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LICENSING LODGING HOUSES IN YORK REGION

The Community Services and Housing Committee recommends the adoption of the recommendation contained in the following report dated May 28, 2009, from the Regional Solicitor.

1. RECOMMENDATION

It is recommended that:

1. This report be received for information.

2. PURPOSE

This report sets out the scope of the Region's legal rights concerning the licensing of lodging homes in York Region. It has been prepared in response to a request by Regional Council.

3. BACKGROUND

Town of Georgina resident requested that a study be conducted about the prevalence of hostels in Georgina

At its meeting on March 26, 2009, Regional Council received a communication from the Town of Georgina in which it attached a copy of its report no. PB-2009-0021 along with an excerpt from the minutes of the March 2, 2009 meeting of the Town's Committee of the Whole. At issue was a request from a resident of the Town of Georgina to suspend the issuance of additional licensed beds to a domiciliary hostel located in Georgina until a review could be done on the prevalence of licensed hostels in the municipality. Since the Region is the licensing authority of lodging houses under the authority given to it under the *Municipal Act, 2001* (the "*Municipal Act*") the Town forwarded the request to Regional Council for its consideration and possible action.

Regional Municipality of York has authority under the *Municipal Act* to license lodging houses

Section 11 of the *Municipal Act* gives The Regional Municipality of York the legal authority to license lodging houses in the Region of York. A “lodging house” is defined under the *Municipal Act* as “a nursing home and any house or other building or portion of it in which persons are lodged for hire, but does not include a hotel, hospital, nursing home, home for the young or the aged or institution if it is licensed, approved or supervised under any other Act”.

Region’s funding of per diems to lodging houses is conditional upon a licence under the Region’s Lodging Houses By-law or under a Homes for Special Care Licence

The Region makes licensing of the facility a condition of its provision of per diem funding to operators of lodging homes. The Region requires that the facility be licensed either under the Region’s Lodging Houses By-law No. LI-0012-2005-061 or by the Minister of Health and Long Term Care, under the *Homes for Special Care Act*. Accordingly, it is important to operators that they can secure a licence if they wish to obtain subsidy for their residents.

March 2009 Report to Regional Council delineated the general requirements to be met to obtain a lodging houses licence from York Region

The Commissioner of Community and Health Services previously reported to Regional Council in March 2009 (Clause 6, Report No. 2 of Community Services and Housing Committee, March 26, 2009) regarding the requirements that an applicant needs to comply with in order to obtain a lodging houses licence. Generally speaking, these requirements pertain to the physical characteristics of the facilities, including that the facility complies with zoning, fire and building code regulations, and public health regulations. Save for public health, the local municipality has jurisdiction over these areas. Provided that the proposed lodging house facility complies with these requirements, and there are no grounds within the By-law, as discussed below, to refuse to issue, the Region must issue a licence for that facility.

4. ANALYSIS AND OPTIONS

Refusal to issue licence on the basis of location is discriminatory and not permissible under the *Municipal Act*

The *Municipal Act* does not permit York Region to discriminate under the Lodging Houses By-law with respect to the location of a lodging house. As conveyed to Georgina's Planning staff, the Region's concern about conducting a study as to the prevalence of lodging houses in the Town of Georgina is that the Region would have no legal basis, despite the study's findings, to refuse to issue a licence to an operator who has met the licensing requirements as set out in the Background section of this report. The Courts have opined that distinctions in licensing by-laws between different types of applicants are *ultra vires* the municipality or, in other words, not within the legal jurisdiction of the municipality. The Ontario Court of Appeal in *Forst v. Toronto (City)* (1923), 54 O.L.R. 256 held that a municipality's right to regulate restricts it to passing general regulations affecting all those who come within its ambit of the municipal legislation. It does not permit the municipality to discriminate and give permission to one applicant and refuse it to another.

With respect to this particular lodging house in Georgina, by refusing the licence for additional beds, the Region would be treating this facility differently than another lodging house in another area municipality or even one in another neighbourhood of the Town of Georgina. As well, operators who are licensed through the Province could in effect secure a Homes for Special Care licence in the same neighbourhood even though the Region refused to grant this licence, rendering an unfair, illegal and unintended application of the By-law.

York Region cannot use its licensing powers to refuse to issue a licence when it is intended to restrict the user of land

The Region cannot use its powers to refuse to issue a licence with the sole object of restricting the user of land. The courts have stated that to do so would be the equivalent of implementing zoning enactments but disguising them as licensing powers. The *Planning Act* governs whether a land use will be permitted in a certain geographical location and at law, the local municipality, and not the Region, has jurisdiction for land use matters. Therefore the Region cannot purport to refuse to issue a licence if the sole reason for the refusal is to prohibit an applicant from carrying on a lodging house business in a certain neighbourhood.

York Region must comply with the explicit provisions in the Lodging Houses By-law to revoke or refuse to issue a licence

If York Region wishes to either revoke a licence or refuse to issue a licence, it must do so under the specific applicable provisions set out in the By-law. Under the *Municipal Act* and based upon the common law, the power to refuse to grant a licence or to revoke or suspend a licence does not confer the power to prohibit a licence.

Lodging Houses By-law contains narrow grounds to refuse to issue a licence

The Lodging Houses By-law sets forth the specific grounds upon which the Commissioner of Community and Health Services (the “Commissioner”), as the Region’s authorized licensing officer, can make a recommendation to the Licence Committee, to refuse to issue a licence, suspend a licence or revoke a licence. Based upon the Commissioner’s recommendation, the Licence Committee will then provide its recommendation to Regional Council who has the authority under the By-law to make the decision.

The narrow grounds upon which the Commissioner may rely to support her recommendation that the Region not issue a licence are set out in sections 10.1, 10.2 and 10.3 of the By-law. These grounds focus upon the operator’s past conduct which affords the Commissioner reasonable grounds to believe that the applicant will not operate the lodging house in accordance with applicable law, proper management, or with honesty and integrity. Moreover, a refusal to issue may be justifiable where there are outstanding complaints against the lodging house so long as these are not frivolous or vexatious. In the situation at issue, none of these factors are present.

When considering the issue of “proper management” the By-law narrows it to three factors to be considered by the Commissioner, namely, (i) whether the lodging house is safe, clean and sanitary, (ii) whether there are concerns about the operator’s conduct that would endanger the health and safety of the residents or members of the public, and (iii) whether there are concerns surrounding illegal activities at the premises. The issues raised by the Georgina resident cannot be said to bring into question this facility’s “proper management”.

York Region is subject to a duty of procedural fairness in any decision to refuse to issue a lodging houses licence

A decision by the Region to refuse to issue a lodging houses licence is a statutory power of decision and is therefore subject to the duty of procedural fairness whenever it decides to refuse to issue a licence. An applicant may bring a proceeding before the Ontario courts to quash the decision on the grounds that the Region did not afford the applicant procedural fairness when it made its decision. Legal proceedings of this nature can be

lengthy, expensive and have the potential of being detrimental to the Region's customer service reputation. Thus it is imperative that when the Region is contemplating a decision to refuse to issue a licence, there must be clear evidence that one or more of the grounds set forth in sections 10.1, 10.2 or 10.3 of the By-law are present. If none of these circumstances are present, provided that the applicant is otherwise in compliance with the By-law facilities' requirements, then the Commissioner shall issue the licence.

5. FINANCIAL IMPLICATIONS

There are no financial implications from this report.

6. LOCAL MUNICIPAL IMPACT

Lodging houses serve another important role in providing accommodation to the most vulnerable members of our communities.

7. CONCLUSION

York Region cannot outright prohibit the issuance of a licence to a lodging house operator if it meets the requirements of the Region's Lodging Houses By-law. There are no grounds under the By-law that the concerned Georgina resident has raised which would give the Region the legal ability to refuse to issue a licence for additional beds for this particular lodging house and the Region cannot enact a by-law that discriminates based on location.

For more information on this report, please contact Janis Vanderburgh, Senior Counsel, Ext. 1408.

The Senior Management Group has reviewed this report.