

Promoting Code Compliant, Affordable, Safe, Clean and Healthy Rental Housing



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Preface

In October 2017, the Hamilton & District Apartment Association, in cooperation with a broad range of rental housing stakeholders, held a Rental Housing Roundtable to discuss problems and challenges within the rental housing market based on the following goal:

“Find the means to legalize rental housing and ensure that all tenants are living in safe, clean and healthy units.”

The participants of the Hamilton Rental Housing Roundtable provided reasonable, pragmatic, effective and innovative ideas to improve the quality of rental housing through the tenants’ affordability lenses with consideration of the landlords’ ability to capitalize building improvements and the efficacy of city by-laws.

Special Thanks to Rental Housing Roundtable Participants

Donna Bacher,	The REALTORS® Association of Hamilton-Burlington
Michelle Ball,	Student Life at Mohawk College
Tom Cooper,	Hamilton Poverty Reduction Roundtable
Graham Cubitt,	Indwell
John Hawker,	Citizen
Joe Hoffer,	Cohen Highley, LLP
Larry Huibers,	Hamilton Housing Help Centre
Jennifer Klevin,	McMaster Housing
Keanin Loomis,	Hamilton Chamber of Commerce
Paul Martindale,	Wink Properties
Suzanne Mammel,	Hamilton Halton Home Builders Association
Paul McAlister,	Hamilton Housing Help Centre
Ivan Murgic,	Effort Trust
Matteo Patricelli,	Flamborough Chamber of Commerce
Michael Ollier,	Hamilton Community Legal Aid Clinic
Arun Pathak,	Hamilton & District Apartment Association
Valerie Webster,	The REALTORS® Association of Hamilton-Burlington
Renee Wetselaar,	Social Planning Research Council

Rental Housing Licensing History

In January 2007, the Ontario government provided a new “tool box” for municipalities which gave Councils the authority to charge a number of new levies, fees, and licenses on residents and businesses. This new set of revenue generating tools was ostensibly meant to relieve the growing financial pressures on the local property tax. Licensing landlords was just one of the many new instruments. The concept was controversial given that license fees could be passed to tenants through “Above the Guideline Rent Applications” at the Landlord Tenant Board or subsequently through higher rents for new tenants at unit turnover.

In 2008, the Hamilton City Council approved a Residential Rental Housing Community Liaison Committee to ostensibly explore the feasibility of a new program to license landlords. The driving force for such action was the ongoing issues with student housing, primarily in Wards 1 and 8. After much debate, the recommended solution was to develop proactive property standards enforcement in Wards 1 and 8. Council adopted a pilot project for 18 months called, “Project Compliance”.

This pilot project was extended by Council to give city staff the time to explore the legality, models, and implementation mechanisms of licensing.

On September 28, 2012, at a regular City Planning Committee meeting, the city staff Report on Regulation of Rental Housing (PED10049(h)) was presented for the first time. The report recommended a hybrid solution to proactively enforce property standards and to proceed with a new landlord licensing regime.

The HDAA, in partnership with the REALTORS® Association of Hamilton-Burlington, presented a joint submission to respond to the staff report and appeared as delegates before the Planning Committee. There were nine delegates who appeared at the committee to oppose the staff recommendations.

Subsequently, the planning committee approved the following motion:

(Clark/Collins)

That the recommendations be amended by deleting the words, “the Planning Committee for approval by November 2012” and replacing with “a Special Public Meeting of the Planning Committee to be held before December 15, 2012 and that the report be released to the public

one week prior to the public meeting”, and to add a new subsection item (d), to read as follows:

(a) That the concept of licensing rental housing in low-density buildings, as detailed in Report PED 10049(h), be received;

(b) That staff be directed to prepare comprehensive recommendations, a draft by-law amendment and cost-recovery analysis to be presented to a Special Public Meeting of the Planning Committee to be held before December 15, 2012 and that the report be released to the public one week prior to the public meeting;

(c) That all future reports related to the Vital Services By-law be submitted to the Planning Committee with notification provided to the Emergency and Community Services Committee;

(d) That staff report back to the Special Public Meeting of the Planning Committee with a comprehensive report on proactive enforcement:

(i) Rentals/Singles;

(ii) Any limitations within the Landlord Tenancy Act as to whether or not a landlord can apply licensing and inspection fees to a tenant’s rent;

(iii) Does the tribunal have authority to enforce non-compliant landlords to live in non-compliant units;

(iv) report on the City of Waterloo’s successes and issues;

- (v) Reconsider our residential care facilities by-law with rental licensing by-law;
- (vi) Feasibility of utilizing a longer compliance order;
- (vii) Review fire codes pursuant to current technology;
- (viii) Constitutional use of the rental licensing by-laws as means to gain access without search warrant through Justice of the Peace. (1)

On December 11, 2012, a Special Meeting of the City of Hamilton Planning Committee was held to address the earlier staff report and any information arising from the direction given at the September 28th meeting.

The committee also received written communications from twenty-five citizens. The committee heard verbal presentations from twenty-seven delegates: twenty-five opposed the proposal, one supported the proposal for safety reasons, and one raised concerns about the problems with student housing.

The Committee passed two motions:

(Ferguson/Partridge)

That the Hamilton Real Estate Board and the Hamilton Apartment Association be requested to provide a solution to illegal apartments and, in particular, student residences in an effort to respect neighbourhood concerns and tenants' safety and that staff be directed to provide necessary statistics to both associations.

(Farr/Johnson)

That Report PED10049(j), Rental Housing Licensing Model, be referred back to staff for further consultation.

(2)

In 2013 the Joint Rental Housing Taskforce: composed of Hamilton and District Apartment Association with the REALTORS® Association of Hamilton-Burlington met seven times and developed a report that was presented to the Planning Committee on June 18, 2013. The Committee directed city staff to come back with some alternates for licensing rental housing.

On September 25, 2013, the City Council passed the following motion:

(a) That a permanent Proactive Enforcement Program to enforce rental housing conditions be approved, subject to the approval of items (i) and (ii) below:

(i) An additional 5 FTEs (4 enforcement officers and 1 support clerk) at an estimated net levy impact of \$275,000 annually until 2017 when the levy impact would be reduced to approximately \$175,000 annually;

(ii) A one-time Capital (cost to an upset limit of \$160,000) to purchase 4 vehicles funded from Unallocated Capital Reserve Account No. 108020.

(b) That a sub-committee be established to work with interested stakeholders to assist with implementation of an approach to enforcement and

legalization of appropriate rental housing including, but not limited to, process, fees, and by-law regulations.

(3)

With the passage of this motion, the City Council voted **NOT** to license rental housing providers and instead adopted a permanent proactive property standards enforcement program. The Council also voted to establish a Rental Housing Sub-Committee with a mandate to work with interested stakeholders to assist with the implementation of an approach to enforcement and legalization of appropriate rental housing including, but not limited to, process, fees, and by-law regulations.

The Rental Housing Sub Committee was provided terms of reference that included the mandate, **“to work with interested stakeholders to assist with the implementation of an approach to enforcement and legalization of appropriate rental housing including, but not limited to, process, fees, and by-law regulations.”** (4)

While this mandate seems to be clear and unequivocal, some members of the sub-committee interpreted the language as approval to move forward with a licensing regime, leaving a fractured committee looking for common ground.

In February 2017, Chair (Councillor) Matthew Green resigned from the sub-Committee, citing a conflict of interest. Councillor Doug Conley was appointed as his replacement. Councillor Terry Whitehead was elected Chair.

The new Chair, Councillor Whitehead made it clear that he wants the sub-committee to find common ground and make recommendations to the Planning Committee. He also publicly stated his personal opposition to any form of voluntary registry and his personal support for some form of mandatory registry/licensing.

What Problems Are We Trying to Solve?

Generally, the establishment of a task force, working group or sub-committee is first predicated on the identification of a problem to solve.

During our research, Maple Leaf Strategies conducted face to face confidential interviews with numerous housing stakeholders, advocates, landlords, municipal staff, Councillors, and members of the Rental Housing Sub-Committee. Our interviews revealed a general feeling of exasperation and frustration with the style, substance and decorum of the Rental Housing Sub-Committee.

It was clear that there was ambiguity about the mandate of the sub-committee. Some members truly believed that they were on the sub-committee to implement rental housing licensing while others understood the Council approved mandate. Every interviewee expressed in some way or another their concern that the sub-committee had NOT identified the problem(s).

Identifying a problem can be a challenge in itself. Anecdotally, there are many issues, symptoms and challenges that Councillors are facing everyday regarding rental housing in their wards. Each issue needs to be thoroughly assessed to establish if it is a legitimate problem that warrants new legislation or if it can be more easily addressed through existing provincial legislation, municipal by-laws, policies and enforcement.

Increase in Off-campus Student Housing

In recent years, there has been a great deal of community discussion about the increase of off-campus student housing.

In the meantime, Universities and Colleges have found it challenging to meet the demand for student housing through their on-campus student residences. With demand far outpacing supply for on-campus residences, local property owners saw an opportunity to benefit by offering their properties for off-campus student housing. These properties are most prominent in Ward 1 with proximity to McMaster University, as well as Wards 8 and 10 with proximity to the Mohawk College campuses.

The challenge for the City is that not all off-campus student housing is in contravention of the city's by-laws. Some landlords purchased houses with the intent of supplying student housing in full compliance of local codes and statutes. Some students or their families purchased properties and subsequently invited other students to live with them through some private agreement. There are even some students who combined their capital to purchase a house. Finally, there are live-in landlords who rent some rooms to students.

For all intents and purposes, some of these modified off-campus student homes are operating much like a lodging or rooming house. Each tenant gets a bedroom with shared or common access to the kitchen, living room and bathroom(s). Given that the general operations of such off-campus student housing closely resemble rooming houses, the City of Hamilton should utilize the existing Lodging Home by-law to ensure Code compliance to ensure fire and building code compliance.

Single Family Home Conversion to Multi-Unit Housing

The Province's 2008 policy change making "granny flats" or secondary units "a right" of home ownership forced many municipalities to amend their zoning by-laws. Hamilton includes this as a right under Section 19 of Hamilton's zoning by-law. Specifically, the zoning by-law permits conversions without a zoning application for an additional dwelling unit. Building permits are required.

The low mortgage interest rates have also prompted a booming new real estate sales tool, "rental income". Many home buyers are being encouraged to consider "rental income" on homes that may be larger than they wanted. It has become common for Realtors® to point to the provincial government's decision to allow secondary units as a right in planning law regardless of whether the local zoning by-laws are permissive.

Confusing Residential Housing Zoning By-laws

In January 2001, the former municipalities of Hamilton Wentworth Region were amalgamated. As a result of this merger, the new city was faced with the challenge of merging former town by-laws. While the City Council has approved many new by-laws, an Urban Official Plan and a Rural Official Plan, city staff is still administering all planning applications through six unique zoning by-laws from the former municipalities. For example, the Hamilton zoning by-law has secondary units permitted as a right while the other former municipality by-laws do not allow secondary units as a right and they prescribe one dwelling unit per single family home. Given the incongruities with Hamilton's residential zoning by-laws, the City of Hamilton has started a comprehensive review of the six zoning by-laws with the goal of created one citywide by-law with an expected completion date of Fall 2019.

Not in My Backyard Issues

Under the "Places to Grow Act", the province of Ontario has prescribed that by 2015 a minimum of 40% of all annual residential development in all municipalities should have been within the 2006 built-up area. The intent was to minimize greenfield development and increase density across all communities. While the City of Hamilton has yet to meet this goal, the impacts of such a policy are now being felt within mature communities. Homeowners are seeing redevelopments and rezoning applications for conversions of

single family homes into rental housing properties.

In neighbourhoods in proximity to post-secondary institutions, residents frequently complain to Councillors about the impacts of having a student rental housing on properties that are zoned as single-family homes. Noisy parties, too many cars, littering, theft, vandalism, drunk and disorderly students and the reduction of property values are the most common complaints received by Councillors.

We wish to thank and congratulate the City of Hamilton and the Hamilton Police Service for adopting one of the previous recommendations made by the Hamilton & District Apartment Association and the REALTORS® Association of Hamilton-Burlington. We have been advised that a noise response team has been established for weekends. We understand that Councillor Ferguson was instrumental in finding the resources within the Hamilton Police Service's budget.

Municipal Right of Access to Tenant's Home

There seemed to be some confusion as to whether a new licensing by-law would enable municipal right of access to a dwelling unit. In some interviews, we were told that the primary purpose to moving forward with licensing is to gain access to rental dwellings for inspection purposes. Some Councillors expressed concern that the city cannot enter alleged non-conforming rental units to inspect for health and safety risks without a search warrant. They argue that the city has been "stymied" by the long standing legal requirements for search warrants.

The underlying desire by Councillors to enable municipal right of access as a condition of any rental housing licensing by-law is a Pandora's box waiting to be opened for the first time. The Courts are reticent to acquiesce to any government authority an automatic right to access any private domicile. The often-expressed political position that Hamilton needs a municipal right of access to tenant's homes to ensure safe rental dwellings is severely hampered by the fact that the current judicial thresholds for securing a search warrant have never been problematic for the city.

"In Hamilton's case, however, staff have pioneered the use of search warrants to ensure their ability to act on complaints or evidence of illegal conversions. Once a rarely used aspect of existing legislation, search warrants have been incorporated into Hamilton's regular enforcement program, as a periodically employed 'last resort'. Even when search warrants are not used, the fact that they are secured on a regular basis has likely encouraged compliance with access requests, and thus enhanced the capacity of enforcement authorities to inspect premises suspected of being non-compliant."

Michael Fenn, A Review of the Effectiveness and Implications of Municipal Licensing of Residential Apartments - September 2013 (5)

Even from the landlord's perspective, gaining access to a tenant's unit for an inspection can get complicated. The landlord gives 24 hours notice with a request to inspect. If the tenant refuses, the landlord may file an N5 application for eviction with the Landlord and Tenant Board (LTB) and again provide 24 hours' notice to inspect. If the tenant refuses again, then the landlord must file another N5 application to evict. A hearing will be held within 3-6 weeks with a possible eviction within 3-5 months from application.

Generally, the LTB will advise the tenant that if they do not permit access than they can be legally evicted.

Discussions with current and past staff confirmed that securing search warrants has never been an issue for Hamilton. In fact, search warrants are rarely used in Hamilton as most tenants freely invite by-law enforcement staff into their units.

Municipalities like Guelph, which rejected licensing rental housing, is finding success in gaining entry for safety inspections by shifting the paradigm from mandatory inspections to encouraging tenants to request FREE 15-minute safety inspections.

“City inspectors check rental units to identify safety concerns related to Ontario building and fire code regulations. Safe rental units have:

- **working smoke alarms on every level and outside every sleeping area (houses built after 2013 must also have a smoke alarm in every bedroom).**
- **working carbon monoxide alarms installed outside of sleeping areas if the unit contains a fuel burning appliance, fireplace or attached garage.**
- **a large enough window or door to be able to get directly outside from basement bedrooms, and**
- **fire separation(s) between each unit.” (6)**

Property Standards Enforcement

In 2008, the City Council approved a pilot proactive property enforcement plan for Wards 1 and 8 only. The other 13 wards did not have proactive enforcement, rather enforcement was reactive or complaint based.

Today, there is some confusion as to what is the actual policy for property standards enforcement. The Rental Housing Sub-Committee was advised, at their July 18, 2017 meeting, that there is no longer any proactive property standards enforcement. However, the City Clerk’s records indicate that on September 25, 2013 the City Council approved a permanent, city-wide proactive property standards enforcement program.

Subsequent meetings with city staff revealed that the City has continued with the proactive enforcement as well as having a complaint driven process.

Studies have shown that proactive property standards enforcement is beneficial to all property owners and tenants as well as the overall tax base.

“Housing policy can play an economic development role through neighborhood effects. Repairing one rundown building has positive effects on the value and attractiveness of the surrounding buildings. In fact, studies have found that neighborhood quality has a substantial impact on property values and housing prices. One research paper examined property values in the New York City metropolitan area. Holding other factors such as income and employment constant, it found that property values were one third higher for properties that were not located in run-down neighborhoods.” (7)

At the present time, the City has a well-established and successful Multi-Residential Rental Blitz inspection program. Such programs, when concentrated on areas of need, have proven to beautify the city, lower neighbourhood crime, increase property values for homeowners and increase the local tax base. As such, there is an argument for extending the proactive property standards enforcement program to all wards within the city for both rental and owner-occupied properties.

Analysis of Licensing Rental Housing

Licensing rental housing, as a new municipal policy, was enabled by the Government of Ontario as a new authority in a toolbox with other revenue generating mechanisms. As a result, it has been slowly creeping across the province as a means to raise non-tax revenue and to combat a number of issues such as student housing, rooming houses, parking, noise, litter, thefts, speeding, vandalism, drunken public behaviour, non-conforming rental housing in single family home communities, property maintenance and fire code violations.

The most common public complaints that Councillors receive from the constituents is revealing.

Complaints about lack of parking, noise, litter, speeding, and property maintenance are all issues that fall within the local municipality sphere of authority. As such, municipal by-laws already exist to address many of such complaints.

For example, proactive property enforcement has proven to be an excellent tool to address outside and common property maintenance issues. Parking, noise, litter, and fire code violations are being effectively addressed through By-law Enforcement and Fire Department Inspections.

Speeding, vandalism, drunken public behaviour, and theft are issues more properly dealt with by the Hamilton Police Service.

Rental housing licensing or a mandatory registry will not resolve these community complaints as the landlord has a very limited set of tools to deal with tenants who are NOT good neighbours.

At the present time, (new) City of Hamilton has not adopted city-wide provincial policies which give every homeowner the option of a secondary unit or granny flat as a right.

To be clear, the Hamilton Residential Zoning by-law has been amended to permit, as a right, secondary housing while the zoning by-laws for Ancaster, Dundas, Flamborough, Glanbrook and Stoney Creek prohibits granny flats.

We understand that the planning staff have started the process of reviewing residential zoning across the entire city with consultations planned in 2018 with approval in 2019.

Who Pays for Licensing Rental Housing?

One of the most frequent discussions that has occurred in every municipality that has considered licensing rental housing is the question, “Who pays?”.

Proponents of licensing rental housing argue that the landlord pays the fees to the benefit of the tenants. They argue that provincial rent control laws prohibit increases in rent beyond set limits. However, a comprehensive review of the Residential Tenancies Act, Above the Guideline policies and recent LTB decisions verifies that tenants can be charged for their share of licensing and inspection fees, as in the Waterloo Case Study.

Waterloo Case Study (LTB File Number: SWL-69354-14)

On January 27, 2014, the City of Waterloo adopted licensing of low-rise rental properties under By-law No. 2014-008.

The preamble to the Waterloo by-law provides the city’s rationale for adopting the new regulation.

“The Corporation of the City of Waterloo considers it necessary and desirable to regulate residential rental units in order to:

(a) protect the health and safety and human rights of the persons residing in rental units; (b) ensure that certain essentials are provided in residential rental units such as plumbing, heating and water; and, (c) protect the residential amenity, character and stability of residential areas.” (7)

The Waterloo by-law requires that the landlord submit the following documents with their application,

- 1) Police criminal record check (issued within six months of the date of application)
- 2) Electrical Safety Authority Elec-Check Certificate (issued within six months of the date of application)
- 3) HVAC certificate (issued within six months of the date of application)
- 4) Insurance certificate
- 5) Floor plan
- 6) Parking plan
- 7) Proof of ownership (transfer agreement or deed)
- 8) Property maintenance plan

According to the Residential Tenancies Act and current Landlord and Tenant Board policies, landlords may apply for above the guideline rent increases for any municipal fee including licensing and inspection fees.

Municipal taxes and charges are defined under section 2 of the RTA and section 41 of O. Reg. 516/06. Municipal taxes and charges include:

- **taxes charged to a landlord by the municipality (which include education taxes levied under Division B of Part IX of the Education Act);**
- **charges levied on a landlord by the municipality; and**
- **taxes levied on a landlord's property in unorganized territory. (8)**

As such, a landlord filed an application to the Landlord and Tenant Board requesting an above the guideline rental increase for the city's licensing fees and the municipally required Electrical Safety Authority Elec-check Certificate. Any rent increase that exceeds the maximum annual percentage allowed by the provincial government must be reviewed by the LTB. (Currently, the maximum percentage by which a landlord can increase the rent for most residential tenants without approval from the Landlord and Tenant Board is 1.5 % for 2017.)

On November 18, 2015, the Landlord and Tenant Board issued its decision and ordered that the landlord may increase the rent by 6% in addition to the annual guideline (1.5%) in effect on the increase date for the unit (**File Number: SWL-69354-14**) (appendix i).

This Board decision was affirmed by the Divisional Court of Ontario on December 7, 2017 *Houston versus 530675 Ontario*, 2017 ONSC 6419 – Divisional Court File DC-17-828) and as such, this decision firmly sets the precedent for future AGI rent increases to tenants may include such levies as municipal license fees and related mandatory inspection or audit fees (appendix ii).

In this case, **tenants' rent increased by 7.5%** over the previous year.

According to Rentboard.ca, average rents in Waterloo range from \$655 to \$1250 and \$1580 to \$2900 for a 3-bedroom unit. Therefore, in this actual case and based on a 7.5% rent increase, **rent increases could range from a minimum of \$49 per month to \$217 per month** just to offset licensing and all inspection fees.

The implementation of rental housing licensing in Waterloo is increasing rents as landlords can now apply for above guideline rent increases for any municipal fees, license fee and all mandatory inspection fees and other charges imposed by by-law.

Risk of Tenant Displacement

Past discussions about licensing rental housing in Hamilton revealed a pressing concern from many stakeholders that some vulnerable tenants may be displaced or lose their units because of zoning and code enforcement action or additional fees placed on landlords. In such cases and where costs are too prohibitive for the landlord to comply with rezoning, tenants may not only be displaced but the rental building itself may come off the rental market.

"In extraordinary cases, when an inspection determines that particular rental units are uninhabitable, tenants might be displaced after an inspection. Funded tenant relocation programs can help ease displacement and help low-income tenants avoid homelessness, if the landlord is unable to provide alternative housing for tenants while repairs are being completed."

Healthy Housing Through Proactive Rental Inspection by changelabsolutions.org (9)

Such trepidation is warranted given that any new license fees, inspection fees and strict enforcement of zoning by-laws could result in landlords shuttering their buildings and subsequently selling their property.

In December 2013, the Hamilton Housing Services Division publicly released a long-awaited collaborative document entitled, “Hamilton’s Housing & Homelessness Action

Plan with the aspiration statement “Everyone has a home... Home is the foundation”. This broadly celebrated document, drafted through a thorough public consultation, addressed the context of precarious housing and homelessness, provided viable strategies for implementation, critical investment strategies, workplans and the need for ongoing evaluation. This

There about 13,000 rental units in the secondary rental housing market, representing just over 20% of the total rental stock in Hamilton. The secondary market is an important source of affordable rental housing through units in rented single and semi-detached homes, apartments in houses, multi-plexes and rented condominium units. While providing an important supply of affordable housing, a number of issues are associated with this component of the rental market. In particular, secondary rental market units are not as permanent as purpose-built rental housing apartments. They come into and out of the market relatively quickly through conversion of space to rental and de-conversion back to ownership. This makes the secondary housing market difficult to track and measure. There may also be quality issues with these units and potentially by-law and code compliance issues.

(10) Pages 48-49 Housing and Homelessness Action Plan - Hamilton

comprehensive report identified the secondary rental housing market as an important source of affordable rental housing and raised the legitimate concern of tenant displacement.

Similarly, the Hamilton Planning Staff Report PED10049(j) raised this very concern that large number secondary rental units, most of which are perfectly safe, would be at risk of being converted back to ownership as current landlords would rather sell the housing than pay the fees, be subject to unnecessary inspections and make the changes to become compliant with zoning.

“It is anticipated that some properties will need to be rezoned due to illegal changes that have been made without the proper permits which may not comply with the current zoning regulations. The potential loss of rental units that are not in compliance with zoning is the single biggest concern raised. It is difficult to estimate the exact number, but it is anticipated that if landlords are required to return to the last legal use (e.g. from a fourplex to a duplex) up to 30% of rental units could be lost. The other potential loss is where a landlord may choose to de-convert the properties in order to avoid licensing. While Hamilton’s vacancy rate for purpose-built rentals is modestly high at 4% there would not be enough stock to absorb the estimated losses and displaced tenants of rental units due to licensing, and this may result in a potential increase of homelessness and waiting lists for social housing.”

(11) Hamilton Planning Report PED10049(j)

Currently, Hamilton’s primary rental market vacancy rate is 2.7% and the impact would be even greater today.

In our discussions with Social Planning Research Council staff, we learned that by comparing census and

CHMC data, it is possible to estimate the number of at risk secondary housing rental units as follows (all data for City of Hamilton only):

Data Source	Category	Number
2016 Census	All rental units	68,545
2016 Census	Subsidized housing	10,625
2016 CMHC	Primary rental market units	33,728
SPRC calculation based on Census and CMHC data	Estimate of secondary rental housing market	24,192
Staff report PED10049(j)	Loss of up to 30% of units	7,258

*Source SPRC Staff

The risk of tenant displacement as a direct result of licensing rental housing, municipal fees, inspections, and the requisite rezoning applications have proven to be all too real with a projected loss of 7,258 rental units in the sector of the housing market that serves some of the most vulnerable residents in the city.

Rental Housing Licensing: Revenue and Expenses

Every municipality that has implemented new licensing regimes for rental housing has had the goal of full cost recovery with no financial impact on the tenants or the tax payers.

Given recent LTB decisions approving above the guideline rent increases specifically for license and inspection fees, the challenge for municipalities with rental housing licensing is to find a fee schedule that does not unfairly burden tenants while minimizing the impact of the municipal tax levy.

London Case Study

The City of London adopted a Rental Housing Licensing By-law “To address sub-standard housing conditions in rental units and protect the amenity, character and stability of residential areas.” This by-law targeted 12,000 rental buildings containing four or less dwelling units of converted dwellings while exempted apartments and townhouses.

From 2010 to 2013, the City of London received 3,646 new applications for licenses from the estimated 12,000 non-conforming properties. The City issued 4,422 new licenses and renewals. The city refused licenses for 15 properties, 13 non-compliant with zoning, one property could not schedule a Fire Prevention & Protection Act (FPPA) inspection, and one property could not comply with FPPA. The City received one appeal which was deemed invalid.

The cost for the program over the same three-year period totaled \$1,260,000 while the total revenue received from licensing was just \$91,400. (appendix ii)

The London case study exemplifies that the actual incurred costs to implement their licensing program dramatically exceeded the actual revenue.

Toronto case Study

On July 1, 2017, the City of Toronto implemented a new rental housing licensing by-law for buildings with three or more stories and ten or more units. Toronto City staff estimated that the by-law would capture approximately 3,500 buildings of which 580 buildings are operated by social/supportive housing providers including Toronto Community Housing.

The City would only inspect common areas and NOT individual units. This program was projected to cost about \$5 million, with 53 per cent of costs to be recovered through an annual registration fee of \$10.60 for each unit; 12 per cent from enforcement action, and 35 per cent from property taxes. While Toronto Community Housing and all social/supportive housing providers are exempt from all fees, inspection portions of the by-law will still apply.

The Toronto by-law sets out standards for apartment building owners and operators by requiring them to:

- Register annually with the City
- Provide key information regarding their building and pay an annual fee
- Have a process for receiving and tracking tenant service requests.
- Conduct regular inspections of the building for cleanliness and pests.
- Take action when pests are detected.
- Develop and maintain a number of operational plans related to cleaning, waste management and capital planning.
- Use licensed contractors for mechanical systems repairs.
- Have a notification board in a central location in the building to communicate key information to tenants.
- Retain records relating to the operations of the building.

The registration fee of \$10.60 per unit does not include the administrative fee of \$1,800, which covers the cost of doing the administrative work associated with an audit and the cost of the pre-audit inspection. Furthermore, there will be a fee for each hour spent at the building during the audit: \$108.80 per hour per inspector, with a minimum fee of \$108.80.

At passage, Toronto City Staff argued that any costs incurred by landlords could not be passed on to tenants which has subsequently proven to be incorrect by recent Landlord Tenant Board decisions and Divisional Court appeals.

Hamilton Rental Housing Roundtable Recommendations

These recommendations were drafted holistically with the success of any one recommendation generally being dependent on another. For example, the proposed 24-month amnesty program for rental housing charges and fines for landlords willingly working towards code and by law compliance is essential for the success of other recommendations.

Rental housing amnesty program

- 1) That 24-month amnesty period be adopted during which time no zoning and property standards enforcement action can be taken against non-conforming rental properties provided the city inspector and the landlord agree to and sign a compliance agreement with an agreed upon timetable to correct any and all deficiencies.
- 2) That no charges or fines can be laid if the landlord can reasonably demonstrate that the compliance agreement is on schedule.

Safe, healthy rental housing financial support program

- 3) That a formalized financial assistance and emergency housing program be developed to assist tenants who are displaced due to safety issues or code enforcement.
- 4) That a support program be developed to prevent displacement of tenants by providing emergency loans and discounted fees to landlords who voluntarily agree to bring their rental units into compliance.

Secondary units, in-law suites, granny flats as a right

- 5) That Hamilton adopt policies and by-laws that match provincial policies to give each homeowner the legal right to include a secondary dwelling unit within their home without a rezoning requirement, provided building permits are acquired and that any minor variances are approved by the Committee of Adjustment.

Grandfathering of secondary units

- 6) That Hamilton grandfather all pre-existing secondary units provided they fully comply with the fire code, building code and any applicable property standards by-laws.

Streamlined building permit process for secondary suites (Granny Flats)

- 7) That Hamilton adopt a one-stop shop service to streamline the process of obtaining a building permit for secondary suites and make it easier for rental unit owners to come to the City to legalize their units.

Streamline process for secondary units

- 8) That Hamilton eliminate the current policies requiring re-zoning applications for the conversion of a single-family home to include secondary units as a right.
- 9) That the City adopt reasonable fees and building permit costs for conversions of single family homes to include secondary unit as a right.

Secondary suites public awareness campaign

- 10) That Hamilton develop a public awareness campaign explaining the provincial policies for secondary suites and the positive impact such suites can have on the affordable housing deficit.

Off-campus student housing

- 11) That Hamilton apply and enforce the Lodging Home By-law to include off-campus student housing, as rooming houses.

Extend and expand proactive property standards enforcement

- 12) That Hamilton develop a permanent proactive property standards enforcement program for all classes of properties including owner-occupied homes, rental and commercial properties in all city wards.
- 13) That Hamilton continue to resource the proactive property standards enforcement program through the general levy.
- 14) That Hamilton monitor and report annually on the efficacy of the program and any change in property values in the subject properties.

Reporting non-conforming rental housing

- 15) That Hamilton remove any policies prohibiting anonymous tips and adopt a new process by which citizens can report a suspected unlicensed rooming house or off-campus student housing to by-law enforcement while protecting their privacy as per their rights under the Municipal Freedom of Information and Protection of Privacy Act.
- 16) That any complainant be advised that their identity is protected under MFIPPA.

Merge the zoning by-laws of the former municipalities of the Hamilton-Wentworth Region

- 17) That Hamilton create one modern zoning by-law for the entire city providing reasonable and fair policies that treat all residents equally.

NOTE: we understand that the City of Hamilton Planning Department is consulting and hopes to present a new by-law in 2019.

Adopt a zoning by-law that is congruent with the Ontario Building Code

- 18) That pursuant to Section 9.5 of the Ontario Building Code, Hamilton:
 - a) amend its Zoning By-law 6593, Section 19 by replacing “the minimum dwelling size from each dwelling unit has a floor area of at least 65 square metres (699.65 square feet)” with the minimum 145 square feet floor areas of for studios, 223 square feet for one-bedroom units, 298 square feet for two-bedroom units and 373 square feet for three-bedroom units,
 - b) Set the definition of “basement” in the new Residential Zoning By-law to "BASEMENT - A story of a dwelling which is below ground level, and includes a cellar."
 - c) Make clear what the City’s requirements for ceiling height are, and ensure the information is easy to both find and interpret and not impose ceiling heights in excess of the Ontario Building Code requirements. Remove the minimum lot size or change to a minimum 120m².
 - d) Review the parking provisions and amend requirements to meet the actual need and encourage maximum compliance.

Tenants’ and Landlords’ rights and responsibilities charter

- 19) That Hamilton, in consultation with rental housing stakeholders, develop a charter outlining rights and responsibilities for tenants and landlords including a complaint resolution protocol with progressive steps of action for the tenant.
- 20) That Hamilton provide public education to encourage tenants and landlords to follow this suggested complaint protocol:
 - a) The tenant should first contact the Property Manager or on-site superintendent, to file their complaint. The tenant should be required to document the complaint and response for possible future by-law enforcement. If the complaint remains unresolved, after a reasonable period of time, then the tenant should contact the Landlord or Property owner.
 - b) If the Property Owner does not resolve the tenant’s issue then they should contact a local mediation service provider such as Housing Help Centre.
 - c) If the issue is related to health and safety concerns that the Tenant should contact Municipal By-law enforcement for assistance through a free tenants’ inspection.
 - d) If the issue still remains unresolved, the tenant can contact the Ontario Rental Housing Enforcement Unit. Tenants in Ontario may report any offence under the Residential; Tenancies Act Toll-free 1-888-772-9277
 - e) If the Ontario Rental Housing Enforcement Unit fails to resolve the issue then the tenant should file an application with the Landlord Tenant Board.

NOTE: The Province has indicated its intent to bring forward legislation in 2018 that would set a province wide requisite lease, which may cover items 18-19.

Free rental unit inspections

- 21) That Hamilton adopt a new program whereby tenants may request a **free** tenant safety inspection to identify safety concerns related to Ontario building and fire code regulations.
- 22) That Hamilton develop a public awareness campaign to inform the general public,

tenants and landlords about the free tenant safety inspection.

23) That Hamilton request local universities and colleges provide information about the free rental unit inspection to **all** students

24) That upon a tenant inspection request, Hamilton inspectors will identify themselves to the tenant and explain that the inspection is provided to identify any safety concerns related to Ontario building and fire code regulations specifically, that safe rental units must have

- a. working smoke alarms on every level and outside every sleeping area (houses built after 2013 must also have a smoke alarm in every bedroom).
- b. working carbon monoxide alarms installed outside of sleeping areas if the unit contains a fuel burning appliance, fireplace or attached garage.
- c. An egress or large enough window or door to be able to get directly outside from basement bedrooms, and fire separation(s) between each unit.”

Support the establishment of the Hamilton Rental Housing Roundtable

25) That Hamilton support the establishment of an independent community based Hamilton Rental Housing Roundtable (HRHR), consisting of a broad cross section of rental housing stakeholders as an advisory/liaison committee to assist the city on all rental housing matters.

Conclusions

Adoption of rental housing licensing by-laws by Ontario municipalities is far from universal. In most cases, the initial catalyst to adopt rental housing licensing is to gain new revenue opportunities from license and inspection fees. The results of such programming decisions reveal significant new costs being added to the municipality and limited opportunities to secure full cost recovery from landlords given their ability to legally pass such costs onto their tenants.

As a result, the financial impacts on tenants through above guideline rent increases that are permitted to offset such municipal license and inspection fees can be overwhelming and life altering to some of the most vulnerable people in our city. Above guideline increases and/or the subsequent rent increases at unit turnover all but certainly guarantee substantial rent increases, in a market where affordability is a real challenge.

Our review shows that the risk of displacement remains especially real for secondary housing tenants. The landlord’s unwillingness or inability to pay fees required to meet zoning and code compliance puts a projected 30% or 7,258 of such tenants in jeopardy of displacement which, given the current state of the affordable rental housing market, could substantially increase local homelessness for the most vulnerable tenants.

It is reasonable to conclude given the current housing market in Hamilton that adopting rental housing licensing will not encourage new construction of rental housing, the legalization of rental housing, improve safety, or improve housing affordability. In fact, the opposite is quite true. Adopting a licensing by-law for rental housing will dampen if not eliminate any new investments in the rental market, encourage more underground rentals, and adversely impact rent affordability.

The Hamilton Rental Housing Roundtable is confident that the City of Hamilton can make a real difference by collaborating with the community and stakeholders and adopting our reasonable, pragmatic and holistic recommendations.

On balance, the risks and negative impacts of licensing rental housing outweigh any potential gains.

Therefore, we respectfully request the following considerations:

- 1) that City Council make a definitive decision to NOT license rental housing
- 2) that any work in relation to the investigation and consideration of the licensing of rental housing be suspended until such time as staff has an opportunity to review and make recommendation as to findings of this report
- 3) that City staff be directed to work with the Hamilton Rental Housing Roundtable to promote code compliant rental housing with safe, clean and healthy dwelling units.

References

- 1) City of Hamilton Planning Committee Minutes September 28, 2012, PED10049
- 2) City of Hamilton Planning Committee Minutes, December 11, 2012, PED10049
- 3) City of Hamilton Planning Committee Minutes, September 25, 2013 PED10049
- 4) Terms of Reference: Rental Housing Sub-Committee, September 25, 2015, Planning Committee Report 13-014
- 5) Review of the Effectiveness and Implications of Municipal Licensing of Residential Apartments”, Michael Fenn, September 2013.
- 6) Guelph web page, Book Free Rental Unit Safety Inspection, <https://guelph.ca/2017/09/book-free-inspection-rental-unit>
- 7) Rental Unit Licensing: Applicability to Milwaukee, Ian Crichton, Matt Rosenberg, and Joe Thompson
- 8) Waterloo By-law No. 2014-008
- 9) Municipal taxes and charges are defined under section 2 of the RTA and section 41 of O. Reg. 516/06
- 10) Housing and Homelessness Action Plan – Hamilton
- 11) Hamilton Planning Report PED10049(j) <http://www2.hamilton.ca/NR/rdonlyres/63327BE5-71D5-4E3F-83B5-DB7CBAD2C753/0/Dec11Item61.pdf>

Appendices

Appendix (i) LTB Decision File Number: SWL-69354-14

File Number: SWL-69354-14

Order under Section 126
Residential Tenancies Act, 2006

[Company name removed] (the 'Landlord') applied for an order permitting the rent charged to be increased by more than the guideline for one or more of the rental units in the residential complex because of an extraordinary increase in the cost for municipal taxes and charges.

This application was resolved by written hearing. The Board received submissions from Tenants LS, LG, GA, JS and LH.

It is determined that:

1. The Landlord justified a rent increase above the guideline because of an extraordinary increase in the cost for municipal taxes and charges.
2. The municipal taxes and charges claimed by the Landlord have been adjusted to remove the licensing fees and ESA charges applicable to the 3 units not covered by the application.
3. Although the Landlord has failed to file a Certificate of Service as required by subsection 188(3) of the Act, based on Tenant submissions received by the Board on August 7th, 21st and 27th, 2015, I am satisfied that the parties have been notified of the written hearing.
4. The Board received submissions from Tenants LS, LG, GA, JS and LH. In their submissions, some of the tenants raise maintenance issues. These submissions were taken into consideration in as much as we can under the legislation.

It is ordered that:

1. The Landlord may increase the rents charged by 6.00% for the units set out in Schedule 1.
2. The Landlord may increase the rents charged within the time period of April 1, 2015 to March 31, 2016.
3. The percentage increase set out in paragraph 1 may be taken in addition to the annual guideline in effect on the increase date for the unit.
4. The Landlord or the Tenants shall pay to the other any sum of money that is owed as a result of this order.

November 18, 2015

Date Issued

Eastern-RO

Greg Joy

Member, Landlord and Tenant Board

255 Albert Street, 4th Floor
Ottawa ON K1P6A9

If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.

Important Notes:

1. The landlord may increase the rent charged by the ordered increase within the time period specified if at least 12 months have passed since the last rent increase or since the tenant moved in, and if the landlord has given the tenant at least 90 days proper Notice of Rent Increase. Any part of the ordered increase that is not taken within the time period specified cannot be added to subsequent rent increases in subsequent time periods.
2. If the landlord has given a Notice of Rent Increase for a rent increase that is less than the ordered increase, the landlord may only take the rent increase set out in the Notice.
3. The ordered increase does not affect tenants who moved into the complex on or after January 1, 2015. The landlord cannot add the ordered increase to the rents these tenants pay.

Appendix ii

CITATION: Houston v. 530675 Ontario, 2017 ONSC 6419

DIVISIONAL COURT FILE NO.: DC-17-828

DATE: 20171207

ONTARIO SUPERIOR

COURT OF JUSTICE

DIVISIONAL COURT

N. Spies, M. G. J. Quigley, M. G. Ellies JJ.

BETWEE)
)
LESLIE HOUSTON and JULIA SEIRLIS) *Joseph W Richards II, for the Appellants*
)
)
)
Appellants (Tenants))
)
- and-)
)
)
530675 ONTARIO LIMITED O/A) *Joseph J. Hoffer, for the Respondent*
MAYFIELD ESTATES LP)
)
)
Respondent (Landlord))
)
)
Sabrina Fiacco, for the Landlord Tenant
) Board (Social Justice Tribunals Ontario)
)
) **HEARD:** October 5, 2017
)

REASONS FOR DECISION

ELLIESJ.

OVERVIEW

- [1] The appellants are tenants of the respondent landlord. They appeal three related orders of the Landlord and Tenant Board (the "Board") which authorized an above-guideline rent increase (an "AGI") for municipal taxes and charges under s. 126(1) of the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17 (the "RTA").
- [2] The Board held that fees paid by the landlord to the municipality for a Rental Housing Licence (a "RHL") and to the Electrical Safety Authority (the "ESA") for a certificate, both of which were required by a by-law, were part of an extraordinary increase in municipal taxes and charges.
- [3] The tenants challenge the Board's ruling in four respects. First, they allege that the Board was wrong to find that ESA fees are charges levied by a municipality. Second, they contend that, although the RHL fees qualify as municipal charges, both the RHL fees and the ESA fees are exempted because they relate to an alleged breach by the landlord of health, safety, housing or maintenance standards and the Board was wrong to conclude otherwise. Third, they argue that the Board improperly fettered its discretion by not calculating the AGI in a way that spread the fees and charges more evenly over the period of time for which they were incurred. Lastly, they allege that they were not afforded procedural fairness in the manner in which they received notice of the landlord's application, disclosure of the basis for the application, and the way in which the Board proceeded to deal with it.
- [4] These reasons explain why I would dismiss the appeal. The Board's conclusions that the ESA fees qualify as municipal charges and that the RHL fees and ESA fees are not exempt were reasonable. So, too, was the Board's decision that it was required by the *RTA* to calculate the AGI over a 12 month period only. Finally, although the notice and the disclosure provided to the appellants were inadequate, the procedural unfairness that resulted was cured in this case by the Board's subsequent review of its own decision.

BACKGROUND

- [5] In May 2011, the City of Waterloo passed the Rental Housing Licensing By-law (By-law 2011-047). The by-law implemented a new, comprehensive Rental Housing Licensing Program (the "RHL Program"), which required landlords of most low-rise rental units to obtain an RHL annually. In order to obtain an RHL, the landlord was required to pay a fee to the municipality and to certify that the rental property complied with certain statutorily-imposed standards, including those imposed by the *Electrical Safety Code*, O. Reg. 164/99. In this regard, the by-law required that the landlord submit a certificate from the ESA every five years.

- [6] By-law 2011-047 was the subject of an application for judicial review before this Court. The landlord in this case was one of a group of landlords that together challenged the by law in *1736095 Ontario Ltd. v. Waterloo (City)*, 2015 ONSC 6541 ("*173*"). For reasons released on October 22, 2015, the court dismissed the application.
- [7] In December 2014, the landlord filed an application for an AGI with the Board. The application related to the landlord's residential townhouse rental complex located on Goldbeck Lane, in Waterloo. It was based solely on an alleged extraordinary increase in municipal taxes and charges. The landlord alleged that municipal taxes and charges had increased over the base year of 2014 in the amount of \$52,853.60. Of this amount, the sum of \$25,112.63 related to RHL licensing fees and the sum of \$18,034.80 related to ESA fees.
- [8] The Board issued a Notice of Written Hearing on July 9, 2015. The notice required the landlord to give the tenant a copy of the notice by July 29, 2015, and to file a Certificate of Service with the Board by August 3, 2015. The landlord failed to file the certificate.¹
- [9] The appellants filed a joint submission with the Board on August 27, 2015.
- [10] . On November 18, 2015, Board Member Greg Joy issued an order, without reasons, authorizing an increase of 6.00% above the annual guideline, effective April 1, 2015. As a result, Julia Seirlis' rent increased by 7.6 percent and Leslie Houston's rent increased by 8 percent.
- [11] On January 7, 2016, Waterloo Region Co=unity Legal Services ("WRCLS"), acting on behalf of Leslie Houston ("the tenant"), requested reasons for Member Joy's decision and a copy of all of the landlord's submissions on file. The Board had difficulty fulfilling the latter request. To preserve the tenant's rights, counsel from WRCLS requested a review of Member Joy's decision and an extension of time under the Board's Rules of Practice (the "rules"). Reasons for Member Joy's decision were issued on March 10, 2016. The landlord's evidence was received by WRCLS counsel on March 22, 2016, following which counsel amended both the request to review and the request to extend time.
- [12] On July 25, 2016, Board Vice-Chair Charron issued an Interim Review Order on behalf of the Board. In the order, Vice-Chair Charron denied the tenant's request for a review hearing relating to the RHL fees and the ESA fees, but allowed a review hearing on the sole question of the proper AGI calculation under s. 31 of the Ontario Regulation 516/06 ("the regulation"), made under the *RTA*.
- [13] The review hearing took place on October 26, 2016, and consisted of oral argument only. Board Vice-Chair Usprich issued a Review Order on April 10, 2017, finding that the Board did not have jurisdiction to modify the AGI calculation under the *RTA* over any longer period than 12 months.
- [14] The appeal to this Court was launched thereafter.

ISSUES

[15] This appeal raises the following issues:

- (1) Does the appeal raise questions of law?
- (2) If so, what is the proper standard of review?
- (3) Does the Board's decision that the ESA fee is a municipal charge meet the standard of review?

¹ The appellant, Leslie Houston, relied on this fact before the Board in arguing that the landlord had failed to prove sufficient service of the notice. This point was not pressed before us.

- (4) Does the Board's decision that the RHL and the ESA fees are not exempted municipal charges meet the standard of review?
- (5) Does the Board's decision that it has no discretion to amortize the rent increase over more than **12** months meet the standard of review?
- (6) Was the tenant denied procedural fairness?

[16] Although the issues were addressed by the appellants more or less in the order set out above, I propose to deal with the last issue, procedural fairness, first. If the tenant was denied procedural fairness, some or all of the other issues may be moot.

ANALYSIS

Was the tenant denied procedural fairness?

[17] The appellants maintain that the tenant was denied procedural fairness in three ways. The first two relate to the nature of the notice they received of the landlord's application and the pre-hearing disclosure.

[18] The appellants submit that the notice was inadequate because the application form did not particularize the nature of the municipal taxes and charges that formed the basis for the landlord's request. Further, without disclosure of the landlord's evidence or submissions to the Board, the appellants were unable to perform their own calculations concerning the amount or timing of the RHL and ESA fees. As a result, the appellants say that they were unable to properly participate in the written hearing held before Member Joy.

[19] I agree that the appellants received inadequate notice and inadequate disclosure in this case. However, in my view, the procedural unfairness that resulted was remedied by virtue of the reviews that subsequently took place by Vice-Chair Charron and before Vice-Chair Usprich.

[20] The landlord's application for an AGI was brought in compliance with s. 22(1) of the

regulation, which provides that, in an application under s.126 of the *RTA*, the application must be accompanied by the following material:

- I. If the application is based on extraordinary increase in the cost for municipal taxes and charges or utilities or both,
 1. evidence of the costs for the base year and the reference year and evidence of payment of those costs, and
 11. evidence of all grants, other forms of financial assistance, rebates and refunds received by the landlord that effectively reduce those costs for the base year or the reference year. -

2. If the application is based on capital expenditures incurred,
 1. evidence of all costs and payments for the amounts claimed for capital work, including any information regarding grants and assistance from any level of government and insurance, resale, salvage and trade-in proceeds,
 - ii. details about each invoice and payment for each capital expenditure item, in the form approved by the Board, and
 111. details about the rents for all rental units in the residential complex that are affected by any of the capital expenditures, in the form approved by the Board.

3. If the application is based on operating costs related to security services, evidence of the costs claimed in the application for the base year and the reference year and evidence of payment of those costs.

(21) Thus, pursuant to the regulation, unlike an application for an AGI based on capital expenditures, the landlord in this case was not required to, and did not, file details about the increased municipal taxes and charges.

(22) In considering the issue of procedural fairness, Vice-Chair Charron pointed out that the tenant never asked that the landlord provide a breakdown of the amounts set out in the application (Interim Order, para. 7). That is correct. However, I agree with the appellants' submission that there was nothing in the notice of application that told them that they could make such a request. In my view, at a minimum, that information should have been provided. The Board regularly deals with tenants who have no legal training, nor any legal representation. As a result, the Board's forms must be legally informative. The prescribed notice in this case was not.

(23) Vice-Chair Charron also held that there was no evidence before her that the tenant was not reasonably able to participate in the written proceeding before Member Joy. I do not agree with that conclusion. As the Vice-Chair herself pointed out, "(t)he arguments raised by the Tenant in this Request to Review were not raised at the initial hearing stage" (Interim Order, para. 8). That is at least some evidence that the tenant was not able to reasonably participate in the earlier written hearing. There is more.

(24) In their written submissions to Member Joy, the appellants wrote (para. 2):

The proposed increase seeks to unfairly place the burden of costs incurred under a new licence fee imposed by the City of Waterloo on tenants rather than on the landlord.

The licence fee, i.e. the RHL, was only one of the charges at issue. The ESA fees were also a significant component of the increase sought by the landlord. This is further evidence that the appellants did not fully understand the basis for the landlord's request.

- [25] However, notwithstanding the fact that the tenant had not satisfied Vice-Chair Charron that she had not been reasonably able to participate in the previous hearing, and notwithstanding the fact that the tenant was raising arguments not raised before, Vice Chair Charron went on to carefully consider the arguments raised by the tenant "out of an abundance of caution" (Interim Order, para. 12). I will return to her analysis, below.
- [26] The appellants also argue that the effect of the lack of proper notice and disclosure continued after the written hearing and impacted the review later conducted by Vice Chair Charron because they were required to satisfy a higher standard, namely that a serious error had been made.
- [27] Vice-Chair Charron's review was conducted under rule 29.2 of the rules, which permits the Board to exercise its discretion to review a previous order where it is satisfied that the order "contains a serious error, a serious error occurred in the proceeding, or the person making the request was not reasonably able to participate in the proceeding."
- [28] Although Vice-Chair Charron began by outlining the test under rule 29.2, she went on to consider simply whether the Board had "erred" in allowing the landlord to claim the amount it did for municipal taxes and charges and whether the Board ought to have exercised a discretion to spread out the AGI over several years in order to minimize the impact (Interim Order, para. 12). Vice-Chair Charron did not apply the serious error test until the end of her analysis, by which point she had concluded that no error, let alone a serious error, had occurred.
- [29] For these reasons, the effect of the lack of proper notice and disclosure was remedied by virtue of the review undertaken by Vice-Chair Charron.
- [30] The appellants' third complaint relating to procedural fairness concerns the nature of the hearing conducted before Member Joy. The appellants contend that this was not a straightforward AGI request because the request involved a "complex and contentious" municipal by-law and non-municipal charges (Appellants' Factum, para. 49). The appellants submit that the landlord's request should have been the subject of an oral hearing. They argue that if it had been, the tenants would have had disclosure of the landlord's evidence on the hearing date, if not earlier.
- [31] I do not agree with the appellants' submissions in this regard.
- [32] In *Baker v. Canada*, [1999] 2 S.C.R. 817, at paras. 23 - 27, the Supreme Court of Canada held that the specific requirements necessary to provide procedural fairness in any given case depend upon a number of factors, including the following:

- (1) the nature of the decision being made and of the process followed in making it;
- (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;

- (3) the importance of the decision to the individual or individuals affected;
- (4) the legitimate expectations of the person challenging the decision; and
- (5) the choices of procedure made by the agency itself.

[33] In my view, the Board's decision to hold a written hearing in the first instance, and the legislative and regulatory framework within which that decision was made, respect the duty of procedural fairness and, in particular, the *audi alteram partem* rule of natural justice.

[34] Section 183 of the *RTA* requires the Board to adopt "the most expeditious method of determining the questions arising in a proceeding that affords to all persons directly affected by the proceeding an adequate opportunity to know the issues and be heard on the matter."

[35] Pursuant to s. 184, the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the "*SPPA*") applies with respect to all proceedings before the Board. Section 25.0.1 of the *SPPA* grants the Board the power to determine its own procedures and practices and to make rules for that purpose under s. 25.1 of the *SPPA*.

[36] Section 5.1 (1) of the *SPPA* provides that a tribunal may make a rule permitting written hearings. Section 184 (2) of the *RTA* specifically exempts the Board from s. 5.1(2) of the *SPPA*, pursuant to which a tribunal shall not hold a written hearing if a party satisfies the tribunal that there is a good reason for not doing so.

[37] Rule 22.1 of the rules governs when the Board will hold a written hearing. It provides:

In deciding whether to hold a written hearing, the [Board] may consider any relevant factors, including:

1. the suitability of a written hearing format considering the subject matter of the hearing;
2. whether the nature of the evidence is appropriate for a written hearing, including whether credibility is in issue and the extent to which facts are in dispute;
3. the extent to which the matters in dispute are questions of law;
4. the convenience of the parties;
5. the ability of the parties to participate in a written hearing; and
6. the cost, efficiency and timeliness of proceedings.

[38] Notwithstanding that the *RTA* specifically exempts the Board from the provisions of the *SPPA* that prohibit a tribunal from holding a written hearing in certain circumstances, the rule also provides a procedure pursuant to which a party can object to a written hearing

within a certain time limit and by virtue of which the Board may continue a hearing as either an oral hearing or an electronic hearing.

- [39] As Vice-Chair Charron pointed out, the Board routinely deals with AGI increases by way of written hearings (Interim Order, para. 10). As she also pointed out, as with most AGI's dealing with municipal taxes and charges, the issues in this application revolved mainly around numbers, there were no issues of credibility and the facts were straightforward.
- [40] If, as the appellants argue, the central issues in this case are questions of law and not questions of fact or mixed fact and law (an argument that I accept for reasons set out below), I cannot see why the duty of procedural fairness required an oral hearing in this case. The fact that the appellants may have received at least last minute disclosure as a by-product of an oral hearing is more properly a reason to question the disclosure process, as I have done, than it is to question the hearing process.
- [41] For these reasons, I do not accept the appellants' argument that this matter should not have proceeded as a written hearing.

Are there questions of law raised?

- [42] This appeal is brought under s. 210 of the *RTA*, which permits an appeal from an order of the Board, "but only on a question of law."
- [43] The landlord and the Board argue that the issues raised by the appellants regarding the ESA fees and the RHL fees are both questions of fact or, at best, questions of mixed fact and law. As a result, they argue that the appeal on those issues should be dismissed: *Solomon v. Levy*, 2015 ONSC 2556 (Div. Ct.), at para. 33. I am unable to agree.
- [44] The distinction between questions of law, questions of fact, and questions of mixed fact and law was articulated by Iacobucci J. in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (at para. 35):

Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

- [45] With respect to both the ESA fees and the RHL fees, the Board was called upon to determine questions of law. With respect to the ESA fees, the question was whether a fee paid by a landlord to a third party pursuant to a municipal by-law could qualify as a charge levied by a municipality. With respect to both the ESA fees and the RHL fees, the Board was required to consider whether, in order to be exempt as municipal charges under s. 2(1)(a) of the *RTA*, a specific allegation had to precede an inspection.
- [46] These are both questions of law. As with all questions of law, the questions were set against a factual background. That does not make them questions of fact.
- [47] I see no distinction between the nature of the questions raised in this case and the legal

questions raised in the governing cases cited by the landlord and by the Board regarding the standard of review applicable in this matter, addressed below.

- [48] In *First Ontario Realty Corp. v. Deng*, 2011 ONCA 54, 274 O.A.C. 338, the Board had decided that tenants were entitled to a rent reduction due to a reduction of facilities provided in a residential rental complex. An appeal to the Divisional Court by the landlord was allowed. A further appeal to the Court of Appeal was dismissed, but not on the basis that the appeal failed to raise a question of law.
- [49] The issue before the Board and the courts in *Deng* was whether the landlord's removal of fenced-in gardens, lawns and walkways was a "reduction in common recreational facilities" within the definition of "services and facilities" under ss. 1(1) and 142(1) (now ss. 2(1) and 130(1)) of the *RTA*. Notwithstanding the particular factual matrix giving rise to the question, the issue was still one of statutory interpretation, involving a question of law.
- [50] In *Onyskiw v. CJM Property Management Ltd.*, 2016 ONCA 477, the issue was whether tenants were entitled to an abatement of rent as a result of the fact that the elevator in their building was out of service for 96 days in one year. The Board held that they were not. The Divisional Court dismissed the tenants' appeal, as did the Court of Appeal. Again, neither court dismissed the appeal on the basis that the issue was a question of fact or mixed fact and law. As Weiler J. A. acknowledged on behalf of the Court of Appeal, the appeal involved the interpretation of a section of the *RTA* (s. 20(1)) and whether it was an error of law on the part of the Board to refuse an abatement of rent on the basis that the landlord's behaviour was reasonable (para. 25).
- [51] Like *Deng* and *Onyskiw*, this case involves questions of law, namely, the interpretation of the meaning of "municipal taxes and charges" ins. 2(1) of the *RTA* and the exemption in paragraph (a) under that section.
- [52] In my view, therefore, this appeal is properly brought under s. 210.

What is the proper standard of review?

- [53] The appellants submit that the proper standard of review is correctness with respect to the proper legal characterization of the RHL fees and the ESA fees. They submit that correctness is the test because the Board was not interpreting a provision with which it had particular familiarity or expertise. With respect to the Board's decision that it had no power to amortize the AGI beyond 12 months, the appellants say that correctness is the standard of review because the issue raises a question of true jurisdiction.
- [54] I disagree. The proper standard of review with respect to all three issues is reasonableness.
- [55] The governing authority on the standard of review is the decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. When determining the applicable standard of review, *Dunsmuir* instructs us first to look to existing jurisprudence on the question.

There is no need to proceed from first principles where the standard of review of a tribunal's decisions on a particular issue has already been determined (paras. 57 and 62).

- [56] A look at the jurisprudence relating to reviews of the Board's decisions interpreting its home statute quickly reveals that the standard of review is reasonableness.
- [57] In *Deng*, the Divisional Court had held that the standard of review was correctness. Writing on behalf of the Court of Appeal, Karakatsanis J. A. (as she then was) began by noting that the standards of review established in *Dunsmuir* apply not only to judicial review, but also to statutory appeals, as well (para. 16). After acknowledging that a tribunal's decision may attract different standards of review depending on the issue involved, Karakatsanis J. A. proceeded to conduct the first principles analysis required under *Dunsmuir*. She concluded that the Divisional Court erred in applying a correctness standard and held that the appropriate standard was reasonableness, even where the issue before the Board involves a pure question of law in which the Board is required to apply general principles of statutory interpretation (paras. 15 and 21).
- [58] A similar conclusion was reached by the Court of Appeal in *Onyskiw*, an appeal that involved the interpretation by the Board of s. 20(1) of the *RTA*. That section imposes a duty on a landlord to provide residential rental units in a good state of repair, fit for habitation, and in compliance with health, safety and maintenance standards.
- [59] In *Onyskiw*, the Divisional Court had applied a standard of reasonableness on the appeal. The Court of Appeal upheld the Divisional Court decision to apply that standard. Writing on behalf of the court, Weiler J. A. held (paras. 28 and 29):

[28] Where an administrative tribunal interprets or applies its home statute, the standard of review is presumptively reasonableness: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 39. A correctness standard may apply if the question at issue is both of central importance to the legal system and outside the adjudicator's specialized area of expertise: *Alberta (Information and Privacy Commissioner)*, at para. 46. However, this exceptional category must be interpreted conjunctively and not as separate and distinct factors: see *Loewen v. Manitoba Teachers' Society*, 2015 MBCA 13, 315 Man. R. (2d) 123, at para. 48.

[29] Where, as here, the jurisprudence has already determined the standard of review and thus the degree of deference to be accorded to a particular category of question before a given administrative tribunal, this will end the inquiry: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 62; *First Ontario Realty Corporation v. Deng*, 2011 ONCA 54, 274 O.A.C. 338, at para. 20. Subject to the exception stated above, decisions of the Board are subject to review on a standard of reasonableness: *Deng*, at para. 21. In *Deng*, this Court held, at para. 21, that the

Board administers a specialized adjudicative regime for resolving residential tenancy disputes, and where it is required to interpret its "home statute" (the RTA) and regulations, with which it has particular familiarity, in making determinations with respect to its core functions, deference is owed to its decisions.

[60] In my view, *Deng* and *Onyskiw* require that we apply a reasonableness standard to the decisions of the Board in this case regarding the RHL and the BSA fees. A similar conclusion was reached by this Court in *Helberg Properties Ltd. v. Caldwell*, 2015 ONSC 7863, which involved an appeal of an AGI allowed by the Board on the basis of a capital expenditure by the landlord.

[61] I reach the same conclusion with respect to the issue of the amortization of the AGL. The appellants submit that the Board's decision raises a true question of jurisdiction, requiring a correctness standard. They rely on *Dunsmuir*, where the majority held that administrative bodies must be correct in their determination of "true questions of jurisdiction or *vires*" (para. 59). The appellants argue that the present case is like the decision in *Bellaire v. Ontario Aboriginal Housing Services Corp.*, 2017 ONSC 2839, in which this court applied the correctness standard to a decision of the Board. In my view, however, *Bellaire* is readily distinguishable from the case at bar.

[62] In *Bellaire*, the Board was asked in the course of an eviction proceeding to determine whether it had jurisdiction under s. 203 of the RTA to review the amount of geared-to-income rent that was being paid by the tenant. Section 203 of the RTA reads:

203. The Board shall not make determinations or review decisions concerning,

- (a) eligibility for rent-geared-to-income assistance as defined in section 38 of the *Housing Services Act, 2011* or the amount of geared-to-income rent payable under that Act; or
- (b) eligibility for, or the amount of, any prescribed form of housing assistance.

[63] The Board held that s. 203 precluded it from reviewing the amount of rent allegedly owed by the tenant. This court held that the Board had erred in reaching that conclusion because the Board incorrectly believed that the tenant's income was being paid under the *Housing Services Act, 2011*, S.O., 2011 c. 6, when it was not.

[64] *Bellaire* involved a true question of jurisdiction. Quoting from *Dunsmuir* at para. 59, Heeney J. wrote on behalf of this court at para. 19) that:

"Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. **In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.** [Emphasis added]

· in *Bellaire*.]

- [65] In the subsequent decision in *Alberta (Information and Privacy Commissioner)*, a majority of the Supreme Court of Canada confirmed that the category of true questions of jurisdiction is a narrow one and highlighted the deference owed to a tribunal interpreting its home statute (para 34):

The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction ... it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

- [66] In the present case, the Board was not being asked if it had the power to make determinations regarding the proper calculation of an AGL. Instead, it was being asked whether the power it did have could be exercised in a particular manner. The question before the Board was much more like the question before the Board in *Deng* than the question before the Board in *Bellaire*. In *Deng*, one of the issues was whether the Board had discretion to adopt a method of calculating a rent reduction for the loss of services or facilities based on the value of the loss to the tenants, as opposed to the cost of the service or facility to the landlord or the rental value of the service or facility. The Court of Appeal held that the Board had no jurisdiction to adopt an alternative method of calculating the rent reduction other than to base it on the cost to the landlord or the rental value of the service or facility. The Court of Appeal held that, notwithstanding the mandatory language of the regulation in question, the standard of review was not converted from one of deference to one of correctness (para. 21).

- [67] I see no significant distinction between the question regarding the proper method of calculating a rent reduction in *Deng* and the question of how to calculate a rent increase in this case. Neither question gives rise to a jurisdictional issue.

Is the Board's decision that the ESA fee is a municipal charge reasonable?

- [68] The landlord's application for an AGI was brought under s. 126(1) of the *RTA*. That section permits the landlord to apply for an AGI where the landlord experiences:

- I. An extraordinary increase in the cost for municipal taxes and charges or utilities or both for the residential complex or any building in which the rental units are located.

[69] "Municipal taxes and charges" are defined ins. 2(1) of the *RTA*:

"municipal taxes and charges" means taxes charged to a landlord by a municipality and charges levied on a landlord by a municipality and includes taxes levied on a landlord's property under Division B of Part IX of the Education Act and taxes levied on a landlord's property in unorganized territory, but "municipal taxes and charges" does not include,

- (a) charges for inspections done by a municipality on a residential complex related to an alleged breach of a health, safety, housing or maintenance standard,
- (b) charges for emergency repairs carried out by a municipality on a residential complex,
- (c) charges for work in the nature of a capital expenditure carried out by a municipality,
- (d) charges for work, services or non-emergency repairs performed by a municipality in relation to a landlord's non-compliance with a by-law,
- (e) penalties, interest, late payment fees or fines,
- (f) any amount spent by a municipality under subsection 219 (1) or any administrative fee applied to that amount under subsection 219 (2), or
- (g) any other prescribed charges.

[70] Vice-Chair Charron held that - the ESA fees qualified as a charge levied by the municipality. At paras. 18 and 19 of her Interim Order, the Vice-Chair wrote:

18. In 1736095 Ontario Ltd. v. Waterloo (City) [2015 ONSC 6541], the court held:

"In summary, the RHL Program requires landlords of most low-rise rental units to obtain a rental housing license, renewable annually, and to pay the prescribed license or renewal fee to the City. The rental housing license application process requires landlords to certify that the rental property is in compliance with the Building Code Act, 1992, S.O. 1992, c.23 and the Fire Protection and

Prevention Act, 1997, S.O. 1997, c. 4 and the Electrical Safety Code, O. Reg. 164/99 and to submit, inter alia, the following: (a) **a general inspection certificate report from the Electrical Safety Authority ("ESA") (required every five years)**; (b) an HVAC certificate (required every five years); (c) proof of insurance (required annually); (d) a criminal record check (required every five years); and, (e) a floor plan for the rental property." [At para. 11 Emphasis Added]

19. The Divisional Court clearly contemplated that landlords were to obtain a general inspection report from the ESA as a component of the licensing program and there is no evidence before me that if the inspection is conducted by ESA, and not directly by the Landlord, that the fee charged for the inspection ceases to be a municipal charge.

- [71] The appellants submit that Vice-Chair Charron erred in two important ways in reaching the conclusion she did. First, they submit that whether the ESA inspection is carried out by the landlord is immaterial to the question of whether the inspection fees are a municipal charge. Instead, the appellants submit that what matters is whether the fees are charges levied on a landlord by a municipality. They submit that the ESA is a completely separate entity than the municipality and that the inspection fee bears no similarity to taxes. They also submit that the term "levy" is not one that can properly be used to describe the fee paid by the landlord to the ESA. In summary, the appellants submit that, in order to be a municipal tax or charge, the expense must be paid directly to a municipality and not to a third party, even if required by municipal by-law to do so.
- [72] I disagree. To understand why, it is important to bear in mind that we are not called upon to determine if the ESA fee is a municipal tax or charge. Rather, we are called upon to determine if the Board's conclusion that it is was reasonable.
- [73] As the Supreme Court of Canada explained in *Dunsmuir*, in judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (para. 47). The same concerns apply to the reasonableness standard of review on a statutory appeal such as this one: *Deng*, at para. 16.
- [74] Vice-Chair Charron's comments in para 19 of her Interim Order must be read in the context of her reference to the decision in *173*. In *173*, the landlord argued that by-law 2011-047 was, in fact, a taxing statute and, therefore, was *ultra vires* the municipality. This Court held that it was not. Instead, the court found that the RHL fee was a levy (para. 71). On a fair reading of Vice-Chair Charron's Interim Order, it appears that she relied on the decision in *173*, incorrectly in my view, as authority for the proposition that the ESA fees are a charge levied by the municipality within the meaning of s. 2(1) of the

RTA. The court in *173* did not decide the nature of the residential housing by-law in that context. It decided the validity of the by-law in a jurisdictional context. The decision does not stand as authority that fees paid by a landlord to a third party as part of the RHL process are municipal charges. In this sense, Vice-Chair Charron's decision on the issue cannot be said to meet the requirement of justification.

- [75] Absent clear authority on the issue, in order to determine whether the ESA fees are charges levied by a municipality which qualify for an AGI under s. 126(1) of the *RTA*, Vice-Chair Charron ought to have engaged in a process of statutory interpretation. Presumably because she incorrectly believed that she was bound by this Court's decision in *173*, she did not do so. In these circumstances, this Court is entitled to conduct its own statutory analysis: see *2274659 Ontario Inc. v. Canada Chrome Corp.*, 2016 ONCA 145 at para. 47, citing *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, [2013] 3 S.C.R. 895 (S.C.C.) at paras. 37-70; and *Canada (Attorney General) v. Mowat*, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.) at paras. 32-64. When one undertakes the necessary analysis, it is clear that Vice-Chair Charron's decision fits within a range of reasonable, defensible outcomes.
- [76] The modern principle of statutory interpretation requires that the words of an Act be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of the Legislature: *Rizzo & Rizzo Shoes Ltd. (RE)*, [1998] 1 S.C.R. 27, at para. 21; *Rooney v. ArcelorMittal SA.*, 2016 ONCA 630, 133 O.R. (3d) 387, at paras. 10-21.
- [77] The object of the *RTA* is set out ins. 1 of that Act, as follows:
1. (1) The purposes of this Act are to provide protection for residential tenants from unlawful rent increases and unlawful evictions, to establish a framework for the regulation of residential rents, to balance the rights and responsibilities of residential landlords and tenants and to provide for the adjudication of disputes and for other processes to informally resolve disputes.
- [78] The appellants argue that, in keeping with the object of the *RTA*, the scheme of the Act is to require that landlords, and not tenants, bear the costs of routine maintenance. This may be true. However, contrary to the submissions of the appellants, the RHL and ESA fees are not part of routine maintenance. They form part of an inspection scheme designed to ensure that certain standards are met, for the benefit of the tenants. In keeping with the object and scheme of the *RTA*, where those inspections reveal deficiencies, the landlord, and not the tenant, bears the costs of bringing the premises into compliance.
- [79] Section 126(1) of the *RTA* does not seek to pass on the costs of routine maintenance to tenants. Instead, in keeping with the object of the Act, it seeks to pass on extraordinary increases in municipal taxes and charges in the same way such increases are ordinarily passed on to the occupants of dwellings owned by those occupants.

- [80] The intention of the Legislature to flow extraordinary municipal taxes and charges through to tenants becomes obvious when one considers the definition of municipal taxes and charges set out in s. 2(1) of the *RTA* and, in particular, the exemptions listed thereunder. The Legislature clearly wished to exempt tenants from taxes and charges imposed upon a landlord by a municipality for expenses for which the landlord was to blame, or at least with respect to expenses that could have been avoided by the landlord with due diligence. I will return to discuss these exemptions when I address the RHL fees.
- [81] In my view, to interpret the definition of municipal taxes and charges as the appellants suggest would be at odds with the object and scheme of the *RTA*. To require that charges must be paid directly to the municipality would result in an absurdity by exempting from the flow-through scheme any fee that a municipality demanded a landlord to pay to a third party, regardless of the nature of the fee or charge.
- [82] Such an interpretation would also be at odds with the ordinary and grammatical meaning of the words in s. 2(1). If the Legislature wished to add the words "when paid directly to" the municipality, it could have done so. It did not. Instead, it defined municipal taxes and charges by virtue of the authority under which they were imposed, namely the municipality, and not by virtue of the identity of the party to which they were paid.
- [83] For these reasons, I believe that, although the reasons of Vice-Chair Charron fail to meet the requirement of justification, her decision nonetheless fits within a range of reasonable outcomes that are defensible in fact and in law.
- [84] The second error alleged by the appellants to have been committed by Vice-Chair Charron relates to the evidentiary onus on the question of the ESA fees. The appellants submit that the landlord had the onus of demonstrating that the ESA fees were a municipal charge. I agree with this submission. However, the appellants also submit that Vice-Chair Charron's comment that there was no evidence before her that an electrical inspection ceases to be a municipal charge if conducted by someone other than the landlord shows that she incorrectly reversed that onus. I am unable to agree with this submission.
- [85] I do not read the Vice-Chair's comments as suggesting that the tenant bore the evidentiary onus. Instead, I read her comment to mean that there was no reason to conclude from the record before her that the characterization of the ESA fees as a municipal charge changes as a result of who conducts the inspection. Nor do I read Vice Chair Charron's comment as suggesting that the evidentiary onus was not met. This was not a question that turned on the absence of evidence. It was a legal question. The Board had all of the evidence that it required from the landlord, who had submitted a copy

of the by-law, the ESA fee schedule, and receipts for payment.

[86] For these reasons, I would not give effect to this ground of appeal.

Is the Board's decision that the RHL and ESA fees are not exempt as municipal charges reasonable?

[87] The appellants concede that the RHL fee is a municipal charge. However, they submit that, if the ESA fee is also a municipal charge, both the ESA and the RHL fees fall within the exemption contained in paragraph (a) under the definition of "municipal taxes and charges" in s. 2(1) of the *RTA*. For the sake of convenience, I will set that clause out again here:

... but "municipal taxes and charges" does not include,

(a) charges for inspections done by a municipality on a residential complex related to an alleged breach of a health, safety, housing or maintenance standard...

[88] The appellants submit that if the ESA fees need not be paid directly to a municipality in order to qualify as municipal charges, then the inspections for which the fees are paid also need not be done directly by a municipality in order to be exempt under paragraph (a).

[89] With respect to both the RHL and ESA fees, the appellants argue that there is no authority to suggest that the words "related to an alleged breach" in paragraph (a) require that the allegation occurs before the inspection (facturn, para. 26). The appellants submit that the effect of the RHL program is to create a presumption that the landlord of a low rise residential rental unit is in breach of health, safety, housing and/or maintenance standards unless and until the requisite inspections are passed.

[90] I cannot agree. There is no authority for the proposition that an allegation must occur before an inspection in order for the exemption to apply under paragraph (a) because no authority is needed. The paragraph is incapable of bearing such a meaning.

[91] There is nothing in the grammatical and ordinary sense of the words used in paragraph (a) that would support the interpretation urged by the appellants. The ordinary and grammatical meaning of the words "related to" (an alleged breach) is that the inspection must have arisen from an alleged breach. In order for an inspection to arise from an alleged breach, the allegation must occur before the inspection.

[92] Moreover, the interpretation urged by the appellants does not accord with the context of the *RTA*, nor with its scheme and object. As I stated earlier, all of the exemptions set out in paragraph (a) through (f) have in common some element of fault on the part of the landlord for failing to properly maintain a property or some element of unjust enrichment of the landlord by virtue of the municipality having stepped in to do so. The interpretation suggested by the appellants would completely denude these paragraphs of any effect. In essence, it would remove the element of fault or unjust enrichment on the part of the landlord. This would be contrary to the clear intention of the Legislature in exempting the charges set out in paragraphs (a) through (f).

[93] The appellants argue that an allegation need not be proven under paragraph (a) in order to exempt the charges for inspections done as a result thereof. The appellants contend that, in such a case, even an exemplary landlord would still be deprived of the ability to flow the cost of such an inspection through to the tenants as a municipal charge. We have not been provided with any jurisprudence in support of this argument. Without intending to decide the issue, such an interpretation might not survive the modern principle of statutory interpretation relied upon by the appellants in support of their argument that the fees at issue in this case are exempt.

[94] For these reasons, I would dismiss this ground of appeal.

Is the Board's decision that it has no discretion to amortize the AGI over more than 12 months reasonable?

[95] Vice-Chair Charron dismissed the tenant's request for a review hearing regarding the RHL and ESA fees. However, she granted the tenant's request for a review hearing with respect to the manner in which the AGI should be calculated under s. 31 of the regulation and stayed the order of Member Joy pending the hearing. Because the landlord had not had an opportunity to make submissions on the issue, she directed that an oral hearing be held with respect to whether "the Board has, and ought to exercise discretion to spread the AGI over several years" (Interim Order, para. 2).

[96] The relevant parts of s. 31 of the regulation read as follows:

31. The percentage rent increase above the guideline for each rental unit that is the subject of the application shall be calculated in the following manner:

1. Divide the amount of each allowance determined under subsection 29 (2), subsection 29 (3) and section 30 by the total rents for the rental units that are subject to the application and are affected by the operating cost.
2. If the Board is of the opinion that the amount determined under paragraph 1 for an allowance does not reasonably reflect how the rental units that are subject to the application are affected by the operating cost to which the allowance relates,

1. paragraph 1 does not apply in respect to the allowance, and
 - n. the Board shall determine an amount by another method that, in the opinion of the Board, better reflects how the rental units that are subject to the application are affected by the operating cost to which the allowance relates.

[97] The oral hearing proceeded before Vice-Chair Usprich. The tenant argued before her that the Board had discretion under s. 31 of the regulation to spread the AGI over time and that it ought to do so as a result of the fact that (a) the ESA fee covered a period of five years and (b) the amount of the RHL fees decreased by almost 50% after the first year. The tenant argued that, by spreading the ESA fee over five years and by allocating half of the total RHL fees paid over two years for each of those years, the appropriate rental increase was 3.59 percent above the guideline. The tenant argued that this method of calculating the AGI "better reflected" how the rental units were affected by the operating cost.

[98] Vice-Chair Usprich rejected the tenant's argument. Having found that the appropriate standard of review on this issue is reasonableness, the question now to be considered is whether her decision was reasonable. I have no doubt that it was.

[99] Vice-Chair Usprich held that the Board had no discretion to allocate rent under s. 31 of the regulation because s. 126(10) of the *RTA* imposed a mandatory obligation on the Board to allocate the AGI over a twelve month period. She referred to s. 126(10), which sets out the order the Board can make if satisfied that an AGI is justified. It reads:

(10) Subject to subsections (11) to (13), in an application under this section, the Board shall make findings in accordance with the prescribed rules with respect to all of the grounds of the application and, if it is satisfied that an order permitting the rent charged to be increased by more than the guideline is justified, shall make an order,

(a) specifying the percentage by which the rent charged may be increased in addition to the guideline; and

(b) subject to the prescribed rules, specifying a 12-month period during which an increase permitted by clause (a) may take effect.

[100] Vice-Chair Usprich compared the language of this section, in which a 12 month period is specified with respect to applications of the type made in this case, with the language of s. 126(11), which permits the Board to allocate a rental increase associated with capital expenditures over two 12 month periods. She concluded that the Board had no discretion in light of this specificity in the *RTA* to allocate the AGI in question over a period of more than 12 months.

[101] Vice-Chair Usprich held that the *RTA* took precedence over the regulation and, therefore,

s. 31, clause 2. ii. of the regulation did not give the Board the discretion urged upon it by the tenant. Her decision was a reasonable one. Vice-Chair Usprich's reasons meet the requirement of transparency, justification and intelligibility. Her conclusion falls within a range of reasonable outcomes that is defensible in terms of both the facts and the law.

[102] For these reasons, I would dismiss this ground of appeal.

CONCLUSION

[103] The appeal does raise questions of law, which questions are reviewable on a standard of reasonableness.

[104] The Board's decisions that the ESA fee was a municipal charge and that neither the ESA nor RHL fees were exempt, were reasonable. So, too, was the Board's decision that it had no discretion to allocate the AGI over more than 12 months.

[105] While the appellants were not given proper notice of the landlord's application or disclosure of the basis upon which it was made, the denial of procedural fairness that resulted was cured by the reviews undertaken by the Board.

[106] For these reasons, the appeal must be dismissed.

COSTS

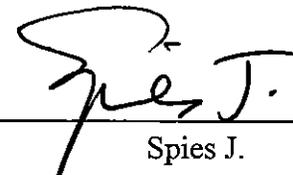
[107] At the hearing of the appeal, it was agreed that, if the appeal was dismissed, costs would be payable by the appellants to the landlord in the amount of \$7,500, all-inclusive.

[108] I would so order.



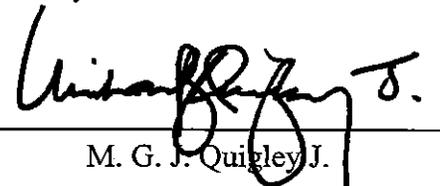
Ellies J.

I agree



Spies J.

I agree



M. G. J. Quigley J.

CITATION: Houston v. 530675 Ontario, 2017 ONSC 6419

DIVISIONAL COURT FILE NO.: DC-17-828

DATE: 20171207

**ONTARIO
SUPERIOR COURT OF
JUSTICE
DIVISIONAL COURT
FILE NO. DC-17-828**

LESLIE HOUSTON and JULIA SEIRLIS

Appellants (Tenants)

-and-

530675 ONTARIO LIMITED O/A MAYFIELD ESTATES LP

Respondent
(Landlord)

REASONS FOR DECISION
