

September 25, 2012

Our File No.: 12.2753

## **By Email & Regular Mail**

London North Community Association Inc.  
1091 The Parkway  
London, ON  
N6A 2W8

### **Attention: Mr. Don Bartlett, President**

Dear Mr. Bartlett:

**Re: London Zoning By-law Z-1 (the “London Zoning By-law”)  
Student Rental Housing – Permitted Uses in an R1 Residential Zone**

You asked us to provide our legal opinion with respect to the following question:

*“Do four or more unrelated people renting an R-1 Single Housekeeping Unit with an absentee landlord constitute a Lodging House under London’s zoning by-law and therefore not R-1?”*

### **Summary of Opinion**

For the reasons set out below, our opinion is as follows:

A house which is rented to four or more unrelated people, none of whom are the owner, and whose only common bond is the need for shared temporary rental accommodation, is properly characterized as a “class 2 lodging house” as defined in the London Zoning By-law, and is therefore not a permitted use in an R1 Zone.

A court tasked with determining whether the use of a particular house is in compliance with the R1 use restrictions would examine the facts on a case-by-case basis. Where the above-noted circumstances exist, and the house has been designed, altered or reconfigured to facilitate its use as a commercial rental operation, or in a manner inconsistent with its use as a single domestic unit, it would almost certainly be considered a “class 2 lodging house”, even if the tenants are friends who have chosen to live together and share household responsibilities. Additional facts which would further support, but are not necessarily required for, this conclusion would include individual rooms being advertised for rent, separate leases for each tenant, an insurance policy geared towards student housing, and a high rate of turnover amongst some or all of the tenants.

Definitions in London Zoning By-law

The relevant definitions from the London Zoning By-law are as follows:

“Dwelling” means a building containing one or more dwelling units.

“Dwelling Unit” means a single room or a series of rooms of complementary use which is located in a building, in which food preparation, eating, living, sleeping and sanitary facilities are provided for the exclusive use of the occupants thereof, which has a private entrance directly from outside the building or from a common hallway inside the building, in which all occupants have access to all of the habitable areas and facilities of the unit, and which is occupied and used or capable of being occupied and used as a single and independent housekeeping establishment. A dwelling unit shall contain no more than five bedrooms.

“Lodging House, Class 1” means a residential building which is used to provide lodging units for hire or gain directly or indirectly to three or fewer persons with or without meals. A lodging house, class 1, shall not include a nursing home, hotel, motel, hostel, group home, bed and breakfast establishment, emergency care establishment, or a residence of an educational institution.

“Lodging House, Class 2” means a residential building which is used to provide lodging units for hire or gain directly or indirectly to more than three persons, with or without meals. A lodging house, class 2, shall not include a nursing home, hotel, motel, hostel, group home, bed and breakfast establishment, emergency care establishment, or a residence of an educational institution.

“Lodging Unit” means a room with sleeping facilities, either alone or in conjunction with another room or rooms.

“Single Detached Dwelling” means a single dwelling which is freestanding, separate and detached from other main buildings or main structures, including a split level dwelling, but does not include a mobile home.

“Single Dwelling” means a dwelling containing not more than one dwelling unit as the sole main use thereof, with or without accessory uses thereto.

Pursuant to section 5.2 of the London Zoning By-law, a single detached dwelling is the only permitted use in an R1 Zone.

However, section 4.22 states that a class 1 lodging house with up to three lodging units is permitted in any dwelling unit in a single detached dwelling. Therefore, any detached house with three residential occupants or less is a permitted use within an R1 Zone, regardless of the particular living arrangements or degree of social bond between the occupants.

A single detached dwelling can only contain one dwelling unit as the sole main use, which means that all occupants must have access to the entire dwelling, and that the dwelling must be occupied and used or capable of being occupied and used as a “single and independent housekeeping establishment”. Although this phrase is not defined in the London Zoning By-law, its meaning is informed by several court decisions.

#### Judicial Interpretation of “Single Housekeeping Establishment”

##### 1) London Fraternity House Dispute (1994)

In *Phi Delta Beta of London Inc. v. London (City) Chief Building Official*,<sup>1</sup> the Ontario Court of Justice was asked to determine whether a proposed 11-bedroom fraternity house was a permitted use within an R2 Zone. This required an assessment of whether the building was intended to be used or capable of being used as a “single and independent housekeeping establishment” as this was (and remains) a key component of the definition of “dwelling unit”.

Given the facts, the court had no trouble in determining that the proposed fraternity house was not a single dwelling unit and therefore not a permitted use in an R2 Zone. The court found that the element of independence had not been established since the fraternity would be responsible for determining who could live in the house and how the operating expenses would be divided amongst the occupants. Furthermore, since the occupants would not have to associate with each other or conform to any particular domestic behavioural standards, the court also found that the element of singleness was lacking.

In our view, although the Court was able to interpret and easily apply the London Zoning By-law definitions on the facts of this dispute, the decision provides very little guidance as to how the definitions would be applied in a case with more difficult facts (ie. a house with less bedrooms or occupants with different rental circumstances).

##### 2) Waterloo Lodging House Licensing Dispute (2003)

In *Good v. Waterloo (City)*,<sup>2</sup> the owners of a rental property applied to the Superior Court for an order that the building on the property complied with the definition of “residential unit” in the City’s lodging house licensing by-law, thereby exempting them from the requirement to obtain a license. In these circumstances, the court found that the primary distinguishing characteristic between a lodging house and a residential unit was who maintained control of the premises (the owner or the group of occupants). Moreover, in order to determine whether the house was being used as a “single housekeeping establishment”, the court also considered whether the occupants had chosen to live together (voluntariness of possession) and whether they shared household

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<sup>1</sup> [1995] O.J. No. 477 (Ont. C.J.), affirmed [1996] O.J. No. 5119 (Ont. Div. Ct.)

<sup>2</sup> [2003], O.J. No. 4027 (Ont. S.C.J.), affirmed [2004] O.J. No. 3725 (Ont. C.A.)

responsibilities (group decision-making). On the evidence presented, the court was satisfied that the property was being used as a residential unit.

### 3) Oshawa Student Housing Dispute

In *Neighbourhoods of Winfields Limited Partnership v. Death*,<sup>3</sup> an application was brought by a local developer and the City of Oshawa against the owners of 30 single detached houses in the vicinity of Durham College and the new Ontario Institute of Technology. The applicants sought a declaration that the properties were being used in a manner contrary to the zoning requirements and an order restraining the use of the properties in such manner. More specifically, the applicants alleged that the houses were being used as lodging houses despite being located in an R1 Zone which only permitted the use of single detached dwellings.

The Superior Court decision (which was upheld on appeal) turned on an interpretation of the term “dwelling unit”, since this was integral to the definition of “single detached dwelling” but specifically carved out of the definition of “lodging house”. The Oshawa zoning by-law defined “dwelling unit” as “a unit consisting of one or more rooms, which unit contains toilet and cooking facilities and which is designed for use as a single housekeeping establishment”. In our opinion, Howden J. made two critical findings which allowed him to construe the intent behind the zoning by-law’s use of the undefined term “single housekeeping establishment”:

1. The purpose of a zoning by-law enacted under the *Planning Act* is to regulate the intensity of use to which land is put, and the design and planned function of buildings erected thereon. While the tests of control, voluntariness and consensual decision-making may be relevant to the meaning of the term “single housekeeping establishment” in a municipal licensing context (as articulated in the *Good* decision), they are not the relevant factors to be considered in a planning context, where the term must instead be informed by the use, design and function of the buildings in question, as well as the anticipated impacts on surrounding properties.
2. The intent of the Oshawa zoning by-law, as informed by the Oshawa Official Plan, was to create two mutually exclusive land use categories in single detached dwelling and lodging house. Each was intended to be a distinct use, different in design and function, and permitted in different zones to the exclusion of the other. In a lodging house, the relationship of tenants to lodging house proprietor was described as an economic or commercial one, whereas a single detached dwelling was intended to be used by a single family unit or other similar basic societal living arrangement.

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<sup>3</sup> [1998] O.J. No. 3298 (Ont S.C.J.), affirmed [2009] O.J. No. 1324 (Ont. C.A.), leave denied [2009] S.C.C.A. No. 253 (S.C.C.);

Guided by these findings, Howden J. made the following observations in an attempt to attach further meaning to the term:

*“A single housekeeping establishment would generally approximate a typical family group of one or two adult persons, together with minor or adult children or a similar social unit either by relationship or some other common bond for living together as a housekeeping establishment, not simply the need by boarders for temporary sleeping quarters for which each pays rent to the landlord/landlady...”*

*Accurate planning for use intensity would be rendered meaningless if the definition of “single housekeeping establishment” could include any number of persons, each independent from each other, coming together for temporary short-term economic reasons to share the cost of accommodation...*

*I find that a single housekeeping establishment, when read in context, means a use typical of a single family unit or other similar basic social unit. For example, it could include a group of unrelated persons, one or more of whom are dependent on the others due to physical or related challenges; or one person, or a couple cohabiting with children (not theirs biologically), to whom they stand in loco parentis. There are many examples of such basic social units in today's society which do not follow the traditional family model. However they involve more between them as a unit than simply short-term temporary sleeping quarters and shared facilities on a rental basis.”<sup>4</sup>*

Having established the intended meaning of the by-law provisions, Howden J. went on to apply the provisions to each of the properties in dispute, and in all but two cases held that the houses were being used illegally as lodging houses. He found that several of the houses had been altered to increase the number of bedrooms and/or reconfigured to accommodate a commercial rental operation. Moreover, he found many examples of houses being advertised to individual student tenants, insurance policies specifically tailored to student housing, and occupants individually renting the exclusive use of one bedroom (along with other shared facilities). On these facts, Howden J. had no difficulty finding the houses were operating as lodging houses and that the occupants shared no common social bond other than their temporary housing needs.

However, even those property owners who led evidence to assert that their tenants chose to live together as a single housekeeping unit were unsuccessful. One defendant argued that the five students living in his house shared a social relationship which preceded their tenancy, that they had agreed to stay together for a second year, and that they made collective decisions, each having access to the entire house with no locks on the bedroom doors. Nevertheless, Howden J. still found this house to be a lodging house on the basis that its design had been altered by the addition of two bedrooms and a bathroom to facilitate a rental operation. He stated:

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<sup>4</sup> *Ibid.*, at paras. 59-62

*“They may be friends, but the particular grouping of these five friends in one house is for temporary individual housing needs, not as a basic unit like a family or other similar bond of cohabitation in a state of singleness’. I find that the house was altered in design to accommodate what is a lodging house business and as such its use contravenes By-law 60-94.”<sup>5</sup>*

While Howden J. stopped short of declaring that a group of three or more students living in a residential structure could never constitute a single housekeeping establishment in Oshawa, the passages reproduced above suggest that it would be very difficult for a group of unrelated students to demonstrate that they live as a single domestic unit with the requisite level of social interdependence to refute the characterization of their residence as a lodging house.

Having said that, it should be noted that notwithstanding the decision by Howden J., the City of Oshawa has since taken the position that a group of students can indeed form a single housekeeping establishment, and that the determination must be made on a case-by-case basis.<sup>6</sup> It is not clear what facts would have to be present to satisfy the City of Oshawa that a group of three or more unrelated students constitute a single housekeeping establishment.

#### Application of Oshawa Decision to London Context

The definitions contained in the London Zoning By-law are similar, but not identical, to the definitions in the Oshawa zoning by-law. For your convenience, we have attached a chart comparing the relevant definitions as Schedule “A”.

In our view, the intent and purpose of the London Zoning By-law, as informed by the relevant London Official Plan policies, is to establish mutually exclusive land use categories for single detached dwellings and class 2 lodging houses. This is consistent with the intent and purpose of the Oshawa planning documents as determined by Howden J.

In London, various residential zones are established in order to identify the appropriate location for low, medium and high density residential uses and to minimize land use compatibility problems. The R1 Zone is the most restrictive residential zone in London and only permits single detached dwellings. Single detached dwellings are also permitted in the R2, R3 and R6 Zones, but not in the other residential zones. In contrast, class 2 lodging houses (with four or more occupants) are only permitted in the R8, R9, R10 and R11 Zones. We believe that the clear intent is to draw a bright line between single detached dwellings and class 2 lodging houses such that they are each confined to separate areas within the City and not located in close proximity to one another.

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<sup>5</sup> *Ibid.*, at para. 128.

<sup>6</sup> *Hanzelka v. Oshawa (City)*, [2011] O.J. No. 4054 (Ont. S.C.J.)

Just as the Oshawa definition of “dwelling unit” requires that it be “designed for use as a single housekeeping establishment”, the London definition requires that a dwelling unit be “occupied and used or capable of being occupied and used as a single and independent housekeeping establishment”. Similarly, the London definition of “lodging house” requires that lodging units be provided for hire or gain, which is consistent with Howden J.’s finding that the relationship of tenants to lodging house proprietor in Oshawa is an economic or commercial one.

Given the parallels in intent and terminology, the criteria and factors considered by Howden J. in determining whether a group of unrelated persons constitute a “single housekeeping establishment” would apply to the London Zoning By-law in the same fashion as they were applied in Oshawa.

We note, however, that unlike in Oshawa, the London definition of “dwelling unit” includes the phrase “*capable of being occupied and used as a single housekeeping establishment*”. We have considered this phrase in light of the fact that class 1 lodging houses are permitted within houses that might otherwise be considered single detached dwellings, and would suggest that this circumstance lends meaning to the words “capable of being occupied or used”. In other words, it appears that the intent in London is that a building which is capable of being used as a single housekeeping unit but is instead being used as a class 1 lodging house (rented to three persons or less) is a permitted use in an R1 Zone. On the other hand, a building which is capable of being used as a single housekeeping unit but is instead being used as a class 2 lodging house (rented to four or more persons) is not a permitted use in an R1 Zone. This interpretation would be consistent with the underlying objective to appropriately plan for a range of land use intensities.

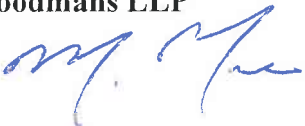
Accordingly, in our view, a house which is rented to four or more unrelated people, none of whom are the owner, and whose only common bond is the need for shared temporary rental accommodation, is properly characterized as a “class 2 lodging house” and is therefore not a permitted use in an R1 Zone in London.

A list of the materials we reviewed in forming this opinion is attached hereto as Schedule “B”.

We trust this is satisfactory and would be pleased to answer any additional questions you may have or discuss any of the foregoing at your convenience.

Yours very truly,

**Goodmans LLP**



Mark Noskiewicz  
MRN/

cc: Ian Andres, Goodmans LLP

## SCHEDULE “A”

### COMPARISON OF BY-LAW DEFINITIONS IN OSHAWA AND LONDON

Defined Term	Oshawa Zoning By-law 60-94, as amended	London Zoning By-law Z-1, as amended
Dwelling	n/a	A building containing one or more dwelling units.
Dwelling Unit	A unit consisting of one or more rooms, which unit contains toilet and cooking facilities and which is designed for use as a single housekeeping establishment	A single room or a series of rooms of complementary use which is located in a building, in which food preparation, eating, living, sleeping and sanitary facilities are provided for the exclusive use of the occupants thereof, which has a private entrance directly from outside the building or from a common hallway inside the building, in which all occupants have access to all of the habitable areas and facilities of the unit, and which is occupied and used or capable of being occupied and used as a single and independent housekeeping establishment. A dwelling unit shall contain no more than five bedrooms.
Lodging House	A building or a part of a building, containing three to ten lodging units, which does not appear to function as a dwelling unit, although one may be included with the lodging units. It includes, without limitation, a rooming house and a boarding house, a fraternity or sorority house. It does not include a hotel, a crisis care residence, a hospital, a group home, a correctional group home, a bed and breakfast establishment nor a nursing home. A lodging house may involve shared cooking or washroom facilities. Meals may or may not be provided to residents. Common areas, such as living rooms, may or may not be provided.	<p>Class 1 – A residential building which is used to provide lodging units for hire or gain directly or indirectly to three or fewer persons with or without meals. A lodging house, class 1, shall not include a nursing home, hotel, motel, hostel, group home, bed and breakfast establishment, emergency care establishment, or a residence of an educational institution.</p> <p>Class 2 – A residential building which is used to provide lodging units for hire or gain directly or indirectly to more than three persons, with or without meals. A lodging house, class 1, shall not include a nursing home, hotel, motel, hostel, group home, bed and breakfast establishment, emergency care establishment, or a residence of an educational institution.</p>
Lodging Unit	One or more rooms within a lodging house used or designed to be used for sleeping accommodations. Lodging units may contain cooking or washroom facilities, but not both.	A room with sleeping facilities, either alone or in conjunction with another room or rooms.



Lodger	Any person who pays rent, fees or other valuable consideration to a proprietor for living accommodation in which cooking or washroom facilities are shared with other persons.	n/a
Single Detached Dwelling	A building which is freestanding, separate and detached from other main buildings or main structures and which contains only a dwelling unit, but does not include a mobile home.	A single dwelling which is freestanding, separate and detached from other main buildings or main structures, including a split level dwelling, but does not include a mobile home.
Single Dwelling	n/a	A dwelling containing not more than one dwelling unit as the sole main use thereof, with or without accessory uses thereto.

## **SCHEDULE “B”**

### **LIST OF MATERIALS REVIEWED**

#### City of London Planning Documents and By-laws

City of London Official Plan, as amended (consolidated January 1, 2006)

City of London Zoning By-law No. Z-1, as amended (consolidated January 2007)

City of London By-law No. L-6 (licensing of lodging houses, consolidated September 19, 2011)

City of London By-law No. CP-19 (licensing of residential rental units, consolidated August 30, 2011)

City of London By-law No. Z-1-122125 (zoning amendment for Near-Campus Neighbourhoods Area, enacted July 24, 2012)

City of London By-law No. CP-1284(sn) (official plan amendment for Near-Campus Neighbourhoods Area, adopted July 24, 2012)

#### City of London Staff Reports

Report from Planning Staff re: Great Near-Campus Neighbourhoods Strategy Implementation Plan (October 29, 2008)

Report from Planning Staff re: Near-Campus Neighbourhoods Planning Amendments (September 18, 2009)

Report from City Solicitor re: Intensification of Residential Units and Analysis of Oshawa Decision (March 29, 2010)

Report from Planning Staff re: Near-Campus Neighbourhoods Planning Amendments (June 11, 2012)

#### Court Decisions

*Smith et al. v. Township of Tiny*, [1980] O.J. No. 3091 (Ont. H.C.J.), affirmed [1980] O.J. No. 3531 (Ont. C.A.)

*Phi Delta Beta of London Inc. v. London (City) Chief Building Official*, [1995] O.J. No. 477 (Ont. C.J.), affirmed [1996] O.J. No. 5119 (Ont. Div. Ct.)

*Good v. Waterloo (City)*, [2003] O.J. No. 4027, affirmed [2004] O.J. No. 3725 (Ont. C.A.)

*Ottawa (City) v. Bentolila*, [2006] O.J. No. 5444 (Ont. C.J.)

*Neighbourhoods of Winfields Limited Partnership v. Death*, [2007] O.J. No. 5081 (Ont. S.C.J.)

*Neighbourhoods of Winfields Limited Partnership v. Death*, [1998] O.J. No. 3298 (Ont S.C.J.),  
affirmed [2009] O.J. No. 1324 (Ont. C.A.), leave denied [2009] S.C.C.A. No. 253  
(S.C.C.)

*Neighbourhoods of Winfields Limited Partnership v. Death*, [2009] O.J. No. 98 (Ont. S.C.J.)

*Neighbourhoods of Winfields Limited Partnership v. Death*, [2010] O.J. No. 1304 (Ont. S.C.J.)

*Hanzelka v. Oshawa (City)*, [2011] O.J. No. 4054 (Ont. S.C.J.)