

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
WINDSOR HOUSING PROVIDERS INC.)
) Applicant) Steven Pickard, for the Applicant
)
- and -)
)
WINDSOR (CITY)) Sharon Strosberg, for the Respondent
)
) Respondent)
)
)
) HEARD: December 7, 2023

K.A. GORMAN

NATURE OF THE APPLICATION

- [1] The Applicant brings this application to quash Residential Licensing By-law 14-2023 (“RRL”), pursuant to s. 273(1) of the *Municipal Act, 2001* on the grounds that it was enacted in bad faith, and illegally.
- [2] The applicant alleges that the regime is unlawful on several grounds including arbitrary discrimination, and that it violates the *Charter of Rights and Freedoms*, the *Constitutional Act*, the *Municipal Freedom of Information and Protection Act*, the *Residential Tenancies Act* and the *Human Rights Code*.
- [3] The respondent submits that the bylaw was passed in good faith for its legitimate stated purpose. The respondent submits that the application is brought solely to protect the applicants’ collective economic interests and to allow for their rental housing operation without regulatory oversight.

OVERVIEW

- [4] On February 13, 2023, the City of Windsor passed a bylaw to regulate landlords in Wards 1 and 2 through a licensing regime. Wards 1 and 2 were selected as a precursor to the By-law being rolled out city-wide.

- [5] The city of Windsor is comprised of 10 municipal electoral wards numbered 1 to 10. Ward 1 is the home of St. Clair College. Ward 2 is the home of the University of Windsor.
- [6] Windsor Housing Providers Inc. (“WHP”) is a not-for-profit corporation, incorporated on April 13, 2023, to represent housing providers (landlords) in the city of Windsor and their interest in the rental housing market. Borys Sozanski is the President of WHP and is a housing provider in the City of Windsor.
- [7] The bylaw is entitled “a bylaw to establish a licensing program for the regulation of residential rental housing in the city of Windsor”. The stated purpose of the bylaw is:
- AND WHEREAS the Council for The Corporation of the City of Windsor considers it necessary and desirable for the public to regulate the renting of residential premises for the purpose of protecting the health and safety of the persons residing in residential rental premises by ensuring that certain regulations are met, that the required essentials such as plumbing, heating and water are provided, for ensuring that the residential rental premises do not create a nuisance to the surrounding properties and neighbourhood and to protect the residential amenity, character and stability of residential areas.
- [8] The Respondent submits that the RRL is meant to provide a framework of licensing that will ensure that residential landlords provide dwellings that are licenced and inspected and in compliance with property standards, the *Building Code Act*, and the *Fire Code*.
- [9] The requirement for compliance with the bylaw came into force June 1, 2023.

ISSUES AND ANALYSIS

Was the RRL passed in “bad faith”?

- [10] While not specifically plead in the Application, the applicant submits that the bylaw should be quashed on the basis of bad faith because:
- a. The true purpose of the bylaw is to regulate student housing and/or housing in the vicinity of the University of Windsor and St. Clair College;
 - b. The municipality falsely purports the bylaw to be a “two-year pilot” but there is no time limit in the bylaw;
 - c. The bylaw only regulates Wards 1 and 2 and does not apply to any other Wards;
 - d. The bylaw unfairly disregards the economic interests of landlords and tenants;
 - e. There is a requirement that licensees be the resident of Windsor Essex and if not, they require a “local contact”;

- f. Licensees must not have a criminal record for designated over fences;
- g. Licensees must carry insurance;
- h. Licences are required for anyone who collects a fee or handles payment in respect of a rental property or anyone who is involved in marketing rental properties; and
- i. There is a broad discretion granted to the municipality in granting licences and enforcing the bylaw.

[11] The applicant submits that the true purpose of the by-law is to regulate the student housing in Wards 1 and 2 in favour of the city's more permanent residents.

[12] The city had previously enacted bylaws to regulate a variety of real estate-based business activities, including bed and breakfasts, guesthouses, lodging houses and short-term rentals. Residential rentals fell outside of each of these bylaws and were not subject to a system of licensing until the RRL was enacted.

[13] During Question Period at a Windsor City Council meeting on May 6, 2019, Ward 2 Councillor Constante asked:

[...] that administration report back a comprehensive affordable housing strategy that includes, but is not limited to, the following:

- What, if any, legislative options city Council has two require the University and College to provide safe and affordable student housing to their increasing student population;
- Options for developing a university, college and city of Windsor education strategy for students to learn their rights with respect to property standards and their rights as tenants in Ontario;
- Options for a residential rental licence that includes a pilot in Ward 2 with the intent of being rolled out citywide if successful after a definite period of time to be decided by counsel;
- Review our lodging home bylaw and ways to improve it to capture more rental properties in our community and allow for better opportunities to enforce property standards.

The intent of this counsel question is to provide incentives for safe and affordable housing in a concentrated manner that does not intrude on residential neighbourhoods, particularly those surrounding Ward 2.

[14] The motion proposed by Councillor Constante's question was carried.

- [15] On August 24, 2020, in response to counsellor Councillor Costante's question Council Report C137/2020 was tabled. The report recounted previous licensing proposals. After review, Council directed that the Administration pursue education and outreach initiatives rather than enact a new bylaw. The preference was to increase enforcement of existing complaint-based bylaws to ensure that properties were maintained through building, by law enforcement and fire inspection to bring properties into compliance.
- [16] On March 8, 2021, Council received a report from the Deputy Chief Building Official dated September 30, 2020. The report detailed the response to the increased enforcement activities requested by Council. After considering the information contained in the report, and after hearing from concerned residents¹ council directed Administration to draft a residential rental licensing bylaw as a pilot project in Wards 1 and 2.
- [17] Resolution CR 171/2-22 was passed on April 25, 2022. The RRL was drafted as a two-year pilot study in Wards 1 and 2. Its purpose is indicated as:
- The primary goal of licensing residential rentals in Windsor is to protect resident safety by ensuring rental housing units comply with safety regulations and applicable laws. The licensing framework described in this report will allow the city to preserve Windsor's existing rental housing stock by proactively addressing substandard housing conditions. If successful, the pilot study's results will indicate improved rental housing conditions in wards one and two and fewer actionable complaints received regarding rental housing properties.
- [18] By-law 14-2023 was passed on February 13, 2023.
- [19] On May 29, 2023, Council passed a number of housekeeping amendments to the by-law, including an amendment to ensure that landlords could market their rental properties online.
- [20] The burden of proving bad faith falls on the Applicant: *Payne v. Windsor (City)*, 2011 ONSC 5123. The court recited the relevant principles at para 12:

At this juncture it would be useful to enumerate some of the principles surrounding the issue of good versus bad faith, which is the central objection of the applicants:

- i) Pursuant to [s. 272 of the Municipal Act](#), when a by-law is passed in good faith a court is prohibited from quashing it on the ground of unreasonableness provided that the council act in good faith. However the unreasonableness of the by-law may be considered in evidence in an attempt to establish a lack of good faith when it was passed; (see *Howard v. Toronto (City)*, [1928] 1 D.L.R. 952 (Ont. C.A.)).
- ii) [Section 273\(1\) of the Municipal Act](#) provides the basis upon which anyone can request that the Superior Court quash a by-law, in whole or in part, for illegality.

¹ Including Mr. Sozanski.

iii) A municipal council is entitled to considerable deference, absent clear evidence that it was acting in excess of its powers. This principle was first enunciated by McLachlin J. in her dissenting opinion in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 (S.C.C.). In the subsequent case of *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342 (S.C.C.), at paragraphs 35-37, that view formed the majority opinion, with the result that this is now the current state of the law.

iv) To re-cap the deference test, approved by the Supreme Court in *Rascal Trucking*, the courts must respect the mandate of elected municipal bodies and exercise caution to avoid substituting their views regarding what is best for the citizens who are governed by those municipal councils. Unless there is clear evidence that a municipality was acting in excess of its powers, the courts should not interfere.

v) The notion of a wide municipal discretion relating to the regulatory powers of the municipality was also confirmed in *Toronto Livery Assn. v. Toronto (City)* (2009), 58 M.P.L.R. (4th) 11 (Ont. C.A.), at paragraph 47, where the court held that so long as the measures chosen are not arbitrary and are rationally connected to a legitimate municipal objective the court is precluded from second-guessing a city council on what regulatory measures are in the public interest of that city.

vi) Councils can be proactive and are therefore not limited to react only in response to complaints from constituents. In appropriate cases, council members may adopt proposed amendments by tapping into their personal knowledge, such as their familiarity with their municipality: see *Langille v. Toronto (City)* [2007 CarswellOnt 2822 (Ont. S.C.J.)], 2007 CanLII (ON S.C.) 15245, at paragraph 50. Furthermore, for a by-law to be set aside on the basis of bad faith, it must be proven that a majority of the council members acted in bad faith, which is a very onerous test: see *Langille*, at paragraph 38.

vii) Where a municipal council is engaged in policy making (as it was here with respect to the initiation and implementation of the Olde Sandwich Towne studies and by-laws) as opposed to acting in an adjudicative function, a less strict standard of fairness is required: (see *McLaren v. Castlegar (City)* (2011), 16 B.C.L.R. (5th) 261 (B.C. C.A.)).

viii) The onus of establishing bad faith rests on the person attacking the by-law: see *Grosvenor v. East Luther Grand Valley (Township)* (2007), 84 O.R. (3d) 346 (Ont. C.A.). There, the court held that the obligation to act in good faith continues to be an essential characteristic of the valid exercise of a by-law and it remains a central component of its validity where the by-law is passed in conformity with the municipality's power. A by-law that is properly passed is presumed to have been passed in good faith.

ix) A municipal council's power must be exercised on a bona fide basis and a by-law may be quashed if, when it was passed, the council was not using its power in good faith and in the public interest. This fact is a matter to be determined by the

judgment of the municipal council. Furthermore, it is not a valid objection to a by-law to say that it operates to the special benefit of some private individual if at the same time it is in the public interest.

x) Bad faith by a municipality connotes a lack of candour, frankness and impartiality and that includes the notion of arbitrary or unfair conduct: (see *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (Ont. C.A.), at p. 340).

xi) Due consideration must always be given to the principle that a by-law is presumed to be valid and anyone attacking it bears the burden of proving the contrary. The notion of bad faith is not to suggest any wrongdoing or personal advantage on the part of members of council but rather, in the factual context of the case, it must be established that the municipal council acted unreasonably and arbitrarily without the degree of fairness, openness and impartiality required of a municipal government. The issues of bad faith and discrimination are questions which must be determined on the totality of the facts and the circumstances of each case: (see *H.G. Winton Ltd. v. North York (Borough)* (1978), 20 O.R. (2d) 737 (Ont. Div. Ct.), at p. 746).

xii) Where the bona fide intent that is necessary for council's decision is absent and the by-law in question is passed not for a city, concern but rather, as a political measure intended to appease certain rate payers, it will be quashed: (see *839891 Ontario Inc. v. St. Catharines (City)* (1992), 10 M.P.L.R. (2d) 1 (Ont. Gen. Div.)).

xiii) A court should only intervene on the basis of bad faith and that will only be found if there is an absence of frankness and impartiality, which are the usual indicia of good faith (see: *Pedwell v. Pelham (Town)* (2003), 37 M.P.L.R. (3d) 161 (Ont. C.A.)).

[21] What is meant by “bad faith”? As Robins, J. stated in *H.G. Winton Ltd. v. North York (Borough)* (1978) 1978 CarswellOnt 491 at para. 477:

To say that Council acted in what is characterized in law as "bad faith" is not to imply or suggest any wrongdoing or personal advantage on the part of any of its members: *Re Hamilton Powder Co. and Township of Gloucester* (1909), 13 O.W.R. 661. But it is to say, in the factual situation of this case, that Council acted unreasonably and arbitrarily and without the degree of fairness, openness, and impartiality required of a municipal government.

[22] The relevant sections of the *Municipal Act, 2001, S.O. 2001, c. 25* (“the Act”) are:

8(1) Scope of powers

The powers of a municipality under this or any other Act shall be interpreted broadly so as to confer broad authority on the municipality to enable the

municipality to govern its affairs as it considers appropriate and to enhance the municipality's ability to respond to municipal issues.

10(1) Broad authority, single-tier municipalities

A single-tier municipality may provide any service or thing that the municipality considers necessary or desirable for the public.

10(2) By-laws

A single-tier municipality may pass by-laws respecting the following matters:

1. Governance structure of the municipality and its local boards.
2. Accountability and transparency of the municipality and its operations and of its local boards and their operations.
3. Financial management of the municipality and its local boards.
4. Public assets of the municipality acquired for the purpose of exercising its authority under this or any other Act.
5. Economic, social and environmental well-being of the municipality, including respecting climate change.
6. Health, safety and well-being of persons.
7. Services and things that the municipality is authorized to provide under subsection (1).
8. Protection of persons and property, including consumer protection.
9. Animals.
10. Structures, including fences and signs.
11. Business licensing.

151(1) Powers re licences

Without limiting [sections 9, 10](#) and [11](#), a municipality may provide for a system of licences with respect to a business and may,

- a) prohibit the carrying on or engaging in the business without a licence;
- b) refuse to grant a licence or to revoke or suspend a licence;
- c) impose conditions as a requirement of obtaining, continuing to hold or renewing a licence;
- d) impose special conditions on a business in a class that have not been imposed on all of the businesses in that class in order to obtain, continue to hold or renew a licence;
- e) impose conditions, including special conditions, as a requirement of continuing to hold a licence at any time during the term of the licence; and
- f) licence, regulate or govern real and personal property used for the business and the persons carrying it on or engaged in it.
- g) [Repealed 2017, c. 10, Sched. 1, s. 12(1).]

- [23] Accordingly, the *Act* permits the City of Windsor to provide for a system of licences with respect to businesses and differentiate its licensing requirements between different types of businesses. Specifically, s. 151(1)(f) of the *Act* allows a municipality to “licence, regulate or govern real and personal property used for the business and the persons carrying it on or engaged in it.”
- [24] WHP alleges that the RRL was passed for an improper purpose, namely, the regulation of post-secondary student housing. There is simply no evidence of that. The evidence put forward by the municipality shows the opposite.
- [25] There can be no suggestion that Council acted arbitrarily or without fairness, openness, and impartiality.
- [26] There was no rush to judgment or rush to the implementation of the by-law. It was first addressed in May 2019 and not passed until February 2023. The city website kept the public abreast of developments. Indeed, at the March 8, 2021, Council meeting 17 members of the public were heard from and expressed their views and opinions – including both Mr. Sozanski and Mr. Pickard.
- [27] Indeed, even after its passing, in response to some criticisms of the RRL, Council corrected them in an amendment on May 29, 2023.
- [28] There is no evidence that the by-law was enacted in bad faith.

Should the RRL be quashed for illegality?

- [29] Section 14 of the *Act* provides:

14(1) Conflict between by-law and statutes, etc.

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.

- [30] The test to be applied in determining whether a conflict exists was articulated by the court in *Rothmans, Benson & Hedges Inc. v. Saskatchewan* 2005 SCC 13:

(1) Is it impossible to comply simultaneously with the by-law and with the federal or provincial legislation; and

(2) Does the by-law frustrate the purpose of Parliament or the Legislature in enacting those laws?

If the answer to both questions is "no," then the by-law is effective.

[31] The Applicant alleges that the following provisions of the RRL are illegal for being ultra vires and/or a violation of various legislation:

- a. Rights of entry to any property without a warrant or reasonable probable grounds to determine if the By-law is being complied with;
- b. The requirements of tenants to obtain a licence to be able to sublet;
- c. Licences can be denied on the basis of who or where the Owner is, or in the case of a corporation, who the Shareholders are and where the Corporation is;
- d. The By-law restricts the marketing of rental units and requires anyone who markets or advertises a property for rent to also have a licence;
- e. The By-law targets student populations and/or specific areas around the University of Windsor and St. Clair College;
- f. The collection of personal information beyond name, title, and contact; and
- g. Licences are denied to people who have been convicted of certain offences.

[32] In approaching statutory interpretation, guidance is had from the court in *Brantford (City) Public Utilities Commission v. Brantford (City)*, (1998) 36 O.R. (3d) 419 at para. 27:

[...] it is important to bear in mind a fundamental principle of statutory construction that courts should attempt to avoid finding a conflict between two pieces of legislation [...].

Ultra Vires Issue A: Rights of entry to property

[33] Section 9.8 and 9.9 of the By-law reads:

9.8 Officers, and any person acting under their direction, may, at any reasonable time or at any time when there are reasonable grounds to believe that a contravention of this bylaw is occurring or alleged to be occurring and subject to applicable law, enter onto any property to determine if the provisions of this bylaw are being complied with.

9.9 Officers are authorized, for the purposes of an inspection to determine and enforce compliance with the bylaw, to:

(a) direct an owner or operator to provide a tenant with notice in accordance with the *Residential Tenancies Act, 2006* to allow entry into the unit to carry out an inspection;

(b) enter, at any reasonable time, onto any property, other than an occupied dwelling unit unless authorized by the occupier of such dwelling unit or under the authority of a warrant issued by a court of competent jurisdiction;

...

(e) require information from any person concerning the alleged offence or inspection.

[34] The applicant submits that the “entry, search and seizure provisions” of the By-law are in contravention of section 8 of the *Charter of Rights and Freedoms* (“the Charter”).

[35] Section 8 of the *Charter* guarantees that, “everyone has the right to be secure against unreasonable search or seizure.

[36] A careful reading of s. 9.8 and 9.9 of the By-law indicates that officers may enter onto the property at any reasonable time. However, they cannot enter the actual dwelling unit unless authorized by either the occupant or under the auspices of a judicially issued warrant. The RRL authorizes officers to enter property for the purposes of inspection, and not search and seizure.

[37] In *Belgoma Transportation Ltd. v. Ontario (Director of Employment Standards) 1985 CarswellOnt. 1583 (OCA)* the court held that as the legislation in question did not authorize “search and seizure”, but rather “inspection”, there was no violation of s. 8 of the Charter.

[38] I conclude that Sections 9.8 and 9.9 of the By-law do not contravene s. 8 of the *Charter*.

Ultra Vires Issue B: Subletting

[39] Section 4 of the By-law reads:

4.1 No person shall do any of the following except in accordance with a Licence issued under this by-law:

(a) Operate a Rental Housing Unit;

(b) Permit a person to operate a Rental Housing Unit.

...

4.2 No person shall do any of the following, other than at a location for which a Licence has been issued under this by-law:

- (a) Operate a Rental Housing Unit;
- (b) Permit a person to operate a Rental Housing Unit;
- (c) Collect Rent, or permit Rent to be collected, for a Rental Housing Unit.

[40] The applicant submits that the aforementioned sections of the by-law conflict with s. 97 of the *Residential Tenancies Act, 2006, SO 2006, c. 17 sec 97* (“the RTA”):

97(1) Subletting rental unit

A tenant may sublet a rental unit to another person with the consent of the landlord.

97(2) Same

A landlord shall not arbitrarily or unreasonably withhold consent to the sublet of a rental unit to a potential subtenant.

[41] The applicant submits that s. 97 of the RTA provides the right of subletting with the consent of the landlord, where the by-law would require tenants seeking to sub-let to obtain a licence to do so.

[42] The applicant submits that requiring tenants to obtain a licence to sub-let would make subletting inaccessible given that s. 2 of the RRL requires proof of inspection, proof of insurance, etc. to obtain a licence.

[43] The relevant definitions for this consideration are as follows:

“Operate”, “Operated” or “Operating” means to rent out, rent out, provide, offer to rent out or provide, or cause to be marketed, the offer or rental, whether directly or indirectly, including, without limitation, via the Internet or other electronic platform, of a rental housing unit and shall include a person collecting a fee or handling payments in respect of a Rental Housing Unit;

“Operator” means any person who operates, maintains, or is otherwise responsible for managing or addressing issues in relation to a Rental Housing Unit but is not an Owner;

“Tenant” includes a person who pays rent or provide services in lieu of paying rent in return for the right to occupy a Rental Housing Unit and includes the persons air, assigns (including subtenants) and personal representatives.

[44] In *Law Society (British Columbia) v. Mangat*, [\[2001\] 3 S.C.R. 113](#) (S.C.C.), the court discussed the issue of conflict at para. 69:

There will be a conflict in operation where the application of the provincial law will displace the legislative purpose of Parliament. The test is stated at p.191

[of *Multiple Access*]: "one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things'; compliance with one is defiance of the other".

[45] And as the court stated in *Croplife Canada v. Toronto (City) 2005 CarswellOnt 1877 at para. 74*:

Finally, the by-law will not be effective, if it expressly contradicts any other law, whether federal or provincial, or if it frustrates the purpose of those laws.

[46] As Madam Justice Leitch stated in *London Property Management Association v. City of London 2011 ONSC 4710*, the Residential Tenancies Act governs the relationship between landlords and tenants, where licensing by-laws regulate the rights of the landlord in relation to the municipality.

[47] The definitions of “Operate” and “Operator” do not refer to subleases or subtenants. There is nothing in the RRL that requires a tenant to obtain a licence.

[48] While I appreciate that the evidence of the City Clerk and Licence Commissioner, Mr. Steven Vlachodimos² was that a tenant seeking to sublet would require a licence, that simply cannot be the case, on a reading of the RRL. A licence is required by an “Operator”. There can be no suggestion that a “Tenant” is an “Operator” as defined in the by-law.

[49] The legislature has not precluded other acts from dealing with residential complexes.

[50] There is no conflict between the *Residential Tenancies Act* which purpose is:

1(1) Purposes of Act

The purposes of this Act are to provide protection for residential tenants from unlawful rent increases and unlawful evictions, to establish a framework for the regulation of residential rents, to balance the rights and responsibilities of residential landlords and tenants and to provide for the adjudication of disputes and for other processes to informally resolve disputes.

and the stated purpose of the RRL:

[...] to provide protection for residential tenants from unlawful rent increases and unlawful evictions, to establish a framework for the regulation of residential rents, to balance the rights and responsibilities of residential landlords and tenants and to provide for the adjudication of disputes and for other processes to informally resolve disputes.

² Transcript Q 591-597

[51] Accordingly, the RRL is not ultra vires regarding the issue of subletting.

Ultra Vires Issue C: Residency

[52] The applicant submits that the bylaw contains an arbitrary necessity for applicants to have a contact or agent within the city of Windsor or Essex County. It submits that this condition is contrary to both the *Municipal Act* and section 6 of the *Charter*. The applicant submits that licences can be denied on the basis of where the owner resides, or in the case of a corporation, who the shareholders are and where the corporation is located.

[53] Section 6 of the *Charter* states:

6(1) Mobility of citizens

Every citizen of Canada has the right to enter, remain in and leave Canada.

6(2) Rights to move and gain livelihood

Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

- (a) to move to and take up residence in any province; and
- (b) to pursue the gaining of a livelihood in any province.

6(3) Limitation

The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

[54] Section 2.1 of the RRL states that: every application to obtain or renew a residential rental licence shall include: [I] if none of the owners reside in the city of Windsor, or if the owner is a corporation, the name and contact information of a local contact.

[55] Local contact is defined as:

[...] an individual person, whether an owner or an operator, who is responsible for the care and control of the rental housing unit and who resides within the city of Windsor.³

³ In May 2023 the residence requirement was extended to include the County of Essex.

[56] The Applicant submits that the RRL is in direct contravention of s. 153 of the *Municipal Act*:

153(1) Limitation re location of business

Despite [sections 9, 10, 11](#) and [151](#), a municipality shall not, except as otherwise provided, refuse to grant a licence for a business under this Act by reason only of the location of the business.

[57] The by-law permits anyone to apply for a licence, regardless of where they live.

[58] It appears that the applicant has misapprehended the “local contact” requirement. The purpose of a local contact is consistent with the fundamental purpose of the RRL which is to ensure the health and safety of residential tenants. The purpose of the “local contact” is to have someone close by who could respond in an urgent situation to access the property.

[59] The applicant further submits that the by-law is ultra vires the authority of the Municipal Act in that it gives the Commissioner an overreaching power to determine who receives a licence, based on arbitrary ground. In this regard, the applicant directs the court to s. 151(4) of the Act:

151(4) Exercise of power

The exercise of a power under clause (1), (b), (d) or (e) is in the discretion of the municipality, and the municipality shall exercise its discretion,

(a) upon such grounds as are set out by by-law; or

(b) upon the grounds that the conduct of any person, including the officers, directors, employees or agents of a corporation, affords reasonable cause to believe that the person will not carry on or engage in the business in accordance with the law or with honesty and integrity.

[60] The applicant contrasts this section with s. 5.18 of the RRL:

At the hearing, the Windsor licensing commission may suspend, revoke, and refused to issue or impose conditions on any licence under this bylaw:

(h) if the conduct or character of the applicant or licensee affords reasonable grounds to believe that the applicant or licence will not carry on or engage in the business in accordance with the law or with honesty and integrity;

(k) issuing the licence is not in the public interest.

[61] The applicant submits that city Council has illegally added the provision, namely the word “character”.

[62] I find no merit in this submission. While s. 151(4)(b) of the *Municipal Act* does not mention “character” subsection a provides that municipal discretion shall be exercised “upon such grounds as are set out in the bylaw”. I agree with the submission of the respondent that “character” is simply an additional standard provided under the RRL and accordingly a valid consideration for the Commissioner.

[63] The by-law references shareholders in several section where a corporation is applying for a licence. The applicant submits that s. 151(4)(b) of the *Municipal Act* only lists officers, directors, employees, or agents of a corporation as those whom a municipality may exercise discretion against. Accordingly, the applicant submits that the RRL is ultra vires.

[64] I cannot accede to this submission. Section 151(4)(b) states:

151(4) Exercise of power

The exercise of a power under clause (1), (b), (d) or (e) is in the discretion of the municipality, and the municipality shall exercise its discretion,

(a) upon such grounds as are set out by by-law; or

(c) upon the grounds that the conduct of any person, including the officers, directors, employees or agents of a corporation, affords reasonable cause to believe that the person will not carry on or engage in the business in accordance with the law or with honesty and integrity.

[65] Clearly the legislature did not intend to exclude shareholders. In my view, the provision was drafted in the broadest of terms.

[66] The residency requirement contained in the by-law is not ultra vires.

Ultra Vires Issue D: Marketing Restrictions

[67] The applicant submits that the by-law violates the freedom of expression as guaranteed by s. 2 of the *Charter*. The RRL as enacted restricted the location of marketing rental units.

[68] In May 2023, the relevant provisions of the RRL which restricted the marketing of rental housing units to the location of the licence was amended. There is no longer a restriction with respect to where, or how a property can be marketed.

[69] Accordingly, there is no *Charter* violation.

Ultra Vires Issue E: Ontario Human Rights Code and s. 15 of the Charter

[70] The applicant submits that the RRL violates the Human Rights Code (“the Code”) and section 15 of the Charter by discriminating on the basis of age.

[71] Section 6.1 of the RRL provides that any person seeking to obtain or renew a Rental Housing Unit Licence must be at least eighteen (18) years of age. The applicant submits that this is in violation of s. 4(1) of the Ontario Human Rights Code which guarantees:

Every sixteen- or seventeen-year-old person who has withdrawn from parental control has a right to equal treatment with respect to occupant pendency of a contracting for accommodation without discrimination because the person is less than 18 years old.

[72] The applicant also submits that persons who reside within Wards 1 and 2 are being discriminated against because of their age and student status. Wards 1 and 2 house St. Clair College and the University of Windsor.

[73] The RRL was drafted as a two-year pilot study which requires city administration to report back to city Council on its results. Resolution CR171/2-22 was passed on April 25, 2022, and provided:

That Council APPROVE the proposed residential rental licensing framework described in this report; and

That Council APPROVE the draft bylaw, to be brought into effect upon the final implementation of the approved framework; and further,

That administration REPORT BACK TO COUNCIL on the results of the two-year pilot study within Wards 1 and 2.

[74] Section 2 of the Code provides:

2. (1) Accommodation- 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.

[75] Section 15 of the Charter states:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[76]

[77] In *Ontario (Director, Disability Support Program) v. Tranchemontagne (2006)*, 102 O.R. (3d) 97 at para 86, the Ontario Court of Appeal set out the applicable test to determine discrimination for the purposes of the Code:

The term "discrimination" is not defined in either [s. 1 of the Code](#) or [s. 15 of the Charter](#). In [the Charter](#) context, the Supreme Court of Canada confirmed in *Kapp* at para. 17, that the test to be applied for determining whether discrimination exists is the two-step test set out in *Andrews*:

1. Does the law create a distinction based on an enumerated or analogous ground?

2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[78] The court held that a similar inquiry is appropriate in considering whether there has been a violation of s. 15 of the Charter.

[79] There is no evidence before this court as to the ages of the renters within Wards 1 and 2. While many renters within those wards may indeed be students, students run the spectrum in terms of age.

[80] At paras. 90-91 of *Tranchemontagne (supra)* the court stated:

In the human rights context, in most instances, it will be evident that a *prima facie* case of discrimination has been established based solely on the claimant's evidence showing a distinction based on a prohibited ground that creates a disadvantage (in the sense of withholding a benefit available to others or imposing a burden not imposed on others). An inference of stereotyping or of perpetuating disadvantage or prejudice will generally arise based on that evidence alone.

However, in other instances a more nuanced inquiry may be necessary to properly assess whether a distinction based on an enumerated ground that creates a disadvantage actually engages the right to equal treatment under [the Code](#) in a substantive sense.

[81] It is evident that "students" are not listed in the accommodation section of the Code. I adopt the reasoning of the court in *London Property Management (supra)* at para. 71:

A review of the jurisprudence, literature and international human rights conventions and agreements reveals that "race" is not an ambiguous term, but rather is consistently referred to in the context of inheritable, physical attributes. Student status is not an inheritable, physical attribute, but rather is a transient, non-physical state. Accordingly, a group of students may not properly be included in the definition of the word "race" for the purposes of making a complaint on a prohibited

ground of discrimination under the Act. Furthermore, student status is not analogous to any ground of discrimination proscribed in subsection 3(1) of the Act.

- [82] There is no evidence showing a distinction based on a prohibited ground that creates a disadvantage.
- [83] Additionally, the RRL does not prohibit persons under the age of 18 years old from seeking accommodation. The RRL requires an applicant for a license to be the age of majority. In Ontario, a minor is considered to be a person under a disability and as such, cannot enter into a contract.
- [84] The RRL does not conflict with either the Code of s. 15 of the Charter.

Ultra Vires Issue F: Collection of Personal Information

- [85] Section 28 of the Municipal Freedom of Information and Protection of Privacy Act, RSO 1990, c. 56 states:

28(2) Collection of personal information

No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity.

- [86] The RRL requires that a corporate licence applicant provide:

[...] (ii) the name and contact information of each director, officer and Share holder who holds more than 30% of the issued shares in the corporation; and (iii) a corporate profile report dated no more than thirty (30) days from the date of application submission

...

(g) proof of insurance;

(h) a completed police record check every owner and applicant, if different from the owner, issued by an Ontario police service [...];

...

(ii) if the owner or applicant is a corporation a completed police records check for each director, officer, or shareholder who holds more than 30% of the issued shares in a corporation;

(i) If none of the owners reside in the city of Windsor, or if the owner is a corporation, the name and contact information of a local contact;

...

- (m) any other information required to be provided under this bylaw or as may be requested by the Commissioner.

[87] The applicant submits that the information requested under the RRL directly conflicts with the exemptions allowed under MFIPPA and that the municipality has provided no evidence as to why the requested information is “necessary to the proper administration” of the by-law.

[88] Section 2.1 of the MFIPPA states:

2(2.1) Business identity information, etc.

Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[89] As the court held in *London Property Management (supra)* at para. 92:

In my view, landlords who lease Rental Units are engaged in business whether or not the landlord is an individual leasing a Rental Unit in his own home or a corporate landlord leasing units in a large apartment building. Both landlords are operating a business. As a result, I am satisfied that the Licensing By-law does not conflict with the provisions of the *MFIPPA* which protects personal information because the information requested comes within the exclusion set out in [s. 2\(2.1\) of MFIPPA](#). It is contact information that identifies the individual in a business capacity.

[90] The information requested by the RRL is not in conflict with the MFIPPA.

Ultra Vires Issue G: Denial of Licences due to Criminal Record

[91] Section 5.4 of the RRL states:

Despite section 5.2, a license shall not be issued or renewed, and the license commissioner shall refer the matter to the Windsor licensing commission where:

(b) any of the applicants, within the previous five years from the date of application or renewal have been convicted of any of the following under the criminal code of Canada:

- (i) homicide or manslaughter;
- (ii) sexual offences;
- (iii) Assault offences;

- (iv) Confinement offences;
- (v) Robbery or extortion offences;
- (vi) Break and enter offences;
- (vii) Fraud or forgery offences; or,
- (viii) A statutory or regulatory offence in any way related to the ownership or management of residential rental properties.

[92] Section 91 of the Constitution Act gives the federal government sole jurisdiction over the criminal law.

[93] Further, the applicant submits that s. 11 of the Charter guarantees a person that, “[...] if finally found guilty and punished for the offence, not to be tried or punished for it again”.

[94] The applicant submits that the RRL seeks “to punish those who have committed an offence under the Criminal Code, which is an illegal exercise of power by a Municipality”.

[95] I cannot accede to this submission. The purpose of s. 5.4 of the RRL is in line with the overall purpose of the by-law: the safety of residential tenants.

[96] Section 5.4 of the RRL does not encroach on federal jurisdiction, nor does it create “punishment”. The section merely places limits on the eligibility of certain applicants.

CONCLUSION and ORDERS

[97] I have concluded that the RRL was passed in good faith.

[98] I have applied the test to determine whether a conflict exists as articulated by the court in *Rothmans, Benson & Hedges Inc. v. Saskatchewan 2005 SCC 13*:

(1) Is it impossible to comply simultaneously with the by-law and with the federal or provincial legislation; and

(2) Does the by-law frustrate the purpose of Parliament or the Legislature in enacting those laws?

[99] In each instance, I have determined that the answer to both questions is "no". Accordingly, the RRL is effective.

[100] The application is dismissed.

[101] The respondent is entitled to its costs. If the parties are unable to come to an agreement as to quantum, I will receive brief (no more than 5 pages) submissions within 30 days.

Kelly A. Gorman

Justice K.A. Gorman

Released: March 25, 2023

CITATION: Windsor Housing Providers Inc. v. The City of Windsor, 2024, ONSC 1781
COURT FILE NO.: CV-23-32091
DATE: 20240325

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

WINDSOR HOUSING PROVIDERS INC.

Applicant

– and –

WINDSOR (CITY)

Respondent

REASONS FOR JUDGMENT

Justice K.A. Gorman

Released: March 25, 2023