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April 17, 2019

VIA EMAIL: ogk@london.ca

Orest Katolyk
Chief Municipal Law Enforcement Officer
Development and Compliance Services
300 Dufferin Avenue
London, Ontario
N6A 4L9

Dear Mr. Katolyk:

Re: Draft Public Nuisance By-Law Amendment; LPMA Stakeholder Input

Thank you for your email of April 15, 2019 and your enclosure of proposed draft amendments to the above-referenced By-law. LPMA appreciates the opportunity for further input into the proposed amendment.

There continues to be fundamental legal and practical barriers to lawful implementation and enforcement of the amendment. Before commenting on those barriers, and particularly the legal issues, we recall that there was an expectation by Members of the Community and Protective Services (CAPS) Committee and those of us in attendance at the public meeting that a review by the City's legal department of legal issues raised in our previous written and oral submissions would occur. The City lawyer present at the public meeting on April 9 made it clear that it was unlikely that a legal review could be completed for several weeks. It appears, from the significant deficiencies in the proposed amendment, that a review by the City legal department has not yet taken place. We respectfully submit it would be more constructive and efficient for everyone if, prior to further stakeholder consultation, proposed amendments would first be vetted by the City legal department as the proposal provided to us is a legal non-starter.

The fundamental legal flaw in the proposed amendment of April 15, 2019 is that it continues to assume that an "owner" of leased rental residential property has some legal basis to "prevent" tenants and their lawful guests from engaging in illegal or "nuisance" conduct. As we made clear in our previous submission, under the *Residential Tenancies Act* (RTA), residential tenants have "exclusive possession" of rented premises, including the attached yard of a residential dwelling. Residential landlords are prohibited under the RTA from interfering with tenant conduct, other than to seek a remedy at the Landlord and Tenant Board (LTB) after proper Notices have been issued in strict compliance with the provisions of the RTA. Landlords cannot

restrict the tenants' rights to exclusive possession of a rental unit through leases because the "RTA applies despite any agreement or any other Act" (s. 3 RTA).

The provisions which require a landlord to "prevent" or "end" a Nuisance Party, as described in section 4A, would compel a landlord to engage in unlawful behaviour. For example, a landlord may not enter on to a tenant's property unannounced for the purpose of "preventing...fireworks and pyrotechnics" from occurring, or for requiring people to leave a roof, or to eliminate or reduce what the landlord deems to be unreasonable sound, etc. Where tenants or their invitees engage in disruptive or damaging behaviour in rented premises, a landlord is restricted to serving a Notice of Termination based on the tenant's "interference with the landlord's legal interests" (which is "voidable"); filing an application to the LTB for an eviction order; and, persuading the LTB Member that the interference is sufficiently serious so as to warrant termination of the tenancy. While s. 4A (1) does require the landlord to take "lawful actions" to prevent a Nuisance Party, the fact is that the examples given in the next proposed subsection would require the landlord to engage in unlawful conduct. The only lawful actions a landlord may take to prevent or end the activity are actions which cannot be deployed until after the activity has occurred.

In summary, to the extent that the By-law requires a landlord to prevent tenants and their invitees from doing anything, and to the extent it purports to impose financial penalties for failing to prevent tenants from engaging in defined conduct, the By-law will undoubtedly be declared legally unenforceable. The provisions of the RTA "trump" the conflicting provisions of a municipal by-law. The activities sought to be prevented are fully within the control of occupants and tenants and therefore the word "owner" in s. 4A (1) should be deleted.

There is a further practical and legal concern with the provisions [4A (2)] which purport to require the landlord to engage in firefighting and law enforcement activities by entering on to the property to require that persons cease disruptive behaviours. The City has expressed concern about the physical safety of its first responders, including Fire, Police, and By-law Officers, when confronted with the aggressive, boorish and confrontational behaviours of attendees at Nuisance Parties. The proposed solution by the City is to force landlords, rather than first responders, to attend at the scene and confront the attendees. As morally satisfying as that may seem for some "anti-rental housing" people, upon legal review by the City it will be apparent that physical injury to landlords is foreseeable and, where injury occurs as a consequence of a landlord attempting to comply with the By-law, the civil liability of the City for personal injury and aggravated damages will be substantial.

Clause 4A (3) (b) is, in our submission, unenforceable on the basis that where the City is the adjudicator of whether the landlord "...took all reasonable and lawful actions to prevent the Nuisance Party", there is an inherent conflict of interest and lack of natural justice in making such findings of fact which would lead to financial recoveries for the City. The City official making such determination will be inclined to reach a conclusion which favours financial recovery regardless of the circumstances. This raises an unqualified "apprehension of bias" which, in turn, creates a fatal jurisdictional legal flaw in the proceeding and the legislation.

The insertion of clause 4A (3) (c) (an immunity clause if a site is "Nuisance Party" free for two years) is entirely new. The section was not in the first By-law draft and appears to be an afterthought; however, it too is seriously flawed. First, where a property changes ownership or

where possession changes with new tenants, the section imposes punitive liability based on conduct engaged in by a former owner or tenant. Secondly, and as averred to above, the landlord would first have to be found liable for conduct which the landlord is lawfully prohibited from engaging in, but would then not face financial cost consequences. The provision makes no legal or practical sense.

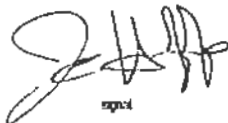
In summary, the same overriding legal deficiency that was present in the first draft of the By-law amendment remains in this current draft. Because of legal restrictions imposed by the RTA, landlords have even less ability than parents, or the relevant post-secondary institution, or the City, in “preventing or ending” Nuisance Parties. The proposed amendment is a legal non-starter and, with the exceptions of increased fines and adding a designation of “Chief” to the title of a City official (which some may rightly find offensive), the balance of the By-law amendment should be scrapped and new approach to addressing the issues should be taken. If stakeholder input continues, it is respectfully submitted that any future draft first be vetted by the City legal department prior to circulation.

For its part LPMA continues to be of the view that it would be an operational “best practice” for its members, whose tenants occupy converted residential structures in near campus neighborhoods, to add a caution and acknowledgment to the leases of tenants and their guarantors relative to the consequences of hosting Nuisance Parties. What its members cannot do, however, is engage in unlawful conduct at the behest of a municipal By-law which would contravene superior legislation such as the RTA.

We trust the foregoing is clear; however, if you have questions we would be pleased to respond.

Yours very truly,

COHEN HIGHLEY LLP



Joseph Hoffer

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cc: LPMA
cc: City Legal Department
cc: CPSC Committee Members and Councillor Squire