supply and availability of rental housing across the city and within neighbourhoods. Second units may be provided within a primary dwelling in a detached or semi-detached house or townhouse. Second units may also be provided within a building that is ancillary to a detached or semi-detached house or townhouse where it can be demonstrated that it will respect and reinforce the existing physical character of the neighbourhood.

[46] The Appellants point to the OP’s economic policies in s. 3.5.1:

1. Toronto’s economy will be nurtured and expanded to provide for the future employment needs of Torontonians and the fiscal health of the City by: ...
  - j) recognizing the full diversity of employment activities that are increasingly taking place in non-traditional employment areas, such as homes and public spaces, and strengthening the necessary regulatory frameworks and policies to support this employment.

[47] The Appellants also point to s. 3.5.2 Creating a Cultural Capital which speaks to promoting “vibrant cultural life” to retain residents, attract newcomers and foster cultural tourism. The OP acknowledges the City’s role in supporting arts and culture, including galleries, museums, and the film industry. The associated policies include:

1. A full range of arts and cultural activities, from community-based endeavours to nationally prominent institutions, will be promoted and supported in Toronto to express the cultural diversity of our communities.
- ...
5. Concentrations of cultural activities will be promoted to create arts districts and corridors that can collectively draw visitors and revitalize communities.

[48] Finally, the policies for s. 4.1 Neighbourhoods, 4.2 Apartment Neighbourhoods and 4.5 Mixed Use Areas complete the policies to which the witnesses refer. In s. 4.1:

1. *Neighbourhoods* are considered physically stable areas made up of residential uses in lower scale buildings such as detached houses, semi-detached houses, duplexes, triplexes and townhouses, as well as interspersed walk-up apartments that are no higher than four storeys. Parks, low scale local institutions, home occupations, cultural and recreational facilities and small-scale retail, service and office uses are also provided for in *Neighbourhoods*.

[49] The Appellants emphasize that the development criteria for neighbourhoods focus only on physical changes that must be “sensitive, gradual and ‘fit’ the existing physical character” in accordance with the extensive list of considerations in s. 4.1.5 and regulated through the ZBL per s. 4.1.8.

[50] Rental and condominium apartment buildings comprise half of the dwelling units in the City. Where developed in clusters, these buildings are designated as Apartment Neighbourhoods and are subject to the policies of s. 4.2. Such buildings are also found in Mixed Use Areas, s. 4.5, permitting residential, office, commercial and other uses in single-use or multi-use buildings. The Mixed Use Areas designation is found in the downtown and along the City’s many Avenues.

[51] The City’s stated objectives for the ZBAs are as follows:

- Allowing people to rent their homes for short periods;
- Minimizing negative impacts on housing affordability and availability;
- Maintaining community stability, including for vertical communities;
- Minimizing nuisances such as noise and garbage; and
- Enabling greater diversity in tourism accommodations.

### **Legal Non-Conforming Uses**

[52] The Appellants assert that the existing ZBL permits STRs by virtue of the broad definition of dwelling unit and that, should some forms of STRs be prohibited by the ZBAs, the Appellants imply that their existing units used for STRs will be shielded from the ZBAs under s. 34(9) of the Act. This section of the Act prevents the retroactive application of zoning by-laws, subject to certain tests, which can result in what is commonly called a legal non-conforming (“LNC”) use, being an existing use that is permitted to continue despite the new zoning by-law.

[53] The Appellants ask the Tribunal to find that the existing ZBL does not prohibit STRs and to confirm that their STR operations existed before the ZBAs were passed on December 8, 2017. To be clear, the Appellants request the foregoing findings but stop short of asking the Tribunal to make a determination of the legal non-conforming LNC status of their STR uses.

[54] The City responds that LNC rights are enshrined in the Act and it is not necessary for the Tribunal to consider the operation of the existing ZBL when assessing the appropriateness of the ZBAs. It contends that the consideration of LNC status would arise in a prosecution for a ZBL infraction or in a planning application to expand or change a LNC use under s. 45(2) of the Act, neither of which occurs here. The City argues that the determination of facts related to LNC status must be based on the unique circumstances of each case and that insufficient evidence is provided in this hearing to make such findings, noting that save for some evidence of three operators, only a long list of municipal addresses containing alleged STRs is provided by the added Parties.



[55] Fairbnb responds that a finding either way on LNC makes no difference to the Appellants. If the ZBL permits STRs today and they can satisfy the requirements of s. 34(9) of the Act, then those operations will be LNC uses and may continue. Conversely, if the ZBL prohibits STRs today, then existing operations are illegal now and will continue to be illegal if they are not in compliance with the ZBAs, if approved.

[56] Having considered the questions on the Issues List pertaining to the existing ZBL and matters of LNC status, and having heard the evidence of Ms. Samuel and Mr. Manett, the Tribunal finds that it has neither the jurisdiction nor the need to answer the two basic questions posed: whether the existing ZBL permits STRs and whether the three testifying Appellants' operations meet certain requirements in support of LNC protection.

[57] These matters are unrelated to the Tribunal's task of assessing the appropriateness of the ZBAs under appeal. What the existing ZBL permits and its effect on the LNC status of individual uses is a matter for some other forum. The determination of what is permitted by an existing ZBL is a different exercise in law than determining the compliance of the ZBAs with the necessary statutory tests. The existing ZBL No. 569-2013 is not the subject of the appeals and is not before the Tribunal for adjudication. The City intends to define and regulate STRs and it is those provisions in the ZBAs that are at issue.

[58] Without making any final determination on these questions, the Tribunal will provide some observations based on the evidence that go to the rationale behind the structure of the ZBAs, and will also provide a summary explanation of the nature of the Appellants' STR operations as a basis for understanding their appeals.

[59] The Tribunal heard evidence on the manner in which the existing ZBL regulates dwelling units, secondary suites and related residential uses, with differing opinions as to whether these provisions permit or prohibit STRs under current zoning. The crux of the issue is found in the ZBL definition of dwelling unit, being a use of land permitted in residential and mixed use zones:

Dwelling Unit means living accommodation for a person or persons living together as a single housekeeping unit, in which both food preparation and sanitary facilities are provided for the exclusive use of the occupants of the unit.

[60] Ms. Samuel's view is that the reference to "living accommodation" is contrasted with references to "sleeping accommodation" in the definitions for tourist home and hotel. She opines that a dwelling unit is intended as a principal residence, where persons "live" as opposed to where people "stay" while travelling or otherwise away from home. Although the definition contains no length of stay criteria, Ms. Samuel relies on the purpose of occupying a dwelling, i.e., residing or travelling, to assess whether the use is permitted. She concludes that a STR type of use is not where a person lives and is therefore not permitted by the existing ZBL.

[61] Mr. Manett disagrees and opines that a person occupying a dwelling unit even for a day or two is using the premises for "living accommodation" and that there is no basis in the definition to distinguish the acceptance of that use on length of stay. He considers the use to be identical regardless of the purpose or duration of occupancy. Mr. Manett concludes that a STR is permitted in a dwelling unit by the existing ZBL.

[62] The Tribunal observes from the evidence that it is difficult for a person to ascertain on the face of the dwelling unit definition whether a STR is permitted. The City has never prosecuted a STR operator for non-compliance with the ZBL, in part, according to Ms. Samuel, because length of stay is not clear and an infraction is difficult to prove. Ms. Samuel attests that the ZBAs will make clear what length of stay is considered a residential use, with anything short of 28 days constituting a STR.

[63] The ambiguity of the existing ZBL is illustrated by the City's own reports. In its report of October 11, 2016, the City stated:

Toronto's zoning by-laws were not written to regulate the length of time a dwelling unit is rented. (Exhibit 3.2, p. 249)

and,

The By-law does not restrict the number of days a residence can be rented. (Exhibit 3.2, p. 250)

[64] On June 7, 2017, the same authors wrote:

It should be noted that short-term rentals were not previously defined in the city-wide zoning bylaw or other zoning bylaws, and are therefore currently not permitted. (Exhibit 3.2, p. 270)

[65] Ms. Samuel addressed these apparent inconsistencies under cross-examination but the Tribunal is left with the observation from the above statements that the existing ZBL does not explicitly state a length of occupancy of a dwelling unit.

[66] As a further observation, the ZBL contains common provisions for interpreting the by-law. A use is permitted in a zone if it is included on the list of permitted uses for that zone, and if a use is not listed as permitted, it is not allowed (s. 1.20.2(13) and (14)). Further, a listed or defined use may not be interpreted to include any other use (s. 1.20.2(15)). All of this instruction seems obvious.

[67] However, the Tribunal sees legitimacy in the Appellants' opposition to the City's position that because STRs were not defined in the ZBL prior to these ZBAs, a dwelling unit cannot be interpreted as including a STR. This reasoning of the City appears to retroactively apply a newly defined land use to interpret the existing ZBL. For the purpose of interpreting an existing ZBL, it must stand on its own, unaided by new inventions introduced to address evolving issues.

[68] Finally on the matter of LNC uses, the intentions and operations of the three STR operators are clear although the City raises questions, not about the Appellants' STR history, but whether basement units were created legally.

[69] Ms. Narciso resides on the upper floors of her dwelling at 107 Gladstone Avenue and has rented out the main floor as a separate dwelling unit on the long-term rental market. A basement unit was added in 2003 and used for a long-term rental until extensive renovations following flooding events and other expensive repairs to the

house resulted in her decision in 2017 to operate two STR units in the basement, one as a complete suite with kitchen, and the other as a hotel-type room. Each basement suite has direct and separate access from outside. In response to questions from the City, Ms. Narciso acknowledged that the second basement unit was not explicitly shown on the plans and that she had created it by simply adding a locked interior door between the units. Ms. Narciso testified that she has received no complaints from the neighbourhood and that neighbours and her own long-term tenants have rented the STR suites occasionally for visiting friends and relatives.

[70] Mr. Westhaver operates Westhaver Boutique Residences Inc. consisting of five dedicated STR units: three at 72 Grace Street since mid-2016 and two at 69 Crawford Street (date of commencement not entered into evidence). Neither Mr. Westhaver nor his business partner resides in these units. With a background in the business of luxury brand management, it is clear that Mr. Westhaver's fashion and design passion and attentive customer service have succeeded in creating "high end units for discerning travellers" as he describes it. Mr. Westhaver achieves an 84% average occupancy rate across all his units while charging higher than average STR rates, more in line with hotel rates. No complaints have been lodged with him or to anyone else regarding the Westhaver units. Mr. Westhaver acknowledges that the basement unit at 72 Grace Street was not shown on building plans and was created by adding a fire door between it and the main floor unit.

[71] Mr. Leino resides on the main floor of 294 Mortimer Avenue where he has operated a STR in the basement secondary suite since early 2017. As with the basement units of the others, questions from the City resulted in Mr. Leino acknowledging that he is aware of the uncertainty over permissions for the original secondary suite, established by a previous owner, and is making enquiries to resolve the matter in connection with a current minor variance application for his property.

## **STR Definition**

[72] Starting with a technical matter, Westhaver argues, with reliance on Mr. Manett's testimony, that a dedicated STR is not captured by the STR regulations and is therefore not regulated by the ZBAs. He suggests that because a STR is defined as a dwelling in which the operator resides, if the operator does not reside there then it is not a STR by definition. Put another way, Westhaver is arguing that the ZBAs regulate home sharing but fail to regulate dedicated STRs.

[73] The Tribunal does not accept this argument and aligns with the City's argument on the evidence of Ms. Samuel. With reference to the interpretation section of the ZBL noted earlier (s. 1.20.2), zoning by-laws routinely operate by defining uses and then regulating those uses within specified zones. "If a use is not listed as permitted, it is not allowed" (s. 1.20.2(14)).

[74] Westhaver is correct that a dedicated STR is excluded by the STR definition, but the consequence is one of prohibition not permission. A STR is defined as being within a PR and that use is permitted in various zones. Those zones do not permit a use expressly permitting a STR that is not within a PR. The very basis of zoning by-laws would be rendered ineffective if one aspect of a use could be altered to release it from a definition and thus be permitted.

[75] To illustrate, take the definition of a dwelling unit cited earlier. It refers to accommodation where food preparation and sanitary facilities are provided for the exclusive use of the occupants. Using Westhaver's argument, if the kitchen was opened to public use or an exterior door gave direct access to a public washroom, it would cease to be a dwelling unit and would not be regulated by the ZBL. Yes, it would cease to be a dwelling unit, but it would be something else that is not permitted by the ZBL by operation of the definition of a dwelling unit and the list of permitted uses.

[76] In addition, the Tribunal finds no contradiction with this finding and its observation earlier on the ambiguity of the dwelling unit definition regarding length of stay.

Whatever the existing ZBL is determined to allow prior to these ZBAs, the effect of the ZBAs is to clarify what constitutes a STR with reference to length of stay and the PR requirement. This clarification prohibits a dedicated STR by its absence of permission within the definition and by operation of the ZBL's interpretation provisions.

[77] In short, zoning by-laws are not dictionaries. They do not neutrally define uses without a purpose in mind. The purpose of definitions is to frame what is meant by certain terms used in a list of permitted uses, to the exclusion of other possible meanings or uses. The contents of those definitions are integral to the regulatory scheme of a zoning by-law.

### **Commercial Use**

[78] STRs span a spectrum of arrangements that bear some relationship with the intensity of the use. Generally, at one end of the spectrum is home sharing and at the other end is a whole dwelling unit devoted to STRs year-round. Home sharing includes the STR of one or more bedrooms while the residents are present (coincides with a tourist home or bed and breakfast) and the STR of the entire dwelling unit while the residents are away. Both of these STR forms apply equally to dwelling units and secondary suites. Somewhere on the spectrum between home sharing and dedicated STRs is the STR of a secondary suite by the residents of the primary dwelling unit.

[79] The notion of whether a STR becomes a commercial use of land at some point on this spectrum lies at the core of this dispute. If the nature of the land use changes such that it is no longer supported by the policy environment, then some limits on those uses are warranted. This issue underlies each of the contested aspects of the ZBAs: restricting the ZBAs application to STRs less than 28 consecutive days, imposing a PR requirement on the operator, and the same PR requirement for secondary suites.

[80] The Tribunal finds that the intensity of the use rises as one moves along the spectrum from home sharing to dedicated STRs. For the reasons that follow, dedicated

STRs are found to exhibit characteristics of a commercial use of land to an extent that takes them out of meeting the policy tests.

[81] Similar to their positions summarized earlier, Ms. Samuel and Mr. Manett differ on whether STRs, or subtypes of them, are residential or commercial uses.

[82] Ms. Samuel generally considers uses that cater solely to the travelling public with sleeping accommodations as commercial enterprises, whereas places of residence, where people live, are residential uses. In support, she refers to hotels as being commercial uses in commercial zones. She also refers to tourist homes in certain residential zones which are permitted subject to a PR requirement and a limit of two rented rooms, which provisions, in her view, ensure that the use of the dwelling remains primarily residential.

[83] Ms. Samuel, supported by Ms. Rajakumar, applies the same rationale to STRs, emphasizing that, as the lead author of the ZBAs, the intention is to keep the use of dwelling units residential by the application of the PR requirement. She considers dedicated STRs to constitute commercial uses akin to hotels. In her view, if no-one resides in the dwelling unit as a place of residence, and it is exclusively devoted to STRs, then the use is not residential as intended by the relevant planning policies and the ZBL.

[84] Mr. Manett's view is that a reference to length of stay has no place in a zoning by-law for residential uses. He opines that the land use characteristics are not affected by how long persons reside in a dwelling. The use is residential and a STR is but a form of tenure and is not a use. Mr. Manett sees residential rentals of any length as implementing provincial and City policies to provide a full range of housing.

[85] On the issue of use intensity, the Tribunal considers the dedicated STR end of the spectrum to exceed what is expected and appropriate in residential areas. Before exploring the policy basis for this finding below, two scenarios presented to Mr. Manett in the hearing will provide an example of intensity considerations.

[86] In response to the Tribunal's questions and re-examination by counsel for the Appellants, Mr. Manett acknowledged, albeit with careful inclusion of certain caveats, that an occasional garage sale would be a permitted use in a residential area, but if conducted every day year-round, the use "could be considered a commercial use..." (Transcript, September 4, 2019, p. 286, line 24). Mr. Manett offered that for such use a study may be required to assess the impacts on traffic and parking. Similarly, Mr. Manett responded that a hypothetical outdoor concert in a dwelling's rear yard held as a regular recurring event every weekend is "not a residential use at that point" (Transcript, September 4, 2019, p. 288, line 24). In fairness, Mr. Manett disassociated these responses from the issues of STRs, explaining that garage sales and rear yard parties are secondary uses whereas a STR in his view is a permitted primary use of land in residential areas. Nevertheless, the Tribunal finds that the concept of intensity is transferrable to STRs, and to that extent, Mr. Manett and Ms. Samuel are not completely at odds.

[87] Certain uses or components of uses may be acceptable and contained within the scope of a permitted land use at one scale, but may transform into something unacceptable and out of scope at another scale. STRs are no different. The home sharing end of the spectrum involves utilizing excess space (e.g., bedrooms) or occasional absences (e.g., entire unit) for STR purposes as a direct extension of the occupancy of the dwelling unit as a place of permanent residence.

[88] In contrast, a dedicated STR does not house residents who would consider it their permanent home and has the potential for occupant turnover every day. By these characteristics, dedicated STRs bear striking resemblance to a hotel. On a daily or near daily basis, guests move in and move out, the owner or staff attend the premises for cleaning, and traffic is generated. Indeed, Ms. Samuel considers dedicated STRs to be encompassed by the ZBL definition of hotel, and Mr. Manett fairly acknowledges that here the lines do blur. In response to questions from the Tribunal, Mr. Manett acknowledged that the intensity of use is a factor, noting, for example, that four dwelling



units within a detached house operated as dedicated STRs with turnover of guests every day or so, display characteristics similar to a small hotel.

[89] Like the difference between a one-off versus an ongoing garage sale, a residential home and a dedicated STR are separate and distinct uses of land, differentiated by their purpose and by the way in which persons occupy the units. One is non-commercial and the other is commercial. These differences raise questions on conformity with policies and generate potential effects within neighbourhoods.

[90] Residential areas are designed and intended to be non-commercial areas where people reside, with some exceptions for in-home activities such as a home occupation as-of-right, and small-scale services and retail uses by rezoning. Commercial areas are designed and intended as locations for business where commerce is practiced. Zoning by-laws routinely separate uses into classes and subclasses to prevent one type of use from infiltrating another. The differences between the use of a house as a place of permanent residence and the dedicated use of that same house for daily paying guests is sufficient to warrant differentiation under s. 34(1) and (2) of the Act. A dedicated STR is an identifiable and distinguishable use of land.

[91] Although the context and facts differ, various authorities have found that temporary forms of accommodation for tourists and others do not constitute a residential use. The Tribunal's finding here that dedicated STRs exhibit commercial characteristics beyond what is intended or expected in residential areas is supported by *Mailloux v. Tofino (District)*, 2018 BCSC 2298 in which Loo, J. notes at para. 111:

[111] ... The Courts have consistently distinguished between dwellings which permit residential uses only, and hotels, motels and other tourist accommodation facilities, where commercial accommodation is permitted ...

[92] For example, in *Whistler (Resort Municipality) v. Wright et al.*, 2003 BCSC 1192 at paras. 51 and 54, D.D. Owen-Flood, J. writes:

[51] In order for property to be used as “residential” property, it must be a fixed place of living, not a revolving door. ...

[54] The evidence strongly supports the view that the [subject] property is, in fact, being used as a commercial enterprise. ...

[93] Closer to Toronto, the Ontario Municipal Board considered the question of residential or commercial use in *Rosen, Re, 2011 CarswellOnt 5300* (“*Rosen 2011*”) where Vice-Chair K.J. Hussey writes at p. 15:

... The Board finds that [short-term accommodation] units are distinct commercial entities ... This commercial entity has the potential to conflict with the character and stability of existing neighbourhoods because of the constant turnover of people and the difficulty that turnover brings in controlling noise and other nuisances.

[94] That Decision was upheld in *Rosen v. Corporation of the Town of The Blue Mountains, 2012 ONSC 4215* (“*Rosen 2012*”) in which Herman, J. finds at para. 54:

[54] I cannot conclude that there is reason to doubt the correctness of the decision on a question of law with respect to this issue. The promotion of tourism and economic development cannot be looked at in isolation from other legitimate goals, such as the preservation of the residential nature of certain neighbourhoods. The Board considered the PPS and the two Official Plans, as well as the various interests at stake, and concluded that the amendments were an appropriate response.

[95] In the case at hand, the Tribunal is satisfied that the legal basis exists to find that STRs may be suitably regulated in a zoning by-law to mitigate against their use characteristics that represent a more commercial use of land.

### **STR Regulations**

[96] The policy basis for the ZBAs forms the foundation for their approval by the Tribunal in the form passed by the City.

[97] The PPS calls for liveable communities to be sustained, in part, by accommodating an appropriate range and mix of residential uses, and qualifies residential as including second units and affordable housing, among other types (s. 1.1.1(b)). While this policy is generic in its use of the term “residential,” the housing

policies refer explicitly to a range and mix of housing to meet the needs of “current and future residents” (s. 1.4.3 and 1.4.3(b)1). Virtually identical wording is found in the GP (s. 2.2.6.1(a)i).

[98] In the OP, general references to housing are found in the contextual statements of non-policy text, however, the policies themselves utilize wording consistent with provincial directions: “a full range of housing ... will be provided and maintained to meet the current and future needs of residents” (s. 3.2.1.1).

[99] The above policies, read in their entire context and ordinary meaning, mandate the City to plan and organize for the housing of residents. Economic matters are discussed later, but for the purposes of housing, the policies are clear that housing in residential areas is for residents. No policies expressly direct that accommodations for the travelling public must be accommodated in residential areas. Regulations for STRs that uphold the protection of residential areas for residents are supported by the policies.

[100] The Appellants are correct that residents too require STR accommodations on occasion for any number of reasons such as for family visitors, during home repairs or renovations, life changes like separation or divorce, for employment in another part of the City, or access to medical treatment. However, Mr. Wachsmuth reports that the vast majority of STR guests are visitors to the City. He suggests that the widespread STR opportunities provided by the ZBAs are more than sufficient to meet the needs of residents.

[101] No-one in this hearing disputes that there is a housing crisis in Canada’s largest metropolis. The availability and affordability of housing are interconnected issues influenced by a host of contributing factors. Ms. Rajakumar does not imply that the STR ZBAs will substantially address affordable housing, as defined and used in the OP, but that the potential return of dwelling units and secondary suites to the long-term rental or ownership market may assist, even if in a small way, the availability and affordability of housing in the City. This response is supported by the OP comment to “preserve what

we have” (s. 3.2.1) and the policy that “the existing stock of housing will be maintained” (s. 3.2.1.2).

[102] The Appellants’ expert witnesses opined that the return of dwelling units to the long-term rental market, as a result of these ZBAs, would be insignificant. They emphasize that even if every one of the estimated 5,000 units used for dedicated STRs were rented long-term, it would equal the available rental units on the market at any one time. There would be a one-time injection of units on the market, they would be quickly absorbed, and the rental vacancy rate would not change thereafter. Many of the units may not return to the rental market and may instead be sold to new owners, and given that the majority of dedicated STRs is located in condominium units, those units would not constitute affordable housing.

[103] To the Tribunal, the question is not whether the return of units to the rental market will have a measurable effect on the availability and affordability of housing, but rather whether the ZBAs support or detract from the policy objectives noted above. The ZBAs are found to implement the policies, first by protecting the housing supply as permanent domiciles for residents, and second, by responding to the availability and affordability issues, if not by returning units to the rental market, at least by preventing further conversions of dwelling units into dedicated STRs.

[104] To address the policy objectives, a distinction for STRs based on rental periods shorter than 28 days – essentially one month using the shortest month of the year as the threshold – is an appropriate, convenient and understandable means of differentiating STRs from long-term rentals. A length of rental term is necessary for clarity of defining a STR and to operationalize other provisions in the ZBAs. Dr. Wachsmuth opines that the ZBAs capture existing patterns of STR usage, noting that 98% of Airbnb reservations are for fewer than 28 days.

[105] The Tribunal accepts the unwavering evidence of Ms. Samuel that “the PR requirement keeps the use residential.” Its effect is to establish the dwelling unit primarily as a place of residence for residents, and only secondarily, as accommodation

for visitors or persons otherwise away from their normal place of residence. The PR requirement is not new to the ZBL. It is employed in the regulation of home occupations, tourist homes and day nurseries in residential areas.

[106] Collectively, the above provisions for STRs support the provincial and city policies related to housing. They maintain the integrity and stability of residential areas as neighbourhoods of residents and protect those areas from the intrusion of commercial-type accommodations that, if allowed to proliferate, would change the composition and character of the neighbourhood. Mr. Wachsmuth refers anecdotally to an apartment building he is aware of in another city where only one apartment is occupied as a dwelling, and the rest of the units in the building are dedicated STRs. While perhaps an extreme example, the Tribunal considers such result as not in keeping with the housing policies governing Toronto.

### **Secondary Suites**

[107] The Tribunal finds that the rationale for the PR requirement in a dwelling unit applies equally to secondary suites and should be upheld.

[108] Mr. Manett's opinion is that, for the same reasons as above, the 28 day and PR requirements are not appropriate zoning measures to impose on a residential use in its proper zone.

[109] The Tribunal appreciates that secondary suites, where operated as STRs by the occupants of the main dwelling, have several attributes. Ms. Narciso and Mr. Leino elucidate these advantages when describing the STR of their basement secondary suites. The operator resides in the dwelling, overseeing the STRs attentively, responding to their guests' needs, and ensuring that no issues are caused for their neighbours. The secondary suite is available for their own visiting friends and relatives, when needed. The primary use of the dwelling is preserved as residential as their principal residence, based on the ZBL definition that a secondary suite forms part of the main dwelling unit. Of course, not all secondary suites are within a dwelling where the

STR operator resides, such as in Mr. Westhaver's units, but the same argument applies. If secondary suites are subordinate to a main dwelling unit, then why not allow their use for a dedicated STR?

[110] This issue is complicated by the fact that at an earlier stage in the process of developing the ZBAs, City planning staff recommended that one secondary suite in a dwelling be eligible as a STR with no PR requirement. The Appellants argue that the change in staff's recommendation was motivated politically. In response, Ms. Samuel attests that after further consideration, she felt that the PR requirement for secondary suites was necessary to conform with and implement policy 3.2.1.10 of the OP, which had been the subject of a recent Official Plan Amendment 418. Ms. Rajakumar did not support the original recommendation, finding it contrary to the policy of preserving existing housing stock.

[111] Dr. Wachsmuth opines that if secondary suites were the only source of whole-unit STRs, they would be at risk of further conversion out of the long-term rental market and into STRs. Because secondary suites account for 20% of all rental residential units in the City, he recommends that this important source of housing, positioned in the more affordable range of the rental market, should be protected against conversion in conformity with the housing policies.

[112] The Tribunal accepts the opinions advanced by the City and Fairbnb's experts based again on the wording of the applicable policy. The secondary suite policy expressly establishes the purpose of second units "to increase the supply and availability of rental housing across the city" (OP, s. 3.2.1.10). In the context of the provincial and City housing policies, the reference to "housing" is taken to refer to the housing of residents.

[113] In light of the provincial interest for "the adequate provision of a full range of housing" (s. 2(j)) and the policy context described earlier, the provisions of the Act requiring municipalities to permit "additional residential units" in houses (s. 16(3)) could not have been intended to provide for visitor or tourist accommodations. Instead, it was

direct instruction to Toronto and all municipalities, to facilitate what the City calls second units within otherwise single-unit forms of housing.

[114] In the Tribunal's view, Dr. Wachsmuth summarizes accurately the relationship between dedicated STRs and the availability of housing: "there is a direct tradeoff between the supply of commercial STRs and the supply of long-term housing, since a gain in the former represents a loss in the latter, and vice versa" (Exhibit 1, Tab 2R, para.31).

[115] The ZBAs apply a PR requirement as a precondition to permitting a STR. The Appellants argue that this regulation amounts to "people zoning" because, for example, a tenant in a secondary suite may operate a STR while the owner of that unit, even if residing in the main dwelling unit within the same building, is prohibited from operating a STR in the secondary suite.

[116] From the *Rosen 2011* case cited above, the OMB found at p. 9:

The Courts have held repeatedly that reference to continuous habitation and permanent residence relates to the use of the land and building and is not in contravention of the Charter [of Rights and Freedoms] or the [Human Rights] Code. ...

and,

... that the proposed By-laws are intended to regulate the use of lands and not the persons who use it. The Board finds that the actions of the Municipality are a legitimate exercise of its authority to zone for "differing levels of use intensity and differing needs for municipal services."

[117] The Divisional Court in *Rosen 2012* upheld the OMB's finding, concluding at para. 62:

... The purpose and the effect of the amendments under consideration are to provide a regulatory scheme for [short term accommodation] use in the Town. They target the use of the land, not the personal characteristics or qualities of the individuals who use that land. As such, they cannot be said to be people zoning.

[118] The Tribunal reaches the same conclusion in the case at hand. The use of land being distinguished by the ZBAs is the commercial nature of a short-term stay of paying

guests, contrasted with and dependent upon the unit being occupied as a principal residence. The PR requirement speaks to the use of the land as residential, and not to any personal characteristics of the people residing there.

[119] Alexis Leino refers to *Advocacy Centre for Tenants Ontario v. Waterloo (Regional Municipality)*, 2010 CarswellOnt 320, in part to support his contention that the ZBAs encroach into the prohibited field of people zoning. However, in that case, the OMB notes at para. 120:

[120] 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.*”

[120] In the ZBAs here, any person may occupy, as owner or tenant, a dwelling unit as a place of residence. Part of the use permissions of such occupancy includes the opportunity to operate a STR as defined and regulated by the ZBAs, no different than the use permissions for other residentially associated uses, such as a home occupation. These provisions relate to the use of the land and regulate the intensity of the use to ensure they remain within the realm of residential uses. They do not regulate the personal characteristics of either STR operators or their guests.

### **Neighbourhood Character**

[121] The City and Fairbnb suggest that nuisance factors such as noise, garbage and parking are exacerbated in residential areas from the operation of dedicated or commercial STRs. The City cites its records of complaints as evidence that issues do arise from STR operations. Dr. Wachsmuth’s research suggests that negative externalities – costs and other impacts imposed on neighbours – may occur more frequently where non-resident operators and their STR tenants have less social incentive to get along with neighbours.



[122] The Appellants argue that the City produced no evidence to demonstrate that the incidence of complaints about STRs is any higher on a per unit basis than that of long-term rentals or owner-occupied dwellings in residential areas. To Dr. Wachsmuth's assertion, Mr. Westhaver disagrees, saying that he feels and acts on the obligation to not pass costs or impacts onto his neighbours. Mr. Westhaver confirms that he has excellent relationships with his neighbours and that he works intently to keep it so.

[123] The Tribunal accepts the Appellants' position that the City's complaints data are not sufficient to constitute reliable support for the ZBAs. Ms. Samuel candidly agreed that the City could not verify that the proportional frequency of complaints against STRs is any greater than other complaints within residential areas. Several witnesses testified to the effect that the competitive STR market, guest expectations and a desire to not disrupt neighbours encourages STR operators to maintain high property standards and to impose strict rules regulating the behaviour of their STR tenants.

[124] The Tribunal does find, however, that the commercial characteristics of dedicated STRs could have an effect on neighbourhood character. A permitted dwelling containing three or four units, all dedicated to STRs, could very well experience turnover of occupants for one or all units every day. Mr. Manett, although maintaining that the use remains residential, agreed that there are similarities between such a building and a commercial use. A concentration of dedicated STRs could result in an entire block, for example, being used for other than resident housing. That possibility exists under the Appellants' interpretation of the existing ZBL.

[125] The Tribunal finds that the intensity of use arising from a successful, dedicated STR, with its business intention of regular turnover of STR customers, even if just one dwelling, operates as and exhibits a commercial use of land that changes the character of a neighbourhood. The short, temporary stay of the occupants, repeated day after day year-round results in a land use that is not residential as intended by the policy framework. Zoning provisions to constrain STR uses to levels compatible with the planned function of residential areas are considered appropriate.

## **Economic Considerations**

[126] Mr. Thoma provided most of the economic data debated by the witnesses, with Dr. Wachsmuth providing some economic information for STRs.

[127] Mr. Thoma studied the tourism, hotel and housing markets to understand the potential effects of the ZBAs from an economic perspective. He emphasizes the continued growth in visitors to the City in step with increases in population and jobs, while the supply of hotel rooms has remained unchanged for some 15 years. The demand for accommodation of a short-term nature is driven by tourism and business, but also responds to the needs of local residents whether moving or renovating, family transitions, newcomers, or medical reasons.

[128] Mr. Thoma reports that the supply of hotel rooms, as calculated from development applications in process in the City, is remaining constant or declining in the downtown and growing in outlying parts of the City. Although some growth is anticipated if current proposals materialize, he predicts that a shortage of hotel rooms will persist. He suggests that STRs in the downtown area, and across the City, serve an important segment of the tourism and business accommodation market. They provide alternatives in type, location and price of accommodations compared with conventional travel options.

[129] Mr. Thoma explains that the absence of growth in the hotel sector in the downtown is not connected with increased STR offerings. It is linked directly with the more rapid return on investment obtained from condominium developments and, to some extent, office towers.

[130] Mr. Thoma also concludes that the low vacancy rate for rental housing is not attributable to the growing STR market, given that the decline in vacancy rates predates the prevalence of online STR offerings. He attributes the scarcity of rental housing and especially affordable rental housing to the failure of governments at all levels to facilitate sufficient purpose-built rental housing. The completions of rental housing developments

declined for three decades after a peak in the 1970s, and although the last decade has seen growth, City studies indicate a continued shortage of purpose-built rental housing.

[131] Dr. Wachsmuth opines that it is plausible that the rental units removed from the long-term market by STRs in recent years have reduced the supply of rental housing despite all the new construction and thus prevented rental vacancy rates from rising as might otherwise have occurred.

[132] Ms. Deneau does not anticipate a negative economic impact from the ZBAs' regulation of STRs. She anticipates the continuation of many forms of STR offerings throughout the City's neighbourhoods with economic benefits for operators, service providers and local businesses. Ms. Deneau considers that a reduction of dedicated STRs would likely benefit the hotel industry.

[133] All three of the above witnesses agree that the factors affecting the availability and affordability of rental housing are complex. Caution is warranted when seeking cause and effect relationships. The experts' consensus is that rigorous research is necessary to answer these questions more fully.

[134] Based on the evidence, the Tribunal finds support for the ZBAs in the economic policies.

[135] To be clear, competition is not a valid land use basis for decision-making. It is not the role of planning to protect one business type over another. It is appropriate, however, to consider the broad economic needs of the community and to provide for those needs through the planned functions of various areas of the municipality. This approach is embodied in the OP as guided by the provincial documents.

[136] In general terms, the economic policies of the PPS call for sustaining communities and promoting economic development by accommodating employment uses and supporting a diversified economic base including tourism. (s. 1.1.1, s. 1.3.1

and s. 1.7.1). A guiding principle of the GP is to “provide flexibility to capitalize on new economic and employment opportunities as they emerge.”

[137] STRs are an example of employment activities captured by the OP’s reference to recognizing employment in non-traditional areas such as in homes and to support this employment with regulatory frameworks (s. 3.5.1.1.(j)). The “cultural capital” aspirations of the City are pursued in part to attract newcomers (s. 3.5.2).

[138] From a tourism perspective, it may be desirable to allow for the unrestrained proliferation of STRs. Let the market decide how many and where and what type should be offered. The growth and success of STRs is indicative of the need for this type of accommodation, as Mr. Thoma observes. However, multiple policy objectives must be considered, including the housing policies reviewed earlier. Given the facts and policies in evidence in this hearing, permitting unregulated STRs would be just as inappropriate as an outright ban on all types of STRs. A balancing is required between the mandate to provide housing for residents and the direction to support tourism and employment. Extending regulation too far for one objective may be unduly detrimental on another.

[139] The Tribunal considers the ZBAs to strike a reasonable balance. They allow an opportunity for various forms of STRs to respond to the obvious market demand in support of tourism as well as the STR needs of residents, while also controlling the infringement of dedicated STRs on the availability of owned or rental housing.

[140] In argument, Alexis Leino refers to *Oshawa (City) Zoning By-laws 108-89 & 125-89*, Re, 1990 CarswellOnt 3828,1990 where the OMB notes at p.15:

... What it does not stand for is a placing of housing need above all other planning considerations. The board must have regard to approved planning policies in a municipality, the state of existing development in the area affected, municipal services and infrastructure to deal with the social and environmental matters, suitability of the site, compatibility of uses as well as need for a particular type of project.

[141] The Tribunal finds that each of the foregoing factors has been considered in determining the appropriateness of the ZBAs. Neither this Decision nor the ZBAs place housing above all other planning considerations. On the contrary, the ZBAs demonstrate a concerted effort to facilitate acceptable levels of STRs in dwelling units for the needs of tourists and residents while also respecting the housing imperative in a city in the midst of a housing crisis.

[142] With respect to market need, the Tribunal finds validity in the Appellants' proposition that some customers require or prefer a dedicated STR unit. The evidence is that much of the growth in dedicated STRs in the downtown area is in condominium towers despite their higher rental rates compared to other forms of STRs. Perhaps a business traveller needs to bring along other members of the household, or perhaps a family of newcomers wishes to experience a particular neighbourhood before deciding where to settle. It is reasonable to accept that dedicated STRs suit certain needs better than PR STRs. As Mr. Westhaver illuminates, the experience of a dedicated STR is different for both the guest and the operator as compared to a STR in a person's home. Nevertheless, other options exist for the above examples, such as suite hotels or a relatively self-contained set of rooms within a PR dwelling.

## **OTHER MATTERS**

[143] Toronto is not the first City to grapple with how to address STRs. Several large US cities were noted in evidence, utilizing a variety of approaches to the issues under obviously different legal and governance systems than apply here. Nevertheless, similar issues have been addressed including how and where to permit STRs, including in some cases a PR requirement. Vancouver employs a similar approach to these ZBAs with a PR requirement and a monthly limit to differentiate STRs from other forms of housing. In Ontario, Mississauga and Oakville implemented a PR provision, and in the Town of The Blue Mountains and Niagara-on-the-Lake, complementary approaches were used to address cottage rentals and similar uses.

[144] Westhaver and Alexis Leino raise in argument that the ZBAs conflict with the *Residential Tenancies Act* regarding weekly rentals and sublet rental rates. The City counters that the Tribunal has no evidence to consider those matters. Ms. Samuel and Ms. Rajakumar responded to limited questioning only on the subject of weekly rentals, suggesting that, in the Tribunal's view, they understood the need for weekly rentals in certain circumstances and were unsure whether the ZBAs posed a problem. In their evidence related to persons facing precarious housing, the City's witnesses offered that options continue to exist in the form of bed-sitting rooms. The Appellants' expert witnesses provided no explanatory evidence or opinion on the interaction of the ZBAs with weekly rentals or subletting regarding the *Residential Tenancies Act*. The Tribunal received wholly insufficient evidence to give consideration to these issues and has no basis to consider them a bar to the ZBAs.

[145] The Tribunal has had regard to the decision of City Council. The City has established a solid basis and planning rationale for the ZBAs by conducting considerable research and studies, consulting widely with industry and public stakeholders, and convening numerous opportunities and avenues for input. With care and reason, the City crafted a zoning framework to address the land use implications of STRs.

## **CONCLUSION**

[146] The ZBAs could spur the return of some 5,000 housing units currently used as dedicated STRs to the long-term rental market, or, depending on the decisions of owners and the outcome of legal non-conforming status, they could return zero units to the long-term market.

[147] Whatever the number, one fact is indisputable: each dedicated STR unit displaces one permanent household. That household must find another place to live. This phenomenon is occurring in increasing numbers in Toronto's residential areas, the very places that are planned, designed and built to provide housing for residents. The ZBAs do not prohibit STRs, but permit and regulate them in a manner that does not

displace households. At the same time, the ZBAs provide opportunities to meet the needs of residents and visitors requiring or preferring short-term accommodation in a residential setting.

[148] Much of the criticism centres on what the ZBAs restrict. Turning that around, it is also helpful to understand what the ZBAs permit. To provide for the legitimate needs of residents, visitors and businesses for STR accommodations, the following forms of STRs are allowed by the ZBAs: dedicated units for stays of 28 days or longer (not STRs by definition, but units not aimed at the long-term rental market); entire dwelling units offered by the PR occupants; and rooms within dwelling units whether the PR occupants are present or absent.

[149] These opportunities represent a reasonable balancing of several policy objectives. They assist in ensuring that housing is provided for residents, that a full range of housing is available including STRs, and that the business and tourism economies are supported.

[150] This Decision is consistent with similar matters considered by the courts and by the Tribunal's predecessor, the Ontario Municipal Board. The ZBAs are found to satisfy all statutory tests: regard for provincial interests; consistent with the PPS; conform with the GP; and conform with and implement the OP. The Tribunal has had regard for the decision of City Council and concludes that the ZBAs represent good planning in the public interest.

## **ORDER**

[151] The appeals are dismissed.

*"S. Tousaw"*

S. TOUSAW  
MEMBER

If there is an attachment referred to in this document,  
please visit [www.elto.gov.on.ca](http://www.elto.gov.on.ca) to view the attachment in PDF format.

**Local Planning Appeal Tribunal**

A constituent tribunal of Tribunals Ontario - Environment and Land Division  
Website: [www.elto.gov.on.ca](http://www.elto.gov.on.ca) Telephone: 416-212-6349 Toll Free: 1-866-448-2248