

TO:	CHAIR AND MEMBERS PLANNING AND ENVIRONMENT COMMITTEE MEETING ON MARCH 20, 2012
FROM:	JAMES P. BARBER CITY SOLICITOR
SUBJECT	AMENDMENTS TO THE OFFICIAL PLAN AND ZONING BY-LAW TO PROVIDE APPROPRIATE OPPORTUNITIES FOR THE SITING OF METHADONE CLINICS AND METHADONE PHARMACIES WITHIN THE CITY OF LONDON

RECOMMENDATION

That on the recommendation of the City Solicitor this report **BE RECEIVED** for information.

PREVIOUS REPORTS PERTINENT TO THIS MATTER
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None.

BACKGROUND

The City Clerk has advised the writer that the Planning and Environment Committee directed that a special meeting be held to receive legal advice from the City Solicitor concerning submissions received at the meeting in relation to the proposed by-law. This report is prepared to set out the general law with respect to the scope of the enabling authority for enacting land use by-laws, whether methadone clinics and methadone pharmacies may be and are regulated as a land use in Ontario, the differences between the definitions contained in the interim control by-law and the proposed zoning by-law, the jurisprudence of the Courts dealing with primary and ancillary activities and the questions raised in the submissions of the Ontario Human Rights Commission and other parties.

What is the enabling authority for land use regulation?

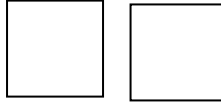
The *Planning Act* provides that an “official plan shall contain, goals, objectives and policies established primarily to manage and direct physical change and the effects on the social, economic and natural environment of the municipality or part of it” and “[z]oning by-laws may be passed by the councils of local municipalities: [f]or prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas” and “[f]or prohibiting the erecting, locating or using of buildings ... for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas”.

The Ontario Court of Appeal confirmed the scope of an official plan:

An official plan rises above the level of detailed regulation and establishes the broad principles that are to govern the municipality’s land use planning generally. . . . In our view, it is essential to bear in mind this legislative purpose when interpreting scope of authority to adopt an official plan. The permissible scope for an official plan must be sufficient to embrace all matters that the legislature deems relevant for planning purposes¹.

City Council may consider all matters that have been deemed relevant for planning purposes including but not limited to matters of provincial interest under section 2 of the *Planning Act*, such as “the orderly development of safe and healthy communities”, the “adequate provision

¹ *Toronto (City) v. Goldlist Properties Inc.* (2003), 67 O.R. (3d) 441 (C.A.) at 15, para. 49 (QL)



and distribution of educational, health, social, cultural and recreational facilities”, and the “protection of public health and safety”.

Can methadone clinics and methadone pharmacies be regulated as a land use in Ontario?

The Corporation of the City of London and various other municipalities have passed land use by-laws pursuant to the *Planning Act* in relation to methadone clinics and methadone dispensaries or methadone pharmacies using different definitions which are contained in the various by-laws. Some of those land use by-laws have been appealed² to or are presently under appeal to the Ontario Municipal Board³ and the Divisional Court⁴. The appeal with respect to the City of London interim control by-law was dismissed by the Ontario Municipal Board and an application to the Ontario Superior Court of Justice for an order to quash the interim control by-law of the City of London was instituted and abandoned.

Based upon the decision of the Ontario Municipal Board in the London case, it would appear that there is authority for land use regulation of methadone clinics and methadone pharmacies under the *Planning Act* in Ontario.

What are the differences between the definitions used in the various land use by-laws enacted by the City?

The proposed draft by-law contains definitions which could be described as being based on the prescribing of methadone and dispensing of methadone and which exempt ancillary activities which are defined to involve prescribing or dispensing to a maximum of 30 clients a day. The planning rationale for recommending a level of activity of “30” is set out in the planning report. It is open to City Council, based upon a review of the various reports and submissions received, to amend the number after having given consideration as to whether further notice should be provided.

There is Ontario jurisprudence addressing the character of a commercial use on a land use basis by reference to the number of clients per day⁵. Municipal zoning by-laws presently address certain land uses based upon restrictions on the number of clients⁶. City Council has to consider having regard to the official plan and other relevant land use considerations whether the recommended maximum level of activity for ancillary prescribing and dispensing (i.e 30 per day) is appropriate. City Council may have regard to the statistics provided concerning current levels of activity in the planning report (pp. 394, 402, 403, 446, 468) and in the submissions received suggesting that a pharmacist may dispense between 20 and 50 doses per day (p. 402) and “it takes approximately 50 to 70 patients before it would become profitable for a doctor to become actively involved in prescribing methadone” (p. 403) with certain clinics averaging “between 250 to 300 daily visits (peak day may approach 400+)” (p. 402). City Council should also consider the relationship of the threshold level of activity in the proposed by-law to the needs of people with addictions⁷.

In response to the submissions recommending the deletion of any numerical measure from the by-law in relation to ancillary activities, the present definitions would not appear to be adequate without a more precise description of the scope of ancillary activities which are to be exempted in the regulations. The general definition of ancillary in the Z.-1 by-law is as follows:

"ACCESSORY or ANCILLARY" means a use, building or structure customarily incidental, subordinate and exclusively devoted to the main use and carried on with such main use, building or structure on the same lot. (Z.-1-051390)

2 Ontario Addiction Treatment Centres v. London (City), [2011] O.M.B.D. No. 556; Loralgia Management Ltd. v. Oshawa (City), [2002] O.M.B.D. No. 1155;

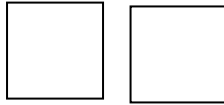
3 By-law Z - 7887

4 Oshawa (City) v. Loralgia Management Ltd., [2004] O.J. No. 4661

5 Tang v. Scarborough (City), [1992] O.J. No. 1329; Cordon v. Mississauga (City) Committee of Adjustment, [2005] O.M.B.D. No. 17; Emery v. Oakville (Town) Committee of Adjustment, [2005] O.M.B.D. No. 202

6 London (City) Chief Building Official v. Ravji, [1993] O.J. No. 2271 ; By-law Z-1, s. 4.10(6) Home Occupation “No more than five persons shall be present in the dwelling unit at any time to receive treatment, services or instructions.”

7 Canada (Attorney General) v. PHS Community Services Society, [2011] S.C.J. No. 44



The courts have been called upon in various cases to interpret whether something is ancillary based upon the definitions in a zoning by-law.⁸

In response to the submissions recommending a reversion to the definitions used in the interim control by-law, the wording in the definitions in the interim control by-law⁹ was considered by the Ontario Municipal Board which stated as follows:

Mr. Patton also took issue with the City's definition of the phrase 'the prescription of methadone' as the principal activity. In the Board's determination, the City's definitions of "Methadone Clinic" and "Methadone Dispensary", provided in the context of an interim control by-law that is enacted for a period of one year, are reasonable.

By reverting to these definitions, the question as to the scope of the primary activity or principal use would be left to the courts in the event that litigation were commenced to enforce the by-laws. If the previous definitions were adopted, a court would have to determine based upon the evidence before it whether the use fell within the terms "primary activity" and "used principally"¹⁰ in interpreting the by-law based upon the evidence adduced before the court. A representation was made to the Committee that to meet this standard, the number of methadone prescriptions on any day would have to equal 50% plus 1 of all prescriptions on that day. It would appear that the Committee has to consider the volume of prescriptions at a pharmacy in evaluating the alternate definitions.

Is there a possibility that the by-law could be found to be overbroad, excessive, unwarranted or discriminatory as suggested in various submissions?

There are two aspects to these questions.

The first aspect relates to the correspondence from the Ontario Human Rights Commission (OHRC) which indicates that the by-law must not "discriminate against people with addictions" and "must make sure that it makes all possible efforts, short of undue hardship, to accommodate the needs of people with addictions." The OHRC has questioned the "cutoff" system where a standard clinic can provide methadone services to no more than 30 clients per day". The Commission has suggested that the City has an obligation to "make sure that people with addictions who rely on methadone receive uninterrupted and convenient access to the services that they need."

City Council should evaluate any land use regulations which continue to permit methadone pharmacies and clinics having regard to the evidence presented to it concerning the potential impact on the proposed regulations on persons with addictions having regard to provisions of the Ontario Human Rights Code and the Charter of Rights and Freedoms¹¹. Further, City Council must consider whether the proposed by-law is arbitrary or overbroad having regard to the Charter rights of persons with addictions based on the recent decision of the Supreme Court of Canada (S.C.C.) where the Minister refused to continue an exemption to permit safe injection sites. The proposed by-law does not appear on its face to amount to a prohibition of methadone clinics or methadone dispensing with the same effect the Minister's decision considered by the S.C.C. As well, the *Planning Act* provides that "no zoning by-law applies to prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law, so long as it continues to be used for that purpose".

The second aspect involves the differentiation in the definitions based upon the threshold of 30

8 IPCF Properties Inc., and Loblaw's Supermarkets Limited, Applicants, and Sevendon Holdings Limited, Knob Hill Farms Ltd. and the Corporation of the City of Scarborough, Respondents, [1993] O.J. No. 3206; Bayfield (Village) v. MacDonald, [1997] O.J. No. 1892

9 "Methadone Clinic" means a building, or part of a building, which is used principally for the prescription and/or dispensing of methadone and may include the provision of counseling and other support services, but does not include a hospital.

"Methadone Dispensary" means a business selling or filling methadone prescriptions for customers as the primary activity of the business, but excludes a pharmacy or a pharmacy that is accessory and ancillary to a Hospital."

10 Gain v. Ideal Milk Haulage Ltd., [2002] O.J. No. 720; Toronto (City) v. 1291547 Ontario Inc., 49 O.R. (3d) 709; Re Kitchener-Waterloo Real Estate Board Inc. and Regional Assessment Commissioner, Region No. 21 et al., [1986] O.J. No. 763

11 Canada (Attorney General) v. PHS Community Services Society, [2011] S.C.J. No. 44

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prescriptions or clients per day and whether the by-law is as a result overbroad, excessive and unwarranted from the standpoint of the viability of the business activities of those persons engaged or proposing to be engaged in carrying on the uses of methadone pharmacies or methadone clinics. In addressing these questions, the Committee may wish to consider whether there was any evidence or suggestion that the business viability of clinics or pharmacies at the recommended levels of activity is jeopardized based upon the operation of the by-law such that the by-law prohibits or impermissibly discriminates¹² against the ancillary dispensing of methadone at clinics or pharmacies in the City or violates corporate Charter rights¹³. Even if the proposed by-laws do not involve prohibition, discrimination or impair Charter rights, the question of the business viability of the recommended levels of activity may also be considered from the standpoint of sound planning, public policy and assuring that the needs of persons with addictions are being met where they are receiving services from providers who provide the service on an ancillary basis.

Court challenges to municipal by-laws affecting business corporations have been addressed on the following basis the Supreme Court of Canada as follows:

Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold.¹⁴

The *Planning Act* provides a remedy to those who contend that official plan amendments and zoning by-laws do not constitute sound land use planning in that such by-laws can be appealed to the Ontario Municipal Board which has the jurisdiction to dismiss the appeals, to amend the by-laws or repeal them (in whole or in part). As well, an application to quash a by-law for illegality may be brought pursuant to the *Municipal Act, 2001*. In exercising the power to quash a by-law for illegality contained in s. 273(1) of the *Municipal Act, 2001* the court's discretion must be exercised judicially and in accordance with established principles of law.¹⁵

RECOMMENDED BY:
JAMES P. BARBER CITY SOLICITOR

12 The *Municipal Act, 2001* provides in s. 8. that (1) 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; and (4) Without limiting the generality of subsections (1), (2) and (3) and except as otherwise provided, a by-law under this Act may be general or specific in its application and may differentiate in any way and on any basis a municipality considers appropriate.

13 *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927

14 *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231

15 *Ashfield-Colborne-Wawanosh (Township) v. Central Huron (Municipality)*, 2012 ONCA 111