

CITY OF HAMILTON**PLANNING AND ECONOMIC DEVELOPMENT DEPARTMENT***Strategic Services and Special Projects Division*

TO: Chair and Members Planning Committee	WARD(S) AFFECTED: CITY WIDE
COMMITTEE DATE: February 15, 2011	
SUBJECT/REPORT NO: Zoning and the <u>Human Rights Code</u> (PED11029) (City Wide)	
SUBMITTED BY: Tim McCabe, General Manager Planning & Economic Development Department	PREPARED BY: Shannon Hamilton (905) 546-2424 ext. 7491
SIGNATURE:	

RECOMMENDATION:

- (a) That Report PED11029 respecting Zoning and the Human Rights Code be received.

EXECUTIVE SUMMARY**Council Direction:**

Council, at its meeting of April 28, 2010, approved the following: "That the correspondence from Barbara Hall, Chief Commissioner, Ontario Human Rights Commission respecting Land Use Planning and the Human Rights Code be received and referred to the General Manager of Planning and Economic Development for a report to the Economic Development and Planning Committee."

Information:

On April 28, 2010, City Council received correspondence from Barbara Hall, Chief Commissioner, Ontario Human Rights Commission, respecting "Land use planning and the Human Rights Code" (attached as Appendix "A" to Report PED11029). Chief Commissioner Hall's letter warns of the potential impact of zoning by-laws on groups,

such as people with disabilities or people in receipt of social assistance, protected under the Human Rights Code.

The Chief Commissioner's correspondence was referred to the General Manager of Planning and Economic Development for a report to the Planning Committee (formerly Economic Development and Planning Committee). This Report fulfils that directive.

Alternatives for Consideration – Not Applicable

FINANCIAL / STAFFING / LEGAL IMPLICATIONS (for Recommendation(s) only)

Financial: **None.**

Staffing: **None.**

Legal: **None.**

HISTORICAL BACKGROUND (Chronology of events)

Barbara Hall, Chief Commissioner, Ontario Human Rights Commission, has sent correspondence to the Mayor on two occasions in the past two years with respect to the impact of municipal by-laws on groups protected under the Human Rights Code.

The first letter, dated December 19, 2008 (as shown in Appendix "C" to Report PED11029), dealt with the licensing of rental housing. It was intended to raise awareness of human rights issues and to ensure that the City did not adversely affect people from Human Rights Code protected groups by limiting accessible or affordable housing options. In response, Report PED07296(d), which outlined the strategic approach being taken by the City of Hamilton to investigate the regulation of residential rental housing, was forwarded to the Ontario Human Rights Commission.

The second letter, dated April 14, 2010, (as shown in Appendix "A" to Report PED11029), deals with zoning by-laws. Like the first letter, the second letter is intended to remind the City that it must avoid discriminating against people from protected groups by limiting their housing options.

POLICY IMPLICATIONS

None.

RELEVANT CONSULTATION

Legal Services was consulted in the preparation of this Report.

ANALYSIS / RATIONALE FOR RECOMMENDATION

(include Performance Measurement/Benchmarking Data, if applicable)

Ontario Human Rights Commission

In her April 14, 2010 letter, Chief Commissioner Hall cites two recent legal decisions.

In the first decision, *Death v. Neighbourhoods of Winfields Limited Partnership*, several landlords were found to have breached the City of Oshawa's zoning by-law by operating lodging houses in a residential zone where they were not permitted. This decision was appealed first to the Ontario Court of Appeal, where it was upheld, and then to the Supreme Court of Canada, where leave to appeal was refused in November 2009. As the letter indicates, the issue of zoning by-laws and the Human Rights Code was not considered as the Ontario Human Rights Commission's application to intervene, made only when the matter was appealed to the Supreme Court of Canada, was refused together with the leave to appeal. The decision did affirm the authority of municipalities to zone density.

The second decision is a January 2010 interim decision of the Ontario Municipal Board, *Advocacy Centre for Tenants Ontario v. Kitchener (City)*. The City of Kitchener and Region of Waterloo attempted to restrict further development of a neighbourhood for "single person, low income households" and "residential care facilities and social/supportive housing". The Official Plan amendment and Zoning By-law amendment enacted to do this were appealed. The Ontario Human Rights Commission made a written submission arguing that the Ontario Municipal Board should consider whether or not the Official Plan and Zoning By-law amendments were consistent with the Human Rights Code. The Ontario Municipal Board found in favour of the municipalities' objectives of "decentralizing institutions" and "fostering a neighbourhood mix." It also agreed with the municipalities with respect to seeking to distribute the institutions throughout Kitchener. It did find that measures restricting development in the neighbourhood were "premature" as the required planning analysis had yet to be done, including consideration of consistency with the Human Rights Code. The Ontario Municipal Board gave an interim decision requiring the municipalities to return when the planning analysis has been done, warning that the needs of all residents must be addressed.

Chief Commissioner Hall's April 14, 2010 letter, which used the two legal decisions to highlight the Ontario Human Rights Commission's message that municipal by-laws cannot conflict with the Human Rights Code, is repeated in the Ontario Human Rights

Commission's comments on the City of Toronto's proposed Zoning By-law dated September 25, 2009. The Ontario Human Rights Commission identified "that zoning by-laws should be deemed invalid if their purpose is to regulate the user, as opposed to the use of the land". The Ontario Human Rights Commission went on to identify a number of concerns regarding regulations that impacted group homes, residential care homes, senior's community houses, rooming and lodging houses, municipal shelters and crisis care shelters, namely regulations that:

- are not based on a legitimate urban planning rationale and have the effect of people zoning as opposed to zoning the use of land;
- result in barriers to the location of affordable housing, lodging houses, emergency shelters, care facilities and retirement homes; and
- place onerous zoning restrictions on housing serving people from Code-protected groups, which may prevent people from living in the neighbourhoods of their choice.

Hamilton Zoning By-laws

Zoning By-laws, currently in place for the City of Hamilton and former municipalities, have regulations specific to the capacity and the radial distance separation of care facilities. This includes the new Institutional Zones, implemented as the third stage of Comprehensive Zoning By-law 05-200, which established regulations for Residential Care Facilities and Correctional Residences. The Neighbourhoods component of the Comprehensive Zoning By-law 05-200, which will also establish regulations for care facilities, is currently underway, but cannot be implemented until the Urban Official Plan is in effect.

Comprehensive Zoning By-law 05-200 regulations with respect to care facilities are based on "The Residential Care Facilities, Long Term Care Facilities and Correctional Facilities Discussion Paper" completed in May 2001, discussions with Community Services Division as well as individual operators of facilities.

"Residential Care Facilities, Long Term Care Facilities and Correctional Facilities Discussion Paper"

In May of 2001, the "Residential Care Facilities, Long Term Care Facilities and Correctional Facilities Discussion Paper" outlined a number of recommendations to bring the City of Hamilton's planning policies and zoning by-law regulations up to date. The discussion paper emphasized the role that various types of living arrangements play, such as supportive housing, in creating a complete community. The paper also highlighted that planning policy and regulation should provide the opportunity for these facilities to be created as part of the community. The regulations and policy of the day

did not reflect the need to create harmoniously integrated communities. As a result, the following recommendations were made:

1. To include policies in the new City of Hamilton Official Plan(s) and Secondary Plans:
 - To provide more consistent access in all parts of the region for residential care facilities and long term care facilities;
 - To permit residential care facilities/retirement homes “as of right” in all urban areas;
 - To limit over-concentration of facilities in the region/city;
 - To establish location criteria and performance standards for all facilities; and,
 - To define performance standards for correctional facilities for consideration in further zoning submissions.

Status: The Urban Official Plan included new policies for care facilities throughout the City of Hamilton in a consistent manner to encourage care facilities in all urban areas of the City.

2. To include new definitions in the Zoning By-law for:
 - Retirement home;
 - Correctional facility; and,
 - Long term care facility.

Status: In March of 2007, new Institutional Zones were created for facilities with a capacity greater than 6 residents. Care facilities with less than 6 residents will be addressed through the Residential Zoning process.

3. To eliminate the definition of short term care facilities and home for elderly persons which are redundant.

Status: The definitions of short term care facility and home for elderly persons was removed as a part of the new Institutional Zones in 2007.

4. To create two new zoning districts (complete with performance standards – setbacks, height, etc.).
 - Large scale institutional districts to allow long term care facilities and large retirement homes (50+ residents); and,
 - Small scale institutional, smaller retirement homes (21-50 residents).

Status: Three new Institutional Zones were created to address the variation in the level of service and locational criteria for care facilities across the City. The capacities were also reviewed during the Institutional Zoning process to evaluate the necessary number of residents

needed to run a facility and were revised according to this research as explained in the Institutional Zones summary below.

5. To modify the existing Zoning By-law regulations
- To increase the radial separation distance from 180m to 300m for residential care facilities;
 - To establish a radial separation distance for correctional facilities from any other correctional facility or residential care facility;
 - To establish a minimum capacity of 4 residents for a residential care facility; and,
 - To allow residential care facility as a permitted use in the residential zones.

Status: By-law 07-101 established a radial distance separation of 300 metres for any new residential care facility or correctional residence throughout the City and the Institutional Zones established the capacity for any residential care facility. Through the Neighbourhood Zoning process residential care facilities with a capacity of 6 or less residents will be permitted in all residential zones.

Institutional Zoning Process

Following the completion of the “Residential Care Facilities, Long Term Care Facilities and Correctional Facilities Discussion Paper”, and as a part of the Comprehensive Zoning By-law 05-200, the Institutional Zoning process began in 2005. Using the recommendations of the Discussion Paper, the foundation of the Institutional Zones was established and further modified based on consultation with Community Services as well as a number of private operators.

Those facilities with a capacity greater than 6 residents are still permitted within residential areas, however, are specifically zoned for institutional purposes. During the Institutional Zoning process and with consultation with the Community Services Division, staff acknowledged that facilities with greater than 6 residents benefit from locating within stable residential communities, however, provide a different level of service and have greater requirements for built form, access to community services, as well as transit. In order to address the differences, three levels of Institutional Zones were created: Neighbourhood Institutional (I1) Zone, Community Institutional (I2) Zone and Major Institutional (I3) Zone.

Neighbourhood Institutional (I1) Zone

The Neighbourhood Institutional (I1) Zone permits Elementary Schools, Places of Worship, Day Nursery, Emergency Shelter, Residential Care Facilities and Retirement Homes. The I1 Zone has been applied within stable residential areas

throughout the City and permits a range of Institutional and Residential uses that are typically located within a built form that is compatible and appropriate in comparison to the existing residential built form. A maximum capacity of 15 residents is permitted within the I1 Zone. The regulation reflects that the uses are appropriately located within the residential area, however, that the capacities are higher than that which would typically be found within a residential dwelling.

Community Institutional (I2) Zone

The Community Institutional (I2) Zone permits Elementary Schools, High Schools, Places of Worship, Day Nursery, Residential Care Facility, and Retirement Home. The I2 Zone is also located within existing stable residential areas, however is typically located on arterial and collector roads. The I2 Zone allows for a maximum capacity of 50 residents. The maximum capacity associated with this zone acknowledges that the built form, parking requirements, staffing requirements for care facilities is higher and creates a different land use impact within the residential area.

Major Institutional (I3) Zone

The Major Institutional (I3) Zone permits a wider range of Institutional uses including, Medical Clinic, Medical Office, Social Services Establishment, as well as the care facilities permitted within the I1 and I2 Zones. The I3 Zone was created to recognize the need for Long Term Care Facilities. After consultation with a number of different private facilities and public bodies, a third institutional zone was added. The consultation proved that there was a need for a zone that addressed the locational requirements and land use differences between various institutional facilities. The Major Institutional I3 Zone recognizes that there are facilities that require large areas of land, parking for residents, visitors and staff, easy access to community services and transit. Given the requirements, the appropriate location for Long Term Care Facilities is at major intersections where other commercial, retail, and services are located, as well as all major transportation routes.

In all of the Institutional Zones, a radial distance separation has been established for Residential Care Facilities and Emergency Shelters of 300 metres. During the research and analysis phase of the Institutional Zones, a reference map (as shown in Appendix “B” of Report PED11029) was created that identified the location of all existing Residential Care Facilities. The map clearly showed that there is a concentration of care facilities within the downtown core as well as in Ward 3. The downtown core has been over saturated with care facilities, placing stress on the community services required by the residents. After reviewing the map and acknowledging that there were few facilities elsewhere in the City, it was determined that the concentration should be

more equally dispersed throughout the Municipality to increase proximity to other community services, and transit.

Urban Official Plan

The Housing Policies of the Urban Official Plan ensure that housing is available for all residents with a wide variety of needs. In order to do so, there must be a sufficient supply of housing with a range of housing types, forms, tenures, densities, affordability levels and housing with support services. The following policies specifically address the need for support services throughout the City:

3.2.1 Urban Housing Goals

- 3.2.1.1 Provide for a range of housing types, forms, and densities to meet the social, health and well being requirements of all current and future residents.
- 3.2.1.3 Increase Hamilton's stock of housing for those whose needs are inadequately met by existing housing forms or tenure, affordability or support options.
- 3.2.1.6 Increase the mix and range of housing types, forms, tenures, densities, affordability levels, and housing with supports throughout the urban area of the City

3.2.4 General Policies for Urban Housing

- 3.2.4.3 Housing with supports, including residential care facilities, shall be permitted in the Institutional, Neighbourhoods, Commercial and Mixed Use designations, as shown on Schedule E-1 Urban Land Use Designations, and shall be subject to zoning regulations where applicable.

Residential Zoning Process

The Residential Zoning process for the Comprehensive Zoning By-law 05-200 is in the beginning stages. During this process, staff will be concentrating on the dynamics of residential areas across the City. Staff will be relying on the recommendations of the "Residential Care Facilities, Long Term Care Facilities and Correctional Facilities Discussion Paper" and on the goals and policies contained in the Urban Official Plan.

Conclusion

The City of Hamilton approaches zoning residential uses by applying the recommendations made by the "Residential Care Facilities, Long Term Care Facilities

and Correctional Facilities Discussion Paper” to the City’s Official Plan and Zoning By-law as these are developed. This approach has and will continue to result in an Official Plan and Zoning By-law based on a legitimate urban planning rationale, designed to encourage all housing types, including accessible and affordable housing types, throughout the City, and to give all residents the opportunity to live in neighbourhoods of their choice.

ALTERNATIVES FOR CONSIDERATION:

(include Financial, Staffing, Legal and Policy Implications and pros and cons for each alternative)

None.

CORPORATE STRATEGIC PLAN (Linkage to Desired End Results)

Focus Areas: 1. Skilled, Innovative and Respectful Organization, 2. Financial Sustainability, 3. Intergovernmental Relationships, 4. Growing Our Economy, 5. Social Development, 6. Environmental Stewardship, 7. Healthy Community

Financial Sustainability

- ♦ Effective and sustainable Growth Management

Intergovernmental Relationships

- ♦ Maintain effective relationships with other public agencies

Social Development

- ♦ Everyone has a home they can afford that is well maintained and safe

Healthy Community

- ♦ Plan and manage the built environment

APPENDICES / SCHEDULES

Appendix “A” to Report PED11029 -	April 14, 2010 Letter to Mayor Eisenberger from Barbara Hall, Ontario Human Rights Commissioner
Appendix “B” to Report PED11029 -	Radial Distance Separation Mapping for Residential Care Facilities
Appendix “C” to Report PED11029 -	December 19, 2008 Letter to Mayor Eisenberger and Members of Hamilton City Council from Barbara Hall, Ontario Human Rights Commissioner

Ontario Human
Rights Commission

Commission ontarienne
des droits de la personne

Office of the Chief Commissioner

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COPY



April 14, 2010

Mayor Fred Eisenberger
Hamilton City Centre
77 James Street North, Suite 230
Hamilton, ON
L8R 2K3

Dear Mayor Eisenberger:

Re: Land use planning and the Human Rights Code

I wanted to write to you about some recent developments involving land use planning and the Ontario *Human Rights Code* (*Code*). Two legal decisions have resulted in many questions to the OHRC about the impact of the *Code* on municipal zoning.

In November 2009, the Supreme Court of Canada dismissed an application for leave to appeal by several landlords in the case *Death v. Neighbourhoods of Windfields Limited Partnership*.¹ The landlords attempted to challenge a Court of Appeal decision that affirmed that they were operating lodging houses in breach of the City of Oshawa's zoning by-law, which prohibits this form of housing in certain neighbourhoods. The Court of Appeal indicated that a relevant factor was how the renters related amongst themselves when determining whether they constituted a "single housekeeping establishment". However, neither the Superior Court nor the Court of Appeal examined this issue from the perspective of the *Code*.²

The OHRC had applied to intervene in the Supreme Court application because of the potential human rights impact on students and other groups protected by the *Code*. However, the Supreme Court refused to hear the appeal and therefore it did not examine the merits of the case or the human rights issues involved.

Afterward, some people suggested that the *Death* case laid to rest any human rights concerns regarding lodging houses. That is not the OHRC's interpretation. There are still unresolved questions around zoning related to lodging houses, and restricting the ability of people to share accommodation based on their relationship to one another. Municipalities should be cautious when enacting or enforcing by-laws that rely on a narrow understanding of "family" to define the use, occupancy or zoning of a structure, as this may give rise to concerns of discrimination and open municipalities to human rights challenges.

The January 2010 decision of the Ontario Municipal Board (OMB)³ made it clear that municipalities are bound by the *Code*, and have to consider the needs of everyone – including

¹ *Death v. Neighbourhoods of Windfields Limited Partnership*. (2009) S.C.C.A. No. 253.

² *Neighbourhoods of Windfields Limited Partnership v. Death* (2008) O.J. No. 3298; *Neighbourhoods of Windfields Limited Partnership v. Death* (2009), ONCA 277, respectively.

³ *Advocacy Centre for Tenants Ontario v. Kitchener (City)* (2010) O.M.B.D. Case No. PL050611.

people with disabilities or people in receipt of social assistance – when enacting by-laws. In that case, the OMB stated that when restricting prospects for housing for persons with disabilities or receiving social assistance, a sufficient planning analysis was required. This planning analysis should have included consideration of the *Code* and whether or not the City had engaged in “people zoning”, which is prohibited.⁴ Although the context of the case involved people with disabilities and single-person, low-income households, these are broad general principles that should be applied when considering municipal by-laws that may affect any *Code*-protected group, including immigrants, young people, older individuals, people from racialized and Aboriginal communities, single people, people with children, and women.

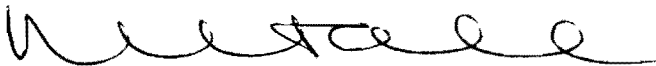
The OMB indicated that the *Code* appears to prohibit by-laws and planning instruments that have discriminatory effects on groups protected by the *Code*. A municipality that seeks to justify a discriminatory by-law might be expected to demonstrate that the by-law was established in good faith, was reasonable, and that real and substantial efforts were made to accommodate the needs of persons who were adversely affected. The OMB also stated, “[A municipality] might also be expected to establish, on a substantive level, that it is not possible to accommodate, short of undue hardship.”

The OHRC will continue to use its mandate to work with municipalities, the provincial government, and community stakeholders to help answer questions that have been raised about land use planning and by-laws which may be inconsistent with the *Code*. One of our goals is to provide clarity on the expectations of the *Code*. We invite you to be part of a continuing dialogue on this issue and will be following up in the coming months with further information.

In the meantime, you might wish to review the OHRC's submission to the City of Oshawa about its student accommodation strategy. This submission discusses in greater detail many of the issues outlined in this letter and can be found in English and French on the OHRC's website at www.ohrc.on.ca.

Should you have concerns or questions, please contact me or Anya Kater, Senior Policy Analyst, at 416-314-4551.

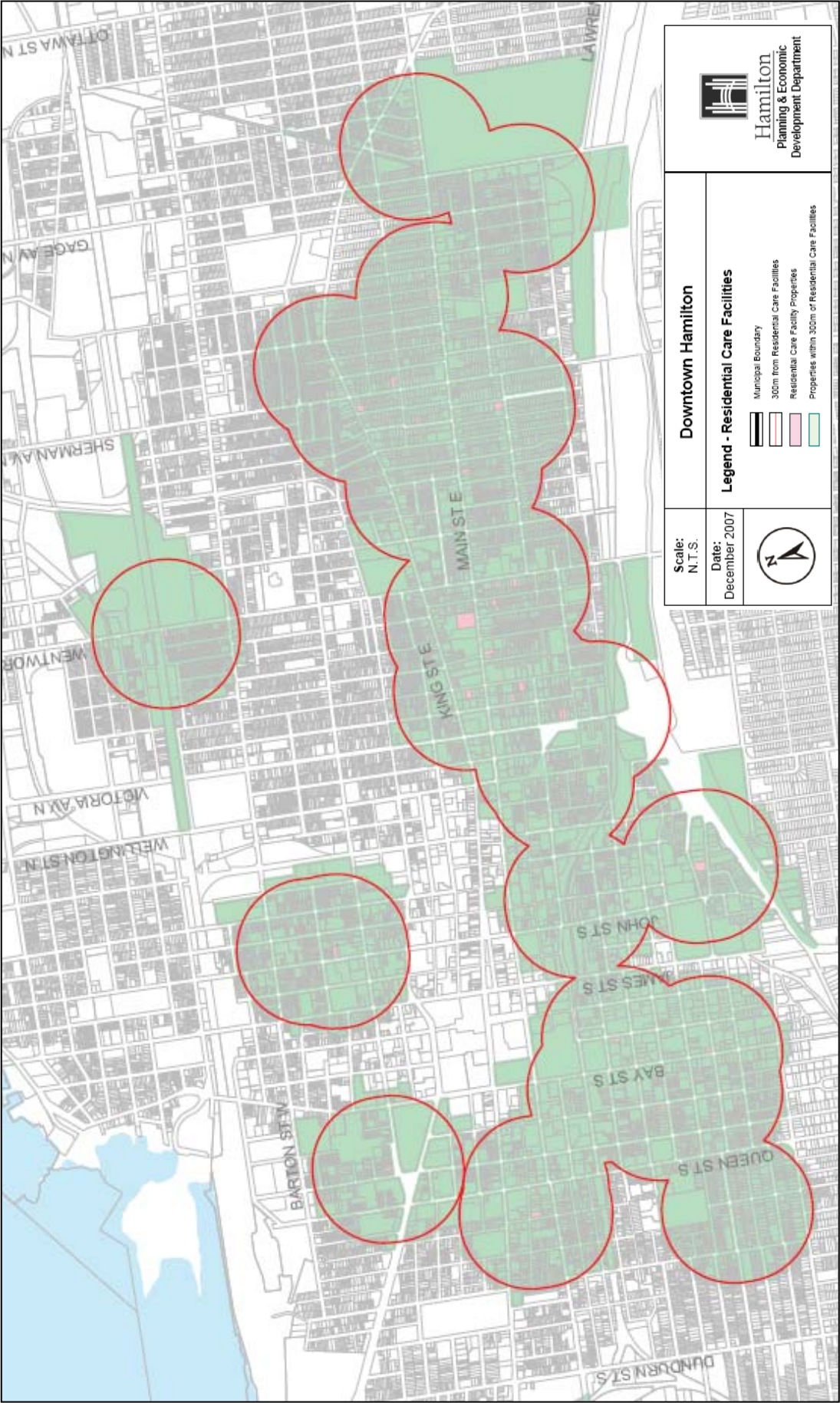
Yours truly,

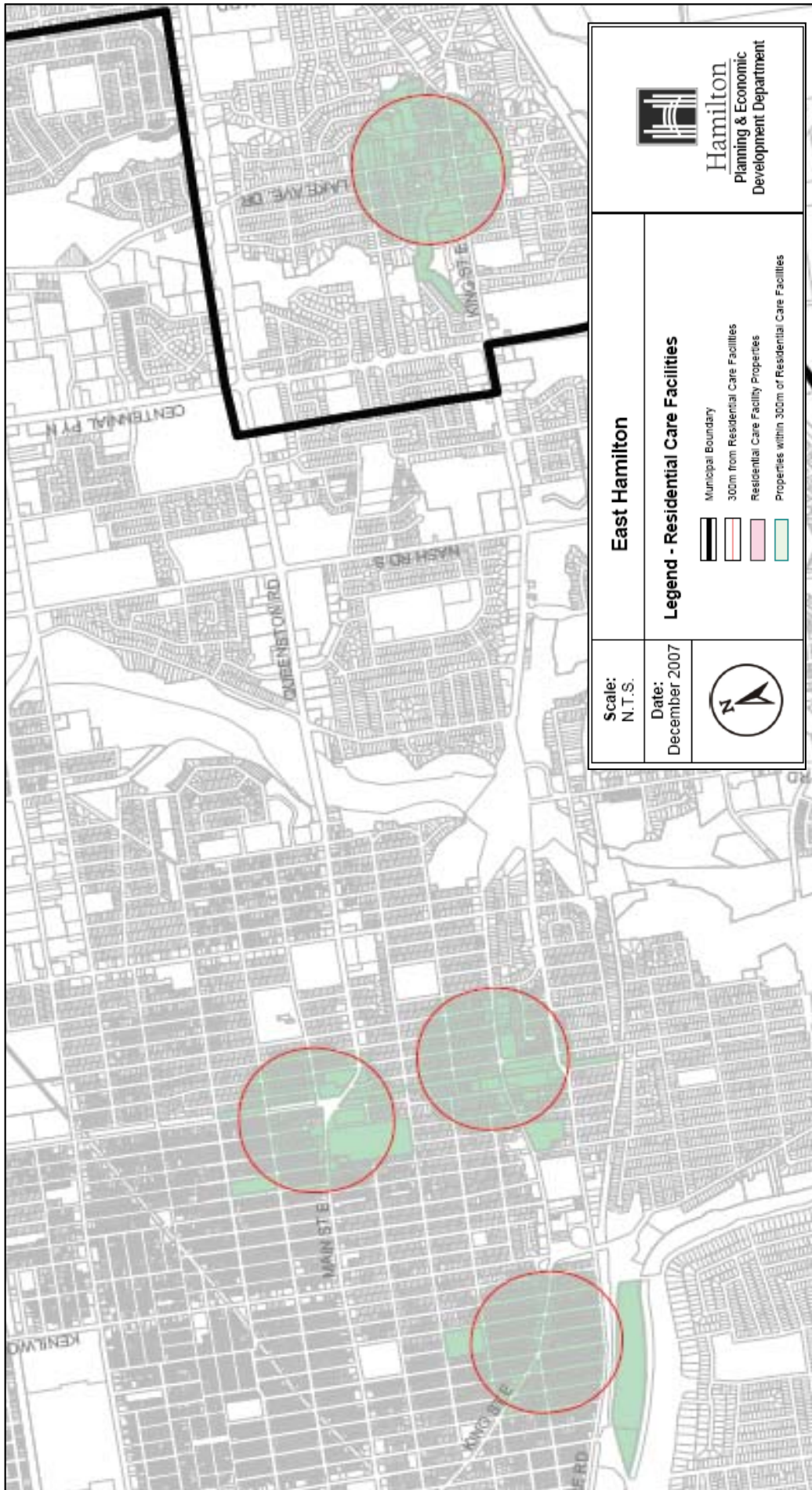


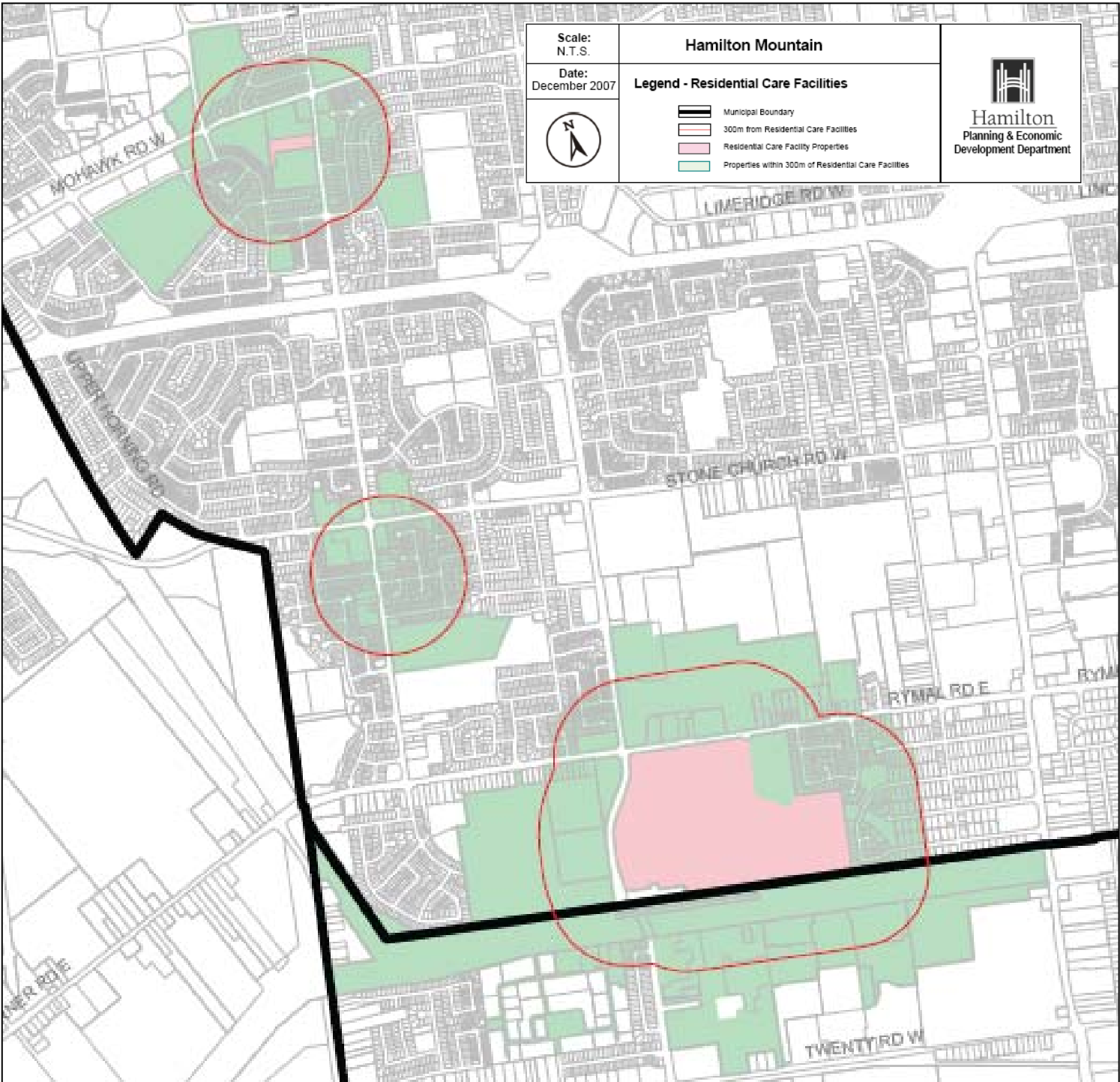
Barbara Hall, B.A, LL.B, Ph.D (hon.)
Chief Commissioner

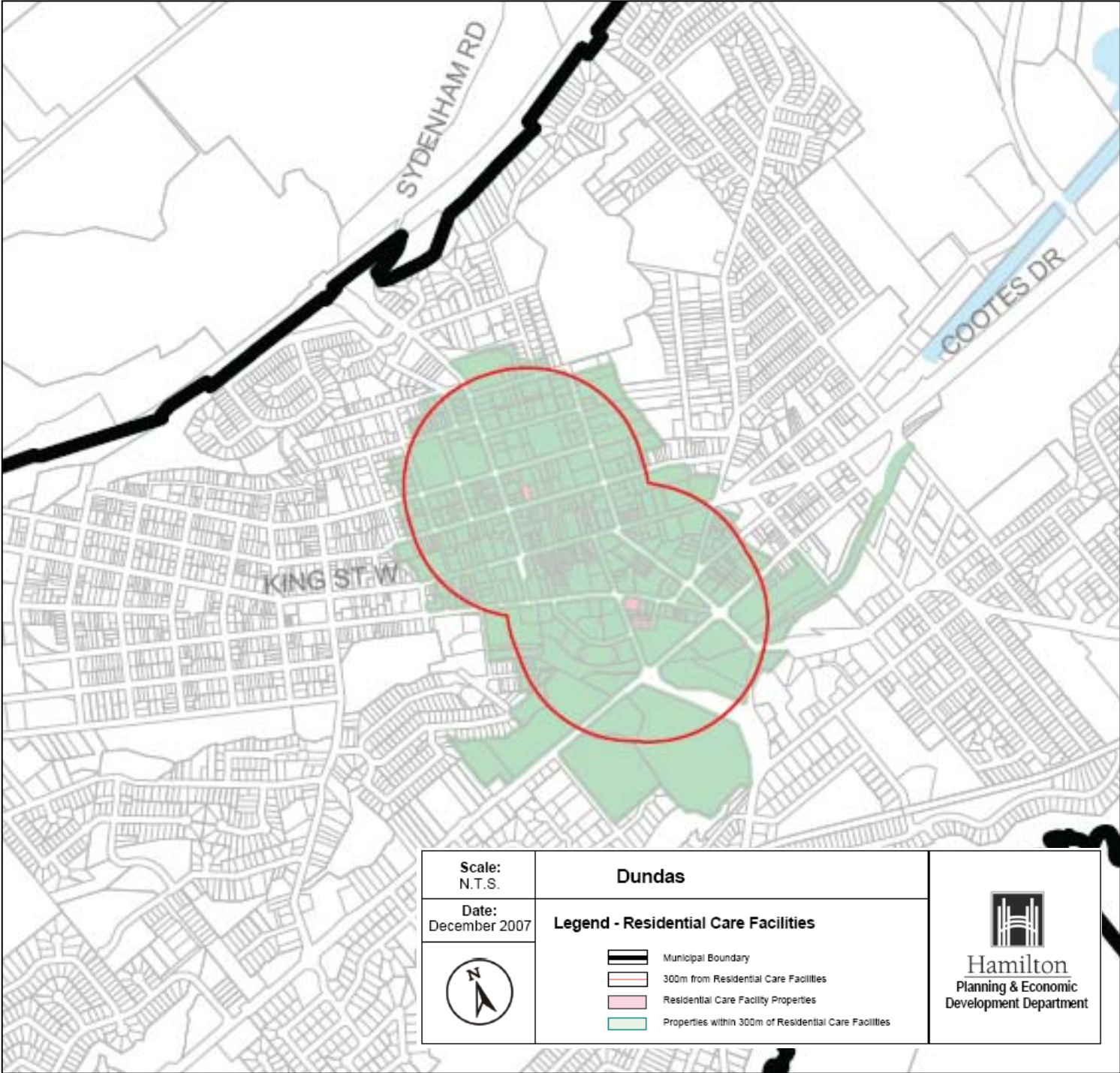
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⁴ The OMB drew its analysis of “people zoning” from the Supreme Court of Canada decision in *R.v. Bell* (1979), (S.C.C.), 98 D.L.R. (3rd) 255, in which the Court struck down a by-law limiting dwelling occupants to family members.









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5.20

December 19, 2008

Mayor Fred Eisenberger and Members of Hamilton City Council
Hamilton City Centre
Clerk's Department
77 James St. North
Suite 220
Hamilton, ON
L8R 2K3

Dear Mayor Eisenberger and Members of Council:

Re: Rental housing licensing by-law

Please see the attached letter recently sent to the City of Oshawa, outlining the potential human rights implications of their rental housing licensing by-law. I understand that the City of Hamilton has endorsed the concept of a city-wide residential rental housing licensing by-law. I wanted to share this letter with you to raise awareness of the human rights issues to consider in your planning, and to ensure that the City of Hamilton does not adversely affect people from *Human Rights Code*-protected groups by limiting accessible or affordable housing options.

If you need further details, please do not hesitate to contact me or my office at (416) 314-4537.

Yours truly,

A handwritten signature in black ink, appearing to read "Barbara Hall".

Barbara Hall, B.A., LL.B., Ph.D (hon.)
Chief Commissioner

Clerks
Chris Murray
Mary