City of Greater Sudbury

Third Party Review of Occupancy Standards and Local Eligibility Rules

March 4, 2020

HSC

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1.

Introduction

Housing Services Corporation (HSC) has been retained to provide a third party review of the legislated requirements of the City of Greater Sudbury, with regard to occupancy standards and local eligibility rules for rent-geared-to-income ("RGI") assistance.

Under the *Housing Services Act, 2011* the City of Greater Sudbury (the "City"), as a service manager, is required to establish occupancy standards for determining the size and type of unit permissible for a household receiving rent-geared-to-income assistance, in accordance with eligibility rules.

In September 2019, the Ministry of Municipal Affairs and Housing introduced amendments to the *Housing Services Act, 2011* and its regulations: Ontario Regulation 367/11: General and Ontario Regulation 298/01 Determination of Geared-to-Income Rent under Section 50 of the Act. A report entitled "Updates to Housing Services Act, 2011" was presented at the Community Services Committee meeting on December 2, 2019.

In addition, the *Housing Services Act, 2011* requires service managers to develop a ten (10) year plan to address housing and homelessness in its service area. At least every five (5) years, service managers must review their plans and amend as necessary. On November 18, 2019, the Community Services Committee approved the Housing and Homelessness Five (5) Year Updated Plan, as per resolution CS2019-19. One of the seven (7) priorities identified in the Plan is a need to improve housing access and affordability for low-income households.

To support the City's efforts to best meet the needs of applicants and maximize the use of current housing assets, this third party review of occupancy standards and eligibility requirements includes the following:

- **Summarization of the legislation** with regard to occupancy standards under the *Housing Services Act, 2011* (the "Act") and *Ontario Regulation 367/11* (the "Regulation"), including a summary of the amendments to the Regulation, as they relate to occupancy standards.

- **Identification of industry practices** in the establishment of local eligibility rules and occupancy standards, through the analysis of five (5) service managers with service areas comparable to the City of Greater Sudbury.

- **Memorandum of legal analysis and opinion** from Gowling WLG (Canada) LLP ("Gowling WLG") regarding legal implications of establishing alternate local rules and the application of human rights law to eligibility rules. Included as **Attachment 1**.

2.

Review of legislative requirements

In April 2019, the Ontario government launched its Community Housing Renewal Strategy and announced changes to Regulations under the *Housing Services Act, 2011*. The amendments address the following:

- Community Safety
- Tenant transfers between different housing providers
- Provincial Rules on Refusal of Offers, Selections, and Over-housed households, and
- Rent-geared-to-income (RGI) calculation simplification.

Ontario's Community Housing Renewal Strategy is focused on affordable housing for low-income households and the non-profit, co-operative and municipal housing sector. The purpose of the Community Housing Renewal Strategy is to help sustain, repair, and grow the community housing system, recognizing there is an increasing need for community housing across Ontario.

Some of the changes to regulations under the *Housing Services Act, 2011* are in response to specific recommendations of the Auditor General to make waiting lists shorter by filling vacant units faster and helping people in need access units more quickly.

This section includes a review of the rules with regard to eligibility and occupancy standards, outlined under sections 42-43 of the *Housing Services Act, 2011* (the "Act") and Ontario Regulation 367/11 (the "Regulation"). The impact of amendments to the Regulation in-force January 1, 2020, as they relate to occupancy standards, is also noted.

The City of Greater Sudbury as service manager

The City is designated as a service manager under the Act as established by s. 8 of O. Regulation 367/11. As a service manager, the City must comply with the requirements of the Act and relevant regulations to address housing and homelessness in its service area.

Eligibility rules

Section 42(1) of the Act stipulates that eligibility for RGI assistance be determined in accordance with the following:

1. The **prescribed** provincial eligibility rules
2. The **local** eligibility rules made by the service manager

Prescribed provincial eligibility rules, *as they relate to occupancy standards*

Section 23 of the Regulation outlines the prescribed provincial eligibility rules for determining rent-geared-to-income assistance. On January 1, 2020 section 23 is amended by striking out "32.1" and substituting "32.2." as outlined below.

New provincial rule: Cessation of eligibility – refusal of offers

Effective January 1, 2020, the Regulation is amended to include a *new provincial rule* in section 32.2 and states that a household ceases to be eligible for rent-geared-to-income assistance if the household refuses an offer by the service manager for assistance in a unit where the unit:

a) **meets the service manager's occupancy standards;** and
b) is in a housing project for which the household has expressed a preference.

Further, section 32.2 provides that:

- If a household refuses an offer for a portable housing benefit it would not be considered as a refusal under this rule.
- Service managers may determine that a household remains eligible if the service manager is satisfied there are extenuating circumstances.

While the amendments come into force on January 1, 2020, the provincial rule on refusal of offers (commonly referred to as the "one offer" rule) begins to apply on a date chosen by the service manager that is *no later than January 1, 2021*.

Impact on current policies and procedures

Implementation of this new provincial rule will require service managers to update all directives, policies and procedures to reflect the change from the **previous** *minimum of three (3) offers* of RGI assistance to the new provincial rule of *one (1) offer* of RGI assistance, as per section 32.2 of the Regulation.

Local rules

Under section 42(2) of the Act*,* the City has the ability and responsibility to establish local rules for determining eligibility for RGI assistance on prescribed matters set out in subsection 33(1) of the Regulation. On January 1, 2020 subsection 33(1) of the Regulation is amended by striking out "34 to 39" and substituting "34 to 38" as outlined below.

Revocation of local rule – refusal of offers

Section 39 of the Regulation allowed service managers to make a local rule providing that a household would no longer be eligible for RGI assistance if a household refused a *minimum of three offers* of RGI assistance from a service manager.

Effective January 1, 2020, section 39 of the Regulation is revoked and any local rule made under this section may only continue to apply until the service manager implements the new provincial rule on refusal of offers, as outlined above, no later than January 1, 2021.

Impact of amendment(s) on current policies and procedures

As noted above, implementation of this new provincial rule will require service managers to update all directives, policies and procedures to reflect the change from the **previous** *minimum of three (3) offers* of RGI assistance to the new provincial rule of *one (1) offer* of RGI assistance from the service manager, as per section 32.2 of the Regulation.

Amendment to local rule – ceasing to meet occupancy standards

Section 38 of the Regulation allows a service manager to establish a local eligibility rule that a household ceases to be eligible for RGI assistance if the household occupies a unit that is larger than the largest size permitted under the service manager's occupancy standards. The rule must indicate that the household is **not ineligible**

a) until a year after it is notified by the service manager that it occupies a unit that is larger than permitted, and
b) if it is following the process specified in the rule or by the service manager to be transferred to a unit that is permissible under the service manager's occupancy standards.

On January 1, 2020, section 38 of the Regulation is amended and states that the process to be transferred set out in the rule or specified by the service manager must provide that,

a) a household ceases to be eligible if, after a year from being notified that it is in a unit that is larger than permitted, it refuses an offer to transfer to another unit that is permissible under the service manager's occupancy standards; and
b) a service manager may determine that the household remains eligible if the service manager is satisfied that there are extenuating circumstances.

<u>Impact of amendment(s) on current policies and procedures</u>

The amendment to section 38 is consistent with the new provincial "one offer" rule. Particular attention should be given to local rules regarding overhoused households and policy and procedure references to the number of offers a household is entitled to under the local rule.

Occupancy standards

Under section 43 of the Act, service managers must establish occupancy standards for determining the size and type of unit permissible for a household receiving RGI assistance. The occupancy standards must comply with the **following prescribed requirements** outlined in section 42 of the Regulation:

1. The standards must provide for the household to be permitted a larger unit than would otherwise be permitted if a larger unit is reasonably necessary due to a disability or medical condition of a member of the household.
2. The standards must treat a child of a member of a household as a member of the household, for the purposes of the occupancy standards, if the child,
   i. is in attendance at a recognized educational institution and, while in attendance, does not live with the household,
   ii. lives with the household while not attending that educational institution, and
   iii. is dependent, in whole or in part, on the household for financial support. O. Reg. 367/11, s. 42 (1).

(2) In subparagraph 2 i of subsection (1),

"recognized educational institution" means any of the following or a similar institution outside Ontario:

1. A school, as defined in the *Education Act*.
2. A university.

3. A college of applied arts and technology established under the *Ontario Colleges of Applied Arts and Technology Act, 2002*.
4. A private career college, as defined in the *Private Career Colleges Act, 2005*.
5. A private school, as defined in the *Education Act*, for which a notice of intention to operate has been submitted to the Ministry of Education in accordance with that Act. O. Reg. 367/11, s. 42 (2).

Section 46 of the Act states that service managers must determine the size and type of unit that would be permissible if the household receives RGI assistance. The service manager's determination of size and type of unit must be made in accordance with the occupancy standards established under section 43 of the Act.

Impact of amendment(s) on current policies and procedures

At the time of this review, there were no amendments to sections 42 or 46 of Ontario Regulation 367/11.

Implications of amendments

To ensure compliance with the amendments to the Regulation outlined in this review, service managers will need to update existing directives, policies and procedures. The City's affected policies and procedures could include, but are not limited to, the following:

- Occupancy Standards for RGI Households
- Local rule - Overhoused Households
- Local rule – Ineligible for RGI due to three refusals
- Eligibility for Modified Units
- RGI application form

3.

Review of industry practices

In order to identify industry practices in the establishment of occupancy standards, the relevant policies/directives of five other services managers were reviewed and compared to those of the City.

Approach

The City used the following criteria when identifying and selecting suitable service manager areas for this review:

1. The service manager area has **similar socio-demographics** to Greater Sudbury (as it relates to population size and/or # of community housing RGI units), or;

2. The City of Greater Sudbury has **referenced the local rules of the service manager** area in the past in the development and/or updating of its own local rules because their rules strongly reflect the requirements in the Act.

3. The service manager area is a **participant of the Municipal Benchmarking Network Canada** (MBN Canada). MBN Canada is a partnership between Canadian municipalities that believe in the power of measurement to inspire continuous improvement in the delivery of services to communities. Partner municipalities identify and collect consistent and comparable data in their municipal service areas; report the findings annually, and; analyse the results to see how they measure up. The City of Greater Sudbury has been an MBN Canada participant since 2017.

The following service manager areas met one, or both, of the aforementioned criteria and have been included as part of this review:

- Hamilton
- Kingston
- London
- Ottawa, and
- Peterborough

Key areas of comparison

1. Legislative references

All five service manager areas reference section 43 of the Act in their respective policies/directives regarding Occupancy Standards, particularly with regards to the service manager's mandate to establish occupancy standards. Likewise, all of the policies reviewed also refer to section 42 of the Regulation – Occupancy standards requirements.

Similar to the City of Greater Sudbury, both Kingston and London also refer to the following legislation when defining recognized education institution in their policies:

- *Ontario Colleges and Applied Arts and Technology Act, 2002*
- *Private Career Colleges Act, 2005*
- *Education Act*

The City of Ottawa is the only service manager area reviewed to make reference in its occupancy standards to other sections, beyond those listed above, of the Act and Regulation.

2. Occupancy standards (largest/smallest unit size)

The policies of all five service managers use similar wording to describe the use of occupancy standards for determining the size and type of unit permissible for a household receiving RGI assistance.

There was however, some variation in terms of the level of detail provided by the service managers when outlining the smallest and largest unit for which an RGI household is eligible. The policies ranged from including a detailed chart with all possible household types (sizes) and corresponding smallest/largest unit size, to referencing the provincial occupancy standards originally defined in Social Housing Reform Act (SHRA) O. Ref 298/01.

What is the largest unit that a single person household is eligible for under the service manager's occupancy standards?	
City of Hamilton	One bedroom
City of Kingston	One bedroom
City of London	One bedroom
City of Ottawa	One bedroom
City of Peterborough	One bedroom
City of Greater Sudbury	One bedroom

Regardless of the level of detail provided in the occupancy standards, all five service managers defined the largest unit that a single person household receiving RGI assistance is eligible for as being a one bedroom unit.

Over-housed households

In addition to the occupancy standards, four of the five service managers also have local rules for over-housed households. The City of Ottawa differs only in that the over-housed rule and Occupancy Standards are addressed in the same policy document.

Over-housed households were similarly defined by all five service managers as being households in receipt of RGI assistance who occupy units larger than permitted under local Occupancy Standards. The intent of the local rule being to ensure a process whereby households in receipt of RGI assistance are housed in appropriately sized units, in order to remain eligible for RGI assistance.

Does the service manager have a local rule for households ceasing to meet occupancy standards (over-housed households)?	
City of Hamilton	**NO***
City of Kingston	**YES**
City of London	**YES**
City of Ottawa	**YES (part of Occupancy Standards)**
City of Peterborough	**YES**
City of Greater Sudbury	**YES**

**While this service manager does not have a specific local rule regarding over-housed households, the occupancy standards clearly define over-housed household as being "a tenant or co-op member in receipt of RGI or rent supplement who occupies a unit that is larger than the largest unit for which they are eligible under the occupancy standards" which Hamilton has set as one bedroom for single person households.*

Under-housed households

All five service managers similarly described households in receipt of RGI assistance that occupy a unit of a size that is smaller than the smallest unit for which they are eligible as being considered under-housed.

While under-housing households in receipt of RGI assistance is not standard practice among the service managers reviewed, it was noted that under certain conditions households may choose to be under-housed. In reference to under-housed households, four of the five service managers further noted that the occupancy could not violate any local municipal by-laws, and cited the specific by-law.

Does the policy reference local municipal occupancy by-laws/building codes?	
City of Hamilton	**YES**
City of Kingston	**YES**
City of London	**YES**
City of Ottawa	**YES**
City of Peterborough	**NO**
City of Greater Sudbury	**NO**

3. Criteria for an additional bedroom

All of the five service managers outline circumstances when a household receiving RGI assistance is permitted an additional bedroom than would otherwise be permitted by the Occupancy Standards.

Does the policy specify special circumstances/criteria when a household receiving RGI assistance is permitted a larger unit than would otherwise be permitted by the occupancy standards?	
City of Hamilton	**YES**
City of Kingston	**YES**
City of London	**YES**
City of Ottawa	**YES**
City of Peterborough	**YES**
City of Greater Sudbury	**YES**

The common criteria for an additional bedroom outlined by the service managers reviewed are:

- Documented disability or medical
- Child-related

4.

Executive Summary of Legal Opinion

A Memo of legal analysis and opinion from Gowling WLG (Canada) LLP ("Gowling WLG") regarding legal implications of establishing alternate local rules and the application of human rights law to the eligibility rule is included as **Attachment 1**. The Executive Summary from this legal analysis and opinion is provided below.

Executive Summary

1. **If a service manager creates a local eligibility rule that differs from the prescribed provincial eligibility rules, which rule would take precedence?**

The provincial eligibility rules take precedent over a local rule if the local rule conflicts with the provincial eligibility rules. A court would consider whether the rules actually conflict, and they are permitted to differ as long as they do not conflict.

2. If a service manager creates an occupancy standard that differs from the prescribed provincial requirements, which would take precedence?

The prescribed provincial requirements take precedence over an occupancy standard adopted by a service manager.

3. How will the *Human Rights Code* and other applicable human rights law impact changes to eligibility rules (regardless of whether rule changes are made at the provincial level or locally)?

While the *Human Rights Code* (the "Code") applies to the provision of subsidized housing, s. 14 of the Code permits the landlord or manager to impose rules that are rationally connected to the goal of providing housing to as many eligible applicants as possible.

For example, there is a strong case that setting a minimum occupancy for a unit or limiting larger units to larger families would be protected from challenge because of s. 14 of the Code. An individualized analysis will be required, especially where there is evidence of a need for a larger unit due to disability or medical need. Further, s. 42(1) of Ontario Regulation 367/11 requires that a larger unit be provided due to a disability or medical condition and in situations where there is a child dependent who attends a school elsewhere but lives at home when not in school. Flexibility in local eligibility rules is required to permit an individualized analysis to ensure that statutory and regulatory requirements are met.

5.

Recommendations arising from the analysis

As a service manager under the *Housing Services Act, 2011*, the City of Greater Sudbury has an important responsibility to establish local rules in order to administer, implement and distribute rent-geared-to-income assistance in an equitable and consistent manner. The Act establishes the service manager's authority to make local eligibility rules, which are relevant to local circumstances.

The review of occupancy standards of five (5) other jurisdictions demonstrates that there is a great deal of consistency in the application of the legislative references, occupancy standards and criteria for an additional bedroom in the implementation of the requirements under the Act and the Regulations. Where there are differences across the five service managers it is in how these requirements are documented. The review of the other service manager areas suggests that a best practice would be to ensure consistency across all policies, directives and procedures.

Based on the legal analysis and opinion of Gowling WLG, and HSC's review of occupancy standards from other service manager areas, it is recommended that the City of Greater Sudbury:

1. **Consider the legal opinion provided by Gowling WLG** when reviewing and updating any local rules and occupancy standards. In particular, note, "the prescribed provincial requirements take precedence over an occupancy standard adopted by a service manager."

2. Continue to administer, implement and distribute RGI assistance in an **equitable and consistent** manner, with particular consideration to:,

    (i) Ensuring households are not over-housed. Active efforts should be made to meet the needs of applicants while maximizing the use of existing housing assets.
    (ii) Ensuring households are not under-housed. Ensure procedures are in place to allocate the adequate and appropriate unit size to eligible households. If a household may choose to be under-housed, stipulate parameters for the resulting occupancy (e.g. reference local municipal by-laws that the occupancy must be in accordance with).

3. **Update existing policies, directives and procedures** to reflect changes under the *Housing Services Act, 2011* and its regulations: Ontario Regulation 367/11: General and Ontario Regulation 298/01 Determination of Geared-to-Income Rent under Section 50 of the Act to ensure the consistent application of these requirements and the local rules.

Attachment 1:
Memorandum of legal analysis and opinion from Gowling WLG (Canada) LLP

GOWLING WLG

SENT BY E-MAIL

MEMORANDUM

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File no. K0563118

To: City of Greater Sudbury (the "City")
cc: Housing Services Corporation
Re: Housing Services Act, 2011 Opinion on Occupancy Standards
Date: February 20, 2020

Executive Summary

1. If a service manager creates a local eligibility rule that differs from the prescribed provincial eligibility rules, which rule would take precedence?

The provincial eligibility rules take precedent over a local rule if the local rule conflicts with the provincial eligibility rules. A court would consider whether the rules actually conflict, and they are permitted to differ as long as they do not conflict.

2. If a service manager creates an occupancy standard that differs from the prescribed provincial requirements, which would take precedence?

The prescribed provincial requirements take precedence over an occupancy standard adopted by a service manager.

3. How will the *Human Rights Code* and other applicable human rights law impact changes to eligibility rules (regardless of whether rule changes are made at the provincial level or locally)?

While the *Human Rights Code* (the "Code") applies to the provision of subsidized housing, s. 14 of the Code permits the landlord or manager to impose rules that are rationally connected to the goal of providing housing to as many eligible applicants as possible.

For example, there is a strong case that setting a minimum occupancy for a unit or limiting larger units to larger families would be protected from challenge because of s. 14 of the Code. An individualized analysis will be required, especially where there is evidence of a need for a larger unit due to disability or medical need. Further, s. 42(1) of Ontario Regulation 367/11 requires that a larger unit be provided due to a disability or medical condition and in situations where there is a child dependent who attends

a school elsewhere but lives at home when not in school. Flexibility in local eligibility rules is required to permit an individualized analysis to ensure that statutory and regulatory requirements are met.

Background

The *Housing Services Act, 2011* (the "Act") establishes the legislative framework for social housing in Ontario. Under the Act, 47 Service Managers (municipalities and district social services administration boards are required to administer waiting lists for rent geared-to-income (RGI) assistance in social housing in their service area, in compliance with detailed rules. Section 6 of Ontario Regulation 367/11, made under the Act (the "Regulation"), establishes the City as a Service Manager. Sections 120-125 of the Act establish the Housing Services Corporation.

The Housing Services Corporation is working with the City to review local eligibility rules and occupancy standards for community based planning and delivery of housing and homelessness services in the City. The permitted content of local eligibility rules is governed by s. 42 of the Act, while the permitted content of occupancy standards is governed by s.43. Accordingly, this opinion focuses on these two sections of the Act and the corresponding prescribed requirements in the Regulation.

There have been recent changes to relevant regulations. Elements of the Regulation governing eligibility for rent-geared-to-income came into force on January 1, 2020.[1] Our analysis in this opinion focuses on the Regulation, since there is limited if any impact of the prior regulations and other associated regulations.

In preparing this opinion, we have had a discussion with the Housing Services Corporation, and reviewed relevant legislation and regulations, legal secondary sources and the Policy Statement: Service Manager Housing and Homelessness Plans issued by the Minister. If any of the information relied upon in this opinion changes, then this may alter our opinion.

Analysis

Statutory interpretation analysis requires consideration of: (1) common law; (2) a plain reading giving the words of statute their ordinary meaning in context (in this case, the Act and corresponding regulations); and (3) may include consideration of other statutory interpretation principles and tools, including Hansard debates before the legislature.

There were no reported decisions in relation to ss. 42 and 43 of the Act or relevant regulations. A review of the Hansard in relation to ss. 42 and 43 the Act reveals that there was no reference to the relevant provisions of the Act; therefore, this opinion focuses on the plain reading of the statute, pursuant to the principles of statutory interpretation. The July 2016 Policy Statement on Service Manager Housing and Homelessness Plans, which was issued by the Minster pursuant to s. 5(1) of the Act, does not address the issues raised in this opinion. The Regulation also does not alter the analysis interpreting ss. 42 and 43 of the Act.

1. If a service manager creates a local eligibility rule that differs from the prescribed provincial eligibility rules, which rule would take precedence?

[1] Furthermore, Ontario Regulation 316/19 will also come into force on July 1, 2020, and will replace Ontario Regulation 298/01.

Section 42(1) of the Act provides that eligibility rules must be established in accordance with prescribed provincial eligibility rules; and local eligibility rules made by the service manager. Section 42(3) of Act provides that: "the local eligibility rules must comply with the prescribed requirements." Based on a plain reading of s. 42(3) alone, the local eligibility rules may not conflict with the provincial eligibility rules. The use of the word "shall" is mandatory, meaning there is no discretion and local eligibility rules therefore must comply with the provincial eligibility rules (being one of the prescribed requirements).

Further, a plain reading of s. 42(4) of the Act provides that a local eligibility rule **does not apply** to the extent that it conflicts with a provincial eligibility rule:

> Conflicts
>
> (4) A local eligibility rule does not apply to the extent that it conflicts with a provincial eligibility rule, unless the provincial eligibility rule provides otherwise.

The language is express, making it clear from a plain reading that the local eligibility rules may not conflict with any provincial eligibility rule. Further, this provision reflects the established legal principle that municipalities are creatures of provincial statute, and may only exercise those powers explicitly conferred upon them by statute.[2] It also mirrors the language of s. 14 of the *Municipal Act,* which is analogous as it provides that any municipal by-law is of no force and effect to the extent that it conflicts with a provincial or federal act, regulation, or "instrument of a legislative nature":

> Conflict between by-law and statutes, etc.
>
> 14 (1) A by-law is without effect to the extent of any conflict with,
>
> (a) a provincial or federal Act or a regulation made under such an Act; or
>
> (b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation. 2001, c. 25, s. 14.
>
> (2) Without restricting the generality of subsection (1), there is a conflict between a by-law of a municipality and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument. 2006, c. 32, Sched. A, s. 10.

In short, s. 42(4) of the Act is clear that a provincial eligibility rule will take precedence over a local eligibility rule, to the extent the two rules conflict.

However, courts have been clear that municipal powers are to be read broadly and purposively, and that a municipal instrument is presumed to have been validly enacted absent a clear demonstration that it is beyond the municipality's powers. This approach extends to issues of conflict between municipal and provincial instruments, as courts will attempt to find a harmonious reading of the two instruments that avoids conflict. The Ontario Court of Appeal has been clear that a conflict will only exist if:

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[2] *Magder v. Ford*, 2013 ONSC 263 (Div Ct.) at para 64

1) a person cannot simultaneously comply with both the municipal and provincial instrument (known as the impossibility of dual compliance test); and/or

2) the municipal instrument frustrates the purpose of the legislature in enacting the conflicting statute.[3]

Therefore, ss. 42(3) and (4) of the Act provide that a local eligibility rule is not permitted to conflict with provincial eligibility requirements.

2. If a service manager creates an occupancy standard that differs from the prescribed provincial requirements, which would take precedence?

Section 43(1) of the Act requires a service manager to establish occupancy standards for determining the size and type of unit permissible for a household receiving assistance pursuant to eligibility rules. Section 43(2) provides that the occupancy standards must comply with all prescribed requirements. This means that occupancy standards cannot conflict with provincial eligibility rules, as that is a prescribed requirement in the Act.

Section 46(1) of the Act provides that the service manager must determine the size and type of unit permissible, and that determination must be in accordance with the occupancy standards set out pursuant to s. 43(1) of the Act.

A potential challenger against occupancy standards would need to meet a high threshold. Assuming that the City adopts the occupancy standards through a by-law, a challenge would need to demonstrate that the by-law was passed in bad faith or *ultra vires* the City's statutory authority.[4]

To minimize any potential challenges, thorough analysis should be included in any staff report or consulting report that justifies the occupancy standards that are chosen. For example, by the City conducting a third party review of its current occupancy standards and those of other service managers, any risk of a successful challenge against the City's by-law is greatly reduced. Considering relevant policy factors, such as financial implications of the occupancy standards and eligibility rules is helpful to demonstrate the validity of any by-law adopting occupancy standards.

3. How will the Human Rights Code and other applicable human rights law impact changes to eligibility rules (regardless of whether rule changes are made at the provincial level or locally)?

a. Example: A municipality has a local rule limiting the maximum size of a unit to 1 bedroom for a household with 1 resident. The resident is requesting that they be eligible for a 2 bedroom unit so that they have room in case a relative visits overnight to provide occasional support to the resident (such as taking them to appointments, etc.). Would human rights law provide a duty to accommodate that overrides the local rule (even if the local rule is in compliance with the Act)?

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[3] *Croplife Canada v. Toronto (City)* [2005] OJ No. 1896 (ONCA) at para 60.

[4] Section 273 of the *Municipal Act, 2001* provides the mechanism for challenging a by-law. For the test on challenging a by-law, see *RSJ Holdings v. London (City)*, 2007 SCC 29.

Human Rights Legislation

The Supreme Court of Canada has consistently held that human rights legislation has a fundamental and quasi-constitutional status.[5] The Ontario Code[6] has primacy over all other legislation in Ontario, unless the other legislation specifically exempts the applicability of the Code.[7] The exemption does not apply in the present situation. The powers granted by the Act to determine eligibility and occupancy requirements are consequently subject to the Code.

The applicability of the Code is specifically recognized in the context of rental housing. All landlords are required to comply with its provisions, in accordance with s. 2(1):

> Every person has a right to equal treatment with respect to **the occupancy of accommodation**, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, disability or the receipt of public assistance.[8] (emphasis added)

Application of the Code to Occupancy and/or Eligibility Standards

Landlords are permitted to set rules and requirements for occupancy or eligibility, so long as those rules and requirements do not constitute discrimination on one of the protected grounds listed in s. 2(1) of the Code.

Discrimination can be direct, i.e. "no unmarried couples need apply" or indirect, i.e. a criteria or requirement that has the impact of discriminating against individuals on the basis of a protected ground, e.g. family status, marital status, disability or race.

In certain cases, a "special program" may be set up to "relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity."[9] Discrimination may be permitted if it is to ameliorate the situation of a disadvantaged group under the rubric of a "special program."

The Ontario Human Rights Commission (OHRC) approved its own *Human Rights and Rental Housing*[10] policy on July 21, 2009. While the OHRC's policies are not legally binding, they have significant weight. The OHRC comments that s. 14 of the Ontario Code permits the use of special

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[5] See, e.g., A. v. B., 2002 SCC 66 at para 44.
[6] RSO 1990, c. H.19, as amended.
[7] *Ibid*, s. 47(2).
[8] Note that there are certain exceptions to the prohibition against discrimination in accommodation set out in the *Code*. Where the owner/landlord must share a bathroom or kitchen with tenants, the owner is exempt from compliance with the right under the *Code* to equal treatment with respect of the occupancy of residential accommodation without discrimination (s.21(1)). The same applies on the basis of sex where the occupants of residential accommodation are all of the same sex (s.21(2)). Furthermore, landlords are permitted to request income information, credit checks, credit references, rental history, guarantees or other similar information in selecting prospective tenants without that request being discriminatory (s.21(3)). We do not consider these relevant for the purposes of this analysis.
[9] Ontario Human Rights Code, s. 14
[10] Published July 21, 2009 and available at http://www.ohrc.on.ca/sites/default/files/attachments/Policy_on_human_rights_and_rental_housing.pdf (accessed January 20, 2020).

programs in housing to "relieve hardship or economic disadvantage or to help disadvantaged people or groups achieve equal opportunity. Creating special programs is one step that governments can take to address the shortage of adequate and affordable housing."[11] These special programs may have "restrictions within the program [that] are rationally connected to the objective of the program."[12]

The applicability of occupancy or eligibility criteria set by co-ops or landlords of subsidized housing has been considered from a human rights perspective, frequently in British Columbia. Because the protection provided by the British Columbia Human Rights Code is similar to the Ontario Code, British Columbia case law is very helpful in Ontario.[13] A recurring issue has been whether a housing provider can insist on a **minimum** occupancy for a particular size of unit. This was explicitly addressed in the two cases discussed below.

In *Bone v. Mission Co-op Housing Association,*[14] a widowed member of the co-op was asked to move from a two-bedroom suite to a one-bedroom suite following the death of his wife. The request was made in accordance with the co-op's "overhousing policy," which required that two-bedroom units be occupied by two adults. The complainant established *prima facie* discrimination on the basis of marital status, but the BC Human Rights Tribunal concluded that the "overhousing policy" was **rationally connected to the co-op's purpose**, which was to provide suitable housing for seniors of modest income. The purpose of the policy was to **maximize the available housing in a situation of housing scarcity**.

In *Dubois v. Benryk Mews Housing Co-op,*[15] a couple with one child challenged a policy that required that spouses share a bedroom. In short, the family was only entitled to a two-bedroom unit. Although this was clearly discriminatory on the basis of marital or family status, the BC Human Rights Tribunal determined that the policy was justified. The purpose of the co-op was to provide low-income housing to as many people as possible and there was a lengthy waiting list for affordable units.

The size of a unit may also be an issue where there is an issue of disability. In *Shortts v BC Housing Management Commission,*[16] the complainant suffered from a physical disability and requested a move from her bachelor unit to a one-bedroom unit. The move was denied by the landlord as priority for one-bedroom units was given to couples. As the complainant was not able to provide **medical evidence** that she required more space for her disability and BC Housing had provided her other forms of accommodation, the Tribunal dismissed her complaint. The BC Housing authority was not required to provide the perfect accommodation or solution to her disability needs.

Finally, excluding applicants because there may be too many occupants for a unit may also be challenged on the basis of Code. In *Fakhoury v. Las Brisas Ltd.*,[17] the tribunal held that a policy requiring a four-person family (one parent and three children) to rent at least a three-bedroom unit was discriminatory and not reasonably justified. The tribunal disagreed with the landlord that the rule was necessary to control population density in the building. The landlord admitted it permitted four-person

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[11] *Ibid.*, at pp. 53-54.
[12] *Ibid.*, at p. 54.
[13] *Human Rights Code*, RSBC 1996, c. 210, ss. 8, 10.
[14] 2008 BCHRT 122.
[15] 2012 BCHRT 224.
[16] 2019 BCHRT 26.
[17] 1987, Ont. BD. Of Inquiry, 8 CHRR D/4028.

families that included two adults to occupy two-bedroom apartments. Therefore, it was clear that it was the type of family and not the number of people that was the fundamental issue.

CONCLUSION

While the Code applies to the provision of subsidized housing, s. 14 of the Code permits the landlord or manager to impose rules that are rationally connected to the goal of providing housing to as many eligible applicants as possible. Therefore, setting a minimum occupancy for a unit or limiting larger units to larger households would be protected under s. 14 of the Code.

An individualized analysis will be required, especially where there is evidence of a need for a larger unit due to disability or medical need. In particular, s. 42(1) of Ontario Regulation 367/11 requires that a larger unit be provided due to a disability/medical condition and in situations where there is a child dependent who attends a school elsewhere but lives at home when not in school. Therefore, flexibility in local eligibility rules is required to permit an individualized analysis to ensure that statutory and regulatory requirements are met.

ROBERTO AGUATS

APPENDIX "A" – Applicable Statutory Provisions

***Housing Services Act, 2011*, SO 2011, c 6, Sch 1**

Rent-Geared-to-Income Assistance

Eligibility rules

42 (1) Eligibility for rent-geared-to-income assistance shall be determined in accordance with the following:

1. The prescribed provincial eligibility rules.

2. The local eligibility rules made by the service manager. 2011, c. 6, Sched. 1, s. 42 (1).

Limits of local rules

(2) A service manager may make local eligibility rules only with respect to the prescribed matters. 2011, c. 6, Sched. 1, s. 42 (2).

Prescribed requirements for local rules

(3) The local eligibility rules must comply with the prescribed requirements. 2011, c. 6, Sched. 1, s. 42 (3).

Conflicts

(4) A local eligibility rule does not apply to the extent that it conflicts with a provincial eligibility rule, unless the provincial eligibility rule provides otherwise. 2011, c. 6, Sched. 1, s. 42 (4).

Occupancy standards

43 (1) A service manager shall establish occupancy standards for determining the size and type of unit permissible for a household receiving rent-geared-to-income assistance. 2011, c. 6, Sched. 1, s. 43 (1).

Prescribed requirements

(2) The occupancy standards must comply with the prescribed requirements. 2011, c. 6, Sched. 1, s. 43 (2).

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