Agenda Item #	Page #

TO:	**CHAIR AND MEMBERS PLANNING AND ENVIRONMENT COMMITTEE**
FROM:	**JAMES P. BARBER CITY SOLICITOR**
SUBJECT:	**BLACKFRIARS/PETERSVILLE NEIGHBOURHOOD PLANNING OPTIONS MEETING ON MONDAY, MAY 7, 2013**

RECOMMENDATION

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

PREVIOUS REPORTS PERTINENT TO THIS MATTER

Report to Planning Committee Meeting of December 5, 2008, extract is attached.

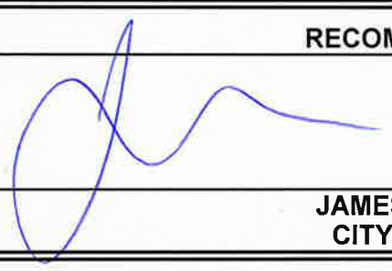
BACKGROUND

Further to City Council's direction to include in the report to Planning Committee information relating to the recent court decisions regarding "Lodging House" uses, extracts from the writer's earlier report together with two recent Court of Appeal decisions are attached.

The Court of Appeal in *Neighbourhoods of Windfields Limited Partnership v. Death,* [2009] O.J. No. 1324 upheld the lower court's decision referred to in my earlier report on the basis that "this was a fact-driven application". The Supreme Court of Canada dismissed the application for leave to appeal.

In *Balmoral Developments Hilda Inc. v. Orillia (City)*, [2013] O.J. No. 1552, the Court of Appeal reversed the lower court's decision at *Balmoral Developments Hilda Inc. v. Orillia (City)*, [2012] O.J. No. 5012 that "the proposed use would not result in the units being boarding, lodging or rooming houses as defined in the *Building Code"* but was not asked to interfere with the lower court's decision that "the students occupying the Balmoral project are operating as single households" based upon the particular facts in the case and the definitions in the relevant City by-law.

RECOMMENDED BY:



JAMES P. BARBER
CITY SOLICITOR

Att.

TO:	CHAIR AND MEMBERS PLANNING COMMITTEE MEETING ON DECEMBER 8, 2008
FROM:	JAMES P. BARBER CITY SOLICITOR
SUBJECT:	INJUNCTIONS AND NUISANCES - RESIDENTIAL UNITS

RECOMMENDATION

That this report **BE REFERRED** by the Planning Committee to the Town and Gown Committee for review.

PREVIOUS REPORTS PERTINENT TO THIS MATTER

December 8, 2003, Report to Planning Committee

BACKGROUND

At its meeting of September 29, 2008 City Council adopted the following recommendation of Planning Committee:

> 29. That in response to an enquiry by Councillor N. Branscombe, the City Solicitor's Office **BE REQUESTED** to bring forward a report to be considered in public at a future meeting of the Planning Committee which will indicate implications for the City of London in relation to the recent Ontario Superior Court of Justice Decision (Court File No. 49820/07) concerning residential intensification of lands, as brought forward by the Corporation of the City of Oshawa, The Neighbourhoods of Windfields Limited Partnership, and the owners of 30 homes in The Neighbourhoods, to a future meeting of the Planning Committee.

At its meeting of October 29th, 2008, Board of Control received and noted the 4th report of the Town and Gown Committee which included the following reports:

> 1. That the Town and Gown Committee (TGC) heard a verbal delegation and received a communication dated September 10, 2008 from Sgt. L. Prelazzi, Supervisor, London Police Services, with respect to limiting the activities and number of people on front lawns; it being noted that the TGC asked that the above-mentioned communication, along with a report on the East Lansing (Michigan) Police Department nuisance and disorderly conduct issues and the attached excerpt from the Boulder, Colorado By-law, entitled "Nuisance Party Prohibited" be referred to the City's Legal Department for a report to be considered at a future meeting of the TGC outlining suggestions to address the concerns noted in Sgt. Prelazzi's communication.
>
> 4. That the Town and Gown Committee (TGC) reviewed and received a communication dated August 27,2008 from Councillor N. Branscombe, with respect to a Superior Court decision relating to the an application by the City of Oshawa and the Neighbourhoods of Windfields Limited Partnership relating to the conversion of 30 homes into short-term rental/lodging accommodations that would predominately be occupied by students; it being noted that the City's Legal Department is preparing a report on what the implications of this decision could be for London.

Pursuant to the direction of City Council and the request of the Town and Gown Committee, this report will address the availability of injunctions to restrain land uses and conduct contrary to the City's by-laws and the possibility of further local legislation to address nuisance parties. The

Civic Administration has recently brought forward a report concerning a revised noise by-law and a report concerning the licensing of rental residential units is forthcoming.

Injunctions

The City of Oshawa and a residential subdivider brought proceedings for an injunction before the Superior Court of Ontario to restrain the use of 30 homes in a subdivision in the City of Oshawa. According to the decision granting the injunction[1], they alleged that the homes owned by the respondents had been altered internally, with or without building permits and using misrepresentations of the purpose of the alterations, to convert them into short-term rental/lodging accommodation for between five and nine persons per home. The occupants were predominantly, if not exclusively, students.

The Court reviewed the evidence, the Official Plan and Zoning By-law and considered the definition of dwelling unit which provided that a "dwelling unit consists of one or more rooms, together with toilet and cooking facilities, and must be designed for use as a single housekeeping establishment" and the term "single housekeeping establishment" which was not defined in the by-law. The Court found that based on the evidence the use of some of the homes was contrary to the by-law in that the use was as a lodging house and not in the nature of a single housekeeping establishment for those homes. The application was dismissed with respect to some of the homes based on the evidence. The decision has been appealed to the Ontario Court of Appeal.

The Oshawa decision is subsequent to an earlier Court of Appeal decision[2] interpreting a Waterloo by-law containing a similar provision ("residential unit: a unit ... used as a single housekeeping unit, which includes a unit in which no occupant has exclusive possession of any part of the unit ..."). In the Waterloo case, the Court of Appeal upheld the finding that a house occupied by 3 students represented a lawful use under the zoning by-law of a residential unit stating that the court correctly addressed "the critical phrase to be interpreted, namely whether the premises in question are a "single housekeeping unit". [The judge] used as an important interpretative criterion whether there was collective decision making sufficient to create a single unit for housekeeping purposes."

Both of these decisions were subsequent to the decision of the Ontario Divisional Court[3] interpreting a similar provision in the City of London by-law finding that a fraternity house was not a single and independent housekeeping establishment. In that case, the use of a fraternity house was held to be contrary to the by-law based on the evidence in circumstances where the Divisional Court dismissed an appeal on the basis that "the appellant's evidence establishes that "each occupant - will be a tenant to Phi Delta." As a tenant if he fails to pay his rent he will be subject to eviction by the landlord. Accordingly, the whole house is not occupied or used as a "single and independent housekeeping establishment".[4]

The writer advised City Council in a report in December of 2003 that many students in London live in dwelling units which are rented by a group of individuals under a common lease. Where complaints arise concerning the occupancy of dwelling units under a common lease, they may be addressed through by-laws such as the zoning by-law. The Oshawa and Waterloo decisions reinforce the conclusion in the 2003 report based upon the London decision that it may only be possible to obtain a remedy under the zoning by-law against persons who occupy premises under a common lease where they do not live as a single and independent housekeeping unit. Whether occupants are living as a single and independent housekeeping unit will be based upon a consideration of the evidence tendered before the court[5].

It appears that Oshawa is the only recent Ontario case where injunctive proceedings to restrain the use of premises as not being a single housekeeping establishment have been commenced as other court decisions relating to this issue have arisen as a consequence of other types of

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[1] *Neighbourhoods of Windfields Limited Partnership v. Death*, 2008 CanLII 42428 (ON S.C.)

[2] *Good v. Waterloo (City)* [2003] O.J. No. 4027 (C.A.)

[3] *Phi Delta Beta of London Inc. v. London (City) C.B.U.* (1995), 25 M.P.L.R. (2d) 140; 36 M.P.L.R. (2d) 319 (Div. Ct.)

[4] *Phi Delta Beta*, 36 M.P.L.R. (2d) 319 @ 320

[5] *Neighbourhoods of Windfields Limited Partnership v. Death*, 2008 CanLII 42428 (ON S.C.));

proceedings.[6] Much of the evidence for the injunction in the Oshawa case was secured by the subdivider. Injunctive proceedings are available under section 440 of the *Municipal Act, 2001* to restrain an illegal use and this municipality has used injunctive proceedings on occasion in the past to enforce compliance with its zoning by-law but not with respect to this type of occupancy. The decision to utilize or to become a party to statutory injunctive proceedings is in the discretion of the municipal council and should be based on evidence demonstrating a breach of the zoning by-law.

Case Name:

Neighbourhoods of Windfields Limited Partnership v. Death

Between
The Neighbourhoods of Winfields Limited Partnership, The Corporation of the City of Oshawa, Applicants (Respondents),
and
Ronald Death, Julie Rowland Michael Death, Jessica Seiffert, Jeffrey Hiltz, Jeremy Hopson, Jennifer Hopson, Eugene Lei, Justin St. Onge, Guangjian Bai, Xiaomei Wen, Jacky Chan, Vinod Dodhia, Chandrakala Dodhia, Paras Dodhia, Emily Frac, Magdalene Leung, Nicky Wong, Andrea Lewin, Orville Lewin, Michael McGivery, Ralton Myers, Brahm Datt Selhi, Malti Selhi, Richard Shea, Steven Smith, Dennis Symes, Jeanne Symes, David Takeda, Frances Hung, Harold Tomlinson, Rebecca Tomlinson, Sanath Walaliyadde, Lokahita Walaliyadde, Lei Yang, Cyril Smith, Ernestine Smith, Lawrence Greco, Marian Greco, Di Lu, Qing Wang, Peter Dewsbury, Nicole Dewsbury, Shirley Wong, Respondents (Appellants)

[2009] O.J. No. 1324

2009 ONCA 277

55 M.P.L.R. (4th) 159
176 A.C.W.S. (3d) 243
2009 CarswellOnt 1756

Docket: C49460

Ontario Court of Appeal
Toronto, Ontario

J.C. MacPherson, R.J. Sharpe and P.S. Rouleau JJ.A.

Heard: March 31, 2009.
Oral judgment: March 31, 2009.
Released: April 2, 2009.

(8 paras.)

Municipal law — Planning and development — Zoning regulations — Land use — Non-conforming uses — Types — Residential — Appeal by landlords from order requiring them to cease using properties as lodging houses dismissed — Judge found that properties were purchased to rent rooms individually to students, found that landlords added rental bedrooms without permits and insured properties as rooming houses — Characterization of properties as lodging houses, not single dwelling residences, was reasonable and grounded in the evidence.

Appeal by three groups of landlords from a judgment in favour of Winfields and the City of Oshawa in their application for an order requiring the landlords to cease using their properties as lodging houses. The landlords alleged that their properties were being used as single dwelling establishments for students, a permitted use, as opposed to lodging houses. The judge considered the properties lodging houses because the landlords had purchased them to rent out bedrooms for short terms on a room-by-room basis, had added extra rental bedrooms without permits and had insured the properties as rooming houses or student housing. He found the essence of the relationship between the landlords and tenants was one of lodger and proprietor.

HELD: Appeal dismissed. There was no legal error in the judge's conclusion on the nature of the properties' use. The judge's findings were reasonable and solidly grounded in the record. His legal analysis of the relevant statutory provisions and case law was sound.

Statutes, Regulations and Rules Cited:

Planning Act, R.S.O. 1990, c. P.13, s. 35(2)

Appeal From:

On appeal from the judgment of Justice Peter H. Howden of the Superior Court of Justice, dated August 26, 2008.

Counsel:

Jacky Chan, appellant appearing in person, and for the appellants Shirley Wong, Magdalene Leung and Nicky Wong.

Signe Leisk and Nicole Auty, for the appellants Harold Tomlinson, Rebecca Tomlinson, Dennis Symes, Jeanne Symes, Nicole Dewsbury, Peter Dewsbury, Vinod Dodhia, Paras Dodhia, Chandrakala Dodhia, Lawrence Greco, Marian Greco, Cyril Smith, Ernestine Smith.

Alan Patton, for the appellants Ronald **Death,** Julie Rowland Michael **Death,** Jessica Seiffert, Jennifer Hopson, Jeremy Hopson, Eugene Lei, Jeffrey Hiltz and Justin St. Onge.

Jonathan C. Lisus and Paul Fruitman, for the respondent The Neighbourhoods of **Windfields** Limited **Partnership.**

David J. Potts, for the respondent City of Oshawa.

[Editor's note: An amended judgment was released by the Court April 22, 2009. This document contains the amended text.]

ENDORSEMENT

The following judgment was delivered by

1 THE COURT (orally):-- The appellants, three groups of landlords in Oshawa, appeal the judgment of Howden J. dated August 26, 2008, allowing the application by the respondents, the developer **Windfields** LP and the City of Oshawa, and ordering the appellants to cease using their properties as lodging houses. The appellants contend that their properties are, and operate as, single dwelling establishments for various groups of tenants, mostly students attending the nearby University of Ontario Institute of Technology. Accordingly, the current use of the 28 subject houses is a permitted use.

2 We disagree. Essentially, this was a fact-driven application. The application judge had to draw a line between two types of accommodation, single dwelling establishment and lodging house as defined in by-law 60-94 of the Corporation of the City of Oshawa. He identified a broad range of factors to consider in relation to the definitions of the two categories of houses and then applied those factors individually to the 30 houses in question.

3 While there were some differences in the facts relating to the different landlords and their houses, the application judge found that generally the appellants purchased their houses for the purpose of renting out bedrooms on a room-by-room and a short-term basis to individual tenants, added extra rental bedrooms without building permits or with building permits that misrepresented use, and insured the properties as "rooming houses" and "student housing". He found that the essence of the relationship between the appellants and their renters was one of "lodger" and "proprietor" as defined in the by-law. He essentially found that there was no relationship between the renters other than their use and occupation of single rooms rented for short-term accommodation.

4 We see no legal error in the application judge's treatment of the relevant statutory provisions and case law. In particular, we reject the submission that s. 35(2) of the *Planning Act* which prohibits "distinguishing persons who are related and persons who are unrelated in respect of the occupancy or use of a building" barred the application judge from considering as a relevant factor how the renters related amongst themselves when determining whether they constituted a "single housekeeping establishment". Moreover, his assessment of the factual situations with respect to 30 different houses and his application of the law to those houses is a matter of mixed fact and law and, therefore, is subject to review on a reasonableness standard.

5 In our view, the application judge's conclusions are far removed from any fair invocation of the label 'unreasonable'. His factual findings are solidly grounded in the record and his legal analysis of the relevant statutory provisions and case law is sound.

6 The appellant Jacky Chan appeals the costs order of approximately $22,000 made against him in relation to the four houses owned by him and members of his family. We see no basis for interfering with this component of the application judge's costs order.

7 On consent, the operation of Howden J.'s order is amended from April 30, 2009 to June 30, 2009.

8 In all other respects the appeal is dismissed. If the parties cannot reach an agreement as to costs, they are to make submissions one page in length, no later than April 8, 2009.

J.C. MacPHERSON J.A.
R.J. SHARPE J.A.
P.S. ROULEAU J.A.

cp/e/qlrpv/qlpxm/qlrxc/qlaxr/qljyw

Case Name:

Balmoral Developments Hilda Inc. v. Orillia (City)

Between
Balmoral Developments Hilda Inc., Applicant/Respondent by counter-application, and
The Corporation of the City of Orillia and Kelly Smith, Chief Building Official, Respondent/Applicant by counter-application

[2012] O.J. No. 5012

2012 ONSC 6040

4 M.P.L.R. (5th) 118

221 A.C.W.S. (3d) 744

2012 CarswellOnt 13171

Court File No. CV-12-0310

Ontario Superior Court of Justice

S.E. Healey J.

Heard: July 25, 2012.
Judgment: October 24, 2012.

(118 paras.)

Municipal law -- Planning and development -- Building regulations -- Occupancy permits -- Zoning regulations -- By-laws -- Interpretation -- Land use -- Types -- Residential -- Application by owner of project that consisted of two multi-unit residential buildings for declaration that would allow it to rent each unit to seven college students allowed -- Project was stacked townhouse and under zoning bylaw owner could rent each unit to seven students -- Project was not boarding, lodging and rooming house, that would have restricted number of students that could have rented each unit -- City was also ordered to issue final occupancy permit for project without conditions as to number of occupants for each unit.

Application by Balmoral Developments Hilda Inc. for a declaration that would permit it to rent each unit in its project, that consisted of two multi-unit residential buildings that it owned in the City of Orillia, to up to seven students who attended a nearby college or university. The City opposed the application and it maintained that renting to more than four students per unit would trigger the designation of the buildings as "boarding, lodging or rooming houses", which usage was not permitted in the zone in which the buildings were located.

HELD: Application allowed. The project was a stacked townhouse that was permitted by the City's zoning bylaw. Due to this designation the bylaw allowed Balmoral to rent each unit to seven occupants. The project was not a boarding, lodging and rooming house. The City was required to issue a final occupancy permit for the project without conditions as to the number of occupants in each unit.

Statutes, Regulations and Rules Cited:

Building Code Act, 1992, S.O. 1992, c. 23, "boarding, lodging or rooming house, "dwelling unit, "storey, "suite, s. 10, s. 35

Building Code Act Regulation, O.Reg. 350/06,

City of Orillia By-law 2005-72, s. 14.3.25.1, s. 14.3.25.2

City of Orillia By-law 2009-155,

City of Orillia By-law 2009-156,

City of Orillia By-law 2010-172,

Places to Grow Act, 2005, S.O. 2005, c. 13,

Planning Act, R.S.O. 1990, c. P.13, s. 3, s. 24(1)

Strong Communities (Planning Amendment) Act, 2004, S.O. 2004, c. 18,

Counsel:

E. Marshall Green and E. Brohm for the applicant/respondent by counter-application.

M. Miller for the respondent/applicant by counter-application.

REASONS FOR JUDGMENT

S.E. HEALEY J.:--

THE NATURE OF THE APPLICATIONS

1 Balmoral Developments Hilda Inc. ("Balmoral") has constructed and owns two multi-unit residential buildings at 248 Hilda Street in the City of Orillia. They are three-storey buildings, plus a basement, each divided into twelve units consisting of two levels. Access to each of the units is from an exterior entrance, reached by one of two balconies that run along the front of each building, on different levels.

2 Balmoral seeks a ruling that would permit it to rent each unit to up to seven students attending the nearby Georgian College or Lakehead University campuses in the City.

3 The Corporation of the City of Orillia (the "City") opposes, taking the position that renting to greater than four students per unit would trigger the designation of the buildings as "boarding, lodging or rooming houses", a use not permitted in the zone in which the buildings are located. The City further submits that any increase in number beyond four individuals would require a change of use permit under the *Building Code Act, 1992*, S.O. 1992, c. 23. The City argues that such change of use permit cannot be granted because, first, the project is not zoned for a boarding, lodging or rooming house and, second, because the buildings are not in compliance with the requirements of O.Reg. 350/06 under the *Building Code Act* (the "*Building Code*") for a boarding, lodging or rooming house. The City applies for declaratory and injunctive relief arising out of Balmoral's intended plan to increase the number of renters.

4 The City has refused to issue an occupancy permit without a restriction on the number of occupants in each unit. Balmoral currently rents each unit to only four students while it awaits this court's ruling.

5 Balmoral seeks the following declarations:

(a) a declaration that the project located at 248 Hilda Street ("the project") in the City of Orillia is a stacked townhouse as defined in the City's zoning by-law;
(b) a declaration that the project is subject to the provisions set out in the City's zoning by-law that was in force on October 25, 2010;
(c) a declaration that the project complies with the provisions of the City's zoning by-law that was in force on October 25, 2010;
(d) a declaration that the project can legally rent to up to seven occupants for any one unit;
(e) a declaration that the project is not a boarding, lodging and rooming house pursuant to the City's zoning by-law; and
(f) an order directing the City to issue a final occupancy permit for the project without conditions as to the number of occupants for each unit.

6 The City also seeks certain declarations:

(a) a declaration that each unit in the project, if occupied by more than four persons for remuneration, is a boarding, lodging or rooming house as defined in the City's zoning by-law;
(b) a declaration that a boarding, lodging or rooming house is not a permitted use on the subject property;
(c) a mandatory injunction prohibiting the use of the project as a boarding, lodging or rooming house;
(d) if a unit can be legally rented to up to seven occupants, then the City seeks a declaration that the buildings as constructed are boarding, lodging or rooming houses as defined in the *Building Code*, and as such do not comply with the requirements of the *Building Code*, and require a change of use permit pursuant to section 10 of the *Building Code Act*; and
(e) a permanent injunction restraining Balmoral, its agents or employees, from leasing rooms to more than four persons per townhouse unit.

THE ISSUES TO BE DETERMINED

7 Four main issues are to be determined:

(1) Under the City's zoning by-law, is the proposed use of each building permitted as a "stacked townhouse" or as a "boarding, lodging or rooming house";
(2) If not a boarding house, is there any limitation on the number of tenants who may rent units in the building;
(3) If not a "boarding, lodging or rooming house" as defined in the zoning by-law, do the provisions of the *Building Code Act* nevertheless apply, such that the requirements of that Act or its regulations must be met before the buildings can be occupied by any particular number of tenants; and
(4) Is expert evidence admissible to assist the court with the interpretation of the zoning by-law and the official plan?

THE PLANNING FRAMEWORK

8 Both counsel referred this court to the decision of Howden J. in *Neighbourhoods of Windfields Limited Partnership v. Death*, [2008] O.J. No. 3298, 2008 CanLII 42428 (ONSC.) ["*Windfields*"] as being a leading decision regarding the approach to be taken by courts in construing a zoning by-law. After referencing *Loblaws v. Ancaster (Town) Chief Building Official*, [1992] O.J. No. 2290, 1992 CarswellOnt 508 (Ont.Ct. (Gen. Div.)); *Croplife Canada v Toronto (City)*, (2005) 75 O.R. (3d) 357 (C.A.); and *Montréal (Ville) v. 2952-1366 Quebec Inc.* 2005 SCC 62, [2005] 3 S.C.R. 141, Howden J. determined that a proper approach to legislative interpretation of a municipal zoning by-law is one that takes into account the words used, the intent of council, and the purpose and scheme of the by-law as a whole [para. 33]. Referencing Driedger, "Construction of Statutes" (4th ed) by R. Sullivan, at para. 35 of *Windfields* Howden J. quoted:

> In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of

> (a) its plausibility, that is its compliance with the legislative text; (b) its efficacy, that is its promotion of the legislative purpose, and (c) its acceptability, that is, the outcome is reasonable and just.

9 Howden J. also referenced his decision in *Aon v. Peterborough (City)*, [1999] O.J. No. 1225 (S.C.) ["*Aon*"], in which he noted that he adopted the Sullivan and Driedger approach to statutory interpretation while attempting to recognize that context under the *Planning Act* involves some understanding of the relation of the zoning by-law to the official plan. At paragraph 18 of *Aon* he wrote:

> (Zoning by-laws) are a somewhat unusual type of law in their statutorily required interrelationship with an official plan. A proper contextual approach to their interpretation requires the zoning by-laws should be interpreted in their ordinary and plain meaning in light of the by-law as a whole and its policy derivation and basis within the official plan. However it must be borne in mind that it is the zoning by-law which is the applicable law to be applied.

10 Adopting that purposive and contextual approach set out in *Windfields*, it is necessary to consider the entire planning scheme within which the City's zoning by-law was made, including the Provincial Policy Statement, the Greater Golden Horseshoe Growth Plan, the official plan of the City, and all other relevant and admissible indicators of legislative meaning. And, as pointed out by Howden J. at para. 43 of the *Windfields* decision, an absurd consequence is to be avoided, that being one that is incompatible with other provisions, or with the object and purpose, of the by-law.

(i) Provincial Policy Statement, 2005

11 The Provincial Policy Statement issued under the authority of s. 3 of the *Planning Act* came into effect on March 1, 2005 and applies to all applications, matters or proceedings commenced on or after that date. The Provincial Policy Statement sets the policy foundation for regulating the development and use of land in Ontario. In accordance with s. 3 of the *Planning Act*, as amended by the *Strong Communities (Planning Amendment) Act, 2004*, S.O. 2004, c.18, planning decisions must be consistent with this Provincial Policy Statement.

12 Part V of the Statement sets out the policies to be followed throughout the province with a view to the goal of building strong communities. Section 1.1 under Part V is entitled "Managing and Directing Land Use to Achieve Efficient Development and Land Use Patterns", which lists the following policies relevant to the present application:

> (a) Promoting efficient development and land-use patterns which sustain the financial well-being of the Province and municipalities over the long term;
> (b) Accommodating an appropriate range and mix of residential, employment (including industrial, commercial and institutional uses), recreational and open space uses to meet long-term needs;
> (c) Avoiding development and land-use patterns which may cause environmental or public health and safety concerns ...;
> (d) Promoting cost-effective development standards to minimize land consumption and servicing costs ...;

13 "Settlement areas", a defined term in the Statement under which the City is captured, are identified within the Provincial Policy Statement as being the focus of growth, and that their vitality and regeneration is to be promoted (section 1.1.3.1). Land use patterns within settlement areas are to be based upon densities and a mix of land uses which efficiently use land and resources, are appropriate for and efficiently use the infrastructure and public service facilities which are planned or available, and minimize negative environmental impacts (section 1.1.3.2). Development standards are to be promoted which facilitate intensification, redevelopment and compact form, while maintaining appropriate levels of public health and safety (section 1.1.3.4).

(ii) Greater Golden Horseshoe Growth Plan

14 Pursuant to the *Places to Grow Act*, 2005, S.O. 2005, c. 13, the Growth Plan for the Greater Golden Horseshoe, 2006 took effect on June 16, 2006.[1] It is to be read in conjunction with the Provincial Policy Statement. One of the stated goals of the Growth Plan is to promote population intensification and growth within built-up areas where the infrastructure and public services already exist. The Plan sets minimum intensification targets for municipalities.

(iii) The City's Official Plan[2]

15 The purpose, philosophy and principles of the official plan are an important consideration when looking at the context in which the zoning by-law and its amendments have been made. Those principles form the policy framework with which the zoning by-law is to conform and pursuant to which it must function under the *Planning Act*. They are stated in the official plan as follows:

> 1.1 PURPOSE OF THE OFFICIAL PLAN
>
> The Official Plan is one of a series of plans and policies, which direct the actions of local government, and shape growth and development. The Orillia Official Plan establishes a vision for the future urban structure of the City. The Plan will serve as the basis for managing change over the next 20 years. The achievement of this future urban structure will, in large part, be dependent on the form, location and rate of growth permitted by Council.
>
> Policy 1.2(b)(iii) of the Official Plan indicates: "This Plan promotes a City with housing choices that meet the needs of all people throughout all stages of life".
>
> 1.4 PHILOSOPHY OF THE PLAN
>
> ...
>
> When change is proposed, this Plan is intended to provide clear direction to Council, both in general terms related to the long-term vision as well as through specific guidelines to judge the impacts and benefits of change and the degree to which proposed changes are in the public interest.
>
> This Plan is written to focus the process of judging the suitability of land use change through the planning approval process. The Plan sets out five, very broad land use designations within which substantial change can occur, provided performance standards can be met to ensure the minimization of impacts and the maximization of benefits.
>
> 3.1 PRINCIPLE #1 - MANAGE GROWTH IN A RESPONSIBLE AND EFFICIENT MANNER.
>
> 3.1.1 In order to accommodate population growth and economic activity, land must be developed or re-developed for new housing, employment, institutional and recreation facilities. The City of Orillia will take the necessary steps to ensure that future growth occurs in a responsible and efficient manner that is complementary to the community's existing character.
>
> 3.1.2 Compact forms of development that make more efficient use of existing developed or vacant lands, buildings and municipal services will be encouraged.
>
> 3.1.3 A high quality of urban design for new buildings and re-development projects will be encouraged.
>
> 3.1.4 All new development and re-development should be designed to be consistent with and sensitive to, the style and context of the existing community.
>
> 3.1.5 Re-development, infilling and transportation systems, particularly within the Downtown District, should foster a pedestrian environment which promotes social interaction and easy access to community amenities.

16 Section 4 of the official plan indicates that five land use designations have been established to achieve the objectives of the plan, with the intent that all development within the City occur in accordance with these land use policies.[3]

17 One of those designations is "Living Area".[4] The plan provides that the Living Area designation permits a variety of housing types and a broad range of residential densities as well as limited local commercial and institutional uses. This is intended to meet the City's long-range housing needs and optimize opportunities to provide affordable living

accommodation. The Plan goes on to note that Schedule A - Land Use, does not designate specific sites as locations for the various permitted residential densities. Rather, the intent of the official plan is to determine locations for low, medium and high density residential uses on a site-specific basis by amendment to the zoning by-law.

18 The objectives of the Living Area designation are expressed as being:[5]

(a) To maintain and enhance the character and identity of existing residential communities.
(b) To encourage and facilitate the production of a range of dwelling types and forms of tenure.
(c) To encourage a high quality of design consistent with the policies of Section 6 of this Plan.
(d) To encourage residential intensification.

19 Under the permitted uses listed for lands designated as Living Area on Schedule 'A' to the Plan[6], medium and high density housing is permitted, as are various other uses including bed and breakfast establishments, all subject to certain criterion.

20 One of the subsections under Living Area addresses housing demand.[7] It notes the recognition by City council that the number of low, medium and high density residential dwelling units required to meet the long-term needs of the City's population could vary over time due to market factors. Accordingly, the official plan does not limit the mix of low, medium and high density housing within the Living Area designation, providing the other residential objectives of the official plan are attained. This subsection also states that innovative housing forms that will facilitate affordable housing will be encouraged.

21 High-density residential uses are defined in the official plan as those which have a density greater than 42 units per net hectare and less than 100 units per net hectare[8]. As previously mentioned, new high-density uses are permitted in the Living Area designation subject to an amendment to the zoning by-law. High-density residential development may include components comprised of lower density forms such as triplexes, townhouses, low rise and medium rise apartments and similar buildings. High density development is to be encouraged to locate in the Living Area adjacent to the downtown district as defined by Schedule 'A' to the plan, or at highly accessible locations in the Living Area designation. High density uses should be located near public transit, parks, schools, community residential facilities, local commercial facilities and along arterial or collector roads or on sites where access is not obtained from a local road. Also, Council may require development to take place at reduced densities if it is found that municipal services are inadequate to serve higher density proposals.

22 Road classifications[9] within the official plan also play some significance in this case. The plan provides that arterial roads are primarily traffic carrying facilities, providing through routes across the City. Arterials will generally limit private land access to existing lots and commercial and industrial uses, with new residential access permitted only where traffic movement, volume, speed and safety are not compromised, no alternative local or collector road access is available and the entrance criteria of the City are met. Collector roads carry traffic between arterial roads and the local or neighbourhood roads. Through traffic will be discouraged from using these roadways, but access to properties abutting these roadways will be permitted. Local roads are designed to accommodate only low volumes of traffic at low speeds and generally only serve the properties that abut these roadways.

23 The property on which the project is situate is bounded by a local road, and a mixed density residential area consisting of single detached dwellings, townhouse dwellings, apartments and triplex buildings, with a 32-unit townhouse complex abutting the property immediately to the south. Yet because the proposed development site is not near public parks or commercial facilities nor adjacent to the downtown district, in addition to only being accessible from a local road as opposed to an arterial or collector road, the project did not wholly conform to all of the locational requirements suggested within the City's official plan.

24 According to a report submitted by the Director of Planning and Development to the City's Planning Advisory Committee dated October 16, 2009 ("the Planning Report"), an official plan amendment was required because the proposal did not meet the intent of the official plan with regard to high density development, for the reasons described in the preceding paragraph. Balmoral applied for such an amendment, and on December 14, 2009, City Council approved the application for the official plan amendment and passed By-law 2009-155, allowing for high density development on the subject land.

(iv) <u>The Zoning by-law</u>

25 Zoning is controlled by the City's by-law 2005-72 (the "zoning by-law").

26 The purpose of the zoning by-law is set out in the by-law's preamble:

> Being a By-law, pursuant to Section 34 of the Planning Act, R.S.O. 1990, as amended, to regulate the use of land, the location and use of buildings or structures, the type of construction and the height, bulk, size, floor area, spacing, character and minimum opening elevations of buildings or structures and the provision of parking and loading area facilities in the City of Orillia.
>
> Whereas it is considered desirable to control the use of land, construction and use of buildings or structures in defined areas of the City of Orillia in accordance with Section 34 of the Planning Act R.S.O. 1990, as amended, and in conformity with the Official Plan of the City of Orillia ...

27 The zoning by-law sets out eight different types of residential zones (not including the West Ridge residential zones) that reflect different residential densities. For each zone, any lot, building or structure must conform to varying measurements for minimum lot area, yard requirements and maximum building height, among other criteria. The zoning by-law itself does not prescribe net residential densities for any particular residential use. However, building growth clearly becomes more concentrated as one moves within the by-law from the first density residential (R1) zone along a continuum of density to the second density multiple residential (RM2) zone, as a function of the prescribed minimum and maximum measurements for both lot, setbacks and building. This reflects the gradations of use intensity permitted by the by-law's lot coverage regulations.

28 The definition section of the zoning by-law also reflects the City's intention to have differing use gradations among zones. Single detached dwellings and duplex dwellings, permitted in the R1 zone, allow for only one and two dwelling units, respectively, the dwelling unit being designed for use as a "single housekeeping establishment". Moving along the spectrum of density, the RM1 and RM2 zones permit multiple dwellings, townhouse and link townhouse dwellings, and apartments. Townhouse dwellings may contain three or more dwelling units, whereas apartment dwellings contain five or more dwelling units. In *Windfields*, at para. 55, Howden J. wrote:

> I conclude that By-law 60-94 reflects a legislative goal of creating a comprehensive scheme to regulate and control residential use intensity throughout the City, using a single dwelling unit, designed for use as a single housekeeping establishment, as the basic planning unit.
>
> I reach the same conclusion with respect to the City of Orillia's zoning by-law.

29 Initially, the project as first conceived by Balmoral was for an affordable seniors housing rental building. For reasons that I have determined are not germane to the issues to be determined on this application, that initial concept was abandoned along the way as a result of affordable housing funding being unavailable, in favour of the creation of student housing.

30 When the property was purchased by Balmoral, the lands in question were zoned as Second Density Residential ("R2"). The uses permitted in the R2 zone were single detached dwelling, duplex dwelling, bed-and-breakfast establishment, place of worship, elementary or secondary school, and park.

31 In order to build the townhouse development as proposed in the initial planning stages, the lands needed to be re-zoned to allow for the proposed multi-residential use of the project. In response to Balmoral's application, City council passed by-law 2009-156 on December 14, 2009, which provides that the lands are now zoned as a Second Density Multiple Residential Exception (RM2-25), in conformity with the official plan, as amended. The RM2-25 designation was the highest density residential zoning available to the City. Accordingly, the permitted uses within the RM2-25 zone include a wide range of building types, all of which are permitted to have multi-unit occupation, including stacked townhouse, multiple dwelling, townhouse dwelling, link townhouse dwelling and apartment dwelling.

32 By-law 2009-156 also had the effect of adding sections 14.3.25.1 and 14.3.25.2 to the zoning by-law. These sections allowed stacked townhouses to be included as a permitted use within the RM2-25 zone, and defined a stacked townhouse, for the purposes of the RM2-25 zone, to mean "a building or structure containing townhouses, divided horizontally and vertically with each unit having its own private entrance to the exterior".

(v) <u>The Planning Report</u>

33 The Planning Report prepared for the project and presented to the City's Planning Advisory Committee, for a meeting held just prior to the passing of the by-laws, is an important document to assist in understanding the legislative intent of council and the purposes of by-laws 2009-155 and 2009-156. The Planning Advisory Committee is appointed by City council to make recommendations to council on official plan and zoning by-law amendments.

34 Referring to the site plan submitted with Balmoral's application, the Planning Report indicated that Balmoral was proposing to construct 24 dwelling units in the form of a stacked townhouse development. Two separate building blocks were being proposed, each having six units on the ground floor and six units directly above. Each dwelling unit was to have two bedrooms and would be approximately 82 m2 (800 ft.) in gross floor area. Balmoral proposed to provide thirty parking spaces, of which eight would be for visitor parking. At the time of Balmoral's application, the zoning by-law required 1.25 parking spaces per dwelling unit in a townhouse project.

35 The Planning Report noted that Balmoral's application was consistent with the Provincial Policy Statement, as it met the Statement's definition of intensification, being a high density townhouse development on a parcel with full municipal services, further diversifying the existing housing stock. The Planning Report also stated that the application proposed to develop a vacant site within the City's built-up area, and therefore conformed to the Growth Plan for the Greater Golden Horseshoe, 2006 through intensification. It was noted that, other than the irregularities that required the official plan amendment, the proposal conformed to and was consistent with all applicable policies.

36 With respect to the issue of the proposed townhouses only having access onto a local road, the Planning Report notes that the official plan does not preclude townhouse development from accessing a local road as long as a traffic impact analysis indicates that the immediate road network is capable of handling the proposed development. It was noted that a transportation review and analysis had been completed for the property and the results deemed acceptable by the City's Public Works Department.

37 Despite the proposed development site not being near public parks, commercial facilities, or adjacent to the downtown district, it was noted in the Planning Report that the proposal met one of the objectives of the Living Area by encouraging residential intensification. As stated at page 11 of the Report:

> The proposed townhouse rental units will increase the range of dwelling types offered in the City and, as the parcel is currently vacant, will make more efficient use of land and resources within the City's existing built-up area. The application conforms to the Zoning By-law's parking requirements and only minor variances to the RM1 zoning provisions are required to accommodate the proposal.

38 At page 4 of the Report, the planner wrote:

> Although townhouses are typically considered to be "medium density" residential development, townhouses can be considered a high density residential development form as per Section 4.3.8 of the Official Plan. High density is defined as 42 to 100 units per net hectare. The density of the proposed twenty-four (24) townhouse units would be 66.7 units per net hectare.
>
> And at page 6 of the report:
>
> The Draft Official Plan also notes that a wide array of housing types are encouraged throughout the Living Area and that density alone should not be the key determining factor regarding the types of development permitted in each land use designation. Instead, building form should be the key determining factor. The Draft Official Plan suggests that density is a product of built form, and that density, used as a planning tool in isolation of other considerations will not ensure good planning. Density is not proposed to be specifically regulated in the Draft Official Plan.

39 The Planning Advisory Committee met on October 28, 2009 to review Balmoral's proposal. The minutes of the meeting indicate that a neighbouring citizen inquired about the number of people who would live in the units, but there is no indication that the question was answered. At the conclusion of the meeting, the Planning Advisory Committee recommended to City Council that the official plan and zoning amendments be approved. As previously indicated, council did so on December 14, 2009. As such, the amended zoning by-law complied with s. 24(1) of the *Planning Act*, which requires that a by-law shall not be enacted for any purpose that does not conform to a municipality's official plan.

(vi) The Conditional Permit Agreement

40 On May 25, 2010, the City received an application for site plan approval for the project. The plans submitted with the application included ground and second-floor plans showing two bedrooms per dwelling unit. At the same time as the site plan approval was proceeding, Balmoral filed different plans with the Chief Building Official showing four bedrooms per unit.

41 In October 2010, Balmoral submitted an application for a conditional building permit to construct the footings and foundations for the project. A Conditional Permit was requested because, among other reasons, Balmoral had not received site plan approval from the City. Later that month a Conditional Permit Agreement was entered into between Balmoral and the City.

42 On November 1, 2010 the City received an application for a permit to construct one of the buildings. It is the evidence of Kelly Smith, the Chief Building Official for the City, that the building plans filed with the application were dramatically different from any plans that she had previously seen for the project. Four bedrooms were now included within each unit. The electrical plan showed seven bedrooms in each unit.

43 It is the City's position that it first became aware of the possibility that the project was being developed as a student residence in late November 2010 as a result of a Transit Advisory Committee meeting with a representative of Georgian college, at which time the City learned that Balmoral was potentially planning to provide housing for 157 students. As a result of that information, Ms. Smith made a notation on the building plans, which reads as follows:

> Note: Units are classed as Single Family Dwellings. If money or services are received for more than 4 occupants per unit, then they become boarding, lodging or rooming houses and a different set of Code requirements will be applied.

44 Construction on both buildings was begun under Conditional Permit Agreements. It is Balmoral's position that the conditional permits were issued only because there was delay on the part of the City's lawyer in completing preparation of the site plan agreement. It is also Balmoral's position that the Chief Building Official's notation on the plans, as cited above, was made without the City having authority to impose such a requirement under the terms of the zoning by-law.

45 Subsequently, in or about March 2011, City planning staff discovered a brochure advertising "Hilda House" as a student residence with seven private bedrooms in each unit. As a result of the discovery of the intended use of housing up to seven students, the City sent a letter to Balmoral's principal, Mr. Kurtz, advising him that the zoning for the property did not permit a boarding, lodging or rooming house, and that more than four renters per unit was not permitted. Mr. Kurtz's evidence is that he told the City that the brochure was published in error, as he was at that time aware that the City was requiring him to limit the number of occupants to four.

46 Site plan approval was obtained from the City in or about March 2011, and the building permit issued on April 18, 2011. According to the City, a number of conversations were held with Mr. Kurtz early in 2011, during which he assured City staff that he knew that he could only rent to four students, and that that was his intent. However, the documentary evidence establishes that by at least as early as March 29, 2011 the City was aware, through correspondence sent from Balmoral's lawyer, that Balmoral was hoping to enter into leases with up to seven students per unit. On September 2, 2011 an occupancy permit was issued by the City permitting occupancy of units 13 to 24 of the project, which contained the following condition:

> Occupancy is granted on the owner's expressed and acknowledged guarantee that he will lease to a maximum of 4 tenants per unit.

47 Another occupancy permit was issued by the City on November 23, 2011 for the remaining units in the project, which contained the same condition.

48 Balmoral is currently leasing each unit to only four students. The court accepts that this was a decision made only because City officials took the view that they would be required to revoke Balmoral's building permits if Mr. Kurtz did not agree to this limitation.

ANALYSIS

Issue #1 - Under the zoning by-law of the City of Orillia, is the proposed use of each building permitted as a "stacked townhouse" or as a "boarding, lodging or rooming house"?

49 Any analysis of this question has to begin with the recognition that the intentions of Balmoral were communicated to the City very late in the process. It was only after the official plan and zoning amendments had taken place that there was any indication that Balmoral had its sights set on a use that would involve providing rental accommodation for up to seven individuals in each unit. The question is whether this change is significant, in the sense that this revised plan creates a use that is prohibited under the zoning by-law. If this court concludes that the proposal to provide rental housing for up to seven students results in the creation of a "boarding, lodging or rooming house" (hereafter "boarding house") within the definition in the zoning by-law, it is clearly a use not permitted in this RM2-25 zone. Boarding houses are only permitted in Orillia's Fourth Density Residential (R4) zone.

50 The position of Balmoral is that the project exhibits a building form that most closely fits, and indeed comes within, the definition of stacked townhouse, the use added when the by-law amendment was passed. It is located within an area now zoned for the highest density residential development. Further, the tenants who are intended to occupy the building do not fit within the prototype of the more transient lodger; they are students who live together for a common purpose and each under the terms of a 10-month lease. It submits that the City's focus on numbers alone leads to a preposterous outcome, with individual units being either a single household unit or a boarding, lodging or rooming house, all within the same building, depending on the number of occupants in each unit. Balmoral argues that there are many living arrangements that could result in the townhouse unit transforming from a single household unit to a boarding house under the City's analysis: a household containing two single parent families where each of the families paid rent separately to the landlord and whose total number exceeded four; foster parents, whose combined biological and foster children totalled a family of more than four; a family on social assistance where the County paid rent directly to the landlord. Even five separate adults, for example seniors who chose to live together for both financial and social reasons in a long-term arrangement, would not be permitted to do so without offending the zoning by-law. An entire extended family, however, living together with aunts and uncles, cousins and grandparents, in a single household unit, even if numbering double digits, would not offend. Yet an arrangement that the City considers "legal" - the renting of a townhouse suite to four students - could become illegal just by adding one more student. The term "single housekeeping unit", not defined in the by-law, should be flexible enough to include students who occupy a dwelling unit together for a common purpose.

51 The position of the City is that there is a distinction between a boarding house and a stacked townhouse or any other type of multi-dwelling building. Failing to distinguish a boarding house from the other types renders the definition meaningless, and fails to recognize that the City tries to place boarding houses within another zone distinct from the R2 zones. If persons occupy a single housekeeping unit, there can be up to four individuals of any relationship to one another, but in excess of four, the unit becomes a boarding house. If there is a familial relationship among the members occupying a dwelling unit, it remains a single housekeeping unit even if there are more than four in occupation. Separate payment of rent by tenants signals a relationship that would not equate to a "single housekeeping unit". The City argues that a boarding house cannot be defined by the attributes of the people who live within it, as enforcement becomes impossible. When a non-familial situation exists, numbers are the only means by which the classification into boarding house can be made, an approach used in other municipalities. Students living together do not create a quasi-familial community of the type necessary to form a single housekeeping unit. Further, student residences are only permitted in the Community Facility (CF) Zone as part of a college or university. Parking is also an issue. The project was designed and approvals were processed on the basis of providing the minimum number of parking spaces required for 24 townhouse units, being 30 parking spaces. The City suggests that by virtue of renting seven lodging rooms to the occupants of each unit, a minimum of one parking space for each lodging room is required. This would entail a total of 168 parking spaces for the entire project. Hilda Street is a dead-end street that ends at the subject property and therefore is the only means of ingress and egress to the subject property, and overnight parking is not permitted on Hilda Street during the winter months. The City argues that Balmoral misled the City as to its intended use of the project during the planning process and when seeking approvals from the City. Had the City known of Balmoral's intentions it would have approached Balmoral's proposal differently in light of the significantly increased intensity of use, the mass and scale of the buildings, the major parking deficiency, and the adverse impact on neighbouring properties.

The Definitions as Contained in the Zoning By-law

52 The starting point is to consider the definitions of stacked townhouse and boarding house within the zoning by-law, as amended:

> BOARDING, LODGING OR ROOMING HOUSE means a dwelling unit, which is designed, or intended to provide lodging for more than four (4) persons in return for remuneration, or for the provision of service or for both, and in which the individual lodging rooms do not have both washroom facilities and cooking facilities, but shall not include a retirement home or retirement lodge.
>
> STACKED TOWNHOUSE, for the purpose of the RM2-25 zone only, means a building or structure containing townhouses, divided horizontally and vertically with each unit having its own private entrance to the exterior.

53 It is noted that this latter definition has no stated limit on the type or number of residents that might live in the building, nor the purposes of the dwelling's intended use.

54 Other significant definitions in the by-law are:

> DWELLING means a building, occupied or capable of being occupied as a home, residence or sleeping place by one or more persons, containing one or more dwelling units.
>
> DWELLING, APARTMENT means a dwelling unit in a building containing five or more dwelling units which units have a common entrance from the ground level and the occupants of which have the right to use in common, halls and/or stairs and/or elevators and yards.
>
> DWELLING UNIT means one or more habitable rooms, located within a building which is designed, or intended to house one or more persons living together as a single household unit, in which both washroom facilities and cooking facilities are provided for the exclusive and common use of the occupants of the dwelling unit, and has access provided by a private entrance from outside the building or from a common hallway or stairway inside the building.
>
> DWELLING, SINGLE DETACHED means a completely detached dwelling unit, but shall not include a mobile home.
>
> DWELLING, LINK TOWNHOUSE means a building that is divided vertically into three or more dwelling units, each of which has independent entrances, from the outside, and which dwelling units are attached above or below finished grade by a wall.
>
> DWELLING, MULTIPLE means a building, which is not otherwise defined herein, that is designed, intended and used for occupancy by three or more households living independently of one another.
>
> DWELLING, TOWNHOUSE means a building that is divided vertically into three or more dwelling units, each of which has independent entrances, to a front and rear yard immediately abutting the front and rear walls of each dwelling unit.
>
> HABITABLE ROOM means a room in a dwelling used or intended to be used primarily for human occupancy and shall include any room designed for living, sleeping, eating or preparing food.
>
> HOUSEHOLD means one or more persons who share occupancy of a dwelling unit as a separate and independent housekeeping establishment.
>
> LODGING ROOM means a room designed or intended to be used for sleeping accommodations provided for individuals in return for remuneration or for the provision of service or both. A lodging room may contain washroom facilities, but shall not include cooking facilities.

55 Both counsel referred extensively to the *Windfields* decision in their facta and argument. In *Windfields*, the issue before the court was whether the zoning by-law in the City of Oshawa was being contravened by thirty homeowners who had converted their homes to accommodate multiple living quarters for students attending a nearby college. The

City of Oshawa sought a declaration that such use was prohibited by the zoning by-law. The court found that, in all but six cases, the buildings had been converted into short-term rental/lodging accommodation, which was an illegal non-conforming use, and granted injunctive relief prohibiting such use.

56 In both this case and *Windfields*, boarding houses are not permitted in the zoning for the subject lands. Counsel for Balmoral seeks to distinguish *Windfields* on the basis that Balmoral's lands were specifically placed into the "Multiple Residential" category, with the approval of the City, and that, again in contrast to the *Windfields* case, zoning of the neighbouring lands is also multiple residential.

57 It is my view that there are two significant differences between this case and *Windfields*.

58 The first key difference between the present case and *Windfields* is that the subject lands are located in a very different zone than were the buildings at issue in *Windfields*. In *Windfields* the houses in question were located in R1 single detached residential, allowing one dwelling unit per lot, and were designated in the official plan for low density residential use as part of "a safe, liveable, family oriented community that is reflective of, and builds upon, the legacy of Windfields Farm", and founded on principles that include "a high quality and diverse residential community with attractive neighbourhoods and streetscapes" [para. 18]. As previously discussed, with the re-zoning that has taken place, Balmoral's project is within the Second Density Multiple Residential Exception (25) Zone, with permitted uses including a wide range of building types that are permitted to have multi-unit occupation.

59 The second key discrepancy between the subject case and *Windfields* is found in the definition of boarding house. Under the operative bylaw in *Windfields*, "Lodging House" was defined as:

> a building or a part of the building, containing 3 to 10 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 washing facilities. Meals may or may not be provided to residents. Common areas such as living rooms, may or may not be provided.

60 Under the City of Oshawa's zoning by-law, "dwelling unit" was defined 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." A "lodging unit" was one or more rooms used or designed to be used for sleeping accommodations, to be occupied by lodgers whose relation to the owner is one of rental.

61 Having earlier concluded that all uses other than a single detached dwelling were prohibited in the R1 zone, Howden J. turned to the definition of "single housekeeping establishment" as used in the definition of "dwelling unit". The term "single housekeeping establishment" was not defined in Oshawa's zoning by-law.

62 At para. 45 of the decision, Howden J. wrote:

> ... By definition, a "single detached dwelling" cannot be a "lodging house" in By-law 60-94, nor are they intended to be similar in design and function. Each is distinct, a permitted use in different zones, and each excludes the other, because of the manner in which the By-law operates. It can be concluded that a lodging house, which has its own specific lot regulations and is not allowed by the By-law nor contemplated by the Official Plan for a low density or R1 residential area, is a use which does not function as a single housekeeping establishment. It can include a dwelling unit, but its three to ten rooms are to be used for sleeping accommodations, with the sharing of other facilities, for which the lodgers pay the owner rent (or other consideration). The relationship of boarders to lodging house proprietor is an economic or commercial one, lodgers and business proprietor, unlike the relationship and function of a dwelling unit, commonly described as use by a single family or other similar basic living arrangement in society.

63 Ultimately Howden J. concluded that buildings whose use comes within the following criteria for a "lodging house" are not being used for the purpose of a "single housekeeping establishment", and therefore not permitted in the R1 zone (para 76):

(i) There must be between three and ten lodging units or bedrooms used by individual lodgers;
(ii) The lodging units are occupied by lodgers paying rent, fees or other consideration;
(iii) The lodging units are rooms used or designed to be used for sleeping accommodation, with cooking or washing facilities, not both;
(iv) Cooking and/or washroom facilities are shared by the lodgers in the building;
(v) The building does not function as a dwelling unit.

64 Similar to *Windfields*, the term "dwelling unit" is significant to this case. Although the term does not appear within the definition of stacked townhouse for this exception, it does form part of the definition of all of the other types of buildings permitted within the RM-25 lands, being "multiple dwelling", "townhouse dwelling", "link townhouse dwelling" and "apartment dwelling". With the exception of "multiple dwelling", each of these types of residences must contain one or more "dwelling units". Although the definition of stacked townhouse only refers to a "unit", I have decided that it is reasonable to infer that in using the term "unit", council was referring to a "dwelling unit", given that all other related definitions use that term and dwelling units are the basic planning unit within the by-law.

65 Pursuant to the definitions in the City's zoning by-law as previously set out, a dwelling unit must, in addition to other criteria, be located within a building which is designed, or intended to, house one or more persons living together as a "single household unit". A "household" requires one or more persons who share occupancy of a dwelling unit "as a separate and independent housekeeping establishment". There is no definition of "housekeeping establishment".

66 Of significance is the fact that the building or portion of the building in question under Oshawa's by-law "must not appear to function as a dwelling unit". In complete contrast, the definition of boarding, lodging or rooming house in the City of Orillia's by-law specifically means "a dwelling unit, which is designed, or intended to provide lodging for more than four (4) persons in return for remuneration ...". Herein lies the problem: If a dwelling unit, by definition, requires persons to be living together as a single household unit, then a boarding, lodging or rooming house, which also must be a dwelling unit, likewise requires persons to be living together in a single household unit. Accordingly, it would be impossible to conclude, as Howden J. did in *Windfields*, that "lodging houses (R7) are different from the other types of residential developments in that their density is not defined by reference to dwelling units. Their density is defined by the number of lodging units within the building" [para. 50].

67 Attempting to distinguish between units in a townhouse and a boarding house under the City's zoning by-law is simply impossible. The fault lies in the definitions contained in the by-law of "dwelling unit" and "boarding, lodging or rooming house", and the fact that "single household unit" has been given no definition. The confusion is compounded by the fact that "household", which is a defined term, contains the very term - "dwelling unit" - that it purports to assist to define. This is legislative drafting at its most convoluted.

68 The City's counsel argued that it would render the definition of boarding house meaningless if there was a failure to recognize a living arrangement, where more than four individuals live autonomous lives unconnected by familial ties, as being different from a single household unit. Yet that is exactly what the by-law itself does; it renders the definition of "boarding, lodging and rooming house" to be nonsensical, since its occupants must, by definition, be living together as a single household unit. And any attempt to use numbers by themselves to lead to the conclusion that any given dwelling unit is a boarding house is of no help at all, since it does lead to absurd outcomes that cannot possibly have been intended by City council - a family of five who rents a unit, even one that society would consider the "nuclear family" comprised of two parents and three or more biological or adopted children, would be living in a boarding house. This would be so even though they would be living as "single household unit", since the only distinguishing feature between the two types of use found in the definitions is sheer numbers.

69 Accordingly, there is no way in this case to answer the question of whether renting to more than four students changes the use into a boarding house based strictly on the definitions in the zoning by-law. There can be little doubt that the City intends a differentiation between the two, particularly since it places the two types of accommodations in different zones and applies differing planning requirements, such as parking, to these two potential dwellings. However, the definitions alone leave no room to make any logical distinction between the two.

The Planning Scheme and the Intentions of City Council

70 As indicated earlier, under the City of Oshawa's zoning by-law as outlined in *Windfields*, lodging houses are different from the other types of residential developments in that their density is not defined by reference to dwelling units. Their density is defined by the number of "lodging units" within the building. A separate by-law dealt with the

specifications as to the spacing of lodging houses throughout the City of Oshawa, as well as the maximum number of lodging units proportionate to the house size and minimum room sizes.

71 Several factors led Howden J. to the conclusion that a "single housekeeping establishment" could not be comprised of multiple lessees who shared accommodation for short-term economic reasons. The first was the interplay between Oshawa's official plan and the zoning by-law, both using the same measurement of "units" or "dwelling units" per hectare for the purpose of classifying residential density. The second was the by-law's parking provisions; single detached dwellings required at least two parking spaces per dwelling unit, lodging houses were required to have .5 spaces per unit. Howden J. concluded that this scheme was an indicator that the City intended that a dwelling unit would, depending on its size, contain on average one or two car-utilizing persons, which would generally mean "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 for boarders for temporary sleeping quarters for which each pays rent to the landlord/landlady" [para. 59]. The third factor considered by Howden J. was the density limits within Oshawa's official plan and the zoning by-law, concluding that the only possible rationale to zone and plan using such density calculations would be to regulate use intensity. He concluded that if the definition of "single housekeeping establishment" could include any number of independent persons, then accurate planning for use intensity would be rendered meaningless.

72 For the reasons stated, I find that the Windfields decision is distinguishable from this case and that Howden J. was considering a markedly different planning context from the one before this court. As stated earlier, the basic planning unit within the City's zoning by-law is the "dwelling unit", which is designed, or intended to house one or more persons living together as a single household unit. Counsel for Balmoral argues that because there is no limitation within the definition of "stacked townhouse" on the number of individuals who are able to rent, this court should conclude that the townhouse units may be leased to seven individuals without offending the zoning by-law, because the tenants will be living as a single household unit. I agree with this submission, for although high density uses are permitted within this zone, anything other than a single household unit within each townhouse unit was not under consideration during the planning stage. It was on that basis that the number of parking spaces, the traffic impacts, and the increased demand on municipal services were assessed. Based upon the planning scheme set out in the official plan and zoning by-law, I find it crucial that these seven individuals would have to be living as a single household unit in order to not offend the by-law. Also crucial to this case is that high density usage was specifically permitted by the zoning amendment for this site despite the medium density usage originally proposed.

73 It is necessary to consider the intentions of City council when it permitted the official plan and zoning by-law amendments. The evidence is clear that its members did so believing that they were providing the means for townhouses to be built on the subject property, and ones that would be designed for households requiring two bedrooms. This is because the project was presented by Mr. Kurtz as a two-bedroom townhouse throughout all phases of the approval process, and it was only shortly before the issuance of the building permit that the nature of the project became questionable. The preliminary site plans received by the City on January 15, 2009 showed 27 townhouse units, containing two bedrooms in each dwelling unit. On August 10, 2009, the City received applications from Mr. Kurtz for the zoning and official plan amendments to permit a maximum of 24 stacked townhouse dwelling units on the property. The Planning Report refers throughout to the project as being a 24-unit stacked townhouse development, for rental use. The site plans submitted by Mr. Kurtz on May 25, 2010 described the proposed use as "Residential - 24 Unit Stacked Townhouses". The first time that any plans were filed showing more than two bedrooms was when building plans were filed with the application for a building permit on November 1, 2010, showing four bedrooms per unit. Yet the evidence is also conclusive that the townhouses were considered a high density residential development form within the intent and meaning of the Official Plan, allowing up to 100 units per net hectare, more than the original site plan provided. As previously discussed, it was that high density multiple housing form that Council found to conform to the objectives of the planning framework set out in the Provincial Policy Statement, the Growth Plan and, after the amendments, to the City's Official Plan. The project as initially presented met the parking requirements of the zoning by-law, and both the transportation review and the pre-servicing feasibility report relied on by City council concluded that high density development would not have any adverse impacts on traffic volumes or sewer and water management. These considerations are not changed by the fact that at no time were City employees or council considering a proposal to place buildings containing seven-bedroom units on the subject lands.

74 The parking requirements were satisfied on the basis that there would be 30 parking spaces made available, meeting the by-law's requirement of 1.25 parking spaces per dwelling unit in a townhouse. This meant that the City considered that there would be the need for each townhouse unit to have, on average, more than one but less than two,

vehicles. Under the by-law's parking provisions, single detached dwellings, which contain the basic planning unit of one dwelling unit, must allocate at least two parking spaces. Rental apartment buildings require one parking space per dwelling unit. The number of parking spaces allocated under the by-law reflects the City's expectations in terms of use intensity; only one or two drivers would occupy a dwelling unit, depending on the type of building containing the dwelling unit. Balmoral urges the court to consider that the average student does not own his or her own vehicle, and therefore the parking demands will not be inconsistent with that anticipated for a single household unit. Yet I find that is not the correct consideration. In approving the parking plan for this project, the City did so on the basis that each "single household unit" in occupation would contain a maximum number of car-utilizing adults. Similarly, the City officials approved the Official Plan amendment on the basis that, on average, a maximum of 30 cars would be utilizing Hilda Street as a means of ingress and egress, even though it is a local road. Yet the planning density recommended for this site and accepted by City council is within the high density category, recognizing a higher car usage, and the designation provided by the site-specific OPA and zoning clearly accepts the incidents of high density development.

75 Balmoral also argues that impact on surrounding neighbourhoods would be minimal, should each unit be permitted to be occupied by an additional three individuals. The evidence is that since the issuance of occupancy permits, there have been no reported incidents showing negative impacts on the surrounding residential neighbourhoods. Again, this is ultimately not the relevant issue given the allocation by the City of the highest density use possible within the Living Area.

76 So while it is true that this project is located in a high density zone surrounded by other high density uses, the by-law itself does not prescribe a maximum number of persons to occupy these townhouse units. But the qualifier is that they must be living as a single household unit.

77 So the crucial question in this case is whether the proposed seven students could be characterized as living together as a single household unit. If not, does the occupancy by seven individuals create a boarding house under the zoning by-law?

Can Occupancy by up to Seven Students be a "Single Household Unit" Within the City's Planning Context?

78 The term "single household unit" is not defined in the zoning by-law. "Household" is given a definition: one or more persons who share occupancy of a dwelling unit as a separate and independent housekeeping establishment. This definition is not particularly helpful, although I infer that the words "separate and independent" are meant to be in relation to any other dwelling unit within the same building or an adjacent building.

79 "Household" is defined in the Oxford English dictionary as "a house and its occupants regarded as a unit".

80 It need hardly be pointed out that the traditional form of household, comprised of a single family unit, has now expanded in our society to include various configurations of individuals living in social arrangements that have come together to meet those same needs, and some different, on which the traditional family household was based. As Howden J. wrote in *Windfields*, at para. 62:

> ... For example, it could include a group of unrelated persons, on 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 sleeping quarters and shared facilities on a rental basis.

81 Balmoral argues that the students have come together for a common purpose, they collectively function like a household through shared goals, responsibilities and decision making, they are not short-term renters, and as such can be characterized as a modern-day "household" even though there may be no biological ties, or even ties that resemble a family unit.

82 Several cases exist that have examined the issue of whether college or university students living together can be classified as a single household unit, although the wording of that term varied between the decisions and none were cases involving by-law interpretation: *Good v. Waterloo (City)* (2004), 72 O.R. (3d) 719 (C.A.) ["*Good*"], affirmed 2004 72 O.R. (3d) 719 (Ont. C.A.); *Ottawa (City) v. Bentolila* 2006 ONCJ 541, [2006] O.J. No. 5444 ["*Bentolila*"]; and *2161907 Ontario Inc. v. St. Catharines (City)* 2010 ONSC 4548 ["*St. Catharines*"]. Generally, these cases have used the following criterion to assess whether the occupants should be characterized as a household: collective decision making,

and control over who occupies the premises and the activities carried out on the premises, all in relation to the landlord's level of involvement in those issues.

83 In reaching his decision as to what comprised a lodging house operation in *Windfields*, Howden J. rejected the analysis used in the case of *Good*. In determining that residential units within a house were exempt from the licensing requirements of a lodging house within the City of Waterloo, the application judge in *Good* used the occupants' behaviour as the determining factor for distinguishing between a lodging house and a residential unit. He found that the three occupants engaged in collective decision-making in renting together, assigning bedrooms, rent and utility payments and sharing housekeeping, furniture, entertaining and respect for the other's privacy, despite the fact that there was occasional turn-over within the group of three individuals who were occupying the residential unit. In *Windfields*, Howden J. reasoned that the activities of the occupants of the house internally and running their lives on a daily basis did not relate to the purpose and rationale for a zoning by-law, and that the term "single housekeeping unit" must be interpreted contextually within the provision itself and in the light of the scheme and purpose of the zoning by-law as a whole [para. 72]. Additionally, Howden J. did not find *Good* helpful as it involved the interpretation of a licensing by-law, with differently worded definitions from those involved in *Windfields*, and with a different purpose from the zoning by-law. He noted that a licensing by-law does not address restrictions on the use of land, and generally does not prohibit certain uses in certain areas. By contrast, a zoning by-law restricts the use of land in the areas to which it applies, with a view to reducing impacts on neighbouring properties and implementing the official plan. Howden J. concluded therefore that the tests used in a licensing case like *Good* involving standards interior to the business or operation, rather than the use, design and the function of the building and their exterior impacts, were not relevant to the case before him [para. 74].

84 Having rejected the approach in *Good* that looked to interior standards of the operation, at para. 77 Howden J. discussed these buildings in terms of land use - whether these buildings were designed and functioned as single family dwellings or as commercial businesses not permitted in the R1 zone: they were advertised as boarding houses, the owner exerted ultimate control of the property in accepting rental payments, the insurance policies for most of the buildings referred to their use as student housing, and the homeowners misrepresented their purpose in changing the design of the buildings. Presumably these factors are antithetical to the creation and existence of a "single housekeeping establishment".

85 In *Windfields*, the home-owners knowingly used misrepresentations in their building permit amendment applications to cover up design changes, which allowed the homes to function as commercial rental or lodging house businesses with the City's apparent approval, clearly exhibiting the owner's knowledge of the R1 restrictions and flouting them. *Windfields* was a by-law enforcement proceeding under the *Municipal Act*, not a prior interpretation application under Rule 14 as this one is. Both require interpretation of a zoning by-law, the land use elements of which I have had regard to from *Windfields*, but they occur within very different legal contexts.

86 I reach the opposite conclusion from Howden J. with respect to the applicability of the criterion used in *Good*, *Bentolila* and *St. Catharines* to a zoning issue, particularly given the impossibility of using his analysis to determine "single household unit" due to the confused state of the definitions in the Orillia zoning by-law, as explained earlier. I find the criteria applied in the above cases to be helpful in determining the issue of whether or not a single household unit as used in the Orillia zoning by-law includes the kind of arrangement that would qualify as a boarding house. A household is a factor in determining what is a dwelling unit, but is a different thing than a dwelling unit, the former being produced by behaviour and the latter being a product of use, building form and measurement. The words "living together" within the definition of dwelling unit implies not a static state, but rather a state in which the occupant's conduct defines the extent to which the individuals are together and living as a single unit. As such it is helpful to look at the objective indicators of behaviour in determining whether a single household unit exists.

87 In *Good*, the application judge made the following factual findings (*Good v. Waterloo City* (2003), 67 O.R. (3d) 89, at para. 19 (S.C.)):

a. There was one lease signed by all of the occupants,
b. Several occupants would leave during the lease period and were responsible for arranging for a sublet of their tenancy,
c. Rent was paid by the occupants individually by post-dated cheques,
d. The utilities were equally split among the occupants,
e. The housekeeping of the interior of the unit was the responsibility of the occupants, while the landlord was responsible for the exterior upkeep,
f. Furniture was supplied by the occupants,

g. Bedroom allocation was determined by the occupants,
h. The occupants all used the living room to entertain guests, watch television and perform other activities,
i. The bedrooms had locks on their doors.

88 In determining that residential units within a house were exempt from the licensing requirements of a lodging house within the City of Waterloo, Gordon J. in *Good* used the occupants' behaviour as the determining factor for distinguishing between a lodging house and a residential unit. At para. 24, Gordon, J. stated that control in a lodging house is by the owner and the occupants on an individual basis, whereas in a residential unit is by the group. Accordingly, for a residential unit there must be evidence of collective decision-making regarding the use of the premises. He determined that factors such as locks on bedroom doors, not eating meals together, replacement of individual occupants during the lease term and individual rental payments, were not factors relevant to determining whether the unit was a boarding, lodging and rooming house. Gordon J. found that the three occupants engaged in collective decision-making in renting together, assigning bedrooms, rent and utility payments and sharing housekeeping, furniture, entertaining and respect for the other's privacy, despite the fact that there was occasional turn-over within the group of three individuals who were occupying the residential unit. On the basis of those facts, Gordon J. reached the decision that the actual use of the premises was as residential units, and not as a lodging house.

89 This issue of whether a building was a dwelling unit or a boarding house was before MacPherson J. in *St. Catharines*, although it too is distinguishable as a case involving *Building Code* compliance as opposed to by-law interpretation. Citing *Good* as authority for the proposition that the court must examine criteria that reflects whether there is collective decision-making sufficient to create a housekeeping unit, MacPherson J. reviewed the applicable factors to reach her conclusion that the occupants were living as a cohesive unit with some familiarity with each other, and therefore were living in a dwelling unit.

90 In *St. Catharines*, McPherson J. referenced *Bentolila* as another decision involving a determination as to whether a property was a "dwelling unit under a single tenancy" or a "boarding, rooming and lodging house. At para 26 she wrote:

> ... Although the decision was rendered in the context of an appeal from various Fire Code infractions, it was noted that the Building Code and Fire Code are companion regulations as the category of occupation determines the building and fire safety requirements. In the *Bentolila* case, the property was found to be a "boarding, lodging and rooming house" based on such factors as:
>
> a. There had been substantial renovations done to the property (converted from a single-story two-bedroom home to a three-story fourteen bedroom home);
> b. The landlord's son lived in the third-floor unit which was not accessible to the other occupants;
> c. Each tenant entered into his or her own lease with the landlord and agreed to pay fixed rent by way of post-dated cheques;
> d. The tenants were selected by the owner's son or the superintendent student; and
> e. There was no sharing of utilities or other expenses associated with the operation of the house.

91 The following are the relevant factors in this case, which are not disputed:

a. The lease is for a period of 10 months between September to April;
b. The occupants are required to enter into individual leases;
c. The occupants pay their rent individually;
d. The occupants have the ability to select which other occupants will reside in the unit;
e. The occupants have the ability to select their own room;
f. The utilities are paid by the landlord and equally split by the occupants (forming a part of their individual monthly rental amount);
g. The occupants have full access to all of the unit including cooking and washroom facilities;

h. The occupants are responsible for some of the maintenance and repair costs, such as replacement of batteries in smoke detectors, light bulbs, fuses, and the repair of any damage caused by their own misuse of the premises;
i. The occupants are responsible for the housekeeping;
j. The lease provided by the landlord incorporates rules for the benefit of the landlord and the occupants;
k. Most of the furniture is supplied by the landlord, but occupants are required to provide their own entertainment systems, computers, linens, and cleaning supplies;
l. The occupants all use the living room to entertain guests and perform other activities;
m. The bedrooms have locks;
n. Entry by the landlord is on notice to the tenant;
o. Subletting by the occupants is permitted under the terms of the lease, subject to the consent of the landlord, which is not to be unreasonably or arbitrarily withheld; and
p. The lease provides that the tenant, upon paying the rent and performing the other covenants contained in the lease, may have quiet enjoyment of the premises "for all usual residential purposes" for the term.

92 Based on the analysis in *Good*, *St. Catharines* and *Bentolila*, I am led to the decision that the students occupying the Balmoral project are operating as single households. This is so even though the rules and regulations for Hilda House, being pages 4 and 5 of the standard lease, contain many terms meant to restrict and control the behaviour of the occupants. However, like MacPherson J. in *St. Catharines*, I find that the landlord's imposition of these rules not significant enough to create a boarding house, where the owner ultimately retains control over the use. Each unit would function largely through decisions made collectively, subject to the general rules of behaviour set out in the lease. This is akin to having house rules imposed by a parent for the benefit of both the parents and other household members. The terms imposed by the landlord do not diminish, in my view, the areas of decision making that remain the province of the students in this scenario - the right to choose their rooms, to select their preferred housemates, and to determine the acceptable sharing of both cooking and washroom facilities, housekeeping, and the manner of use of common rooms to enjoy individual and common pursuits. There are sufficient consensus-building opportunities of the type that led MacPherson J. to conclude that the six students in *St. Catharines* operated as a cohesive unit, having "control of who and what took place at the property". I do not find the individual rental payments to be a determining factor, nor the existence of individual leases. The leases are standard, each being for the same ten-month period, and as noted in *Good* at para. 29, individual payment of rent is a common practice among students holding residential leases, as it avoids the need for a communal bank account.

93 I find that, using the elements found in Good, *St. Catharines* and *Bentolila*, as well as in Windfields, that the zoning by-law in its definitions of townhouse and dwelling unit and the primacy it gives to the factor "single household unit" is met by the proposed use of the townhouse units. Fundamentally for purposes of land use, I am satisfied that the restrictions and collective areas of decision proposed here allow the use to assume the character of a single household establishment for purposes of this particular zoning by-law. The zoning by-law as amended fails to provide any bright line between a dwelling unit encompassing a single household unit and a boarding, lodging or rooming house other than the required sharing of both washroom and cooking facilities for a single household use, which is the case here, and a number. As Balmoral's counsel showed in his argument, a number ceases to have any meaning in particular cases of large families living together or various groups of individuals that function as a single household unit.

94 I am satisfied that this conclusion is one that is in compliance with the text of the by-law, promotes its purpose and that of the official plan and its underlying policy rationales, and is acceptable in leading to an outcome that is reasonable and just. This outcome supports the City's goal of providing affordable housing for "all people throughout all stages of life", provides more efficient use of vacant land and encourages residential intensification, all within a zone that allows for high density use.

95 If I am incorrect in the above analysis, in the alternative I have considered that at the time that Balmoral made its applications for re-zoning and amendment of the official plan, there were different definitions for both "dwelling unit" and "boarding, lodging or rooming house". At the time of the applications, those definitions were:

> DWELLING UNIT means one or more habitable rooms designed or intended for use by one household exclusively as an independent and separate unit in which separate kitchen and sanitary facilities are provided for the exclusive use of the household with a private entrance from outside

the building or from a common hallway or stairway inside the building. Within a dwelling unit no service or care shall be provided for monetary consideration to more than five persons.

BOARDING, LODGING OR ROOMING HOUSE means any building in which the proprietor resides and supplies for hire or gain to more than four (4) persons, lodging and/or meals, but shall not include a hotel, an apartment hotel, a bed and breakfast establishment, hospital, nursing home, senior citizens home, retirement home or retirement lodge. For the purposes of this By-law, a children's home, hostel, or other similar establishment, shall be deemed to be a boarding or rooming house.

96 These two former definitions were changed on November 15, 2010, when the City passed by-law 2010-172, which introduced a number of housekeeping amendments to the zoning by-law. The purpose was to bring the language used in the City's zoning by-law more closely in line with the definition of "boarding, lodging or rooming house" in the *Building Code*. To summarize, those amendments accomplished the following:

(i) The definition of dwelling unit was amended to remove the prohibition that no service or care shall be provided for monetary consideration to more than 5 persons;
(ii) The definition of boarding, lodging or rooming house was amended to exclude the requirement that the proprietor lived in the building; and,
(iii) A new definition of lodging room was included to complement the amended definition of boarding, lodging or rooming house.

97 Clearly, at the time that the approvals were given to the Balmoral re-zoning and OPA applications in December 2009, the townhouse units would not have qualified as a boarding house because the proprietor would not be living in the building.

Issue #2 - Is there any limitation on the number of tenants who are permitted to occupy the stacked townhouse units?

98 While the project is zoned for high density use, it is subject to a density policy in the official plan that is capped at 100 units per net hectare, and the site is zoned specifically to produce a density and intensity of use below that number. As concluded above, the number of individuals in occupation will not impact on the potential conversion of any townhouse unit into a boarding, rooming and lodging house. Balmoral has applied for an order allowing up to seven per unit, which, at 66.7 per net hectare, comes well under the maximum intensity of use allowed by the zoning by-law for this site. Accordingly, the court will base its order on that request.

Issue #3 - If not a "boarding, lodging or rooming house" for the purpose of zoning, do the provisions of the *Building Code Act* nevertheless apply, such that the requirements of that *Act* or its regulations must be met before the buildings can be occupied by any particular number of tenants?

99 Given that I have found that each townhouse unit can be legally rented to any number of occupants, the City seeks a declaration that the buildings as constructed are boarding, lodging or rooming houses as defined in the *Building Code* and as such do not comply with the requirements of the Code. They also seek a declaration that the buildings require a change of use permit pursuant to section 10 of the *Building Code Act*.

100 The position of the City is that, regardless of what is determined with respect to the zoning of the property, the *Building Code* must still be complied with. It relies on section 35 of the *Building Code Act*, which states that that Act and the *Building Code* supersede all municipal bylaws respecting the construction or demolition of buildings. I accept that that is an accurate statement of the law, and for that reason it is necessary to determine whether the buildings comply with the *Building Code*.

101 It is the position of the City that if the units are occupied by more than four persons for remuneration, they meet the definition of a "boarding, lodging or rooming house" as defined in the *Building Code* and must meet the higher safety standards prescribed in the *Code* for such structures.

102 The definition of "boarding, lodging or rooming house" in the *Building Code* is a building:

(a) that has a building height not exceeding 3 storeys and a building area not exceeding 600 m;

(b) in which lodging is provided for more than four persons in return for remuneration and/or for the provision of services or for both; and,
(c) in which the lodging rooms do not have both bathrooms and kitchen facilities for the exclusive use of individual occupants.

103 It is the City's evidence that the buildings in the units do not comply with the requirements of the *Building Code* for a boarding, lodging or rooming house in that:

1. The third floor area must have a single exit which cannot be an interior stairway from the third floor area to the second floor area. No such single exit exists.
2. If sleeping accommodation is provided for in the basement then there must be no fewer than two exits from the basement floor area. There are no exits from the basement floor area and an interior stairway to the first floor area does not qualify as an exit.

104 In terms of the dimensions of these buildings, I have insufficient evidence to conclude that these are buildings that both exceed 3 storeys *and* have a building area not exceeding 600m2. I believe that this would be a four-storey building, as "*storey*" is defined in the *Building Code* as the portion of a building,

(a) that is situated between the top of any floor and the top of the floor next above it, or
(b) that is situated between the top of the floor and the ceiling above the floor, if there is no floor above it.

Building area is defined as:

Building Area means the greatest horizontal area of a building above grade,

(a) within the outside surface of exterior walls, or
(b) within the outside surface of exterior walls and the centre line of firewalls.

In terms of building area, the site plan filed as exhibit C to the affidavit of Ian Sugden indicates "total gross floor area" of 1,771.6 m2 for both buildings, but the court was given no indication of how this measurement relates to "building area".

105 Balmoral argues that, once again, the units are "dwelling units" as defined in the *Building Code*, and therefore the increased number of required exits set out in the *Code* do not apply.

106 The *Building Code* also has a specific definition of "dwelling unit" as follows:

"*Dwelling unit*" means a *suite* operated as a housekeeping unit, used or intended to be used as a domicile by one or more persons and usually containing cooking, eating, living, sleeping and sanitary facilities.

"*Suite*" means a single room or series of rooms of complementary use, operated under a single tenancy, and includes,

(a) *dwelling units*,
(b) individual guestrooms in motels, hotels, boarding houses, rooming houses and dormitories, and
(c) individual stores and individual or complementary rooms for *business and personal services occupancies*.

107 Using the same analysis above in relation to the factors set out in *Good*, *St. Catharines* and *Bentolila*, I find that these townhouse units are also dwelling units as defined in the *Building Code*. The fact that individual leases are executed does not detract from there being a "single tenancy" in this case. As earlier stated, they are standard leases, identical for each student, and create a situation where all tenants are subjected to common terms. As such I find that the townhouse units are suites being "operated under a single tenancy" and therefore fully fall within the definition of dwelling unit in the *Building Code*.

Issue #4 - Is expert evidence admissible to assist the court with the interpretation of the zoning by-law and the official plan?

108 Balmoral filed the affidavit of Celeste Phillips, who is a Registered Professional Planner and Full Member of the Canadian Institute of Planners. Her affidavit provides an analysis of how she came to her opinion that "the proposed use of the property and the buildings thereon for a student residence with up to 7 students per dwelling unit meets the policy intent of the Official Plan of the City, meets the definitions and the intent of the zoning bylaw and would meet the already mixed residential character of the surrounding neighbourhood". She opines that the most accurate description of the property would be two stacked townhouse buildings, each containing 12 household units, as opposed to a boarding, lodging or rooming house.

109 The City objects to the use of such expert evidence, arguing that the interpretation of a zoning by-law is a matter of law, as opposed to a factual matter that could benefit from the opinion evidence of a planner. The City relies on *Niagara River Coalition v. Niagara-On-the-Lake (Town)*, 2010 ONCA 173, 68 M.P.L.R. (4th) 1 ["*Niagara River Coalition*"], citing that case as authority for the proposition that the interpretation of an official plan is not a factual matter to be decided on opinion evidence from planners, but rather a question of law (at para.43).

110 I did not find it necessary to avert to the evidence contained in Ms. Phillips' affidavit in order to reach any of my conclusions. Ms. Phillips' affidavit does set out some of the same factual background covered in these reasons, but those facts were already contained in the evidence that was necessary for the court to review when analyzing the planning framework and the legislative intent. Even if potentially helpful, however, I would have been inclined to give her evidence little weight. This is so because she was the planner retained to give planning advice for Balmoral's project, and attended meetings with City officials along with Balmoral's principal. As she deposed in her affidavit, it was part of her role to attempt to convince City officials that "our position" (meaning herself and Mr. Kurtz) with respect to Balmoral's preferred use was both legal and in keeping with good planning principles. Given her role, it would be problematic for the court to accept that her opinion is being given with rigorous independence.

111 Had I considered Ms. Phillips' opinions, I would nonetheless have been cautious about omitting her evidence on the basis of *Niagara River Coalition.* In *Niagara River Coalition*, the application judge allowed the town planner, who was responsible for drafting the official plan, to provide evidence explaining the scope and meaning of the language used in the plan in order to fill in the drafting omissions. At paras. 44 and 45 Winkler C.J.O. wrote:

> ... I find the words of Bouck J. in *Capital Regional District v. Saanich (District)* (1980), 24 B.C.L.R. 154 (S.C.), at para. 47, to be apposite: "The [municipality] must set out in its official ... plan what it is trying to do. When it fails in its purpose, others cannot fill in the gaps because they are then placing themselves in the position of the [municipality] which alone is responsible for the decision".
>
> It is clear that official plans are not legislation, and where interpretation is necessary, it is a question of law that must be determined on the basis of the documents that comprise such plans. In this instance, the application judge relied on opinion evidence that was inadmissible to determine the scope and meaning of the language used in the Plan. As a result of this error, I am not prepared to accept his finding ...

112 Accordingly, despite the clear statement in para. 43 of *Niagara River Coalition* that the proper interpretation of an official plan is not a factual matter to be decided on the opinion evidence of planners, it may be that a broad application of this case is problematic given its particular facts.

113 Further, the proper approach to the admissibility of expert evidence is that set out in *R. v. Mohan*, [1994] 2 S.C.R. 9 and *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, requiring a weighing of relevance, necessity, assistance to the trier of fact, and the absence of any exclusionary rule, along with a properly qualified expert. At paras. 24-25 of *R. v. Mohan*, Sopinka J. wrote:

> There is also a concern inherent in the application of this criterion that experts not be permitted to usurp the functions of the trier of fact. Too liberal an approach could result in a trial becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept.
>
> These concerns were the basis of the rule which excluded expert evidence in respect of the ultimate issue. Although the rule is no longer of general application, the concerns underlying it remain. In light of these concerns, the criteria of relevance and necessity are applied strictly, on oc-

> casion, to exclude expert evidence as to the ultimate issue. Expert evidence as to credibility or oath-helping has been excluded on this basis: see *R. v. Marquard*, [1993] 4 S.C.R. 223, per McLachlin J.

114 Further in *R. v. Burns*, [1994] 1 S.C.R. 656, McLachlin J. stated (at para. 25):

> The respondent does not argue that psychiatric evidence bearing on a witness's behaviour is for that reason inadmissible. His objection is that "the opinion of Dr. Maddess went to the very root of the issue before the learned trial judge" and that "allowing that opinion usurped the function of the trial judge": the so-called "ultimate issue rule". However, the jurisprudence does not support such a strict application of this rule. While care must be taken to ensure that the judge or jury, and not the expert, makes the final decisions on all issues in the case, it has long been accepted that expert evidence on matters of fact should not be excluded simply because it suggests answers to issues which are at the core of the dispute before the court: *Graat v. The Queen* (1982), 2 C.C.C. (3d) 365, 144 D.L.R. (3d) 267, [1982] 2 S.C.R. 819; see also *Khan v. College of Physicians and Surgeons of Ontario* (1992), 76 C.C.C. (3d) 10 at pp. 33-4, 94 D.L.R. (4th) 193, 9 O.R. (3d) 641 (C.A.), (per Doherty J.A.).

115 While the Ontario Court of Appeal has modified the test enunciated in *R v. Mohan* in *R. v. Abbey* 2009 ONCA 624, 97 O.R. (3d) 330, leave to appeal dismissed [2010] S.C.C.A. No. 125, it has also clearly stated that there is no general rule excluding expert evidence in respect of the ultimate issue: *R. v. Bryan*, (2003), 175 C.C.C. (3d) 285 (Ont. C.A.) at para. 17; *R. v. P.G.*, 2009 ONCA 32, 242 C.C.C. (3d) 558 at para. 16. See also *R. v. Johnson*, 2010 ABCA 230, 259 C.C.C. (3d) 555 at para. 52; *R. v. Juneja*, 2010 ABCA 262, 490 A.R. 127 at para. 12, which likewise state that a blanket prohibition on "ultimate issue' evidence by experts does not exist.

116 Accordingly, the law as it currently stands may or may not allow for the admission of expert evidence regarding the interpretation of official plans and by-laws, depending upon whether the *Mohan* criteria are satisfied, and whether the prejudicial impact of the evidence does not outweigh its probative value. In any event, I have not found it necessary in the findings I have made to assign any weight to the evidence of the planner retained by Balmoral.

DECISION

117 This court orders that judgment shall issue in respect of both applications in the following terms:

1. This court declares that the project located at 248 Hilda Street in the City of Orillia is a stacked townhouse as defined in by-law 2009-156 and permitted by the City's zoning by-law;
2. This court declares that under the terms of the City's zoning by-law, Balmoral can legally rent each townhouse unit to 7 occupants;
3. This court declares that the project is not a boarding, lodging and rooming house pursuant to the City's zoning by-law;
4. This court declares that the buildings as constructed are not boarding, lodging or rooming houses as defined in the *Building Code*, and as such are not required to comply with the requirements of the *Building Code* in respect of boarding lodging or rooming houses;
5. This court orders that the City shall issue a final occupancy permit for the project without conditions as to the number of occupants for each unit; and
6. This court orders that the City's application is dismissed.

118 If the parties are unable to agree upon costs, they may make written submissions not exceeding 2 typewritten pages, each attaching their Bill of Costs and any relevant offers to settle, on a timetable to be agreed upon by counsel provided that all submissions are received by the trial co-ordinator's office by noon on November 23, 2012.

S.E. HEALEY J.

cp/e/qljel/qlpmg/qlced/qlhcs

1 Amendment 1 (2012) to the Growth Plan for the Greater Golden Horseshoe, 2006, was approved by the Lieutenant Governor in Council, Order-in-Council No. 1702/2011 to take effect on January 19, 2012.

2 **This official plan came into effect in 1999 and was replaced by the City of Orillia's new official plan that was approved, with modifications, by the Ministry of Municipal Affairs and Housing on March 17, 2011.**

3 Section 4.0 of the Official Plan. Schedule 'A' maps out the land use designations and is to be read in conjunction with Schedules 'B', 'C' and 'D' and the policies of the Plan.

4 Section 4.3 of the Official Plan.

5 Section 4.3.1 of the Official Plan

6 Section 4.3.2 of the Official Plan

7 Section 4.3.3 of the Official Plan

8 Section 4.3.8 of the Official Plan.

9 Section 8.3 of the Official Plan

Case Name:

Balmoral Developments Hilda Inc. v. Orillia (City)

Between
Balmoral Developments Hilda Inc., Applicant (Respondent-in-appeal), and
The Corporation of the City of Orillia and Kelly Smith, Chief Building Official, Respondents (Appellants)

[2013] O.J. No. 1552

2013 ONCA 212

Docket: C56312

Ontario Court of Appeal
Toronto, Ontario

J.L. MacFarland, P.S. Rouleau and S.E. Pepall JJ.A.

Heard: March 25, 2013.
Judgment: April 5, 2013.

(10 paras.)

Municipal law -- Planning and development -- Building regulations -- Occupancy permits -- Zoning regulations -- Bylaws -- Interpretation -- Land use -- Types -- Residential -- Appeal by city and building official from order declaring that owner of multi-unit residential building project could rent each unit to seven college students allowed -- Respondent intended to lease each unit to seven students, each with his or her own lease -- Project was boarding, lodging or rooming house as proposed use of units provided for lodging for more than four persons for remuneration as each student would have individual lease, rooms would have locks, furniture would be provided by landlord and there was no evidence of collective decision-making or shared expenses by occupants, who would be selected by landlord.

Statutes, Regulations and Rules Cited:

Building Code Act, R.S.O. 1990, c. B.13, s. 1.4.1.2(a), s. 1.4.1.2(c)

Building Code Regulation 350/06

Appeal From:

On appeal from the judgment of Justice Susan E. Healey of the Superior Court of Justice, dated October 24, 2012.

Counsel:

Michael M. Miller, for the appellants.

E. Marshall Green and E. Brohm, for the respondents.

ENDORSEMENT

The following judgment was delivered by

1 THE COURT:-- The appellants, the City of Orillia and Kelly Smith, Chief Building Official, appeal the October 24, 2012 judgment of S. E. Healey J.

2 Before the application judge, the City took the position that a proposal by the respondent to increase the occupancy of each unit to seven students, each with his or her own lease would bring the units within the definition of a boarding, lodging or rooming house. As such, the respondent's proposal was contrary to the City's zoning by-law and non-compliant with Ontario Regulation 350/06 of the *Building Code Act* ("the *Building Code*"). The application judge found against the City on both issues.

3 The appellants appeal the application judge's finding that the respondent's proposal would not result in the units being boarding, lodging or rooming houses under the *Building Code*. They argue that as constructed, the buildings cannot accommodate the increase to seven without violating the fire exit requirements mandated by the *Building Code* for boarding, lodging or rooming houses.

4 It is conceded on behalf of the respondent that if the townhouse units are boarding, lodging or rooming houses, then they would not comply with the exit requirements of the *Building Code*.

5 It is also conceded that the units meet the requirements of subsections (a) and (c) of the definition of boarding, lodging or rooming house found in s. 1.4.1.2 of the *Building Code*. The only dispute concerns whether the proposed use would result in the units meeting the final requirement, the requirement in subsection (b) which reads:

> in which lodging is provided for more than four persons in return for remuneration or for the provision of services or for both.

6 In our view, it is clear that the respondent's proposed use of the units provides lodging for more than four persons in return for remuneration. This is apparent from the following facts:

* there will be seven individual leases, one for each of the bedrooms, which the occupants of those bedrooms will enter into with the landlord
* the occupants will rent for terms that vary between 10 and 12 months
* the individual bedrooms all will have locks on their doors
* the furniture by and large will be provided by the landlord
* there is no evidence of any anticipated collective decision making among the occupants
* there is no evidence that the occupants will be required to pay a share of the utilities other than as encompassed in the rent
* although the landlord will take requests into consideration, the occupants will be selected by the landlord, and
* apart from their attendance at university or college there is no evidence of any other connection among the seven proposed occupants.

7 In our view, the application judge erred in her interpretation of the *Building Code* and its application to the facts before her when she determined that the proposed use would not result in the units being boarding, lodging or rooming houses as defined in the *Building Code*.

8 Accordingly, we would allow the appeal, set aside the judgment of the application judge and in its place, substitute a judgment in accordance with this endorsement.

9 In view of the appellants' success, they are entitled to costs in this court on a partial indemnity scale fixed in the sum of $25,000 inclusive of disbursements and applicable taxes.

10 In view of the divided success in the court below as the result of our decision, we accept the appellants' submission that there be no costs of the application to either party in the court below.

J.L. MacFARLAND J.A.